

## Report<sup>1</sup>

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

Public Authority	District Council of Cleve (the council)
Public Officer	Mr Peter Arnold (the CEO)
Ombudsman reference	2018/09526
ICAC reference	2018/003437
Date of referral	4 June 2018
Issues	<ol style="list-style-type: none"><li>1. Whether the CEO committed maladministration in public administration within the meaning of the ICAC Act by using council funds to pay costs of the Cleve and Districts Bowling Club</li><li>2. Whether the CEO committed misconduct in public administration within the meaning of the ICAC Act by using council funds to pay costs of the Cleve and Districts Bowling Club</li><li>3. Whether the CEO committed misconduct in public administration within the meaning of the ICAC Act by failing to disclose to elected members that he had used council funds to pay costs of the Cleve and Districts Bowling Club</li></ol>

### 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 potential issues of misconduct and maladministration 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—

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<sup>1</sup> As amended 30 June 2020

- (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.

On 2 April 2018 the *Local Government (General) Regulations 2013* were amended by the *Local Government (General) (Employee Code of Conduct) Variation Regulations 2018*. The amendments provided for a new Code of Conduct for Council Employees.

Given that the CEO's conduct occurred prior to 2 April 2018 I have considered his conduct under the Code of Conduct for Council Employees (**the Code of Conduct**)<sup>2</sup> which applied at the time.

As a contravention of the Code could constitute grounds for disciplinary action under the Code, I have considered these matters under section 5(3)(a) of the ICAC Act.

In order to protect the identity of the complainant, I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

## Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the CEO
- seeking further information from the CEO
- seeking more particulars from the complainant
- considering the *Local Government Act 1999*
- considering the Code of Conduct
- preparing a provisional report and seeking a response from the parties
- considering Mayor Phil Cameron's response to the provisional report
- 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

<sup>2</sup> Published by the minister in the Gazette on 20 February 2014 (as amended).

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

I provided my tentative views to the CEO, the complainant and the council's mayor, Mayor Phil Cameron, by way of my provisional report dated 30 August 2019.

The mayor responded to my provisional report by letter dated 4 October 2019, providing a 'substantive and collective response' from himself as the mayor, 'on behalf of the council and from the CEO' (**the mayor's response**), submitting that he disagreed with my provisional findings.

I have carefully considered the mayor's response, and as a result I have amended my views in response as I consider appropriate. I have set out and addressed some of the mayor's submissions in the body of the report.

The CEO did not formally respond to the provisional report.

The complainant advised that they had no comments.

### Background

1. The Cleve and District Bowling Club (**the bowling club**) is on land owned by the council.
2. The council entered into an agreement with the bowling club commencing 1 August 2003, titled 'Local Government Recreation and Sporting Facilities Licence for Licensing the Use of Council Sporting Facilities (**the Licence Agreement**)'. The licence period expires on 30 July 2024.
3. In 2017, the bowling club resolved to remove its existing green and replace it with new synthetic carpet (**the project**). The cost of the project was expected to be in excess of \$200,000.
4. Sometime in March 2017 the CEO met with the President and the Treasurer of the bowling club. The CEO, in his letter to me dated 4 April 2019, wrote:

...

The first meeting was in March 2017 when [bowling club] reps (President & Treasurer) were seeking a letter of support and Landowner consent for a grant application which was being submitted to the Office for Sport and Recreation for assistance with the purchase and installation of a synthetic bowling green. Copies provided - Attachment A. They also advised that if their grant application was successful, they would be seeking a loan from Council for the project to proceed. They further discussed how club members had travelled extensively across the state inspecting synthetic greens for playability, durability, ongoing operational maintenance and general value for money. At that point in time the [bowling club] had no intention of proceeding with this project without grant funds. This information was passed on to Council at the April 2017 meeting...

<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.

5. The bowling club lodged a grant application with the Office for Recreation and Sport for the cost of the project (**the grant**).
6. The CEO gave his support for the bowling club's grant application for the project in a letter to the Office for Sport and Recreation dated 17 March 2017. Attached to the letter was a 'Landowner Consent Form', which was signed by the CEO and stated that, as the landowner, the council gave its consent for the project. The Landowner Consent Form stated that the council would provide \$100,000 in financial support for the project 'subject to final loan approval'.
7. In the mayor's response to my provisional report I was advised that, at the ordinary meeting of the council on 11 April 2017, the CEO provided a verbal report to the council as part of his regular operational update. It is submitted that the CEO advised the council that the letter of support to the bowling club had been provided and that the club was likely to apply to the council for a loan of \$100,000 if the grant funding was successful. As far as I can discern, there was no mention of this in the meeting's agenda papers nor was it recorded in the minutes of the meeting. The mayor advised that whilst no decision was made at this meeting, he recalled that 'the elected members were receptive to the concept of a loan for the club'.
8. Sometime in June 2017 the CEO again met with the President and the Treasurer of the bowling club. The CEO, in his letter to me dated 4 April 2019, wrote:

...

The second meeting was in June 2017 when [the bowling club] advised that they wished to proceed with the synthetic green project regardless of the outcome of their current grant application but would however require a Council loan to fund part of the project. It was the Treasurer that sought Council's assistance with account payments. He advised that he may not be readily available for periods during the project and did not consider himself proficient at making electronic funds payments (the club is run entirely by volunteers). The [bowling club] also raised concerns regarding the administering of GST for the project but were advised regardless of who pays for the invoices initially, the [bowling club] would need to be registered for GST or absorb the GST component for the project. They were further advised that the loan and account payment requests would need to be made in writing and considered by Council...

9. There is nothing in writing available to me in relation to the CEO's alleged advice to the bowling club that they must be registered for GST.
10. The Australian Government Australian Business Register 'ABN Lookup' website shows that the bowling club registered for GST from 1 May 2018, which was after the completion of the project.
11. By letter dated 7 June 2017, the President of the bowling club wrote to the then mayor of the council stating that, in the event that the grant application was not successful, the bowling club would seek a loan from the council of between \$100,000 and \$150,000 for the project. The letter included:

The Cleve Bowling Club would like to inform the local Council that we are going forward with the replacement of our Southern grass green with a synthetic surface.

This project is scheduled to start mid September.

As we are a 100% volunteer organization we are seeking the Council's assistance with some of the project management requirements. At this stage, this would primarily involve the timely payment of accounts which our Treasurer would periodically reimburse.

Secondly we would ask if the Council would arrange for the Cleve Bowling Club to borrow between \$100k and \$150k over 10 years to finance said project.

We have applied to the Office of Rec and Sport for \$65k grant but we will not know the outcome until 31 July. This project is going ahead regardless.

We have attached the last 3 years financials and as you can see we are quite capable of repayment.

12. On 15 June 2017, the company Sportcrete issued an invoice to the council for \$24,200 for a deposit for 'Bowling Green Works'. A council Purchase Order was created the same day. The Purchase Order states the payment was authorised by the CEO. Both the invoice and the Purchase Order are stamped 'Paid', and the stamp was initialled by the CEO.

13. On 26 June 2017, the council held a Special Meeting to consider draft budget submissions for the 2017/18 financial year. At the meeting, the bowling club's loan request, along with a request for financial assistance from another sporting club, was considered. The CEO's Report for the meeting included the following:

1 PURPOSE OF REPORT

1.1 Consider Cleve Bowling Club Inc loan

2 DISCUSSION

2.1 The Cleve Bowling Club Inc have advised of their intention to remove their southern turf green and replace it with a synthetic surface. They currently have a grant application for this project pending with the Department of Sport & Recreation and depending on this application, will require a loan between \$100,000 and \$150,000 to complete the project. Their request and a copy of the last 3 years financials are attached for your reference. The financials suggest that the Cleve Bowling Club have the capacity to meet loan repayments which are expected to be in the vicinity of \$15,000 per year. It is expected that they will be formally advised to [sic] result of their grant application on or about July 31 2017 at which point the amount of loan will be determined.

The Cleve Bowling Club have also requested the Council's assistance with the timely payment of accounts for this project. As the number of accounts is expected to be very low, Council has no issue with being able to meet this request for account payments to be made in accordance with Council's procurement policy.

...

6 RECOMMENDATION

6.1 That Council give in principal support to facilitating a loan for the Cleve Bowling Club Inc up to an amount of \$150,000 for the installation of a synthetic green.

14. The council gave 'in principle' support for the loan. The minutes, at Item 3.3, record:

Moved Crs Tarran/Siviour that Council give in principal support to facilitating a loan for the Cleve Bowling Club Inc up to an amount of \$150,000 for the installation of a synthetic green.

CARRIED

15. The CEO's report to the council for this meeting did not include any mention of the fact that the council had already paid \$24,200 for the deposit for the project.

16. The bowling club was subsequently notified that the grant application was unsuccessful. However, the deposit had already been paid by the council and the bowling club proceeded with the project.
17. The project was completed by November 2017. It has been alleged that the project was completed with council funds.
18. By letter dated 2 November 2017, the President of the bowling club wrote to the CEO advising that the grant application had been unsuccessful and requesting the council to provide funding for part of the project, which at this time had already been completed. The letter included:

The Cleve District Bowling Club would like to thank our Local Council for the role that they have played in the project management and work in kind to the upgrades of our lawn bowling facility. After many hours of voluntary work this project is now complete and is a credit to the Cleve Community.

As you may be aware the bowling club was declined any grant funding from the Department of Recreation and Sport. The amount ask [sic] for was \$65000 on a \$250000 project. An amount we felt was a reasonable request.

We appreciate the loan agreement we will be entering into with our Local Council however we ask for your consideration to help with funding for this community facility.

The Cleve District Bowling Club has many uses these include school sports, tafe education, funeral services and wakes and social bowls. It is a true community facility and because of this we feel we deserve your consideration.

19. The bowling club's letter was presented at Item 24 of the council meeting on 14 November 2017. The council resolved to decline the bowling club's request for funding. The minutes record:

24.5 Cleve District Bowling Club Inc. - ILE2017 12266 - Request for further funding for the upgrade of the Cleve Bowling Club

...

Moved Crs Tarran/Jones that the Cleve Districts Bowling Club Inc. be advised that Council does not consider requests for retrospective funding to projects that are already completed.

CARRIED

It is alleged that at the 14 November 2017 council meeting the CEO again had the opportunity to advise elected members that the council had in fact covered all the costs of the project, and failed to do so.

20. On 2 February 2018, the President of the bowling club again wrote to the CEO requesting that the council facilitate a \$150,000 loan for the project. The email included:

The Cleve District Bowling Club Inc. would like to arrange a loan for \$150,000 at a fixed rate over 10 years with 2 six monthly repayments per annum. This loan to commence at your early [sic] convenience.

Although this project is not yet complete we are in a position to settle.

21. On 13 February 2018, the council meeting considered the bowling club's request for a loan.<sup>5</sup> The CEO's report to the council advised that the bowling club had made a formal application for a loan of \$150,000 and had provided their financial records for the previous three years. The CEO's report included the following:

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<sup>5</sup> Item 15.2.

1 PURPOSE OF REPORT

1.1 Consider Cleve Bowling Club Inc loan

2 DISCUSSION

2.1 The Cleve Bowling Club Inc have made a formal application to Council for a loan of \$150,000.

Council have previously considered this matter in June 2017, where it was resolved; *'that Council give in principal support to facilitating a loan for the Cleve District Bowling Club Inc. up to an amount of \$150,000 for the installation of a synthetic green'.*

The Cleve Bowling Club have provided their last 3 years financials which are attached for your reference. The financials demonstrate that the Club should have the capacity to meet the loan repayments which will be in the vicinity of \$18,000 per year.

...

22. The CEO recommended that the council agree to borrow \$150,000 from the Local Government Finance Authority (LGFA) on behalf of the bowling club, subject to guarantors being found. The CEO's report included the following:

6 RECOMMENDATION

6.1 That Council agree to borrow \$150,000 from the Local Government Finance Authority on behalf of the Cleve District Bowling Club Inc. to be repaid in biannual payments over a period of 10 years, subject to the Cleve District Bowling Club Inc. providing guarantors up to the value of the loan.

That the Cleve District Bowling Club Inc. provide Council with a copy of its Annual Audited Financial Statements each year for the period of the loan.

That pursuant to Section 38(1) of the Local Government Act 1999, Council authorise the Mayor and Chief Executive Officer to sign and affix the common seal to the Debenture Loan Documentation.

23. The council adopted the CEO's recommendation and approved the loan for the bowling club. At this point the elected members were still allegedly unaware that the council had already made payments for the project. The minutes record:

15.2 Cleve District Bowling Club Inc. Loan

...

Moved Crs Tarran/Siviour that Council agree to borrow \$150,000 from the Local Government Finance Authority on behalf of the Cleve District Bowling Club Inc. to be repaid in biannual payments over a period of 10 years, subject to the Cleve District Bowling Club Inc. providing guarantors of up to the value of the loan.

That the Cleve District Bowling Club Inc. provide Council with a copy of its Annual Audited Financial Statements each year for the period of the loan.

That pursuant to section 38(1) of the Local Government Act 1999, Council authorise the Mayor and Chief Executive Officer to sign and affix the common seal to the Debenture Loan Documentation.

CARRIED

24. The CEO advised the bowling club that its loan request had been approved and that the club was required to nominate guarantors for the security of the loan.

25. By letter dated 20 February 2018, the Secretary of the bowling club wrote to the CEO requesting that the council waive the requirement for security from guarantors. The letter included the following:

Thank you for your correspondence re Council agreeing to loan the Cleve District Bowling \$150000.00 for its green upgrade. The loan being subject to the Club providing guarantors to the value of the loan.

The Club feels that is [sic] the Council's role to foster sport and sporting facilities in the council area and therefore should itself guarantee reasonable loans to clubs that provide such facilities. Most Sports Club members work hard to provide and maintain good facilities and should not be required to guarantee such loans.

As a matter of principal members are reluctant to provide the guarantees and ask Council to reconsider its decision requiring them.

26. At the council meeting on 13 March 2018, the CEO advised the council that, pursuant to the council's resolution on 13 February 2018, the \$150,000 loan for the project had now been facilitated through the LGFA. The CEO advised that the 'loan had been finalised and the \$150,000 (@4.6%) will become available for draw down on or about 15 March 2018.' The CEO recommended to the council that it should reconsider the requirement for the bowling club to have a guarantor for the loan.
27. The minutes for Item 15.1 of the 13 March 2018 council meeting record that the council resolved as follows:

15.1 Cleve Bowling Club Inc. Loan

...

Moved Crs Tarran/Jones that the Chief Executive Officer prepare a draft Loans to Community Groups policy for consideration at the April meeting of Council.

CARRIED

28. The complainant alleges that, at the 13 March 2018 council meeting, the CEO verbally advised the elected members that the bowling club's bills for the project had already been paid, but that the CEO omitted to explicitly state that the council had paid those bills. Further, it is alleged that the CEO did not advise the elected members that he had been authorising the payment of the bills since 15 June 2017, or the amount that had been paid by the council on behalf of the bowling club. The complainant submitted that 'no loan agreement was in place, and effectively the [bowling club] had a new green paid for by [the council] and total risk of reimbursement falls to council, with no guarantors in place'.
29. The CEO subsequently prepared a draft policy titled 'Loans to Community Groups' which was adopted by the council at its 10 April 2018 council meeting. The policy does not include the requirement for guarantors but provides that guarantors can be included at the request of the council.
30. At the 8 May 2018 council meeting, the CEO advised the council that a Notice of Motion to rescind the decision the council made at the 13 February 2018 meeting to approve the bowling club's request for a \$150,000 loan for the project had been made. The motion asked the council to reconsider the approval of the loan pursuant to the newly adopted 'Loans to Community Groups' policy, i.e., without requiring the bowling club to provide guarantors for the loan. At Item 12.1, the council resolved to rescind the 13 February 2018 motion approving the loan on the proviso of there being guarantors in place. At Item 15.3, the council resolved to borrow \$150,000 from the LGFA on behalf

of the bowling club. The motion did not include a requirement for there to be guarantors in place.

31. The council entered into a Loan Agreement with the bowling club (**the Loan Agreement**) which was signed on 15 May 2018 by the President of the bowling club and by the CEO. The Loan Agreement includes the following:

The Council will advance the whole of the Principal to the Borrower on or about 15 March 2018.

32. By letter dated 9 July 2018, I wrote to the CEO notifying him of my investigation, advising him of the allegations and seeking a response to the allegations, as well as answers to a number of questions.
33. The CEO responded by letter dated 25 July 2018 (**the CEO's first response**), attaching the following:
- letter of support for grant application
  - bowling club loan application and request for administrative assistance
  - report to June 2017 Special meeting of Council
  - copy of the creditor payment listing which appears in each council meeting agenda
  - bowling club letter querying the need for guarantors and report to the March 2018 meeting of the council
  - copy of draft policy which was presented to the April meeting of the council and after much discussion was adopted as presented
  - copy of final invoice provided to the bowling club.
34. I wrote to the CEO again on 26 November 2018 seeking further information. The CEO responded by letter dated 20 December 2018 (**the CEO's second response**), attaching the following:
- the accounts for the legal advice obtained about the employee the CEO suggested was responsible for the council's 'budget issues'
  - the Loan Agreement between the council and the bowling club.
35. By letter dated 22 March 2019, I wrote to the CEO advising that I did not consider that his previous responses to me had been fulsome or sufficient and asking him to provide a further response.
36. The CEO replied by letter dated 4 April 2019 (**the CEO's third response**), attaching the following:
- letter of support and Landowner Consent from the CEO for the grant application
  - letter from the President of the bowling club to the CEO dated 7 June 2017
  - the CEO's report to the 26 June 2017 council meeting
  - minutes of the 26 June 2017 council meeting
  - the council's 'Procurement (Inc. Contracts & Tenders) Policy' issued February 2016
  - the council's 'Internal Control Procedures'
  - creditor vouchers, orders and invoices
  - 'Payment Report for June 2017 - List of Payments'
  - receipts for the bowling club's repayments to the council
  - emails between the CEO and the President of the bowling club in relation to the loan.
37. Attachment F to the CEO's third response includes:<sup>6</sup>

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<sup>6</sup> Note the handwritten annotation were included on document provided to me by the CEO.

EFT	DATE	PAYEE	DESCRIPTION	AMOUNT PAID
EFT14986	15/06/2017	SPORTCRETE ASIA-PACIFIC PTY LTD	DEPOSIT FOR CLEVE BOWLING GREEN WORKS	\$22,200.00
EFT15104	06/07/2017	COATES HIRE OPERATIONS P/L	HIRE OF LAWN TURF CUTTER	\$209.07
EFT15123	06/07/2017	GASKELL CONTRACTORS PTY LTD	50.6T SCREENED SAND	\$2,110.76
EFT15343	20/09/2017	PORT NEILL QUARRY	25.4T SCREENED SAND	\$712.47
EFT350 15350	20/09/2017	EYRE HOME IMPROVEMENTS	CLEVE BOWLING CLUB-VERANDAH	\$6,193.00
EFT15379	06/10/2017	DG GRAY & PA LEWIS	PREPARE SUPPLY & LAY 350M2 PAV FOR CLEVE BOWLS CLUB	\$22,253.00
EFT15547	26/10/2017	SPORTCRETE ASIA-PACIFIC PTY LTD	CARPET & UNDERLAY FOR CLEVE BOWLS CLUB	\$121,000.00
EFT15474	07/11/2017	SPORTCRETE ASIA-PACIFIC PTY LTD	CLEVE BOWLING CLUB COMPLETION OF BASEWORKS	\$84,700.00
EFT15519	10/11/2017	BAB ALUMINIUM PTY LTD	NEW SEATING FOR CLEVE BOWLING CLUB	\$4,064.50

38. According to Attachment F, the total amount the council paid for the project, between 15 June 2017 and 10 November 2017, was \$263,442.80. The amounts are inclusive of GST.<sup>7</sup> Therefore, according to the above table, the council paid a total of \$239,493.45 plus \$23,949.35 GST for the project.
39. The following expenses are recorded in the monthly 'Payment Reports' that were presented to the elected members at council meetings. These amounts are inclusive of GST:

EFT14986	15/06/2017	SPORTCRETE ASIA-PACIFIC PTY LTD	DEPOSIT FOR CLEVE BOWLING CLUB WORKS	24,200
EFT15104	06/07/2017	COATES HIRE OPERATIONS P/L	HIRE OF LAWN TURF CUTTER	209.07
EFT15123	06/07/2017	GASKELL CONTRACTORS PTY LTD	50.6T SCREENED SAND	2,110.76
EFT15343	20/09/2017	PORT NEILL QUARRY	25.4T SCREENED SAND	712.47
EFT15350	20/09/2017	EYRE HOME IMPROVEMENTS	CLEVE BOWLING CLUB - VERANDAH	6,193.00
EFT15379	06/10/2017	DG GRAY & PA LEWIS	PREPARE, SUPPLY & LAY 350M2 PAVING FOR CLEVE BOWLS CLUB	22,253.00
EFT15447	26/10/2017	SPORTCRETE ASIA-PACIFIC PTY LTD	CARPET & UNDERLAY FOR CLEVE BOWLS CLUB	121,000.00
EFT15474	07/11/2017	SPORTCRETE ASIA-PACIFIC PTY LTD	CLEVE BOWLING CLUB - COMPLETION OF BASE WORKS	84,700.00
EFT15519	10/11/2017	BAB ALUMINIUM PTY LTD	NEW SEATING FOR CLEVE BOWLING CLUB	4,064.50

<sup>7</sup> The dates appear to be the dates of the council's payment vouchers (which have been provided to my investigation).

40. According to the above Payment Reports, the total amount the council paid for the project was \$265,442.80. The amounts are inclusive of GST.<sup>8</sup> Therefore, according to the Payment Reports the council paid a total of \$241,311.64 plus \$24,131.16 GST for the project.
41. There is a discrepancy between the table at paragraph 38 above and the Payment Reports at paragraph 40 above of \$2,000. I consider that it is reasonable to assume that the first item, of \$22,200 and \$24,200 respectively, was entered incorrectly in the table. As such, I have determined that the total amount paid by the council for the project was \$241,311.64, exclusive of GST.
42. The council issued an invoice to the bowling club dated 15 May 2018 for \$237,082.90 (being \$215,529.91 plus GST of \$21,552.99). The invoice provides the description as follows:

REIMBURSEMENT FOR EXPENSES PAID TOWARDS THE NEW SYNTHETIC BOWLING GREEN			
5914	0001	PRIVATE WORKS REIMBURSEMENT	237,082.90*
		1.00 @ 237082.90 ea	
		*\$215,529.91 GST charge \$21,552.99	

43. As such, it appears that the council invoiced the bowling club for \$25,781.73 less than the amount the council had already paid for the costs of the project.
44. According to the receipts provided to my investigation, the bowling club has repaid the council a total of \$112,777.90, as follows:<sup>9</sup>
- \$22,000.00 on 15/06/2017
  - \$3,695.00 on 23/11/2017
  - \$21,552.99 on 29/05/2018
  - \$65,529.91 on 14/5/2018.
45. The information provided in the mayor's response to my provisional report agrees that the Club repaid the council \$112,777.90. However, it was submitted that the total amount the council paid for the project was \$241,853.48 excluding GST (\$266,038.83 inclusive of GST), being \$541.84 less than the amount calculated by my investigation. The response explained the discrepancy as being due to my investigation having been provided with some amounts excluding GST and 'some invoices in error'. Given that the figures are not significantly different from mine, I do not consider that this changes my final views.
46. In summary, from the information available to me, I consider that it is reasonable to conclude that:
- the council paid a total of \$241,853.48 for the project
  - the council invoiced the bowling club for reimbursement of costs of \$215,529.91 for the project
  - the bowling club repaid the council an amount of \$112,777.90.
47. As such, it appears that the bowling club repaid the council:

<sup>8</sup> The dates appear to be the dates of the council's payment vouchers (which have been provided to my investigation).

<sup>9</sup> I note that the receipts record the GST as being '\$0'.

- \$102,752.01 less than the amount the council invoiced it for, and
  - \$129,0075.58 less than the amount the council spent on the project.
48. The mayor's response to my provisional report, having submitted that the total cost of the project was \$241,853.48 excluding GST (\$266,038.83 inclusive of GST) and agreeing that the council paid \$112,777.90 also stated that that 'the Club was also proposing to 'draw down' on the loan facilitated by the council, in the amount of \$150,000', Therefore, it was submitted that the council only 'short invoiced' the Club \$3,260.93. The response also advised that 'the loans monies had been advanced to the council on 15 March 2018'. This information has not changed my views, particularly given that the council had covered costs of the project prior to any loan being in place to ensure that the bowling club could repay the costs to the council.
49. The mayor's response also submitted that 'at the time of invoicing, the Club was also proposing to 'draw down' on the loan facilitated by the Council, in the amount of \$150,000'. This, in my view, is incorrect given that the 15 June 2017 and 23 November 2017 invoices were made prior to the approval of the loan by the council, with the 23 November 2017 invoice in fact being after the council's 14 November 2017 decision not to approve the loan.

### The Licence Agreement

50. The Licence Agreement signed between the council and the bowling club, dated 7 November 2003, includes the following relevant clauses:

#### **BACKGROUND:**

- A. This Licence is issued pursuant to Section 202 of the 1999 Local Government Act.
- B. The Sporting Facility described in Item 2 of the Schedule ("the Facility") is owned or controlled by the Council.
- C. The Licensee has requested a licence to use the Facility and the Council has resolved to grant the Licensee a licence for the use of the Facility.
- D. The Licensee has inspected the Facility and is satisfied that the Facility is in good condition and is fit for the purposes for which the Licensee intends to use it.
- E. The council and the Licensee wish to record the conditions of the Licence in this document.

...

#### **1. Interpreting this Licence**

##### 1.2 The expressions below have the following meanings:

- "the Schedule" means the Schedule at the back of this Licence;
- "the Facility" means the Sporting Facility being licensed, as described in **Item 2** of the Schedule, including any buildings, structures, fences, improvements and fixtures that:-
  - re on the property now; or a
  - re erected during the term of this Licence [..] a

...

### 3.1 Erection/Alteration of Buildings

3.1.1 Unless the Licensee first gets the consent of the Council in writing it must not in or on the Facility:-

- erect a building or structure; [..]
- alter or demolish an existing building or structure [..]
- make any other change of a permanent nature.

3.1.2 If the Council consents to any of the works under this section then the works must be done strictly in accordance with plans and specifications approved by the council **and at the cost of the Licensee**. (my emphasis)

...

### 3.7 Maintenance and Repair

3.7.1 The Licensee must maintain the Facility in good condition and free from hazards and must:-

...

- keep the Facility in good repair (fair wear and tear and damage by fire, storm, tempest, act of god, war, riot, civil commotion and earthquake excepted);

...

- keep any vegetation, lawns or gardens on the facility maintained in an attractive state;
- keep all of the Licensee's property in good condition so as to prevent any hazard to any person or any deterioration in the condition of the Facility;
- notify the Council as soon as it becomes aware of any defects in the Facility or anything which could present a hazard or cause harm to any person or the Facility.

3.7.2 The obligations imposed upon the Licensee in this Clause are to be carried out at the Licensee's expense.

...

### 6.1 Ownership of Improvements

Unless mutually agreed, all structures, improvements, fixtures and fittings located in or on the Facility and constructed by the Licensee, remain the property of the Licensee.

## Relevant law

51. 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.

52. 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.

53. Section 44 of the Local Government Act:

- (1) A council may delegate a power or function vested or conferred under this or another Act.
- (2) A delegation may be made—
  - (a) to a council committee; or
  - (b) to a subsidiary of the council; or
  - (c) to an employee of the council; or
  - (d) to the employee of the council for the time being occupying a particular office or position; or
  - (e) to an authorised person.
- (3) However, a council may not delegate—
  - (a) ...
  - (b) ...
  - (c) power to borrow money or to obtain other forms of financial accommodation;
  - (d) ...
  - (da) power to adopt or revise an annual business plan or budget of the council;
  - (e) power to approve expenditure of money on works, services or operations of the council not contained in a budget adopted by the council;
  - (g) power to approve payment or reimbursement of expenses that may be paid at the discretion of the council and for which the council has not adopted a formal policy or made specific financial provision;

...

54. Section 99 of the Local Government Act sets out the role of the CEO. It includes:

- (1) The functions of the chief executive officer include.
  - ...
  - (g) to ensure that the assets and resources of the council are properly managed and maintained;
  - ...

55. Section 109 of the Local Government Act provides, and did at the relevant time:

- (1) An employee of a council must at all times act honestly in the performance of official duties.
  - ...

56. Section 110 of the Local Government Act provides, and did at the relevant time:

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the employees of all councils.
- ...
- (4) Council employees must observe the code of conduct.
- (5) Contravention or failure to comply with the code of conduct constitutes a ground for suspending, dismissing or taking other disciplinary action against the employee.
- (5) Contravention of or failure to comply with the code of conduct constitutes a ground for suspending, dismissing or taking other disciplinary action against the employee.

57. At the relevant time the Code of Conduct included:

## 2. Conduct required of Council employees

In line with 'PART 1–Principles' of this Code, the following behaviour is considered essential to upholding the principles of good governance in Councils.

A failure to comply with any of these behaviours can constitute a ground for disciplinary action against the employee, including dismissal, under section 110(5) of the *Local Government Act 1999*.

...

Council employees will:

### General behaviour

- 2.1 Act honestly in the performance of official duties at all times, as required by s109(1) of the *Local Government Act 1999*.
- ..
- 2.9 Endeavour to provide accurate information to the Council and to the public at all times.
- ...
- 2.24 Council employees must not use public funds or resources in a manner that is irregular or unauthorised.
- ...

## Whether the CEO committed maladministration in public administration within the meaning of the ICAC Act by using council funds to pay costs of the Cleve and Districts Bowling Club

58. I have considered whether the CEO committed maladministration in public administration under the ICAC Act in relation to the payment of the bowling club's costs for the project with council funds.
59. To conclude that the definition of maladministration within the meaning of the ICAC Act has been met, I must be satisfied that the conduct of the CEO resulted in:
- an irregular and unauthorised use of public money (s5(4)(a)(i) of the ICAC Act); *or*
  - a substantial mismanagement of public resources (s5(4)(a)(ii) of the ICAC Act).

### *Irregular and unauthorised use of public money*

60. Firstly, I have considered whether the CEO's conduct resulted in an irregular use of public money.
61. As the ICAC Act does not provide for a specific interpretation of what is deemed to be irregular in the context of maladministration, I have considered the ordinary meaning of the word and am guided by the following definition of the word 'irregular':
- ...contrary to the rules or to that which is normal or established.<sup>10</sup>
62. In my view, it is reasonable to conclude that a council's use of ratepayers' money to cover costs of another entity without the following:
- any **formal** approval by the council
  - specific inclusion in the council's budget
  - any agreement in writing, or
  - any assurance that the money will be repaid
- could be considered irregular.
63. In accordance with the Licence Agreement, the responsibility for paying for any improvements to the facility lies with the licensee, being the bowling club.
64. In light of this, and the definition above, I am of the opinion that the CEO's conduct, in facilitating the council to pay the costs for the project on behalf of the bowling club resulted in an irregular use of public money.
65. Secondly, I must consider whether the CEO's conduct resulted in an unauthorised use of public money.
66. Based on the information available to me, I have not been able to identify any authority under which the CEO was authorised to pay the costs of the project from the council budget.
67. In his third response to my Office, the CEO stated:
- ... The Procurement Policy (particularly Section 6), in conjunction with Council's internal controls, was however relevant in the authorisation and payment processes used to pay the accounts. All of Council's account payments, regardless of their purpose or nature, follows these same authorisation and payment processes. The CEO, and other authorised officers with varying authority levels, have authority to approve orders for budgeted expenditure...
68. The CEO later conceded to my investigation that the council's Procurement Policy was not relevant in the circumstances, given that the project did not involve the procurement of any goods or services for the council.
69. My investigation asked the CEO under what specific authority he purported to authorise the payments for the project. The CEO answered that the costs for the project were made as 'budgeted expenses'.<sup>11</sup>
70. I have not been able to identify any provisions in the Local Government Act that authorise the CEO to have paid the costs for the project on behalf of the bowling club from the budget of the council, without the specific approval of the council.

<sup>10</sup> Oxford Dictionary, definition of 'irregular' < <https://en.oxforddictionaries.com/definition/irregular>>.

<sup>11</sup> In the CEO's second response.

- 
71. I note that, pursuant to section 137 of the Local Government Act, the council has a discretion to expend its funds as it thinks fit. I do not, however, consider that this discretion extends to the CEO (in the absence of any authority from the council).
72. The CEO advised my investigation that when he met with the bowling club in June 2017 it was advised that 'the loan and account payment requests would need to be made in writing and considered by Council.'
73. The bowling club requested in writing that the accounts be paid by the council by letter to the then mayor dated 7 June 2017 and the CEO reported to the council at its 26 June 2017 Special Meeting that the bowling club had requested the council's assistance with the payment of accounts for the project. The CEO, however, failed to make a recommendation to the council that it authorise the council to pay the invoices for the project and I have no evidence that the council approved the payment of the invoices for the bowling club project.
74. Section 44(3)(g) of the Local Government Act provides that the council may not delegate the power to approve payment or reimbursement of expenses that may be paid at the discretion of the council and for which the council has not adopted a formal policy or made specific financial provision. This includes delegating to the CEO.
75. I have no evidence that the costs for the project were included in the council's budget and, as far as I am aware, there was no decision of the council, no policy and no procedure which permitted the CEO to use the council budget to make such expenditures in the absence of its specific inclusion in the council's budget.
76. Further, section 44(3)(da) of the Local Government Act provides that the council may not delegate the power to revise the annual budget of the council.
77. I also note that the CEO confirmed that reference to these payments was omitted from the December 2017 Budget Review.
78. Given the above, I am satisfied that the conduct of the CEO in ensuring payment of the invoices for the project resulted in an unauthorised use of public money as the CEO had no authority from the council to expend the money in such a way.
79. I further note that, as per section 99 of the Local Government Act, a function of the CEO is 'to ensure that the assets and resources of the council are properly managed and maintained'.
80. Given the above, my view is that the payment of the invoices for the bowling club project by the council was unauthorised within the meaning of section 5(4)(a)(i) of the ICAC Act.
81. In summary, on balance, and having regard to the *Briginshaw* principle, I am satisfied that:
- the use of council funds to pay the invoices was irregular
  - the CEO's use of council funds to pay the invoices was not authorised by the council.
82. In the mayor's response to my provisional report it is submitted that the CEO had authority to approve the initial payment of the \$24,200 deposit to Sportcrete as a result of clause 3.10 of the council's 'Budget Management Policy', which provides:

The CEO is authorised to approve actions not budgeted for where such expenditure is necessary on the grounds of urgency or cost effectiveness.

83. I am advised that a deposit was required to be paid to secure the services of the contractors by 22 June 2017. I do not agree that paying the cost of the deposit for the project could reasonably be considered to be 'necessary on the grounds of urgency or cost effectiveness' in the circumstances, given the council had not otherwise approved the expenditure on the upgrade.
84. I note that in the mayor's response to my provisional report, it is submitted that, in speaking to the report for item 3.3 at the 26 June 2017 council meeting, the CEO verbally advised the council that the deposit had been paid. It is not mentioned in the CEO's report to the council. The letter from the Club attached to the report states that the Club is 'going forward with the replacement' of the green and that the project 'is scheduled to start in mid September'. In my view, it would have been prudent for the CEO to formally address the fact that the deposit had already been paid by the council. That the council had been reimbursed the same day is not, in my view relevant.
85. The response to my provisional report also submitted that, at the 26 June 2017 Special Council Meeting, the Draft Budget for 2017/18 included a proposed amendment providing \$120,000 for a loan to the club 'in the event that the Council resolved to assist the Club'. Given that the council did not resolve to assist the club, but rather resolved to provide 'in principle support to facilitating a loan', combined with the fact that the council later at its 14 November 2017 meeting resolved to decline the Club's request for funding, my views are not changed by this.
86. The response to my provisional report further submitted that in approving the draft budget at the 26 June 2017 meeting, which included the budget line of \$120,000 for the loan, the council had resolved to provide the assistance as it was reflected in the adopted draft budget. I disagree. The resolution made by the council clearly agreed to provide 'in principle support' and provided the sum of up to \$150,000. It is submitted that the then Manager of Corporate Services failed to include the expenses in the 2017/18 budget that was adopted at the 11 July 2017 council meeting, and that given it was the responsibility of the Manager 'to make the necessary amendments' council employees (including the CEO) proceeded to make payments for the project in good faith on the understanding that the project was, in fact, budgeted expenditure'. I disagree. I consider it is Mr Arnold's responsibility as the CEO of a council receiving funds from ratepayers to ensure that the council is accountable and transparent.
87. Given the above, my final view is that conduct of the CEO in facilitating the payment of the invoices for the bowling club project by the council resulted in an 'irregular and unauthorised use of public money' within the meaning of section 5(4) of the ICAC Act.

### ***Substantial mismanagement of public resources***

88. For the sake of completeness, I have also considered whether the CEO's conduct resulted in substantial mismanagement of public resources.
89. There is no specific test in the ICAC Act as to what is considered substantial mismanagement under the ICAC Act or at common law. I note, however, the dictionary definition of 'substantial', which includes 'of considerable importance, size or worth' and 'real and tangible rather than imaginary'.<sup>12</sup>
90. As I have outlined above, I consider that ratepayers' money was used to cover the costs of another entity without the following:
- any formal approval by the council

<sup>12</sup> <https://en.oxforddictionaries.com/definition/substantial>.

- specific inclusion in the council's budget
  - any agreement in writing, or
  - any assurance that the money will be repaid.
91. In my view, the above factors, combined with the fact that the council's record keeping did not accurately reflect the amounts paid by the council for the project led to the bowling club repaying the council in excess of \$120,000 less than the amount the council spent on the project, resulted in substantial mismanagement of public resources.
92. Therefore, in light of my reasons above, I consider that the conduct of the CEO in facilitating the payment of the invoices for the bowling club project by the council resulted in 'substantial mismanagement of public resources' within the meaning of section 5(4) of the ICAC Act.
93. I note that, in my provisional report I commented that in failing to ensure that there was any guarantee that the money would be repaid by the bowling club, the CEO put the resources of the council at risk. In the mayor's response to my provisional report it was submitted that the decision to remove guarantors arose from discussion of the elected members and the fact that some loans that had been made to community organisations required guarantors and others did not, and given this the CEO had suggested that 'for reasons of transparency, accountability and good governance, it was appropriate for the Council to consider whether it wished to adopt a policy position in relation to the manner in which it might assist community groups'. It was also pointed out to me that the decision to adopt the policy was that of the council as a governing body, not of the CEO. In response, I have revised my position and do not consider that the CEO failed to ensure that there was any guarantor in place.

### Opinion

In light of the above, I consider that the CEO committed maladministration in public administration for the purposes of section 5(4)(a) and of the ICAC Act by using council funds to pay costs of the bowling club.

### **Whether the CEO committed misconduct in public administration within the meaning of the ICAC Act by using council funds to pay costs of the Cleve and Districts Bowling Club**

94. In order to find that the CEO's conduct amounted to misconduct under section 5(3) of the ICAC Act, I must be satisfied that his conduct, while acting in his capacity as a public officer, amounted to either a contravention of the Code of Conduct for Council Employees or 'other misconduct'.
95. Pursuant to section 5(3)(a) of the ICAC Act, a public officer commits misconduct in public administration through a 'contravention of a code of conduct [...] while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer'. Owing to the operation of section 110(5) of the Local Government Act, the Code of Conduct was such a code of conduct at the relevant time.
96. Clause 2.24 of the Code of Conduct established that a council employee must 'not use public funds or resources in a manner that is irregular or unauthorised.'
97. As I have set out above, I consider that the CEO used council funds to pay the invoices for the project and that this use of public funds was done in a manner that was both irregular and unauthorised. As such, I consider that the CEO breached clause 2.24 of the Code of Conduct.

98. I have considered the conduct of other employees who may have been aware of the irregular and unauthorised payments. However, as the Chief Executive Officer of the council, and given section 99(1)(g) of the Local Government Act, I consider that the CEO was ultimately responsible for the payments of the accounts associated with the bowling club.
99. Further, section 99(1)(g) of the Local Government Act provides that the functions of the CEO include 'to ensure that the assets and resources of the council are properly managed and maintained.' At the time that the council commenced making the payments for the project, the bowling club had not successfully secured any funding for the project, either by way of grant funding or a loan. Given this, I consider that the CEO put the resources of the council at risk.
100. I also consider it is Mr Arnold's responsibility as the CEO of a council receiving funds from ratepayers to ensure that the council is accountable and transparent. He had a duty to ensure that sufficient procedures, processes and practices were in place to ensure accountability and transparency and I consider that that he failed to do so.
101. It follows that I am satisfied that, through the manner in which he agreed to and facilitated the payment of the invoices for the project, the CEO committed misconduct in public administration.
102. It also follows that I am satisfied that the CEO through his contravention of the Code of Conduct also contravened section 110(4) of the Local Government Act. Accordingly, I consider the CEO's conduct appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

### Opinion

In light of the above, I consider that, by using council funds to pay costs of the bowling club, the CEO breached clause 2.24 of the Code, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

I also consider that the CEO's conduct in breaching clause 2.24 of the Code contravened section 110(4) of the Local Government and accordingly appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

### **Whether the CEO committed misconduct in public administration within the meaning of the ICAC Act by failing to disclose to elected members that he had used council funds to pay costs of the Cleve and Districts Bowling Club**

103. Clause 2.9 of the Code of Conduct establishes that a council employee must 'endeavour to provide accurate information to the Council and to the public at all times.'
104. The CEO advised my investigation that the elected members were 'informally advised' that the council had paid the invoices for the project.
105. Clause 2.1 of the Code of Conduct establishes that a council employee must 'act honestly in the performance of official duties at all times, as required by s109(1) of the *Local Government Act 1999*.'
106. In the CEO's Report to the Special Meeting of the council on 26 June 2017 the CEO advised the council that the bowling club had requested that the council pay the invoices for the project. However, the CEO failed to **formally** advise the council that it had already paid an invoice of \$24,200 to Sportcrete as a deposit for the project.

- 
107. The CEO had many other opportunities to formally advise the elected members that the council had paid costs for the project, being when the bowling club and the project were considered by the council at the following meetings:
- 14 November 2017
  - 13 February 2018
  - 13 March 2018, and
  - 8 May 2018.
108. There is no evidence that the CEO formally advised the council at any of these meetings that the costs of the project were being paid for by the council from the council budget, despite him having the opportunity to do so in the reports he presented to these meetings.
109. The complainant has told my investigation that, at the 13 March 2018 council meeting, the CEO did verbally advise the elected members of the fact that the council had paid the invoices for the project. However, the complainant advised that the CEO did not tell the elected members that the council had been doing so, without any authorisation, since 15 June 2017 (which, I note, was prior to the project even being presented to the council) and he did not inform the elected members that the amount paid was in excess of \$240,000, and without any formal agreement that it would be repaid.
110. It is particularly concerning to me that the CEO continued to fail to formally advise the council of the payments, and to seek its approval, even when the council was making significant decisions about the granting of the loan to the bowling club. I consider that this was information relevant to these decisions.
111. In his response to my provisional report, the mayor has submitted that the CEO advised the council informally of the payments on a number of occasions.
112. I acknowledge that some of the payments made by the council for the project were included in the monthly 'Payment Reports' attached to meeting agendas. Six such transactions included in the description that the payments were for the Cleve Bowling Club. Three further transactions do not describe the payments as being for the bowling club and the elected members would have had no way of identifying them as such.
113. I consider the payments that specifically mentioned the bowling club had the potential to alert elected members to the fact that the council was paying for the project, in the absence of any agreement between the council and the bowling club as to repayment of the amounts, or any resolution authorising the CEO to make the payments from the council budget.
114. Given this, I have considered whether to report the actions of the elected members in either failing to notice the payments, or if they did notice them, failing to query whether there was any authority for the payments being made by the council, to the Office for Public Integrity (**the OPI**).
115. I am required to report to the OPI any matter that I reasonably suspect involves serious or systemic misconduct or maladministration in public administration. I have, however, determined that the failure of the elected members to notice and/or query the payments does not lead to me to reasonably suspect serious or systemic misconduct or maladministration in public administration. I have reached this view largely because I do not consider that it was unreasonable that the elected members did not either notice or query the payments due to the way the information was presented to them.
116. The amounts the council paid for the project were included in monthly Payment Reports, which were provided to elected members within large volumes of pages of agenda papers. Within five months of Payment Reports totalling over 600 transactions,

there were six transactions that identified the bowling club. Given this, I do not consider that it was unreasonable that elected members may not have noticed the transactions, and I do not consider that their failure to do so meets the standard of serious or systemic misconduct or maladministration in public administration which I must report to the OPI. That said, this highlights the importance of elected members carefully scrutinising the material before them when making any decisions.

117. Ultimately, I do not consider that the CEO took sufficient steps to ensure that the elected members were formally, clearly and explicitly informed of the fact that the council was making the payments for the project.
118. As I have outlined above at paragraph 85, the submissions that the CEO had verbally advised the council that the deposit had been paid, and the council had been reimbursed the same day, do not change my view that it would have been prudent for the CEO to clearly and formally advise the elected members.
119. Given the numerous opportunities that the CEO had to formally advise the council of the payments made for the project, I have considered whether by failing on a number of occasions to formally advise the council that it was paying the costs of the project, the CEO acted dishonestly. For example, in his Report to the Special Meeting of the council on 26 June 2017 the CEO advised the council that the bowling club had requested that the council pay the invoices for the project. However, the CEO failed to formally advise the council that it had already paid an invoice of \$24,200 to Sportcrete as a deposit for the project. The CEO again failed to formally advise the council that the council had effectively already provided the bowling club with funding for the project when the council refused the request for retrospective funding at the 14 November 2017 council meeting. Given that the CEO has submitted that he advised the council informally on a number of occasions, and that the amounts were in the draft budget and payments were included in the monthly Payment Reports, I am not prepared to go so far as to find that CEO failed to act honestly or failed to provide accurate information, contrary to clauses 2.1 and 2.9 of the Code of Conduct and section 109 of the Local Government Act.
120. In his response to my provisional report, the Mayor has corroborated the CEO's submissions that he verbally advised the elected members on a number of occasions. Whilst I do not consider that it would be a good use of my resources to confirm exactly the advice given to the elected members, I consider that the CEO should have formally advise the elected members that the council was paying the costs of the project, and that he failed to do so. In my view, this falls below the acceptable standard of accountability and transparency. This issue also highlights the potential problems when information is conveyed informally, rather than by formal written communications to elected members.
121. Given the above, and while I consider that the conduct of the CEO falls below the acceptable standard of accountability and transparency, I do not go so far as to conclude that the CEO's conduct was in breach of clauses 2.1 and 2.9 of the Code of Conduct or section 109 of the Local Government Act.
122. My final view is that, by failing to formally advise the council that the council budget had been used to pay the invoices for the project, the CEO did not commit misconduct in public administration.

## Opinion

In light of the above, I consider that the CEO did not breach clauses 2.1 2.9 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.

## Summary and Recommendation

My final view is that:

- in using council funds for the payment of the invoices for the bowling club project the CEO committed maladministration in public administration for the purposes of section 5(4)(a) of the ICAC Act
- in using council funds for the payment of the invoices for the bowling club project the CEO breached clause 2.24 of the Code, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act
- the CEO's conduct in breaching clause 2.24 of the Code contravened section 110(4) of the Local Government and accordingly appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act
- by failing to formally advised the council that the council budget had been used to pay the invoices for the project the CEO did not breach clauses 2.1 and 2.9 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.

The failure by the CEO to comply with the Code of Conduct would prima facie, constitute a ground for disciplinary action.

I will report the matter of the CEO's misconduct to the principal officer of the council as required by section 18(5) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council consider taking disciplinary action against the CEO in accordance with its policy and the CEO's employment contract.

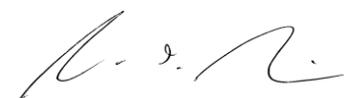
## Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **31 July 2020** on what steps have been taken to give effect to the recommendation 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

30 June 2020