

Final Report¹

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

Public Authority	City of Adelaide
Public Officer	Cr Anne Moran
Ombudsman reference	2019/08278
ICAC reference	2020/000109
Date of referral	12 September 2019
Issue	Whether Cr Anne Moran divulged information the subject of a council confidentiality order, thereby committing misconduct in public administration

Jurisdiction

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

Section 14B of the *Ombudsman Act 1972* 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;

¹ As amended 10 December 2019.

ICAC Act means *Independent Commissioner Against Corruption Act 2012*;

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

The referral arose from a report made to the Office for Public Integrity concerning the alleged conduct of Cr Anne Moran of the City of Adelaide (**the council**).

Specifically, it was alleged that on or about 3 July 2019 Cr Moran divulged information the subject of a council confidentiality order to a journalist or intermediary.

The referral concerns an alleged breach of clause 3.3 of Part 3 of the Code of Conduct for Council Members (**the Code**). Failure by a council member to comply with Part 3 of the Code constitutes misconduct. As a contravention of Part 3 can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered this matter under section 5(3)(a) of the ICAC Act.

I have also used my 'own initiative' powers under section 13(2) of the Ombudsman Act to consider whether the referral raises potential administrative errors for the purposes of section 25(1) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- reviewing the media reports at issue
- seeking a response from Cr Moran
- seeking further information from the council's principal officer and administration
- listening to an audio recording of the committee meeting in question
- considering:
 - the Code
 - the Local Government Act
- preparing a provisional report and seeking the views of the parties
- considering responses to my provisional report made by:
 - the reporter
 - the council's principal officer
- preparing this final 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.² That principle is best summed up in the decision as follows:

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

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

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

Responses to my provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 15 October 2019.
2. Cr Moran did not elect to respond to my provisional report.
3. The reporter responded to express acceptance of my provisional views.
4. The council's mayor also responded to express acceptance of my provisional views.
5. As such, my views remain the same as expressed in my provisional report.

Background

6. Cr Moran is an elected member of the council.
7. Pursuant to section 41(1) of the Local Government Act, the council has established a 'core advisory committee' known as 'the Committee'. The Committee is comprised of all of the council's elected members. The primary purpose of the Committee is to make recommendations in respect of the 'overall priorities, strategies and policies related to achieving [the council's] Strategic Plan outcomes.'⁴
8. An ordinary meeting of the Committee was convened on 2 July 2019. Included on the agenda for the meeting was a presentation by representatives of the Office for Recreation, Sport and Racing (ORSR). That presentation concerned a feasibility study to be undertaken on behalf of the state government in respect of Adelaide's possible bid to host the 2026 Commonwealth Games.
9. In the weeks prior to meeting, the council's administration received a request from a representative of the ORSR that the presentation concerning the feasibility study be conducted in a confidential setting.⁵
10. In this regard, the council was notified that the presentation included information that:
 - pre-empted possible future commercial negotiations should Adelaide progress as a candidate to host the 2026 Games
 - would be held in confidence by the Commonwealth Games Federation pending negotiation of sponsorship and broadcast deals
 - was yet to be endorsed by Cabinet.
11. Documents concerning the ORSR presentation were accordingly omitted from the version of the meeting agenda that was made available to the public.⁶
12. The meeting agenda also included a recommendation from the council's Chief Executive Officer that the public be excluded from the meeting for the duration of the ORSR presentation pursuant to section 90(3)(j) of the Local Government Act.⁷
13. An audio recording of the 2 July 2019 meeting discloses the following discussion:

⁴ City of Adelaide, 'Governance Structure', available at <<https://www.cityofadelaide.com.au/about-council/your-council/council-meetings/governance-structure/>>, last accessed 10 October 2019.

⁵ Email dated 21 June 2019.

⁶ See Local Government Act, sections 87(10) and 88(6)(a).

⁷ Section 90(3)(j) provides that members of the public can be excluded from a committee meeting to allow the committee to discuss in confidence 'information the disclosure of which— (i) would divulge information provided on a confidential basis by or to a Minister of the Crown, or another public authority or official (not being an employee of the council, or a person engaged by the council); and (ii) would, on balance, be contrary to the public interest.'

- Chair: We will move on to item 4, which is an item to exclude the public-- item 4.1. The reason for the exclusion is a presentation for the Commonwealth Games feasibility study. I'll ask a member to move for the exclusion. Moved by Councillor Hyde. Seconded Councillor Hou. Any discussion or debate? Councillor Moran.
- Cr Moran: What's the reason for this?
- Chair: I'll take your question to the Acting CE.
- A/CE: Through the chair. That's the request from the state government given the sensitive situation now around feasibility and some of the financials they'd like to talk about.
- Chair: Councillor Moran are you happy with that answer?
- Cr Moran: Yeah.
- Chair: Councillor Simms?
- Cr Simms: Not wanting to put administration on the spot, but have the government given any more information about that in terms of their rationale? I do understand that it's a feasibility study, but at the same time I would have thought that a project of this size is very much in the public interest, in terms of wanting the community to get information about what's in scope and have a sense of discussions that might be being had, given it's a major, major project for the city, were it to happen.
- Chair: Thank you Councillor Simms. I'll take that through the Acting CEO as well.
- A/CE: Again through the chair. I understand the question, it's subject to some cabinet proposal coming shortly from the state government. So I think they're looking to canvass some more detailed conversation with you, as elected members, before they go to Cabinet. I think there's a full understanding of the need that, subject to that decision, what [sic] would happen with the community consultation.
- Chair: Any further questions Councillor Simms?
- Cr Simms: No, I'll make a comment.
- Chair: Councillor Moran?
- Cr Moran: Would they give this briefing if we decided not to hear it in confidence?
- Chair: I'll take that again. I guess I can answer that. The answer would be probably no. Thank you Councillor Moran. Any other questions? Councillor?
- Cr Moran: No.
- Chair: Any other councillors with questions? Cr Simms, did you want to make a comment?
- Cr Simms: Yes, I just wanted to say, I don't support this being discussed in confidence. I think this is a project that is clearly in the public interest, the discussion of which is clearly in the public interest. I would have thought that if the project does go ahead, that the public would be very interested to know what's being proposed and I think there should be open discussions in the community about this. So I don't support it being in confidence.
- Chair: Thank you Councillor Simms. Any further debate about this item? I will go back to Councillor Hyde to sum up.
- Cr Hyde: Summed up.
- Chair: I will put the exclusion of the public motion to you. All those in favour? All those against? That is carried.

14. The minutes concerning the meeting record the following resolution:

Exclusion of the Public

1. Item 4.1 - Exclusion of the Public to Consider [2018/04291] [TC]:

For the following Discussion Forum Item in Confidence:

- 5.1. Presentation - Commonwealth Games Feasibility Study (s 90(3)(j))

Order to Exclude for Item 5.1:

THAT THE COMMITTEE:

1. Having taken into account the relevant consideration contained in s 90(3)(j) and s 90(2) & (7) of the *Local Government Act 1999 (SA)*, this meeting of The Committee dated 2/7/2019 resolves that it is necessary and appropriate to act in a meeting closed to the public as the consideration of Item 5.1 (Presentation - Commonwealth Games Feasibility Study) listed on the Agenda in a meeting open to the public would on balance be contrary to the public interest.

Grounds and Basis

At the request of the State Government, this item includes information provided on a confidential basis provided by a public authority. The disclosure of this information could reasonably prejudice the ability of Council to undertake/participate in future negotiations relating to hosting a future Commonwealth Games.

Public Interest

The Committee is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances given that information as provided in the briefing relates to the potential hosting of a Commonwealth Games. The release of such information may pre-empt the potential negotiating ability of the City and State Government for future commercial deals relating to the opportunity to host the Commonwealth Games.

2. Pursuant to s 90(2) of the *Local Government Act 1999 (SA)*, this meeting of The Committee dated 2/7/2019 orders that the public (with the exception of members of Corporation staff and any person permitted to remain) be excluded from this meeting to enable this meeting to receive, discuss or consider in confidence Item 5.1 (Presentation - Commonwealth Games Feasibility Study) listed in the Agenda, on the grounds that such item of business, contains information and matters of a kind referred to in s 90(3)(j) of the Act.
15. The minutes concerning the meeting reflect that Cr Moran left the meeting room following the above resolution and re-entered the meeting room approximately two minutes later.
 16. The audio recording of the meeting discloses that the Committee proceeded to receive the presentation. The recording discloses that, following a question and answer session, the following discussion took place:

Chair: I will need a motion from the floor which presents an order to keep in confidence. So, Councillor Moran. Seconded by Councillor Hyde. Any further debate or discussion on this item? Can I please leave the door closed, thank you? Thank you very much. So any debate on this issue? Councillor Simms.

Cr Simms: I reiterate my concerns about it being kept in confidence. I don't think that there was anything in the presentation that was confidential. Most of it could have been found from Google.

Chair: Noted. Thank you Councillor. I'll put that to the vote. All those in favour? All those against? That is carried. I will now reopen the meeting to the public to deal with item 6.
 17. The minutes concerning the meeting relevantly record:

That in accordance with Section 91(7) & (9) of the *Local Government Act 1999 (SA)* and because Item 5.1 (Presentation – Commonwealth Games Feasibility Study) listed on the Agenda for the meeting of The Committee held on 2 July 2019 was received, discussed and considered in confidence pursuant to Section 90(3)(j) of the *Local Government Act 1999 (SA)*, this meeting of The Committee do order that:

1. the discussion and any other associated information submitted to this meeting and the Minutes of this meeting in relation to the matter remain confidential and not available for public inspection until 31 December 2026;
2. the confidentiality of the matter be reviewed in December 2020;
3. the Chief Executive Officer be delegated the authority to review and revoke all or part of the order herein and directed to present a report containing the Item for which the confidentiality order has been revoked.

18. On 3 July 2019, being the day after the meeting of the Committee, the following report was published in the *InDaily* online newspaper:

State Govt tight-lipped on Commonwealth Games plans

LOCAL

A State Government move to exclude the public from an Adelaide City Council meeting about the city's bid to host the 2026 Commonwealth Games has angered some councillors, who say the community has a right to know.

Last night representatives from the Office of Recreation and Sport briefed city councillors on a "Commonwealth Games Feasibility Study" it plans to undertake to determine the cost and merit of Adelaide hosting the 12-day event.

According to the council's agenda, the State Government had requested that the study be discussed in confidence as the disclosure of information "could reasonably prejudice the ability of council to undertake/participate in future negotiations relating to hosting a future Commonwealth Games."

"It is necessary and appropriate to act in a meeting closed to the public as the consideration of... (the item) listed on the agenda in a meeting open to the public would on balance be contrary to the public interest," the agenda stated.

"At the request of the State Government, this item includes information provided on a confidential basis provided by a public authority."

While the Government insists that confidentiality at this stage is a requirement of the Commonwealth Games Federation, councillors Anne Moran and Robert Simms argued during the meeting that the information was in the public's interest.

"I do understand that it is a feasibility study, but at the same time with a project of this size it's very much in the public interest in terms of wanting the community to get information about what's in the scope and (to) get a sense of discussions that are being had," Simms said.

"I think there should be open discussions in the community about this so I don't support it being held in confidence."

Moran asked the meeting's chair, Deputy Lord Mayor Houssam Abiad, if the State Government would proceed with the meeting if the council decided not to discuss the item in confidence, but he said they "probably" wouldn't.

The council's director of growth Ian Hill said the State Government would discuss the feasibility study in cabinet "shortly" and it wanted to "canvas some more detailed conversation with... elected members before going to cabinet".

Both Moran and Simms voted for the council to not exclude the public from the discussion, but they were defeated with the support of all other councillors.

Moran told *InDaily* after the meeting that the discussion did not warrant confidentiality as there was no costings mentioned.

"They were just testing whether we (the council) were massively against it," she said.

“They pointed out that other than two cities (that have hosted the Commonwealth Games), on paper the rest didn't make a profit but there were uplifts for things like public transport and Infrastructure.

“One of the councillors mentioned housing and asked if they could use the houses built during the Games for social and affordable housing afterwards.

“They (the State Government representatives) said that in Queensland they had done that,”

Moran said the State Government was planning to undertake a “detailed cost benefit study” as part of its initial investigations into hosting the 2026 Commonwealth Games.

The 2018 Games, hosted by the Gold Coast, cost taxpayers \$2 billion from state, federal and local government coffers,

But it was touted at the time that hosting the spectacle would generate \$4 billion in economic activity.

Sports Minister Corey Wingard said in a statement to *InDaily* that Moran and Simms were “either grandstanding for media attention or a bit confused over the processes which were explained to them at the briefing last night”.

“I hope it is the latter,” he said.

“In the spirit of cooperation with a stakeholder who may be impacted by a Commonwealth Games and have advice to contribute, we approached the Adelaide City Council to offer them a courtesy update on the progress of the study, which is yet to be completed.

“It is a requirement by the Commonwealth Games Federation that the feasibility phase of their process is kept confidential at this stage.”

Adelaide is Commonwealth Games Australia's preferred city to bid for the 2026 Games.

19. It is alleged that the remarks attributed to Cr Moran in the above article are indicative of a contravention of the confidentiality order imposed by the Committee.

Response from Cr Moran

20. The investigation sought a response from Cr Moran to the allegations referred by the Commissioner.

21. By email dated 26 September 2019, Cr Moran responded (in full):

I cannot remember saying that but I may have. I would have thought that they were general remarks and didn't break the confidentiality of the meeting eg costings etc. I apologise if any of my general observations were breaking confidentiality. That was not my intent.

Relevant law

22. 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.

23. Section 90 of the Local Government Act relevantly provides:

90—Meetings to be held in public except in special circumstances

- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):
 - [...]
 - (j) information the disclosure of which—
 - (i) would divulge information provided on a confidential basis by or to a Minister of the Crown, or another public authority or official (not being an employee of the council, or a person engaged by the council); and
 - (ii) would, on balance, be contrary to the public interest;
 - [...]
- (7) If an order is made under subsection (2), a note must be made in the minutes of the making of the order and specifying—
 - (a) the grounds on which the order was made; and
 - (b) the basis on which the information or matter to which the order relates falls within the ambit of each ground on which the order was made; and
 - (c) if relevant, the reasons that receipt, consideration or discussion of the information or matter in a meeting open to the public would be contrary to the public interest.

24. 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.

25. Part 3 of the Code relevantly provides:

Member duties

Council members must:

[...]

- 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 Anne Moran divulged information the subject of a council confidentiality order, thereby committing misconduct in public administration

26. The minutes concerning the 2 July 2019 meeting disclose that the Committee ordered that ‘the discussion and any other associated information’ submitted to the meeting in connection with the ORSR presentation was to remain confidential until 31 December 2026.

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27. I note that the following remarks were attributed to Cr Moran in the article published in *InDaily*.
- “They were just testing whether we (the council) were massively against it,” she said.
- “They pointed out that other than two cities (that have hosted the Commonwealth Games), on paper the rest didn't make a profit but there were uplifts for things like public transport and Infrastructure.
- “One of the councillors mentioned housing and asked if they could use the houses built during the Games for social and affordable housing afterwards.
- “They (the State Government representatives) said that in Queensland they had done that,”
- Moran said the State Government was planning to undertake a “detailed cost benefit study” as part of its initial Investigations into hosting the 2026 Commonwealth Games.
28. Having listened to the audio recording of the presentation and the subsequent discussion that took place during the 2 July 2019 meeting, I am satisfied that the above remarks identify information falling within the ambit of the confidentiality order imposed by the Committee.
29. Cr Moran has submitted that she cannot recall making those remarks, but has conceded that she ‘might have’ done so.
30. Cr Moran has otherwise submitted that she ‘would have thought’ that the remarks were of a general nature such that they did not contravene the confidentiality order imposed by the Committee.
31. In the circumstances, it would seem very implausible for the author of the article appearing in *InDaily* to have attributed remarks to Cr Moran that she did not make. Having regard to the principle in *Briginshaw*, I am satisfied on the balance of probabilities that Cr Moran made those remarks to the journalist.
32. I accept that the remarks do not appear to have disclosed information that was likely to be of particular sensitivity to the state government or the council. However, it was not for Cr Moran to make such an assessment, having regard to the broad terms of the confidentiality order in question.
33. It is important that council members respect and uphold the lawful decisions of the council’s governing body, notwithstanding any strongly held personal views.
34. In the circumstances, I am satisfied that Cr Moran divulged information that the council (via the Committee) had ordered be kept confidential.
35. I am accordingly satisfied that Cr Moran contravened clause 3.3 of Part 3 of the Code and thereby committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
36. I am also of the view that Cr Moran’s conduct appears contrary to section 63(2) of the Local Government Act and, accordingly, appears contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

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

1. Cr Moran contravened clause 3.3 of the Code by divulging information to a journalist that the council had ordered be kept confidential, thereby committing misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
2. Cr Moran's conduct in this regard appears contrary to section 63(2) of the Local Government Act and, accordingly, appears contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

I note that Cr Moran has expressed an apology of sorts, albeit in a manner that does not expressly concede contravention of the confidentiality order imposed by the Committee.

I also understand from enquiries with the council that Cr Moran has not previously been censured by the council for a breach of council confidentiality.

On the other hand, I note that Cr Moran's remarks to the journalist appear to have been made in full knowledge of the confidentiality order imposed by the Committee; Cr Moran having initially queried the basis for the matter being heard in confidence and then subsequently having moved the motion to maintain confidentiality over the proceedings.

In the circumstances, I make the following recommendation under section 263B(1) of the Local Government Act:

1. That the City of Adelaide, by means of a public statement, reprimand Cr Moran for her misconduct in public administration.

Final comment

I now report Cr Moran's misconduct 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, 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 **21 January 2020** on what steps have been taken to give effect to my recommendation above; including:

- details of the actions commenced or completed
- relevant dates of the actions taken.

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 with SACAT.

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

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines
SA OMBUDSMAN

10 December 2019