

Final 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 Officers	Cr Kendall Jackson Deputy Mayor Leon Stephens
Ombudsman reference	2018/02770
ICAC reference	2018/002260; 2018/002296; 2018/002372
Date of referral	1 March 2018
Issues	<ol style="list-style-type: none">1. Whether Cr Kendall Jackson disclosed confidential information to an external party, thereby committing misconduct in public administration2. Whether Deputy Mayor Leon Stephens disclosed confidential information to an external party, thereby committing misconduct in public administration

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 in public administration 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 arises from a number of separate but related reports made to the Office for Public Integrity in respect of the Port Pirie Regional Council (**the council**) and its officers.

For the purposes of the present report, it is alleged that an elected member of the council disclosed to a journalist (or intermediary) information from (i) a report prepared by the council's former Chief Executive Officer; and (ii) associated legal advice, in circumstances where that elected member was not authorised to do so.

The allegations raise potential breaches 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 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 the conduct of a relevant council officer relates to administrative acts that have been made contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act. In doing so, I have exercised my 'own initiative' powers under section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the reporters
- considering associated reports published in *The Advertiser* newspaper
- seeking further information from the Acting Chief Executive Officer of the council (as at 14 March 2018), Mr James Holyman
- seeking and considering a response from Cr Jackson
- seeking and considering a response from Deputy Mayor Stephens
- seeking information from Senior Reporter for *The Advertiser* newspaper, Mr Andrew Hough
- seeking information from the President of the Liberal Party of Australia (SA Division), Mr John Olsen
- seeking information from Cr Jackson's campaign adviser for the purposes of the March 2018 state election, Mr David Franchitto
- seeking and considering a further response from Cr Jackson
- considering:
 - the ICAC Act
 - the *Ombudsman Act 1972*
 - the *Local Government Act 1999*
 - the *Evidence (Journalists) Amendment Act 2018*
 - the *Evidence Act 1929*
 - the Code
- preparing a provisional report and seeking the views of the parties
- preparing this final 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 provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 11 September 2018.
2. Cr Jackson did not elect to comment on my provisional report.
3. Deputy Mayor Stephens responded to my provisional report to, *inter alia*, express his satisfaction with my provisional conclusions.
4. The council's Chief Executive Officer did not elect to comment on my provisional conclusions in respect of the conduct of either officer.
5. Section 18(4) of the Ombudsman Act provides that, before making a report affecting an agency, I must allow the principal officer of the agency a reasonable opportunity to comment on the subject matter of the report. Mayor Rohde responded to my provisional report by way of letter from his solicitor dated 19 October 2018.
6. Mayor Rohde, through his solicitor, expressed his dissatisfaction with the steps taken by my investigation, submitting, *inter alia*:
 - the matter amounts to 'one of the most serious matters that one can imagine [my] office has had to deal with in [my] tenure as SA Ombudsman'
 - the matter should have been investigated by the Independent Commissioner Against Corruption
 - the process observed by my investigation was 'manifestly inadequate', insofar as I should have required witnesses to give evidence under oath
 - my determination not to issue a summons to the journalist compelling him to deliver up his source 'totally compromised' my investigation of the matter
 - my provisional conclusions in respect of the conduct of Deputy Mayor Stephens were wrong, insofar as the forwarding of the relevant document to the business email address was, in Mayor Rohde's assessment, evidence of misconduct and 'unarguable [...] maladministration in public office.'
7. As far as I am aware, the leaking of the documents was not a criminal act (there being no relevant order under section 90 of the Local Government Act in place). The submission that the matter should have been investigated by the Independent Commissioner Against Corruption is misconceived.

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 pp 361-362, per Dixon J.

8. Section 18(3)(b) of the Ombudsman Act provides that I may obtain information from such persons and in such manner as I think fit. I identified in my provisional report why I did not consider it necessary or appropriate to compel the production of further information from Cr Jackson and the journalist. Cr Jackson was in any case under a duty to provide true and correct information to my investigation. Mayor Rohde's submissions have not persuaded me to make further enquiries of the parties.
9. I remain of the view that a breach of the Code has not been demonstrated on the part of the Deputy Mayor. Even if the question of maladministration had been referred to me, there would also be no basis for my coming to such a conclusion in respect of the Deputy Mayor's conduct.
10. My views remain as expressed in my provisional report.

Background

11. Deputy Mayor Leon Stephens is an elected member of the council. He was appointed Deputy Mayor of the council on 26 November 2014.
12. Cr Kendall Jackson is an elected member of the council. Cr Jackson was the Liberal candidate for the seat of Frome for the purposes of the 2014 and 2018 state elections.

The investigation

13. Between April and June 2016 the council's Mayor, Mr John Rohde, undertook two council-funded visits to the Philippines for the ostensible purpose of representing the council as part of an international trade mission organised by the Department of State Development.
14. Mayor Rohde was the Labor candidate for the seat of Frome between approximately 2002 and 2010.
15. On 6 November 2017 the council's elected members received an unsolicited email from a person holding themselves out to be a resident of the Philippines. That email alleged certain improprieties on the part of the council's Mayor relating, in part, to his travel to the Philippines in connection with the trade mission.
16. I understand that the contents of the 6 November 2017 email were of some concern to the council's elected members. The council's Chief Executive Officer at the time, Dr Andrew Johnson, subsequently undertook to conduct a review of the Mayor's expenditure encompassing the period between 2016 and 2017.
17. On 27 November 2017 Mayor Rohde forwarded to the council's elected members the following email from the council's solicitor, Mr Michael Kelledy (**the legal advice**):

Hi John

It is my advice that the allegations made against you are of a personal nature and pertain to your personal life, separate to your role and functions as the principal member of the Council. Therefore, the email chain that I have seen does not create any exposure for the Council because it makes allegations that are unrelated to the carrying out [of] your functions of office as a public official.

Further, given the above, there is no requirement to make a public statement or to put into the public domain the statement that I have provided to you for your use – this is an honest statement which presents a true and accurate response but the advice of both myself and the highly respected media adviser I engaged with about this matter, on a strictly confidential (and anonymous to you) basis.. [sic] To make any public statement is

to invite unnecessary scrutiny, to risk inappropriate and uninformed speculation of a connection between your personal life and your public functions of office and, generally, to give 'oxygen' to a matter that, as evidenced by the responses/reaction of Fairfax, The Advertiser, the Recorder and ABC local radio, is not a matter of public interest. It behoves you and the Council to not try to make it a matter of public interest when legal and expert media advice is that it is not.

Rather, the position is that you are now well advised and well placed to respond if it were to become a matter of public interest – which, at this point, I am unable to see how it could become a matter of public interest given there is no connection with the performance of the functions of your office.

18. In forwarding the legal advice to the elected members, Mayor Rohde commented:

This advice has been received to be viewed and kept as a strictly confidential matter.

19. On 8 December 2017 Dr Johnson sent the following email to the council's elected members (**the internal review findings**; emphasis in original):

Your Worship

I refer to our discussion on Tuesday November 28th 2017 when you provided me with a copy of a number of your Council credit card statements and asked that I confirm/certify that the expenditure incurred on the cards was all Council related. You also informed me that you have reviewed all of your credit card statements for the period in question and that the statements which you provided to me were the only ones which included travel, accommodation etc during the period in question.

In undertaking a formal review of your Mayoral expenditure, I have gone back through all of your credit card statements for 2016 & 2017, as well as job cost codes 60014 – EIMem Mayoral Travel/Accommodation Expenses, 60013 EIMem Mayoral Training and Conferences, 60019 EIMem Other Mayoral Expenses, and 60022 EIMem Meals and Refreshments in our finance system (copies attached).

I have also requested from the Deputy Mayor, a copy of the email sent to all Elected Members from the 'aggrieved' party. A number of dates were mentioned in this email which I have relied upon to cross-check against Council's financial records.

As you are aware, I have provided you a copy of my preliminary findings into the expenditure which you have incurred on behalf of council, to verify the accuracy of my report and I also requested further information on your two Council funded (flights only) trips to the Philippines [sic], which you promptly provided me. I have also provided a copy of my preliminary findings to and have been liaising with Council's lawyers [sic] Michael Kelledy from KelledyJones Lawyers in relation to this matter.

As discussed, I wanted to ensure that the review of your expenditure, could hold up to external scrutiny for your benefit as well as Council's and mine (as the investigating officer).

I have reconciled your credit card statements and the above job cost numbers with your Outlook calendar, your Monthly Mayor report to Council, my Calendar and with the dates referred to in the circulated email mentioned above.

I can certify that all travel, accommodation and other expenditure which you have incurred on behalf of Council is all [sic] for Council related business.

That is, while I have not reviewed every individual receipt/invoice, I have reviewed the credit card statements and the job cost transactions [sic] descriptions and I have referenced these descriptions to official Council functions/activities. In addition, where I have been unsure of an item, I have reviewed the corresponding invoice.

It is my understanding that Council paid for your air fares [sic] to the Philippines in April and May 2016 at a cost of \$1,994.00 and \$1,452.73 respectively.

I have noted that whilst you were in the Philippines in April and May 2016, the only items recorded on your Council credit card relating to these trips, were flights, airport parking (in Adelaide) and items freighted to Manilla [sic] (information packs on Council which I

provided you as well as sample products). There were NO other transactions during these periods relating to these trips (i.e. there are no related transactions for accommodation, food or transport costs on your Council credit card while you were away in the Philippines, which you have subsequently advised me, per the attached, that there were funded personally and not by Council)[.]

I am aware that you did note these visits in your monthly Mayoral report, you provided a verbal report at an ordinary meeting of Council about these visits. As part of my review I requested, and you promptly provided, more details on these trips including the background to these trips, an itinerary and photos relating to the business conducted on the trip. I have attached a copy of this to my report.

Once again I am able to state that, after my comprehensive review of your credit card and Council's general ledger, I did not find any transactions that were for non-Council related activities.

Further more [sic], after reviewing my preliminary findings and the subsequent information you provided me, Michael Kelledy from KelledyJones Lawyers advised me that:

"Given the unequivocal statement by the Mayor that "...all other costs including accommodation etc.." were paid by him directly (i.e. as personal costs) it is my view that that 'completes' consideration of the concerns raised by some elected members as to issues of impropriety in the use of Council funds and/or resources.

Taking the disclosures made by the Mayor, together with your audit and findings, it appears to be without doubt that there is no evident legal or financial exposure for the Council in this matter."

Please feel free to contact me if you wish to clarify any items from this review.

20. The following disclaimer appeared below Dr Johnson's email signature:

The information transmitted in this email and any attachments, is intended only for the person or entity to which it is addressed and may be confidential or contain privileged material.

Any review, retransmission, dissemination, disclosure, other use of, or taking any action in reliance upon, this information by persons or entities other than the intended recipient is strictly prohibited.

If you receive this email message in error, please contact the sender and delete the material without making a copy.

Media reports

21. On 8 January 2018 Dr Johnson and Mayor Rohde received an email enquiry from Mr Andrew Hough, Senior Reporter for *The Advertiser* newspaper. The terms of that enquiry suggested that Mr Hough had been supplied with information concerning the internal review findings and, possibly, the legal advice.

22. In this regard, Mr Hough's email provided:

We understand that an internal review undertaken by Dr Johnson has not identified any expenditure of a "personal nature" on Mr Rohde's credit card or through reimbursed expenses but confirms that council paid for the Mayor's flights.

[...]

* Why hasn't this information been publicly disclosed to the community or at the council? Is this based on any legal or media advice? If so, was this at ratepayers' expense?

23. On 9 January 2018 the following report was published in the online edition of the *The Advertiser*.

Port Pirie Mayor John Rohde defends trade missions to the Philippines – where he met up with his online girlfriend

Exclusive – Andrew Hough, The Advertiser

The leader of one of the state's biggest regional councils met up with his online girlfriend while on two ratepayer-funded overseas trips to the Philippines, triggering a council review.

Port Pirie Mayor John Rohde – an aspiring state Labor MP who has also stood for a Senate seat – flew to Asia in April and May 2016 on separate trade missions, costing almost \$3500.

[...]

Some councillors' concerns about "inappropriate spending" had caused internal council angst, prompting Mr Rohde to request an investigation.

The "comprehensive" review, undertaken by chief executive Andrew Johnston [sic], found the council paid \$3446.73 for return airfares to Asia.

But it did not uncover any other personal credit card spending or expenses over the past two years.

Dr Johnson did not review "every individual receipt/invoice" but said he searched records.

24. On 10 January 2018 a second report was published in the online edition of *The Advertiser*.

Port Pirie Mayor John Rohde had legal advice that disclosing his relationship with Filipino lover would invite 'unnecessary scrutiny'

Andrew Hough, The Advertiser

The regional mayor who met up with his online girlfriend while on ratepayer-funded overseas trips was told publicly disclosing the issue would invite "unnecessary scrutiny", leaked documents show.

The Advertiser revealed on Tuesday how Port Pirie Mayor John Rohde, 52, flew to the Philippines in April and May 2016 on separate trade missions, costing the council almost \$3500.

[...]

Council chief executive Andrew Johnson launched an investigation at the request of Mr Rohde – a former postman, who also stood for the Senate as an independent after resigning from the Labor Party in 2013.

During that review – the conclusions of which have never been published – the mayor sought legal advice about whether "this matter was of a public or private nature".

In his advice, lawyer Michael Kelledy, of KelledyJones, wrote the "allegations made against you are of a personal nature and pertain to your personal life, separate to your role and functions as the principal member of the council".

He said the email, sent by [the resident of the Philippines] three weeks after the relationship ended, did not "create any exposure" for the council – and his conclusions were supported by a "highly respected expert media adviser".

"Further ... there is no requirement to make a public statement or to put into the public domain the statement that I have provided to you," he wrote.

"To make any public statement is to invite unnecessary scrutiny, to risk inappropriate and uninformed speculation of a connection between your personal life and your public functions of office.

"And, generally (it would) give 'oxygen' to a matter that, as evidenced by the (lack of) responses/reactions of Fairfax, *The Advertiser*, the (*Port Pirie*) *Recorder* and ABC local radio, is not a matter of public interest."

He added: "It behoves you and the council to try and not make it a matter of public interest when legal and expert media advice is that it is not."

Mr Kelledy said that if it was publicly revealed, the mayor could respond accordingly.

“At this point, I am unable to see how it could become a relevant matter of public interest given there is no connection with the performance of the functions of your office,” he added.

[...]

The internal review found the council paid \$3446.73 for the two sets of return flights to The Philippines but no other personal spending was uncovered.

25. On 11 January 2018, and again on 17 January 2018, the matter was reported to the Office for Public Integrity as raising an alleged breach of confidentiality by a council officer.
26. The substance of the internal review findings was subsequently considered by the council’s elected body during a public session of the council’s 24 January 2018 ordinary meeting.

Enquiries of the parties

27. At the time of the referral, my investigation was supplied with a screen capture derived from the council’s email systems, purporting to depict the circulation of the internal review findings through all council email accounts.
28. This screen capture relevantly disclosed:

From	To	Subject	Date	Size
Istephens@pirie.sa.gov.au	sales@boatsnbikesportpirie.com.au	Fwd. Review of Credit Card Statements (Final findi	11/12/2017 08:24 AM	2.2 MB
Istephens@pirie.sa.gov.au	sales@boatsnbikesportpirie.com.au	Fwd. Review of Credit Card Statements (Final findi	11/12/2017 08:24 AM	9.7MB
kjackson@pirie.sa.gov.au	kendall.jackson@sa.liberal.org.au	Fwd. Review of Credit Card Statements (Final findi	08/12/2017 11:12 AM	9.7MB

29. I interpreted this screen capture to mean that Deputy Mayor Stephens and Cr Jackson each forwarded a copy of the internal review findings to an external email address.
30. On 14 March 2018 my Deputy wrote to Deputy Mayor Stephens and Cr Jackson to query, *inter alia*, whether either officer was responsible for disclosing information from the legal advice or internal review findings to a third party.
31. On this same date, my Deputy wrote to the council’s then-Acting Chief Executive Officer, Mr James Holyman, to enquire if the council’s email records disclosed whether any council officer had forwarded a copy of the legal advice to an external email address.

32. By letter dated 3 April 2018, Mr Holyman adverted to the screen capture identified above, advising that the council held no further information relevant to my investigation.
33. On 20 March 2018 Deputy Mayor Stephens provided a response to my Office in which he denied having disclosed information from the relevant documents to any other person.
34. Deputy Mayor Stephens submitted that for the duration of his position on the council he has maintained an arrangement by which council emails are accessible on his mobile telephone and iPad.³ He volunteered that the email address depicted in the screen capture ('sales@boatsnbikesportpirie') is his business email address. He submitted that he 'would have' forwarded Dr Johnson's email to this address 'so I could read it more clearly than off my iPhone, as the matters were pressing at the time to be dealt with.'
35. In his written submissions, and during an earlier telephone conversation with my investigator, Deputy Mayor Stephens expressed frustration with the media attention concerning the matter. He submitted that, although he had advocated for an internal review of the Mayor's expenditure, the matter should have been handled internally.
36. On 3 April 2018 Cr Jackson provided a response to my Office in which she denied 'supply[ing] or leak[ing] any information to any journalist or media outlet.' She submitted that she was 'one of the few councillors who didn't speak with journalists about this case, because [she] did not want to be linked to it in any way.'
37. In a subsequent email exchange with my investigator, Cr Jackson clarified her position to assert that she did not disclose a copy of either document to a third party.
38. Cr Jackson submitted that she forwarded a copy of Dr Johnson's email to her Liberal Party email account 'so that I could read the email on my computer, and not on my phone.'

Enquiries of the journalist

39. On 6 April 2018 I wrote to Mr Hough, the author of the media articles, to enquire as to how he came to be in apparent possession of information from the relevant documents. In doing so, I made it clear that the referral to my Office did not allege any impropriety on his part in publishing the relevant materials.
40. On 8 May 2018 a solicitor acting for Mr Hough wrote to my Office to advise that Mr Hough was unwilling to provide a response to my enquiries 'as to do so would require him to expose a confidential source.'
41. Mr Hough's solicitor submitted that it would be unreasonable for 'action to be taken against [Mr Hough] for his failure to disclose details which may identify his source' in circumstances where the State Government had announced its intention to introduce legislation to provide protection to journalists in such situations.
42. Mr Hough's solicitor was referring to the Evidence (Journalists) Amendment Bill 2018, which was introduced to Parliament some days later, on 10 May 2018.
43. That Bill, with some modifications, eventually came into operation as the Evidence (Journalists) Amendment Act on 9 August 2018. The effect of that Act was to introduce certain protections for journalists who refuse or fail to disclose the identity of a

³ In his response to my provisional report, Mayor Rohde submitted that this practice is 'in clear breach of council policy and the Act.' I have been unable to locate a provision in the council's *Elected Members Communications & Records Management Policy* that would prohibit such an arrangement. I am not aware of such a provision in the Local Government Act or the *State Records Act 1997*.

confidential informant in the course of proceedings ‘before a court’. The term ‘court’ is given a wide construction in the Evidence Act so as to include ‘a tribunal, authority or person invested by law with judicial or quasi-judicial powers, or with authority to make any inquiry or to receive evidence’.

44. On 9 May 2018 I wrote to Mr Hough’s solicitor to advise that I was prepared to issue a summons for the requested information under section 10 of the *Royal Commissions Act 1917*. In this letter I requested that Mr Hough’s solicitor take instructions as to whether such a course of action would overcome his client’s concerns, and whether his client anticipated complying with a summons once issued.
45. On 24 May 2018 Mr Hough’s solicitor responded to advise that Mr Hough did not anticipate complying with such a summons. I was requested to defer taking further action, pending a final vote on the amendments to the Evidence Act.
46. Mindful of Mr Hough’s position and the overall timing of the situation, and mindful of another line of enquiry still available to my investigation, I determined to defer pressing the matter further. On 25 May 2018 my investigator communicated this position to Mr Hough’s solicitor.

Enquiries of the Liberal Party (SA Division)

47. On 25 May 2018 I wrote to the President of the South Australian Division of the Liberal Party of Australia, Mr John Olsen, to request, *inter alia*, that he identify whether the email forwarded to Cr Jackson’s Liberal Party email account on 8 December 2018 had been further circulated by use of his organisation’s email systems.

48. On 19 June 2018 Mr Olsen wrote to advise:

With your approval, I asked Liberal Party’s State Director Sascha Meldrum to review the email system in order to answer the questions posed in your letter request.

I provide the following information in answer to your questions:

- Records indicate that Cr Jackson did forward a copy of Dr Johnson’s email to her Liberal Party email account.
- Records indicated that Cr Jackson did forward a copy [of the internal review findings] to one other person. The person was Campaign Adviser David Franchitto at david.franchitto@sa.parliament.gov.au [sic]⁴
- Records indicated that Cr Jackson did not forward supplied information for either of the council documents to any other person.
- Records do not show Cr Jackson having any contact with a representative of *The Advertiser* in respect of this matter.
- There is no other relevant information to provide you.

49. Mr Olsen supplied my investigation with a screen capture derived from the Liberal Party’s email systems. That screen capture depicted an email, dated 8 December 2017, from Cr Jackson’s Liberal Party email account to a recipient identified as ‘Franchitto, David’. The text of the internal review findings is reproduced in this email under the comment, ‘fyi’.

⁴ Subsequently clarified by Ms Meldrum to be ‘david.franchitto@parliament.sa.gov.au’ (emphasis added).

Enquiries of the campaign adviser

50. I subsequently wrote to Mr David Franchitto to seek further information concerning the correspondence depicted in the abovementioned screen capture.
51. I understand that Mr Franchitto was a campaign adviser to Cr Jackson for the purposes of the March 2018 state election. He currently holds a position in the Office of the Hon David Ridgway MLC.
52. On 6 August 2018 Mr Franchitto wrote to my Office to acknowledge receiving a copy of the internal review findings from Cr Jackson in the manner depicted in the screen capture.
53. Mr Franchitto submitted:
- I cannot speak to why Cr Jackson forwarded me this email, however I was in regular communication with Cr Jackson in the lead up to the last state election and candidates were encouraged to raise potential issues.
54. Mr Franchitto submitted that he ‘cannot recall if [the legal advice] was also sent to [him] by Cr Jackson.’⁵
55. Mr Franchitto denied supplying information from either document to a representative of *The Advertiser*. He submitted that ‘to the best of [his] recollection’ he did not supply information from either document to any other person.

Further enquiries of Cr Jackson

56. On 7 August 2018 I wrote to Cr Jackson to supply a summary of the information I had received from the Liberal Party (SA Division) and Mr Franchitto. In doing so, I reiterated the questions posed by my Deputy, referring Cr Jackson to section 24(c) of the Ombudsman Act.⁶
57. On 22 August 2018 Cr Jackson wrote to my Office, submitting:
- I do not recall disclosing a copy of the investigation report to any other person. I would have denied it again, had you not provided the evidence.
58. Cr Jackson submitted that she could not recall disclosing a copy of the legal advice to any other person or disclosing the contents of either document to any other person.
59. Cr Jackson denied having any knowledge as to how information from the documents came to be supplied to *The Advertiser*.
60. Cr Jackson contended that her conduct in forwarding the internal review findings to Mr Franchitto was not in contravention of clause 3.3 of Part 3 of the Code, submitting:
- Given the screenshot evidence that you have provided, there’s no indication the email is confidential. I write CONFIDENTIAL in red type at the top of an email, if I send a confidential email.

⁵ In a telephone discussion with my investigator, Mr Franchitto submitted that his parliamentary email account has been made defunct.

⁶ Section 24(c) of the Ombudsman Act provides that ‘[a person shall not] wilfully make any statement that is false or untrue in a material particular to the Ombudsman or any other person acting in the exercise of powers under this Act.’ Section 24(c) is an offence provision, carrying a maximum penalty of \$2,000.

Relevant law, etc.***ICAC Act***

61. 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.

Local Government Act

62. 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.

The Code

63. The Code is established under section 63(1) of the Local Government Act and applies to all council members.

64. Clause 3.3 of Part 3 of the Code relevantly provides:

Council members must:

[...]

- 3.3 Not release or divulge information that the Council has ordered by 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 Kendall Jackson disclosed confidential information to an external party, thereby committing misconduct in public administration

65. Clause 3.3 of Part 3 of the Code provides that an elected member must '[n]ot 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.'

66. In this case it has not been alleged that either the legal advice or the internal review findings was subject to an order of the council under section 91(7) of the Local Government Act.

67. The question, therefore, is whether either document amounted to or contained 'information [...] that the Council member should reasonably know is information that is confidential', etc.

68. In my view, both documents contained information that Cr Jackson should reasonably have known was confidential.

69. The legal advice included a request from Mayor Rohde that it be considered and retained 'as a strictly confidential matter'. It was likely subject to legal professional privilege. The thrust of the advice was that the whole of the matter concerning the Mayor's expenditure should remain confidential.
70. The internal review findings included a disclaimer that the information was 'intended only for the person or entity to which it is addressed and may be confidential or contained privileged material.' The document included information concerning the personal affairs of the council's Mayor. It described matters of some sensitivity to the Mayor and to the council more generally. It purported to reproduce legal advice from the council's solicitor that was likely subject to legal professional privilege.
71. Both documents appear to have been circulated only to the elected members. That was the position communicated to the Office for Public Integrity.
72. There was nothing in the documents to suggest that either author intended or consented to the information being circulated beyond the initial class of recipients.
73. I am not persuaded by Cr Jackson's submission to the effect that the internal review findings were not confidential because they were not clearly marked as such in the subject or opening lines of Dr Johnson's email.
74. I also do not consider it material that the internal review findings were included in the public agenda relating to the 24 January 2018 meeting. By this time, the substance of the document had already been published in the media. In the circumstances, there would have been little sense in the council considering the matter in confidence.
75. On the information available to me, I am satisfied that Cr Jackson disclosed a copy of the internal review findings to Mr Franchitto on 8 December 2017. Cr Jackson herself has conceded this point.
76. On this basis, I am satisfied that Cr Jackson divulged to Mr Franchitto confidential information, contrary to clause 3.3 of the Code.
77. On the information before me, I am unable to come to a definitive view as to whether Cr Jackson was the individual responsible for distributing the information to *The Advertiser*. It appears possible that she was, but I do not formally conclude as such.
78. I have also been unable to identify the party responsible for disclosing the contents of the legal advice.
79. I have considered whether in the circumstances I should seek to interview Cr Jackson under oath or otherwise press my enquiries further with the journalist. On balance, I do not consider either course to be appropriate or necessary, noting that a breach of the Code has already been established.
80. As I am of the view that Cr Jackson contravened clause 3.3 of the Code, it follows that I consider Cr Jackson committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
81. It also follows that Cr Jackson's conduct was contrary to section 63(2) of the Local Government Act and, consequently, contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Opinion and Recommendation

It is my final view that Cr Kendall Jackson committed misconduct in public administration by disclosing confidential information to an external party.

It is also my final view that Cr Jackson's conduct in disclosing confidential information to an external party was contrary to section 63(2) of the Local Government Act and, consequently, contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

In the circumstances, I recommend under section 25(2)(f) of the Ombudsman Act and sections 263B(1)(a) and (b) of the Local Government Act that the council:

- reprimand Cr Jackson for her breach of the Code
- subject to Cr Jackson's re-appointment to the council following the 2018 local government elections, require Cr Jackson to attend a course of training relevant to the subject of information security.

Whether Deputy Mayor Leon Stephens disclosed confidential information to an external party, thereby committing misconduct in public administration

82. Deputy Mayor Stephens has denied disclosing information from the legal advice or the internal review findings to any other person.
83. There is no evidence before me, other than the screen capture supplied to the Office for Public Integrity, to suggest that Deputy Mayor Stephens circulated either document beyond the council's elected body.
84. Deputy Mayor Stephens has supplied an explanation for his circulating the internal review findings to an external email address. That explanation appears plausible. There is no evidence that any other person accessed the document once forwarded.
85. The information concerning Cr Jackson provides one alternative explanation as to how the information may have been circulated to *The Advertiser*.
86. On the information before me, I am not satisfied that Deputy Mayor Stephens released or divulged information from either document to an external party.
87. It follows that I do not consider that Deputy Mayor Leon Stephens committed misconduct in public administration.

Opinion

It is my final view that Deputy Mayor Stephens did not disclose confidential information to an external party and, accordingly, did not commit misconduct in public administration.

Summary and Recommendations

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

1. Cr Kendall Jackson committed misconduct in public administration by disclosing confidential information to an external party.
2. Cr Jackson's conduct in disclosing confidential information to an external party was contrary to section 63(2) of the Local Government Act and, consequently, contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2)(f) of the Ombudsman Act and sections 263B(1)(a) and (b) of the Local Government Act that the council:

- reprimand Cr Jackson for her breach of the Code
- subject to Cr Jackson's re-appointment to the council following the 2018 local government elections, require Cr Jackson to attend a course of training relevant to the subject of information security.

3. Deputy Mayor Leon Stephens did not disclose confidential information to an external party and, accordingly, did not commit misconduct in public administration.

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

In accordance with Part 3 of the Code, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

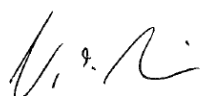
In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **22 January 2019** on what steps have been taken to give effect to my recommendations above; including:

- 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 that 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 South Australian Civil and Administrative Tribunal.

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



Wayne Lines
SA OMBUDSMAN

23 October 2018