

REDACTED FINAL REPORT

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

Public Authority	TAFE SA (TAFE)
Public Officer	Mr Bob Burton
Ombudsman reference	2016/02696
ICAC reference	2016/001165
Date of referral	9 March 2016
Issue to be assessed	Whether Mr Bob Burton committed an act of maladministration in public administration in relation to a payment to the Berri Barmera Council (the council) in July 2015

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 maladministration in public administration within the meaning of that Act (the referral).

The referral arose out of a report to the Office for Public Integrity (OPI) made by an anonymous complainant.

The referral gives rise to one issue.

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 ICAC Commissioner
- interviewing under oath the former Acting Chief Executive Officer of TAFE Ms Miriam Silva, and Mr Simon Porter, Director, People and Culture of TAFE
- interviewing over the phone TAFE's Manager Facilities Support Ms Gloria Duurland, and Team Leader Information Services Ms Sandra Harman-Smith
- seeking and receiving written responses from TAFE Chief Executive Officer Mr Robin Murt and TAFE's Director of Facilities and Procurement Services Mr Bob Burton
- considering:
 - the ICAC Act and the Ombudsman Act
- preparing a provisional report and seeking the views of Mr Murt and Mr Burton
- providing a draft Final report to the Commissioner for comment and considering his response
- preparing this Final 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;¹ 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 ...²

Response to my provisional report

Mr Murt replied to my Office by letter received on 6 December 2016 and informed me that he had no further comment to make.

Mr Burton replied to my Office by email on 10 November 2016. Mr Burton did not agree with the conclusions detailed in the report and, whilst he agreed that the payment was unnecessary, he stated that it was made to avoid potential litigation and mitigated against further damaging media coverage in the Riverland region. Mr Burton considered that he sought advice from the Acting Chief Executive (ACE) Ms Miriam Silva and followed her suggestion to make a goodwill payment. Further, he believed that it could not be concluded that the payment did not save TAFE money, as he believed that the council would have initiated legal proceedings against TAFE had the payment not been made. Mr Burton concluded that his action in making the payment of \$63,631 was not substantial mismanagement of public resources; in fact it was to the contrary.

I consider that Mr Burton has not provided me with any additional information that would alter my view. I am unconvinced based on the emails between Mr Burton and Mr Beaton that the council would have initiated legal proceedings against TAFE, particularly as there was no legal obligation for TAFE to pay the council at the conclusion of the JULA contract.

Background and evidence obtained in the investigation

1. TAFE is a statutory corporation established by the *TAFE SA Act 2012 (SA)* and as such is subject to the *Public Corporations Act 1993 (SA)*. Consequently TAFE is subject to the control and direction by the Minister as provided for in the Public Corporations Act, and is an instrumentality of the Crown. Its officers are therefore public officers and are subject to the ICAC Act and Ombudsman Act.
2. On 2 August 2001 the then Minister for Education and Children's Services (**the Minister**), on behalf of TAFE signed the Joint Use Agreement with the council whereby the council paid the Minister money towards the construction of a library and carpark on the site of the Glossop High School, and money for plant and equipment. The agreement will be referred to as the Joint Use Library Agreement (**JULA**). JULA was for a fixed term of 15 years, expiring on 31 December 2014. Under the terms of the agreement, the parties jointly agreed to the staffing levels, classifications and salaries payable for the library staff. The council was the employer of the staff and was required to pay their salaries and on-costs. TAFE was to contribute 52.6% of the costs of the employee's salaries and on-costs.

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

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

3. On 3 November 2014 TAFE gave notice to the council by email that it would not renew the JULA at the end of its term (which was permitted pursuant to the JULA). The council had hired two permanent employees, a librarian and an assistant at the commencement of the JULA. Given that at the conclusion of the JULA the council would no longer receive the contribution from TAFE for the salaries and on-costs it was required to make 'redundant' the two TAFE Services Library employees. The JULA is silent in respect to the issue of redundancy. Neither TAFE nor the council had any obligation under the JULA to make redundancy payments.
4. On 7 November 2014 the Murray Pioneer reported TAFE's withdrawal of the JULA in an article entitled 'TAFE checks out of library deal'. The article quoted the council's CEO Mr David Beaton:

...

Mr Beaton said TAFE SA's decision had come as a surprise to council.

"The disappointing thing is that they didn't involve the local TAFE or even the library in the review," he said.

"There wasn't an opportunity to provide any extra input or any different scenarios that they might have been able to look at.

"We've got to do something by the end of the year, so we have to sit down with the school and work out what the library structure is going to be in the future, and how that might be funded.

"The building doesn't get any smaller, the amount of lights that have to be switched on and the air-conditioning doesn't get any less, so even if the level of services were reduced it's very difficult.

"There's a lot of uncertainty with the whole process.

"All round, it's very unfortunate."

A TAFE SA spokesperson said the decision was made following a review of the agreement this year.

"We have determined that the agreement is not financially sustainable for us," they said.

5. On 10 November 2014 the ABC Riverland reported 'TAFE pulls out of Berri library agreement':

TAFE SA is ending a 15 year agreement with the Berri Bamera Council and the Education Department to run the Berri library.

The current library provides a service to the Berri Community, the Glossop High School and TAFE students.

The CEO of the Berri Bamera Council, David Beaton says said (sic) under the current agreement, TAFE and Glossop High School each provide about \$174,000 worth of funding, toward the library.

The Council provides about \$350,000.

He said TAFE's decision means an uncertain future for two people employed at the library.

"This is an agreement that goes back 15 years," Mr Beaton said.

“There are a librarian and an assistant who are allocated directly to the TAFE function.

“The disappointing thing for us, is that the local library staff who have a level of expertise weren’t involved in the review, and nor was the local TAFE.

“It’s been a decision that’s been made away from the region.”

David Beaton said Berri will still have a library, but the Council will need to renegotiate its agreement with the education department.

A spokesman for TAFE SA said the current agreement finishes at the end of 2014 and the organization has reviewed its involvement.

“We have determined that the agreement is not financially sustainable for us and also that we wish to service our students in an alternative manner,” the spokesman said.

“An IT rich learning commons will be established at the Berri TAFE SA Campus for use by TAFE SA students.

“This will provide a more suitable environment for our students to direct their own learning and access a range of online and printed resources.”

TAFE expects the learning commons will be established in early 2015.³

6. On 2 December 2014 the council’s website reported ‘TAFE SA exits Berri joint use library agreement’. The council posted the following entry:

...

The Berri Joint Use Library Agreement between the Minister for Education and Children’s Services and Berri Barmera Council which has operated for 15 years expires on the 31st December 2014. On the 3rd November 2014, TAFE SA contacted Council by email and explained that “...TAFE SA is withdrawing from the Joint Use Library arrangements at Berri” because “...the financial aspects of our review of the Agreement indicate the arrangement is not sustainable and we need an alternative arrangement for TAFE students and staff in the Riverland.” According to TAFE SA “...this involves the establishment of an IT rich Learning Commons...” It was disappointing that TAFE SA did not contact library staff, Council or even local TAFE SA staff for their input before making this decision, and it appears it was mainly financially motivated.

...

7. On 10 December 2014 Mr Beaton wrote to Mr Bob Burton, the Director of Facilities and Procurement Services on the following terms:

Due to TAFE SA withdrawing its funding from the JULA, the positions currently held by these two employees are therefore redundant on 31 December 2014. The employment of the employees is governed by the Berri Barmera Council Enterprise Agreement (ASU) No.8, 2011 (**EBA**).

On the basis that these employees’ positions have become redundant due to TAFE SA withdrawing its involvement and funding of the JULA, the Council seeks contribution by TAFE SA in relation to redundancy payments regarding these employees. The Council has issued the redundancies to the two employees, the EBA redundancy entitlements for each employee is the following:

- 8 weeks notice of termination or pay in lieu thereof;
- 2 weeks salary as severance payment for each year of service; and

³ Article by Narelle Graham, <http://www.abc.net.au/local/stories/2014/11/10/4125083.htm>

- An amount representing 10% of annual salary for the purposes of outplacement assistance.

The total redundancy costs for these employees is therefore:

- Person A - **\$80,535.41**
- Person B - **\$42,952.10**

Given the short time frame, please contact the writer as a matter of urgency to make the necessary arrangements for payment to the Council for these redundancy entitlements.

8. On 11 December 2014 Mr Beaton emailed Mr Burton stating that he had adjusted the amount of the redundancies for TAFE contribution to only include the redundancy component not the original that included accrued leave entitlements.
9. Following Mr Beaton's email, Mr Burton sought the advice of colleagues Mr Andrew Gilbert, Manager Information Services and Ms Dianne Baron, Director of Education Services. He wrote:

Andrew/Di

I am inclined to offer 50% (I can find the money) on the basis of the Council decision to offer employment beyond the term of the JuL contract.

Your thoughts????

10. Mr Gilbert, the Manager of Information Services replied by email half an hour later:

Really. I'd be inclined to offer nothing !

They're not our staff. (Person A was a TAFE SA staff member...then she left in 1999 for a better offer !)

Why do we have an obligation to them beyond the conclusion of the Agreement? The Contract had a set term. It wasn't nebulous in terms of its conclusion. Why were staff assigned to it permanently?

11. My investigation was not provided with Ms Barron's reply, if any. Mr Burton then sent a copy of Mr Beaton's request for redundancy payments to the Acting Chief Executive of TAFE, Ms Miriam Silva. Ms Silva was and remains a member of the TAFE Board and held the role of Acting Chief Executive for seven months from July 2014 to February 2015.

12. On the same day, 11 December 2014 at 11:57am Mr Burton wrote:

Miriam

Please see attached...I am inclined to offer 50% of their claim and no more.

They're not our staff. (One was a TAFE SA staff member...then she left in 1999 for a better offer!)

We don't really have any obligation to them beyond the conclusion of the Contract which had a set term. It wasn't nebulous in term of its conclusion.

Why were staff assigned to it permanently?

Some have suggested we should refuse to pay anything, but that is not a good look and we have made a substantial recurrent saving (over \$100k) so a \$60k exit fee seems OK????

Your advice please

13. Ms Silva replied by email to Mr Burton, copied into Mr Simon Porter on 11 December 2014 at 1:31pm as follows:

Hi Bob

I'm not sure that we want to set a precedent here by paying (all or part) redundancy for a local govt department - Simon, have we done anything previously?

However, if we wanted to as an act of good will share 50% of the first year savings to the local council (for them to use however they wanted) that would seem more palatable.

Let me know what you think.

14. On 18 December 2014 the council's CEO Mr Beaton emailed Mr Burton asking if there was any progress on the matter. Mr Burton replied later that afternoon as follows:

David

We are not able to set a precedent by paying (all or part) of a redundancy payment to staff who are not employed by TAFE SA.

However, a contribution from our savings to the Council's joint use library operating costs for 2014/15 is a possibility.

Consequently an invoice from Council for \$41,162.50 for "joint use library operating costs for 2014/15" is suggested.

Regards

15. Mr Burton subsequently emailed Mr Beaton again on 18 December 2014 to clarify why \$41,162.50 was offered: "FYI The \$41,162.50 number represents one third of the quoted cost of redundancy payments."
16. On 19 December 2014, eight days after Mr Burton's email to Ms Silva and her suggestion that Mr Porter provide advice, Mr Porter emailed Mr Burton, copied into Ms Silva. Mr Porter's email, at 6:04am stated:

Hello Bob,

As discussed I would not see any reason why one employer would contribute to the cost of redundancies to employees of another employer at the lawful & appropriate conclusion of a commercial agreement.

The interesting clause in the letter to me is:

Pursuant to the JULA, the Council employed Person A (TAFE Services Librarian) and Person B (TAFE Services Library Officer). Both these employees were hired solely for use by TAFE SA. The employees did not provide Council services.

So the questions I have are:

- Presumably TAFE SA has concluded the contract/ JULA per an appropriate method either at the end of the agreement and/or with appropriate notice
- Presumably these two people were employed by Council to perform duties required by the JULA with funding provided by TAFE SA as a part of that agreement. So the

employees were not hired for use by TAFE SA, but hired by Council to perform duties as required by the JULA in return for funds provided by TAFE SA.

If yes to these issues - then the risk is with the Council, not TAFE SA & so I would not support providing any payments towards redundancy of these two individuals.

Regards,
Simon

17. Mr Burton responded to Mr Porter at 8:27am on 19 December 2014. The email was copied into Ms Silva and Ms Dianne Baron. The email read:

Thanks Simon,

All good, however we are members of a relatively small rural community in South Australia...so, yesterday I responded to the Council CEO with the attached.

The amount of \$42k is one third of what they were asking..it will probably land at half.

Regards

18. The council responded to TAFE's suggestion that it make a contribution to the council's operating costs on 19 December 2014. Mr Beaton emailed Mr Burton as follows:

Good Morning Bob,

I think you should reconsider your position. I find the attempt to disassociate TAFE SA from these redundancies to be wrong both morally and legally. It is a simple fact, if TAFE SA had not withdrawn from this arrangement these staff would still be employed.

TAFE SA has a long and continuous history of funding these positions for their requirements certainly there has only been one employer but that does not remove your obligation.

I have attached a copy from 1999 where this Council took a TAFE employee as part of the transition to the new arrangement an(sic) the requirement to fund that position as an example; and yes Council did employ (sic) the TAFE librarian on the transition and there is additional information supporting Council's claim.

Regards

19. Six months later, in June 2015 emails between TAFE (Mr Burton, Team Leader Information Services Ms Sandra Harman-Smith, and Manager Facilities Support Ms Gloria Duurland) and the council (Mr Beaton, Ms Karyn Burton the council's Manager Corporate Services) discuss how the council should invoice TAFE for the amount.⁴
20. On 9 June 2015 Ms Harman-Smith emailed Ms Duurland with the subject 'Berri Library invoice':

Hi Gloria,
The invoice from the Berri Barmera Council is on Basware for coding and has on it-
\$61,560-Salaries
\$14,159-Oncosts
\$63,361-Voluntary Separation Package

Was there an agreement with the council for us to pay for the VSP?

21. Ms Durrland then emailed Mr Burton a few hours later:

⁴ Note that Mr Bob Burton employed by TAFE and Ms Karyn Burton employed by the council are not related to each other.

Hi Bob

Sandra Harman-Smith has advised that the Invoice from the Berri Barmera Council includes amount for TVSP of \$63,361.
Your advice please as I recall a conversation with you re TAFE SA not contributing to the TVSP payment.

Kind Regards

22. Mr Burton replied to Ms Durrland seven minutes later at 1:13pm and copied his response in to Mr Porter, Ms Cathie Brown, Ms Julie Robertson, and Ms Harman-Smith:

Gloria

We will not be paying the \$63k because we do not pay for separation packages for persons not employed by our Minister.

Can you or Sandra please convey same to the Berri Council OR forward the invoice to me, with an email contact at the Berri Council and I will advise.

Regards

23. On 9 June 2015 Ms Harman-Smith emailed the council's Ms Karyn Burton and copied in Ms Duurland and Mr Andrew Gilbert:

Good afternoon Karyn,
As Team Leader for the Information Services team, that included a working relationship with the Berri Joint Use library, I have just received the attached invoice.

While we were expecting the salaries and oncost charges for 1/7/2015 - 31/12/2015, an additional cost of \$63,361 has been added for a Voluntary Separation Package. When the Joint Use Library Agreement expired TAFE made no agreement with Council to cover a separation package.

Can this invoice be adjusted accordingly please and resubmitted for payment.

Please don't hesitate to get back to me with any queries.

Regards

24. On 9 June 2015 Mr Beaton replied to Ms Harman-Smith and copied in the council's Ms Burton, and Berri Barmera Council Mail:

Good afternoon Sandra,

Please see below correspondence between myself and Bob Burton prior to the actual redundancy figure being known with an offer of \$41,162.50, if you wish to discuss please call.

Regards
David Beaton

25. Ms Harman-Smith emailed her colleague Ms Duurland, copied into Mr Gilbert:

Hi Gloria,
See email from Bob to David Beaton below.

So I go ahead with the payment?
Or do we need them to reword the entry on the invoice?

Cheers

26. On 18 June 2015 at 9:08am, nine days after the earlier correspondence Ms Duurland emailed Mr Burton. The email subject is 'Berri Library Staff Redundancies' and reads:

Hi Bob

I have spoken with David Beaton CEO-Berri Barmera Council (thought Sandra Harman-Smith was talking to David but not the case so I have attended to this matter) and David will reissue the invoice today with your suggested wording of "Joint Use Library Operating Costs for 14/15" as the description on the invoice - trust this is all okay with you. (And have advised Sandra - All fixed.)

Kind regards

27. On 30 June 2015 at 8:18am Ms Duurland emailed Mr Beaton at the council. The email is titled 'Berri Library Staff Redundancies - Operating costs invoice' and read:

Hi David

I am needing to confirm that the invoice under discussion below - and regarding which we discussed by phone on 18 June - has been reissued as "joint use library operating costs for 2014/15" for the amount of \$63,361 please??

Thanks heaps!

Kind Regards

28. Mr Burton immediately forwarded the above email to his colleague Ms Burton for her to follow up. Ms Burton then emailed Ms Duurland, also on 30 June 2015:

Hi Gloria,
David passed your email on to me to attend to.

We have amended the invoice for JUL expenditure to 31 December 2014 as requested and forwarded it a couple of weeks ago.
Attached is a copy for your records.

Any further queries please let me know.

Regards

29. On 16 July 2015 Ms Duurland again emailed Ms Burton at the council, and copied in her colleagues Ms Harman-Smith and Mr Gilbert:

Hi Karyn

Further to my messages (and apologies for my voice - on the mend from laryngitis) I refer to Invoice No 10675 which is addressed to Berri TAFE Campus.

First, may I sincerely thank you for your assistance to date in regard to the amendments to this invoice. I am hoping that you are able to further assist by creating 2 separate invoices for TAFE as the payment of the current invoice is proving problematic.

Can I request that one invoice is created for the Joint Library Salaries - \$63,361 + GST and is sent to:
TAFE SA Facilities And Procurement Services Attention Gloria Duurland Scan
Conversion Services Locked Mail Bag 9 Adelaide SA 5001

Please allocate the remainder of the original invoice to a new invoice and send to:
TAFE SA Information Services
Attention Sandra Harman-Smith
Scan Conversion Services

Locked Mail Bag 9
Adelaide SA 5001

Thank you ever so much for your patience and invaluable assistance.

Kind Regards

30. Invoice number 10675 dated 27 May 2015 from the council to TAFE was redrafted by TAFE staff five times. The table below summaries the invoice information, with invoice number five being the final agreed invoice.

	Invoice date	Date TAFE receives Inv	Invoice No	Amount	Invoice description
1.	27/5/15	29/5/15	10675/DUP	\$153,002	Joint Library Salaries 5/19 Share \$61,560 Joint Library Salaries Oncosts \$14,159 Joint Library Salaries Voluntary Separation Package \$63,631
2.	27/5/15	22/6/15	10675/DUP	\$153,002	Joint Use Library Expenditure-6 months to 31/12/14
3.	27/5/15	9/7/15	10675/DUP	\$153,002	Joint Use Library Expenditure-6 months to 31/12/14 Capital Expenditure \$5,245 Joint Use Library Expenditure-6 months to 31/12/14 Recurrent Operating Expenditure \$8,383 Joint Use Library Expenditure-6 months to 31/12/14 Library Books \$18 Joint Use Library Expenditure-6 months to 31/12/14 Periodicals \$276 Joint Use Library Salaries \$139,080
4.	27/5/15	24/7/15	10675/A	\$89,641	Joint Use Library Expenditure-6 months to 31/12/14 Capital Expenditure \$5,245 Joint Use Library Expenditure -6 months to 31/12/14 Recurrent Operating Expenditure \$8,383 Joint Use Library Expenditure-6 months to 31/12/14 Library Books \$18 Joint Use Library Salaries \$75,719
5.	27/5/15	24/7/15	10675	\$63,631	Joint Use Final Salaries

31. On 19 May 2016 Ms Harman-Smith spoke with my Officer over the telephone. Ms Harman-Smith stated that:
- her role was limited to receiving invoices, checking they were correct and elevating them for payment

-
- she worked to Mr Gilbert and usually had no contact with Mr Burton in the ordinary course of her role
 - she received an invoice from the council that contained an additional cost of around \$63,000 and could not understand what it was for
 - she therefore made enquiries within TAFE that the amount was correct
 - she was unaware that there had been previous correspondence between TAFE and the council in relation to this amount
 - she therefore emailed her colleague Ms Duurland and asked what she should do as she was unsure what Basware code to attribute the \$63,000 to
 - she was advised by Ms Duurland to hold off with contacting the council in relation to that invoice
 - she was not privy to what was decided in relation to the invoice
 - she did not have authority to approve invoices.
32. On 19 and 23 May 2016 Ms Duurland spoke with my Officer over the telephone. Ms Duurland stated that:
- she recalled the transaction
 - that TAFE's withdrawal from the JULA made media headlines and that TAFE received negative press about its decision
 - TAFE has subsequently withdrawn from other JULA contracts, the Berri Bamera council was the first
 - all JULA contracts were unusual agreements as they were weighted in favour of the councils. In relation to the council, there were only 200 library items yet it cost TAFE \$100,000 annually so the discussion was made within TAFE to terminate the JULA agreement with the council
 - her line manager was Mr Burton
 - Mr Burton had financial delegations of up to \$1.1million as he was a TAFE Director
 - her understanding about the circumstances surrounding the transaction was that the council employ people to do TAFE's work but they are not TAFE staff
 - she considers that the amount of \$63,631 was not exorbitant as a 'termination payment'
 - her view as to why the invoice was re-written was because the amounts were paid out of different 'buckets' in TAFE and therefore it was easier if these amounts were separated on the invoice to ensure it was accurately reflected
 - that Mr Burton directed her to word the invoice 'Joint Use Library Operating Costs 14/15'
 - the final invoice that was paid had different wording 'Joint Use Library Salaries' to describe the amount of \$63,631. She was unsure if Mr Burton picked this discrepancy up or whether he was happy with the wording; she just knew that he paid it
 - she was 'exasperated' at having to instruct the council to redraft the invoice
 - she understands the payment was authorized by the Acting Chief Executive at the time, Ms Silva
 - in her view there was no intent by Mr Burton to do anything untoward because the payment for a 'good will option' was suggested by Ms Silva. She therefore considers Ms Silva authorized Mr Burton to make the payment to the council.
33. On 3 August 2016 Ms Silva was interviewed in person by my Officer and gave evidence that:
- she is currently a member of the Board of TAFE
 - for a period of 7 months, from July 2014 to February 2015 she held the role of ACE, during this period she was not a board member of TAFE

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- Mr Burton was the Director of Facilities and reported to her as ACE. Mr Burton was responsible for JULA contracts
 - Ms Baron has since been made redundant from TAFE. Ms Baron was, at the time, responsible for libraries and was at the same level as Mr Burton.
 - Mr Porter was the Human Resources Manager and was the most senior person of those listed above. It was his role to determine if TAFE had a liability for payment to the council
 - her understanding of why TAFE withdrew from the JULA was that it was not financially viable
 - she had not read the JULA contract as ACE would not be expected to deal with it. It was Mr Burton's responsibility and within his delegation to deal with. The issue only came to her attention in an email from Mr Burton asking for her view on payment
 - her memory is that Mr Burton asked her opinion on a payment to the council and that she forwarded it to Mr Porter asking him his opinion
 - she recalled a discussion about a 'goodwill' payment as she wanted to support the council and did not want to financially impact its budget. She would prefer to come to an arrangement that would benefit both TAFE and the council and come to a 'common sense approach' and that 'government money to government money' made sense
 - she left Australia to travel to the United Kingdom on 18 or 19 December 2014 and returned mid-January 2015
 - no-one acted in her role in her absence as TAFE was closed for Christmas. She was contactable by email or the Chair of the Board Mr Peter Vaughn could assist if necessary
 - she is unsure if Mr Porter sought legal advice, and has no clear recollection as to whether she read his email reply to Mr Burton and herself that he did not consider TAFE had any obligation to pay the council any money at the conclusion of the contract
 - she presumed the matter had been resolved in her absence and she did not follow it up
 - she is unable to confirm whether money was eventually paid by TAFE to the council
 - she was surprised to hear that money was paid by TAFE to the council after she was shown and read Mr Porter's advice in his email dated 19 December 2014
 - she considered Mr Burton was not authorized to make the payment, as the matter of whether or not TAFE ought to make the payment was unresolved
 - she stated that Mr Porter should have raised with her that a payment was made given his advice
 - her view is that if the council employees were TAFE employees they would have been given generous redundancy payments but technically they were not TAFE employees
 - she considered that if Mr Porter's view was that TAFE should not pay then it should not have. She did not want to set a precedent
 - the amount of \$63,631 or even \$153,000 was well within Mr Burton's budget and his delegation
 - it would have been difficult for TAFE to pick up that this payment was made, if it was made by Mr Burton. She relied on Risk and Audit Committee (of which she was a member) to trace these types of payments
 - split payments (two different codes on invoices) would also usually raise a red flag but if the invoice had changed to one amount it would not have raised an issue
 - she stated that her view in light of Mr Porter's advice was that no money should have been paid to the council at the termination of the JULA contract

- she met with Mr Burton in person on a regular basis in her role as ACE
- she may have discussed this with him in person but cannot recall
- she was not aware though that money had been paid by TAFE
- her view is that it was an unusual payment of TAFE to make and was unacceptable
- had she been aware of the payment, the split invoices, the rewording of the invoices she would have raised it with TAFE's Audit and Risk Committee to investigate.

34. On 10 August 2016 Mr Porter was interviewed by my Officer under affirmation and gave evidence that:

- his role at TAFE was the Human Resource Manager, which was given its current title Director of People and Culture in 2015
- he reports to the Chief Executive, which in late 2014 was Ms Silva
- Mr Burton is the Director of Facilities and Procurement and has been employed by TAFE in various roles for more than twenty years
- the JULA contract is a service agreement and part of Mr Burton's role was to oversee the management of all of those agreements
- his understanding is that JULA agreements are not common
- he is unaware as to whether TAFE sought legal advice in relation to the termination of the contract
- his understanding is that TAFE paid \$63,631 to the council at the end of the contract and that Mr Burton explained to Mr Beaton that a redundancy payment would not be possible but that savings from TAFE would be passed on
- at the time Mr Burton was thinking of exiting the JULA he sought advice from Mr Porter and Ms Silva about redundancies
- he was asked to investigate the issue by Ms Silva
- Mr Burton had financial delegation for \$63,631 to be paid by TAFE to the council
- TAFE undertook an internal investigation into Mr Burton's payment to the council. He was asked by the current CE Mr Robin Murt to look into the issue in February 2016 and provided a briefing to Mr Murt which was approved by Mr Murt on 10 February 2016. My Officer was provided with a copy of the Minute by Mr Porter during the interview. The briefing did not contain any recommendations but stated:
 - I met with Mr Burton on Monday 1 February, 2016 regarding this matter. Mr Burton listed the series of events consistent with the history provided as above
 - Mr Burton acknowledged that TAFE SA had no obligation regarding the redundancy costs for Berri Barmera Council employees however he reports that he acted in good faith to negotiate a commercial agreement per Ms Silva's original advice (11 December, 2014). Mr Burton reports that he did so, in his view, to avoid the potential of legal action and mitigate against further poor media coverage of TAFE SA in the Riverland region.
 - Mr Burton claims that he was acting within his delegated financial authority when making this payment.
 - Mr Burton confirms that he did not advise the Chief Executive, TAFE SA on the matter or the intention to make payment. Mr Burton has no explanation for this other than he was acting in good faith, within his authority.
- following his provision of the Minute to Mr Murt, his understanding was that Mr Burton was informed that his contract would not be extended

- his understanding of Ms Silva's suggestion that a 'goodwill payment be more palatable' was that she was looking for a commercial arrangement where the council would not be adversely affected by TAFE's decision not to renew the JULA contract. His view was that the council's employment terms (that it would be left with two excess employees) was a matter for the council
- he understands that TAFE has legal officers in a small team that worked for Ms Barron and were experienced in employment law. He is unsure if they were consulted about what TAFE's obligations were at the end of the JULA contract. He confirmed that he did not seek any legal advice
- the advice contained in his email to Ms Silva were based on his thoughts, not on any research and he is unsure why he took eight days to reply to Mr Burton and Ms Silva
- he often had verbal discussions with Mr Burton and may have discussed this issue but does not keep notes of these conversations
- he was surprised that Mr Burton acted prior to receiving Mr Porter's email reply, but said that it is his view that Mr Burton would have known that Mr Porter did not think TAFE should have paid the council any money at the conclusion of the contract
- he cannot recall if he took any action once he received Mr Burton's email of 19 December 2014 informing him that he authorised payment to the council. It was close to Christmas and Ms Silva was overseas. He took the view that rather than get involved anymore he felt that it was up to Ms Silva to take it up with Mr Burton and assumed that had been done
- he was informed that a payment had been made by TAFE to the council by Mr Murt, and was surprised because he presumed that any payment was still being negotiated internally within TAFE
- if Ms Silva was concerned then she would have reported the issue to the board otherwise it would be considered an operational issue
- his view as to why the invoice was re-written many times was that he presumes that council employees had in their mind that TAFE would support redundancies. TAFE's view is that it was sharing savings rather than redundancies and wanted to use the language that reflected TAFE's position. He thinks that Mr Burton was effectively trying to get the invoice to reflect what TAFE proposed
- he is unaware as to whether Mr Burton knew council staff personally, but Mr Burton did not speak fondly of Mr Beaton
- Mr Burton is a strong character who had an affinity with regional South Australia and was focused on TAFE operating in an effective and efficient way and wanted to mitigate the impact on TAFE and the council
- it was his view that, knowing what Mr Porter's advice would be about any payment to the council Mr Burton's motivation to resolve the matter was greater than his desire to follow Mr Porter's advice
- Mr Craig Telford is the Manager of Internal Audit and it was he who initially queried the payment from TAFE to the council with Mr Murt.

35. On 22 August 2016 Mr Burton provided a written reply to my investigation answering the allegations put to him. Mr Burton stated:

- he authorised the payment to the council of \$63,631
- the payment was not for a VSP but:

was provided in goodwill for the inconvenience and increased operating expense that would fall to Council in the short term following our withdrawal from the Join Use Library Agreement (JULA) which was advised with minimum notice.⁵

⁵ Letter from Mr Burton to my Officer Ms Fairhead Hall, 22 August 2016, p1.

- he agreed that there was no requirement for TAFE to pay for a VSP to the council
 - he authorised the payment:
 - ...because TAFE SA had just exited the agreement, with little warning and at considerable inconvenience to the Council. It was considered compensation for inconvenience and short term operating costs caused by TAFE's withdrawal from the JULA
 - he considered that he had agreement from Ms Silva that a goodwill payment would be 'more appropriate' than payment for a VSP
 - his financial delegations were for payments up to \$550,000 and financial authorisations up to \$330,000
 - he did not consider the payment by TAFE to the council an unusual payment in the context of TAFE's withdrawal from the contract at short notice and 'recurrent savings benefit of \$175,000 gross and \$95,000 per annum'
 - TAFE's withdrawal from the JULA with the council was the first JULA that TAFE sought to exit. TAFE has also withdrawn from the Port Lincoln JULA
 - on 1 December 2014 the council requested TAFE pay \$123,487.51 at the exit from the JULA
 - on 27 May 2015 an invoice from the council to TAFE requesting \$153,002 was received but rejected because of the reference to the VSP
 - during the 2014/2015 financial year TAFE paid the council a total of \$332,494, which included Invoice 10675/A on 27/5/15 for \$63,631 for 'one off, as a goodwill payment to Council for JULA operating expenses' and Invoice 10672 on 27/5/15 for \$89,641 for '14/15 JULA Salaries & Operating expenditure'.
 - the invoice was re-written three times 'because the Council CEO was adamant that TAFE should pay for the VSP's and we were equally adamant that we would not'
 - there were five invoices in total
 - the invoice needed to be split to show transparency in relation to the goodwill payment
 - he instructed the council to use the wording 'joint use library operating costs 2014/15'
36. On 8 September 2016 Mr Murt provided a written reply to me answering my request for further information. Mr Murt enclosed a copy of TAFE's investigation report dated 8 February 2016 prepared by Mr Porter; and a copy of a letter to Mr Burton dated 1 April 2016 informing him that his current contract due to expire on 5 December 2016 would not be extended.
37. On 28 October 2016 Mr Murt provided additional information as requested, including copies of the Job and Person Specification for the Director of Facilities and Procurement, and a copy of the many financial delegations associated with that role. Mr Murt informed me that:
- Mr Burton's contract was not renewed because of his questionable decision making skills on various occasions, including in respect of this transaction. This decision was balanced with Mr Burton's valuable contribution over many years to TAFE
 - informal warnings have been given to Mr Burton over the years, in this regard Mr Murt took advice from the Internal Auditor and the Director of Human Resources and Organisational Development
 - the director of Facilities and Procurement has general financial delegation of \$1.1 million dollars to authorise payments associated with contracts re property services.

Relevant law/policies

38. 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.

Whether Mr Bob Burton committed an act of maladministration in public administration in relation to a payment to the council in July 2015

39. In order for Mr Burton to have committed an act of maladministration I need to determine whether his conduct in instructing TAFE to pay \$63,631 to the council was an irregular and unauthorised use of public money (s5(4)(a)(i) of the ICAC Act) or substantial mismanagement of public resources (s5(4)(a)(i)) or substantial mismanagement in or in relation to the performance of official functions (s5(4)(a)(ii)) .
40. I consider from the above evidence that the payment to the council was an irregular payment as it was not the kind of payment that would have been made regularly by TAFE. Evidence that supports my view is:
- that Mr Burton sought the advice from his colleagues including his peers and senior management as to whether TAFE should make this payment at all despite his many years of experience working at TAFE
 - that the invoice was redrafted five times
 - Ms Duurland, Ms Silva and Mr Porter when interviewed stated that the payment was irregular.
41. As to whether Mr Burton's conduct in agreeing for TAFE to pay the council \$63,631 resulted in an unauthorised use of public money I consider that:
- On the one hand Mr Burton had the financial delegation to authorise the amount of money that was paid to the council
 - Mr Burton acknowledged that he authorised the payment
 - It is the view of Ms Duurland, Ms Harman-Smith, Ms Silva and Mr Porter also that Mr Burton authorised the payment
 - Mr Burton sought advice from Mr Gilbert, Ms Silva and Mr Porter as to whether a payment should be made in these circumstances
 - On the other hand Mr Burton did not wait for the outcome of advice from Mr Porter as instructed by Ms Silva before reaching a decision as to whether to pay the council money
 - Mr Burton has since not had his employment contract renewed as an outcome of his questionable decision making skills
 - there was confusion amongst staff as to what the payment was for: redundancy for council staff who did TAFE work; outgoing contractual costs or a goodwill payment
 - TAFE had no legal obligation under the terms of the JULA contract to pay the council any money

- TAFE staff have an obligation under the Code of Ethics for the South Australian Public Sector (**Code of Ethics**) to use the government's financial resources 'efficiently and only for appropriate purposes as authorised'.⁶
42. Weighing the above factors I consider that the payment to the council of \$63,631 was authorised because Mr Burton had the financial delegation to make the payment. Aside from whether he ought to have authorised the payment or not Mr Burton's role as Director of Facilities and Procurement was to negotiate contracts on a case by case basis and he had the financial delegation to make the payment. I therefore consider that the payment, whilst irregular, was not unauthorised.
43. While he had sought Ms Silva's advice and she had suggested a goodwill payment would be 'more palatable', Mr Burton did not need Ms Silva's or anyone else's authorization given his financial delegation. I do consider however that in seeking the views of his colleagues initially, and subsequently of Ms Silva that there was doubt in his mind as to whether a payment to the council at the conclusion of the JULA was necessary or indeed advisable. Nevertheless the payment was authorized.
44. I now turn to consider whether Mr Burton's conduct in authorising the payment to the council was substantial mismanagement of public resources. Mr Burton, in his response to my Office argued that TAFE's exit from the JULA gave it a 'recurrent savings benefit of \$175,000 gross and \$95,000 net' per annum and it was in that context that he considered TAFE offering \$63,631 for a goodwill payment as part of its 'withdrawal negotiation' was reasonable. I therefore understand Mr Burton's argument to be that he negotiated a commercial arrangement that was within the scope of his role to negotiate, and was less than what the council were asking (\$153,002) and therefore TAFE was saving money by its decision not to renew the contract.
45. It is clear from reading the JULA agreement however that there was no legal obligation for TAFE to pay the council any money at the cessation of the contract. The payment of \$63,631 therefore is an additional amount paid by TAFE that it had no obligation to pay. The question is, whether this represents substantial mismanagement of public resources?
46. I consider that the additional payment by TAFE to the council for \$63,631 is substantial mismanagement of its public resources for the following reasons:
- the payment was unnecessary
 - the amount of money was significant
 - Mr Burton did not wait for the advice of the ACE once he sought it
 - Mr Burton was incorrect in his belief that the payment was saving TAFE money as pointed out to him by his colleagues and Mr Porter.
47. I also consider that Mr Burton's conduct is substantial mismanagement in the performance of his official functions (section 5(4)(a)(ii) of the ICAC Act) for the same reasons as cited above.

Conclusion

In light of the above, my final report is that Mr Burton committed an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act because his conduct resulted in substantial mismanagement of TAFE's public resources and it involved substantial mismanagement in or in relation to the performance of his official functions.

⁶ Code of Ethics for the South Australian Public Sector, p 12 'Use of Government/Public Resources'.

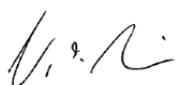
Summary and Recommendations

I have not made any recommendations in relation to this matter because Mr Burton's contract has not been renewed and he has left the employ of TAFE.

Final Comments

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

I will send a copy of my report to the Hon. Susan Close, MP, Minister for Higher Education and Skills as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

9 February 2017