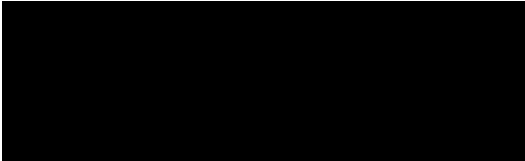
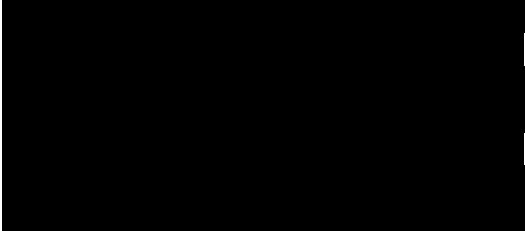
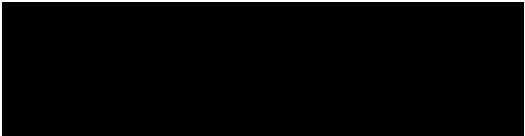
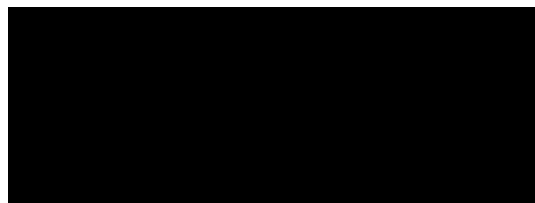


FINAL REPORT

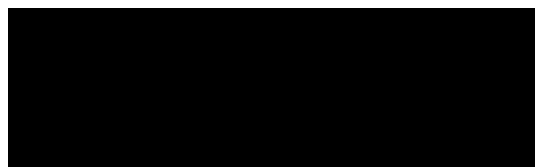
Investigation pursuant to referral
Section 24(2)(a) *Independent Commissioner Against Corruption Act 2012*

Public Authority	City of Onkaparinga
Public Officer	Mr Mark Dowd
Ombudsman reference	2016/04000
ICAC reference	2016/000400
Date of referral	5 May 2016
Issue/s to be assessed	<ol style="list-style-type: none">Whether the Chief Executive Officer's Performance Management Committee committed an act of maladministration in public administration under the ICAC Act by approving the reimbursement of a golf club membership for the Chief Executive OfficerWhether the Chief Executive Officer's golf club membership should be included on the Register of remuneration, salaries and benefitsWhether confidentiality orders should have been made pursuant to section 90(2) and 90(3)(a) of the <i>Local Government Act 1999</i> in relation to the reimbursement of the Chief Executive Officer's golf club membership

7.



8.



Jurisdiction

My Office received a complaint from Councillor Martin Bray on 6 August 2015 about the City of Onkaparinga (**the council**) in relation to decisions relating to the approval of a payment to the council's Chief Executive Officer, Mr Mark Dowd, (**the CEO**) for membership of the Kooyonga Golf Club Inc (**the golf club**).

My Office sought further information from the council and determined the issues to be:

1. whether the council's CEO Performance Management Committee (**the CEOPMC**) was wrong in approving the reimbursement of the golf club membership for the CEO
2. whether the CEO's golf club membership should be included on the Register of remuneration, salaries and benefits (**the Register**)
3. whether confidentiality orders should have been made pursuant to section 90(2) and 90(3)(a) of the *Local Government Act 1999* in relation to the reimbursement of the CEO's golf club membership.

Referral from the Commissioner

Under section 20(3) of the *Independent Commissioner Against Corruption Act 2012* (**ICAC Act**) and section 8 of the Directions and Guidelines, I am required to report to the Office for Public Integrity (**the OPI**) information that has been sent to the Ombudsman that on its face, raises a potential issue of serious or systemic misconduct or maladministration in public administration.

I determined that the complaint raised a reasonable suspicion of serious maladministration in public administration on the part of the council and, as such, reported the matter to the OPI by letter dated 11 April 2016.

The OPI assessed the report in accordance with the ICAC Act and, by letter dated 5 May 2016 this matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the **ICAC Act**, as raising potential issues of misconduct and/or maladministration in public administration within the meaning of that Act (**the referral**).

The Commissioner referred the following eight issues to the Ombudsman pursuant to section 24(2)(a) of the ICAC Act to be dealt with by me in accordance with section 13 of the Directions and Guidelines:

1. whether the council's CEOPMC committed an act of maladministration in public administration under the ICAC Act in approving the reimbursement of the golf club membership for the CEO
2. whether the CEO's golf club membership should be included on the Register
3. whether confidentiality orders should have been made pursuant to section 90(2) and 90(3)(a) of the *Local Government Act 1999* in relation to the reimbursement of the CEO's golf club membership
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]
7. [REDACTED]
8. [REDACTED]

By letter dated 24 May 2016 I advised the parties that I had received a referral from the Commissioner pursuant to section 24(2)(a) of the ICAC Act concerning the complaint and that, as such, the complaint was now being investigated by the Ombudsman pursuant to the ICAC Act.

Jurisdiction in relation to the CEOPMC

Council committees are established by councils pursuant to section 41 of the Local Government Act for the purpose of assisting the council in the performance of its functions, inquiring into and reporting to the council on matters within the ambit of the council's responsibilities, providing advice to the council to exercise, and to perform or discharge delegated powers, functions or duties of the council.

While decisions in my investigation were purportedly made by the CEOPMC, not the council, the CEOPMC was established by resolution of the council and has delegated authority to make certain decisions.¹ As such, I consider that a decision of the CEOPMC is effectively, for the purposes of my investigation, a decision of the council.

Jurisdiction under the Ombudsman Act

Mayor Rosenberg provided a detailed response to my provisional report (**Mayor Rosenberg's response**), prepared with the assistance of the council's lawyers. Mayor Rosenberg's response raised issues in relation to my jurisdiction to investigate matters under the Ombudsman Act (using my powers under the Ombudsman Act), that have been referred to me by the Commissioner.

I consider that I have jurisdiction to investigate referred matters using Ombudsman Act powers. In my view, a referral to an inquiry agency by the Commissioner enlivens the use of that agency's existing powers, even when the matter referred is not an 'administrative act'. A contrary interpretation would, in my view, be inconsistent with the purpose of the ICAC Act. I

¹ See City of Onkaparinga Chief Executive Officer Performance Management Committee, Terms of Reference, adopted by the council 1 December 2015. Accessed at http://www.onkaparingacity.com/onka/council/meetings_agendas/terms_of_reference.jsp on 2 August 2016.

also consider that I have jurisdiction to make findings under the Ombudsman Act in relation to matters that have been referred by the Commissioner.

Action taken

Using my powers under the Ombudsman Act, I have conducted an investigation of the issues in response to the referral by:

- assessing the information provided by the complainant
- seeking a response from the council
- seeking further information from the council
- considering:
 - the ICAC Act and the Ombudsman Act
 - the Local Government Act
 - the Code of Conduct for Council Employees (**the Employee Code of Conduct**)
- reporting the matter to the OPI
- advising the parties that the complaint had been referred by the Commissioner and was being investigated pursuant to the ICAC Act
- seeking a further response from the CEO to the additional issues in the referral
- preparing a provisional report and providing it to the parties for comment
- considering the parties' responses to my provisional report
- preparing a revised provisional report and providing it to the Commissioner for comment
- providing a copy of my revised provisional report to the parties for comment
- preparing this Final Report.

Standard of proof

The standard of proof I have applied in my investigation and this 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 (*Briginshaw*), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;² and 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 ...³

Responses to my provisional report

Mayor Rosenberg's response raised various procedural issues which I have addressed by way of letter to the council.

Mayor Rosenberg's response raised specific issues in relation to my findings on issues 1, 3

² 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.

³ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

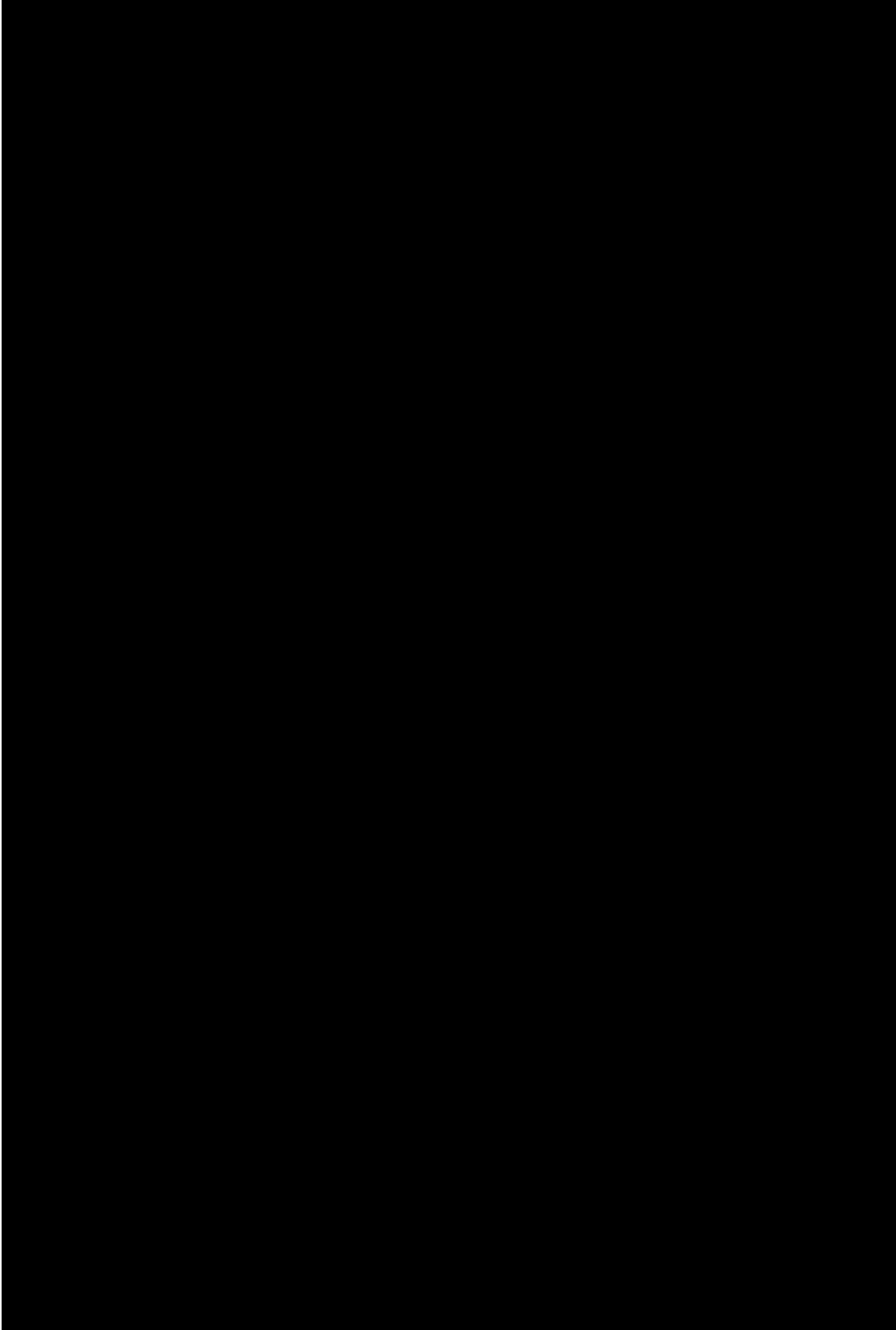
Issue 1:

Mayor Rosenberg's response:

- refuted my provisional finding that the council committed maladministration for the purposes of section 5(4) of the ICAC Act by approving reimbursement of the golf club membership
- suggested that my provisional view was reached, at least in part, on the basis that the council's decision to reimburse the CEO for golf membership was for the purpose of the CEO playing golf
- asserted that, instead, the council's objective was to expand the opportunities for the CEO to transact council business for the benefit of the council and its community, which is clearly within the purview of the functions of the CEO
- asserted that I failed to properly consider section 99(1)(j) of the Local Government Act at all, or adequately
- asserted that the approval for reimbursement of the membership was for the purpose of the CEO undertaking the following lawful functions consistent with section 99(1)(j) of the Local Government Act:
 - to undertake significant engagement with a variety of stakeholders
 - to build and maintain collaborative and positive business relationships with elected members, staff and the community
 - to promote the council in the local community
 - to ensure effective and efficient implementation of the council's policies and strategies
 - to promote the aims and objectives of the council, noting that one of the council's five goals set out in its Community Plan 2035 is a prosperous economy which has the following objectives:
 - attract more and higher yielding tourists to region
 - prepare and implement an investment attraction strategy including a foreign investment plan
 - define the regional brand for attracting investment
 - build connections between businesses and council's communities.
- noted that, in addition, the Strategic Performance Objectives set for the CEO at the Chief Executive Review Panel meeting of 9 November 2011 included the following:
 - planning for sustainable growth
 - working together to renew our economy to capitalise on opportunities both locally and globally, a measure of which was attracting new business and development to the region
- stated that engaging with stakeholders in a variety of settings and locations, including non-traditional meeting spaces, is consistent with the functions of the CEO, as set out above
- asserted that a reasonable person would expect the council and the CEO to pursue all available opportunities to generate growth and development and noted that the council recruited the CEO to assist it undertake its core functions and achieve commercial outcomes that would benefit the community.
- suggested that my views indicate an expression of a personal view and advancement of value judgments rather than an objective assessment
- asserted that I did not identify a 'practice' for the purposes of the definition of maladministration, and noted that the council has only on one occasion approved the reimbursement
- disagreed with the finding of 'substantial' mismanagement
- noted that it is arguable that the effect of the decision in *District Council of Barunga West v Hand* [2014] SASCFC 90 is that the South Australian Municipal Salaried Officers Award does not apply to the employment of CEOs in the South Australian local government sector (although also noting that not much turns on this)
- noted that the CEO's request for reimbursement could have constituted a variation to the employment agreement and on that basis it was open to the council to consider and approve the request for reimbursement.

Issue 3:

Mayor Rosenberg responded that I appeared to erroneously advance the proposition that a matter or information cannot be personal affairs of the CEO under section 90(3)(a) of the Local Government Act and also relate to the Chief Executive Officer's official duties.



Mr Dowd's response to my provisional report:

- [REDACTED]
- agreed with matters raised in Mayor Rosenberg's response
- referred to an informal meeting with the Commissioner, shortly after the Commissioner's appointment, at which a number of matters were discussed, including 'the increasingly commercial and non-traditional business activities being undertaken by local government'
- noted that while the specific matters that are the subject of my report were not discussed at that meeting, Mr Dowd's recollection was that the ICAC recognised that local government is operating in an increasingly commercial environment and is required to pursue opportunities for the benefit of its communities in non-traditional ways
- stated:

I consider my role requires me to be available and[sic] promote the council in a variety of settings and to a variety of stakeholders.

Cr Bray responded to my provisional report:

- raising his concern that the issue of 'misleading councillors' was not addressed, and suggesting that it may be best addressed under issue 2
- [REDACTED]
- raising that the golf club subscription was misleadingly characterised as a 'salary package' and on that basis it should have been declared
- [REDACTED]
- stating his concern that no recommendation was made as to the makeup of the CEOPMC to increase the possibility of independent and critical analysis in deliberations.

I carefully considered the parties' responses, and, as a result, revised my provisional report and provided it to the parties for comment.

Responses to my revised provisional report

Mayor Rosenberg responded to my revised provisional report, relying on the submissions made in response to my provisional report and making the following additional submissions outlined below.

Mayor Rosenberg's letter stated:

The Council maintains its position in relation to the jurisdictional issue that it has previously raised. In particular,

1. The Council does not agree with your view that you are exercising power under the ICAC Act. The ICAC Act provides for the Commissioner to refer matters to your office, but it does not confer additional power or jurisdiction on your office. It is not a source of power to investigate or to make findings under the ICAC Act.
2. Further, whilst you have stated that you are also utilising your powers under the *Ombudsman Act*, it is apparent that you are proceeding on the basis that the source of your jurisdiction to investigate is under the ICAC Act.
3. The Council does not agree that all of the findings you have made would be within jurisdiction were you to start a fresh investigation under the *Ombudsman Act*.

Mayor Rosenberg's response raised further specific issues in relation to my findings on issues 1, 3 [REDACTED]

Issue 1:

Mayor Rosenberg's response:

- agreed with my provisional finding that the council did not commit an act of maladministration within the meaning of section 5(4) of the ICAC Act
- disagreed with my provisional finding that the council acted in a manner that was wrong for the purposes of section 25(1)(g) of the Ombudsman Act
- stated that the council did not approve, nor was it asked to approve, the CEO's annual membership fees for playing golf at the golf course; instead, those substantial fees were personally met by the CEO in that year
- stated that the council approved payment of a one-off joining fee for membership of the golf club; while the resolution noted that future payments may be considered in later years, the resolution only concerned the one-off joining fee and that was the only request that was presented by the CEO for consideration
- noted that the golf club's joining fee, once paid, is never paid again; annual playing membership fees are recurrent
- stated:

From the Council's perspective, there were significant advantages for it arising from the CEO joining the club and paying annually to be a member of the club. The Council thereby had access, through the CEO, to the use of the facility for its guests at nominal fees which would otherwise have been extremely expensive. The Council considers that it has and will, in the future, substantially benefit from this arrangement.

The facilities at the golf club are recognised as world class. The fact of the matter is that it is the Council's experience that investors and visitors, especially but by no means exclusively, from China or elsewhere in Asia, desire to utilise facilities of such a standard for leisure, networking and conducting business.

- expressed the view that it is simply not economic to utilise a facility such as the golf club on a casual basis, and that the costs incurred over a period of time by reimbursing casual visits by four non-members would be far more substantial than the payment of a one off joining fee (which would be demonstrated by a perusal of the golf club's website)
- noted the council's understanding that access to the golf club and other like courses for non-members is limited and that some similar facilities may not allow casual visitors at all
- stated:

It was clearly open to the Council to take the view that the reimbursement of the joining fee was a substantial benefit to the Council and likely to be more efficient than expensive casual visits un-associated with membership over a long period.

Further, the Council did not pay for the CEO to play golf. In fact, the CEO paid 100% of his playing fees and was not reimbursed. I accept that those matters were not clearly put before you in the Council's previous response. I apologise for that.

It is open to the Council to take the view that it is important that it have ready and affordable access to such facilities for the purpose of engaging with visitors and investors. The Council has frequent international and interstate visitors and is also regularly requested by the State Government to entertain and network with overseas visitors especially from China. The Council's CEO works long hours during these regular visits in attending to the Council's guests as well as maintaining his ordinary duties. At the time of applying for the reimbursement of the joining fee the CEO noted that he also used the facility to reward or incentivise Council staff.

- noted that the council considered the issue of CEO reimbursement at the same time as considering the CEO's annual performance and pay review; the council was aware that the CEO had not utilized benefits that may have been available to him in accordance with his contract and that he 'had not even claimed fuel reimbursement when it was obvious that he had incurred such expenses'
- stated:

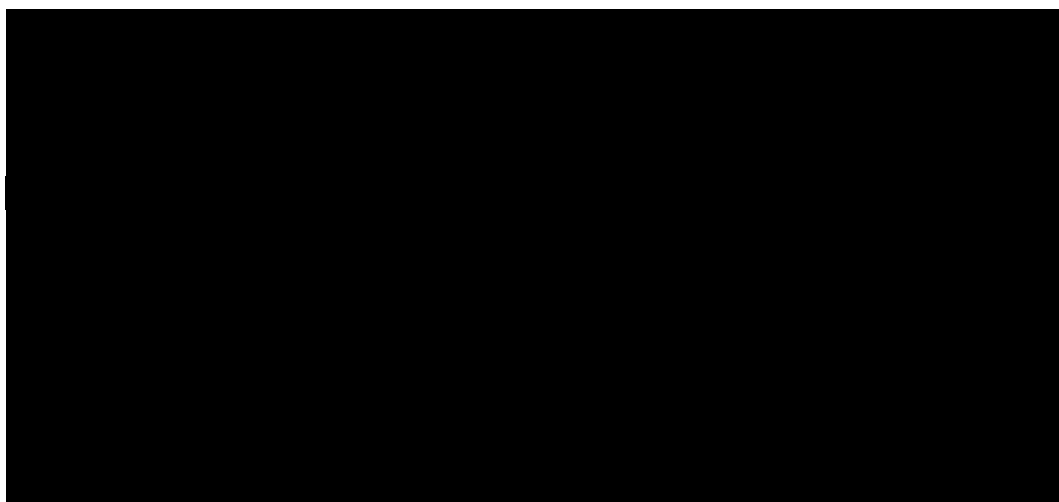
Discussions were had with the CEO about the utilisation of his reimbursement. The Council is unable to say, so long after the event, whether or not discussions were specifically about the golf course membership. There is no doubt that the CEO was encouraged to consider claims for reimbursement for expenses incurred by him. The CEO was also asked to consider other issues such as whether he wished to apply for an additional leave entitlement given the extended duties that he undertook.

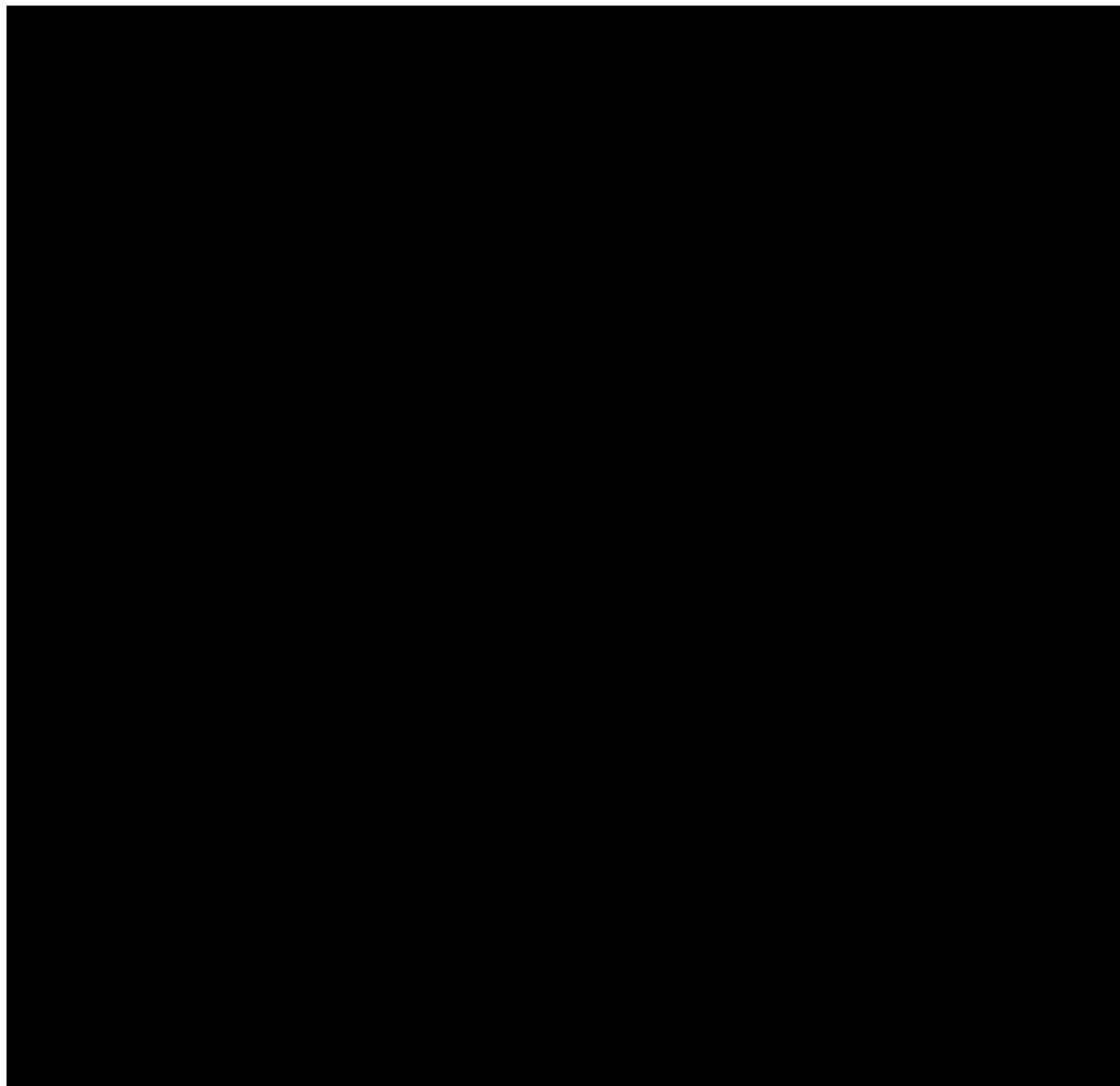
- noted that as the council's delegate is a collegiate body, it is not possible for the council to state with any certainty the reasons that each of the members had for approving the reimbursement of the joining fee
- stated that the council was fully aware of the nature of the reimbursement it was asked to approve; the council's position is that it was open as a matter of law for its delegate on such a review to approve reimbursement of an expense of this nature, which had plain benefits for the council, especially in circumstances where the CEO remained responsible to pay annual membership fees
- submitted that my proposed finding in relation to issue 1 not be made.

Issue 3:

Mayor Rosenberg's response:

- noted that my provisional finding that the council's delegate was wrong in making confidentiality orders pursuant to section 90(2) and 90(3)(a) of the Local Government Act did not extend to any subsequent actions
- maintained the council's position that the issue of whether the CEO would be reimbursed for payment of the joining fee was clearly a matter that related to his financial affairs
- submitted that it was open to the delegate to consider that to debate an issue in public concerning the CEO's personal affairs would be unreasonable; it was possible that a range of views may have been aired in relation to this topic concerning the CEO's personal affairs
- submitted that while I may have come to a different conclusion, that is not the relevant test; as a matter of law it is not open to me to conclude that the council was wrong, in the sense that it was not open to its delegate to conclude that the requirements of section 90 of the Local Government Act were met at the time that it made the order excluding access to the public.





Mayor Rosenberg also provided my Office with a copy of an email from Mr Dowd to Mayor Rosenberg dated 4 October 2014 which I address in the body of my report.

Mr Dowd responded to my revised provisional report, referring to his previous submissions and requesting that those submissions be considered in finalising my report.



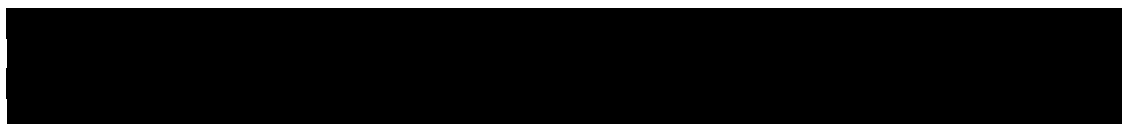
Mr Dowd's response:

- stated that he claimed reimbursement in relation to the golf club after he was requested to do so
- noted that it is difficult to recall the exact circumstances that led to the reimbursement, given the time that has passed, but that he recalled the following events led him to complete an Employee Reimbursement Claim Form:
 - in or around May 2014 the council resolved to enter into negotiations to offer Mr Dowd a new employment contract, effective 1 May 2015
 - between May 2014 to early 2015, the council engaged with Mr Dowd regarding the terms of the new proposed employment contract

- the council first raised the option of the reimbursement of the golf club membership with Mr Dowd for consideration in or around the period July to October 2014 within the context of a broader number of terms of those employment contract negotiations
- the discussion considered the use of the golf club as a tool of office for the purposes of conducting business related transactions as was required of Mr Dowd as part of his CEO duties to attract or potentially attract and entertain business clients and potential investors (particularly from the Asian region) as per his Strategic Performance Objectives)
- a number of in-bound delegations were anticipated during the period 2014-2016 as part of the Sister City and Friendly City arrangements with provinces in China
- Mr Dowd visited China in 2014, 2015 and 2016 for business purposes where business relationships were fostered on golf courses in the ordinary course of those out-bound trade and government delegation visits
- Mr Dowd did not seek 100% reimbursement; that was a decision of the CEOPMC.

Mr Dowd also advised that the reimbursement of \$6,800 was solely for the payment of the entrance fee, or joining fee, not the annual membership fees. Mr Dowd noted that the annual membership fees are currently \$2,780.80 and that the membership fee for the initial year and all subsequent years have been paid for by Mr Dowd.

Mr Dowd stated:



For the purposes of clarity, I was requested by my employer to bring forward the matter of the reimbursement of the golf club, I did not seek out this payment.

I note your provisional view that '*membership of a golf club cannot be said to be reasonably consistent with the role of a Chief Executive Officer*'. I submit that the golf membership has allowed me to undertake part of my role and functions as Chief Executive Officer of the council. I became a member of the Kooyonga Golf Club Inc as a consequence of the discussions with the Council.

Mr Dowd submitted that since becoming a member of the golf club, he has used it for conducting hospitality with business partners of the council, hosting staff as part of recognition programs as well as hosting a number of delegates from China and Hong Kong. Mr Dowd stated:

I consider that the Council's investment needs to be considered in the context of the whole of the monies paid to Kooyonga Golf Club by both myself as well as the Council. In addition, the monies paid can be directly related to the purpose of the reimbursement, being that it provides access to the Kooyonga Golf Club to take business clients to the course for the purposes of undertaking business related activities as per the clear expectations of my employer.



Cr Bray responded to my revised provisional report:

- noting that I did not treat the two dictionary definitions of 'practice' as equally available alternatives, noting that in the event of an improper large, one-off payment (for example, \$500,000), a finding of maladministration may be hard to avoid
- expressing concern that the issue of council members being misled was not addressed in my report and asking again that it be reconsidered

- submitting that there could be no reason other than to mislead for the term 'reimbursement' to be 'obfuscated' into 'CEO's contract of employment' which could well cover any salary package permutations (which may be useful to the CEO) but not increase the quantum paid by ratepayers
- the golf club subscription appears to have been characterised as a salary package issue to both the CEOPMC and the council and should have been declared
- either maladministration occurred because council members were misled (i.e. the reimbursement was not declared as it was falsely characterised), or, maladministration occurred because the reimbursement was not declared on the register (i.e. if it is accepted that it was effectively a salary package issue)
- noting that if staff are not honest with council members, the whole system is at risk and stating:

The community relies on elected members to protect and progress their interests with integrity, and elected members in turn must be able to accept what staff say at face value in order to make good decisions.

- expressing concern that a recommendation as to the make up of the CEOPMC was not made.

Background and evidence obtained in the investigation

1. At its meeting on 17 February 2015 the CEOPMC carried, in confidence, a resolution to approve the payment of a membership to the golf club for the CEO. The confidential minutes of the CEOPMC's consideration of the item record:

4.1 Chief Executive Officer - Condition of employment contract - Confidential

MOVED Cr Kilby.

1. That:

- a. under the provisions of Section 90(2) of the *Local Government Act 1999* an order be made that the public and staff (with the exception of the Director Corporate and City Services) be excluded from attendance at the meeting in order to consider this item in confidence.
- b. the Chief Executive Officer Performance Management Committee is satisfied that it is necessary that the public be excluded to enable the Committee to receive and consider the information/report at the meeting on the following grounds:

Section 90(3)(a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead), in this instance being matters related to the terms and conditions of the employment contract for the Chief Executive Officer.

The Committee is satisfied that it is reasonably foreseeable that the public disclosure or discussion of information concerning the contract of employment of a person at the meeting would be inconsistent with accepted principles of professional human resource management.

- c. on this basis, the principle that this meeting of the Chief Executive Officer Performance Management Committee should be conducted in a place open to the public has been outweighed by the need to keep the information and/or discussion confidential.

Seconded by Cr Schulze.

CARRIED

MOVED Cr Schulze.

2. That the Chief Executive Officer Performance Management Committee, in accordance with the Chief Executive Officer's contract of employment, approve the payment of a membership to the Kooyonga Golf Club Inc., to be reviewed annually upon request.

Seconded by Cr Kilby.

CARRIED

MOVED Cr Kilby.

3. That the matter of the Chief Executive Office - Condition of employment contract - Confidential having been considered by the Chief Executive Officer Performance Management Committee in confidence under Sections 90(2) and 90(3)(a) 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 discussion and the minutes of the Chief Executive Officer Performance Management Committee relating to discussion of the subject matter be kept confidential until the conclusion of the specified contract periods.

Seconded by Cr Schulze.

CARRIED.

2. The council provided my investigation with a copy of the invoice from the Kooyonga Golf Club for the CEO's membership. That invoice is dated 11 August 2014 and is for the amount of \$6,818.18.
3. The CEO completed an Employee Reimbursement Claim Form for the reimbursement of the golf club membership fee, dated 19 February 2015. On 27 February 2015 Ms Alison Hancock, Director, Corporate and City Services, emailed the CEO requesting his authorisation of the Claim Form.
4. At item 15.3 of the council meeting on 3 March 2015 the council considered, in confidence, the minutes of the CEOPMC. The confidential minutes of the item record:

15.3 Chief Executive Officer Performance Management Committee confidential minutes

Mark Dowd declared a conflict of interest in this item as the Chief Executive Officer and left the Chamber at 9.57pm.

MOVED Cr Holtham.

1. That:
 - a. under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public and staff (with the exception of the Director Corporate and City Services) 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 and staff (with the exception of the Director Corporate and City Services) be excluded to enable the Council to receive and consider the information/report at the meeting on the following grounds:

Section 90(3)(a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead), in this instance being matters related to the

terms and conditions of the employment contract for the Chief Executive Officer.

The Council is satisfied that it is reasonably foreseeable that the public disclosure or discussion of information concerning the contract of employment of a person at the meeting would be inconsistent with accepted principles of professional human resource management.

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

Seconded by Cr Schulze.

CARRIED

MOVED Cr Jamieson

2. That Council note the following resolution of the Chief Executive Officer Performance Management Committee:

4.1 Chief Executive Officer - Condition of employment contract - Confidential

2. That the Chief Executive Officer Performance Management Committee, in accordance with the Chief Executive Officer's contract of employment, approve the payment of a membership to the Kooyonga Golf Club Inc., to be reviewed annually upon request.
3. That Council note the confidential minutes of the Chief Executive Officer Performance Management Committee meeting held on 17 February 2015 as attached to the agenda report.

Seconded by Cr Kilby.

CARRIED

MOVED Cr Jamieson

4. That the matter of the Chief Executive Office Performance Management Committee confidential minutes having been considered by the Council in confidence under Sections 90(2) and 90(3)(a) 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, subject to any necessary access by the Director Corporate and City Services and the Chief Executive Officer, the Chief Executive Officer Performance Management Committee confidential minutes and the minutes and report of the Council relating to discussion of the subject matter be kept confidential until the conclusion of the specified contract periods.

Seconded by Cr Schulze.

CARRIED.

5. The complainant, Councillor Martin Bray, raised concerns about the payment of the golf club membership with the council. Whilst Cr Bray was present at the 3 March 2015 council meeting, he was concerned about the decision, particularly that the payment was not registered on the Register. Cr Bray submits that it was not clear to him that the golf club membership was being paid as a reimbursement for official CEO duties, but rather, he had thought it was paid as a part of the CEO's salary package.
6. The complainant raised his concerns about the reimbursement of the golf club membership with the council. He received the following response, by email from Ms Hancock, on 14 August 2015:

In a telephone conversation with me last Friday you asked for clarification relating to the disclosure of the Chief Executive Officer's remuneration on the Register of Salaries relating to the payment of a membership to the Chief Executive Officer.

At its meeting of 3 March 2015 (at which you were present), the Council resolved in confidence to approve the payment of a membership to the Chief Executive Officer. The recommendation was forwarded to Council for approval from the CEO Performance Management Committee who had determined that it would recommend that 100% of this membership due to the nature of this membership to the role of Chief Executive. The membership claim by the Chief Executive Officer was in the form of a reimbursement.

Section 105(5) of the Local Government Act states:

A chief executive officer is not required to include in a Register of Salaries details of any reimbursement of expenses incurred by an employee in performing official duties unless that reimbursement occurs by way of the periodic payment of a lump sum that is not calculated so as to provide exact reimbursement of expenses incurred by an employee in performing official duties.

Therefore it has been determined and confirmed by legal advice that the reimbursement of the membership is not required to be disclosed on the Register of Salaries.

I wish to advise that the remuneration pertaining to the former contract of employment and the remuneration pursuant to the new contract of employment as resolved by Council for the Chief Executive Officer have both been disclosed on the Register of Salaries as is required.

As the matter of the membership has been resolved by Council pursuant to sections 90 and 91 of the Local Government Act, the matter continues to remain in confidence and must not be disclosed...

7. The complainant, in his letter of complaint to my Office, dated 14 August 2015, wrote:

... At the council meeting I asked the value of the benefit, membership of Kooyonga golf club, and was told by the Mayor 'about \$7000'. So there is still some uncertainty as to the exact amount of money involved, as this is not in writing in the documents available.

I am very disturbed by the arrangement as I believe this may be the ratepayers of the City paying for an employees [sic] recreational activities, something people would normally pay for themselves.

At the council meeting brief mention was made of the possibility that during a golf game the CEO may have the opportunity to talk business to an important person. I find it too much of a stretch to believe that any such possibilities will occur that could not be accommodated during a normal business meeting. If something is important enough, the carrying on of a conversation will not hinge on whether it is at a golf club or not as the make or break factor. The blunt reality is that the CEO is the CEO of a local council in Adelaide, not the manager of a multinational company based in Sydney.

The issue of transparency is vital here. If there is a belief that the benefit is valid, the recreational nature of the benefit means it should be public so that it can then be justified if or when requested by community members...

8. If the payment of the golf club membership was a part of the CEO's salaries and benefit, it:
- would have to be registered on the Register, as required by section 105 of the Local Government Act, and
 - could not have been considered in confidence, as a council cannot make an order to 'prevent the disclosure of the remuneration conditions of service of an

employee of the council after the remuneration conditions have been set or determined.⁴

9. The council provided a response to my Office by letter from Mayor Lorraine Rosenberg, dated 13 October 2015 (**the council's response**), including the following:

...The Chief Executive Officer Performance Management Committee (CEOPMC) is a properly constituted Committee pursuant to Section 41 of the Local Government Act and was established in 2012. The Terms of Reference for the CEOPMC are enclosed for your information.

The CEO in his contract of employment (both the former and current contract) has provision and is encouraged to bring forward requests for memberships and subscriptions that are consistent with his role or professional development requirements.

The CEO requested consideration regarding the Membership in early 2015. I determined that this matter ought to be considered by the CEO Performance Management Committee (CEOPMC) at the next available opportunity.

This was tabled for consideration by the CEOPMC on 17 February 2015 where a copy of the invoice for the Membership was provided for information. A copy of that invoice is enclosed for your information.

The CEOPMC considered a range of outcomes that the Membership brought to the role of the CEO. This deliberation included the extent to which the Membership was consistent with the role of the CEO, whether the whole or a percentage of the Membership should be reimbursed as well as consideration as to whether any personal benefit would arise. I consider that the manner and extent to which the CEOPMC considered these issues as being appropriate and reasonable in the circumstances.

As a consequence of the discussion and the relevant factors that the CEOPMC took into account during those deliberations it was determined that the Membership constituted a tool of the office of the CEO and should be reimbursed at the level of 100%. These relevant factors included:

- That the CEO undertook this type of activity to liaise with business parties
- That the CEO undertook this type of activity as part of business investment attraction activities (in particular delegations from overseas which had the prospect to achieve investment potential)
- That the CEO is expected to conduct himself appropriately and activity [sic] engage in activities that would benefit the Council regardless of whether he is within Council facilities or otherwise
- That it is more than likely that the CEO would be approached at the Kooyonga premises by parties who wished to engage with him on Council matters and that this should be encouraged and capitalised on for the Council's benefit.

...

10. The CEO's contract of employment at the relevant time (dated 2011-2015)⁵ (**the CEO's contract**) includes the following clause:

12.2 No additional remuneration is paid for overtime, leave loading, rostered days off or any other payment/allowance payable under the Award, it being noted that this Contract is entered into in contemplation of Clause 5.4.6 of the Award, which facilitates the use of an employment package to cover such contingencies inherent in the work.

⁴ Section 91(8)(a) of the Local Government Act.

⁵ Note - a new contract of employment for the CEO commenced 1 May 2015.

11. The CEO's contract included the following clause:

13 EXPENSE OF OFFICE PAYMENTS AND ALLOWANCES

13.1 The Council shall meet the cost of Council-related expenses itemised in Schedule 4.

12. Schedule 4 of the CEO's contract included:

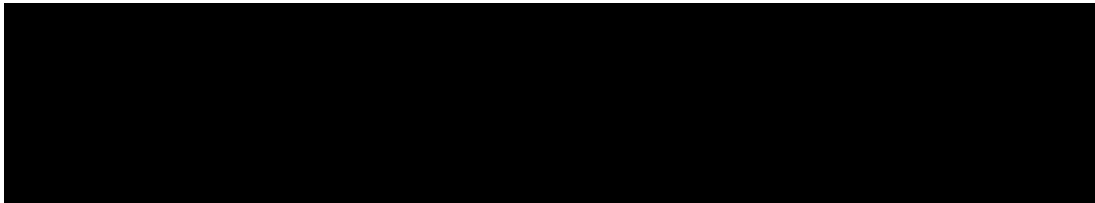
**SCHEDULE 4
EXPENSE OF OFFICE PAYMENTS AND ALLOWANCES**

NOTE: Where an expense is incurred by you on any item referred to in this schedule, the Council will, upon production of accounts or receipts provide you with reimbursement. Reimbursement does not apply to the items in this schedule where a service or facility is provided by Council without cost being incurred by you (ie Item 4).

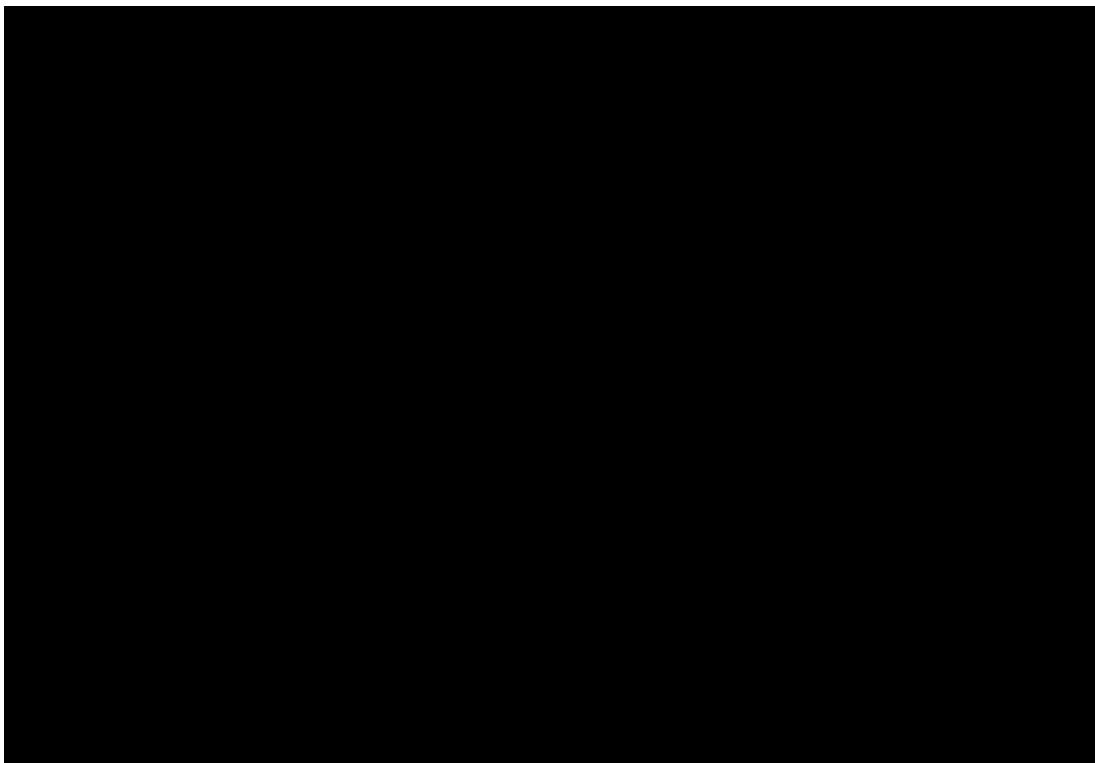
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6. The cost of four annual professional organisation subscriptions (provided such are reasonably consistent with your duties).

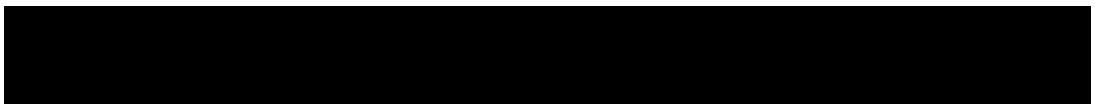
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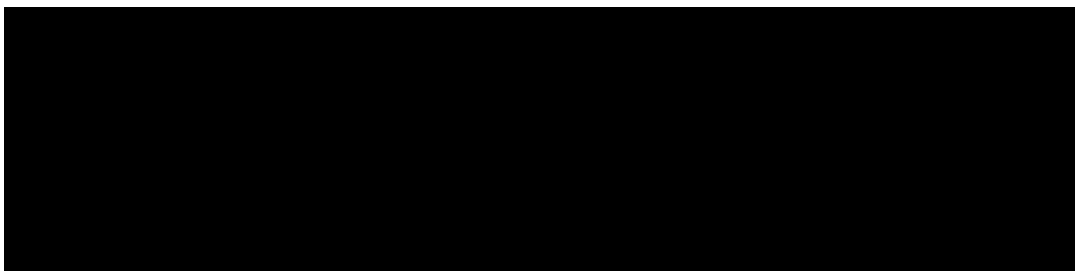


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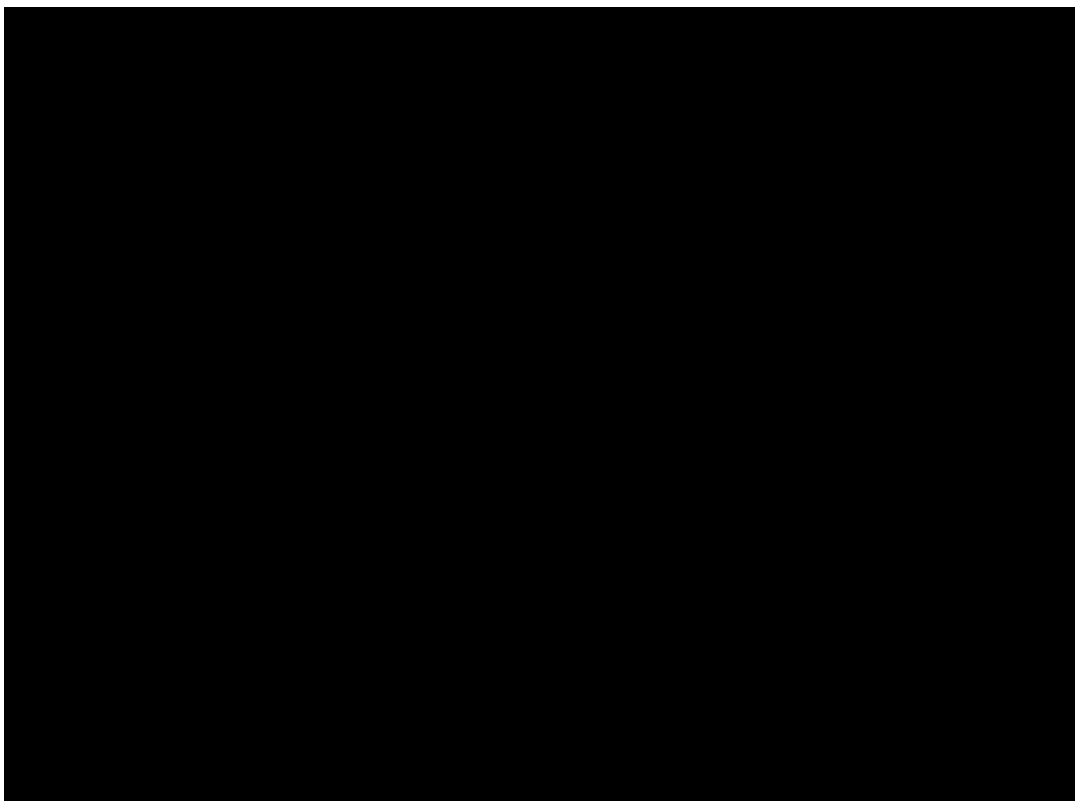


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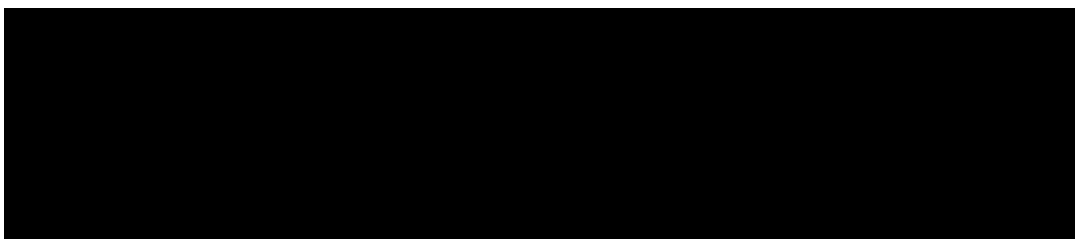




16.



17.



18.



Relevant law/policies

19. Section 5(3) of the ICAC Act provides:

(3) *Misconduct in public administration* means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or

- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

20. Section 5(4) of the ICAC Act provides:

(4) ***Maladministration in public administration***–

- (a) means–
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

21. Section 4 of the Local Government Act defines ‘remuneration’ as:

remuneration means salary, allowances and other monetary benefits paid or payable to an employee of a council;

22. Section 90 of the Local Government Act provides:

90–Meetings to be held in public except in special circumstances

- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (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).
- (3) The following information and matters are listed for the purposes of subsection (2):
 - (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
 - ...
- (4) In considering whether an order should be made under subsection (2), it is irrelevant that discussion of a matter in public may–
 - (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
 - (b) cause a loss of confidence in the council or council committee.
 - ...
- (7) If an order is made under subsection (2), a note must be made in the minutes of the making of the order and of the grounds on which it was made.
- ...
- (9) In this section–

personal affairs of a person includes—

- (a) that person's—
 - (i) financial affairs;
 - (ii) criminal records;
 - (iii) marital or other personal relationships;
 - (iv) personal qualities, attributes or health status;
- (b) that person's employment records, employment performance or suitability for a particular position, or other personnel matters relating to that person,

but does not include the personal affairs of a body corporate.

23. Section 91 of the Local Government Act provides:

91—Minutes and release of documents

...

- (4) A copy of the minutes of a meeting of the council must be placed on public display in the principal office of the council within five days after the meeting and kept on display for a period of one month.
- (5) A person is entitled to inspect, without payment of a fee, at the principal office of the council—
 - (a) minutes kept under this section; and
 - (b) reports to the council or a council committee received at a meeting of the council or committee; and
 - (c) recommendations presented to the council in writing and adopted by resolution of the council; and
 - (d) budgetary or other financial statements adopted by the council.
- (6) A person is entitled, on payment of a fee fixed by the council, to a copy of any documents available for inspection under subsection (5).
- (7) However, subsections (4), (5) and (6) do not apply to a document or part of a document if—
 - (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3; and
 - (b) the council or council committee orders that the document or part be kept confidential.
- (8) A council must not make an order under subsection (7)—
 - (a) to prevent the disclosure of the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined; or

...

24. Section 99(1) of the Local Government Act provides:

- (1) The functions of the chief executive officer include—
 - (a) to ensure that the policies and lawful decisions of the council are implemented in a timely and efficient manner;
 - (b) to undertake responsibility for the day-to-day operations and affairs of the council;
 - (c) to provide advice and reports to the council on the exercise and performance of its powers and functions under this or any other Act;
 - (d) to co-ordinate proposals for consideration by the council for developing objectives, policies and programs for the area;
 - (e) to provide information to the council to assist the council to assess performance against its strategic management plans;
 - (f) to ensure that timely and accurate information about council policies and programs is regularly provided to the council's community, and to ensure that appropriate and prompt responses are given to specific requests for information made to the council;
 - (g) to ensure that the assets and resources of the council are properly managed and maintained;
 - (h) to ensure the records required under this or another Act are properly kept and maintained;
 - (i) to give effect to the principles of human resource management prescribed by this Act and to apply proper management practices;
 - (j) to exercise, perform or discharge other powers, functions or duties conferred on the chief executive officer by or under this or other Acts, and to perform other functions lawfully directed by the council.

25. Section 105 of the Local Government Act provides:

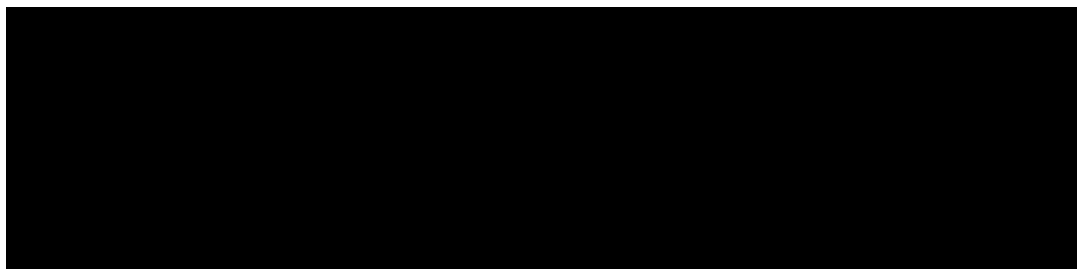
105—Register of remuneration, salaries and benefits

- (1) The chief executive officer of a council must ensure that a record (the *Register of Salaries*) is kept in which is entered, in accordance with principles (if any) prescribed by the regulations—
 - (a) the title of each position held by an employee of the council; and
 - (b) in relation to those positions held by employees who are paid according to salary scales set out in an award or industrial agreement—
 - (i) the classifications of the employees who hold those positions;
 - (ii) the salary scales applicable to each classification (indicating in relation to each scale the number of employees who are paid according to that scale); and
 - (iii) details of other allowances or benefits paid or payable to, or provided for the benefit of, any of those employees as part of a salary package; and

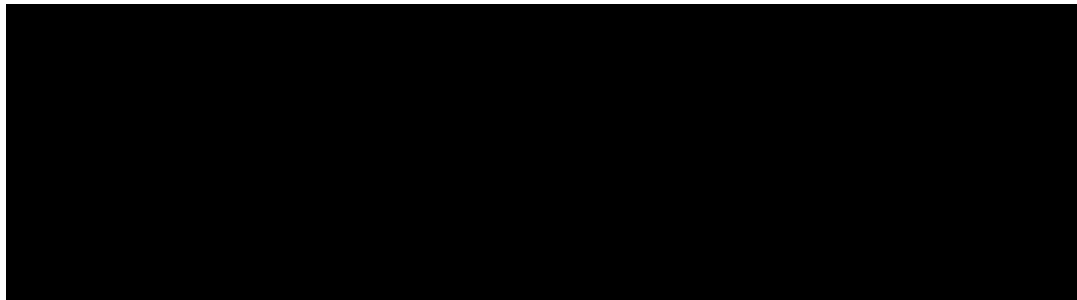
...

- (2) The chief executive officer must ensure that a record is made in the Register of Salaries within 28 days after—
- (a) a change in the salary, wage or remuneration, or an allowance or benefit, payable to, or provided for the benefit of, an employee; or
 - (b) the payment or provision of an allowance or benefit not previously recorded in the Register,
- (insofar as may be necessary or appropriate in the circumstances of the particular case).
- (3) A person is entitled to inspect the Register of Salaries at the principal office of the council during ordinary office hours.
- (4) A person is entitled, on payment of a fee fixed by the council, to an extract from the Register of Salaries.
- (5) A chief executive officer is not required to include in a Register of Salaries details of any reimbursement of expenses incurred by an employee in performing official duties unless that reimbursement occurs by way of the periodic payment of a lump sum that is not calculated so as to provide exact reimbursement of expenses incurred by an employee in performing official duties.

26.



27.



Issue 1 - Whether the CEOPMC committed an act of maladministration in public administration under the ICAC Act by approving the reimbursement of a golf club membership for the CEO

28. The CEO, under the terms of Schedule 4 of the CEO's contract, is entitled to be reimbursed for the cost of four annual 'professional organisation subscriptions', provided that they are 'reasonably consistent' with his duties.
29. Firstly, I do not consider that the golf club membership can be appropriately categorised as a 'professional organisation subscription'. The dictionary meaning of 'professional' is 'relating to or belonging to a profession.'⁷ The dictionary meaning of 'profession' is 'a paid occupation, especially one that involves longer training and

6

7 Oxford Dictionary.

formal qualification.⁸ In my view, a 'professional organisation' refers to organisations relating to the professional skills associated with the role as a CEO, and I do not consider that a sporting club constitutes a professional organisation.

30. Secondly, I do not agree that the golf club membership is 'reasonably consistent' with the CEO's duties, or that it is necessary for the CEO to be a member of the golf club in order to fulfil his official duties.
31. The functions of a CEO are set out in section 99(1) of the Local Government Act. Subsections (a) - (i) provide specific functions required of a CEO and subsection (j) allows for a CEO to exercise, perform or discharge other powers, functions or duties conferred on them by the Act, and to perform other such functions lawfully directed by the council. I do not consider that playing golf is 'reasonably consistent' with any of the specific functions provided in the Act, and there is no evidence that the council has directed the CEO to play golf pursuant to section 99(1)(j). For the council to direct the CEO to perform such a function would, in my opinion, be farcical. As such, I do not consider that playing golf is 'reasonably consistent' with the official functions or duties of a council chief executive officer.
32. Further, I do not consider that a reasonable person would consider that playing golf was reasonably consistent with the official functions of a South Australian council CEO.
33. Mayor Rosenberg's response submitted that it was 'superficial and frankly absurd' for me to suggest that the council approved the reimbursement to enable the CEO to simply play golf. While I accept that that it was not the council's intention to approve the reimbursement on that basis, regardless, as outlined below, my view remains that membership of the golf club (as opposed to playing golf per se) was not reasonably consistent with the CEO's duties.
34. I have considered Mayor Rosenberg's response which outlines the reasons why the council considered that golf club membership was necessary for the CEO to properly fulfil his duties, including:⁹
 - That the CEO undertook this type of activity to liaise with business parties
 - That the CEO undertook this type of activity as part of business investment attraction activities (in particular delegations from overseas which had the prospect to achieve investment potential)
 - That the CEO is expected to conduct himself appropriately and activity [sic] engage in activities that would benefit the Council regardless of whether he is within Council facilities or otherwise
 - That it is more than likely that the CEO would be approached at the Kooyonga premises by parties who wished to engage with him on Council matters and that this should be encouraged and capitalised on for the Council's benefit.
35. I have also noted the email from the CEO to Mayor Rosenberg dated 4 October 2014 which was provided to my investigation after my revised provisional report was provided to the parties for comment. In that email, the CEO stated:

Proposal for use of existing contract

Within the existing contract Schedule 4 point 6, there is the provision for four annual professional organisation subscriptions (provided such *are reasonably consistent* with your[sic] duties). To date I have not been subscribed to any subscriptions. I have during reviews sought advice from various parties including the LGA with little direction or suggestions provided. I am a new member of Kooyonga golf club and I use this membership predominantly on Sundays where in addition to my own relaxation I

⁸ Ibid.

⁹ Letter to the Ombudsman from Mayor Rosenberg, dated 13 October 2015, p2.

sometimes take staff out for a round of golf as incentives or as a thank you, government executives and potential investors, including Chinese.

I would like to propose that the council under subscription covers the establishment fee for my membership, which is a once off fee of \$6200. As I have not exercised any subscriptions to date this equates to approximately \$520 per each of the 4 subscriptions per year.

This is a once off fee and would not continue within the new contract proposed for March dependant on the terms of the new contract. Could you please consider this request and provide your approval or not. I believe that in the interim period this is a fair request and is along the lines of previous discussions we have had of holiday incentives but falls within a subscription category of my existing contract.

36. I have also considered Mayor Rosenberg's submission as to why membership of the golf club was reasonably consistent with the CEO's lawful functions as set out in section 99(1)(j) of the Local Government Act. I note that the council has not provided any detailed evidence to support its assertion that the CEO has engaged in those functions through his membership of the golf club.
37. I do not agree that it is necessary for the CEO to be a member of the golf club in order to fulfil his official duties or that a golf club membership is 'reasonably consistent' with the CEO's duties.
38. I accept that the council only reimbursed the joining fee and that the CEO paid his own annual membership. In that sense, I accept that the council only partly reimbursed the CEO's golf club expenses.
39. The council submitted that there was a 'substantial benefit' to the council in reimbursing the CEO's joining fee. The council stated in its response to my revised provisional report:

It is simply not economic to utilise such a facility on a casual basis. The costs incurred over a period of time by reimbursing casual visits by four non-members would be far more substantial than payment of a one off joining fee. A perusal of the Kooyonga website clearly demonstrates this. Further, the Council understands that access to this and other like courses for non-members is limited and that some other facilities of a similar standard may not allow casual visitors at all.

Because the CEO is a member of the club and payed his own membership fees that year, a similar visit could take place for a relatively nominal fee. There is no fee for the CEO and a small fee for member's guests.
40. I do not accept that there was a 'substantial benefit' to the council in reimbursing the CEO's joining fee. The joining fee was a one-off fee that had already been paid by the CEO. Whether the CEO chose to continue to pay his membership fees on an annual basis was a matter for the CEO over which the council had no control (although I note that the relevant motion stated that the membership was to be reviewed annually upon request). On that basis the council could not guarantee that it would receive any long term benefit from reimbursing the one-off joining fee (unless, of course, it paid the CEO's membership fees on an ongoing basis). If, for example, the CEO had resigned shortly after, the council would receive no benefit at all (while the CEO would continue to benefit).
41. While the council has submitted that it was open to it to take the view that the reimbursement was a substantial benefit to it, there is no evidence that the CEOPMC took any steps to satisfy itself of that benefit (by considering, for example, the fee structure of the golf course).

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42. I have perused the golf club's website and do not consider that there is any clear information to support the council's submission that reimbursing the joining fee would be more economic than reimbursing casual visits by four non-members. Regardless, as mentioned above, any such savings would be dependent on the CEO continuing to pay his membership fees.
43. Even if I am wrong about that point, I query why the council considered it appropriate to pay 100% of the joining fee, given that on the CEO's own admission, his membership of the golf course was partly for his own recreation.
44. Further, the council has submitted that 'it is more than likely' that the CEO would be approached at the golf club by a member of the public who wishes to engage with him on council business. While I have not been provided with any evidence in that regard, I accept that members of the public may approach the CEO at a golf course. In my view, however, a council CEO should be approachable and accessible to all members of the community, and who attend a private golf club should not be provided additional access to the CEO at a cost to all ratepayers. In my view, it is not reasonable for ratepayers to be expected to reimburse the CEO, who receives significant remuneration for his role, for a membership to the golf club, in order for him to be able to be approached by members of the public, when only a small proportion of the ratepayers would actually benefit from this opportunity. It is just as likely that the CEO would be approached at the local pub or shopping centre and, in my view, it is not necessary for him to be reimbursed by the council for the golf membership in order for him to fulfil his official duties.
45. Regardless, as stated above, my view remains that the golf membership was not a professional organisation subscription.
46. In my view, the CEOPMC's decision to reimburse the CEO for the golf club membership is not consistent with the terms of the CEO's contract, because:
- the golf club is not a professional organisation
 - playing golf is not 'reasonably consistent' with the CEO's duties
 - even if playing golf could be considered as an official duty, I do not consider that it was reasonable for the council to reimburse 100% of the joining fee, given that the golf membership was at least partly for the CEO's own personal benefit.
47. As required by the Commissioner's referral of the issue pursuant to section 24(2)(a) of the ICAC Act and the Directions and Guidelines, I have considered whether there is any issue of maladministration in public administration under the ICAC Act in relation to the CEOPMC's approval of the reimbursement for the CEO's golf club membership.
48. In this instance, to be satisfied that the definition of maladministration has been met, I would need to be satisfied that the practice of the council in approving the reimbursement of the CEO's golf club membership resulted in substantial mismanagement of public resources.
49. Mayor Rosenberg's response stated that my provisional report did not identify the 'practice' for the purposes of the definition of maladministration, noting that the dictionary definition of 'practice' is 'habitual or customary performance, a 'habit or custom'.
50. 'Practice' is not defined in the ICAC Act and its meaning in the context of the ICAC act has not been the subject of judicial scrutiny. I accept that in those circumstances, a dictionary definition may provide guidance. I note that the Macquarie Dictionary includes the definitions identified by Mayor Rosenberg's response. The Macquarie Dictionary also includes the definition:
4. the action or process of performing or doing something (opposed to theory or speculation).

51. While I consider that the interpretation of 'practice' is open to argument, and I have noted Cr Bray's submissions in that regard, on balance, I accept that in this particular matter it has not been clearly established that the council's decision constituted a 'practice' for the purposes of the definition of maladministration.
52. In those circumstances, it is not necessary for me to consider the issue of whether there has been a 'substantial mismanagement of public resources'.
53. I have considered whether or not the council's decision to approve reimbursement of the golf membership constituted an administrative error for the purposes of the Ombudsman Act. In particular, I have considered whether the council erred by approving the reimbursement as a professional subscription for the purposes of Schedule 4 of the CEO's employment contract.
54. Mayor Rosenberg's response to my provisional report submitted that the CEO's request for reimbursement 'could' have constituted a variation to his contract of employment which was approved by the council in writing. I consider that submission to be speculative only and not supported by the facts.
55. Instead, on the evidence before me, I am satisfied that the CEO sought a reimbursement for the purposes of Schedule 4 of his contract of employment and that the council considered and decided his request on that basis. In reaching that view, I have had regard to the following:
- the CEO's email of 4 October 2014
 - the fact that the CEO completed an Employee Reimbursement Claim Form in relation to the golf membership.
 - the council's legal advice in relation to whether the cost of the CEO's membership to the golf club must be disclosed (**the legal advice**) which stated:

Based on the information provided, it cannot be said that the membership forms part of the CEO's remuneration package; rather, it was determined as an additional expense/allowance pursuant to Schedule 4 (and presumably a separate provision in the Agreement, not related to the remuneration package¹⁰) of the Agreement.

- Mayor Rosenberg's response dated 13 October 2015 which stated:

The CEO in his contract of employment (both the former and current contract) has provision and is encouraged to bring forward requests for memberships and subscriptions that are consistent with his role or professional development requirements.

The CEO requested consideration regarding the Membership in early 2015. I determined that this matter ought to be considered by the CEO Performance Management Committee (CEOPMC) at the next available opportunity.

[...]

The CEOPMC considered a range of outcomes that the Membership brought to the role of the CEO. This deliberation included the extent to which the Membership was consistent with the role of the CEO, whether the whole or a percentage of the Membership should be reimbursed as well as consideration as to whether any personal benefit would arise...

¹⁰ I note that I have not been provided with the entire Agreement that applied as at 17 February 2015 for the purposes of providing this advice.

- the minutes of the CEOPMC meeting on 3 March state that the CEOPMC approved the reimbursement 'in accordance with the Chief Executive Officer's contract of employment'
- if the CEOPMC had intended to vary the CEO's employment contract, I assume that that would have been noted in the minutes.

56. Schedule 4 of the CEO's contract only allowed reimbursement by the council for professional organisation subscriptions that were reasonably consistent with the CEO's duties. In my view, for the reasons discussed above, the golf membership did not meet those criteria. By approving the reimbursement, therefore, the council acted in a manner that was wrong for the purposes of section 25(1)(g) of the Ombudsman Act.

Opinion

In light of the above, I consider that by approving the reimbursement of the golf club membership for the CEO:

- the council did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act
- the council acted in a manner that was wrong for the purposes of section 25(1)(g) of the Ombudsman Act.

I do not consider it necessary to make any recommendations in relation to this issue.

Issue 2 - Whether the CEO's golf club membership should be included on the Register of remuneration, salaries and benefits

57. The salary, wage or remuneration, or an allowance or benefit, payable to a CEO is required to be recorded in the Register, in accordance with section 105 of the Local Government Act.
58. However, section 105(5) of the Local Government Act provides that a CEO is not required to include on the Register details of any reimbursement of expenses they have incurred in performing 'official duties'.
59. The council, in its response by letter dated 13 October 2015, stated:

...It has been determined that the matter of disclosure of the payment of the Membership should be governed by Section 105(5) of the Local Government Act which states...

[...]

Therefore, given the context as has been set out in the Background above, it was determined that the reimbursement of the Membership is not required to be disclosed on the Register of Salaries. This treatment was subsequently confirmed as appropriate by Council's legal advisors.

I wish to advise that the remuneration pertaining to the former contract of employment and the remuneration pursuant to the new contract of employment as resolved by Council for the CEO have both been disclosed on the Register of Salaries as is required...

60. The legal advice included:

...In my opinion, section 105 of the Act is intended to ensure transparency around the salary, allowances and benefits provided to a council's employees, including the CEO. However, the requirement to include the details of allowances and benefits in the Register of Salaries presupposes that those allowances and benefits are *'paid or payable to, or*

provided for the benefit of, the employee as part of a remuneration package' - see section 105(c)(ii) of the Act.

Based on the information provided, it cannot be said that the membership forms part of the CEO's remuneration package; rather, it was determined as an additional expense/allowance pursuant to Schedule 4 (and presumably a separate provision in the Agreement, not related to the remuneration package¹¹) of the Agreement.

It is also apparent that the reimbursement was applied for by the CEO on the basis that it is reasonably consistent with the CEO's role and his duties in fulfilling the requirements of that role. That is, it was not sought on the basis of it being a benefit (I interpret this to mean a personal benefit) to the CEO. Similarly, it appears that it was not approved by the Committee as a benefit, but rather an appropriate tool to enable the CEO to perform his duties.

Therefore, based on the foregoing, I consider that the Council is not required to include the membership on the Register of Salaries; it does not form part of the CEO's remuneration package and it is not provided for his benefit. The fact that the membership was reimbursed to the CEO as an expense incurred in the performance of his official duties, as envisaged by section 105(5) of the Act, also lends support to this position...

61. I agree with the legal advice, in that an additional expense/allowance pursuant to Schedule 4 of the contract is not required to be included on the Register.
62. However, I question whether the council determined that the amount should be considered as a 'reimbursement' that does not need to be included on the Register pursuant to section 105(5) only after the concerns about the payment were raised by the complainant.
63. I also note that section 105(5) is clear that it is the duty of the CEO to ensure that the required information is recorded on the Register.
64. The complainant advised my investigation, by email 20 August 2015, that it was not clear to him that the membership was to be reimbursed, and that it was not approved as a part of his salary package:

...I went to the meeting minutes, of which you have been sent a copy by me, and the wording talks about 'the CEO's contract of employment' and nothing else. I believe this misled Cr..., as it did me, as I was also surprised that this item was not on the register. To the average person, 'CEO contract of employment' sounds far more like a salary package issue than an expenses reimbursement issue. As such, councillors like me may well have thought it was some in-lieu-of-salary arrangement, rather than an outright additional payment as 'expenses'.

In hindsight I find the wording in the agenda both misleading and I believe it is a valid hypothesis that the wording is possibly disingenuous, given that (1) using the terms 'expenses reimbursement' would have been so simple and obvious to use, and (2) that in the council's explanation as to why this item is not on the register, the term 'reimbursement' is the descriptor used...

65. I note that the minutes of the CEOPMC's consideration of the matter do not mention the word 'reimbursement' but rather refer to 'matters related to the terms and conditions of the employment contract for the Chief Executive Officer' and 'Condition of Employment Contract'. However, it is clear that the payment was not made as a part of the CEO's salary package and, as such, is not required to be included on the Register.

¹¹ I note that I have not been provided with the entire Agreement that applied as at 17 February 2015 for the purposes of providing this advice.

66. For the reasons stated above, I do not agree that playing golf or membership of a golf club is reasonably consistent with the CEO's role. I also note that the Local Government Act is predicated on the principles of open, responsive and accountable government. As such, I consider that the amount ought to have been considered as constituting part of the CEO's remuneration package and ought to have been recorded on the Register.
67. However, given that the reimbursement was not considered as part of the CEO's salary package I am unable to find that, in not declaring the amount on the Register, the CEO acted contrary to section 105(5) of the Local Government Act.
68. I have noted Cr Bray's concerns raised in response to my provisional report and revised provisional report that the subscription had been misleadingly characterised as a 'salary package'. In my view, while the wording of the minutes of the relevant meetings was ambiguous in referring to 'matters related to the terms and conditions of the employment contract for the Chief Executive Officer', I do not consider, however, that wording in itself to constitute evidence of misleading behaviour. In that regard, I note that, in a sense, the application of a term of the CEO's contract (i.e. Schedule 4) was being considered at those meetings.
69. In this instance, to be satisfied that the definition of maladministration has been met, I would need to be satisfied that the practice of the CEO in failing to include the golf club membership on the Register:
- resulted in an irregular and unauthorised use of public money,
 - resulted in substantial mismanagement of public resources, or
 - included any conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions.
70. Given that I am unable to find that the CEO acted contrary to section 105(5) of the Local Government Act, I do not consider that there is any issue of maladministration in public administration under the ICAC Act in relation to the failure to declare the CEO's golf club membership on the Register.

Opinion

In light of the above, I do not consider that by failing to include the golf club membership on the Register of remuneration, salaries and benefits the CEO committed an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act.

Issue 3 - Whether confidentiality orders should have been made pursuant to section 90(2) and 90(3)(a) of the Local Government Act in relation to the reimbursement of the CEO's golf club membership

71. Section 90 and section 91 of the Local Government Act provide a council with the ability to prevent public access to council meetings and council documents.
72. The reimbursement of the CEO's golf club membership was considered in confidence under sections 90(2) and 90(3)(a) of the Local Government Act at:
- the CEOPMC meeting on 17 February 2015, and
 - the council meeting on 3 March 2015.
73. The minutes were kept in confidence pursuant to section 91(7) of the Local Government Act.
74. Section 90(2) of the Act provides that a council may order that the public be excluded from attendance at a meeting, and that the item be considered in confidence, to the

extent (and only to the extent) that the council 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).

75. Section 90(3)(a) provides as follows:

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

(a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);

76. The CEOPMC and the council considered the items relating to the reimbursement of the golf club membership in confidence on the grounds that the disclosure of the information 'would involve the unreasonable disclosure of information concerning the personal affairs of any person'.¹²

77. The council, in its response, defended the decision to consider the items in confidence, as follows:

...The CEOPMC considered the matter of the Membership in confidence on the basis it concerned information, the disclosure of which, would involve the unreasonable disclosure of information concerning the personal affairs of the CEO. It was, in my opinion, entirely appropriate for the CEOPMC to receive, consider and discuss the payment to the CEO of the Membership in confidence to enable a frank and open discussion about a matter which clearly concerns the CEO's personal affairs, specifically the CEO's financial affairs.

It is unreasonable, in my opinion, that the discussion as to whether or not an [sic] the CEO ought to be reimbursed for an expense, should be conducted in public. The Local Government Act 1999 (the Act) includes both financial affairs and personnel matters as personal affairs of a person. I respectfully submit that the payment of the Membership to the CEO is his personal affairs and it was necessary and appropriate for the CEOPMC to consider the matter in confidence, as to do otherwise would have been unreasonable...

78. The test under section 90(3)(a) is two-fold: firstly, the information must concern the personal affairs of any person (living or dead) and, secondly, the disclosure of that information must be unreasonable.

79. If the council relies on section 90(3)(a) to exclude the public it should apply the 'double test' to determine the case for closing the meeting to the public. This means considering both elements of the clause to show how and why:

- the information is of a personal nature
- disclosure of the information is unreasonable.

80. In my view, the council has not properly considered these elements.

81. Firstly, I do not consider that the information concerns the personal affairs of the CEO. The council itself has submitted that the CEO should be reimbursed for 100% of the golf club membership because the golf membership was 'reasonably consistent' with his official duties. As such, I do not consider that it follows that the reimbursement of the membership should not be disclosed because it was 'a matter which clearly concerns the CEO's personal affairs'. If the council truly was of the opinion that the golf club membership was a 'professional organisation subscription' that was 'reasonably consistent' with his duties, then the payment was a reimbursement for official duties and did not concern the CEO's personal affairs at all.

¹² Section 90(3)(a) of the Local Government Act.

82. In my view, it is contradictory to state both that the CEO should be reimbursed for the golf club membership because golf membership is a part of his official duties and that the reimbursement of the membership should not be disclosed because it is 'a matter which clearly concerns the CEO's personal affairs'.
83. In reaching that conclusion, I have considered the council's submissions that the reimbursement necessarily met the definition of 'financial affairs', as listed in section 90(9)(a)(i) of the Local Government Act. The council has also submitted that the relevant test was whether it was open to the delegate to conclude that the requirements of section 90 were met at the time. In my view, the test was whether it was reasonably open to the delegate to reach that conclusion.
84. I note that the matter was not recorded as being confidential on the basis that it concerned the CEO's 'financial affairs'. Instead, the decision is recorded as being made on the basis that:
- [it] would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead), in this instance being matters related to the terms and conditions of the employment contract for the Chief Executive Officer.
85. I also consider that it is arguable that the decision was more about the council's financial affairs than the CEO's.
86. The definition of personal affairs as far as it relates to employment is specified to include a person's employment records, employment performance or suitability for a particular position, or other personnel matters relating to that person. In my view, the reimbursement did not fall within those categories.
87. Even if it was accepted that the reimbursement concerned the CEO's personal affairs, I do not consider that the disclosure of the reimbursement of the golf club membership would be unreasonable. If the council is of the view that the golf club membership is a 'professional organisation subscription' and that golf membership was reasonably consistent with the CEO's duties, then I see no reason why it would be unreasonable to be transparent about this view.
88. In this instance to be satisfied that the definition of maladministration has been met, I would need to be satisfied that the consideration of the item in confidence resulted in substantial mismanagement of public resources. I do not consider that, without more, the council's decision to consider the items in confidence resulted in maladministration for the purposes of section 5(4) of the ICAC Act.
89. I consider, however, that it was wrong for the council to decide that an order to exclude the public should be made under section 90(2) of the Act on the grounds set out in section 90(3)(a) relating to the disclosure of information 'which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead)' at the CEOPMC meeting on 17 February 2015 and the council meeting on 3 March 2015.

Opinion

In light of the above, I consider that, by making confidentiality orders pursuant to section 90(2) and 90(3)(a) of the Local Government Act in relation to the reimbursement of the CEO's golf club membership, the council did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act.

In light of the above, I consider that, by making confidentiality orders pursuant to section 90(2) and 90(3)(a) of the Local Government Act in relation to the reimbursement of the CEO's

golf club membership, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act, that, within three months of the date of my final report, the council lift the confidentiality orders on the minutes of item 4.1 of the CEOPMC meeting on 17 February 2015 and of item 15.3 of the 3 March 2015 council meeting.

[Redacted]

90. [Redacted]

91. [Redacted]

92. [Redacted]

93. [Redacted]

94. [Redacted]

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113. [Redacted]

114. [Redacted]

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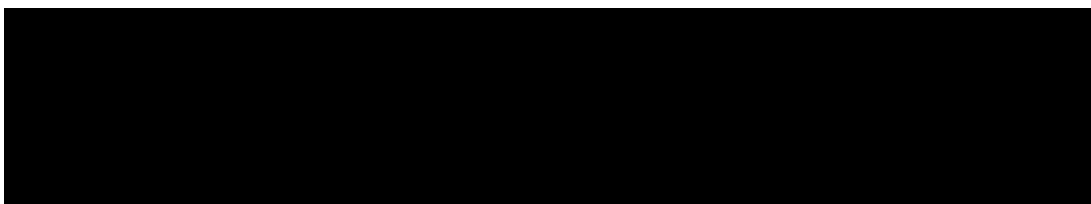
125. [Redacted]

126. [Redacted]

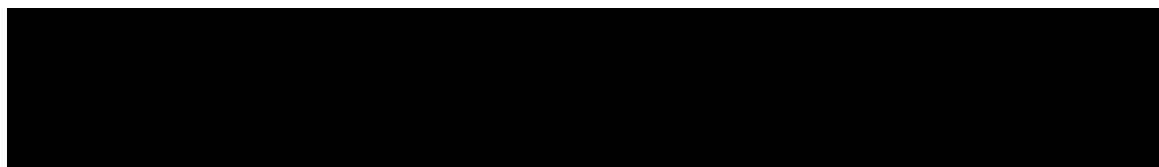
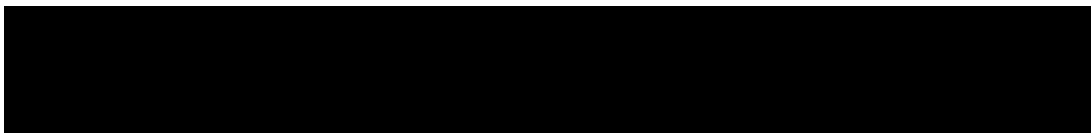
127. [Redacted]

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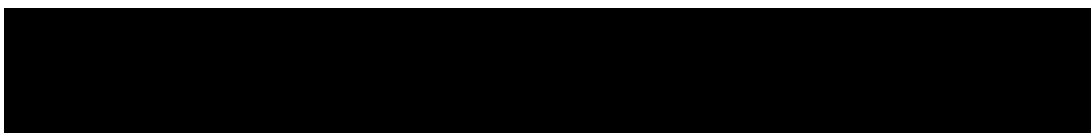
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131.



Summary and Recommendations

In light of the above, my final views are as follows:

1. by approving the reimbursement of the golf club membership for the CEO the council:
 - did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act
 - acted in a manner that was wrong for the purposes of section 25(1)(g) of the Ombudsman Act.
2. by failing to include the golf club membership on the Register of remuneration, salaries and benefits the CEO did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act.
3. by making confidentiality orders pursuant to section 90(2) and 90(3)(a) of the Local Government Act in relation to the reimbursement of the CEO's golf club membership the council:
 - did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act.
 - acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act, that, within three months of the date of my final report, the council lift the confidentiality orders on the minutes of item 4.1 of the CEOPMC meeting on 17 February 2015 and of item 15.3 of the 3 March 2015 council meeting.

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In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **5 May 2017** on what steps have been taken to give effect to my recommendation above; and, if no such steps have been taken, the reason(s) for the inaction.

Disclosure

I intend to send a copy of the final report to the Minister for Local Government as required by section 25(3) of the Ombudsman Act.

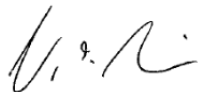
The Ombudsman Act imposes certain obligations¹³ on my Office and others, including complainants, officers and members in the council, to keep information about my investigation confidential. However, if I consider that disclosure of that information is in the public interest, then I may authorise or require its disclosure.

In my opinion, there is a public interest in disclosure of my final reports under the Ombudsman Act. Therefore, I authorise disclosure of the final report (only to the extent that it addresses issues 1, 2 and 3) by the council and require that the council present an extract of the final report including my discussion of, findings and recommendation in relation to issues 1, 2 and 3 to a public meeting of the council within two ordinary meetings of the council following the receipt of the final report.

I require that the council report to the Ombudsman that it has done so.

¹³ Ombudsman Act 1972, section 26.

In the event that the council does not present the final report (that is, the extract relating to issues 1, 2 and 3) to a public meeting of the council within two ordinary meetings of the council following the receipt of the final report, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

7 February 2017