



Report - Burnside Council
Full investigation - *Ombudsman Act 1972*

Complainant	Anonymous
Council member	Councillor Harvey Jones
Council	City of Burnside
Ombudsman reference	2019/09057
Date complaint received	18 October 2019
Issues	<ol style="list-style-type: none">1. Whether Cr Jones disclosed confidential material considered by the council at its meeting on 25 June 2019, thereby committing misconduct in public administration2. Whether Cr Jones disclosed confidential information considered by the council at its meeting on 9 July 2019, thereby committing misconduct in public administration

Jurisdiction

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

Section 14B of the *Ombudsman Act 1972* (the **Ombudsman Act**) provides:

14B—Referral of matter by OPI or ICAC

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

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

ICAC Act means Independent Commissioner Against Corruption Act 2012;

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

This matter concerns alleged breaches by Cr Jones of clause 3.3 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* (**Local Government Act**), I have considered these matters under section 5(3)(a) of the ICAC Act.

In addition, as a contravention of Part 3 of the Code is a breach of section 63(2) of the Local Government Act, I have considered whether the conduct in question appears to be contrary to law for the purpose of section 25(1) of the Ombudsman Act.

The complainant is an informant for purposes of the *Public Interest Disclosure Act 2018*. The identity of the complainant remains confidential and has not been disclosed.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking information from a journalist, Mr Ben Cameron
- seeking information from the Council
- considering the Code for Council Members, the Local Government Act, the ICAC Act, and the Ombudsman Act
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

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

Procedural fairness

I provided the complainant, the council's principal officer, and Cr Jones with copies of my provisional report.

The complainant agreed with my conclusions.

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

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

I have considered Cr Jones' response in reaching my final view. Ultimately, Cr Jones' response did not persuade me to alter my conclusions. In response to my provisional report, Cr Jones raised issues about Habeas Corpus and the common law right to avoid self-incrimination as well as claiming that his response had been taken under 'duress'.

Although Cr Jones referred to his right against self-incrimination in response to my initial enquiries to him, he did not make it clear that it applied to the current investigation and made frank and candid admissions despite reference to it. I do not accept that there was any element of duress. I note that I did not utilise my coercive powers but simply put a request for response to Cr Jones. My enquiry is a misconduct enquiry rather than a criminal investigation. There are no criminal allegations nor any criminal findings; I therefore do not consider that the right against self-incrimination applies to my investigation. Cr Jones answered all my questions despite claiming his right against self-incrimination, and therefore I consider that it was open to me to consider his factual admissions as evidence.

Irrespective of Cr Jones' submissions, I consider that I have sufficient circumstantial evidence in relation to the first allegation and direct evidence in relation to the second allegation to support both my conclusions, including the computer server records of the agency, referred to below, which show that the only person who accessed the confidential document the subject of allegation 1 around the time of the disclosure to the journalist, was Cr Jones. My Office has also observed video evidence of the statement subject of allegation 2. In light of the above, my view remains as set out in my provisional report.

Background

Allegation 1

1. At a meeting on 25 June 2019, the council considered confidential Agenda Item 19.1, concerning an investigation into the conduct of Mayor Monceaux. Included in agenda item 19.1 was an email (**the email**) from the Mayor to the then Chief Executive Officer that was subject of an internal council misconduct investigation. At that time, Cr Jones spoke against the matter going into confidence, and was among three Elected Members who voted against the motion to move into confidence to consider the matter. The council subsequently voted to move the matter into confidence.
2. On 3 July 2019, an article was published, authored by Mr Ben Cameron, in *The Messenger*, referring to the email.
3. Cr Jones subsequently shared the Messenger article to his Facebook account, referring to himself as 'The Voice of Reason'.
4. My investigation has considered the server records for the period of 26 June 2019 to 29 June 2019 and they reveal that one elected member, Cr Jones, had accessed the file containing the email subject of Agenda Item 19.1 during that time.

Allegation 2

5. At a meeting on 9 July 2019, the council considered Agenda Item 13.6 publicly, and Agenda Item 19.1 in confidence.
6. At that meeting, the Mayor warned all elected members on two occasions - at the beginning of the meeting, and again before the motion was debated - to be cautious of releasing confidential information contained in 19.1. Cr Jones was present when both warnings were given.
7. During the debate, Cr Jones stated:

Can I just ask a couple of questions? Am I being asked to vote to spend 6.1 million dollars tonight?

8. It is alleged by the complainant that this disclosure could potentially cost the Council 'hundreds of thousands of dollars as those who tender will now tender at the price disclosed'. I understand the basis for this claim is that the disclosure of the bottom line prior to procurement would enable tenderers to calibrate their tenders towards the budgeted amount, diminishing competitive offers.
9. Based on the following circumstances:
 - Cr Jones had made previous statements about releasing information to the public
 - all elected members were warned a number of times that some aspects were confidential in relation to the matter
 - it was clear that there were no numerical values in the public report, and all numerical figures were placed in the confidential agenda
 the reporter alleged that Cr Jones' disclosure of the 6.1 million dollar figure was intentional.
10. The 6.1 million dollar figure was subsequently reported on in an article appearing in the *The Messenger* on 11 July 2019, again written by Mr Cameron. The article alleged:

The Federal Government promised \$3 million for the project – planned to begin next January – but the council's proposed contribution was kept quiet.

Thanks to a blunder by Cr Harvey Jones, though, it is now known to be around \$6.1 million.

The council was all set to discuss its subsidy in a private session on Wednesday night until Cr Jones raised a question during the open meeting.

"Am I being asked to vote to spend \$6.1 million tonight?" Cr Jones asked.

Legislation

11. 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.
12. Section 90(2) of the Local Government Act provides:
 - (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).
13. Section 91(7) of the Local Government Act provides:
 - (7) However, subsections (4),(5) and (6) do not apply to a document or part of a document if–

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- (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3; and
 - (b) the council or council committee orders that the document or part be kept confidential.
14. Section 63 of the Local Government Act further provides:
- (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.
15. Clause 3.3 of Part 3 of the Code of Conduct requires that a council member 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.
16. I note that the Local Government Act creates an offence for disclosure of material subject of a section 90 order. Section 62(4a) of the Local Government Act provides:
- (4a) A member or former member of a council must not disclose information or a document in relation to which there is an order of a council or council committee in effect under section 90 requiring the information or document to be treated confidentially.
17. However, I have not considered the above offence provision as it is outside the scope of the referral to my Office.

Whether Cr Jones disclosed confidential material considered by the Council at its meeting on 25 June 2019 thereby committing misconduct in public administration

18. On 25 June 2019, the council voted to retain agenda item 19.1 (including the email) in confidence. It also voted to move into confidence to discuss the matter. I accept that Cr Jones was aware of this, as he was in attendance at the meeting.
19. In his submissions to my Office, Cr Jones has stated that he did show the email in question to Mr Cameron, and provided him with a photo of the email so that his editor could view it. In light of this, I consider that Cr Jones breached the council order.
20. Cr Jones does not consider this to have been a breach of clause 3.3 of the Code for Elected Members, as he believes that the email 'was a matter of public record and incapable of being declared retrospectively confidential several months later'. In support of this claim, Cr Jones has submitted that he was told to treat any email sent from his Council account 'as being on the public record', and the common knowledge that 'once you send an email you have lost control of it'. However, this is not relevant to consideration of whether Cr Jones breached the order.
21. In this instance, I do not need to consider the second limb of clause 3.3, that the council member should reasonably have known that the relevant information was confidential.
22. That said, I consider it necessary to note that Cr Jones' submission that his email was in the public domain is not accurate. Rather, the email was a confidential council email with a confidentiality warning on it. It is important that Cr Jones is cognisant that he must not disclose information that he should reasonably know is confidential.

23. Since I take the view that Cr Jones failed to observe the requirement of clause 3.3 of the Code, I therefore consider that Cr Jones breached section 63(2) of the Local Government Act.
24. I consider this to be a clear breach of the confidentiality requirements in the Code, and note that it is incumbent on council members to adhere to all orders made by the council.
25. I am encouraged by the regret expressed by Cr Jones in his submission, saying:

I would first like to say that even though I believe that the e-mail was a matter of public record, I do deeply regret my actions. With the benefit of an additional year's experience on council, I can tell you that it is not an action that I would take today.

Opinion and Recommendation

In light of the above, my view is that, by divulging information subject to a confidentiality order considered by the council at its meeting on 25 June 2019, Cr Jones breached clause 3.3 of Part 3 of the Code, and on that basis:

- committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act
- acted contrary to section 63(2) of the Local Government Act thereby acting in a manner that appears contrary to law.

I recommend under section 25(2) of the Ombudsman Act that the council reprimand Cr Jones.

Whether Cr Jones disclosed confidential information considered by the council at its meeting on 9 July 2019, thereby committing misconduct in public administration

26. I note that a confidentiality order was not made by the Council until after the disclosure made in the course of the meeting. It was, however, recommended on the Agenda. Further, the Mayor read a warning at the commencement of the council's consideration of the item that some of the attachments were confidential. As it is not alleged that a breach occurred when the order was in effect, I am not therefore considering section 90 as the basis for confidentiality by itself for the second allegation. Rather, the issue for me to consider is whether, Cr Jones breached clause 3.3 of the Code by disclosing information that he should reasonably have known was confidential.
27. I consider that Cr Jones should reasonably have known that the information was confidential by virtue of the fact that:
 - there was a recommendation in the agenda papers that a confidentiality order be made
 - the information was provided to him in the confidential agenda
 - the Mayor's warning as described above
 - the figure provided was clearly sensitive and was not in the public domain.
28. After the disclosure of the amount budgeted for the park development, the council did ultimately pass the motion of confidentiality pursuant to section 90 and 91.
29. In his submissions, Cr Jones has confirmed to my Office that he was present at the meeting in question, including for the Mayor's warning about the confidentiality of certain information, and that he made the alleged comments.

30. Cr Jones has stated that he cannot recall whether he knew that a journalist or other members of the public were still in the room. Regardless, his comments were made in a public meeting.
31. Cr Jones has also submitted that the comment was a mistake, based on his confusion about which information being considered was in fact confidential. I note, however, that an elected member will breach clause 3.3 even if they were not aware that the information was confidential if they should have reasonably known that it was.
32. Given the multiple warnings given to the elected members by the Mayor, the clearly sensitive nature of the information, and the fact that all numerical values were found in the confidential agenda, I consider that, at the very least, Cr Jones reasonably ought to have known that the 6.1 million dollar figure was confidential.
33. Cr Jones has also submitted that this breach of confidentiality was not serious as the council estimate was 'of limited value to any future tenderer', as it seems unlikely that the 'two quite distinct multi-million-dollar aspects' would be tendered together. Further, as of 14 June 2020, no invitations to tender had yet been issued, and during the 2020/21 Budget deliberations, the council rejected the administration's proposal to move into confidence, discussing matters, including this one, in open session.
34. I do not accept this submission. First, I note that the council had little reason to maintain the secrecy of the sum budgeted once it had been widely disseminated. Second, while the financial impact is relevant to a degree, the seriousness of the breach is to be assessed primarily against the relevant legal requirements as well as community expectations of his conduct.

Opinion and Recommendation

In light of the above, my view is that by divulging confidential information at a public council meeting on 9 July 2019, Cr Jones contravened clause 3.3 of Part 3 of the Code, and on that basis:

- committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act
- acted contrary to section 63(2) of the Local Government Act thereby acting in a manner that appears contrary to law.

I recommend under section 25(2) of the Ombudsman Act that the council reprimand Cr Jones.

Summary

In light of the above, my view is that:

- by divulging information subject to a confidentiality order considered by the council at its meeting on 25 June 2019, Cr Jones breached clause 3.3 of the Code, thereby committing misconduct in public administration
- by divulging information subject to a confidentiality order considered by the council at its meeting on 25 June 2019, Cr Jones acted contrary to section 63(2) of the Local Government Act, thereby acting in a manner that appears contrary to law
- by divulging confidential information at a public council meeting on 9 July 2019, Cr Jones breached clause 3.3 of the Code, thereby committing misconduct in public administration
- by divulging confidential information at a public council meeting on 9 July 2019, Cr Jones acted contrary to section 63(2) of the Local Government Act by contravening clause 3.3 of the Code, thereby acting in a manner that appears contrary to law.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council reprimand Cr Jones for each of the breaches outlined above.

Final comment

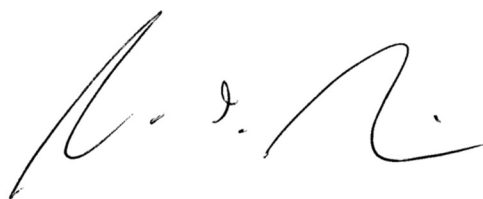
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **15 September 2021** on what steps have been taken to give effect to my recommendation/s above; including:

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

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

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

22 June 2021