

## Report

### Full investigation pursuant to referral under section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012*

Public Authority	Port Pirie Regional Council
Public Officer	Deputy Mayor Leon Stephens
Ombudsman reference	2017/12401
ICAC reference	2018/001093
Date of referral	30 November 2017
Issues	<ol style="list-style-type: none"><li>1. Whether Deputy Mayor Stephens committed misconduct in public administration by advertising the Chief Executive Officer's vacant position without authority, in breach of the Code of Conduct for Council Members</li><li>2. Whether Deputy Mayor Stephens committed maladministration in public administration by advertising the Chief Executive Officer's vacant position without authority</li><li>3. Whether Deputy Mayor Stephens committed misconduct in public administration by using a private email address to conduct council business, in breach of the Code of Conduct for Council Members</li><li>4. Whether the council committed maladministration in public administration by proceeding with the recruitment of a new Chief Executive Officer</li></ol>

#### Jurisdiction

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 potential issues of misconduct and maladministration within the meaning of that Act (the referral).

Section 14B of the *Ombudsman Act 1972* (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.

During the course of my investigation, I obtained information that I considered necessitated further reports to the Office for Public Integrity (**the OPI**). As a result, the Commissioner referred additional issues of misconduct and maladministration, which I have set out in further detail in my report below.

Some of the issues referred by the Commissioner concern alleged breaches by Deputy Mayor Stephens of clauses 2.6, 3.2 and 3.4 of the Code of Conduct for Elected Members (**the Code of Conduct**). As a contravention of the Code can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

In addition, as a breach of the Code is a breach of section 63(2) of the Local Government Act, and as a matter referred to me under the ICAC Act will be taken to relate to administrative acts for the purposes of the Ombudsman Act, I have considered whether Deputy Mayor Stephens' conduct comprises administrative acts that have been made contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act. I have decided to undertake this line of inquiry on my own initiative pursuant to section 263A(3) of the Local government Act.

## Investigation

My investigation has involved:

- assessing information provided by the reporter
- seeking a response from Deputy Mayor Stephens, Port Pirie Regional Council (**the council**)
- seeking a response from Mayor John Rohde, of the council
- reporting information to the OPI, and considering new issues referred by the Commissioner
- considering the Code of Conduct, the Ombudsman Act, the ICAC Act and the *State Records Act 1997*
- providing the reporter, Deputy Mayor Stephens and Mayor Rohde with provisional report for comment, and considering Mayor Rohde's response
- 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.<sup>1</sup> 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 ...<sup>2</sup>

## Response to my provisional report

The reporter did not provide a response to my provisional report.

Deputy Mayor Stephens did not provide a response to my provisional report.

The council responded to my provisional report by letter from Mayor Rohde dated 28 August 2018.

The council made no submissions in regards to my provisional findings pertaining to Deputy Mayor Stephens. However, the council disagreed with my provisional view that the council committed maladministration by proceeding with the recruitment of a new CEO in the circumstances of this matter.

In summary, the council submission included, *inter alia*, that:

- the Committee was specifically established to oversee the CEO recruitment process and is a body that makes recommendations to the council as it has no delegated authority to make decisions
- it is not unusual in any CEO recruitment process for there to be a number of diverse and wide-ranging issues that are required to be considered by the Committee and, ultimately resolved by the council
- a CEO recruitment process is always complex; this is why councils frequently engage the services of a recruitment agency to assist
- it is not unusual for there to be issues raised pertaining to managing the outgoing and incoming CEO's, and given this, it is not unusual for legal advice to be sought by the council in relation to issues arising during a CEO recruitment process
- the relatively minor amount spent by the council on legal fees could not be said to amount to a substantial mismanagement of public resources
- the decision made by the council to continue with its recruitment process in October 2017 was made based on the facts and circumstances known to it at the time
- it could not have been known by the council in October 2017 that the failure to retract the advertisement and halt the recruitment process would result in the CEO's ending his contract earlier
- the council at all times during the CEO recruitment process continued to act on the basis that the former CEO would remain in his role until 18 May 2018

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<sup>1</sup> 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.

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- it was the former CEO's expressed dissatisfaction in January and February 2018, after the new CEO had been selected, that led to the council agreeing to the former CEO's proposition that he leave his position early
- the former CEO was communicating with the Mayor, the Deputy Mayor and council's legal advisers in relation to these matters and, as such, the council fails to see how that could constitute poor communication
- it is up to the council to determine when to start its recruitment process and how to progress the process; there is no requirement for the council to keep the former CEO updated on the process, other than in a general manner
- taking the above into consideration, the council made a commercial decision to acquiesce to the former CEO's request, a decision that, with regard to best practice HR considerations, was an entirely appropriate decision in the circumstances
- the committee, and by extension, the council, considered that retracting the advertisement would cause reputational damage to the council
- there were concerns that the withdrawal of the advertisement could have caused some of the potential candidates to reconsider applying for the position
- the decision of the Deputy Mayor to authorise the advertisement only caused the recruitment process to commence some two weeks earlier than it would have otherwise commenced
- legal costs and funds to pay out the former CEO's contract and the monetary costs of the acting CEO are all common expenses in a CEO recruitment process; and these costs can not be considered as 'substantial mismanagement of public resources'.

While I accept the council's submissions that retracting the advertisement could have caused reputational damage to the council and could have led to some of the potential candidates to reconsider applying for the position, I do accept that these factors justify the decision to proceed with the recruitment process.

I do, however, consider that other factors submitted by the council are persuasive as to whether the decision to proceed amounted to maladministration, specifically the following:

- it is not unusual for legal advice to be sought by the council in relation to issues arising during a CEO recruitment process
- the decision made by the council to continue with its recruitment process in October 2017 was made based on the facts and circumstances known to it at the time
- it could not have been known by the council in October 2017 that the failure to retract the advertisement and halt the recruitment process would result in the CEO ending his contract earlier
- the decision of the Deputy Mayor to authorise the advertisement only caused the recruitment process to commence some two weeks earlier than it would have otherwise commenced
- legal costs and funds to pay out the former CEO's contract and the monetary costs of the acting CEO are all common expenses in a CEO recruitment process.

Having carefully considered the council's submission I have amended my view in response.

## Background

1. On 24 May 2017 the former Chief Executive Officer (CEO) of the council, Mr Andrew Johnson (**the former CEO**), advised council administration that he would not be seeking to renew his contract when it is due to expire in May 2018.<sup>3</sup>

<sup>3</sup> It is my understanding that Mr Johnson provided twelve months' notice of his intention to not seek a renewal of his contract in accordance with the terms of his contract.

2. At a council meeting held on 23 August 2017, a motion was moved by the council to adopt a set of guidelines, the Terms of Reference (**TOR**) for recruiting a new CEO, and in turn also established a CEO Recruitment Committee (**the Committee**).
3. The TOR set out that the Committee was established to fulfil the following functions:
  - 2.1.1 To engage a suitably qualified recruitment firm to assist with the recruitment of a Chief Executive Officer.
  - 2.1.2 To review the proposed job description, contract of employment and salary package for the recruitment of a CEO, in consultation with the appointed recruitment firm.
  - 2.1.3 To determine the most appropriate time to commence the recruitment process.
  - 2.1.4 To call for applications, short list applications, interview applicants, conduct any necessary checks and testing for the recruitment of a CEO, in consultation with the appointed recruitment firm.
  - 2.1.5 Make a recommendation to Council in relation to the appointment of a suitable Chief Executive Officer, for Council's consideration.
  - 2.1.6 To do anything necessary, expedient or incidental to performing or discharging the functions of the Committee as listed herein or to achieving its objectives.
4. Mayor John Rohde, Deputy Mayor Stephens, and Councillors Debra Devlin and Michael Hopgood were appointed as members of the Committee, with Deputy Mayor Stephens appointed as its Chairperson.
5. At a Special Meeting of the council held on 25 September 2017, the council ratified a decision by the Committee to utilise the services of a recruitment agency, Sullivan Consulting, for the recruitment process.
6. On 3 October 2017 the Committee moved a motion:

That the Chair [Deputy Mayor Stephens] instigates the draft advertisement with Sullivan's [sic] for the position of CEO and then progress the agreement for the commencement of this service, to be signed off by the CEO office.
7. In regard to that motion, Mayor Rohde submitted to my Office by email dated 22 December 2017 that:

...It was I [sic] and the other members understanding that the information that we had provided about what we would like to see in an applicant would be formulated into a draft advertisement and brought back to us and I believe this was encapsulated in the [motion].
8. The following email correspondence was provided by Deputy Mayor Stephens:

From: Andrew Sullivan [mailto:andrew@sullivanconsulting.com.au]  
Sent: Wednesday, October 4, 2017 10:52 AM  
To: 'Leon Stephens'  
Cc: 'Leon Stephens'; sheridan@sullivanconsulting.com.au  
Subject: RE:

Thanks Leon, please see attached the amended advertisement.

Look forward to hearing from you.

Regards

Andrew

...

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From: Andrew Sullivan [mailto:andrew@sullivanconsulting.com.au]  
Sent: Wednesday, 4 October 2017 2:34 PM  
To: 'Leon Stephens'  
Subject: RE:

Thanks Leon, would you like me to post it online earlier?

Any luck chasing up the Job Description from Kate?

Regards

Andrew

...

From: Leon Stephens [mailto:sales@boatsnbikesportpirie.com.au]  
Sent: Wednesday, 4 October 2017 3:23 PM  
To: 'Andrew Sullivan' <andrew@sullivanconsulting.com.au>  
Subject: RE:

Yes please, and the job description will take me a little while as I have to correlate the changes

...

From: Andrew Sullivan [mailto:andrew@sullivanconsulting.com.au]  
Sent: Wednesday, 4 October 2017 3:58 PM  
To: 'Leon Stephens'  
Subject: RE:

Do you mean the contract or job description?

No problems, I will post the advertisement in the next 24 hours.

Regards

Andrew

...

From: Leon Stephens [mailto:sales@boatsnbikesportpirie.com.au]  
Sent: Wednesday, 4 October 2017 3:32 PM  
To: 'Andrew Sullivan' <andrew@sullivanconsulting.com.au>  
Subject: RE:

Contract , I thought you had taken the changes we wanted with you, if you want I can get Kate to do it[.]

...

From: Andrew Sullivan [mailto:andrew@sullivanconsulting.com.au]  
Sent: Wednesday, 4 October 2017 3:35 PM  
To: 'Leon Stephens'  
Subject: RE:

Yes, I've taken down the changes, I just need a Word copy of the Job Description to update it.

9. On 6 October 2017, Mr Johnston, Mayor Rohde, and other council members and employees of the council, became aware that an advertisement for the vacant CEO role had been published on an online job board, 'Seek'. It appeared that the publication of the advertisement had been initiated by Deputy Mayor Stephens, who, as per the

motion above, had been tasked with the responsibility of preparing the draft advertisement.

10. Mayor Rohde explained to my Office that upon being alerted to the advertisement:

... I was made aware of the premature advertising by the current CEO on Friday the 6<sup>th</sup> of October and was mortified by what had transpired. I made it my task to contact Andrew Sullivan but he made it clear he had been directed by Leon to go ahead and advertise.

...I managed to catch him as he was boarding a plane and he was quite resolute that Deputy Mayor Stephens had given the go ahead to publish the advertisement. When he arrived back in Adelaide he called me again to reiterate his previous statement and when I intimated that this had not gone through the right process he again was adamant that Cr Stephens had given him the authority and that was that.

...I did not directly contact [Deputy Mayor Stephens] at the time because I was shocked by what had transpired and angry that he had taken this course.

...Cr Devlin did write to Cr Stephens on the Sunday signalling her concern about the process that had taken place. Cr Stephens wrote to me after seeking I think some support for his actions which were not forthcoming and I then wrote back to him with my concerns. The first opportunity to talk to him directly was at the Recruitment Committee meeting of the 12<sup>th</sup> where also Cr Hopgood verbally supported the position that both Cr Devlin and I had taken. At this time although somewhat remorseful Cr Stephens was still supporting his decision. This is no longer the case.<sup>4</sup>

11. Mayor Rohde also provided copies of the following email correspondence outlining exchanges between council members and Deputy Mayor Stephens in the aftermath of the advertisement:

**From:** Debra Devlin <ddevlin@pirie.sa.gov.au>  
**Date:** 8 October 2017 at 9:30:57 pm ACDT  
**To:** Leon Stephens <lstephens@pirie.sa.gov.au>, Andrew Johnson <ceo@pirie.sa.gov.au>, All Elected Members <AllElectedMembers@pirie.sa.gov.au>  
**Subject:** RE: Advertising Position of CEO

Hi Leon

As a member of the CEO Recruitment Panel, I am quite shocked and very disappointed that the position has been advertised prematurely. I searched for the minutes of our meeting of Oct 3<sup>rd</sup> but they have not been uploaded.

I understood the next 2 steps we discussed and agreed to were:

1. Consultant to finalise the Position Description (I wanted the opportunity to add "Project Management" as a key skill set and responsibility) and provide this for Council sign off in October meeting,
2. Mayor Rohde to seek legal advice on clauses to the Contract that need updating and clarification.

At no time did I understand a motion had been passed to recommend to Council that the position was to be advertised immediately. As you are aware we are a committee that needs Council full endorsement of any recommendations. Therefore any commitment to Council expenditure re salary package and potential payout of current contract is Council's - not the Recruitment Committee's.<sup>5</sup>

I am very disappointed that you have set your own time line and agenda for the recruitment process without a full discussion as to the implications of any scenario with

<sup>4</sup> Email from Mayor Rodhe to my Office dated 22 December 2017.

<sup>5</sup> The TOR specify that decisions made by the Committee can only constitute recommendations to the council, and that the council had not delegated any of its powers to the Committee.

Council, who are the ultimate decision makers in terms of the process, steps, content re conditions including salary package, timing and ultimate decision.

I hope it is not too late to stop the process and get things back on track and Council can see PD and agree to potential salary package on offer and accept an advertising and recruitment time line.

Regards

Cr Deb Devlin

**From:** Leon Stephens  
**Sent:** Sunday, 8 October 2017 10:23 PM  
**To:** Michael Hopgood; John Rohde  
**Subject:** Fwd: Advertising Position of CEO

Could you give me feedback on what Deb is saying, I have a different recollection, I recall That we go to market  
 Meet at the end of the month to short list spend a further 2 weeks interviewing

Otherwise why would Sullivan proceed?

Sent from my iPhone Leon Stephens

...

[Email dated 9 October 2017 from Mayor John Rohde to Deputy Mayor Leon Stephens]

...Hi just got back to the house again so just sending reply now.

Have a number of concerns with what has transpired over the last few days. I thought when Andrew left us after the meeting at the beginning of last week that he was going away to collate the information that had been provided to him to bring back to us in some form for approval by all in the committee then ratification by the elected members. If we had been looking for an earlier advancement on that we should have really moved a motion as such seeking the process be expedited earlier and had it agreed to at a special meeting of council.

Please I do want everyone to remember that we are still just a committee of Council and that although everyone may we [sic] be in furious agreement about what we are trying to do that it still needs that level of transparency. I was mortified when I saw Andrew J on Friday and he said that he had been informed that the advertisement had already been posted and accessed.

Although I am in agreeance [sic] that this process must remain moving forward in a timely manner to not have informed him in a formal way that this was happening is both disrespectful and could leave us open to Andrew taking action in some way. I think we really need to sit down as a committee and discuss this because we may have sent out an add [sic] that may well still not meet our needs. We all need to remember that there is a process to follow that not only provides us with an outstanding candidate but makes sure we do it in an open and transparent way.

Regards

John[.]

12. As noted in Mayor Rohde's response above, a Committee meeting was held on 12 October 2017. At that meeting, the Committee moved the following motion to extend the deadline of the advertisement that had been published:

CRC 19/17

That the closing date of Friday, 27 October 2017 for the current electronic advertisement be extended to match the closing date of the print media version so that both close on Friday, 10 November 2017 and that the Chair make Sullivan Consulting aware of this variation; and



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That all future correspondence from Sullivan Consulting be reviewed and signed off by the CEO Recruitment Committee members before continuing the process.

13. Mayor Rohde explained that the decision was made to extend the advertisement period, as opposed to removing the advertisement, as:

...It was the belief of us all that by the time we knew many had already had the opportunity to see it online and if we took it down we would create more detriment to the Council brand than if we left it and tried to work within the new parameters that had been created.

We have been more concerned about trying to recover the process to make sure we secure the best candidate. This has meant however that we have had to adjust the closing date for applications on several occasions, firstly because of the lack of time given on the electronic advertisement we extended the closing date to allow for print media applicants to be able to apply and secondly the elected members once presented with the original advertisement created by Sullivan's at October's Ordinary Meeting of Council found it to be lacking in some key areas and redrafted it and moved to further extend the deadline for applications.

14. Mayor Rohde also provided the following submissions outlining his views on the events that had transpired in connection with the publication of the advertisement:

...Deputy Mayor Stephens clearly wanted to expedite this process as quickly as possible. As the Chair of this Committee he has showed [sic] a clear lack of understanding of the importance of following due process particularly when dealing with such a sensitive issue as that of recruitment and how it affects the incumbent CEO. Councillor Stephens has unfortunately let his personal view of Dr Johnson cloud his decision making and he has tried to 'short circuit' the process to remove him quickly.

Whilst Deputy Mayor Stephens has not faced any internal disciplinary action, the Recruitment Committee has left him in no doubt that his actions were contrary to the desires of the Committee and in future all matters would have to be confirmed by us all before continuing. We also reiterated that we are only a Committee of Council and that all decisions of significance needed the approval of the elected body.

Although initially defending his position to go ahead with advertising, Councillor Stephens has since been remorseful concerning his actions. In speaking to the elected members he has agreed that he could have handled the situation better although he has suggested that there was a misunderstanding between he and Andrew Sullivan about publishing the advertisement, which was not his original position.

Although we have managed to get the recruitment process back on track and have been able to interview from a strong pool of candidates it has felt like an unnecessarily rushed process. Ideally the Committee would have preferred to only be seeking a replacement for the incumbent closer to his end date but unfortunately this option was taken away.

Some candidates who responded and sent applications from the original online advertisement were concerned they noticed multiple changes to the closing date for the position. This portrays an indecisive Council and weakens the Council brand to potential candidates.

The concern I have most held is the lack of consultation between the Chair and the current CEO. Dr Johnson has not been kept 'in the loop' about what has been happening and was distressed when he learnt of the premature advertisement of his position. Dr Johnson had every right to believe that he would be able to fulfil his role until his contract end date in May 2018 but this is now unlikely because of the rushed recruitment process. The Chair has avoided contact with the CEO since this incident and has left Dr Johnson quite unsure where he stands. I have seen a withdrawal from the elected members by the CEO and I am quite concerned about his wellbeing.

...Unfortunately what happened with the process is that we brought forward much earlier than originally intended advertising and now interviewing a suitable replacement for Andrew. Although I believe we will still end up with the best candidate possible it has put enormous unnecessary pressure on the incumbent.

15. Deputy Mayor Stephens was notified of my investigation, and asked to provide a response to the allegation that he inappropriately authorised publication of the advertisement, by letter dated 8 December 2017. Deputy Mayor Stephens responded by email dated 17 December 2017, and provided the following explanation for the events that led to the publication of the advertisement:

On the 3<sup>rd</sup> of October 2017 I received an email from Sullivan's consulting...with a terms of agreement and a draft advertisement, [sic] the terms of agreement were sent off to the CEOs for signing, and I reviewed the draft advertisement [sic] made a couple of changes to the draft and sent it back in attachment... [sic] there were a couple of exchanges of emails with Sullivan's in relation to the draft and job descriptions, [sic] in attachment advertising conversations...were a couple of brief conversations on drafts and fixing changes to the job description, [sic] to run alongside the advertisement [sic]

...upon reflection as I said to our committee I believe is where confusion between Sullivan's and I took place [sic], as I said to our committee at no time did I sign off on a final draft, I was under the understanding advertisement and job description went hand in hand and we were still waiting for that... [sic] the 5<sup>th</sup> October 2017, I received notice that online advertising had occurred on the SEEK website which at the time didn't give it too much thought, believing it to be normal process within the role of a recruitment agency, as I and members of the committee have never engaged in this process before at a local Government level, to the best of my knowledge, and process can sometimes skip a step inadvertently [sic].

...Do I believe there might have been negative effects on the recruitment, no I don't look at it from the prospective of applicant they would not see anything other than an exciting opportunity for employment in a Region on the Move [sic]

The CEO sent an email on Sunday the 8<sup>th</sup> of October 2017 highlighting his concerns I responded to him immediately confused with his email cc to all elected members, believing after signing the terms of agreement from Sullivan's ...he would understand the process, [sic] I realised there was some confusion on the topic and called for a meeting of the Recruitment committee, as we need to give 3 days' clear notice to call a meeting that meeting took place on the 12<sup>th</sup> of October 2017 [sic]

Mayor Rohde chaired in this case and the committee questioned myself intensely and expressed their concern, [sic] I explained as I have done to yourself in question 2 that after review the only thing I could put this down to was the confusion on a draft document for a job advertisement and a job description and at no time did I sign off on a final draft, we formulated a motion to be put to the council on the 25<sup>th</sup> of October 2017.

...I apologised to my committee for any embarrassment I had caused inadvertently, as this came at me from left field and I was blown away by the reaction of the CEO and the Committee, however being brought up as I had, I rang the CEO the next day and explained the series of events, apologised for the confusion, Andrew said that it just surprised him a little and he wished he would have been better prepared for the couple of calls he had received from the colleagues.

...I am concerned that my handling of this role has caused discomfort to the CEO; I believe I have had open and franc [sic] conversations with the CEO during the process trying to cover contingencies so that our transition would be amicable [sic]

16. During the course of my investigation, it became apparent from the email exchanges set out above that Deputy Mayor Stephens communicated with Sullivan Consulting using a private email address (sales@boatsnbikesportpirie.com.au) rather than his council email.

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17. The Commissioner assessed the use of a private email in conducting council business as raising a separate potential issue of misconduct, and referred the matter to me for investigation by letter dated 6 March 2018.
18. It also became apparent during the course of my investigation that the former CEO's contract was terminated before it was due to expire in May 2018, and that the salary component of the former CEO's contract, amounting to \$52,862.67, was paid out by the council for the period of February - May 2018.
19. This issue was also assessed by the Commissioner as raising a potential issue of maladministration in public administration by the council.
20. My Office informed the council by letter dated 8 June 2018 that this issue had been referred for investigation, and requested a further response in relation to the events that had led to the payment of the remainder of the former CEO's contract.
21. Mayor Rohde responded to those enquiries by email dated 24 June 2018, with reference to several emails. In summary, Mayor Rohde stated that:
- a Committee Meeting was held on 12 October 2017, and during that meeting, the Committee expressed the view that retracting the advertisement would harm the council's brand, given that it had already been accessed by potential candidates
  - at that same meeting, a decision was made to extend the closing date for the advertisement from 27 October 2017 to 10 November 2017 to match print media and give candidates more time to apply
  - at the next Ordinary Meeting of the council held on 25 October 2017, the following motion was passed in relation to proceeding with the recruitment process:
    - ...That Council endorse the CEO Recruitment Committee's recommendation that:
      1. the draft advertisement be endorsed and placed in electronic and print media to commence the process for recruitment of a new CEO with applications closing date of 17 November 2017;
      2. the job description, as attached to these Minutes, be endorsed for the Recruitment Committee to utilise for the recruitment of a new CEO;
      3. the CEO Recruitment Committee carry out the application and interview process and then report back to Council with a recommended preferred applicant for recruitment for Council's endorsement; and
      4. the salary package for the new CEO's position on initial offer be commensurate with the current package, with the understanding that it may be adjusted depending on experience. The final offer will be a decision of Council.
  - around the time the council commenced drafting the new CEO's Employment Agreement, the new CEO indicated he was eager to start his new role, and the council felt pressure from Sullivan Consulting and Deputy Mayor Stephens for this to occur
  - on 25 January 2018 Mayor Rohde sent an email to Sullivan Consulting advising that although the former CEO's contract was not due to expire until 15 May 2018, the former CEO had indicated to both himself and Deputy Mayor Stephens that he felt there was pressure to leave his role much sooner
  - on 31 January 2018 Mayor Rohde sent an email to the Committee updating them on the former CEO's circumstances, in particular that he:
    - had recently been unsuccessful in an attempt to seek alternative employment interstate
    - felt he was unlikely to secure other employment in the short term, and therefore felt that payment of the remainder of his contract would be the most ideal solution.
  - his email dated 31 January 2018 also acknowledged that:

- if a contract payout were to be explored, the Committee would require support from council members by way of a motion prior to the new CEO commencing in the role
- support from council members would be required given that there had been 'discussions' concerning 'spending'
- the council could not concurrently employ two CEOs.
- on 31 January 2018 the former CEO sent an email to Mayor Rohde expressing frustration with how the recruitment process and new CEO's transition had been handled, and outlining what he considered were the only two options for handling the finalisation of his role:
  - ...
  - Requiring me to complete the term of my contract and for the new CEO to commence duties on May 19
  - To have the new CEO commence duties on April 2 and for Council to pay out the remainder of my contract (to May 18<sup>th</sup>) and for my employment to terminate from a date that both parties agree on.

Given that the details of my replacement are already commonly known in the community, I believe that the second option is in both parties' interest. That is, I would be seeking Council to mutually agree to pay out the remainder of my contract and for me to cease my employment with Council at the earliest convenience for both parties.

It is my understanding that you are keen to formally appoint the new CEO, sign off on his contract, resolve my 'end date', put out a press release about the arrangements and make a formal announcement to staff. In this regard I would suggest that a special Council meeting be held early next week to consider these issues, as well as sign off on any contract changes etc that may be required.

I am happy for you to circulate this email to all Elected Members.

- on 1 February 2018 Mayor Rohde sent an email to Deputy Mayor Stephens advising that:
  - under the Local Government Act, the council could not employ two CEOs at the same time
  - a decision would need to be made in regard to the former CEO's contract prior to the new CEO commencing his position
  - the new CEO had indicated he was happy to delay commencement in the new role on the condition that the council provide him with certainty that he had secured the position, and that his contract specify that:
    - ...the agreement commences on the 19<sup>th</sup> of May or such earlier date as agreed to by the Mayor and the CEO.
  - the former CEO's contract payout would be discussed at a special meeting to be held the next week.
- in preparation for taking a leave of absence from 1 February - 28 February 2018 he sent Deputy Mayor Stephens, who was to take on the role of Acting Mayor during this time, an email dated 1 February 2018 proposing that the former CEO finish his contract on a Friday, possibly on 9 April 2018, so that the new CEO could start on the Monday, eliminating the need for a temporary CEO
- during his absence, a Special Meeting of the council took place on 6 February 2018, and the Minutes of that Meeting reflect that the council made a decision to recommend that the former CEO finish his contract on 30 March 2018
- he was aware that Deputy Mayor Stephens had sought legal advice from Kelledy Jones Lawyers in regard to early termination, and that Kelledy Jones drafted an email that was sent by Deputy Mayor Stephens on 9 February 2018 to the former CEO confirming that:

- his contract was due to expire on 18 May 2018
  - the council agreed, however, to his proposal to end his employment with the council on 30 March 2018 and payout the remainder of his contract
  - following the email from Deputy Mayor Stephens dated 9 February 2018, Mr Michael Kelledy of Kelledy Jones Lawyers, sent him an email dated 11 February 2018 advising that:
    - the former CEO had indicated to him that communication with him in regard to his employment had been poor, and that as a result he considered that an early conclusion to his employment would be the best outcome
    - he had discussed various options with the former CEO for concluding his contract, but in his opinion the best outcome would be that he and the council make a 'clean break' with his departure on 16 February 2018
    - his recommendation would be that the council appoint one of its directors as the acting CEO until the new CEO could commence in the role on 2 April 2018 in order to minimise any financial impacts the transition may cause.
  - a Special Meeting of the council was then held on 13 February 2018, at which time council members ratified a decision for the former CEO to depart from his role on 16 February 2018, and for Mr James Holyman, Director, Corporate & Community, to act in the role until the new CEO could commence in the position.
22. In an email to my Office dated 13 July 2018, Mayor Rohde advised that during the period of time Mr Holyman acted as CEO (16 February 2018 - 2 April 2018), Mr Holyman received an additional salary allowance for performing higher duties, and that he also continued his duties as Director during this period.
23. Mayor Rohde also advised my Office in an email dated 17 July 2018 that Mr Holyman received an additional \$9,823.00 on top of his ordinary salary whilst acting as CEO.

### Relevant law

24. 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.

25. 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.

26. Section 63 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.

27. Clauses 3.2 and 3.4 of the Code of Conduct provide:

- 3.2 Perform and discharge their official functions and duties with reasonable care and diligence at all times;
- 3.4 Not exercise or perform, or purport to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform.

28. Clause 2.6 of the Code of Conduct provides that council members must:

...Comply with all Council policies, codes and resolutions.

29. Section 5(1) of the State Records Act provides:

- (1) The objects of this Act are—
  - (a) To establish the office of State Records—
    - (i) as the principal repository for official records that are no longer required for current administrative purposes; and
    - ...
  - (b) to ensure that official records of enduring evidential or informational value are preserved for future reference; and
  - ...

**Whether Deputy Mayor Stephens committed misconduct in public administration by advertising the Chief Executive Officer's vacant position without authority, in breach of the Code of Conduct for Council Members**

*Clause 3.2*

30. In order to make a finding that Deputy Mayor Stephens breached clause 3.2 of the Code of Conduct, I must be satisfied that he:

- performed or discharged his official functions; and
- in doing so he failed to act with reasonable care and diligence.

31. As noted above, the functions of the Committee in relation to the requirement of the CEO are quite broad. In particular, I refer to clause 2.1.6 of the TOR, which grants the Committee the function:

...To do anything necessary, expedient or incidental to performing or discharging the functions of the Committee as listed herein or to achieving its objectives.

32. Therefore, I am satisfied that in liaising with Sullivan Consulting in relation to the recruitment process, Deputy Mayor Stephens was performing his official functions.

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33. I must now consider whether he did so with reasonable care and diligence.
34. I do not consider that the motion that was passed by the council on 3 October 2017 made it abundantly clear what the Committee had agreed upon concerning the duties Deputy Mayor Stephens was expected to undertake in relation to the recruitment process. I have set out that motion again in full below:

That the Chair [Deputy Mayor Stephens] instigates the draft advertisement with Sullivan's [sic] for the position of CEO and then progress the agreement for the commencement of this service, to be signed off by the CEO office.

35. Whilst I am of the view that it is sufficiently clear that Deputy Mayor Stephens was responsible for initiating a draft advertisement with Sullivan Consulting, it is less clear what the remainder of the motion was intended to achieve:

...and then progress the agreement for the commencement of this service, to be signed off by the CEO office.

36. It is unclear what the 'agreement' the motion is referring to, and what aspect of preparing and/or finalising the draft advertisement required approval from the office of the CEO.
37. Mayor Rohde's submission, and the email correspondence between other Committee members and Deputy Mayor Stephens, indicates that the council's intention was that Deputy Mayor Stephens would instigate the drafting process for the advertisement, but finalisation of the advertisement required further consultation with the Committee.<sup>6</sup>
38. Regardless of any ambiguity in the drafting of the motion, Deputy Mayor Stephens attended the relevant meeting and should have been aware of the Committee's intention.
39. Although Deputy Mayor Stephens did not clearly state what his understanding of the limitations of his role in relation to the drafting of the advertisement were, the following response appears to indicate that he understood he was not authorised to approve a final draft, and that he believed that publication of the advertisement had been an oversight by the recruitment agency:

At no time did I sign off on a final draft, I was under the understanding advertisement and job description went hand in hand and we were still waiting for that... [sic] the 5<sup>th</sup> October 2017, I received notice that online advertising had occurred on the SEEK website which at the time didn't give it too much thought, believing it to be normal process within the role of a recruitment agency, as I and members of the committee have never engaged in this process before at a local Government [sic] level, to the best of my knowledge, and process can sometimes skip a step inadvertently.

40. It would also appear from the above response that Deputy Mayor Stephens was of the belief that the draft advertisement had not been finalised for publication by him, as the job description had not been completed and provided to Sullivan Consulting. However, the following excerpt of the email exchange between Deputy Mayor Stephens and Sullivan Consulting clearly demonstrates that Deputy Mayor Stephens provided authority to publish the advertisement:

From: Andrew Sullivan [mailto:andrew@sullivanconsulting.com.au]  
Sent: Wednesday, 4 October 2017 2:34 PM

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<sup>6</sup> This evidently did not occur, and it also does not appear that at any stage following the commencement of the drafting process did Deputy Mayor Stephens obtain formal approval, nor was anything 'signed off', by the office of the CEO.



To: 'Leon Stephens'  
Subject: RE:

Thanks Leon, would you like me to post it online earlier?

Any luck chasing up the Job Description from Kate?

Regards

Andrew

...

From: Leon Stephens [mailto:sales@boatsnbikesportpirie.com.au]  
Sent: Wednesday, 4 October 2017 3:23 PM  
To: 'Andrew Sullivan' <andrew@sullivanconsulting.com.au>  
Subject: RE:

Yes please, and the job description will take me a little while as I have to correlate the changes

From: Andrew Sullivan [mailto:andrew@sullivanconsulting.com.au]  
Sent: Wednesday, 4 October 2017 3:58 PM  
To: 'Leon Stephens'  
Subject: RE:

Do you mean the contract or job description?

No problems, I will post the advertisement in the next 24 hours.

Regards

Andrew

41. I do not consider it is possible to construe the above exchange as anything other than a direct instruction to publish the advertisement, which Deputy Mayor Stephens did not have authority to do. The emails also show that Deputy Mayor Stephens was clearly informed by Mr Sullivan that the advertisement would be published within 24 hours, which confirms my view that Deputy Mayor Stephens was aware he was instructing Sullivan Consulting to proceed with publication.
42. As such, I consider that Deputy Mayor Stephens failed to act with reasonable care and diligence during the course of performing his official duties by authorising the publication of the advertisement, contrary to the Committee's intention, in breach of clause 3.2 of the Code of Conduct.

#### *Clause 3.4*

43. In order to make a finding that Deputy Mayor Stephens breached clause 3.4 of the Code of Conduct, I must be satisfied that he exercised, performed, or purported to exercise or perform, a power, duty or function that he was not authorised to exercise or perform.
44. I consider that the relevant 'power' for the purposes of clause 3.4, is the power to make decisions concerning the recruitment process; including, more specifically, the power to decide or give approval to the publication of the advertisement.
45. Although I am satisfied that in liaising with Sullivan Consulting in relation to the advertisement, that Deputy Mayor Stephens was performing official duties, I do not consider he was authorised to approve publication of the advertisement.



46. The powers and functions of the Committee are limited by clause 5.1 of the TOR, which sets out that:

...The Council has not delegated any of its powers to the Committee. Accordingly, all decisions of the Committee constitute recommendations to the Council.

47. The Committee's lack of authority to make decisions was also noted in Cr Devlin's email dated 8 October 2017 as follows:

....As you are aware we are a committee that needs Council full endorsement of any recommendations.

48. Further, as noted above, I am persuaded that it was understood by the Committee, including Deputy Mayor Stephens, that the motion that was passed on 3 October 2017 was intended to restrict Deputy Mayor from finalising the advertisement.
49. Although Deputy Mayor Stephens has submitted he did not believe he was finalising the advertisement, as noted above it is clear that he did so in his email to Sullivan Consulting dated 4 October 2017.
50. Therefore, I am satisfied that Deputy Mayor Stephens performed a power he was not authorised to exercise in breach of clause 3.4 of the Code of Conduct.

## Opinion

In light of the above, my final view is that Deputy Mayor Stephens breached section 63(2) of the Local Government Act by failing to comply with clauses 3.2 and 3.4 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

It is also my view that by breaching section 63(2) of the Local Government Act,<sup>7</sup> Deputy Mayor Stephens acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I make a recommendation under section 25(2)(f) of the Ombudsman Act and section 263B of the Local Government Act that, in the event that Deputy Mayor Stephens is re-elected as a member of the council, the council reprimand him for his failure to comply with clauses 3.2 and 3.4 of the Code of Conduct.

## **Whether Deputy Mayor Stephens committed maladministration in public administration by advertising the Chief Executive Officer's vacant position without authority**

51. Pursuant to section 5(4) of the ICAC Act, a public officer commits maladministration in public administration in circumstances where his or her conduct has resulted in the 'irregular and unauthorised use of public money'; the 'substantial mismanagement of public resources';<sup>8</sup> or has involved 'substantial mismanagement in or in relation to the performance of official functions'.<sup>9</sup>

<sup>7</sup> Noting that under section 263A(4) of the Local Government Act, a contravention or failure to comply with Chapter 5 Part 4 is taken to be an administrative act for the purposes of the Ombudsman Act, and that I have investigated this as a separate issue under the Ombudsman Act pursuant to section 263A(3) of the Local Government Act.

<sup>8</sup> Independent Commissioner Against Corruption Act 2012, section 5(4)(a)(i).

<sup>9</sup> Independent Commissioner Against Corruption Act 2012, section 5(4)(a)(ii).

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52. Having considered the circumstances of the matter, I am of the view that there is no evidence that Deputy Mayor Stephens' actions resulted in irregular and unauthorised use of public money, as Deputy Mayor Stephens' actions do not appear to have resulted in any expenditure of public money. There was already an existing cost associated with advertising the position, and any further expenditure that resulted from Deputy Mayor Stephens' actions, as I have concluded in my report below, stemmed from decisions made by the Committee and the council.
53. I also do not consider that Deputy Mayor Stephens' actions resulted in 'substantial mismanagement of public resources,' as it does not appear that Deputy Mayor Stephens' mismanaged any public resources.<sup>10</sup>
54. It is possible that Deputy Mayor Stephens' actions could be seen as 'mismanagement in or in relation to the performance of official functions,' for similar reasons to those that I have set out above in relation to my consideration of whether he committed misconduct. I do not, however, consider that any possible mismanagement could be considered to be 'substantial'.
55. The ICAC Act does not define what is meant by 'substantial' in relation to mismanagement. In the circumstances, however, I do not consider that the actions of Deputy Mayor Stephens are likely to meet the ordinary definition of substantial, which I interpret as mismanagement that was significant and not trivial.
56. On one hand, in my assessment of whether the potential mismanagement could be considered 'substantial', I have considered the following:
- the suggestion by Mayor Rohde that Deputy Mayor Stephens' actions were intentional and motivated by a 'personal view' of the complainant
  - the fact that Deputy Mayor Stephens acted outside of his authority, and directly against the intentions of the Committee
  - the distress that Deputy Mayor Stephens' actions have apparently caused the former CEO.
57. On the other hand, I also acknowledge that:
- the allegation by Mayor Rohde that Deputy Mayor Stephens acted intentionally has not been substantiated
  - the recruitment process does not appear to have been significantly hindered by Deputy Mayor Stephens' error, and by Mayor Rohde's own account, likely still resulted in the council being able to recruit the 'best candidate possible'
  - it was always intended that the position be advertised: Deputy Mayor Stephens' conduct simply resulted in it being advertised earlier than it should have been.
58. Having weighed the considerations set out above, I do not consider that Deputy Mayor Stephens' conduct constitutes substantial mismanagement for the purposes of section 5(4)(a)(ii) of the ICAC Act.

## Opinion

In light of the above, my final view is that the Deputy Mayor Stephens did not commit maladministration in public administration for purposes of section 5(4)(a)(ii) of the ICAC Act.

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<sup>10</sup> Independent Commissioner Against Corruption Act 2012, section 5(4)(a)(i).

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### Whether Deputy Mayor Stephens committed misconduct in public administration by using a private email address to conduct council business, in breach of the Code of Conduct for Council Members

59. I have considered whether Deputy Mayor Stephens' use of a private business email address to conduct council business constituted a breach of clauses 2.6 and 3.2 of the Code of Conduct.

#### *Clause 2.6*

60. I will deal firstly with clause 2.6 of the Code of Conduct, which sets out that council members must comply with all council policies, codes and resolutions.
61. The use of personal email accounts is prohibited under clause 2.1.10 of the council's Elected Members Communications & Records Management Policy (**Communications Policy**), which sets out that:
- ...The Mayor and Elected Members will only utilise Council systems for official correspondence created or received in the conduct of their role in Council, i.e. personal email accounts will not be used.
62. Having considered the Communications Policy, I am of the view that Deputy Mayor Stephens clearly failed to comply with it.
63. It is evident from the emails that Deputy Mayor Stephens was conducting council business, and that he was doing so on a private email address.
64. Therefore, I am satisfied that Deputy Mayor Stephens breached clause 2.6 of the Code of Conduct by failing to comply with a council policy.

#### *Clause 3.2*

65. I will now consider whether Deputy Mayor Stephens' actions were also in breach of clause 3.2 of the Code of Conduct.
66. As I have previously set out, in order to make a finding that Deputy Mayor Stephens breached clause 3.2 of the Code of Conduct, I must be satisfied that he:
- performed or discharged his official functions; and
  - in doing so he failed to act with reasonable care and diligence.
67. As previously discussed, I am satisfied that in liaising with Sullivan Consulting in relation to the recruitment process, Deputy Mayor Stephens was performing his official functions.
68. I will now consider whether using a private email address in the course of performing that official function, Deputy Mayor Stephens failed to act with reasonable care and diligence.
69. It is my view that the use of a private email address in the circumstances did result in a failure to act with reasonable care and diligence, for the reasons I have set out below.
70. The use of a private email address in the conduct of council related business is inappropriate for several reasons.

71. Firstly, although the use of a private email address is not in itself a breach of the State Records Act, it may conflict with the council's obligations under section 5 of the State Records Act which sets out that it 'must ensure that official records of enduring evidential or informational value are preserved for future reference.'
72. By using a private email address, the sender may not be prompted or able to store correspondence on a central council database. Whilst Deputy Mayor Stephens may have done so manually, not using a council based IT system with automatic backup/storage services presents a risk to the council.
73. Secondly, the storage of confidential information on a private server raises concern, as the security of the information cannot be guaranteed, particularly where that email address may be accessible by other employees. Further, there is no certainty that the private server used by Deputy Mayor Stephens' business, 'Boats 'n' Bikes Port Pirie', has the same level of security as the council's server.
74. I do not consider it is necessary to show that other employees did access that information, or that the server was compromised, as I consider that placing the information at risk alone demonstrates a lack of reasonable care and diligence.
75. In light of the above, I am of the view that Deputy Mayor Stephens breached clause 3.2 of the Code of Conduct by failing to perform his official functions with reasonable care and diligence.

### Opinion

In light of the above, my final view is that Deputy Mayor Stephens breached section 63(2) of the Local Government Act by failing to comply with clauses 2.6 and 3.2 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.

It is also my view that by breaching section 63(2) of the Local Government Act,<sup>11</sup> Deputy Mayor Stephens acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(f) of the Ombudsman Act and section 263B of the Local Government Act that, in the event that Deputy Mayor Stephens is re-elected as a member of the council, the council reprimand him for his failure to comply with clauses 2.6 and 3.2 of the Code of Conduct.

### **Whether the council committed maladministration in public administration by proceeding with the recruitment of a new Chief Executive Officer**

76. My provisional view was that the council's failure to retract the advertisement, and halt the recruitment process, amounted to maladministration in that it constituted a practice that resulted in the substantial mismanagement of public resources for the purposes of section 5(4)(a)(i) of the ICAC Act
77. The following is a summary of events that transpired in the aftermath of the advertisement being published on 5 October 2017:

<sup>11</sup> Noting that under section 263A(4) of the Local Government Act, a contravention or failure to comply with Chapter 5 Part 4 is taken to be an administrative act for the purposes of the Ombudsman Act, and that I have investigated this as a separate issue under the Ombudsman Act pursuant to section 263A(3) of the Local Government Act.

- 
- 12 October 2017 - the Committee made a decision to recommend that the council not retract the advertisement, and to extend the closing date for the advertisement from 27 October 2017 to 10 November 2017
  - 25 October 2017 - the council endorsed the Committee's recommendation to proceed with the recruitment process, and extend the closing date for print and online media to 17 November 2017
  - 6 February 2018 - a Special Meeting of the council was held, and a decision was made to recommend that the former CEO finish his contract on 30 March 2018
  - 9 February 2018 - Deputy Mayor Stephens sent the former CEO an email agreeing to his proposal to end his contract on 30 March 2018, and to pay out the remainder of his contract that was due to expire on 18 May 2018
  - 11 February 2018 - Mr Kelledy, of Kelledy Jones Lawyers, advised Mayor Rohde that the former CEO had expressed concerns about the council's communication with him in regard to his employment, and that he considered an early conclusion to his contract would be ideal in the circumstances
    - Mr Kelledy also suggested that the former CEO conclude his position on 16 February 2018, and that the council appoint one of its directors as Acting CEO until the new CEO could commence on 2 April 2018
  - 13 February 2018 - at a Special Meeting of the council, council members ratified a decision for the former CEO depart from his role on 16 February 2018, and for Mr James Holyman, Director, Corporate & Community to act in the role until the new CEO could commence in the position.
  - 16 February 2018 - Mr Holyman acted as CEO, receiving an additional \$9,823.00 for performing higher duties
  - 2 April 2018 - the remainder of the former CEO's contract, including leave entitlements, amounting to was was paid out to him
  - 18 May 2018 - the salary component of the former CEO's contract amounted to \$52,862.67, and the total amount of his contract including all leave entitlements totalled \$70,527.20.

78. Mayor Rohde submitted to my Office on a number of occasions that the Committee considered that retracting the advertisement would cause reputational damage to the council, as it had already been viewed by a number of potential candidates.
79. I am not persuaded that Mayor Rodhe's explanation as to why the Committee made the recommendation, which was subsequently endorsed by the council, that the recruitment process proceed, reasonably justifies the approach that was taken.
80. While I accept that there was a risk of reputational damage if the recruitment process was halted, I remain of the view that the risk of reputational damage to the council was not a high or significant probability, given that the withdrawal or amendment of job advertisements does not strike me as a particularly unusual occurrence. I also consider that any concerns or grievances about the withdrawal of the advertisement could have been addressed by placing a public notice and/or informing applicants privately that the recruitment process had been postponed and would be recommenced in the new year, thereby informing potential candidates that they could submit or resubmit their applications in a few months' time.
81. My provisional view was that any risk of reputational damage was clearly outweighed by the negative consequences that have resulted from the advertisement and recruitment process going ahead, including:
- the former CEO experiencing stress and uncertainty in relation to his role
  - internal confusion within the council in relation to decisions about managing the potential overlap of CEOs, resulting in the council having to seek legal advice

- 
- potential applicants having accessed an incomplete advertisement that did not contain an accurate job description
  - the early exit of the former CEO, resulting in:
    - the council having to pay out the remainder of the former CEO's contract, resulting in expenditure that provided no value to the public
    - the council paying an additional \$9,823.00 to Mr Holyman for performing higher duties
    - Mr Holyman concurrently performing two roles
    - potential disruption to the council caused by the assignment of an acting CEO, who likely would have taken some time to adjust to the new and additional workload for a short period of time before a new CEO was to also enter and adjust to the role.
82. It is apparent that the council could not mitigate these consequences by negotiating a later start date for the successful candidate, given that the former CEO felt his position had become untenable. By way of comment, I do not consider the former CEO's views were unjustified in the circumstances.
83. Accordingly, I considered that the council ought to have withdrawn the advertisement and postponed the recruitment process as soon as possible and formed the provisional view that the council's failure to withdraw the advertisement amounted to a practice that resulted in substantial mismanagement of public resources.
84. The ICAC Act does not define what constitutes 'public resources'. Therefore, I considered its ordinary meaning and I was of the provisional view that in the circumstances, the relevant public resources that were mismanaged by the council included the:
- time expended by the Committee and the council, including council administration, in determining how to proceed with the recruitment process and to manage the incoming and outgoing CEO
  - cost of legal advice obtained in relation to resolving concerns about the recruitment process
  - additional funds used to pay for an acting CEO, on top of those used to pay the remainder of the former CEO's contract.
85. Earlier in this report I have considered the submission from the council and have indicated that I have amended my view in response.
86. I agree that it is possible that the expenses incurred by the council as a result of it not retracting the advertisement could have been incurred even if it had retracted the advertisement. This is particularly so given that CEO recruitment processes are frequently complex, and Deputy Mayor Stephens' actions resulted in the advertisement of the position occurring only two weeks earlier than it would have done otherwise. I further agree that the council could not have foreseen, on the information available to it at the time, that the failure to retract the advertisement could have led to the early exit of the former CEO.
87. While in hindsight I consider that there are aspects that could have been managed better by the council and that it could have explored other options, such as delaying the start date of the new CEO or pushing back on the former CEO's claim, I acknowledge that the council was placed in an awkward position as a result of Deputy Mayor Stephens' action. Given this, I am prepared to accept that any mismanagement was not substantial.
88. As such, I do not consider that, by proceeding with the recruitment of a new Chief Executive Officer, the council committed maladministration in public administration.

## Opinion

In light of the above, my final view is that the council did not commit maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

## Summary and Recommendation

In light of the above, my final view is that:

1. Deputy Mayor Stephens committed misconduct for the purposes of section 5(3)(a) of the ICAC Act, and acted in a manner that appears contrary to law for the purposes of section 25(1) of the Ombudsman Act, by advertising the Chief Executive Officer's vacant position without authority
2. Deputy Mayor Stephens did not commit maladministration in public administration for purposes of section 5(4)(a)(ii) of the ICAC Act, by advertising the Chief Executive Officer's vacant position without authority
3. Deputy Mayor Stephens committed misconduct for the purposes of section 5(3)(a) of the ICAC Act and acted in a manner that appears contrary to law for the purposes of section 25(1) of the Ombudsman Act, by using a private email address to conduct council business, in breach of the Code of Conduct for Council Members
4. the council did not commit maladministration for the purposes of section 5(4)(a)(i) of the ICAC Act by proceeding with the recruitment of a new Chief Executive Officer.

To remedy these errors, I recommend under section 25(2)(f) of the Ombudsman Act and section 263B of the Local Government Act that, in the event that Deputy Mayor Stephens is re-elected as a member of the council, the council reprimand him at a public meeting of the council.

In accordance with Part 3 of the Code of Conduct for Council Members, my final report must be provided to a public meeting of the council, within two ordinary meetings of the council receiving my recommendations.

## Final comment

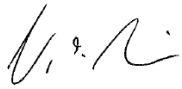
I now report Deputy Mayor Stephens' misconduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **30 January 2019** on what steps have been taken to give effect to the recommendation 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.

I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines  
**SA OMBUDSMAN**

15 October 2018