

FINAL REPORT

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

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| Agency | Mid Murray Council |
| Ombudsman reference | 2014/07944 |
| ICAC reference | 2014/000813 |
| Date of referral | 30 September 2014 |
| Issue/s to be assessed | <p>1. Whether the Chief Executive Officer of the Mid Murray Council committed maladministration in public administration in relation to the Mannum Football Club development application</p> <p>2. Whether the Chief Executive Officer of Mid Murray Council committed maladministration in public administration by failing to properly execute a council tender process for the Mannum dump re-instatement</p> <p>3. Whether the Chief Executive Officer of Mid Murray Council committed maladministration in public administration by mismanaging public funds in relation to the Santrev Pty Ltd development application</p> <p>4. Whether the Chief Executive Officer of Mid Murray Council committed misconduct in public administration by using his position to influence a development application relating to the interests of the Ueding Restaurant</p> |

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**).

The referral arose out of an anonymous complaint to the Office for Public Integrity (**the OPI**).

The substance of the referral is an allegation that Mr Russell Peate, the Chief Executive Officer (**CEO**) of the Mid Murray Council (**the council**), failed to administer properly a number of council decisions in relation to various development applications, and on one occasion improperly sought to influence a development application process. The anonymous complainant has provided examples of this, namely:

1. the Mannum Football Club
2. the Mannum dump re-instatement

3. Santrev Pty Ltd
4. Ueding Restaurant.

The referral noted that a separate issue raised by the complaint concerned activities in relation to the Mannum Hotel. The referral records that this issue has been appropriately dealt with elsewhere and the Commissioner is satisfied that there is no basis to re-examine the issue.

The Code of Conduct for Council Employees (**the Code of Conduct**) was gazetted on 20 February 2014. Some of the alleged behaviour in relation to issue 4 pre-dates this statutory Code of Conduct. At that time, the council's own Code of Conduct for Employees¹ (**the Council's Code of Conduct**) applied and is relevant to issue 4.

Action taken

Using my powers under the *Ombudsman Act 1972*, I have conducted an investigation of the issue in response to the referral by:

- assessing the information provided by the Commissioner
- seeking and considering a written response from Mr Peate
- requesting further information from Mr Peate on three separate occasions
- interviewing Mr Robin Bourne by telephone
- considering:
 - the ICAC Act and the *Ombudsman Act 1972*
 - the *Local Government Act 1999*
 - the *Development Act 1993*
 - the *Development Regulations 2008*
 - the Code of Conduct and the Council's Code of Conduct
- preparing a provisional report
- considering Mr Peate's response to the provisional report prepared by Kelledy Jones Lawyers, and
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and this report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;² and it is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...³

Response to the Provisional Report

In a letter dated 26 August 2015, Kelledy Jones Lawyers (KJL), acting for Mr Russell Peate, the Chief Executive Officer of the Mid Murray Council, responded to the investigation Provisional Report issued on 24 July 2015. A summary of KJL's comments is as follows:

- the referral from ICAC to the Ombudsman arose out of an anonymous complaint to the OPI

¹ Adopted by the council on 14 July 2008 and reviewed by the council on 19 May 2010.

² This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

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

- the CEO has concerns that the complaint comes from an aggrieved employee and there are natural justice implications arising from an anonymous complaint
- procedural fairness demands that anonymous allegations need to be weighed carefully against the clear and comprehensive explanations provided by the CEO
- the CEO has at all times been cooperative and forthcoming with his responses
- the CEO is pleased with the provisional report findings of no case to answer for the Mannum dump, Sandrev Pty Ltd and Ueding Restaurant development application matters
- the CEO disagrees with the provisional finding that he committed maladministration in public administration for the purposes of the Mannum Football Club development application
- new information made available to KJL demonstrates that, at best, the alleged failure is of a minor 'technical nature'
- the new information relates to a declaration of conflict of interest by Mr Peate at a council meeting on 21 January 2013 - eleven months before consideration of the application from the Football Club to waive the development application fees
- it appears that there has been an incorrect assumption made in the investigation report that the waiver of development application fees was, and is, a matter for consideration of the council. It is not. The CEO has the delegated authority
- it is unclear from the report on what basis the CEO has been found to have not properly delegated the decision to Mr Bourne
- the investigation report appears to rely heavily on an email from Mr Bourne
- it is reasonable that Mr Bourne could not recall the specifics of the matter
- Mr Bourne was incorrect in asserting that there was not an instrument of delegation in place and it is likely that he was confused about whether he was Acting CEO
- on the facts it should be found that Mr Bourne was Acting CEO at the relevant time
- the CEO had previously declared his interest in the Football Club application and did not act in relation to the matter relevant to the intent of section 120 of the Local Government Act. Any disagreement with this assertion could only conclude that such a breach was 'technical' in nature
- the CEO has never attempted to 'hide' his interest in the Football Club
- the CEO wishes to be advised if there is no change to the finding of maladministration in public administration so that he may consider his legal position.

I have carefully considered the KJL submission made on Mr Peate's behalf and amended the provisional report accordingly. Because I have taken account of particular submissions and made changes to the report, I considered it appropriate to issue a revised provisional report for Mr Peate's consideration and response.

Response to the Revised Provisional Report

In a letter dated 8 October 2015, KJL, acting for Mr Peate responded to the investigation Revised Provisional Report issued on 22 September 2015. A summary of KJL's comments is as follows:

- KJL notes that the provisional findings in relation to the Mannum Football Club Development Application have been reaffirmed
- the CEO maintains that the facts of the matter demonstrate his compliance with the conflict requirements of the LG Act, having already identified that he has a conflict of interest in the matter and there being no basis for the finding that he did not lawfully exercise his authority to delegate the decision to Mr Bourne and that the decision to waive the fees was lawfully made by Mr Bourne
- at worst, any breach could only be described as 'technical' and minor in nature and could not, on any reasonable objective assessment, be considered to amount to 'maladministration'

- the CEO notes that the provisional report sets out the findings about four separate allegations. One has found that the CEO has committed maladministration in public administration. The other three have cleared the CEO of any wrongdoing.
- the CEO proposes a practical solution to resolve the matter of the finding of maladministration
- on this point, KJL notes that a foreshadowed recommendation to remedy the error in relation to the Mannum Football Club application is that:

a copy of this report be tabled at a meeting of the council within two ordinary meetings of the council receiving the report

- KJL submits that while the Code of Conduct for Council Members requires that a report from the Ombudsman that finds a council member has breached the Misconduct provisions of the Code be provided at a public meeting of the Council, there is no such corresponding provision contained in the Code of Conduct for Council Employees
- KJL states that the requirement that my report be tabled at a meeting of the council is a level of scrutiny beyond that required for a council employee and equates the position of the CEO with that of an elected member
- accordingly, the CEO proposes that the appropriate recommendation that should apply to conclude the matter 'in a fair, transparent and accountable manner' be that:

a report be provided at a meeting of council with regards to the Ombudsman's findings in relation to the Mannum Football Club Development Application, with a recommendation that the matter be dealt with in confidence, within two ordinary meetings of the council receiving the report

- the CEO has subsequently clarified that his proposal would mean that the only report to be received by the council in confidence would relate to the Mannum Football Club Development Application.

Background and evidence obtained in the investigation

The Mannum Football Club

1. On 21 January 2013, the council resolved to offer an interest free loan of \$30,000 for a period of 10 years to assist the Mannum Football Club (**the Club**) with the purchase of furniture and kitchen appliances, subject to the Club entering into a written agreement to repay the loan.⁴
2. It is alleged that the interest free loan has been used to pay players rather than for its intended purpose.
3. On 22 November 2013, the Club lodged a development application to upgrade its kitchen and canteen facilities. The CEO, in his capacity as a non-executive committee member of the Club, lodged this application together with a letter requesting that the development application fees be waived.
4. By email to the CEO dated 3 December 2013, Mr Geoff Parsons, Manager - Development Services wrote:

I am in receipt of the above Development Application for kitchen and canteen upgrades at the Mannum Football Club.
Kelvin [Director, Development & Environmental Services] discussed this with me briefly before he left and he asked me to seek confirmation from you that Council is prepared

⁴ Minutes of the council meeting on 21 January 2013, resolution 13992/1.

to waive the fees for the development application, as per the request from the Mannum Football Club Committee, signed by you.

When you have a moment, can you please confirm that you agree for Council to waive the fees payable for the assessment of the application?

5. By email to Mr Parsons and Ms Melissa Marschall, Executive Assistant, Development and Environmental Services dated 4 December 2013, Mr Robin Bourne, Director, Corporate and Financial Services wrote:

I confirm that I have now sighted the Mannum Football Club application for an extension and upgrade to their kitchen facilities and the letter requesting the application fees be waived. In accordance with past practises that the application fees be waived for community organisations and on the understanding that the application fees for this application are around \$400.00 I consent to the application fees for the Mannum Football Club being waived.

6. It is not clear whether in December 2013 Mr Bourne had the delegation under Schedule 6 to the *Development Regulations 2008* to waive the development application fee.

The Mannum dump re-instatement

7. As a result of changes to legislation, extensive site work and earth moving was required to close the Mannum dump and re-instate the land to Environment Protection Authority standards.
8. The council sought 'registration of interest' from several earth moving companies, however, no quotes were obtained and it is alleged that no formal tender process was undertaken.
9. The project was awarded to Eichler Earthmovers of Mannum.
10. Eichler Earthmovers is owned by Councillor Yates of the council and her husband, Mr Yates.
11. The CEO was involved in the process of awarding the works to Eichler Earthmovers and the 'Council's works manager' was involved in personally approaching Mr Yates in relation to the works.
12. Another company, B&C Excavations, questioned the CEO in relation to awarding the contract to Eichler Earthmovers without a tender process.

Santrev Pty Ltd

13. On 6 February 2013, Santrev Pty Ltd (**Santrev**) lodged a development application to build a chicken farm including: chicken sheds, feed bins, machinery sheds, farm manager's residence, amenity buildings, service sheds and water tanks (DA711/033/13).
14. On 24 July 2013, Santrev lodged a development application for a 'pump house' and related infrastructure (DA711/255/13).
15. On 3 September 2013, Santrev lodged an application to amend development application DA711/033/13 (DA711/163/14).
16. The development application fees payable to the council are approximately \$207,000, seven per cent of which are payable to the Minister for Planning.

17. As of 6 June 2014, only part of the fees had been received by the council, despite the fact that 'the majority of development approval had been finalised'.
18. Due to the size and use of the structures, the development would ordinarily be classed as a Class 8 development under the Building Code, therefore requiring strict controls in relation to fire safety.
19. Throughout the assessment phase, the CEO agreed with the developers that the development should be assessed as a Class 10 building. Such a classification would negate the need for fire hydrants, specific fire water mains, additional water storage tanks and extra site access for the Country Fire Service (CFS). This would save the developers in excess of \$1 million.
20. Mr Peter Beaumont (the council's Building Surveyor), the CFS, a council engineer and other planning staff advised the CEO that the development should be categorised as a Class 8 development.
21. The CEO sought advice from an independent building surveyor, Professional Building Services Australia (PBS). PBS advised that the development could be classified as Class 10. However, it did not wish to issue building rules consent.
22. The CEO signed all approvals as a Class 10 development.
23. The CFS appealed the Class 10 approval in the Environment, Resources and Development (ERD) Court, and following negotiations, the matter was settled and an application was made to change the classification from Class 10 to Class 8 (DA711/163/14). The development is now approved as Class 8.
24. The legal costs incurred by the council and the costs incurred in engaging PBS to provide independent advice are substantial. The allegation is that the costs were unnecessarily incurred due to the CEO's failure to listen to the advice provided to him.

Ueding restaurant

25. On 13 April 2013, Mr and Mrs Ueding lodged a development application for a change of land use in relation to their property, from a bed and breakfast to a restaurant (DA711/127/13).
26. Due to the lack of car parking provided for in that application and the fact that the site is located on a primary arterial road, council staff requested a traffic management report (TMR).
27. The Uedings complained to the CEO about this requirement.
28. The CEO arranged for the TMR to be undertaken by the council at an expense of approximately \$2,000.
29. The TMR was prepared and presented as part of the Ueding's development application. However, the Department of Planning, Transport and Infrastructure (DPTI) recommended that the application be refused as it did not satisfy parking requirements.
30. As a result, the council's Development Assessment Panel (DAP) refused the development application.
31. The Uedings again complained to the CEO who recommended that they lodge a new development application, which was done on 24 January 2014 (DA711/047/14). The

application was accompanied by a letter (believed to have been written by the CEO) requesting that the application fees be waived, with the exception of the public notification fees required of a Category 2 development.

32. DA711/047/14 was almost identical to DA711/127/13, the only change being the removal of off street parking.
33. DA711/047/14 was referred to DPTI who recommended that the application be refused.
34. The CEO wrote to DPTI asking that it reconsider its assessment. As a result, DPTI changed its recommendations subject to a number of conditions.
35. The CEO attended the DAP meeting, addressed the DAP and answered questions. The application was subsequently approved.
36. The TMR identified a portion of nearby council land to be used for the required off street parking.
37. The CEO provided a report to the council recommending that the council develop the site as a car park in line with DPTI requirements. No contribution was made by the Uedings towards this work.

Relevant law/policies

The ICAC Act

38. 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.

39. 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.

The Council's Code of Conduct

40. The Council's Code of Conduct is relevant to the fourth issue.
41. Mr Peate was appointed CEO of the Mid Murray Council effective from 19 March 2012.

42. Clause 1.0 of the Council's Code of Conduct provided:

This Code of Conduct is a public declaration of the principles of good conduct and standards of behavior that the Mid Murray Council have decided its stakeholders could reasonably expect of Council employees to demonstrate in the performance of their duties and functions. It provides guidance on a range of ethical and moral issues that may impact on employees during their service with the Mid Murray Council.

This Code has been developed, as required by the Local Government Act 1999, in consultation with employees and the relevant registered industrial association representing the interests of Council employees.

The standards in this Code of Conduct are in addition to any statutory requirements of the Local Government Act 1999 or any other relevant Act or Regulation.

43. Clause 2.0 of the Council's Code of Conduct provided:

The general duty of Council employees is to act honestly and with reasonable care and diligence in the performance and discharge of their functions and duties. Council employees must not make improper use of information acquired or make improper use of their position as an employee of Council. Refer copy of Section 110 of Part 4 of the Local Government Act, 1999 (Appendix A).

44. Clause 3.0 of the Council's Code of Conduct provided:

Employees of the Mid Murray Council are committed to discharging their duties conscientiously and to the best of their ability.

In the performance of their duties they will act with honesty, integrity and generally conduct themselves in a manner that generates community trust and confidence in them as individuals and enhances the role and image of the Council and Local Government.

In addition to all legislative requirements, (recognizing the need for professional officers to comply with relevant Codes of Conduct endorsed by professional bodies/associations) employees of the Mid Murray Council recognize the requirements of this Code of Conduct as the standards that will be adopted in the performance of their functions and duties.

45. Clause 4.1 of the Council's Code of Conduct provided:

Employees of Council must act in a fair, honest and proper manner according to the law. This includes practices which commit to the application of:

- understanding and giving proper consideration to legal requirements
- reasonable, just and non-discriminatory behavior in all aspects of carrying out their roles and responsibilities
- actions to be undertaken in good faith and not for improper or ulterior motives
- behavior that maintains and enhances the image of the Council and does not reflect adversely on the Council
- guidelines as to the appropriateness of the acceptance of gifts and gratuities
- impartiality in implementing Council decisions or when exercising delegated authority.

46. Clause 4.3 of the Council's Code of Conduct provided:

Council employees must be fair and honest in their dealings with individuals and organisations and behave in a manner that facilitates constructive communication between the Council, other employees and the community. This includes:

- honest and fair dealing with all members of the community
- courteous and sensitive behaviour that does not discriminate

- awareness and disclosure of any situation that may create conflict between their public and private roles
- respect for elector's opinions and property
- prevention of misuse of an employee's position to gain an advantage for themselves or others.

The Code of Conduct for Council Employees

47. The Code of Conduct for Council Employees is relevant to the fourth issue.
48. The Code of Conduct was gazetted on the 20 February 2014.
49. Part 1 of the Code of Conduct comprises an overarching statement of principles (which does not constitute separate enforceable standards of conduct) which includes:

Council employees in South Australia have a commitment to serve the best interests of the people within the community their Council represents and to discharge their duties conscientiously and to the best of their ability.

Council employees will act honestly in every aspect of their work and be open and transparent when making decisions or providing advice to their Council.

Council employees will perform their official duties in such a manner as to ensure that public confidence and trust in the integrity and impartiality of their Council is strong.

50. Part 2 of the Code of Conduct requires that council employees will:
- 2.1 Act honestly in the performance of official duties at all times, as required by Section 109(1) of the *Local Government Act 1999*.
 - 2.4 Act in a way that generates community trust and confidence in the Council.
 - 2.5 Act in a reasonable, just, respectful and non-discriminatory way when dealing with all people.
 - 2.6 Ensure that personal interests, including financial interests, do not influence or interfere with the performance of their role.
 - 2.13 Ensure that relationships with external parties do not amount to interference by improper influence, affecting judgement, decisions and/or actions.
 - 2.26 Chief Executive Officers must act in accordance with the provisions specific to their position within the *Local Government Act 1999* at all times.
51. Part 2 also provides that a failure to comply with the behaviors in Part 2 can constitute a ground for disciplinary action against an employee, including dismissal, under section 110(5) of the Local Government Act.

The Local Government Act

52. Section 99 of the Local Government Act provides:

99—Role of chief executive officer

- (1) The functions of the chief executive officer include—
- (a) to ensure that the policies and lawful decisions of the council are implemented in a timely and efficient manner;
 - (b) to undertake responsibility for the day-to-day operations and affairs of the council;

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

53. Section 120 of the Local Government Act provides:

- (1) The chief executive officer of a council who has an interest in a matter in relation to which he or she is required or authorised to act in the course of official duties—
 - (a) must disclose the interest to the council; and
 - (b) must not, unless the council otherwise determines during a council meeting that is open to the public, act in relation to the matter.

Maximum penalty: \$5 000.

Whether the Chief Executive Officer of the Mid Murray Council committed maladministration in public administration in relation to the Mannum Football Club development application.

54. On 21 January 2013 the council carried a resolution in relation to the Mannum Football Club as follows:

13992/1 Cr Myers moved that Council offer the Mannum Football Club Inc an interest free loan of \$30,000-00 for a period of ten (10) years to assist in financing the purchase of furniture and kitchen appliances, subject to the club entering into a written agreement to repay the loan.

Seconded Cr Sayers

CARRIED

- 55. In his response to my inquiries Mr Peate responded that, as a serving committee member of the club, he 'prepared and lodged a funding application to the Office of Sport and Recreation to significantly upgrade the football club premises and in particular the existing kitchen'.
- 56. Mr Peate submits that the club had endeavored for many years to upgrade its premises, but had no person with expertise to prepare and lodge an application to obtain funding. He estimates that club members contributed approximately \$150,000 in in-kind assistance to the upgrade of the premises in addition to over \$30,000 contributed in cash towards furniture and fit-out.
- 57. Mr Peate provided my investigation with bank statements for the Building Account of the Mannum Football Club which show receipt of the loan money and a range of

purchases including tables, chairs, kitchen appliances, building work, lighting etc.⁵ In his letter dated 21 May 2015, Mr Peate states:

I am fully satisfied that the interest free loan paid to the Mannum Football Club was used only for the agreed purposes of such loan; namely the purchase of furniture and kitchen appliances, as per Council resolution dated 21 January 2013.

58. I am satisfied that there is no evidence available to me to indicate that the council's interest free loan to the Mannum Football Club has been used in any way other than for its intended purpose.

59. I turn now to the matter of the development application. The first issue relates to Mr Peate's declaration of his interest in the matter. As noted in paragraphs 4 and 5 above, emails between senior council staff show that the Manager - Development Services initially handled the club's development application and accompanying request for a fee waiver. The club's application had been signed by Mr Peate in his capacity as a club committee member.

60. In his response to my investigation Mr Peate submits that:

As Chief Executive Officer, I considered that I would have a conflict of interest in approving the waiving of the fees; hence this was referred to and undertaken by the Director, Corporate and Financial Services, who at that time would act in the capacity of the Chief Executive Officer in my absence. It is pointed out that I removed myself and was not part of the decision.

61. Information in the KJL letter dated 26 August 2015 provides evidence that Mr Peate made a formal declaration of his conflict of interest at a meeting of the council on 21 January 2015. This was eleven months before the application from the Mannum Football Club to waive the development application fees was considered. The minutes from the council meeting state:

[CEO Russell Peate] declared an interest under Section 120 of the Local Government Act in Item 6.3.2 Mannum Football Club Inc as he is a member of the Mannum Football Club Inc.

62. Whilst it is now clear that Mr Peate had made an appropriate declaration of his conflict of interest under Section 120 in January 2013, I consider this is not sufficient to have covered the circumstances of the decision to waive the fees eleven months later. It is reasonable to observe that eleven months is a considerable amount of time for such a declaration to be considered current. In my view, the CEO should have made a fresh declaration at the time the waiver was to be considered. I have, however, made no finding of a breach of the law on this particular point.

63. Instead of a fresh declaration, in an internal council email dated 3 December 2013 to Mr Geoff Parsons, Manager Development Services (who had received the application from the club), Mr Peate wrote:

Geoff,
Thanks. For probity purposes, in this case, suggest approval be sought from Robin Bourne (in lieu of the absence of Kelvin), as I am on the Mannum Football Committee, wrote the application and the letter applying for fees to be waived.

64. A second issue arising from Mr Peate's declaration is the rightful authority to make a waiver decision under the *Development Act 1993*. Sections 39(4)(c) and 39(5) codify the power available to the council to waive fees in certain circumstances as follows:

⁵ Bank SA Statements 13 to 19 inclusive from 1 November 2011 to 31 December 2014.

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- (4) A relevant authority may–
- (c) to the extent that the fee is payable to that relevant authority waive payment of whole or part of the application fee, or refund an application fee (in whole or in part);
- (5) A relevant authority may grant permission under subsection (4) unconditionally or subject to such conditions as the relevant authority thinks fit.
65. In his letter to me dated 21 May 2015, Mr Peate submits that the ‘relevant authority’ power was delegated to him in his capacity as CEO. This is correct. Mr Peate did have the authority to make the decision to waive the application fee as per a resolution on the council dated 8 July 2013. The resolution delegated the exercise of the powers and functions contained in sections 20 and 34(23) of the Development Act to the person occupying the office of the CEO.
66. Mr Peate’s letter noted that because of his conflict of interest, in this instance:
- Mr Bourne at that time would act in the position of Acting Chief Executive Officer, when required and was considered the person to determine this in the Chief Executive Officer’s absence.
67. As noted above, Mr Robin Bourne communicated his approval of the fee waiver on 4 December 2013 under his substantive title of Director, Corporate and Financial Services, not as Acting Chief Executive Officer.
68. In response to a question put to him by my investigator on 17 June 2015, Mr Bourne acknowledged he had signed the approval email in this capacity. He also said:
- I don’t think there was an instrument of delegation [in place at the time]...I don’t think I was acting [CEO] at the time.⁶
69. KJL have submitted, on Mr Peate’s behalf, that Mr Bourne’s recollection cannot be relied upon as evidence that he was not acting as CEO at that time. Instead, they imply that Mr Bourne could not recall the specifics of the matter and interpret his statement that: ‘I don’t’ think I was acting...’ as indecision and a lack of sureness.
70. I do not agree with this interpretation of Mr Bourne’s statement. When he said ‘I don’t think [there was an instrument of delegation in place]’ he was clearly understood to mean that he did not think there was such an instrument in place for him to act, not that he was unsure if there was. The same applies to the statement ‘I don’t think I was acting...’ I understand that Mr Bourne was clear that he wasn’t acting at the time. In any event, it is reasonable to assert that Mr Bourne had no recollection of any *bona fide* transfer of the CEO’s authority to him.
71. I note that the email from Mr Peate to Mr Parsons, dated 3 December 2013, does not state that the CEO is delegating his authority to make a decision under Section 39 of the Development Act to waive payment of whole or part of the application fee to Mr Bourne. Instead it advises Mr Parsons that ‘approval be sought from Robin Bourne (in lieu of the absence of Kelvin)’. In my view, this communication does not amount to a *bona fide* delegation of authority.
72. On the matter of properly authorised delegations, the Local Government Association has advised councils that:

⁶ The KJL submission refers to this evidence on page 4 of their letter as an ‘email from Mr Bourne of 17 June 2014.’ In fact, the evidence was given by Mr Bourne in a telephone interview with my investigator on 17 June 2015.

if delegations are not done properly, the enforceability of decisions and actions taken may be compromised and there may be legal and administrative problems for the council...*and*.

a sub delegation needs to be made in writing.⁷

73. A further issue arises because, the email in question was not addressed to Mr Bourne. Although Mr Bourne was copied in to the email, it was sent to Mr Parsons. Therefore, the communication cannot be said to be a sub delegation from Mr Peate to Mr Bourne that properly and clearly conferred on him the role of CEO for the purposes of making the decision on the fee application.
74. Section 102(b) of the Local Government Act lays out clearly the required process for an Acting CEO arrangement in the council administration. It says:
- If there is no deputy or the deputy is absent - a suitable person appointed by the CEO after consultation with the council must act in the office.
75. In this case the apparent deputy, Mr Kelvin Goldstone, was absent and Mr Bourne was nominated, via Mr Parsons, to act in the capacity of CEO. There is no evidence available to me that there was consultation with the council as required under the Act.
76. I note that there is currently an instrument in place that would authorise such a delegation if it were done today. On 11 March 2014, the council endorsed the 'Waiving of development application fees for community groups' policy. It delegates authority to waive development application fees to the Chief Executive Officer and to the Director - Development & Environmental Services. Mr Peate has confirmed that this policy was not in place at the time of his request to Mr Bourne in December 2013.
77. The central point is that on 4 December 2013, Mr Bourne appears to have had no proper delegated authority to waive the development application fee. In my view, Mr Peate's communication to Mr Parsons falls short of an Acting CEO appointment to Mr Bourne. Mr Bourne said as much in his evidence to my investigation; he did not change his signature block and he obviously did not see himself as acting in the CEO role. As such, I find the decision to waive the fees was not lawfully made by him.
78. Whilst it is acknowledged that Mr Peate declared his interest in the Mannum Football Club in January 2013, there is evidence that he breached Section 120(1)(b) of the Local Government Act by acting in relation to the matter. Mr Peate's email to Mr Parsons dated 3 December 2013 seeks approval of the application rather than consideration [my emphasis] of the merits of the application. I consider that this request that 'approval be sought from Robin Bourne..' constitutes an act in relation to the matter and therefore breaches Section 120(1)(b) of that Act.
79. In my view, Section 120(1)(b) is also offended by Mr Peate's first act to nominate Mr Bourne to approve the fee waiver. I note a similarity with Section 17(1)(c) of the *Public Sector (Honesty and Accountability) Act 1995* which determines that senior officials have a duty, where they have a personal interest, to 'not take action or further action in relation to the matter except as authorised in writing by the relevant Minister'. In this case, the authorisation needed to come directly from the council which holds the 'relevant authority' power.⁸
80. My finding is reinforced by the circumstances of the purported delegation of authority to Mr Bourne. To put it plainly, after preparing the fee waiver application for his football

⁷ Local Government Association of SA, *Delegations - General Information 2012*

⁸ See *Viscariello v Legal Profession Conduct Commissioner* [2015] SASC 132. At 62, the judgement notes that: 'the law is clear that a person with an interest in the outcome, or who might reasonably be perceived to have such an interest, must not participate in decision-making in situations where there is a duty to accord procedural fairness'.

club, Mr Peate should have had nothing whatsoever to do with the decision to consider the matter. The correct course of action would be to report the application to the council and then to declare his interest in the Mannum Football Club again. This would have allowed the council to consider if it wanted the application to proceed, and if so, who should exercise their authority to consider the matter and make a decision on the waiver application.

81. The evidence before me demonstrates that Mr Peate was responsible for instigating the decision-making process to consider a fee waiver for the Mannum Football Club's development application. Whilst I do not find any improper motive behind his decision to approach Mr Bourne, I consider Mr Peate's actions in progressing the matter to be a breach of section 120(1)(b) of the Local Government Act.
82. Further, I find that Mr Peate should have exercised particular care to ensure that consideration of the club's application was made transparently, fairly and lawfully. By not properly exercising his authority to delegate the decision to Mr Bourne (after obtaining a council determination in accordance with Section 120(1)(b) of the Local Government Act), Mr Peate failed to do this and so exposed the council to the unlawful exercise of a power and function delegated to him.
83. On this point I consider the failure was not minor or technical in nature and disagree with the KJL submission that the law would consider the breach *de minimus*.
84. In my view, this failure constitutes maladministration in public administration within the meaning of section 5(4)(b) of the ICAC Act by:
 - (a) Mr Peate acting in relation to the matter in breach of Section 120(1)(b) of the Local Government Act, and
 - (b) Mr Peate failing to properly delegate his authority to make a lawful decision thereby rendering the decision invalid.

Conclusion

I have carefully considered the submissions made by KJL and by Mr Peate in his response to my revised provisional report. I do not consider it appropriate to accept the proposed resolution for the following reasons:

- my reasoning in relation to the matter is clearly stated above in relation to the finding of maladministration in public administration
- I consider that the reference made in the submission to the Code of Conduct for Council Employees is not relevant to my foreshadowed recommendation. Whilst it is correct to assert that there is no requirement to provide a report to a public meeting of council contained in the Code of Conduct for Council Employees, that is not the frame of reference for my recommendation
- rather, my recommendation is made in the knowledge that a finding of maladministration in public administration by a council CEO is a matter of public interest and should be disclosed in the interests of transparency and accountability
- I do not accept the proposition that a requirement to table my final report at a meeting of the council open to the public is '[equating] the position of the CEO with that of an elected member'. No such inference is made in my report.
- that said, I consider that the position of the CEO is vital to the effective and lawful discharge of the powers, functions and duties under which elected local government bodies are constituted for the governance of the state. The CEO role is unique in its range of responsibilities and accountabilities. CEOs must be seen to be promoting public confidence and trust in the integrity of the councils in which they serve.

In light of the above, I find that Mr Peate did commit maladministration in public administration within the meaning of section 5(4)(b) of the ICAC Act.

To remedy these errors, I make the following recommendations, that:

1. a copy of this report be tabled at a meeting of the council within two ordinary meetings of the council receiving the report
2. the council remind staff of their obligations under the Delegations Policy adopted by the council on 10 June 2014.

In accordance with section 25(4) of the Ombudsman Act the council should report to me by 1 February 2016 on what steps have been taken to give effect to the 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 me by the due date.

Whether the Chief Executive Officer of Mid Murray Council committed maladministration in public administration by failing to properly execute a council tender process for the Mannum dump re-instatement.

85. In February 2012 the council issued the Mannum Landfill Reclamation and Capping Works Contract. In his letter to me dated 6 May 2015, the CEO provided me with the following evidence:
 - Letters of request for tender to five contracting companies
 - Tender documents
 - Tender assessment forms
 - Letter to the only two respondents to the request for tender
 - A signed contract
 - The front pages of the tenders submitted by Eichler Earthmovers and Hunter Brothers
86. The CEO advises in his letter that the assessment of tenders was undertaken by Geoff Johnston, One World Environment Solutions Pty Ltd - Waste Management Contractor, with Mid Murray council employees Kelvin Goldstone, former Director Development and Environment Services, Tom Avery, Project Manager and Neil Cook, Waste Management Coordinator.
87. Copies of tender assessment forms have been submitted from Messrs Avery, Johnston, Goldstone and Cook. All show a weighted score in favour of Eichler Earthmovers Pty Ltd against the tender assessment criteria.
88. On 12 March 2013, Mr Neil Cook wrote to Eichler Earthmovers Pty Ltd to advise that the company's tender had been successful and to invite contact to discuss the scope of works and related contractual details.
89. The CEO has advised me in his first letter of response dated 5 February 2015 that:

In relation to the works associated with the re-instatement of the Mannum refuse site, I have personally had no involvement with the process involved in the project being awarded to Eichler Earthmovers Pty Ltd of Mannum. Indeed, I am not aware of the exact works that Eichler Earthmovers Pty Ltd undertook in relation to the Mannum Refuse site reinstatement.

and,

It is correct that B&C Excavations questioned me in relation to the awarding of the contract for certain works to Eichler Earthmovers and this was referred to the Infrastructure Services Director. This is consistent with Council's policy for purchases and payments (Attachment 26) and enquiries being directed to the Director. Accordingly, it is suggested that the Infrastructure Services Director and Acting Works and Projects Officer be approached to obtain information.

90. I responded to the CEO's suggestion in a letter to him dated 16 March 2015. I requested that he make the necessary inquiries of his officers and provide evidence to me that the council's procurement policies, practices and processes had been fully adhered to in the execution of the contract with Eichler Earthmovers Pty Ltd.
91. The council's current *Competitive Tendering, Contracting, Purchasing, Sale and Disposal of Land and Other Assets Policy* addresses the purchase of goods and services role by mandating that the following principles will apply:
- Consistency with and relevance to Council's Strategic Management plan.
 - Purchasing procedures and practices shall be transparent and accountable to ensure that Council purchases at the best price and that all potential suppliers are given equal opportunity to provide the required goods and services.
 - Where possible opportunities to enhance local economic development and growth shall be taken.
 - Compliance with statutory and other obligations.
 - Commercial confidentiality.
92. The Policy allows for Selected Tender, i.e. 'seeking tenders from a limited number of suppliers on the basis of location, previous performance, the result of an Expression of Interest process when called'.
93. The CEO responded to my request by email dated 22 June 2015. He states:
- Having previously provided to you on 6 May 2015, letters of request for tender to five contracting companies, tender documents, tender assessment forms, letter to the only 2 respondents to the request for tender, signed contract, front pages of the tenders submitted by Eichler Earthmovers and Hunter Brothers, letter to Eichler Earthmovers Pty Ltd dated 12 March 2013 as the successful tenderer, Council Order issued by the Director of Corporate and Financial Services and delegations to purchase goods and services, it is considered that the Mid Murray Council's procurement policies, practices and processes have been adhered to fully in the execution of the contract with Eichler Earthmovers Pty Ltd.
94. In summary, there is no evidence before my investigation that Mr Peate was directly involved in the awarding of the contract to Eichler Earthmovers. Also, there is no evidence to support the allegation that the council did not execute the tender process for the Mannum dump reinstatement according to the council's policies and the requirements of the Local Government Act.
95. On the matter of a possible conflict of interest on the part of Cr Yates (as part-owner of Eichler Earthmovers), I note that Cr Yates declared an interest under section 74 of the Local Government Act. The minutes also show that she left the 12 March 2013 meeting before the item was considered.

Conclusion

In light of the above, I find that Mr Peate did not commit maladministration in public administration in failing to properly execute a council tender process for the Mannum dump re-instatement within the meaning of section 5(4) of the ICAC Act.

Whether the Chief Executive Officer of Mid Murray Council committed maladministration in public administration by mismanaging public funds in relation to the Santrev Pty Ltd development application.

96. The CEO has provided my investigation with a copy of his report to the council dated 25 September 2013 and another dated 30 June 2014 in relation to the building application fees for the Santrev chicken farm development.
97. Attached to the reports are separate resolutions from the council for the above dates endorsing the recommendation from the CEO for development fees payable from Sandrev. The reports include a rationale for a discounted rate of 30% in recognition of future rates payable and their contribution towards the maintenance and upgrade of Murraylands Road. The 30 June 2014 report includes advice that a Deed of Agreement would be signed between the council and Sandrev for the upgrade of the road. I consider that the resolutions are valid decisions of the council.
98. It is noted that throughout the assessment phase, the CEO agreed with the developers that the development should be assessed as a Class 10 building, saving the developers in excess of \$1 million if approved.
99. The CEO has provided evidence of his efforts to obtain independent advice from the independent building surveyor, PBS, after a difference of opinion with the council's Building Surveyor and other council staff over the appropriate classification for the development.
100. I note that the advice received from Mr Dave Vandborg from PBS on the classification issue states:

..I am in favour of amending the current Minister's Specification urgently, with the view to clarifying that Farm Buildings are generally Class 10A structures and further, clarifying when other Classifications apply.⁹
101. Mr Vandborg's opinion also states that 'the application of the BCA (Building Code of Australia) should be left to the qualified Council Building Surveyor to determine'. In this case, the CEO has disagreed with his own Building Surveyor to press for the Class 10 development, which he openly favoured.
102. Notwithstanding the inconsistency of opinions about the role of the Building Surveyor, I consider that the CEO was entitled to seek external advice on a matter that he believed would significantly influence the outcome of the development initiative. The core issue at stake was the requirement for the developer to install substantial firefighting facilities if the Class 8 development was certified. This would necessarily involve significant additional expenditure.
103. It may be that the CEO's heavy reliance on Mr Vandborg's opinion did not ultimately do service to the interests of his council, or of the developers. However, I note that the Local Government Association of SA (LGA) was, at that time, engaged in a sector-wide consultation on Assessment Requirements for Farm Buildings as part of a DPTI reference group on the issue.
104. On the evidence, it is reasonable to conclude that the tension between fire safety and economic development was a legitimate area for contested opinion. Therefore it was not, in my view, unreasonable for the CEO to seek an alternative opinion, or to decide on the Class 10 development classification before the successful CFS appeal action in the ERD Court.

⁹ Email from D. Vandborg to R. Peate dated 16 December 2014 as a suggested submission to the Local Government Association (LGA)

105. The issue of whether the CEO was unwise not to take the advice provided to him by his staff and the CFS in the first instance has no bearing on the allegation of the mismanagement of public funds. I find the decision the CEO took to approve the Class 10 development was a decision open for him to make.

Conclusion

In light of the above, I find that the CEO did not commit maladministration in public administration by mismanaging public funds in relation to the Santrev Pty Ltd development application within the meaning of section 5(4) of the ICAC Act .

Whether the Chief Executive Officer of Mid Murray Council committed misconduct in public administration by using his position to influence a development application relating to the interests of the Ueding Restaurant.

106. The central allegation against the CEO on the Ueding Restaurant matter is that Mr Peate became personally involved in a development application made to the DAP and influenced decisions of the DPTI and the panel. The inference is that Mr Peate's influence was improper and therefore constitutes misconduct.
107. At the time of the DAP meeting on 16 September 2013, the statutory Code of Conduct did not apply. Given that a failure to comply with the behaviours in Part 2 of the Code of Conduct can constitute a ground for disciplinary action against an employee, including dismissal, under section 110(5) of the Local Government Act, any breach of Part 2 will constitute misconduct for the purposes of section 5(3)(a) of the ICAC Act.
108. Unlike the statutory Code of Conduct that came into effect on 20 February 2014, the Council's Code of Conduct did not provide that a contravention constituted a ground for disciplinary action against an officer. It follows that whether or not the CEO complied with the Council's Code of Conduct will not, without more, determine the issue of whether he committed misconduct.
109. Instead, the relevant question is whether Mr Peate's conduct constituted 'other misconduct' while acting in his capacity as a public officer. That said, in considering that issue, any non-compliance with the Council's Code of Conduct will be relevant.
110. Following an initial rejection by the DAP of the Ueding's development application¹⁰ Mr Peate has explained the action he took as follows:

Subsequent to this I discussed with the applicant, Mrs Ueding the possible lodgement of a fresh development application for consideration by Council in order to assist this development. In order to assist (recognising that I have no personal conflict), I prepared draft letter for consideration and/or amendment by Mrs Ueding to assist, as she had difficulty in doing so. The fresh development application DA 711/047/14 lodged was amended to remove off street parking.

The fresh application was referred to the Department of Planning, Transport and Infrastructure and a copy of their response is attached (please note that their response was identical to the initial application despite an amended application being lodged).

Accordingly, as Chief Executive Officer, I wrote to the Department of Planning Transport and Infrastructure requesting that it reconsider its assessment, primarily due to the fact that they had not considered the amended application.

¹⁰ Development Application 711/127/13 - H&C Ueding

111. The CEO has also provided the minutes of his meeting with the DAP on 16 June 2014 where the DAP resolved in part that:

...the proposed development is not "Seriously at Variance" with the relevant provisions of the Mid Murray Council Development Plan (Consolidated 24 October 2013) and that pursuant to Section 33(1)(a) of the Development Act 1993, Development Plan Consent be granted to Development Application 71/047/14, subject to the following Reserved Matter and conditions and notations:-

112. At the council meeting held on 30 June 2014 the matter was considered. A decision was made to support the CEO's report and recommended action to address the Reserved Matter and conditions imposed. The effect of the council's decision was to commence construction by the council of a sealed car park to enable the Ueding café development to proceed.
113. On the information before me, I am satisfied that Mr Peate had no personal interest in the decision taken by the DAP to approve the Ueding's Development Application.
114. Whilst the position taken by the CEO of a council in a development application matter is one where caution and prudence should be exercised, I accept Mr Peate's submission that he was motivated to support the application by his strong commitment to regional economic development initiatives.
115. On balance, while I accept that Mr Peate had a personal view that the Ueding application should be supported, I do not consider that he had an improper motive or personal interest in assisting the application to proceed. There is no evidence before the investigation to suggest that Mr Peate was improperly relying on his position as CEO to exert undue pressure on the DAP members to reach a particular conclusion.
116. In summary, I do not consider that a breach of the statutory Code of Conduct has been established, nor do I consider that there was any impropriety or attempt to unduly influence the council that would lead to a finding of 'other misconduct' for the purposes of the ICAC Act.

Conclusion

In light of the above, I find that that Mr Peate did not commit misconduct in public administration by using his position to influence a development application relating to the interests of the Ueding Restaurant within the meaning of section 5(3) of the ICAC Act.

Summary

My investigation examined four matters. On three of the four, I made no finding of maladministration or misconduct within the meaning of sections 5(3) and 5(4) of the ICAC Act.

On the matter of the Mannum Football Club development application, I found that Mr Peate did commit maladministration in public administration within the meaning of section 5(4)(b) of the ICAC Act.

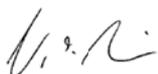
Pursuant to this finding, I recommended that:

1. a copy of this report be tabled at a meeting of the council within two ordinary meetings of the council receiving the report
2. the council remind staff of their obligations under the Delegations Policy adopted by the council on 10 June 2014.

In accordance with section 25(4) of the Ombudsman Act the council should report to me by 1 February 2016 on what steps have been taken to give effect to the 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 me by the due date.



Wayne Lines
SA OMBUDSMAN

13 November 2015