



Report

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

Public Authority	District Council of Grant
Public Officer	Mayor Richard Sage
Ombudsman reference	2019/09540
ICAC reference	2020/003998
Date of referral	22 November 2019
Issues	<ol style="list-style-type: none">1. Whether Mayor Sage committed misconduct in public administration by failing to declare and appropriately deal with a conflict of interest in relation to Agenda Item 5.1.1 at a council meeting held on 1 October 20192. Whether Mayor Sage committed misconduct in public administration by failing to declare and appropriately deal with a conflict of interest in relation to Agenda Item 9.1 at a council meeting held on 9 October 20193. Whether Mayor Sage committed misconduct in public administration by disclosing information concerning the Chief Executive Officer recruitment process4. Whether Mayor Sage committed misconduct in public administration by refusing to follow the council's Charter of Agreed Behaviours

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 potential issues of misconduct within the meaning of that Act (**the referral**).

Section 14B of the Ombudsman Act provides:

14B—Referral of matter by OPI or ICAC

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

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

ICAC Act means Independent Commissioner Against Corruption Act 2012;

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

The issues that are the subject of this report concern alleged breaches by Mayor Sage of clauses 3.3 and 3.13 of Part 3 of the Code of Conduct for Council Members (**the Code**). As a contravention of Part 3 can constitute grounds for disciplinary action under the *Local Government Act 1999*, and failure by a council member to comply with Part 3 of the Code can constitute misconduct, I have considered these matters under section 5(3)(a) of the ICAC Act.

Further, the allegations raise a potential breach by Mayor Sage of Part 2 of the Code of Conduct. Clause 2.25 of Part 2 of the Code of Conduct sets out the disciplinary action that can be taken against elected members in breach of the Code. As a contravention of Part 2 can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

The referral arose from more than one report to OPI. Each reporter is an informant for the purposes of the *Public Interest Disclosure Act 2018* (**the PID Act**) and I have dealt with them as co-complainants for the purpose of my investigation. I have notified the informants of their rights and protections under the PID Act, and do not consider it is necessary to disclose their identities for the purpose of my investigation.

Investigation

My investigation has involved:

- assessing the information provided by the reporters
- seeking a response from Mayor Sage
- seeking a response from the District Council of Grant (**the council**)
- seeking information from council employees and elected members
- considering the:
 - Code of Conduct for Council Members (**the Code of Conduct**)
 - the council's Charter of Agreed Behaviours
 - the council's CEO Recruitment Committee Terms of Reference (**TOR**)
 - *Local Government Act 1999*
 - ICAC Act
 - Ombudsman Act

- preparing a provisional report and seeking the interested parties' views on that 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 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 a copy of the provisional report to the interested parties.

Joint co-complainants

A number of co-complainants in this matter submitted the following joint statement in response to my provisional report:

We feel the penalty is not severe enough for the Mayor. As a result of his refusal to abide with the Charter of Behaviour he has wreaked havoc on the council resulting in the Deputy CEO not taking the CEO position and then leaving the council... He has previously apologised to the council as a report from an ombudsman and nothing changes.

We want any apology to be a minuted item on the agenda stating what he is apologising for and he must also articulate this. This cannot be confidential and he must also state as a result he agrees to follow the charter of behaviour. His continued attitude to not declaring a conflict of interest must also be an agenda item and be articulate by the mayor when he apologises. It was good that he was found guilty however the consequences are weak considering what they could be.

I note the co-complainants' concerns, and confirm that upon finalising my report, it must be provided to a public meeting of the council within two ordinary meetings of the council in accordance with Part 3 of the Code of Conduct.

I also have no concerns with specifying that any apology by Mayor Sage be publicly recorded in the relevant Minutes.

Additional co-complainant A

A submission was also received from an additional co-complainant, including a request for a further recommendation in regard to the CEO recruitment process. As noted in the body of my report, I did not make findings in regard to this issue. I did, however, write to the council with an informal recommendation in regard to this issue, and the council is taking steps to consider my proposal.

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.

Additional co-complainant B

The final co-complainant also made a submission in response to the provisional report. The submission primarily contained comments that I have noted, but not included in this report as they do not relate to the issues considered in my investigation. Co-complainant B also submitted procedural questions, which have been addressed in my response to the joint co-complainants' submission above.

Mayor Sage

Mayor Sage provided a response to my provisional report. His submissions, however, concerned the individual alleged breaches of the 'Council Charter of Agreed Behaviours' (**the Charter**), which are not within the scope of my investigation. My investigation concerned Mayor Sage's refusal to commit to the Charter itself, and Mayor Sage's response to my provisional views on this issue have not caused me to change my views.

I have referred to additional submissions by Mayor Sage in the body of my report.

Chief Executive Officer

Mr Darryl Whicker, Chief Executive Officer of the council, responded to my provisional report expressing concerns about the Charter potentially conflicting with the Local Government Act, and the implications of recommending compliance.

As noted in my provisional report, I do not hold concerns about the Charter conflicting with provisions of the Local Government Act that Mayor Sage had specifically highlighted. The Charter is, however, a document that is subject to change, and concerns about any conflicting provisions should be raised with the council for amendment if necessary.

I remain of the view that Mayor Sage's refusal to comply with the Charter is in breach of clause 2.6 of the Code of Conduct.

Background

The Charter

1. On 24 June 2019, at an ordinary meeting of the council, the council carried a motion to endorse and commit to a Charter. The Charter operates in addition to the Code of Conduct and sets out the following behavioural expectations:

Behaviours

1. The Code of Conduct being the base line behaviour code, but that a well performing team will go beyond this base line.
2. Communicating all matters directly to the CEO, the position's direct senior reports and the Executive Assistant only. At no time should Elected Members engage with, or direct, other members of staff without the consent and knowledge of the appropriate line manager prior to any contact. The exception here, relates to the IT Department and recognises that Elected Members may need assistance on IT related matters to conduct the work of Elected Member.
3. Making an appointment with a Senior Leader (and/or approved staff member), signing in as guests, and waiting for collection from the front reception area. At no time is it appropriate for Elected Members to enter and move about the Council offices without an escort and prior arrangement. This includes use of, and sitting in the Staff Break Room.

4. If not operating in the capacity of an Elected Member (eg as a member of an external committee), issues, questions and enquiries relating to that committee must be progressed through the established Council structure. In other words, an Elected Member will operate as a member of the public in accessing information or assistance for the matter and not utilise their understanding of Council and/or established internal relationships to “short cut” the system.
5. Where an Elected or Staff Member may be personally aggrieved by an action and/or behaviour of another, they will have the courage to discuss it privately with the person first in a respectful and open way. The person receiving the feedback will have the courage to listen, be open to the feedback and to understanding the reasons why.
6. As decision makers, we will present a unified position once the decision is made. Further, no Elected Member or Staff will provide commentary to media outside of a discussed and agreed position on key strategic matters. The Council recognises however that the media will, from time to time, solicit commentary from key Council staff on operational matters and that it will be appropriate for those staff to do so.

Structural Mechanisms

1. The CEO, Mayor, Deputy Mayor and Senior Leadership team will discuss ways that facilitate appropriate involvement of Elected Members in operational and strategic activities, projects and initiatives. Proposed structures will be presented to Elected Members for consideration and/or adoption.
 2. As a minimum, in considering any operational matter, the CEO will actively seek ways to include Elected Members; this may include membership on a working party and/or committee, or soliciting feedback and suggestions. This relates specifically to projects and/or initiatives of significant capital expenditure and/or impact on communities.
 3. The CEO, Mayor, Deputy Mayor and Executive Assistant will meet weekly to organise and coordinate calendar bookings, and discuss and review current issues. As a minimum, the CEO, Mayor, Deputy Mayor and members of the senior Leadership Team will meet to review, discuss and agree the Council agenda before every meeting.
 4. The Mayor will update his calendar once his roster is known and the weekly meetings will be scheduled as a recurring event, recognising that it may need to change from time to time, based on the Mayor’s work roster.
 5. Each fortnight the Mayor will make available to Elected Members, a list of mayoral appointments, events and meetings relating to council business. This provides Members an opportunity to know about any specific meetings or events and to be involved/contribute discussion points.
 6. All Mayoral appointments, events and meetings are to go through the Executive Assistant and logged in the Mayoral Calendar.
 7. Elected Members are only eligible for reimbursement of travel and other costs when the event has been logged in the Elected Member’s diary. Elected Members will also ensure that all Council-related events, appointments and meetings are logged in their Council calendar.
 8. The CEO will continue to provide a regular written update to Elected Members as per current practice.
 9. The CEO will provide direction on appropriate meeting protocols.
 10. The Council will seek additional training on Media and to develop a specific Media Strategy.
 11. The Elected Members and CEO will identify and organise opportunities for regular group activities, including one involving all Staff and Elected Members.
 12. The agreed Charter will be regularly reviewed.
2. Mayor Sage was reported to have refused to accept the Charter, and is alleged to have breached various clauses under the Charter. Those alleged breaches fall under Part 2 of the Code of Conduct, and should therefore be directed to the Chief Executive Officer and dealt with as separate complaints.

3. In response to enquiries by my Office, Mayor Sage provided the following response, which sets out his reasons for refusing to comply with the Charter:

I have refused to commit to the Charter because it was not compliant with my beliefs and I consider it not lawful and that it is still a work in progress and a point of conjecture. Access to all elected members to not only my work roster (which is confidential) but also having the ability to predetermine my discussions with Ministers etc. is not appropriate. The majority of the meetings are at short notice and have very little predetermined points of discussion prior when some even relate to meetings for positions I hold that are external to Council.

...

Emails from Cr Jody Elliott to Jane Fetherstonhaugh...have indicated to Jane in the past, that the code and the expected behaviours are a work in progress, they will never be a finished product as different issues will require new strategies.

I am currently working with the new CEO Darryl Whicker on the Charter of Expected Behaviours and we are addressing my concerns on the Charter. The main thing is it's not to be an open invite to elected members to attend meetings or functions, that the position of presiding member/Mayor is respected and that it is reliant on the Presiding Member/Mayor being able to carry out his duties and the expectations of the community without fear or favour.

Relevant to the Local Government Act, the Mayor has a specific role over and above the Elected Member as set out in the Act and Regulations. This right has been removed from myself, from the 1st October 2019 and was meant to be reviewed after two months, and as previously mentioned, this review has not occurred. This is affecting my obligations as Mayor representing the Community. People in the community are saying to me we re-elected you as our Mayor and spokesperson. What gives the Council the right to do what they are doing to you!

Under the Local Government Act as Mayor, I am to represent the interests of residents and ratepayers, to provide leadership and guidance and to facilitate communication between the community and council.

...

The code of behaviour is a guide to ensure that elected members and the mayor carry out their duties in an open, honest and transparent way.

Many issues that are dealt with in confidence with ratepayers at times may have a conflicting view around the council table, but you still have to represent those people to the best of your ability. As stated before, I have never refused to follow the Charter of Expected Behaviours except where it compromises my obligations of those who have elected me to represent them and the obligations under the Local Government Act, so that I can legally represent my constituents.

I am working within the majority of the Expected Behaviours. Many of the rules have been determined by staff through hallway discussions and were predetermined before going into a workshop as a control measure they wanted to achieve with regard to the Mayor...

- Under the Local Government Act Section 58 1 (c) The Principal Member is to act as the Principal spokesperson of Council.
- The Triple M interview took place prior to removal of my speaking rights.
- Under Council's own code as listed above "will provide commentary to media outside a discussed and agreed position on key strategic matters".
- The Landline interview was aired after my speaking rights were removed. They had no facts to determine their actions as they went on hearsay and hadn't seen the footage.
- The majority of the Elected Members do not understand or respect the "Confidentiality" Clause (I would recommend that the Elected Members be reminded of their obligations)

- They continue to breach their own Code of Conduct and Expected Behaviours under their own policies
 - Clarification needs to be given which has precedent, the Local Government Act & Regulations or a Motion of Council - Charter of Expected Behaviours
 - I am not an elected Member, I have been elected as a Presiding Member (Mayor)
4. In regard to the last point of his submission that he is not an elected member but has been elected as a Presiding Member, it is unclear to me what relevance this has to my investigation, but for the sake of completeness, I note that section 4(1) of the Local Government Act stipulates that a:

member of a council means the principal member or a councillor of the council;

5. Accordingly, Mayor Sage is both an elected member and the principal member of the council.

Alleged failures to declare conflicts of interest

6. On 1 October 2019, the council held a Special Meeting. The meeting was called to discuss a report by Deputy Mayor Clayfield that concerned alleged breaches of the Charter by Mayor Sage.
7. The conduct by Mayor Sage that was of concern, and gave rise to possible breaches of the Charter, included
- having discussions with the media (an interview with Triple M Radio on 23 September 2019 and the Australian Broadcasting Corporation program 'Landline' on 24 September 2019), in contravention of clause 6 of the Behaviours of the Charter
 - Mayor Sage's failure to keep his diary updated and to keep the Executive Assistant notified of updates to his diary, in accordance with clause 6 of the Structural Mechanisms of the Charter.
8. A transcript of the Triple M Interview, provided to my investigation, reflects that comments were made by Mayor Sage criticising the previous CEO, and the culture of the council. Mayor Sage's comments included the following:

People moved the motion, seconded it and didn't even apologise. This is the type of toxic culture that rolled out over the last 12 months.

9. Agenda Item 5.1.1 for the 1 October Special Meeting set out concerns that were raised about the Landline interview, which had not aired or been viewed by the council prior to the Special Meeting. The council's concerns about Mayor Sage's interview with Landline predominantly related to:
- the council not being informed of the interview in advance
 - the council not being consulted on what was said by Mayor Sage during the interview, or who he was purporting to represent
 - private landowners not being informed of the interview being conducted on their property.
10. In addition to the council raising concerns during the Special Meeting that both media interviews were in breach of the Code of Conduct for Council Members, which sets out that Council Members must:
- 2.5 Ensure that personal comments to the media or other public comments, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council.

the council also raised concerns that Mayor Sage had failed to record the interviews in his diary, in accordance with his obligations under the Charter.

11. Agenda Item 5.1.1 for the 1 October 2019 Special Meeting further sets out the following Motion on Notice:

I wish to have the following Motion on Notice considered in an effort to bring some accountability and commitment from Mayor Sage towards our agreed charter of expected behaviours moved on 24 June 2019. These changes will be revisited after 2 months and depending on the Mayor's behaviour may be changed. The log book for his car is to be provided to council at the end of one month if this is not done, then the car section will be revised and changed.

12. Agenda Item 5.1.1 further set out the following proposed recommendations:

RECOMMENDATION

That Council Policy GOVPOL 07 Elected Members Allowance & Support policy be amended as such:

4.3.6 Mayoral Support

In addition to the above, the following facilities and support will be provided to the Mayor to assist in performing and discharging their official functions and duties:-

- Council will provide a vehicle (MI-private-use) for the Mayor, with the vehicle to remain the property of Council, and with Council meeting all operational and replacement costs including costs of insurance, registration, servicing, tyres and minor expenses for the vehicle.
- The Mayor is only approved to use the vehicle for business related to the Mayors role, functions and duties. No private use of the vehicle is permitted.
- Council will be responsible for all fuel costs for the vehicle subject to the following:
 - The Mayor will maintain a log book for all travel and this will be provided to Council on a monthly basis that is not related to the Mayor's role, functions and duties
 - ~~The private use component of the Mayoral Vehicle not to exceed 3,000kms of total annual usage. Any private usage that exceeds 3,000kms of total annual usage will be invoiced to the Mayor for reimbursement, calculated by the number of kilometres exceeding 3,000kms of private use multiplied by the Australian Taxation Office travel reimbursement rate applicable at that time~~
 - ~~For purposes of annual usage period, this will be a period of twelve months following from adoption of this policy and each subsequent 12 month period~~
 - Council will issue the Mayor with a corporate fuel card for fuel purchases for the Council owned vehicle, and the Mayor will provide all such fuel dockets/receipts to the Chief Executive Officer on at least a monthly basis
 - Council will provide a Mobile Phone for business use. Where the Mayor elects to use his or her own personal mobile phone, an allowance of \$150 per month is payable (in advance) to cover business calls.
- It is recognised that the Mayor's role includes the need to meet with various government agencies, businesses etc. The Mayor may seek reimbursement by making a formal claim via Councils Meeting Agenda of entertainment expenses, with any such reimbursement subject to the event being in his

calendar ~~the agreement of the Chief Executive Officer~~ approval from Council.

Section 58(1)(c) - Specific roles of principal member - of the Local Government Act 1999 provides that the Principal Member (the Mayor in our case) is to act as the principal spokesperson of the Council.

58—Specific roles of principal member

- (1) The role of the principal member of a council is—
 - (a) to preside at meetings of the council;
 - (b) if requested, to provide advice to the chief executive officer between council meetings on the implementation of a decision of the council;
 - (c) to act as the principal spokesperson of the council
 - (d) to exercise other functions of the council as the council determines;
 - (e) to carry out the civic and ceremonial duties of the office of principal member.
- (2) Subsection (1)(c) does not apply in circumstances where a council has appointed another member to act as its principal spokesperson.

I wish to have the following motion considered to also bring some accountability and commitment from Mayor Sage towards our agreed charter of behaviours, and to ensure that Councils agreed position is clearly communicated to the media and community. These changes will be revisited in 2 months.

RECOMMENDATION

That as per Section 58(2) of the Local Government Act 1999, the Elected Members will act as principal spokespersons of the District Council of Grant depending on the members individual skills, knowledge and background. The selection of a spokesperson shall be determined by the Chief Executive Officer. This resolution will be reviewed after a period of 2 months.

13. Prior to the holding of the Special Meeting, Ms Jane Fetherstonhaugh, Acting Chief Executive Officer, sent an email to the elected members and other individuals advising that Mayor Sage would need to declare a material conflict of interest regarding the matters being discussed in the meeting and leave the chambers, and that the Deputy Mayor would act as the Presiding Member for that meeting in Mayor Sage's absence.
14. It was subsequently reported to my Office that Mayor Sage chaired the Special Meeting held on 1 October 2019, and did not declare or deal with a conflict of interest in relation to Agenda Item 5.1.1.
15. In response to enquiries by my Office regarding the alleged failure to declare a conflict of interest in accordance with the Local Government Act, Mayor Sage submitted by letter dated 26 February 2020 that he:
 - felt a duty to be present for the discussion of the relevant motion, as he felt the council had already predetermined the outcome and he was being unfairly targeted
 - did not consider that he had a conflict of interest in relation to the Agenda Item as:
 - ...there was no benefit or detriment to me, but I was sure that it was going to play out as it did with the assistance of some senior managers to further restrain and humiliate the Mayor.

With regard to the proposed motions to be discussed before Council they were more to do with the principle of the matter and as you can see it was bring down the position as Mayor to control and damage my reputation to my constituents

 - did chair the meeting, as he is the Presiding Member, he is elected by rate payers, and he only has a casting vote not a deliberative vote

- had a right to be present for the discussion, as the meeting was held in public, not in confidence, and he felt compelled to protect his reputation.
16. At an Ordinary Meeting held on 9 October 2019, the following Notice of Motion, which concerned revisions to the Mayoral Support clause in the council's Elected Members Allowances and Support policy, was set to be discussed:

9.1 Mayoral Vehicle

On 4 October 2019 Cr Megan Dukalskis submitted the following Notice of Motion to the Acting Chief Executive Officer.

That:

- 1. Options for replacement of the current Mayoral Vehicle that is due to be traded in be bought before the next full Council Meeting to make a decision.*
- 2. Council amend the Elected Members Allowances and Support Policy GOVPOL 07 to include the following clause in relation to the Mayoral Vehicle:
The standard/type of Council motor vehicle provided to the Mayor shall be a maximum value of \$35,000 GST exclusive, to be traded in at the completion of each Mayoral Term.*

17. Although Agenda Item 9.1, set out above, was scheduled for discussion, Minutes of the meeting reflect it was set aside to be considered at a later date:

Council was provided with a Notice of Motion from Cr Megan Dukalskis regarding the Mayoral vehicle and proposed changes to *Elected Members Allowances and Support Policy GOVPOL 07*.

Moved Cr Dukalskis that the matter lay on the table until the Works Manager prepares a report for a future Council meeting.
Seconded Cr Little

18. It was alleged that Mayor Sage did not declare a conflict of interest in relation to Agenda 9.1. In response to that allegation, Mayor Sage submitted that:

You will see in the minutes of the meeting held 9th October 2019 ... that the item was deferred until a further report is prepared by the Works Manager. No decision was made in this meeting with regards to the Mayoral Vehicle changeover.

- No I did not have a material, actual or perceived interest in Agenda Item 9.1 as the mayoral vehicle is an operational matter not a Council matter.
- Yes I did chair the meeting on the 9th October 2019, as I am the Presiding Member. This is my role. As the Presiding Member, I can only have the casting vote and not a deliberate vote.

CEO recruitment process

19. At an Ordinary Meeting of the council held on 20 May 2019, a motion was moved to endorse the Terms of Reference for the establishment of a Chief Executive Officer (CEO) Recruitment Panel.
20. A council employee, Ms Fetherstonhaugh, was an applicant for the vacant CEO position, and was successful in her application.
21. On 30 August 2019 Mayor Sage circulated the following email to all council staff and elected members:

Dear Staff

The Mayor and Elected Members wish to advise that Jane was offered the position of CEO for the District Council of Grant, but has decided not to take up the offer.

We have certainly appreciated Jane in her acting capacity and would like to sincerely thank her for all the hard work during this time. We look forward to her continuing in her Acting CEO role for the interim.

A further announcement regarding the CEO position will be made next week.

We take this opportunity to thank staff for your patience as you continue to work with, and provide essential services to our community.

Yours sincerely

The Mayor & Elected Members

22. In response to Mayor Sage's email, Ms Fetherstonhaugh sent the following email on 2 September 2019 to the same recipients:

Dear Staff

I would like to clarify my reasons for not accepting the CEO position. My non-negotiable condition of accepting the contract was for the Mayor to give an undertaking to commit fully to the Charter of Agreed Behaviours that was adopted by Council on 24 June 2019.

I was informed by the selection committee that it was the position of Elected Members that this condition was not accepted. I therefore had no other option than to regretfully decline the offer.

Additionally I am not sure why this message was conveyed to all staff on Friday as I believed my application was confidential.

Thank you all for your support

Jane

23. My office made enquiries with Mayor Sage as to why he informed council staff and elected members of Ms Fetherstonhaugh's decision to turn down the position as CEO.
24. Mayor Sage provided emails to my investigation dated 29 and 30 August 2019, which demonstrate that he was advised by Cr Jody Elliott, in agreement with the other members of the CEO Recruitment Panel (**the Panel**), to notify the staff and elected members of Ms Fetherstonhaugh's rejection of the offer:

I feel we need to send an update to staff today.³

[...]

I think it's very important that staff receive an update this week prior to a further announcement next week. It is not appropriate that we announce a new appointment and Jane's rejection in the same email.⁴

[...]

I've heard from Barry, Kylie and Brad in relation to the message to staff. My thoughts are that as the CEO Panel it's our responsibility to send the email today and that it should come from you.⁵

³ Email from Cr Jody Elliott, dated 29 August 2019.

⁴ Email from Cr Jody Elliott, dated 29 August 2019.

25. Mayor Sage has submitted to my investigation that although his email 'could have been seen as a perceived error with regard to confidentiality by the Panel, their 'hands were forced to act and advise staff and elected members as time restraints were seen to be crucial and [they] were aware that the staff rumour mill had already started'.

Relevant law and guidelines

26. Section 5 of the ICAC Act relevantly 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

27. 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.

28. Division 3 of the Local Government Act further provides:

73 - Material conflicts of interest

- (1) Subject to this section, for the purposes of this Subdivision, a member of a council has a **material conflict of interest** in a matter to be discussed at a meeting of the council if any of the following persons would gain benefit, or suffer a loss, (whether directly or indirectly and whether of a personal or pecuniary nature) depending on the outcome of the consideration of the matter at the meeting:
 - (a) The member;

[...]

74 - Dealing with material conflicts of interest

- (1) If a member of a council has a material conflict of interest in a matter to be discussed at a meeting of the council, the member must -
 - (a) Inform the meeting of the member's material conflict of interest in the matter; and
 - (b) Leave the meeting room (including any area set aside for the public) such that the member cannot view or hear any discussion or voting at the meeting, and stay out of the meeting room while the matter is being discussed and voted on.

[...]

- (6) This section does not apply to a matter of ordinary business of the council of a kind prescribed by regulation for the purposes of this section.

[...]

75 - Actual and perceived conflicts of interest

[...]

- (2) For the purposes of this Subdivision but subject to this section, a **conflict of interest** is a conflict between -

⁵ Email from Cr Jody Elliott, dated 29 August 2019.

- (a) A member of a council's interests (whether direct or indirect personal or pecuniary); and
- (b) The public interest,

that might lead to a decision that is contrary to the public interest

- (3) A member of a council will not be regarded as having a conflict of interest in a manner to be discussed at a meeting of the council -
 - (a) By reason only of -
 - (i) an engagement with a community group, sporting club or similar organisation undertaken by the member in his or her capacity as a member; or
 - (ii) membership of a political party; or
 - (iii) membership of a community group, sporting club or similar organisation (if the member is not an office holder for the group, club or organisation); or
 - (iv) the member having been a student of a particular school or his or her involvement with a school as parent of a student at the school; or
 - (v) a nomination or appointment as a member of a board of a corporation or other association, if the member was nominated for appointment by a council; or
 - (b) in prescribed circumstances.
- (4) A member of a council will not be taken, for the purposes of this Subdivision, to have a conflict of interest in a matter to be discussed at a meeting of the council if the relevant member's interest in the matter is held in common with all or a substantial proportion of the ratepayers, electors or residents of the council area.

75A - Dealing with actual and perceived conflicts of interest

- (1) If, in relation to a matter to be discussed at a meeting of a council, a member of the council -
 - (a) Has a conflict of interest in the matter (an *actual conflict of interest*); or
 - (b) Could reasonably be taken, from the perspective of an impartial, fair-minded person, to have a conflict of interest in the matter (a *perceived conflict of interest*),

the member must deal with the actual or perceived conflict of interest in a transparent and accountable way.
- (2) Without limiting subsection (1), the member must inform the meeting of -
 - (a) the member's interest in the matter; and
 - (b) if the member proposes to participate in the meeting in relation to the matter, how the member intends to deal with the actual or perceived conflict of interest

[...]
- (5) To avoid doubt, it is declared that non-participation in a meeting of a council is not the only way in which a member of the council may appropriately deal in a transparent and accountable way with an actual or perceived conflict of interest of the member in a matter to be discussed at the meeting
- (6) This section does not apply to a matter of ordinary business of the council of a kind prescribed by regulation for the purposes of this section.

- 29. Clause 2.6 of Part 2 of the Code of Conduct for Council Members provides that council members must:

Comply with all Council policies, codes and resolutions.

- 30. Clauses 3.3 and 3.13 of Part 3 of the Code of Conduct for Council Members provides that council members must:

[3.3] Not release or divulge information that the Council has ordered to 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;

[3.13] ... be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999

Whether Mayor Sage committed misconduct in public administration by failing to declare and appropriately deal with a conflict of interest in relation to Agenda Item 5.1.1 at a council meeting held on 1 October 2019

Did Mayor Sage have a material conflict of interest?

31. The Local Government Act sets out that an elected member has a material conflict of interest in a matter to be discussed at a meeting if he or she:

...would gain a benefit, or suffer a loss, (whether directly or indirectly and whether of a personal or pecuniary nature) depending on the outcome of the consideration of the matter at the meeting.

32. As noted above, Mayor Sage submitted the following in regard to the allegation that he failed to declare a conflict of interest:

I did not see this as a conflict as there was no benefit or detriment to me, but I was sure that it was going to play out as it did with the assistance of some senior managers to further restrain and humiliate the Mayor.

With regard to the proposed motions to be discussed before Council they were more to do with the principal of the matter and as you can see it was [to] bring down the position as [sic] Mayor to control and damage my reputation to my constituents.

33. I find Mayor Sage's assertion somewhat inconsistent. On the one hand, he has stated that the outcome of the meeting had the potential to damage his reputation and position as Mayor, therefore having a direct personal consequence for him, but at the same time stating that there was no benefit or detriment to him.
34. Regardless of the Mayor's actual beliefs and intentions, the relevant question is whether he did in fact stand to gain a benefit or suffer a loss depending on the outcome of the discussions around revisions to the Mayoral Support clause under Agenda Item 5.1.1, the purpose of which was to consider:
- ensuring accountability and commitment from Mayor Sage in relation to the Charter, including sanctions for non-compliance
 - revising the Mayoral Support clause in the Elected Members Allowances and Support Policy
 - removing Mayor Sage as the principal spokesperson for the council.
35. Depending on the outcome of the council's consideration of Agenda item 5.1.1 at the 1 October 2019 meeting, Mayor Sage stood to suffer the loss of his ability to use the mayoral vehicle for personal reasons, as well as the financial benefit of '3,000kms of total annual [personal] usage [of the vehicle]'.⁶ I am of the view that this constitutes a direct potential personal and financial loss or benefit.

⁶ District Council of Grant Council Agenda 1 October 2019, Item 5.

36. I am also of the view that decisions in regard to sanctions and/or any other actions in regard to enforcing compliance with the Charter would result in a potential personal loss for Mayor Sage, as it could result in his privileges as Mayor being removed.
37. Further, Mayor Sage himself referred to the Agenda Item as a 'personal attack', and submitted that the removal of his speaking rights would 'restrain and humiliate' him, as well as 'damage [his] reputation'.
38. I agree that the removal of his rights to act as spokesperson, and the limitations this would place on his role as Mayor, in addition to potential reputational harm, was a possible consequence of the outcome of the discussion and vote on Agenda Item 5.1.1. Accordingly, I am of the view that Mayor Sage would gain a benefit or suffer a loss depending on the outcome of the council's consideration of the matter.
39. In light of the above, I am persuaded, on balance, that Mayor Sage stood to suffer a direct personal and pecuniary loss or gain depending on the outcome of Agenda Item 5.1.1.

Did Mayor Sage appropriately 'deal with' the material conflict of interest?

40. I will now consider whether Mayor Sage appropriately dealt with the matter for the purposes of section 74(1) of the Local Government Act.
41. The Local Government Act requires an elected member to deal with a material conflict of interest in a matter to be discussed at a meeting of the council by:
 - informing the meeting of that material conflict of interest; and
 - absent approval of the Minister for Local Government, leave the meeting room 'such that the member cannot view or hear any discussion or voting at the meeting' and remain outside of the meeting room while the matter is being discussed and voted on.⁷
42. Mayor Sage did not declare his material conflict of interest in Agenda Item 5.1.1 or leave the meeting room as required.
43. I firstly note that in response to my provisional report, Mayor Sage highlighted previous submissions that he had only been given four hours' notice that Agenda Item 5.1.1 was to be discussed at the council meeting on 1 October 2019. In my view, this period of notice of the matter did not prevent Mayor Sage from dealing with the matter in the manner required by section 74(1) of the Local Government Act, as there was nothing to prevent him from taking such action at the time the Agenda Item was scheduled for discussion.
44. I further note the Mayor's submissions of his belief that the other elected members 'wanted to ensure that they gained the most from the personal attack', and that they were 'essentially breaking the conflict of interest clause 3.13 themselves'.
45. It is not for me to determine in this report whether the conduct of other council members amounted to a breach of clause 3.13. Regardless, the alleged conduct of other council members does not discharge the Mayor's own obligations to declare and deal with a conflict of interest.
46. Likewise, the fact that the other council members would have already been aware of the Mayor's conflict of interest, along with the fact that the Mayor only had a casting, not

⁷ *Local Government Act 1999*, section 74(1)(a) and (b).

deliberative vote, does not discharge his obligations under the Local Government Act, as Mayor Sage has suggested in his submissions to my investigation.

47. I further disagree with Mayor Sage's submission that he was entitled to remain in the Chamber, as he is of the view that the Local Government Act sets out that it his role as presiding member to do so.⁸ The conflict of interest provisions under the Local Government Act apply to all members of council, including the Mayor.⁹ I am of the view that dealing with his conflict of interest in this matter should have taken precedence over chairing the meeting.
48. In light of the above, I am of the view that Mayor Sage failed to appropriately deal with a material conflict of interest under the Local Government Act.
49. Failure to comply with the material conflict of interest provisions under the Local Government Act constitutes a breach of clause 3.13 of the Code of Conduct for Council Members. As such, I am satisfied that Mayor Sage committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
50. Given my views that Mayor Sage had breached the material conflict of interest provisions under the Local Government Act, I do not consider it is necessary to consider whether he breached the actual/perceived conflict of interest provisions.

Opinion

In light of the above, my view is that Mayor Sage committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 5.1.1 at a meeting of the council on 1 October 2019.

I am also of the view that Mayor Sage acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council require that Mayor Sage:

1. undertake conflict of interest training, and
2. make a public apology at a meeting of the council.

Whether Mayor Sage committed misconduct in public administration by failing to declare and appropriately deal with a conflict of interest in relation to Agenda Item 9.1 at a council meeting held on 9 October 2019

51. Agenda Item 9.1 concerned discussions about options for replacement of the Mayoral Vehicle, as well as the recommendation that:

Council amend the Elected Members Allowances and Support Policy GOVPOL 07 to include the following clause in relation to the Mayoral Vehicle:

The standard/type of Council motor vehicle provided to the Mayor shall be a maximum value of \$35,000 GST exclusive, to be traded in at the completion of each Mayoral Term.

⁸ *Local Government Act 1999*, section 58(1)(a).

⁹ *Local Government Act 1999*, section 4(1): definition of a 'member' includes the presiding member.

52. I am of the view that it is likely that Mayor Sage had a conflict of interest, whether it was 'material', 'actual' or 'perceived',¹⁰ in relation to Agenda Item 9.1.
53. I note, however, that consideration of Agenda Item 9.1 did not progress, as it was set aside until a report could be prepared by the Works Manager.
54. Accordingly, I do not consider that further consideration of this issue, or whether Mayor Sage did in fact have a conflict of interest, is necessary or justifiable given that the matter was withdrawn from consideration by the council.
55. I do, however, caution Mayor Sage, and highlight that he should carefully consider the need to declare a conflict of interest in relation to this matter should it arise in the future.
56. I reject Mayor Sage's assertion that he should not be required to abstain from voting on matters that may affect him on the basis that he has only a casting, not deliberative vote.
57. A casting vote still has the potential to sway the outcome of a decision in the event of a tied vote, and as noted above, I do not consider that Mayor Sage's voting rights are relevant to his obligations to comply with the conflict of interest provisions under the Code of Conduct or the Local Government Act. The wording of the material conflict of interest provisions clearly set out that members must deal with material conflicts of interests in *matters to be discussed*, not just matters to be voted on that may affect that member.

Opinion

I consider that having regard to the circumstances of the case, continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

Whether Mayor Sage committed misconduct in public administration by disclosing information concerning the Chief Executive Officer recruitment process

58. As discussed above, Mayor Sage was authorised by the Panel to notify staff and elected members of Ms Fetherstonhaugh's rejection of the position as CEO, in the following terms:

I feel we need to send an update to staff today.¹¹

[...]

I think it's very important that staff receive an update this week prior to a further announcement next week. It is not appropriate that we announce a new appointment and Jane's rejection in the same email.¹²

[...]

I've heard from Barry, Kylie and Brad in relation to the message to staff. My thoughts are that as the CEO Panel it's our responsibility to send the email today and that it should come from you.¹³

¹⁰ *Local Government Act 1999*, section 73 and 75.

¹¹ Email from Cr Jody Elliott, dated 29 August 2019.

¹² Email from Cr Jody Elliott, dated 29 August 2019.

¹³ Email from Cr Jody Elliott, dated 29 August 2019.

59. In light of these unanimous and direct instructions from the Panel, I am not satisfied that Mayor Sage breached clause 3.3 of the Code of Conduct, which sets out that council members must:
- 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;
60. There was no order of the council to maintain confidentiality in regard to Ms Fetherstonhaugh's rejection of the CEO position, and the Panel expressly instructed that Mayor Sage circulate the email advising of Ms Fetherstonhaugh's decision to decline the position.
61. Whilst I find it very concerning that the Panel would exercise such poor judgement in requesting that the email be sent without first consulting Ms Fetherstonhaugh, given that it affected her personal and professional affairs, I do not consider that Mayor Sage can be held responsible for such an error.
62. In light of the above, I do not consider that Mayor Sage breached clause 3.3 of the Code of Conduct by disclosing information relating to the CEO recruitment process, as the direction from the Panel places doubt as to whether he, as an individual, ought to have known the matter was confidential.

Opinion

In light of the above, my view is that Mayor Sage did not breach the provisions of section 63 of the Local Government Act and clause 3.3 of Part 3 of the Code of Conduct, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

Whether Mayor Sage committed misconduct in public administration by refusing to follow the council's Charter of Agreed Behaviours

63. The purpose of this report is not to consider individual alleged breaches of the Charter by Mayor Sage.
64. Rather, I am considering whether Mayor Sage is required to comply with the Charter, and therefore whether his refusal to adhere to the Charter is in breach of clause 2.6 of the Code of Conduct, which sets out that council members must:
- ...Comply with all Council policies, codes and resolutions.
65. Mayor Sage has submitted that he should not be required to comply with the Charter, as he is of the belief that it is unlawful and in conflict with the Local Government Act, in particular, section 58(3)(c), which sets out that:
- (1) The role of the principal member of a council is—
...
(c) to act as the principal spokesperson of the council;
66. In my view, there is no conflict between section 58(3) of the Code of Conduct and the Charter, or any other council policy that places limitations or removes Mayor Sage's right to act as spokesperson, as section 58(2) of the Local Government Act specifically sets out that:

- (2) Subsection (1)(c) does not apply in circumstances where a council has appointed another member to act as its principal spokesperson.
67. Further, the meaning of a 'spokesperson' in the Local Government Act is not defined.
68. In my view, the right of a mayor to act as spokesperson does not provide unlimited authority to represent the council, or its views on matters, without being directed by the council to do so.
69. I am of the view that this limited view of the mayoral role as spokesperson is supported by the Code of Conduct, which sets out that council members must:
- ...Ensure that personal comments to the media or other public comments, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council.
70. Therefore, regardless of whether Mayor Sage is the spokesperson of the council or not, he is obliged to represent the views of the council as a whole, rather than his own views on particular issues.
71. Accordingly, I do not consider that the restrictions on Mayor Sage's speaking rights are ultimately of much difference to his existing rights under the Local Government Act.
72. Mayor Sage has also submitted that the Charter is not valid, as it is a 'work in progress' and subject to change. I reject Mayor Sage's submission that this affects the requirement that he adhere to the Charter, as many council policies are subject to change and are regularly reviewed.
73. The fact remains that the council carried a motion to endorse and commit to the Charter, as it stood at that time.
74. Whether Mayor Sage agrees with the Charter, or believes it should be amended, is not, in my view, a relevant consideration. If Mayor Sage wishes to dispute the Charter, that is a matter for him to raise with the council, so that the Charter can be amended if the council agrees to do so.
75. In light of the above, I do not consider that Mayor Sage has provided persuasive submissions as to why he should not be required to comply with the Charter.
76. Whilst it is not necessary for me to consider each alleged breach of the Charter, as those matters are being dealt with by the council, it is sufficient to point out that Mayor Sage has himself accepted that he has breached various provisions under the Charter.
77. Given my previous views that Mayor Sage is required to comply with the Charter, and that he has failed to do so in breach of clause 2.6 of the Code of Conduct, I am of the view that his conduct amounts to misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

Opinion

In light of the above, my view is that Mayor Sage committed misconduct in public administration for the purposes of s 5(3)(a) of the ICAC Act by refusing to follow the Charter, in breach of clause 2.6 of the Code of Conduct.

I am also of the view that Mayor Sage acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council require that Mayor Sage:

1. commit to the Charter
2. make a public apology at a meeting of the council.

Summary and Recommendations

In light of the above, my view is that Mayor Sage committed misconduct in public administration, and appeared to act contrary to law, by:

- failing to declare and appropriately deal with a conflict of interest in relation to Agenda Item 5.1.1 at a council meeting held on 1 October 2019
- refusing to follow the council's Charter of Agreed Behaviours.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council:

1. require that Mayor Sage undertake conflict of interest training
2. reprimand Mayor Sage should he fail to commit to the Charter
3. require that Mayor Sage make a public apology at a meeting of the council in relation to both failing to declare and appropriately deal with a conflict of interest in relation to Agenda Item 5.1.1 at a council meeting held on 1 October 2019 and refusing to follow the council's Charter of Agreed Behaviours.

I do not consider that Mayor Sage committed misconduct in public administration by disclosing information concerning the Chief Executive Officer recruitment process.

I do not consider that further investigation in regard to whether Mayor Sage committed misconduct in public administration by failing to declare and appropriately deal with a conflict of interest in relation to Agenda Item 9.1 at a council meeting held on 9 October 2019 is necessary or justifiable.

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.

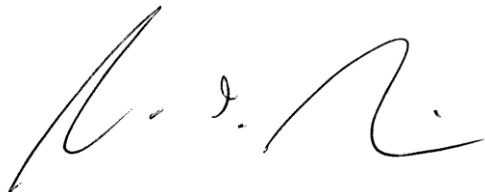
In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **1 June 2021** on what steps have been taken to give effect to my recommendation/s above; including:

- 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.

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/those 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 the South Australian Civil and Administrative Tribunal.

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



Wayne Lines
SA OMBUDSMAN

7 April 2021