

FINAL REPORT

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

Public Office	City of Victor Harbor (the council)
Ombudsman reference	2015/09687
ICAC reference	2015/000920
Date of referral	23 November 2015
Issue to be assessed	Whether Cr Terence Andrews committed misconduct in public administration by releasing confidential information to journalist Mr Michael Simmons

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 a potential issue of misconduct in public administration within the meaning of that Act (**the referral**).

The referral arose out of a complaint to the Office for Public Integrity made by Acting Chief Executive Officer (at the time) Ms Kate Jessep as a mandatory report pursuant to section 20 of the ICAC Act. I shall refer to Ms Jessep as the reporter.

The referral gives rise to one issue. Whether the information the council voted to keep confidential was divulged by Cr Andrews to Mr Simmons.

The reporter alleged a potential breach of section 62(3) of the Local Government Act and/or clause 3.3 of the Elected Member Code of Conduct (**the Code**) in relation to Cr Andrews making improper use of information the council had considered to be confidential by divulging it to Mr Simmons to the detriment of the Council.

Under section 5(3) of the ICAC Act, 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 amounts to misconduct in public administration.¹

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 receiving written responses from Cr Andrews and Mr Michael Simmons
- reviewing council documents including Agendas and Minutes
- considering:
 - the ICAC Act and the Ombudsman Act

¹ Section 5(3)(a) of the ICAC Act.

- the Local Government Act
- the Code
- preparing a provisional assessment and seeking the views of Cr Andrews, the council's CEO Mr Graeme Maxwell, and Ms Jessep who is now the council's Director Corporate and Community Services
- providing a draft Final report to the Commissioner for comment and considering his response.

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 my provisional report

The CEO of the council responded to my provisional report by letter dated 10 March 2016. The CEO reiterated that the complaint to OPI was pursuant to section 20 of the ICAC Act as a mandatory report by the Acting CEO Ms Jessep. I have amended the report to more accurately reflect this. The CEO also made comment that in his opinion Cr Andrews would not have deliberately revealed confidential information and it was perhaps his inexperience, being an elected member for less than twelve months that caused the breach. I have considered the CEO's comments but it does not alter my view in terms of my recommendations.

Cr Andrews responded to my provisional report on 28 March 2016. Cr Andrews stated that he had no comment to make, that he accepted the recommendations and would publicly reply to the allegations 'when it is in the public arena, if I feel it is warranted.'

Background and evidence obtained in the investigation

1. Cr Terence Andrews is an elected member of the Council.
2. At 5:30pm on Friday 11 September 2015 the Council's Agenda for the Special Council meeting on Monday 14 September 2015 was circulated to all elected members. The special Council meeting was to discuss the council's Development Plan Amendment (DPA) which proposed rezoning three council sites to provide for more housing, retail and community centres.
3. It was revealed in item 4 of the Agenda that the Minister for Planning (**the Minister**) had declined to initiate the council's DPA because of ongoing delays. The Council's Mayor and CEO replied to the Minister's letter expressing their disappointment at the action taken and requested a meeting⁴. The council's DPA identified three sites as potential neighbourhood centres: McCracken, Hindmarsh Valley and Encounter Bay. Instead the

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.

⁴ Letter from Mayor Philp and Graeme Maxwell to the Hon John Rau MP, 27 August 2015

Minister stated he had initiated another DPA (**the Ministerial DPA**) that will affect the Council's development plan and informed the council that the Department for Planning, Transport and Infrastructure (**DPTI**) would liaise with Council staff to 'talk through these sites'⁵.

4. Item 5 of the Agenda was marked confidential and detailed the subsequent meeting the Council had with the Minister and DPTI about the Ministerial DPA. The Ministerial DPA included two extra sites in Victor Harbor and Hayborough.

5. Item 5.1 of the Agenda states:

The following commentary about this DPA is based on the verbal discussion at the meeting. Other than the Minister's letter, Council has not received or been privy to any further formal correspondence or documentation about the DPA and a search of the DPTI website has not been able to yield any other information about the matter. It is understood that DPTI staff have been given a time frame of 3 weeks to prepare the DPA for public consultation with an expectation that the entire DPA be concluded and gazetted by the end of the year.

The extent of the DPA is understood to impact the following sites (refer to map in Attachment 1):

6. Item 5.1 goes on to list five sites being:
 1. 'Old TAFE' site, Lot 5 Adelaide Road (**the McCracken site**)
 2. Farquar land (Aldi site), Lot 1010 Adelaide Road (**the Hayborough site**)
 3. Deferred Urban Zone (in/around Makris site), Waitpinga Road (**the Encounter Bay site**)
 4. Waggon Road site (**the Hindmarsh Valley site**)
 5. Lot 101 Armstrong Road, Victor Harbor (**the Victor Harbor site**)
7. The recommendations at item 5.1 were: (summarised)
 1. that pursuant to section 90(2) of the Local Government Act, the Council orders that the public be excluded from the meeting with the exception of several council staff for the reasons listed in section 90(3)(m) of the Local Government Act, being the consideration of a DPA amendment prior to the release for public consultation.
 2. that council note the potential nature and extent of the Ministerial Centres and DPA
 3. that council accept offer from the Minister to work collaboratively in progressing the DPA
 4. that Council work with DPTI on the scope and timeline for the preparation of any deeds that may be required to ensure suitable infrastructure is delivered to support the specific sites proposed to be rezoned
 5. write to the Minister regarding: the need for appropriate infrastructure agreements to be negotiated and implemented prior to gazettal for any future DPA, council's desire to see the provision for emergency services on the Armstrong Road site, and the community value of the walking trail connectivity.
 6. that having considered the Ministerial DPA the council maintain confidence until a future DPA is released for public consultation, or until the next annual review of all outstanding confidential items, whichever occurs first and that public be re-admitted to the meeting.
8. Due to the proposed confidentiality order in relation to item 5, the Agenda circulated to elected members and council staff with the above information. The Agenda that appeared on the website to the general public only contained the first recommendation about confidentiality, and none of the detail as is standard practice.

⁵ Letter from the Hon John Rau MP to Mayor Graham Philp, 20 August 2015, page 2 of 2

9. At the special council meeting on Monday 14 September 2015 Cr Andrews informed me that there was heated discussion in relation to whether item 5 should be deemed confidential pursuant to section 90(2) of the Local Government Act. The minutes record that the following occurred:

Leave of the meeting was sought and given to put item 5.1 on hold to enable questions regarding Item 4.1.

CARRIED

A Division was called:

**For: Cr M Jenkins, Cr T Glazbrook, Cr P Chigwidden, Cr N Hayles
Against: Cr P Charles, Cr R Marshall and Cr T Andrews**

The Motion was CARRIED

10. Following the order to keep item 5.1 confidential the council also resolved in accordance with section 91(7)(b) and (9)(a) of the Local Government Act to retain in confidence the documentation and minutes relevant to agenda item 5.1.
11. Mr Simmons is a journalist for the Victor Harbor Times newspaper (**the newspaper**). On Thursday 17 September 2015 the newspaper published an article by Mr Simmons on page 9. The article, 'Rau gives Victor some hope' reveals in paragraph three the location of the five sites in the Ministerial DPA and in the final paragraph the expected timeframe in which DPTI will prepare the DPA for public consultation 'in the next two weeks' and that 'the DPA will be concluded by the end of the year.' The article quotes council staff member Mr Graham Pathuis and two councillors Cr Moira Jenkins and Cr Andrews. In relation to Cr Andrews the article states:
- Councillor Terry Andrews said developers are "holding a gun to the head of ratepayers". "If we do not get an agreement our ratepayers will be paying \$150 each per year for the Coles development with no way of recovering costs, except by rates over the next 20 to 30 years.' Cr Andrews said.
12. It is alleged by the reporter that information contained in the newspaper article was only known by the Minister, DPTI staff who attended a meeting prior to the special council meeting on 14 September 2015, five council staff members and all elected members. The reporter alleged that all of these individuals were aware that the information was confidential. The reporter informed ICAC that Cr Andrews may be a potential suspect.
13. On 25 November 2015 my Officer wrote to Mr Simmons asking him about how he came to be aware of the information contained in the newspaper article. Mr Simmons replied by email on 10 December 2015. Mr Simmons informed me that:
- the issue of the DPA has been reported on by the newspaper for over a year
 - he became aware of the special council meeting by the notice of meeting sent out by the reporter
 - the identification of the five sites that appears in his article was in the public domain being 'well documented' in the paper and available to the public via a website information sheet published by DPTI at:
https://www.sa.gov.au/__data/assets/pdf_file/0009/183879/Information_Sheet_Victor_Harbor_Centres_and_Residential_amendment_29_Oct_2015.pdf
 - the agenda for the special meeting contained the letter by the Minister declining the Council's proposed DPI and the Mayor's reply
 - the information contained in the final paragraph in relation to timeframes was volunteered by Cr Andrews when he visited the newspaper's offices 'in the week following the council meeting.'

- the quotations from Crs Andrews, Jenkins and Mr Pathuis mentioned in the article came from discussion in the open forum of the special council meeting. Mr Simmons provided me with his handwritten notes of the special council meeting before the council moved into confidence where the notations of the quotations used in the article appear
 - that he was aware that parts of the issue were voted to be kept in confidence by the council at the special meeting
14. Further information was provided by Mr Simmons by email on 23 December 2015, specifically in relation to the meeting with Cr Andrews. Mr Simmons wrote:

I knew of the sites (Old Tafe, Waggon Road & Makris) as they had been public knowledge and I had written many stories about them and their progress with the DPA. The other two sites (Aldi and Armstrong Road) were disclosed to me by Cr Terry Andrews when he visited the offices of *The Times*.

15. My Officer wrote to Cr Andrews on 14 December 2015 and asked for a response to the allegations. Cr Andrews replied on 11 January 2016 and stated:
- the debate in relation to whether the council should order that item 5 of the Agenda be considered confidential occurred whilst Mr Simmons remained in the chamber
 - he 'more than likely' visited Mr Simmons at the newspaper's office on Tuesday 15 September or Wednesday 16 September 2015 about an advertisement and article for the Sporting Challenge Festival information night because Cr Andrews was a media person for that festival's board
 - he and Mr Simmons's 'more than likely' would have passed a few comments about the 'debacle/ discussions regarding the Monday night special council meeting'.
 - he doesn't recall having said anything that was confidential 'only what was already on the public record'
 - that the sites in the Ministerial DPA were consistent with the sites in a council DPA which was previously rejected by the Minister
 - that he did not reveal to Mr Simmons the expected timeframe for the consideration and completion of the Ministerial DPA
 - that he and his wife have been strong supporters of bringing an Aldi store to Victor Harbor and that he campaigned on this point urging the council to allow Aldi's to be built in Victor Harbor providing an infrastructure agreement was in place.

Relevant law/policies

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(3) A member or former member of a council must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.

Maximum penalty: \$10 000 or imprisonment for two years.

90(2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).

90(3) The following information and matters are listed for the purposes of subsection (2):

- (m) information relating to a proposed amendment to a Development Plan under the *Development Act 1993* before a Development Plan Amendment proposal relating to the amendment is released for public consultation under that Act;

Code of Conduct

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

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16. In his email of 10 December 2015 Mr Simmons informed me that he was aware of the five sites affected by the Ministerial DPA because of his previous reporting of the topic and because of information contained on the DPTI website. The website informs the public about the Ministerial DPA and states that it is under consultation from 29 October 2015 to 14 January 2016. The website information details all five sites as:

1. McCracken: rezoning 6.3 hectares on the western side of Adelaide Road from Local Centre (Hayborough) Zone into an amended Residential (Hindmarsh Valley) Zone to enable more retail and accommodation
2. Hindmarsh Valley: incorporating the existing Neighbourhood Centre Zone and Deferred Community Facilities (Hindmarsh Valley) Zone into an amended Residential (Hindmarsh Valley) Zone; this will provide additional flexibility over the location of commercial and community activities in the form of an activity centre
3. Hayborough: rezoning a 1.8 hectare portion of the residential zone on the eastern side of Adelaide Road to a Neighbourhood Centre Zone to enable more retail and community services
4. Encounter Bay: rezoning 60 hectares of the Deferred Urban Zone land fronting Waitpinga Road to Suburban Neighbourhood Zone to provide additional land for housing, neighbourhood activity centre with easier access to residential estates on the western side

5. Victor Harbor: rezoning about 14 hectares of State-owned land from Recreation to Mixed Use Zone to better reflect existing community uses (TAFE, police station, courts and the Encounter Centre) and provide for vacant land for an emergency services precinct close to the urban centre of Victor Harbor.
17. My Office has ascertained from the DPTI that the document was available online on 29 October 2015, on the same date that the Ministerial DPA was released for public consultation and was publicly gazetted. Mr Simmon's article appeared in the newspaper identifying the five sites and the time frame for implementation on 17 September 2015. Therefore, Mr Simmons could not have obtained the information from the web address as he informed me in his email of 10 December 2015.
18. Also in that email Mr Simmons provides evidence of his previous reportage of the DPA sites by the article 'Minister moves to take DPA control' published in the newspaper on 12 March 2015. This article mentions three sites being the 'old TAFE site on Adelaide Road, Waggon Road and the Makris site at Encounter Bay'.
19. However, in Mr Simmon's subsequent email of 23 December 2015 he states that he knew only three of the sites from his previous reportage and that Cr Andrews told him of the other two sites proposed in the Ministerial DPA.
20. I find that as at 17 September 2015 (the date of Mr Simmon's article) only three of the sites were known to the public, being those at McCracken, Hindmarsh Valley and Encounter Bay. However I am unable to be satisfied that the two remaining sites, being the Victor Harbor site and the Hayborough site that appear in the Ministerial DPA were in the public domain prior to 29 October 2015. Based on the evidence from Cr Andrews and Mr Simmons I conclude that on the balance of probabilities Cr Andrews informed Mr Simmons of the two sites identified in the Ministerial DPA and ordered to be kept confidential in the council's Special Meeting of 14 September 2015, being the Victor Harbour site and the Hayborough site.
21. In relation to the expected timeframes for the completion of the public consultation referred to in the final paragraph of Mr Simmon's article, Cr Andrews denies having informed Mr Simmons of this. Mr Simmon's evidence contradicts this by stating that Cr Andrews did inform him of the timeframes. I find it plausible that given Cr Andrews and Mr Simmons met in the week following the council's Special meeting, when they discussed the meeting and the two additional sites, that Cr Andrews informed him of the expected timeframes.
22. I therefore find that Cr Andrews has breached clause 3.3 of the Code because he shared information (being the two sites and the timeframe) ordered to be kept confidential pursuant to section 90(2) of the Local Government Act with journalist Mr Simmons. It is possible that the publishing of the confidential information may have caused detriment to the council due to the information being available earlier than the public consultation period. However I do not have evidence that the early release of this information was detrimental to the council or that Cr Andrews released the information with that intention. I therefore consider that it was unlikely that Cr Andrews has breached the terms of section 62(3) of the Local Government Act.

Conclusion

In light of the above, my final report is that Cr Terry Andrews committed misconduct in public administration within the meaning of section 5(3) of the ICAC Act because he breached clause 3.3 of the Code by sharing information the council ordered to be kept confidential with journalist Mr Simmons.

Recommendations

To remedy this error, I recommend under section 263B of the Local Government Act that the council reprimand Cr Andrews and require Cr Andrews to attend training in relation to confidentiality.

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

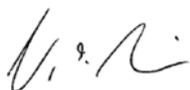
Final Comments

I will send a copy of my report to the Mayor of the council as required by section 18(5) of the *Ombudsman Act 1972*.

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

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 District Court.

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



Wayne Lines
SA OMBUDSMAN

12 May 2016