

Report

Full investigation pursuant to referral under section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012*

Public Authority	City of Victor Harbor
Public Officers	Cr Terry Andrews
Ombudsman reference	2017/11639
ICAC reference	2017/000155
Date of referral	2 November 2017
Issues	<ol style="list-style-type: none">1. Whether Cr Terry Andrews deceived members of the public by posting an incorrect media release on social media about the Whale Centre in breach of the Code of Conduct for Elected Members thereby committing misconduct in public administration2. Whether Cr Andrews used his council signature block on personal emails in breach of the Code thereby committing misconduct in public administration.

Jurisdiction

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act), as raising a potential issues of misconduct within the meaning of that Act (the referral).

Section 14B of the Ombudsman Act provides:

14B—Referral of matter by OPI or ICAC

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
- (a) will be taken to relate to administrative acts for the purposes of this Act; and
 - (b) must be dealt with under this Act as if a complaint had been made under this Act and—
 - (i) if the matter was the subject of a complaint or report under the ICAC Act —as if the person who made the complaint or report under that Act was the Complainant under this Act; or
 - (ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.
- (2) In this section—

Commissioner means the person holding or acting in the office of the Independent Commissioner Against Corruption under the ICAC Act;

ICAC Act means Independent Commissioner Against Corruption Act 2012;

Office means the Office for Public Integrity under the ICAC Act.

These issues concern alleged breaches by Cr Andrews of clauses 2.5, 2.7, 2.8, 3.1-3.3 of Part 2 of the Code of Conduct for Council Members (**the Code**). Clause 2.25 of Part 2 of the Code sets out the disciplinary action that can be taken against elected members in breach of the Code. As a contravention of Part 2 can therefore constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

The referral is based on a report made to OPI.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking responses from Cr Andrews
- clarifying the response with Cr Andrews
- interviewing Cr Andrews under oath
- considering the Code, the ICAC Act and the Ombudsman Act
- providing Cr Andrews and the reporter with my provisional report for comment, and considering their responses
- providing Ms MacKirdy, the Chief Executive Officer with a copy of the report for her information
- 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.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

In response to my provisional report, Cr Andrews responded by email on 29 May 2018 that he accepted the provisional findings and would 'take on board' the findings. Cr Andrews also provided assurance that if he decided to stand for council again in the forthcoming elections that he would learn computer skills.

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.

The reporter was appreciative of the investigation and accepted my recommendations.

Background

1. Cr Andrews is an elected member of the City of Victor Harbor (**the council**).

Whale Centre

2. The Whale Centre in Victor Harbor is funded by the council and currently runs at a loss.
3. On 10 April 2017 the council held a special council meeting to receive its 2017/18 draft budget V0.3 'for the purpose of considering further service level options to enable development of the draft Annual Business Plan.' The meeting was not confidential nor did the council move into confidence during the meeting. The council livestreams ordinary and special council meetings.
4. The minutes of the special council meeting of 10 April 2017 record the following:

SC292017 Moved: Cr Terry Andrews
Seconded: Cr Peter Charles

That the 2017/18 draft budget reflect the continuation of the operation of the Whale Centre.

4:48pm Cr Peter Charles withdrew his support in seconding the motion

LAPSED FOR WANT OF A SECONDER

SC302017 Moved: Cr Peter Charles
Seconded:

That the matter lie on the table.

LAPSED FOR WANT OF A SECONDER

SC312017 Moved: Cr Moira Jenkins
Seconded:

That the 2017/18 draft budget reflect the discontinuation of the operation of the Whale Centre in its current form.

5:03pm Cr Moira Jenkins withdrew her motion

WITHDRAWN

5. The effect of the above motions meant that the existing arrangement continued, being the operation of the Whale Centre funding being maintained with the draft budget in full.
6. On 11 April 2017 the 'Friends of the Encounter Coast' Facebook group posted a media release as follows:

MEDIA RELEASE on behalf of Cr Terry Andrews
Tuesday Morning 11th April

The Whale Centre at Victor Harbor will close.
Victor Harbor council voted and agreed to close the Whale and Marine Centre last night.

This education and tourist facility, that has been running at Victor Harbor for the last 18 years, is still one of the main tourist attractions. The council will redeploy staff and save \$40,000 by closing it.

“The public will and should be outraged by this decision”.

“This decision is short sighted and will send out the wrong message about our council(sic), Cr Andrews said.

A possible white knight in the form of Will Hendriks and Scott Hicks, renown(sic) international film director and local residents may be coming to the rescue. A meeting tomorrow night, Wednesday, at Victor Harbor in the McCracken Convention Centre, will launch the Granite Island Concept Interpretative Centre and Sculptor(sic) Park and (sic) be offering a solution to solve the problem.

“I personally commissioned a report from a top PR Company (Field Public Relations) showing the short comings of our admin in promoting the Whale Centre and the Horse Tram. Unfortunately the administration and councilors were reluctant to even receive the report, let alone act on it” Cr Terry Andrews said.

The launch, which was by invitation, is now open to the public and they are invited to attend.

7. The link to the media release was shared by another elected member, Cr Peter Charles on his personal Facebook page and generated comments by community members, some seeking clarification of this information.
8. On 11 April 2017 at 1:49pm the council's former Chief Executive Officer sent an email to all elected members and senior managers of council's administration as follows:

Good Afternoon Members

Today two elected members (Peter and Terry) have released Facebook posts advising the community that the Council has resolved to close the Whale Centre and that the closure will be effective from the end of October (end of the Whale Centre[sic]). Both posts promote the public meeting announcement to be delivered tomorrow night by the Breakwater Group as being the saviour of everything in this regard.

I have also become aware that media releases have been sent to the Advertiser, Channel 10 and potentially other media outlets.

This raises significant concerns about members understanding of the decisions made last night and certainly raises questions about what interests are being represented by such inaccurate exposure.

Just to refresh members recollection, the record in relation to the Whale Centre debate last night shows as follows -

...

The above series of motions which each lapsed for want of a seconder resulted in the status quo remaining - that is, the continuation of the operation of the Whale Centre in its current form has been maintained within the draft budget in full. I recall stating to the meeting that by default the Whale Centre budget would remain as presented.

This is an example of why the council has nominated spokespersons. Further, the distribution of such material when Council is not yet halfway through the draft budget development stage is premature and provocative. It will not be hard to imagine the public relations disaster that the broad distribution of incorrect information via Facebook and to the media will have. I cannot overly stress how serious this is.

Granite Island Interpretive Centre and Sculpture Park (the sculpture park)

9. On 27 August 2014 council administration signed a lease agreement to hold sculpture installations on Granite Island, the causeway and the waters between Granite Island and Warland Reserve with Sculpture by the Sea Incorporated. This contract was for three years and expired on 31 December 2016. I have not been informed as to a contract extension between the council and Sculpture by the Sea Incorporated however on 5 January 2018 Sculpture Encounters - Granite Island, was launched by the SA Government and Sculptures by the Sea Incorporated. The council's website reports that eight permanent and two temporary sculptures have been installed around Granite Island as part of a three year pilot program, with more sculptures being added every six months for the next three years with all permanent works available for sale.
10. On 26 September 2016 Cr Charles brought a proposal before council about a sculpture park at Granite Island. The motion was as follows:

OC5292016

Moved: Cr Peter Charles
Seconded: Cr Terry Andrews

1. That the City of Victor Harbor Council show their support to enhance and progress these projects by way of advice such as providing information and contacts if required.
2. That this motion does not include any implied or actual financial support.

LOST

11. The creator of the proposal, Mr Will Hendriks is an artist and sculptor with links to Victor Harbor via his son, Mr Shane Hendriks, Director of Advance Building Constructions in Port Elliot. The sculpture park proposal is not and has never been endorsed by the council, but Cr Andrews has publicly supported the proposal.
12. On 12 April 2017 the sculpture park proposal was officially launched in Victor Harbor with the speakers being Mr Hendriks, Mr Scott Hicks, Cr Andrews and Mr Dale Elliot (Granite Island 2020 Spokesperson). Cr Andrews referred to the launch and was actively building public support and attendance at the launch on social media, as evident in the above media release about the Whale Centre.
13. A 'Personal Invite' to the launch was sent 'To all our volunteers' from 'Cr Terry Andrews', and the official launch documentation in leaflets and on email listed 'Councillor, Terry Andrews' as a guest speaker on the evening. A video file has been provided to my investigation showing Cr Andrews formally speaking at the event. Cr Andrews described himself as the 'facilitator' of the sculpture park with the council.

Signature block

14. My investigation has been provided with emails sent by Cr Andrews to two government employees to set up meetings about the sculpture park proposal where he has signed off as 'Cr Terry Andrews, Victor Harbor City Council.'
15. The first email with which my investigation was provide was sent to Mr Chris Thomas, DEWNR dated 6 September 2016 from Cr Andrews' personal email account 'voiceforall14@gmail.com':

Great Chris,

We will look forward to seeing you later this month. Alternatively if you have time on your way back from Kangaroo Island we could possibly meet you this Friday - 9th Sept - and have a cup of coffee.

I leave it to you to tell us when is the most convenient time for you to see us and discuss the concept.

Cr Terry Andrews
Victor Harbor City Council

16. The second email was to Ms Sandy Pitcher, Chief Executive of DEWNR dated 10 April 2017 again, from 'voiceforall14@gmail.com':

Sandy

I will be in Adelaide tomorrow afternoon and available from 1:00pm and can meet with you if you wish.

I believe it is very important that we all work together and present an[sic] united front on the development of such an important icon as Granite Island.

I am sure Will Hendriks and our team would appreciate a statement that our MC can read out on Wednesday night if you have not been able to readjust your or Chris's appointments.

Will and myself are having a meeting today with Rebekha (sic) Sharkie, the Federal Member for Mayo.

Keeping you in the loop

Cr Terry Andrews
Deputy Chair Economic Development & Tourism Committee

17. The referral alleged that Cr Andrews deceived members of the public by posting incorrect information about the Whale Centre on social media, and representing the sculpture park proposal as being endorsed or affiliated with the council.

Relevant law

18. 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.

19. Section 63 of the Local Government Act provides:

63 - Code of conduct for members

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

20. Clauses 2.5, 2.7, 2.8, 3.1-3.3 of Part 3 of the Code of Code of Conduct provide:

- 2.5 Ensure that personal comments to the media or other public comments, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council
- 2.7 Deal with information received in their capacity as Council members in a responsible manner
- 2.8 Endeavour to provide accurate information to the Council and to the public at all times
- 3.1 Act honestly at all times in the performance and discharge of their official functions and duties
- 3.2 Perform and discharge their official functions and duties with reasonable care and diligence at all times
- 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

Whether Cr Terry Andrews deceived members of the public by posting an incorrect media release on social media about the Whale Centre in breach of the Code thereby committing misconduct in public administration

21. In response to this allegation against him Cr Andrews has informed my investigation:
- Due to an inability to touch type he has never used a computer to do council business and instead reads emails and rings people personally. If emails require a written reply Cr Andrews instructs his personal assistant, Ms Jo Smyth, to send and receive emails from her computer which are 'mainly dictated' by Cr Andrews
 - he pays his personal assistant privately and has a confidentiality agreement with her that she keep council business confidential if required
 - he does not have a Facebook page or know how to set one up
 - it was well documented within the council that the Whale Centre would eventually close because it ran at a loss, the building needed repairs and posed a health and safety risk
 - he considered that the Whale Centre media release was unfortunately worded and apologised for reporting its closure
 - in his opinion council administration wanted it to close
 - if any member of the public wanted clarification about the Whale Centre closure they could telephone Cr Andrews
 - the sculpture park is not his personal project but that of Mr Wil Hendricks
 - he did speak at the sculpture park launch but did not say that he was speaking on behalf of the council
 - he arranged for Mr Hendriks to talk to the council's former CEO Mr Graeme Maxwell about his proposal and the CEO suggested that Mr Hendriks contact the Department of Environment, Water and Natural Resources (DEWNR), Mr Chris Thompson
 - he had his personal assistant email Mr Thompson on behalf of Cr Andrews to try to arrange a meeting
 - similarly a meeting was arranged with Ms Sandy Pitcher, former Chief Executive DEWNR
 - Cr Andrews conceded that if he contacted Mr Thompson and Ms Pitcher without his title he may not have obtained meetings with them
 - his only purpose for contacting Mr Thompson and Ms Pitcher on behalf of the council was to attempt to get Mr Hendrik's proposal before them.

22. It is clear from Cr Andrews' responses that he may have genuinely believed that the Whale Centre was likely to close after the October school holidays but it was inaccurate to state that:

- the Whale Centre 'will' close
- the council voted and signed to 'close' the Whale Centre.

These statements in the media release suggest that a decision has been made to redeploy staff and save \$40,000, which is misleading.

23. In my view, Cr Andrews, in creating the Whale Centre media release breached clauses 2.5, 2.7 and 2.8 of the Code for the following reasons:

- the media release did not indicate that it was Cr Andrews' private view that the Whale Centre be closed but instead stated that the council voted to close the Whale Centre by discontinuing its funding
- his 'media release' was not a media release at all
- the information conveyed in the media release was wrong
- he did not deal with information received in his capacity as an elected member in a responsible manner by writing an inaccurate account and then causing it to be published on social media
- he did not endeavour to provide accurate information to the public.

24. Cr Andrews has provided my Office with a recording of the sculpture park project launch. Cr Andrews was introduced as a member of the council. At no time during the event did Cr Andrews state that his support of the project was personal. He is described as 'actively assisting Will Hendriks in getting this proposal out there'. Cr Andrews stated however that the council will have an opportunity to endorse the project at a later date.

25. Because Cr Andrews was not acting in the performance and discharge of his official functions and duties when creating and sending the media release and sharing it on social media he did not breach clauses 3.1 and 3.2 of the Code.

26. I also consider that Cr Andrews did not breach clause 3.3 of the Code because the information contained in the Whale Centre 'media release' did not contain information that was confidential.

Opinion

In light of the above, I consider that Cr Andrews breached section 63 of the Local Government Act and clauses 2.5, 2.7 and 2.8 of the Code of Conduct, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

As Cr Andrews breached section 63 of the Local Government Act he appears to have acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

On that basis I recommend under section 25(2) of the Ombudsman Act in accordance with section 263B of the Local Government Act that Cr Andrews:

1. offer a public apology for creating, sending and sharing incorrect information to the general public which was misleading, and
2. undertake training in elected member responsibilities particularly in how relationships with external parties, including media, ought to be conducted.

Whether Cr Andrews used his council signature block on personal emails in breach of the Code thereby committing misconduct in public administration.

27. In response to this allegation against him Cr Andrews has informed my investigation:
- he did not know what a signature block was until informed by my Office
 - he always uses his title 'Cr' in all communication and sees nothing wrong with it as he was elected by the community
 - that he 'sees nothing wrong in stating as a duly elected councillor by the people that 'I am a councillor for The City of Victor Harbor Council' in all correspondence.
28. In responding to the allegations against him overall, Cr Andrews informed me that his personal secretary, Ms Smyth sends emails on his behalf because he does not like to use technology. Given this information, I am of the view that it was, most likely, Ms Smyth, Cr Andrew's secretary who sent the emails to the government employees on Cr Andrews' behalf. It is however Cr Andrews who is subject to the Code as an elected member and has responsibilities as a public officer. Even if Ms Smyth sent the emails to government employees Cr Andrews authorised her to do so. I have therefore considered the emails as being sent by Cr Andrews because he informed my Office he intended for them to be sent to DEWNR employees.
29. With regard to these emails, I do not consider Cr Andrews has breached clause 2.5, 2.7 or 2.8 of the Code in using his Councillor moniker because:
- describing himself as a councillor was not inaccurate
 - describing himself as the Deputy Chair of the Economic Development & Tourism Committee was not inaccurate
 - the email content did not indicate any particular view or offer any commentary of Cr Andrews and were invitations to meet
 - the email content did not deal with information irresponsibly.
30. Again, because Cr Andrews was not acting in the performance of his official functions and duties when emailing government employees or promoting the launch of the sculpture park I do not consider that he breached clauses 3.1 and 3.2 of the Code.
31. However, in my view it is inappropriate for an elected member to use their title on personal emails. It is confusing for those in receipt of the email as to which capacity the email is being sent. It may lead to an assumption being made by the recipient as to whether the topic is related to council or not.
32. I comment that I do not consider that Cr Andrews' method of conducting council business nor responding to my investigation (in written form at least) via a personal secretary is appropriate, given the confidentiality of information contained in correspondence, and the possibility of confusion as to what responses have been provided and to whom. I suggest that he reconsider this arrangement and seek training in the relevant technology as appropriate for his role as an elected member.

Opinion

In light of the above, I consider that Cr Andrews did not breach the provisions of section 63 of the Local Government Act and clauses 2.5, 2.7, 2.8, 3.1 or 3.2 of the Code, and on that basis did not commit misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act in regard to the signature block used for his personal emails.

Summary and Recommendations

In light of the above, my final view is that Cr Andrews breached section 63 of the Local Government Act and clauses 2.5, 2.7 and 2.8 of the Code of Conduct, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

As Cr Andrews breached section 63 of the Local Government Act he appears to have acted 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 Cr Andrews:

1. offer a public apology for creating, sending and sharing incorrect information to the general public which was misleading, and
2. undertake training in elected member responsibilities particularly in how relationships with external parties, including media, ought to be conducted.

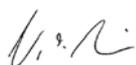
Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **6 August 2018** on what steps have been taken to give effect to the recommendations above; including:

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

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

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

7 June 2018