

Amended and Redacted Final Report
Full investigation pursuant to referral under
section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012*

Public Authority	City of Unley
Public Officer	Cr Robert Schnell
Ombudsman reference	2017/03847
ICAC reference	2017/000229; 2017/000273
Date of referral	4 April 2017
Issues	<ol style="list-style-type: none">1. Whether Cr Schnell committed misconduct in public administration by revealing confidential information to a journalist2. Whether Cr Schnell committed an administrative act that was contrary to law by revealing confidential information to a journalist

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act), as raising a potential issue of misconduct within the meaning of that Act (the referral).

Section 14B of the Ombudsman Act provides:

14B—Referral of matter by OPI or ICAC

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
 - (a) will be taken to relate to administrative acts for the purposes of this Act; and
 - (b) must be dealt with under this Act as if a complaint had been made under this Act and—
 - (i) if the matter was the subject of a complaint or report under the ICAC Act—as if the person who made the complaint or report under that Act was the Complainant under this Act; or
 - (ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.
- (2) In this section—

Commissioner means the person holding or acting in the office of the Independent Commissioner Against Corruption under the ICAC Act;

ICAC Act means Independent Commissioner Against Corruption Act 2012;

Office means the Office for Public Integrity under the ICAC Act.

The referral was based on two reports to the Office for Public Integrity (OPI).

The issue concerns alleged breaches by Cr Schnell of clause 3.3 of Part 3 of the Code of Conduct for Council Members (**the Code**). Failure by a council member to comply with Part 3 of the Code constitutes misconduct. As a contravention of Part 3 can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered this matter under section 5(3)(a) of the ICAC Act.

In addition, as a breach of the Code amounts to a breach of section 63(2) of the LGA, and a matter referred to me under the ICAC Act is taken to relate to administrative acts for the purposes of the Ombudsman Act, I have considered whether Cr Schnell's conduct appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking and receiving a response from [the journalist]
- seeking and receiving a response from Cr Robert Schnell
- seeking and receiving a response from Mr Michael Kelledy from Kelledy Jones Lawyers
- considering the ICAC Act, the *Ombudsman Act 1972* (SA), and the Code
- providing Cr Schnell and the [Elected Member F] 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.¹ 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 ...²

Response to my final report

[the journalist's] solicitor responded by email on 8 December 2017, and requested that it be made clear in paragraphs 7 and 8 that [the journalist] only revealed their source because of the requirements of the Ombudsman Act and ICAC Act. I acceded to the request and amended paragraphs 7 and 8 in that regard.

Neither Cr Schnell nor [Elected Member F] made any response to the final report.

Response to my provisional report

In response to my provisional report Cr Schnell emailed on the 10 November 2017 that he fully accepted the report and proposed recommendations, and was prepared to make a sincere apology at a public council meeting.

¹ 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.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

The [Elected Member F] made no formal response in relation to the provisional report.

Background

1. On 20 February 2017 at 5:30pm elected members and council staff met to receive a briefing from Kelledy Jones Lawyers about a Development Plan Amendment (**DPA**) and conflicts of interest.
2. Ms Rebecca Wilson, Group Manager Governance and Risk at the City of Unley (**the council**) arranged for Mr Michael Kelledy to attend to clarify for elected members the conflict of interest provisions of the Local Government Act, particularly concerning their role in the DPA by discussing the relevant issues and obligations of elected members.
3. Mr Kelledy presented the briefing to all elected members, including Cr Schnell. The Chief Executive Officer, General Manager Community, Coordinator Cultural Development, General Manager City Development and Ms Wilson also attended. The meeting took place at the council, was an informal meeting and was not recorded.
4. On 21 February 2017 at 2:43pm, [the journalist] emailed Ms Erin Thompson, Communications Officer at the council as follows (**the email**):

Hi Erin,

Thanks for giving me the heads up re: last night's workshop. I lasted about 15 minutes before realizing my time was (much) better spent elsewhere.

I do, however, want to get some information from [council employee]³ about a briefing that was given last night to elected members in regards to the Unley Central DPA about potential conflicts of interest.

If you could provide some responses to the following before COB Wednesday that would be appreciated. Alternatively, I am happy to take [council employee's] call.

Q: What was the context for the briefing from Kelledy Jones Lawyers? Why now?

Q: Was this the first time the elected member body have been given legal advice relating to conflicts of interest and Unley Central? If not, why weren't the potential conflicts addressed earlier in the DPA process?

Q: Can you confirm that two councillors ([Elected Member A] and [Elected Member B]) have been advised that they have a material conflict of interest, and must excuse themselves from debate, while another 4 or 5 have been told that they may have "perceived conflicts". Are those with a perceived conflict required to declare that conflict, and then excuse themselves from the meeting? What are the consequences if they do not?

Q: What will happen if seven elected members excuse themselves from a vote, and there is no quorum?

Thanks Erin,

5. Information provided to my investigation identified that the disclosure to [the journalist] occurred between the time the briefing finished at 6:15pm on 20 February 2017, and the time of the email at 2:43pm on 21 February 2017.
6. The referral alleged that the confidential information contained in the email consisted of details of discussions that occurred during the legal briefing including naming specific elected members who may have a conflict of interest in relation to the Unley DPA.

³ [council employee] of the council

7. My investigation sought a response from [the journalist] as to how he came to obtain the information contained in the email. [the journalist] was overseas and responded to my Office via his solicitor, Peter Campbell of HWL Ebsworth Lawyers. [the journalist] provided the information to this Office in accordance with his obligations under the ICAC Act and the Ombudsman Act. [the journalist] responded as follows:
- he received an email from Cr Schnell on 19 February 2017 which stated that elected members would be given a briefing on 20 February 2017 'from a legal adviser about the Unley Central DPA'
 - he received a further email from Cr Schnell on 21 February 2017 which 'discussed some of the matters in the briefing given to elected members at the meeting, including issues relating to potential conflicts of interest.'
 - the information was put to and corroborated by [Elected Member F] during a phone call on 21 February 2017
 - [the journalist] 'was not given notice that the workshop was confidential, nor did he have reason to believe it would be' by either Cr Schnell or [Elected Member F]
 - the first time [the journalist] was aware that the briefing was confidential was on 22 February 2017 when Ms Thompson informed him that it was.
8. In accordance with his obligations under the ICAC Act and the Ombudsman Act [the journalist] provided to my investigation emails from Cr Schnell to [the journalist] on 19, 20 and 21 February 2017. The email dated 19 February 2017 at 12:11pm stated:

Hi [the journalist]

Off the record...

On Monday night we have a workshop on wording of the 4 year plan. However, before that at 5:30 to 6pm we have a session with a legal adviser about the DPA. Supposedly 4 elected members will be unable to vote on the DPA at Council. They are [Elected Member B] (who made a submission re the DPA) and up to 3 others, probably bloggers [Elected Member C], [Elected Member D] and [Elected Member E]. I am hoping that I am not included, but I wouldn't be surprised. I will be outraged. Those affected, those that can't vote (or shouldn't) will be identified and told why. Here's an extract from the CEO...

"Please note at 5:30, Michael Kelledy will be attending to answer questions and advise members of conflict of interest provisions and the current Unley Central DPA process. Presently there are at least 2 members that cannot debate or vote on the DPA. Michael will be able to explain why.

There are potentially 2 more that may need to excuse themselves....

I strongly suggest that all members attend this session so that the next month or so runs smoothly."

This is an outrageous development and will be perceived by the public as controlling the vote at Council: achieving a 100% yes vote.

There is no mention if the session is confidential. I see no reason why it should be confidential. Surely it should be open to the public.

Regards

Bob Schnell.

9. On 21 February 2017 at 8:29am Cr Schnell again emailed [the journalist], this time as follows:

Hi [the journalist]

Off the record...

The session last night was not confidential by nature.
We were not asked to keep it confidential.
The presenter was lawyer Michael Kelledy.
He gave us advice to help us determine if we have conflict of interest; perceived or material.

The outcome was:

- 1) [Elected Member A] should declare a material conflict because his son made a DPA submission and deputation. The son lives on the boundary of the DPA and his amenity will be affected (by overlooking). [Elected Member A] should absent himself from the meeting.
- 2) [Elected Member B] has a conflict because he made a submission to the DPA. [Elected Member B] should absent himself from the meeting.
- 3) The [Elected Member F] and [Elected Member E] are both members of FOCUS. I didn't know that. Given FOCUS's core position re the DPA, it was highly recommended that [Elected Member F] and [Elected Member E] absent themselves from the meeting.
- 4) Then there are the bloggers. I asked that those bloggers deemed to have a conflict be named. Kelledy and [Elected Member F] both said that they would not be named, they didn't want to do that. However there was private comment (later) that [Elected Member C] and [Elected Member D] should declare a conflict and absent themselves; due to their positions stated on their blogs.

So, at least 4 are out and maybe 6.

The bottom line is that if someone doesn't declare a conflict, then we (staff and elected members and in fact the public) are obliged to report the matter to the Ombudsman. It is our duty.

It promises to be an interesting time when it comes to declaring a conflict of interest.

Regards

Bob Schnell.

10. [the journalist] replied at 9:02am 'Really!?'

11. Cr Schnell replied at 9:27am:

Absolutely.
Why not contact the 6 listed and get a comment. Should be a good story.
I believe that I am OK as I have not stated my voting intention. I just blogged on Council deciding to build on the civic centre.

Each member needs to make the decision and if they don't choose wisely then they run the risk of being dutifully reported.

Regards
Bob Schell

12. [the journalist] replied at 9:32am:

Indeed,

This needs to be reported. Are you comfortable with me putting some questions to the council? You will not be identified as the source.

Let me know.

13. Cr Schnell replied at 10:06am:

[the journalist]

Off the record...

Yes, I am ok with you putting the questions as long as you don't reveal me as the source. Throw me into the mix as a blogger (with [Elected Member C], [Elected Member F] and [Elected Member D]) who needs to assess his position. If you were to contact me as part of your investigation, then I would provide an on record statement.

14. On 21 February 2017 at 11:31am Cr Schnell emailed [the journalist] again:

[the journalist]

Off the record...

You're going to love this.
Despite [Elected Member A] being clearly told last night that he has a conflict, he still doesn't get it.
Here's an email exchange between him and the staff....

Dear Councillor [Elected Member A]
From my observations, you were not singled out by the CEO. You asked a question and Michael Kelledy provided a response. From my perspective, the CEO was just trying to use an example to sum up, clarify and conclude the particular example, given there seemed to be some confusion.

Other members asked questions relating to blogs etc. of which responses were also provided. Unfortunately, there were individual conversations occurring around the table which was quite disruptive and therefore I think may have been where it was missed what led to the CEO seeking clarification to this scenario. You will recall he personalised it to his daughter and himself.

As discussed, legal advice will be forwarded to the council and passed onto Members summarising conflict of interest and the code of conduct and Member obligations including the scenarios discussed last night. This advice will be for the Council, which means that it will not be able to be publicly circulated so as to not jeopardise legal professional privilege. If you wish to have advice that you can distribute publicly, then I would recommend you seek independent advice relating to your personal scenarios.

Kind regards

Rebecca Wilson LLB/LP, BA, Grad Dip ACG, AGIA, ACIS
Group Manager Governance and Risk
City of Unley

15. I informed Cr Schnell of my investigation on 31 May 2017, and sought his response to the allegation. Cr Schnell replied by letter dated 15 June 2017. Cr Schnell stated:
- the email calendar request on 20 February 2017 to attend the briefing did not tag the meeting as private nor confidential
 - when a workshop/briefing is deemed to be confidential there is never an explanation provided as opposed to council meetings when an order is made
 - the workshop/briefing took place in an area known as the 'bar area' which does not have a door that can be closed
 - there was no mention of confidentiality and the information provided was educative as in a training session
 - there was open discussion with question and answer format

- statements made by elected members reflected information that was already known to the public eg their residential addresses, membership of community groups and the content of their blogs and emails
- reference was made to two elected members who had potential conflicts of interest, which was known to the public
- Cr Schnell was frustrated by the information provided by Mr Kelledy because Cr Schnell wanted to be told if he had a conflict or not and the information was more advisory in nature.
- he occasionally meets with [the journalist] as he presumes all elected members do
- he did not believe the briefing was confidential and there was no reason given as to why any of the discussions should be confidential
- he only contacted [the journalist] to assist him in understanding what might arise at a future council meeting.

16. In relation to whether the briefing was confidential and whether he emailed [the journalist] about the briefing, Cr Schnell replied:

Yes.

Given my understanding that the discussion was not confidential, I provided a light-hearted summary of the session, probably more of a commentary, to [the journalist]. It was intended to be background information to explain that many elected members will probably cite perceived conflict of interest for various reasons eg. membership of community groups, blog posts, emails to residents and public statements.

The information provided was meant to assist in understanding the statements of conflict of interest that may arise at a future Council meeting. The formality of a Council meeting can at times be a challenge for those in the gallery to understand.

The background information would help an observer understand what was happening.

17. On 26 July 2017 I emailed Mr Michael Kelledy and he replied on 11 August 2017. Mr Kelledy informed my investigation that:
- the briefing was confidential and arranged by the administration on this basis because legal advice would be provided relative to the personal circumstances of some elected members
 - he was advised of the status of the briefing as confidential by Rebecca Wilson
 - he was not asked to advise either before or after the briefing as to it being described as a confidential briefing
 - he spoke about conflict of interest, bias and the District Centre Zone DPA
 - he took no notes as the meeting was informal and interactive.

Relevant law

18. 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.

19. Section 63(2) of the Local Government Act provides:

63-Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils
- (2) Council members must observe the code of conduct.

20. Clause 3.3 of Part 3 of the Code of Code of Conduct provides Council Members must:

- 3.3 Not release or divulge information that the Council has ordered be kept confidential, or that the Council member should reasonably know is information that is confidential, including information that is considered by Council in confidence;

Whether Cr Schnell committed misconduct in public administration by revealing confidential information to a journalist

21. The information disclosed by Cr Schnell to [the journalist] was not information that the council had ordered to be kept confidential. The relevant question is therefore whether Cr Schnell ought reasonably to have known that the matter was confidential.
22. I acknowledge the statements made by Cr Schnell asserting that he believed the information he shared with [the journalist] was not confidential in nature. However, in my view a council member should assume that as a starting point, unless otherwise notified, legal advice should be treated confidentially.
23. Therefore in light of the available information I do not accept that it was reasonable for Cr Schnell to form the belief that the information was not confidential. I consider that Cr Schnell should have reasonably known that the information was confidential in nature for the following reasons:
 - the briefing was for the purpose of Mr Kelledy providing legal advice
 - the briefing discussed personal details of elected members
 - the briefing was for the purposes of assisting elected members in understanding whether they have a conflict of interest in a particular DPA
 - Cr Schnell saw, and passed on, the email exchange between [Elected Member A] and Ms Rebecca Wilson as to whether Mr Kelledy's legal advice was not to be publicly circulated which gives an indication as to how the council administration viewed the briefing
 - [the journalist's] reaction to the information being emailed by Cr Schnell suggested it was information that he otherwise would not have had access to, despite Cr Schnell's insistence that he considered the briefing ought not to have been confidential.

I also note Cr Schnell attempted to keep his own email correspondence about the meeting confidential by marking it 'off the record' and 'don't disclose the source'.

24. It is up to individual council members to determine whether they have a conflict in relation to a particular matter. It was therefore inappropriate for Cr Schnell to disclose personal information to a journalist about [Elected Member A's] and other council members' potential conflict as it possibly compromises this process.

Opinion

In light of the above, I consider that Cr Schnell breached the provisions of section 63(2) of the Local Government Act and clause 3.3 of Part 3 of the Code of Conduct, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

Whether Cr Schnell committed an administrative act that was contrary to law by revealing confidential information to a journalist

25. Given that section 63(2) of the LGA requires compliance with the Code, for the reasons set out above I consider that Cr Schnell in breaching the clause 3.3 of the Code of Conduct acted in manner that appears contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

In light of the above, I consider that Cr Schnell breached the provisions of section 63(2) of the Local Government Act and clause 3.3 of Part 3 of the Code of Conduct, and on that basis his conduct amounts to an administrative act that appears contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

As foreshadowed in my provisional report, I recommend under section 25(2) of the Ombudsman Act that Cr Schnell:

1. undertake training in respect of confidentiality
2. apologise to the council in person at a council meeting for disclosing confidential information (including the sharing of [Elected Member A's] personal information)
3. be reprimanded by the council by means of public statement

Final comment

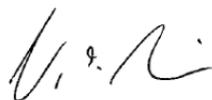
I now report Cr Schnell's misconduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **15 February 2018** on what steps have been taken to give effect to my recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as those above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the District Court.



Wayne Lines
SA OMBUDSMAN

11 December 2017