

**Final Report**  
**Full investigation - *Ombudsman Act 1972***

Complainant	Adelaide Hills Council
Council member	Cr Malcolm Herrmann
Council	Adelaide Hills Council
Ombudsman reference	2017/13047
Council reference	IC18/488
Date complaint received	20 December 2017
Issues	<ol style="list-style-type: none"><li>1. Whether Cr Herrmann breached clause 3.2 of the Code of Conduct for Elected Members ('the Code of Conduct') by not correctly creating, storing and disposing of an email and acted contrary to law within the meaning of section 25(1)(a) of the <i>Ombudsman Act 1972</i> (SA)</li><li>2. Whether Cr Herrmann breached clause 3.4 of the Code of Conduct by inappropriately dealing with an email under the <i>State Records Act 1997</i> (SA) and acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act</li></ol>

### Jurisdiction

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).<sup>1</sup> An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.<sup>2</sup>

Section 63 of the Local Government Act requires elected members to comply with the Code of Conduct. A breach of the Code of Conduct therefore constitutes a breach of the Local Government Act.

### Investigation

My investigation has involved:

- assessing the information provided by Mr Aitken on behalf of the council
- seeking a response from Cr Herrmann
- seeking a response from a council resident, Mr Kevin Kaeding

<sup>1</sup> The Code of Conduct was gazetted on 29 August 2013.

<sup>2</sup> Section 263A(4) Local Government Act; section 3, Ombudsman Act.

- seeking more particulars from the complainant
- considering the Ombudsman Act, the Code of Conduct and the council's Records and Information Management Policy (**RIM Policy**) and Records and Information Management for Council Members Procedure (**RIM Procedure**)
- providing the council and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

### Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>3</sup> It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...<sup>4</sup>

### Response to my provisional report

In response to my provisional report Cr Herrmann replied by email on 22 June 2018. Cr Herrmann did not have any comments to make about the substance of the provisional report, but made enquiries about when and how the recommendation would be implemented. I have addressed these queries in my letter to Cr Herrmann attaching this report. Cr Herrmann also wanted it noted that he has already tendered an apology verbally for breaches he was found to have made by the LGGP of clauses 2.6, 2.7, and 2.8 at the council meeting on 27 March 2018.

Dr Jan-Claire Wisdom, Deputy Mayor responded on behalf of the council by letter dated 2 July 2018. The council's response was thorough and lengthy. I have made some of the uncontroversial amendments suggested by Dr Wisdom (namely, paragraphs A-E, G-J, M, P, S, V of the council's response).

However, in regards to the remaining paragraphs my response is as follows:

- Paragraph F asks me to state in my report that the original complaint did not come from a particular employee group of the council. I decline to do so. All investigations are conducted in private and it is not the role of the Ombudsman to curb assumptions that may or may not be made about a complainant's identity
- Paragraph K asks me to conclude from the Telstra records that Cr Herrmann did not telephone Mr Miller prior to sending the email to residents at 3:57pm on 8 January 2017. However, I decline to draw this conclusion for two reasons. Firstly, the Telstra record provided by Cr Herrmann does not include outgoing or incoming calls to and from Mr Miller's mobile telephone number, and secondly Telstra informed Cr Herrmann that there may be some inaccuracies with the report. Dr Wisdom has since informed me that Mr Miller has also contacted Telstra for his mobile phone records between 6 and 13 January 2017, which located two calls from Mr Miller's mobile telephone number to the council on 10 January 2017. Again, only records of outgoing calls were

<sup>3</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>4</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

provided by Telstra. I therefore cannot determine whether a phone call was made between Mr Miller and Cr Herrmann based on these records.

- Paragraph L asks me to recommend that Cr Herrmann apologise to the council in addition to my recommendation that Cr Herrmann attend training. I note that Cr Herrmann has already apologised to the council on 27 March 2018 for the conduct that gave rise to this complaint. I therefore do not consider in the circumstances that the council requires a further apology
- Paragraph N asks me to consider Cr Herrmann's previous work history in local government. This information was not previously provided to my Office nor, in my view, adds anything further to the particular allegation
- Paragraph O states the factual inaccuracy of Cr Herrmann's personal views about the ERR, which I do not consider relevant to my investigation
- Paragraph Q submits that I should deal with paragraph 29 of my provisional report in separate correspondence. I decline to do so and consider it relevant.
- Paragraph R states that it appears unlikely, on the balance of probabilities that the missing section of the email would have occurred inadvertently. Cr Herrmann and Mr Kaeding have both denied deleting a portion of the email, and, I cannot rule out the possibility of it being deleted in error. I therefore cannot conclude as Dr Wisdom requests
- Paragraph T request that I revisit the weighing up of evidence and my conclusion, however I do not consider the information provided causes me to change my view
- Paragraph U requests that I reconsider recommendations available to me under section 263B(1) of the Local Government Act. I consider the recommendation made in my provisional report to be appropriate and do not intending adding additional recommendations
- Paragraphs W and Y submits that Cr Herrmann has, by informing my investigation that he does not save or keep emails for a long time breached clause 3.4 of the Code, which requires elected members 'not to exercise or perform, or purport to exercise or perform, a power, duty, or function that he or she is not authorised to exercise or perform'. In my view, Cr Herrmann's conduct is not the type of conduct envisaged by clause 3.4 which envisages elected members acting without authority, which I do not consider fits the circumstances of Cr Herrmann's breach of the Code
- Paragraph X states that there is implied criticism in my report in relation to other examples of emails incorrectly sent or stored not being provided by council. I do not consider this to be the case and decline to amend my report in this regard.

## Background

1. Cr Herrmann is an elected member of the Adelaide Hills Council (**the council**).
2. The council adopted a RIM Policy on 18 August 2015 and has a RIM Procedure that all elected members must comply with when creating, receiving, and sending emails.
3. Council records document that Cr Herrmann personally attended training about the RIM Policy on 17 March 2015, 28 April 2015, 20 May 2015, 25 August 2015, and moved a motion on 27 January 2015 in relation to the RIM Policy and was therefore aware of the requirements of the RIM Policy and RIM Procedure.
4. On Sunday 8 January 2017 at 3:54pm Cr Herrmann sent an email from his private email address [malcherm@hotmail.com](mailto:malcherm@hotmail.com) to council residents Mr Justin Goodman, Ms Deb Goodman, Ms Pauline Gill and Ms Joan Playford. The email had the subject 'Fw: ELECTOR REPRESENTATION REVIEW-PROPOSAL TO ABOLISH COUNCIL WARDS' and read as follows:

Hi all,

Can you please promote this through your networks, Particularly(sic) that in a household there can be two people able to complete the form(sic)

Also please advertise the public meeting.

(Good submission from the KRA, but it will only count as one representation)

Malcolm

5. An email was then forwarded three minutes later at 3:57pm by Cr Herrmann to the above named residents and read as follows:

Council is consulting on a proposal to abolish all wards and introduce area councillors. There is a report entitled "Representation Review Report" available on the AHC home page which sets out the proposal in detail.

There are some disadvantages to this proposal:

1. It is at odds with a community survey in which 96% of respondents indicated they favoured the retention of wards,
2. The potential for members being elected from the more populous parts of the council.
3. An organised single interest group (including a political party) could gain considerable representation on council
4. Members may not have empathy for, or affiliation with, all communities across the council

How can you be involved and make your views known?

1. Go to the AHC website and complete the online survey form
2. Go to your local council Service centre (Gumeracha) and complete a survey form
3. Complete the attached survey form and return by post (REPLIED(sic) PAID) or a Service centre
4. You may receive a survey through the mail. Complete and return (REPLIED PAID) ALL ELECTORS ARE ENTITLED TO COMPETE THE SURVEY.
5. Complete the survey form attached to this email and return to council (REPLY PAID)
6. Attend a public meeting on MONDAY 30 JANUARY 2017 at the Gumeracha Civic Centre at 6:00pm to make your views known.

CI Malcolm Herrmann  
04xxx xxxxx (redacted)

6. On 9 January 2017 at 2:39pm council resident Mr Kevin Kaeding emailed Cr Herrmann at his private email address in response to his email out to residents:

Hi Malcolm

Thanks for the information. Appreciated. Malcolm, residents and ratepayers would believe AHC is not listening to them or is it the State Government calling the shots. 96% of respondents favour retention of Wards the AHC must retain Wards indicated by the ratepayers.

Cheers

Kevin Kaeding

Kenton Valley

How can you be involved and make your views known?

1. Go to the AHC website and complete the online survey form
2. Go to your local council Service centre (Gumeracha) and complete a survey form
3. Complete the attached survey form and return by post (REPLIED(sic) PAID) or a Service centre
4. You may receive a survey through the mail. Complete and return (REPLIED PAID)  
ALL ELECTORS ARE ENTITLED TO COMPETE THE SURVEY.
5. Complete the survey form attached to this email and return to council (REPLY PAID)
6. Attend a public meeting on MONDAY 30 JANUARY 2017 at the Gumeracha Civic Centre at 6:00pm to make your views known.

CI Malcolm Herrmann  
04xxx xxxxx (redacted)

7. On 9 January 2017 at 3:27pm Cr Herrmann, from his personal email address, forwarded Mr Kaeding's email to council administration's Mr Lachlan Miller, Executive Manager Governance & Risk asking:

Can you accept this as a response to the survey(sic). An opinion is expressed.

8. I note that Mr Kaeding's email that was forwarded to council administration only included the latter part of Cr Herrmann's initial email to residents, ie. how residents can be involved and make their views known, and did not include the disadvantages to the proposal.
9. On 9 January 2017 at 3:36pm Mr Miller replied to Cr Herrmann's email as follows:

Good afternoon Malcolm

I hope you had a happy and relaxing Christmas break.

Thank you for your email, it came from your private email address but in accordance with Council's Records and Information Management Policy I am responding to your council address as this is council business.

In terms of your question, I can include it in the feedback received but I think Mr Kaeding could achieve greater 'bang for his buck' by being more specific about the position he favours.

Could you please advise what the email was that Mr Kaeding was responding to? If it was one that you are generating for your networks I would appreciate a copy for the Representation Review records file.

Regards

Lachlan Miller - Executive Manager Governance & Risk - Corporate Services Adelaide Hills Council

10. On 9 January 2017 at 4:35pm Cr Herrmann, from his council email address, replied to Mr Miller as follows:

L I am not sure whether my email out was council business or my own electoral business, hence I used my own address book. But it is now in the system.

11. On 29 March 2017, a Code of Conduct complaint against Cr Herrmann was made to the council that alleged that Cr Herrmann had breached:
  - clause 2.6 of the Code by not complying with the council's RIM Policy
  - clause 2.8 of the Code by failing to provide accurate information about the Elector Representation Review (**ERR**) report.
12. On 20 April 2017 the Deputy Mayor referred the Code of Conduct complaint to the Local Government Association's Local Government Governance Panel (**LGGP**). The LGGP obtained documentation for its investigation which was disclosed to the council with its Final Report. The LGGP investigation made the following findings and recommendations:
  - 1) -3)
  - 4) Council consider reference of breaches of Part 3 of the Code to the Ombudsman for investigation under Section 263 of the *Local Government Act* 1999.
13. At the council's meeting on 12 December 2017 it considered the LGGP's Investigation Report and resolved at item 302/17:
  5. To submit the suspected breaches of Part 3 of the Code of Conduct for Council Members to the Ombudsman for investigation under Section 263 of the Local Government Act 1999.
14. On 22 January 2018, the council provided further information in support of the complaint that Cr Herrmann's conduct ought to be investigated by me for breaches of Part 3 of the Code of Conduct. The council's Chief Executive Officer Mr Andrew Aitken included in his correspondence the following information:
  - that Cr Herrmann made a submission to the LGGP investigation that at the time he sent the email to Mr Miller (at 3:57pm on 8 January 2017) he had telephoned Mr Miller where the two men had discussed whether the content of the email was by its nature "electoral", "political" or council business.
  - that Mr Miller advised the LGGP that he had 'no record or recollection of the alleged telephone conversation taking place, and that if he had a conversation with a Council Member of that nature, then he would have made a note of the same and would have followed up with an email to the Council Member'
  - that Cr Herrmann's emails at 3:36pm and 4:35pm on 9 January 2017 do not refer to the alleged telephone conversation, which suggests that the telephone conversation may not have taken place.
15. On 31 January 2018 I emailed council resident Mr Kevin Kaeding and requested a copy of his emails to and from Cr Herrmann to discover whether Cr Herrmann removed the discussion about the disadvantages of the ERR prior to forwarding Mr Kaeding's email to council administration.
16. On 14 February 2018 Mr Kaeding emailed and informed me that he deleted all emails to and from Cr Herrmann pertaining to the subject of the ERR due to the high volume of emails he receives.
17. On 19 March 2018 I informed Cr Herrmann in writing of the allegations against him and asked for his response.
18. On 7 April 2018 Cr Herrmann replied to my Office and informed me that:

- he did not know why the email he forwarded to Mr Miller did not contain the entire email he sent to residents, including the disadvantages of the ERR
- in an effort to prove that he telephoned and spoke with Mr Miller he contacted his mobile phone provider, Telstra, and asked it to identify all phone calls made from his mobile phone number to the council between the 6 and 13 January 2017. Telstra identified two telephone calls, on 10 January 2017, at 4:44am (probably a time error on the server) to Mr Terry Crackett and 6:46pm (this could also be an incorrect time) to the council switchboard
- the Telstra record does not cover whether Cr Herrmann telephoned Mr Miller's mobile number, which Cr Herrmann may have done
- Telstra have informed Cr Herrmann there may have been some inaccuracies with its record of phone calls
- he recalled distinctly speaking with Mr Miller on the issue as to whether the ERR emails were council business or political/ electoral and that the conclusion was "it was a matter of opinion"
- whilst he accepted that he attended the RIM Policy training as stated, he cannot recall detailed explanations of elected members responsibilities in relation to the State Records Act, or being provided with a copy of the State Records Act
- he is confident that all of his council emails have now been sent to the council for record keeping
- he does not save emails for a long time either on his personal or council email accounts but is currently making more effort to separate his council business from his personal business which includes a lot of correspondence with community groups and organisations
- the LGGP concluded in its Final Report that the ERR emails were council business and not political/ electoral business
- he never had any intention of misleading the council and will apologise to the council if found to be in error, as he was required to do as a result of the Code of Conduct complaint against him.

## Relevant law

19. Section 63 of the *Local Government Act 1999* (SA) provides:

### **63—Code of conduct for members**

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct.

20. Clauses 3.2 and 3.4 of Part 3 of the Code of Conduct provides:

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

21. Section 25 of the Ombudsman Act provides:

### **25—Proceedings on the completion of an investigation**

- (1) This section applies to any investigation conducted by the Ombudsman as a result of which the Ombudsman is of the opinion that the administrative act to which the investigation relates—

(a) appears to have been made contrary to law; or

(b)- (g)

## 22. The council's RIM Policy provides:

### 2. OBJECTIVES

The objectives of this policy are to set out Council's commitment to:

2.1 an information and records management environment that fulfils Adelaide Hill's Council's legislative obligations; and

2.2 the preservation of the Council's "corporate memory" through sound and consistent record keeping practices and the comprehensive and accurate capture of information to meet legal, evidential and accountability requirements.

The policy also:

2.3 articulates the records and information management responsibilities of employees, Council Members and other relevant individuals working with one of the Council's key assets - its information.

### 3. SCOPE

This policy applies to all Council Members, employees, volunteers, work experience placements, contractors and sub-contractor working on behalf of Council.

All records and information, of any format, generated or received in the conduct of Council business are within the scope of this policy.

### 4. LEGISLATIVE FRAMEWORK

The *State Records Act 1997* ("the Act") governs the obligations and responsibilities of councils in relation to the management of official records. Under this Act, Council has an obligation to maintain official records in its custody in good order and condition. This obligation applies to the capture, storage, maintenance and disposal of records regardless of format (physical or electronic).

In addition to its record management obligations under the Act, Council is obliged to keep adequate records in order to fulfil its responsibilities under other Acts such as the *Freedom of Information Act 1991*, to fulfil legal processes, such as discovery and subpoenas, and to meet any requirements by Royal Commissions, ICAC, the Ombudsman, the Courts, auditors and other bodies.

### 5. DEFINITIONS

...

**Record** - Information created, received and maintained by Council in the conduct of its business which provides evidence of a business transaction. It is a record if it meets any of the following criteria:

- 5.1 Forms part of a business transaction/ relates to Council's business
- 5.2 Adds value to an existing record
- 5.3 Shows a transaction or how the transaction was dealt with
- 5.4 Shows a decision and how it was reached
- 5.5 Provides evidence of an event (e.g. when and where it happened)
- 5.6 Indicates advice given and who provided it
- 5.7 Requires someone to action it
- 5.8 Relates to a formal draft of a document, an agreement or legal document
- 5.9 Demonstrates compliance with statutory or other regulations

A record can be in various formats (e.g. letter, file note, calendar entry, social media post, sound recording, video file, legal titles, contracts or an email) and is determined by the *content* and not the *format*.

Where more than one copy of a record exists, the *official record* is the one used by the council as part of their work activity and retained for the length of the retention period. The official record should contain all annotations made to the document.

...

## 23. RESPONSIBILITIES

All individuals identified in the Scope need to be aware of and comply with Council's information and records management requirements against all activities they undertake in performance of their duties and functions.

Their responsibilities include:

- a. creating, capturing, maintaining and retrieving all Council records in *authorised corporate systems* to support the conduct of their business activities;
- b. ensuring records are created in all appropriate circumstances immediately, or as soon as practical, after an event, decision, agreement or business action.
- c. Learning how and where records and information are kept within Council;
- d. Not destroying or amending Council records without authority from the Council Records Team;
- e. Being aware of and complying with Council's information and records management procedures.

Council employees, Council Members and all relevant individuals who do not comply with this Policy may be subject to disciplinary action under the relevant Code of Conduct, and/or subject to criminal and civil proceedings. Section 17 of the State Records Act provides for a maximum fine of \$10,000 or imprisonment for two years. Council Employees and Council Members should report breaches of this Policy to the Chief Executive Officer.

### 23. The council's RIM Procedure provides:

#### 3. Information not classified as a record

Information that is created, sent or received by Council Members when they *are not* discharging functions of Council are not classified as records.

Examples include, but are not limited to:

- records relating to political or electoral issues e.g. lobbying for votes, supportive emails from members of the community regarding elections or political stances
- ...

#### 4. Creation of records

Council Members are responsible for ensuring any records they create or receive while conducting the business of Council are stored within Council's record keeping system.

##### 4.1 Electronic records

Electronic records should be forwarded to the Records Team via [mail@ahc.sa.gov.au](mailto:mail@ahc.sa.gov.au). Examples of electronic records include, but are not limited to:

- emails
- ...

4.1.1 email correspondence is to be conducted via the Council Member's corporate email account. Advice from the Ombudsman states Council Members conducting duties via personal email accounts are breaching the *State Records Act 1997*.

4.1.2 email records received via a Council Member's personal email account are to be forwarded to the Records Team to be captured within the records management system. It is recommended the sender is advised that emails are to be directed to the corporate email account when correspondence relates to the Council Member's duties.

**Whether Cr Herrmann breached clause 3.2 of the Code of Conduct by not correctly creating, storing and disposing of an email and acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act 1972**

24. When asked to articulate how Cr Herrmann has breached clause 3.2 of the Code of Conduct, the council provided three 'elements' evidencing how Cr Herrmann's conduct exercised a lack of care and diligence in the course of performing his official duties:
- a) that Cr Herrmann was aware of and practised in using the councils RIM Policy and RIM Procedure as supported by council records including attending training sessions and moving a council motion that referred to the RIM Policy
  - b) that Cr Herrmann amended/ redacted an email sent from Mr Kaeding from his private email account in relation to ERR received prior to forwarding it to council administration and failed to provide the original email when requested by council administration
  - c) that Cr Herrmann cannot support his submission that he telephoned Mr Miller about whether the ERR email was council business or political/ electoral and therefore did not need to be emailed to the council and saved as a 'record' in accordance with the RIM Policy.

25. In response to the above information Cr Herrmann informed me that:

- he attended the council training but did not recall specifics in relation to creating, storing, and sending emails
- that he did not know how the email came to be sent to council administration without the section about the disadvantages of the ERR proposal but that his understanding is that:

I sent out the email regarding the ERR on 8 January at 3.57pm. That outlined my political position on the ERR. I listed the against side of the argument – a position which around 800 residents supported, even though council decided that it was only one submission. The email to K Kaeding on 9 Jan was sent to Mr Miller for inclusion in the submissions to the review. To me, it looks like a different email from the one sent out on 8 January.

- the phone records are inconclusive in supporting Cr Herrmann's assertion that he and Mr Miller spoke about whether the email was classified as a 'record' for the purposes of the RIM Procedure which would not require a copy of the email to be sent to council administration to be saved.

26. Clause 3.2 of the Code of Conduct requires elected members to perform their official duties and functions with due care and diligence. I consider that Cr Herrmann was performing his official functions and duties whilst undertaking the activity of emailing ratepayers about the council's mandated public consultation.

27. At the outset, I will state that I consider the emails to be council related and not political/ electoral in nature because they involved discussion about a public consultation. I therefore consider the emails to be a 'document' for the purposes of the State Records Act and the RIM Policy and RIM Procedure.

28. I also note that the use of private email addresses is not, in itself, contrary to the Local Government Act or the State Records Act. However, under section 5 of the State Records Act, the council 'must ensure that official records of enduring evidential or informational value are preserved for future reference.' I have provided this advice to all councils by letter dated 7 January 2015. I note that my advice is not accurately represented in clause 4.1.1 of the RIM Procedure, which states:

Email correspondence is to be conducted via the Council Member's corporate email account. Advice from the Ombudsman states Council Members conducting duties via personal email accounts are breaching the *State Records Act 1997*.

29. The first question in determining whether Cr Herrmann breached clause 3.2 is to query why the entire email by Cr Herrmann to residents was not forwarded to council administration? The alternative scenarios, as I see them, are:
- Cr Herrmann deleted the section that set out the disadvantages of the proposal (which he has denied doing to the council and to my Office)
  - Mr Kaeding deleted that part of the email when he replied to Cr Herrmann with his view (which he does not recall)
  - it was a genuine mistake by either Cr Herrmann or Mr Kaeding.
30. Both Cr Herrmann and Mr Kaeding deny amending the email from its original form. I am therefore unable to conclude who amended the email, or if it was deliberately done. To do so would be entirely speculative.
31. Cr Herrmann, when speaking with my Officer appeared genuinely confused about how the email he forwarded came to be missing a section of the text. I do accept that the removal of part of the email may have been inadvertent and not, as the council alleges, a deliberate attempt to circumvent the requirements of the council's RIM Policy, RIM Procedure or the State Records Act.
32. Weighing up the evidence presented to me, I consider that, in creating, sending and storing the emails on the ERR process Cr Herrmann demonstrated a lack of diligence and care in the performance of his official duties as an elected member because:
- he did not forward his email sent to residents to council administration in the first instance, but only when he got a reply from Mr Kaeding that supported his personal view about the abolition of council wards
  - if the reason that Cr Herrmann did not forward his email to council administration was because he considered the email 'electoral/ political' then he ought to have kept a proper record of the reasons why he made that decision, i.e. his alleged conversation with Mr Miller
  - all emails sent by Cr Herrmann that are concerned with council business ought to be sent via Cr Herrmann's council email account and not his personal email account as required by the RIM Policy
  - Cr Herrmann's emails were not initially provided by Cr Herrmann in their entirety to council administration as demonstrated by the fact that they were discovered by council only in the course of the Code of Conduct complaint against Cr Herrmann.
33. Whether the error was inadvertent or deliberate, I consider there was a lack of diligence and care by Cr Herrmann in his role as an elected member in dealing with these emails.

## Opinion

In light of the above, I consider that Cr Herrmann breached the provisions of section 63 of the Local Government Act and clause 3.2 of Part 3 of the Code of Conduct. In this way, Cr

Herrmann acted in a manner that appears to be contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council require Cr Herrmann to attend training on the council's RIM Policy and the State Records Act.

**Whether Cr Herrmann breached clause 3.4 of the Code of Conduct by inappropriately dealing with an email under the State Records Act 1997 and acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act**

34. The council alleged that Cr Herrmann breached clause 3.4 of the Code of Conduct by the manner in which Cr Herrmann dealt with official records. The council alleged that:
- Cr Herrmann 'created, stored, altered and potentially disposed of official records located on his private computer without any authorisations under the *State Records Act 1997*'
  - that in the course of the LGGP Code of Conduct investigation, Cr Herrmann had sent and received other emails regarding council business from his private email address.
35. Cr Herrmann has informed me that he:
- did not intend to breach the council's RIM Policy or State Records Act requirements by using his personal email account to send emails that relate to council business and by not directly forwarding these emails to council administration and by sending incomplete emails to council administration
  - is not entirely clear of the requirements of the State Records Act for elected members
  - apologised to the council for his conduct in regards to the use of personal email account as recommended by the LGGP investigation, and that he had no intention of breaching the Code of Conduct by the ERR emails.
36. Clause 3.4 of the Code of Conduct requires an elected member not to exercise or perform, or purport to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform.
37. I consider further investigation into this aspect of the council's complaint is not necessary or justifiable pursuant to section 17(2)(d) of the Ombudsman Act for the following reasons:
- clause 3.4 is the incorrect clause in relation to Cr Herrmann's conduct because he was not attempting to act without authority or beyond a power, duty or function that he was not entitled to exercise as an elected member
  - whilst the council referred to other emails incorrectly sent and stored by Cr Herrmann, it did not provide these to my investigation in support of its allegation
  - as Cr Herrmann has informed my investigation that he has examined his private and council email accounts and made corrections where required, I am satisfied that the issue has been addressed by Cr Herrmann.

## Opinion

In light of the above, I consider that further investigation into whether Cr Herrmann breached clause 3.4 of Part 3 of the Code of Conduct is unnecessary and unjustifiable pursuant to the Ombudsman Act.

## Summary and Recommendation

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

- Cr Herrmann breached the provisions of section 63 of the Local Government Act and clause 3.2 of Part 3 of the Code of Conduct. In this way, Cr Herrmann acted in a manner that appears to be contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act
- further investigation into whether Cr Herrmann breached clause 3.4 of Part 3 of the Code of Conduct is unnecessary and unjustifiable pursuant to the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that Cr Herrmann attend training on the council's RIM Policy and the State Records Act.

## Final comment

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

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

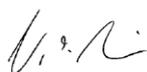
In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **26 September 2017** on what steps have been taken to give effect to my recommendation/s above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as that above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the District Court.

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



Wayne Lines  
SA OMBUDSMAN

26 July 2018