



Report

Full investigation - *Ombudsman Act 1972*

Complainant	Anonymous
Council member	Cr Alayna de Graaf
Council	City of Onkaparinga
Ombudsman reference	2021/07260
Date complaint received	2 December 2021
Issues	Whether Cr Alayna de Graaf divulged confidential information in contravention of clause 3.3 of the Code of Conduct for Council Members

Jurisdiction

On 2 December 2021, this matter was referred to me by the Office for Public Integrity (**the OPI**). The complainant's identity is not known to my Office.

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members (**the Code**) made pursuant to section 63 of the *Local Government Act 1999*.¹ An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.²

I note that since this matter was referred to my Office, and since issuing both my provisional report and revised provisional report, the relevant provisions of the Local Government Act have changed. I have however considered whether there has been a breach of the legislative scheme that was in place at the time of the alleged conduct.

I am investigating this matter of my own initiative under section 263A(3) of the Local Government Act.

I am also of the view that the allegations, in part, raise potential misconduct in public administration, and I have considered whether the allegations amount to an 'intentional and serious' breach of a code of conduct for the purposes of the misconduct provisions under the *Ombudsman Act 1972*.³

¹ The Code of Conduct was gazetted on 29 August 2013.

² Section 263A(4) Local Government Act; section 3, Ombudsman Act.

³ Ombudsman Act 1972, section 4(1).

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a response from Cr Alayna de Graaf⁴
- following up on Cr de Graaf's response and attempting to resolve the matter by way of early resolution
- considering information provided by an interested party (referred to hereafter as **the IP**)
- considering the Ombudsman Act, the Local Government Act, the Code and the council's various policies and procedures
- considering the agendas and minutes of various council meetings
- preparing a provisional report
- obtaining and considering information from the council
- considering additional information provided by the IP
- seeking multiple further responses from Cr de Graaf
- preparing a revised provisional report
- providing my revised provisional report to Cr de Graaf, the council and the IP for comment, and considering their responses
- 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.⁵ 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 ...⁶

Procedural fairness

On 23 September 2022 I provided my revised provisional report to Cr de Graaf, the council and an interested party, the IP. By email dated 5 October 2022 the council advised that it had no further submissions to make. I did not receive a response from the IP.

Between 24 and 26 September 2022 Cr de Graaf sent five separate emails in response to my revised provisional report. Whilst I confirm that I have carefully considered each of Cr de Graaf's in their entirety, I do not consider it necessary to repeat and address every submission made. I especially emphasise that I have not addressed the submissions which have previously been raised and addressed. To the limited extent that Cr de Graaf has provided new submissions, I advise that I have addressed those submissions where necessary in the body of this report.

⁴ Notwithstanding the results of the recent council elections, for the purpose of this report, all parties are referred to by the title they had at the time of the alleged conduct.

⁵ 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.

⁶ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Ultimately, Cr de Graaf's response did not persuade me to alter my conclusions, however other circumstances have caused me to alter my proposed recommendations. In my revised provisional report I advised that I anticipated making a recommendation under section 25(2) of the Ombudsman Act and section 263B(1) of the Local Government Act that the council lodge a complaint with the South Australian Civil and Administrative Tribunal seeking an order that Cr de Graaf be suspended from members of the council and any committees of the council for such period as the Tribunal deems appropriate. I am mindful that since issuing my revised provisional report the council has undergone an election, and that Cr de Graaf was not re-elected as a council member.

As such, there would be no practical effect in my making a recommendation as previously foreshadowed, and it would therefore not be in the public interest for me to do so. That said, I am satisfied that it is in the public interest for me to nevertheless report my findings.

Background

The report to the OPI

1. The OPI received an anonymous complaint about Cr Alayna de Graaf, City of Onkaparinga (**the council**), alleging that Cr de Graaf provided confidential information to a member of the public, the IP.
2. The information that was alleged to have been confidential, and shared with the IP, was noise monitoring data obtained by the council for a local venue, the Pepper Tree Café in Aldinga (**the Pepper Tree**).
3. The council had commenced monitoring noise levels for the Pepper Tree in response to noise complaints about the venue from local residents. One of those complainants was the IP, and at the time of the complaint to the OPI, the council was concerned that the IP was likely to take legal action against the council for its alleged failure to deal with the noise complaints.
4. A confidential Elected Members Information Session was held on 2 November 2021 to discuss the noise complaints.
5. Following that meeting, an email from Mr Matthew Lawrence, the council's Manager Development Services, was sent to council members and select employees containing noise monitoring graphs and analysis, showing spikes in decibel levels at different points in time for the Pepper Tree. The email, which was marked 'confidential', was dated 11 November 2021 and sent at 12:36 PM.
6. At 1:11PM on the same date, the IP emailed the council lodging a Code of Conduct complaint against three elected members. The email stated:

I have in writing that the decibel readings have been over and above the 94db with **limits peaking at 100 decibels** [my emphasis] and over and nothing has been done again. Instead I was attacked, belittled and discussed as a nuisance. I have just provided this to my team and once we have the emails Simon McMahon claims to have sent we can progress sooner rather than later.
7. The reporter suspected that Cr de Graaf was responsible for disclosing the noise recording data referred to in the IP's email, as Cr de Graaf has been 'strongly advocating on the IP's behalf.'⁷

⁷ This was stated by the reporter to the OPI.

8. The reporter also provided the OPI with email correspondence of 6 November 2021 between Cr de Graaf and elected members. It is necessary to note that the chain of emails reflect that:
- Cr de Graaf has been open about her communications with the IP regarding the Pepper Tree
 - Cr de Graaf makes a specific reference to the same decibel level figures highlighted by the IP in her email, set out above, to the council that was sent five days later on 11 November 2021. Cr de Graaf's email reads as follows:

*HI
confidential
Re the workshop -*

*... I note those audio (sic) peaks **were hitting 100 decibels** [my emphasis]- but the limiter inside the "venue" is meant to cut out when it hits 100 db. Looking forward to reviewing those audio files thanks.⁸*

- Cr de Graaf appeared to recognise the confidentiality of the meeting and subsequent emails by labelling her email to the Elected Member Enquiry Portal (**the EM Portal**) as 'confidential'.
- Cr de Graaf was reminded by Cr McMahon that the meeting was confidential:

I will not be engaging in a to and fro other than to remind you that our session was a confidential session and I hope it is remaining this way.⁹

- Cr McMahon responded to Cr de Graaf expressing disappointment at Cr de Graaf's statement that information from the confidential meeting was shared with a resident:

As this email discussion is on the back of a confidential sessions (sic) and the fact you yourself labelled the email confidential I am extremely disappointed you have knowingly forwarded this email.¹⁰

9. The reporter also provided emails reflecting that Cr Michael O'Brien made a request on 14 November 2021 through the council's EM Portal for noise data for the previous night, for the purpose of responding to complaints from local residents. The information was then provided by Ms Karen Ingram, Councillor Liaison Officer, and subsequently forwarded to Cr de Graaf by Cr O'Brien:

From: Michael O'Brien <Michael.O'Brien@onkaparinga.sa.gov.au>
Sent: Sunday, 14 November 2021 12:46 PM
To: EM Enquiry
Cc: Richard Peat <Richard.Peat@onkaparinga.sa.gov.au>; Simon McMahon <Simon.McMahon@onkaparinga.sa.gov.au>
Subject: Pepper Tree Cafe Noise Levels

Hi
Can I please get a reading from the noise monitor for Saturday 13 November.
I have received complaints from two local residents stating that the noise level was "ridiculously loud" and that it was coming from the Pepper Tree.

After recently receiving the explanation on how the monitor works I think that it would be prudent to check and share the reading from last night with elected members and the

⁸ Email dated 6 November 2021 from Cr de Graaf to council members and employees.

⁹ Email from Cr Simon McMahon to Cr de Graaf dated 6 November 2021.

¹⁰ Email dated 6 November 2021 from Cr Simon McMahon to Cr de Graaf and other council members and employees.

OFFICIAL: Sensitive//Legislative secrecy

residents. From the correspondence provided to me I believe that the residents intend to escalate their complaints so it would be good to have the reading as soon as possible.
regards

Cr Michael O'Brien

From: EM Enquiry <au>
Sent: 19 November 2021 12:06
To: Michael O'Brien <Michael.O'Brien@onkaparinga.sa.gov.au>
Cc: Renee Mitchell <Renee.Mitchell@onkaparinga.sa.gov.au>; Matthew Lawrence <Matthew.Lawrence@onkaparinga.sa.gov.au>; Simon McMahon <Simon.McMahon@onkaparinga.sa.gov.au>
Subject: FW: Cr O'Brien -- CR 1862932 -- FW: Pepper Tree Cafe Noise Levels

Good morning Cr O'Brien,

Thank you for your enquiry regarding noise levels from the Pepper Tree Cafe for last Saturday night 13 November 2021.

The following information has been provided by Matthew Lawrence, Manager Development Services.

The attached graphs are the readings for the last two Saturday nights, to allow for a comparison of data. I have also attached the November wind readings from the closest station (Noarlunga).

The graphs do show higher average dB levels for the 13 November, however this night was the windiest night of the month to date, and the high readings actually increased through to 7am which is very unusual. I have confirmed with residents that the band did not play much past 11.30pm - the conditions of approval allow music until 12 midnight. I can confirm that we are monitoring these readings following every weekend as well as implementing other monitoring measures to ensure compliance with development approval conditions.

Residents have provided some feedback regarding a recent perceived increase in volume, which we are addressing directly with the owners.

Kind regards,
Karen Ingram
Councillor Liaison Officer
Corporate
...

From: Michael O'Brien <Michael.O'Brien@onkaparinga.sa.gov.au>
Sent: Thursday, November 25, 2021 5:59 pm
To: Alayna de Graaf
Subject: Fw: Cr O'Brien -- CR 1862932 -- FW: Pepper Tree Cafe Noise Levels

Cr Michael O'Brien
Pimpala Ward
City of Onkaparinga

10. The referral from the OPI only identified the email dated 11 November 2021 from Mr Lawrence as the source of confidential information which was allegedly improperly shared by Cr de Graaf.
11. Upon reviewing all the information and correspondence, however, I formed the provisional view that there appeared to be three occasions where noise data may have been obtained and shared with the IP:

- following the Elected Members Information Session held in confidence on 2 November 2021¹¹
 - by forwarding the email from Mr Lawrence dated 11 November 2021
 - by forwarding the email and noise data sent to Cr de Graaf by Cr O'Brien on 25 November 2021.
12. Between 7 December 2021 and 21 February 2022 my Office made numerous attempts to facilitate an early resolution outcome with Cr de Graaf. Cr de Graaf was advised of my preliminary view that she may have breached clause 3.3 of the Code, and was afforded an opportunity to issue an apology to resolve this matter.
13. The attempts by my Office to resolve this matter with Cr de Graaf's cooperation, which were ultimately unsuccessful, are set out in greater detail below.
14. On 21 February 2022, the IP sent an email to my Office and the council advising that she had retained the services of a law firm, and that Cr de Graaf had implicated herself in a dispute involving the council, the IP, and Michael Kelledy, of Kelledy Jones:

Mr Ashby

...I have also advised Michael Kelledy I have no legal obligation to refrain from providing all the highly defamatory documents sent to me by Cr de Graff [sic] in which she states what Michael Kelledy is trying to do to her and her career. They are damning. I feel he is now entitled to read what was said about him by one of your employees, someone who promised me my case would be resolved if I just shared information with her. I hold no personal anger at him, he can only act on what is provided to him. I have said I am happy to provide the information to him as it is on a private account.

I have cc'd the Ombudsman in on this email as I will now send him all my private communication with Cr de Graff (sic) which is not only damning, defamatory but highly explosive.

Why could you not just help us??

15. The IP provided further information by email dated 7 March 2022, stating that:
- she was of the view that Cr de Graaf had sent her confidential information, and that the sharing of this confidential information had caused her distress
 - she felt that Cr de Graaf had used her dispute with the council to 'harm her colleagues'
 - Cr de Graaf had encouraged her to participate in taking legal action against the council.
16. Relevant excerpts of that email are set out as follows:

I feel Alayna targeted me deliberately and in a calculated manner to harm her colleagues. I did not see that initially.

...Alayna kept harassing me even after I asked for it to stop. Telling me peoples names, people who had committed suicide and joining a class action with her lawyer which I felt was pie in the sky.

...I told her I felt she was doing more harm than good and to please stop sending me highly confidential and distressing content as it was "making me ill", it did not stop...

¹¹ The information session was ordered to be kept confidential by the Chief Executive Officer of the council pursuant to section 90A(4) and 90(3)(a) of the *Local Government Act 1999*.

17. Several images were also attached to the email from the IP dated 7 March 2022. Those attachments include a screenshot of:
- the Agenda Item for the confidential Elected Member Information Session that was held on 2 November 2021 (Image 1)
 - an undated email to Cr de Graaf which appears to be a response to an enquiry she had lodged through the Portal (Image 2)
 - various excerpts of conversations apparently between Cr de Graaf and the IP via Facebook Messenger.

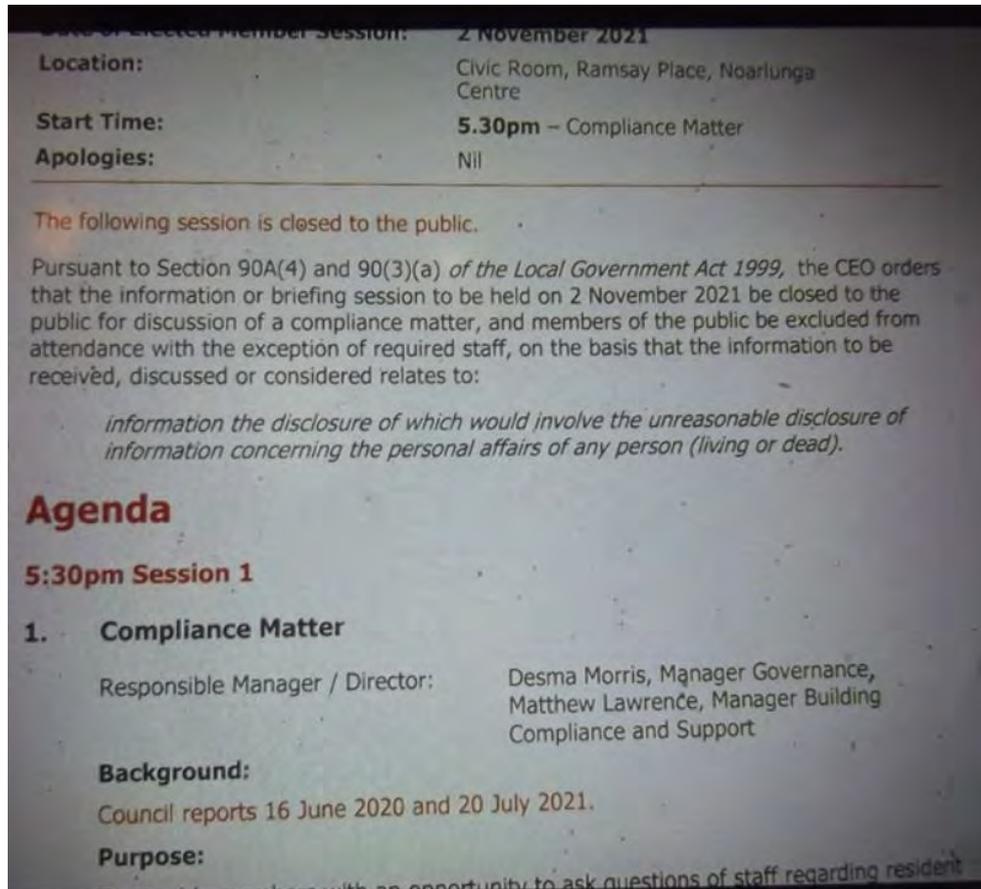


Image 1: Agenda Item for the confidential Elected Member session

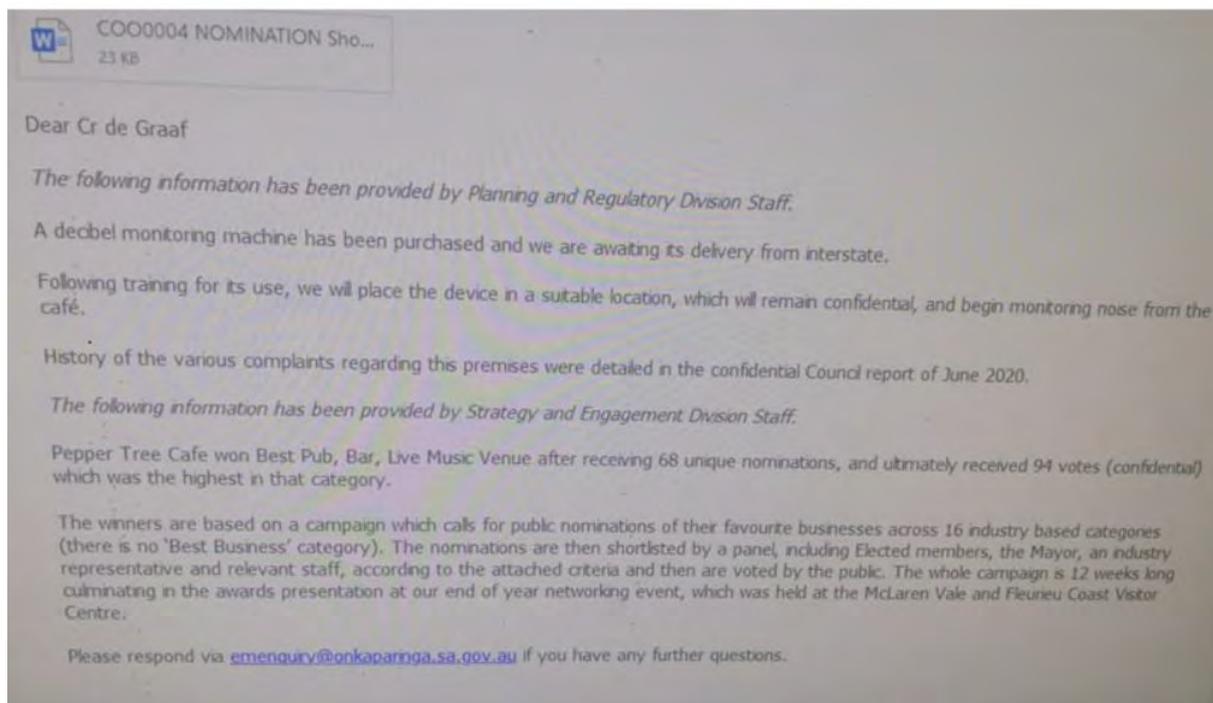


Image 2: email reportedly sent to Cr de Graaf on 15 March 2021 responding to her Portal enquiry

Attempt to facilitate an early resolution outcome

18. Having formed a provisional view that Cr de Graaf may have inappropriately shared noise data with the IP, on 7 December 2021 my Office made enquiries with Cr de Graaf requesting a response as to whether she had at any time shared noise data with the IP, and if so, whether she would be willing to issue an apology on the basis that she ought to have known this information was confidential.
19. In response to my enquiries Cr de Graaf provided substantial submissions disputing the allegation that she had inappropriately divulged confidential information, primarily relying on a submission that information obtained via the Portal is not confidential. Nevertheless, Cr de Graaf did state in an email dated 8 December 2021:

I do not believe I have done anything wrong here, and I do believe I can show that. If you do believe I have erred though, then Yes, I would be prepared to make a public apology.
20. In light of the additional submissions received, I undertook enquiries with the council with a view to assessing whether an elected member ought to treat information obtained through the Portal as confidential. The response received from the council is set out in greater detail below, but essentially established that such information is not automatically considered to be confidential or not; disclosure should be assessed on a case-by-case basis.
21. I therefore again wrote to Cr de Graaf on 22 December 2021 advising my view that:

The council's response is consistent with the general principle that the question of whether information is confidential, or ought to be considered to be confidential, is to be determined on a case by case basis and the nature of the relevant information. Information obtained through the EM Portal is not automatically exempt from

confidentiality, and the Council's Allowances Benefits and Support Procedure expressly contradicts this assertion.

...

In light of the above, I am of the view that it is likely you ought to have known the information was confidential, and I request confirmation that you intend to issue an apology at the next council meeting.

22. By email dated 18 January 2022 Cr de Graaf provided further submissions, again asserting that the information shared with the IP was not confidential. I provided a further response to Cr de Graaf by letter dated 31 January 2022 advising that I was not persuaded by the additional submissions provided and again seeking confirmation that Cr de Graaf intended to issue an apology.
23. The same day my letter was sent, Cr de Graaf sent a further email to my Legal Officer regarding the email sent by Cr O'Brien to Cr de Graaf on 25 November 2021. Although I did not consider Cr de Graaf's further submissions sufficient to alter my views, I did consider it appropriate to obtain further information from Cr O'Brien. Cr de Graaf further advised by email dated 2 February 2022 that:
- I'll do the apology if you want. I don't want to argue.
I just have concerns that this could be a part of a bigger plan from others to try and tarnish my name and even to try and have me removed - and I would have really preferred if you could just check these other points I've mentioned.
I honestly do feel I followed all the correct rules.
I'm worried about repercussions of making such an apology as it makes me look bad - that either I can't work out what is confidential and what isn't.
24. As Cr de Graaf's response indicated a broader issue that she did not appear confident in her understanding of her confidentiality obligations under the Code, and the council's policies and expectations regarding confidentiality, my Legal Officer enquired with Cr de Graaf as to whether she felt she would benefit from further training from the council. Cr de Graaf agreed that such training would be beneficial. My Legal Officer made enquiries with the council about the possibility of providing training on this issue on a voluntary basis, and the council agreed to provide this training.¹²
25. On 7 February 2022 my Office obtained a response from Cr O'Brien. As I was not persuaded by that response to alter my views, my Legal Officer sought clarification again as to whether Cr de Graaf would be willing to issue an apology, as she had previously indicated she would be willing to do so if I was of the view that she had divulged information that ought to be considered confidential.
26. On 21 February 2022, Cr de Graaf withdrew her offer to apologise in an email, stating that:
- it had not been made clear why she ought to have known the noise data was confidential
 - the concept of confidentiality was too vague in relation to the issue in question
 - she has not been provided with training on what is 'reasonably confidential'
 - she is being unfairly targeted and the allegations are simply a tool to discredit her
 - although the noise recording data is owned by the council, data for only one night was requested by Cr O'Brien
 - despite Cr O'Brien's response to my Office, the wording of his email appeared as though the noise data was to be shared with a resident
 - her duty is to the rate payers and residents first and foremost and there is no risk of sharing the data with residents

¹² The council's Governance Officer agreed to this request in an email dated 8 February 2022.

- the council did not specify to Cr O'Brien that the noise data was confidential when it was provided to him
- the allegations are petty
- the assessment of this allegation should not be resolved until other matters and complaints concerning Cr O'Brien have been assessed by this Office¹³
- her emails are being unfairly accessed by council staff¹⁴
- the council is harassing the IP
- residents can access the noise data under the FOI Act and the EM Portal.

27. In responding to my provisional report, Cr de Graaf stated:

The staff were going to offer me "training" on discerning "reasonably confidential" materials. They didn't do that. I was waiting on [the Ombudsman SA Legal Officer] to email me back - I had posed a question to her, and stating I would have accepted the ruling as I did not want to get on the bad side. Reluctantly I stated I would give the apology. I was wondering why she had not contacted me back - to suddenly escalate to this, without replying to that last email, or giving me that option seems unfair.

28. I consider that my Office afforded Cr de Graaf reasonable opportunity to resolve this matter without the need for my Office to expend additional resources to conduct a full investigation of this matter. The decision to commence an investigation of this matter was mine to make. After receiving the response from Cr de Graaf on 21 February 2022, I noted the considerable efforts undertaken by my Legal Officer to attempt to resolve this matter informally with Cr de Graaf and concluded that the matter ought to proceed to an investigation.

Provisional report

29. Based on the information before me, on 26 April 2022 I issued my provisional report to Cr de Graaf, the reporter, the council and the IP as an interested party, advising my tentative view that by:

- sharing information discussed at the Elected Members Information Session held in confidence on 2 November 2021
- forwarding the email from Mr Lawrence dated 11 November 2021
- forwarding the email and noise data sent to Cr de Graaf by Cr O'Brien on 25 November 2021,

Cr de Graaf breached section 63(2) of the Local Government Act and clause 3.3 of Part 3 of the Code.

30. I also advised my tentative view that the sharing of information discussed at the confidential meeting was both intentional and serious, and that Cr de Graaf's actions therefore amount to misconduct in public administration. I foreshadowed recommending that the council reprimand Cr de Graaf.

31. In response to my provisional report the IP provided substantial further information and documentation to my Office, including more than 400 documents, many of which consist of photographs of a Facebook Messenger conversation between the IP and Cr de Graaf.

¹³ My consideration of this matter is specific to whether information was disclosed inappropriately, and it is not clear to me how any other issues raised by Cr de Graaf, or about Cr de Graaf, to my Office, would change the outcome of whether Cr de Graaf breached the Code in this instance.

¹⁴ I have previously addressed this issue and informed Cr de Graaf that council emails remain the property of the council, and may be accessed by council employees in accordance with relevant internal policies. I also do not consider this issue is relevant to my consideration of the allegations considered in this report.

32. Upon reviewing the additional information provided to me I formed the revised provisional view that there are an additional six occasions where Cr de Graaf may have breached section 63(2) of the Local Government Act and clause 3.3 of Part 3 of the Code by disclosing confidential information to the IP by:
- forwarding an email addressed to all elected members with the subject line 'Confidential briefing /Q & A session Tuesday 9 November at 5:30pm' which disclosed the topic to be discussed at a confidential briefing at a confidential session
 - forwarding emails from an email chain involving all elected members but primarily Crs de Graaf, McMahon and Peat on 6 November 2021
 - forwarding an email from Cr Themeliotis to elected members on 6 November 2021
 - disclosing information about a previous councillor or employee who was engaged in a wrongful dismissal claim before later ending their own life
 - disclosing that Cr Greaves is paid \$275.00 per Council Assessment Panel meeting
 - sharing information about a council matter involving Mr Matthew Lawrence and a ratepayer referred to as 'Anthony', including sharing a file titled 'OFFENSIVE MEMO'
33. Accordingly, I made further enquiries with Cr de Graaf on 20 July 2022 requesting a response to the above potential disclosures. I also undertook further enquiries with the council to inform myself as to the nature of the last three alleged disclosures. In particular, I requested that the council provide me with any information that may have indicated that Cr de Graaf ought to have known that the disclosed information was confidential.
34. In response to being notified that my consideration of the six additional matters were prompted by my receipt of and consideration of Cr de Graaf's Facebook Messenger conversations with the IP, Cr de Graaf responded:
- I question the validity of the materials. I question whether it has been photoshopped, or recreated, I question whether this is even a conversation that occurred between myself and [the IP]. As other matters have been utterly mis stated and completely misunderstood (by [the IP] I assume) then therefore, I also question what else has been provided, and where it was sourced from. I don't have copies of any such conversations. I question how evidence was sourced and what it is. I totally refute the interpretations of any potential materials.
35. The Facebook messages have been provided to me in the form of photographs of an electronic device. I did not receive the original conversation in electronic form, nor any electronic recreation. Having reviewed each photograph, I am satisfied that there is no reason for me to believe that the material provided has been photoshopped, recreated or otherwise falsified.
36. I am also satisfied that the photographed conversations were between Cr de Graaf and the IP. This much is clear from:
- the nature of the conversations
 - the fact that the information was provided to me by the IP
 - numerous messages being addressed to or signed off by 'Alayna' or 'Layna'
 - the name of the profile who is party to the conversation being 'Layna de Graaf'.
37. I provide here as an example one of the photographs provided by the IP which supports my conclusion that the relevant conversations were between Cr de Graaf and the IP
-

(Image 3). I also provide this example in support of my conclusion that the conversations have been provided to me in a format unlikely to be susceptible to fabrication.

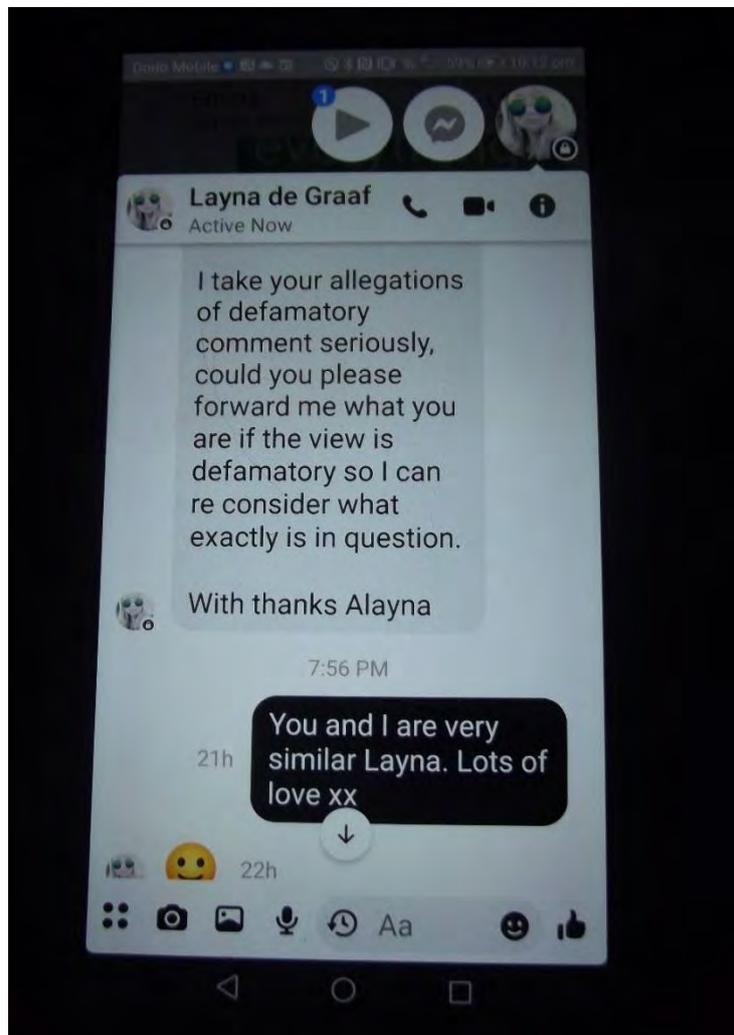
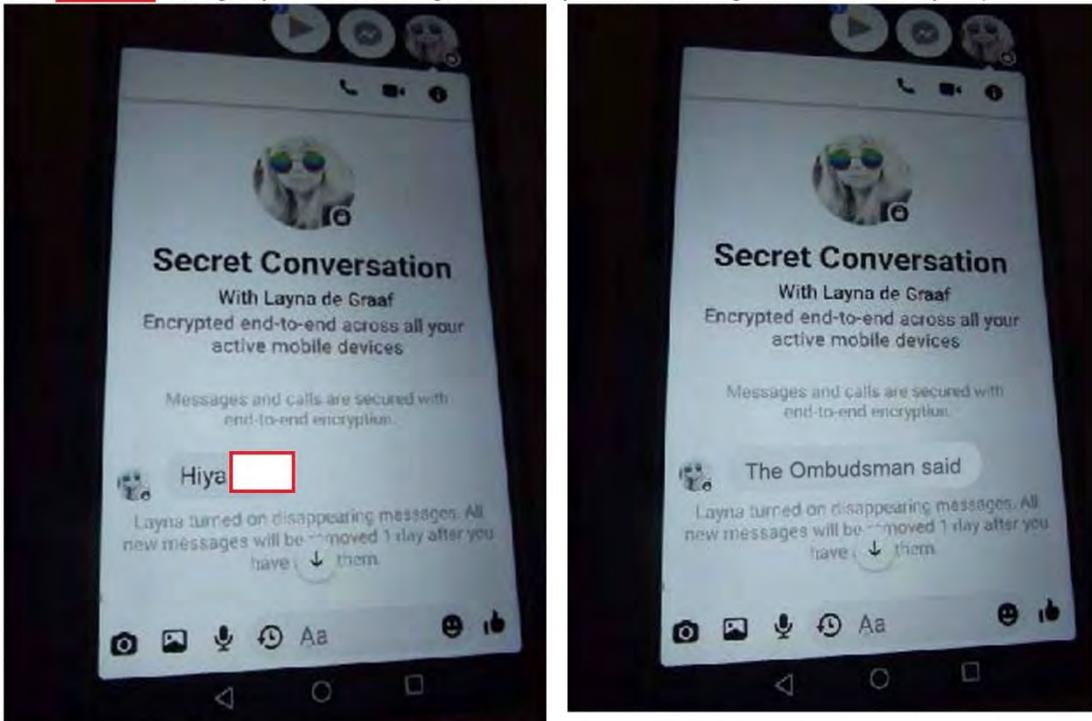


Image 3: extract of conversation between Cr de Graaf and the IP

38. In response to my revised provisional report, Cr de Graaf has again questioned the validity of the photographs provided to me, stating that 'these images look blurry and the lettering looks like it's been photoshopped, like the example attached'. The following image was attached to that submission:

how good are you at spotting a FAKE ? Where is the meta data ? when were these messages written and who's account really is this ? Is [redacted] dobbing Alayna in for something, and if so why ? Has someone got a reason to set Alayna up ?



Why are private messages being apparently provided in this way, is it legal, was a search warrant required ? Is this a privacy invasion ?

Image 4: comparison of original image and photoshopped image by Cr de Graaf

39. Firstly, contrary to Cr de Graaf's submissions, it is clear to me that the image on the right has been photoshopped. The quality of the message text is inconsistent with the rest of the image. This is a clear indication of editing, and is not something I have seen in the images provided to my Office.
40. Secondly, I consider that a number of other submissions provided by Cr de Graaf indicate that the images are in fact a genuine reflection of her conversations with the IP. I refer in particular to the following:

Reply dated 24 September 2022 at 2:35am

I haven't even discussed "council business" at all. I have talked about my own personal matters, about myself, and I've talked with friends, about personal matters that were affecting them. You have no right to invade my personal spaces, and personal private texts, where we were discussing personal things.

Reply dated 24 September 2022 at 7:20am

I didn't give permission for anyone to invade my private chats with friends. I was communicating with [the IP] as a friend, in these instances. This is clearly the case from the messages where she says "you and I are clearly the same, Love [the IP] xxx"

Reply dated 24 September 2022 at 9:28pm

What about my Privacy? I feel like you and others having [sic] invaded it, by your inappropriate sharing, of private conversations

41. It is incongruous for Cr de Graaf to be aggrieved by her conversations with the IP being read, whilst simultaneously submitting that the images of those same conversations have been photoshopped and/or reflect a conversation with someone other than Cr de Graaf.
42. For all of the reasons provided in my revised provisional report, and having regard to Cr de Graaf's further submissions to my Office, I remain satisfied that the images provided to me accurately reflect conversations between Cr de Graaf and the IP.
43. I also take this opportunity to address Cr de Graaf's submissions that it was inappropriate for me to access her conversations with the IP. It appears that Cr de Graaf may believe that I have directly accessed her conversations, as indicated by her comments that I have invaded her messages and her query as to whether I obtained a search warrant to do so.
44. As set out in my revised provisional report, I did not directly access Cr de Graaf's conversations. The images were voluntarily provided to me by the IP who was a party to the relevant conversations and is therefore able to do as she pleases with those records.
45. As outlined above, I have received in excess of 400 documents from the IP. It is noted that some photographs contain only a few sentences of text, but as can be seen from the example above, the quality and format of the photographs require them to be of a certain size in order to be legible. Accordingly, to include all relevant portions of conversations in the format they were provided to this Office would render this report unreasonably lengthy. To avoid this issue I have converted several portions of the conversations to transcript format.
46. I provide here as an example one such transcript which I have relied upon in considering three potential disclosures of confidential information. As I intend to refer to this particular transcript numerous times in this report, hereafter this transcript will be referred to as 'Transcript 1':

Cr de Graaf: Hi every [sic] from Tony's current battle

Cr de Graaf: Also with matthew Lawrence

Cr de Graaf: Sound familiar!!

Cr de Graaf: [screenshot]¹⁵

The IP: Bloody hell it is the same as my experience. Matthew Lawrence threatened me and made me feel really frightened and uncomfortable. I hung up in tears as he said I had to get help from my councillors. I said they ignored me and had for years. He like Renee said it was not their problem. Given they had been discussing my mental health bullying is pure evil Layna.

The IP: Is this my ward as well?

Cr de Graaf: YeH [sic] sorry to hear mate

I'm collecting all the stories in the hope some ceo in the future will look into all of this stuff seriously

The last director corporate said I was alleging accusations against staff but without evidence.

So they don't want to listen and they are the ones sitting on the evidence. I'm so glad that guy left

Chris white not good guy. CEO as I think I told u. Threatened to sue me when I told him his staff were discriminating against me. !!! And no one cared etc.

¹⁵ Screenshot is included below in my consideration of whether Cr de Graaf shared information about a ratepayer referred to as 'Anthony'

apparently that was accusing him of something g !! Ahhh. Go figure. So for now. No one cares No one listens

[Cr 1, Cr 2, Cr 3, Cr 4] and other gang up etc. it's quite insane

They don't actively gang up. They gang up in their silence. Sitting back and watching others getting fried. And just nudging fire somewhat.

But Anthony has mounted a food fight against them too. Just as u have done.

Anthony gave me the permission to share that with u too.

Nah he's down here in my ward.

The IP: He sounds brave. I don't mind you telling him our story too. This has to stop. They knowingly harm people to cover themselves and expect to get away with it by labelling us liars and nuisances but behind closed doors because they are pathetic.

Cr de Graaf: I guess it's been recognised there's a toxic culture problem with the council

Changing that can be slow

Certain steps have been taken. But when certain directors allow or encourage it it makes it really hard

They tend to go in and then get assimilated in a way

Cr de Graaf: I actually didn't want to hire that CEO But he was Erin's pick and seems to be really quite behind her. But for them to support [Cr 3] is pretty stupid.

That man doesn't do things the right way and is a stone cold liar of massive proportions. Who would align themselves with someone like that.

We will see what happens once they finish with their witch hunt on me. I've not heard a thing for weeks now. I just hope my lawyer wins. Because I feel like my life will be over if they say I'm a bully and then tell that to the whole world. That in itself is bullying by putting this obscene threat on my good name. 😞

All because I asked about a guy who was forced out of the organisation. From these exact bullies. And then he fought a wrongful dismissal battle then suicided about two years after. Apparently it all took a lot out of him. And I BET u Kelledy Jones or Norman Waterhouse KNOW something about some of what went down. I just wish anyone would listen and help.

If my lawyer doesn't help. I just don't know what else I can do. For me or anyone else. None of the others even seem to get it. They just feel bad about things. Or they don't quite understand. But at least three of the councillors are on my side. I missed several meetings as it was so stressful at one point.

Anyway. WE know what THEY are like and WE know WE are not insane.

Heidi being on the council assessment panel 'b!?!?!'

Ahhh what about that !!??

She gets \$275 per meeting mind you.

Some things just seem wrong.

47. In instances where it is alleged that Cr de Graaf has forwarded confidential emails to the IP I have included the photographs as provided by the IP to this Office, as I consider that format to be most appropriate to evidencing those particular allegations.
48. In light of the additional information which I have received and the additional potential disclosures of confidential information by Cr de Graaf to the IP, I considered it necessary to issue a revised provisional report. I advise the parties that although the format of this report departs slightly from the format of my provisional report, all relevant information has been replicated.

Submissions from Cr de Graaf

49. To date I have received in excess of 45 pages of submissions from Cr de Graaf as well as numerous additional attachments. Whilst I confirm that I have considered all

submissions and attachments thoroughly, including the most recently received submissions in response to my revised provisional report, I do not consider it necessary to repeat or directly address every submission in this report. This is particularly true of those submissions which have little bearing on my investigation such as:

- comments regarding the conduct of other elected members or the 'culture' of the council, including requests that I investigate those matters
- the validity or findings of the independent investigation which was accepted by the council on 14 December 2021
- requests for me to provide answers or information to Cr de Graaf¹⁶
- comments comparing and identifying differences between my investigative processes and court processes, save for the standard of proof matter which I will address below
- comments as to whether Crs McMahon and Peat responded to the IP from their councillor email addresses.

50. I note that Cr de Graaf has reiterated several of the same matters across several submissions. To that extent I have addressed those submissions cumulatively here. I also confirm that I have addressed further submissions specific to particular allegations below.

51. Cr de Graaf has acknowledged that she has shared some information with the IP but to that extent submits that any information shared was not confidential, in particular submitting that:

- information obtained via the Portal is not confidential unless it is labelled as such as the EM Enquiry system is 'basically public'
- unless a document is specifically marked or classified as confidential then an elected member should not be expected to treat it as such.

52. Cr de Graaf's submissions regarding the above matters, in particular those relating to the EM enquiry system, are numerous and lengthy. Accordingly, I do not intend to repeat all of those submissions, and instead provide selected excerpts:

Email dated 8 December 2021

But - If it's an email and it's within our system, and it's not marked confidential, and doesn't appear to be confidential - then I may assume it's just any other FOI searchable document, and can be forwarded on to interested residents or parties. I recently had approximately 100 of my own emails, many seemed sensitive and were marked "confidential and personal" - yet they were all released to a member of the public (who then gave them to a Councillor, and then he used them to submit a complaint on me). This lead [sic] me to believe - not very much within out [sic] email systems are actually confidential at all, under the FOI Act.

If I have shared an email, it would just have been a normal email, one not marked as confidential, and one not seeming to be confidential at all (sic).

Email dated 8 December 2021

The only time something can be kept confidential in that system, I have been told - is when you apply to the CEO for special orders to that effect. This email in question does NOT anywhere state confidential on it, and it does not appear to be confidential in any way. It also does not appear to give away any confidential information, or information I should otherwise expect to be confidential.

Email dated 22 December 2021

¹⁶ Where appropriate, I have responded to these requests throughout the course of my investigation, but decline to comment on them in my report.

Last year when I questioned why the Mayor had discussed my “EM Enquiry Questions” at a PUBLIC workshop. They stated the em (sic) enquiry system was not a confidential system and that the only thing we are supposed to be aware of is that that email address itself is not to be given out. I tried to claim previously the EM Enquiry area was “confidential” but they said NO it is not.

Also detailed excerpts from the EM Enquiry System were printed in a Public Council Agenda.

If the system was mostly confidential - which they claimed it was not (unless strictly marked confidential) - I do not believe they would they have [sic] published all these excerpts from it in a public agenda. Chopping and changing rules like that, makes it hard to then summarise which "might reasonably considered confidential, in some settings". I believe clearly - it was not confidential, or marked that way. (sic)

These acts set a precedent in my mind that the EM Enquiry System was mainly public and open. I considered this at the time I shared that information with the IP. I only shared with her two small audio reading images and a weather report.

Email dated 31 January 2022

As stated about the EM Enquiry system - there is another email I have from staff, and I have not been able to locate it as yet - but that email says almost the direct opposite to what they have stated in that attachment quote you have shared with me, from them. IE that the system is basically public.

Response dated 10 May 2022

Things in the EM enquiry system are ONLY confidential - when they have clearly been marked on the top of them as confidential - and even then, that can mean nothing, as in the case of all my emails that were released.

The only truly confidential items, are the ones that have actually [sic] confidentiality orders applied on to them by the ceo or council chamber.

Response dated 2 August 2022

If it was not marked confidential - then I can't see why that would be a concern.

53. In light of Cr de Graaf's assertions that information obtained through the council's EM Portal is not confidential, my Office sought a response from the council in order to clarify council expectations regarding confidentiality and the EM Portal. Mr Scott Ashby, CEO, responded as follows:

Please find attached a copy of Council's Allowances Benefits and Support Procedure. This Procedure makes reference to the Elected Member Website (the Website), as extracted below.

Please note that the Website is a secure portal for providing information to elected members and is intended for elected member access only. The information is generally related to assisting elected members in performing their roles and responsibilities.

The Website contains information that is marked confidential, information the Council has ordered be kept confidential, and information that elected members should reasonably know is confidential. The Website also includes information that is not confidential. Some of the information included on the Elected Member website may be duplicated on Council's internal and external website.

Whilst the website is for elected member access only, relevant Governance staff and the Council Executive have access to the website for administrative purposes.

2.3.2 Elected member website

Access to the elected member secure website is provided for the purpose of providing relevant council information for elected member access only. Confidential agendas and minutes are also made available on the Elected Member website.

A user name and password are issued to elected members at the commencement of a new council term or at a supplementary election.

54. In light of the council's response, on 22 December 2021 I wrote to Cr de Graaf highlighting the advice from Mr Ashby and noting that:
- all council records are subject to potential disclosure under the FOI Act, however information which is confidential will be exempt, and accordingly the mere fact that a document may fall within the scope of an FOI application is irrelevant to whether or not the document is confidential
 - the council's response is consistent with the general principle that the question of whether information ought to be treated as confidential should always be assessed on a case-by-case basis
 - information obtained via the Portal is neither automatically confidential or available for disclosure.
55. As outlined above, Cr de Graaf continued to submit that information obtained via the Portal is not confidential. Whilst I have considered each of those submissions carefully, I remain satisfied that the EM enquiry system is neither inherently confidential nor open to the public. Disclosure of information must be assessed on a case-by-case basis.
56. I reject the assertion by Cr de Graaf that any information that is confidential is required to be labelled as such. This is not an uncommon submission presented to my Office, and I reiterate, as I have on previous occasions, that labelling information as confidential is not a requisite feature for establishing confidentiality. In fact, information is on occasion labelled confidential when it is in fact not confidential.
57. Cr de Graaf's submission on 8 December 2021 appears to indicate some understanding that the classification of a document is not determinative of its confidentiality when she observed that documents labelled 'personal and confidential' had been released. Similarly, the absence of a 'confidential' classification on a document is by no means conclusive proof that the document is not confidential.
58. The onus rests with each elected member to exercise good judgement in determining whether the information before them is, or ought to be, confidential.
59. I also reject Cr de Graaf's submissions regarding the relevance of some of the information shared with the IP:

Email dated 27 April 2022

The noise reports of 25/11/2021 showed the "100 decibell [sic] noise" was totally irrelevant and inconsequential. It was noise from wind and cars. It could not have been used an [sic] evidence in any way. If anything, it would dismiss [the IP]'s claims of noise, as the two only files showed nothing consequential.

Reply dated 10 May 2022

It was only though, this one specific time, I shared that data by way of two sound readings, sent to Cr Obrien [sic], as it appeared in this case Cr Obrien [sic] was going to be sharing them. Considering, a stack of other data had also been released too, it did seem like these two sound files were in consequential. [sic].

60. I am not persuaded by this argument; whether or not Cr de Graaf considers the documents to be of benefit or relevance to the IP is not determinative of whether the information was in fact confidential, and does not negate the obligation of elected members to maintain that confidentiality.
61. Cr de Graaf has provided numerous submissions asserting that the council's information briefing on 2 November 2021 should not have been confidential:

Reply dated 10 May 2022

I have seen no evidence whatsoever - as to why that workshop, that I myself had called for with the CEO - was given as a confidential one.

...

There were no items of confidential sensitivity discussed at the workshop, as far as I can recall.

Reply dated 2 August 2022

I was the one who asked Scott Ashby to organise a briefing for me, so I could understand the matters better. There was nothing discussed that was confidential to my recollection. Even though the briefing was confidential, I do not believe it should ever have been termed that way, as this was not my request, and I was the one who called for the meeting - and none of the matters were confidential.

62. I am not persuaded by these submissions and in fact question whether they are genuine. If Cr de Graaf genuinely believes that information can be divulged contrary to a confidentiality order simply because she does not consider the information to be confidential, I consider that this indicates an alarming lack of understanding of her obligations as an elected member.
63. Alternatively, it appears that Cr de Graaf may have made the above submissions by way of an excuse for knowingly acting contrary to a confidentiality order. I refer to Cr de Graaf's submissions from 8 December 2021 in which she states that the only time something is confidential is when the CEO makes an order to that effect, and from 10 May 2022 in which she states that the only truly confidential items are those which have confidentiality orders applied to them.
64. Regardless of whether the information discussed at the briefing could objectively be characterised as being confidential, it was subject to a confidentiality order imposed by the Chief Executive Officer. Such an order is absolute so long as it remains in place, and accordingly any disclosure of information discussed at the meeting on 2 November 2021 amounts to a breach of clause 3.3 of the Code.
65. Further to the matter of confidentiality orders, Cr de Graaf has commented on multiple occasions that such orders are only put in place for one year and may then potentially be released.
66. I am also not persuaded by this submission. The consideration for my Office is whether, at the relevant time, Cr de Graaf ought to have known that information was confidential. The mere fact that information might be released into the public domain at a later time

does not negate an elected member's obligations to keep that information confidential, unless and until the information becomes public.

67. Finally, Cr de Graaf has provided numerous submissions stating that she has only engaged in 'official conversations' via her councillor email account, and that conversations via any other platform are personal and private, and ought not to be reviewed or considered. This is a submission with Cr de Graaf has repeated multiple times, including most recently in response to my revised provisional report :

Reply dated 10 May 2022

At times, some of our conversations were personal conversations, and they would have absolutely been inappropriate to be discussing on my councillor outgoing email account (and that we re iterated recently, with some of my councillor emails being questioned, for the style in which I wrote certain things). General conversations, just as people talking, about our own personal business between each other, that at times would cover a wide range of different things are personal conversations, and I didn't give [the IP] rights to photograph or reprint them.

Reply dated 2 August 2022

When I have official conversations with any party, it is on my Councillor Email Account only. Conversations from any other place if anything are only personal conversations. I was not aware that personal and private conversations, perhaps such as facebook messenger - could be considered to be an official council document, or that your office was in the habit of reading through private facebook accounts. I question if this is something that would be applying to all Councillors, or am I being treated differently, or held to a different or higher standard than others. I am not aware of having any conversations that constituted official council business with [the IP] - other than when I've used my Councillor Email Account to speak with her

Reply dated 24 September 2022

I didn't give permission for anyone to invade my private chats with friends. I was communicating with [the IP] as a friend, in these instances. This is clearly the case from the messages where she says "you and I are clearly the same, Love [the IP] xxx" DOES THAT SOUND LIKE COUNCIL BUSINESS, I don't think so?

68. I reject Cr de Graaf's alleged distinction between communication methods. It is expected that elected members will adhere to the requirements of the Code across all methods of communication. The existence of a personal relationship with a resident does not negate the requirements of the Code, and in fact I consider it would be rather troubling if this was the case. Elected members could disclose any information they saw fit, however sensitive or confidential, by simply submitting that the disclosure occurred in the course of a private conversation.
69. Whilst records of private conversations are not generally considered to be council records, and my Office does not consider such conversations as a matter of course, in this instance Cr de Graaf's conversations with the IP provide relevant evidence that ought to be considered by my Office to determine whether confidential information has been disclosed.
70. As already outlined, the standard of proof I apply in my investigations is the balance of probabilities. That is, having considered all of the information before me, I make my findings upon being satisfied that it is more probable than not that the allegations are made out. Cr de Graaf has provided the following submissions about this:

OFFICIAL: Sensitive//Legislative secrecy

It has been claimed, I did A and B - and so therefore, it is probable that I also did X Y and Z. I have concerns with that method, because as I have stated, I did not do XYZ

...

The rules in a court of law pertain to a person being “innocent until proven guilty” and yet they do not appear to apply in “this space” (the space of Council, and Council related business). Instead time and again, in these code of conducts, it was [sic] been stated to me that I must supply evidence of things that I state in my defence, in effect to prove my innocence.

71. I do not consider that it is correct to state that Cr de Graaf is required to supply evidence to prove her ‘innocence’. Rather, Cr de Graaf has been afforded an opportunity to comment on the allegations.
72. That said, it is noted that on numerous occasions Cr de Graaf appears to have provided incorrect or conflicting submissions to my Office.
73. In an email dated 8 December 2021, Cr de Graaf stated ‘The only thing I have sent to [the IP] was some information that appeared to have been asked on her behalf...’ referring to the information in Cr O’Brien’s email. Upon reviewing the substantial information provided by the IP to this Office, it is evident that this is far from correct. To the contrary, it appears that Cr de Graaf provided the IP with a substantial amount of information across numerous ongoing conversations. Excerpts of those conversations are included throughout this report.
74. In the same email, when referring to the email she sent to the IP on 26 November 2021, Cr de Graaf submitted:

I believe this is one of the only email transactions I have had with The IP - and it is one where I am seeking to make introductions with her and the other residents, as their advocate in these matters.
75. I am in receipt of emails and conversations which show that Cr de Graaf engaged in numerous email transactions with the IP from three different email addresses. I observe that there are at least six different subject lines across those emails, each of which comprises multiple emails in a chain.
76. Additionally, the statement that she sought to make introductions would indicate that the email of 26 November 2021, was one of the first correspondences from Cr de Graaf to the IP, however it is clear that by the time that email was sent Cr de Graaf had already been communicating extensively with the IP via emails and Facebook Messenger.
77. I am in receipt of an email from Cr de Graaf to the IP as early as April 2021 and I note that the content of that email indicates that it follows a prior conversation between the two.
78. Cr de Graaf has submitted on numerous occasions that:
 - she did not believe the council perceived the IP to be a credible legal risk
 - she was unaware of any intention by the IP to initiate legal proceedings against the council
 - if the IP had indicated an intention to initiate legal proceedings, it was against the Pepper Tree, not the council.
79. In my provisional report I noted an email from the IP sent on 11 April 2021 to Mr Daniel Verow, LGA Mutual Liability Scheme, which highlights Cr de Graaf’s awareness of the

IP's intention to take legal action against the council, and also suggests she may have encouraged the IP to pursue legal action:

Dear Daniel

...When I felt able to take it on again at the insistence of Councillor Alayna de Graff (sic) I again asked for the documents to lodge a civil claim.... [my emphasis]

...[the IP]

80. In response to my provisional report Cr de Graaf disputed the accuracy of the information provided by the IP, stating 'This is absolute heresy [sic]. Just because [the IP] says it, does not mean it is true'. I therefore provide the following additional material indicating that Cr de Graaf was aware of the likelihood that the IP might initiate legal proceedings against the council:

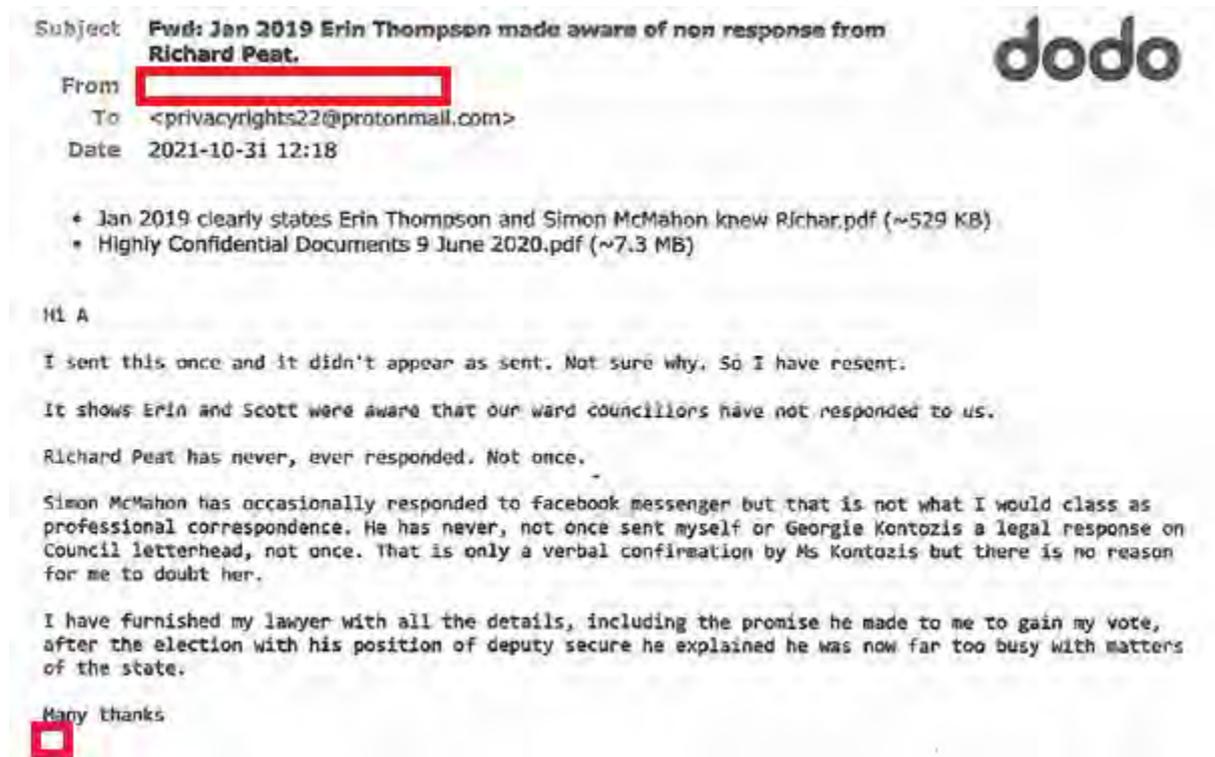


Image 5: email from the IP advising Cr de Graaf she had provided information about the council matter to her lawyer

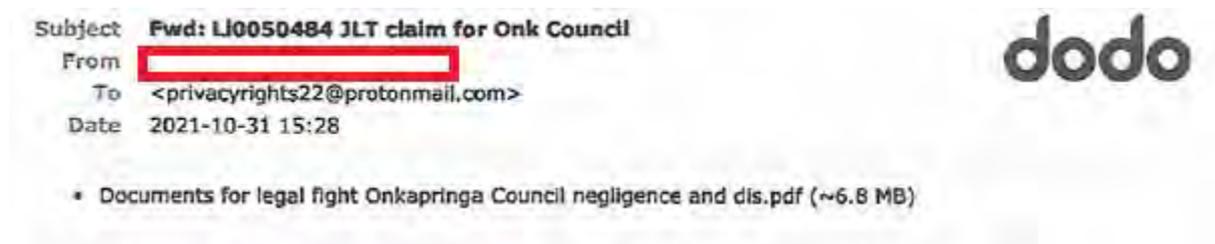


Image 6: email from the IP to Cr de Graaf attaching 'documents for legal fight Onkaparinga Council...'

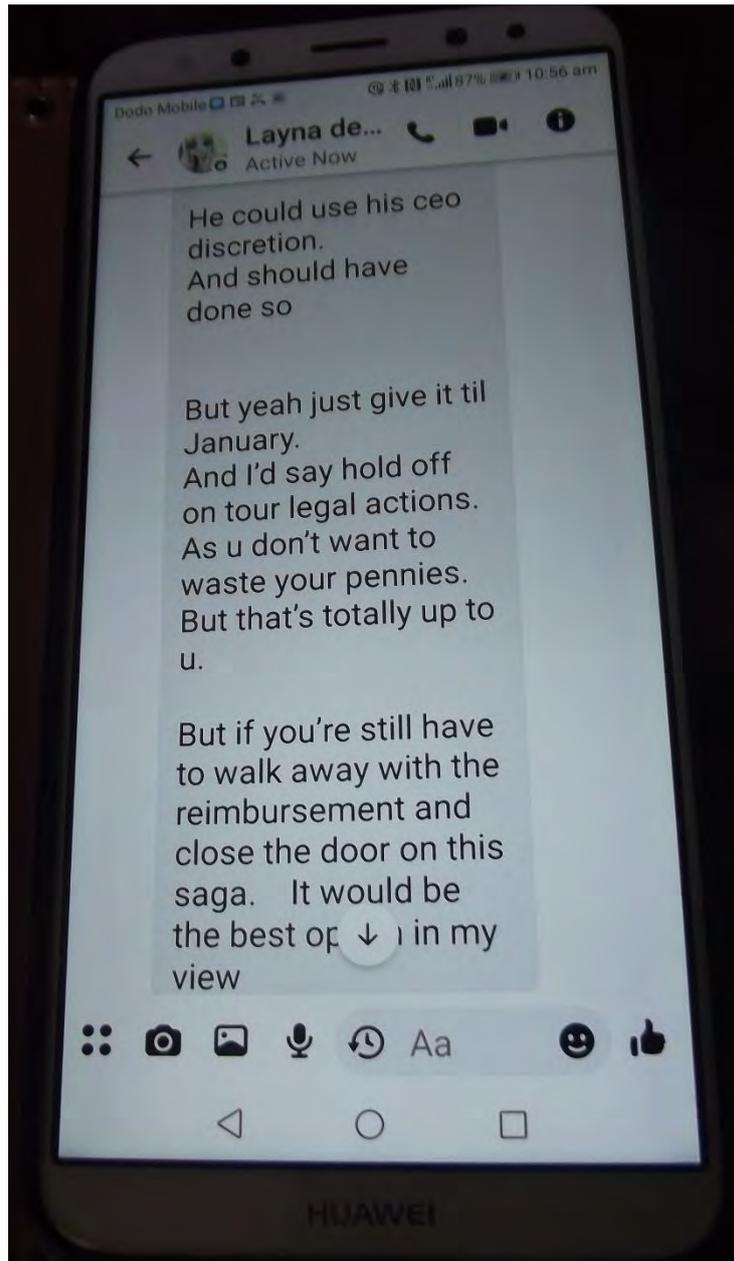


Image 7: excerpt of Facebook Messenger message from Cr de Graaf to the IP regarding 'legal actions'

81. I note that in response to my revised provisional report Cr de Graaf has reiterated her view that the IP had never intended to take legal action against the council. In light of the information above, I am not persuaded by that submission, nor the assertion that Cr de Graaf had no knowledge of the IP's intention to pursue legal action.
82. Further instances of apparently false information being provided to my Office include:
- Cr de Graaf submitting that she has not forwarded any emails marked as 'confidential' - I am in receipt of various screenshots of emails having been forwarded to the IP by Cr de Graaf, one of which Cr de Graaf had herself marked as confidential
 - Cr de Graaf submitted in relation to the alleged disclosure about a prior employee 'AS I understand it, there was no wrongful dismissal...' - I am in receipt of a

message from Cr de Graaf to the IP about that employee stating 'And then he fought a wrongful dismissal battle then suicided about two years after'.

83. Cumulatively, I consider that these examples indicate either a deliberate provision of false and/or disingenuous submissions to my Office, or at the very least an alarming indifference as to whether the submissions provided were accurate, which in turn has raised concerns in my mind about her credibility.
84. In response to my revised provisional report Cr de Graaf has stated that she did not provide any false submissions to my Office, and has requested that I provide evidence of same. Similarly, Cr de Graaf has submitted that no evidence to indicate a breach of the Code has been presented. I query whether these submissions were put forward prior to Cr de Graaf properly reading my revised provisional report. The examples of false information being provided to my Office are set out in detail above, and the relevant evidence is provided together with my assessment of each potential breach.
85. Finally, I take this opportunity to confirm that further submissions from Cr de Graaf regarding the processes which would be followed in a court setting were addressed in a letter to her dated 26 September 2022. In that letter I also confirmed that I would delay the finalisation of my investigation until after the conclusion of the local government elections so as to avoid influencing the voting process in any way.

Relevant law/policies

86. Section 63 of the Local Government Act provides that:
- (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.
87. Section 4(1) of the Ombudsman Act provides that:
- Misconduct in public administration means an intentional and serious contravention of a code of conduct by a public officer while acting in their capacity as a public officer that constitutes a ground for disciplinary action against the officer
88. Clause 3.3 of Part 3 of the Code 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

Whether Cr Alayna de Graaf divulged confidential information in contravention of clause 3.3 of the Code of Conduct for Council Members

89. Clause 3.3 of Part 3 of the Code sets out that council members must not release information that:
- the council has ordered to be kept confidential
 - council members should reasonably know is confidential, including information that is considered by council in confidence.
90. It has not been suggested that Cr de Graaf shared information that was ordered to be kept confidential.

91. Whilst the meeting of 2 November 2021 itself was subject to confidentiality orders, there is no specific information or document considered during the meeting that was ordered to be kept confidential. Accordingly, I have considered whether Cr de Graaf shared information she 'should reasonably know is confidential.'
92. Initially the information that is of relevance to this issue was limited to noise recording data for the Pepper Tree. It is my understanding that the noise monitoring is ongoing, and there are many recordings that may have been obtained and shared by Cr de Graaf.
93. In light of the additional documentation provided by the IP to this Office, the extent of relevant information has been expanded to include numerous internal council communications.
94. As noted above, there is now a total of nine occasions that are of relevance to this specific complaint where Cr de Graaf may have inappropriately shared confidential information with the IP:
 - following the Elected Members Information Session held in confidence on 2 November 2021
 - by forwarding the email from Mr Lawrence dated 11 November 2021
 - by forwarding the email and noise data sent to Cr de Graaf by Cr O'Brien on 25 November 2021.
 - by forwarding an email addressed to all elected members with the subject line 'Confidential briefing /Q & A session Tuesday 9 November at 5:30pm' which disclosed the topic to be discussed at a confidential briefing at a confidential session
 - by forwarding emails from an email chain involving all elected members but primarily Crs de Graaf, McMahon and Peat on 6 November 2021
 - by forwarding an email from Cr Themeliotis to elected members on 6 November 2021
 - by disclosing information about a previous councillor or employee who was engaged in a wrongful dismissal claim before later ending his life
 - by disclosing that Cr Greaves is paid \$275.00 per Council Assessment Panel meeting
 - by sharing information about a council matter involving Mr Matthew Lawrence and a ratepayer referred to as 'Anthony', including sharing a file titled 'OFFENSIVE MEMO'

Elected Members Information Session of 2 November 2021

95. This information session was ordered to be kept confidential by the council's Chief Executive Officer pursuant to section 90A(4) and 90(3)(a) of the *Local Government Act 1999*.
96. Accordingly, any information or discussion that took place during this meeting constitutes 'information that is considered by council in confidence' for the purposes of clause 3.3 of the Code.
97. In my provisional report I expressed the view that the emails between Cr de Graaf and council members and employees, exchanged on 6 November 2021, alluded to the fact that Cr de Graaf shared information that was discussed at this meeting, with the IP. Additionally, the screenshot provided by the IP to this Office highlighted above (Image

1: Agenda Item for the confidential Elected Member session) suggested Cr de Graaf may have communicated discussions from the confidential meeting to the IP.

98. My Legal Officer contacted the IP by telephone to clarify what information, if any, had been communicated to her by Cr de Graaf from that meeting.¹⁷ The IP advised that Cr de Graaf contacted her following the meeting held on 2 November 2021 primarily to inform her that elected members had alleged that her noise complaint had stemmed from being mentally unwell rather than a genuine grievance, and that the decibel readings discussed during that meeting had also been disclosed.
99. In light of the above, in my provisional report I advised my view that Cr de Graaf disclosed information that she ought reasonably to have known was confidential.
100. In forming that view, I had regard to the fact that Cr de Graaf would have been aware that the information session was ordered to be kept confidential by the Chief Executive Officer as:
- it was clearly indicated on the Agenda for the meeting
 - she acknowledged the confidentiality of the meeting in her email dated 6 November 2021 highlighted above
 - she was expressly reminded of the confidentiality of that meeting by Mr Lawrence in his email dated 6 November 2021 highlighted above also.
101. In responding to my provisional report, Acting Mayor Simon McMahon provided the following comments about the IP's recollection of her conversation with Cr de Graaf about the 2 November 2021 meeting:

I confirm that at the conclusion of the confidential Elected Member session on 2 November 2021, the staff presenting the session reiterated that the session was strictly confidential, all information provided should be treated as such, and acknowledged that this was a particularly difficult and sensitive matter for the IP. This is entirely reasonable as both staff members had many dealings with the IP for an extended period and were effectively urging members to be especially aware of the need for confidentiality surrounding this matter. Not only is it completely inappropriate for Cr de Graaf to be divulging any information from a confidential session, it is troubling that Cr de Graaf has misconstrued this concern for the resident and communicated a different position to the IP.

102. In response to my provisional report, in particular the comments about Cr de Graaf disclosing to the IP that elected members had alleged that her noise complaint had stemmed from being mentally unwell, Cr de Graaf has submitted the following:

This has been misstated, misunderstood and misinterpreted.

...

I am totally unaware of having shared anything of a confidential nature. Any discussions that took place were not at all about confidential matters. But only about details that had already been released, or were public.

...

People had discussed [the IP]'s mental health in an inappropriate way, and I had reported that through the correct channels, as I felt absolutely appalled that Cr Greaves, and others would discuss a person's mental health in such a public, and detrimental way. This had been done by multiple people on multiple occasions, in public, at workshops, at council meetings and SDC meetings. I have not taken an oath in any way whatsoever to protect the nefarious actions of others. If a comment is made at a Public council meeting I am not obliged [sic] to hide what they have said, or to not reveal that, to anyone. I am not compelled to cover up lies and inappropriate behaviours.

¹⁷ The telephone call took place on 21 March 2022.

...
But [the IP]'s mental health state was not discussed at all the workshop that was "confidential". If I had mentioned any thing [sic] about [the IP]'s mental health and statements of people made in public - those recollections were from a separate occasion.

103. I am not persuaded by Cr de Graaf's submissions for a number of reasons. Firstly, as outlined above, the information session was subject to a confidentiality order and it is therefore irrelevant whether or not Cr de Graaf perceived the issues discussed at that session to be confidential.
104. Secondly, the information session was not a public council meeting and contrary to Cr de Graaf's submissions, she is in fact obliged to not reveal any information that the council has ordered to be kept confidential. If Cr de Graaf felt that any comments made at the information session were inappropriate, the appropriate avenue to raise this is within the council or by way of a code of conduct complaint about the relevant elected members, not by divulging those comments to a ratepayer.
105. Finally, I refer to the transcript of a message sent from Cr de Graaf to the IP. Based on the information available to me, it appears that this message had been copied and pasted from an email drafted by Cr de Graaf. It is unknown whether that email was ultimately sent:

Cr de Graaf: My understanding is The local court over ruled Councils decision and accepted a retrospective development application.
As far as I am aware she isn't the only one who has complained since 2019 and there is an email from Georgie as a complainant about noise.
We even heard again as per Matthews statement that she is the only one complaining. EMs would be aware of people saying that "[the IP] has mental health issues and she's the only one complaining. (Implying she's imagining this and over exaggerating)". I know I've been told that by two elected members and two staff members. Her mental health should not ever have been raised and I'm sure you would agree with that too. I cannot erase what I've been told as to why her case is not worth trying to assist with. Whether unpopular or hard I will endure difficulties that present when trying to advocate for those who need help.
Is it even relevant if she is the only one complaining anyway?
I wouldn't have encouraged her to participate at all if I knew she was going to go head to head with an insurance company, as it's wasted her time and put more stress on her again...

106. In light of the above, my view is that the IP's mental health was in fact discussed at the confidential information session, and that Cr de Graaf divulged that fact to the IP.
107. It also appears that Cr de Graaf may have divulged further information to the IP which was discussed at the confidential information session, namely the fact that Cr McMahon attended the Pepper Tree. I refer to the following conversation between Cr de Graaf and the IP:

Cr de Graaf: Hey
I'll write down a confidential affidavit and ask Michael also what he heard. But I don't know if I'll be able to question this. Because think of it this way. If he says something that's a lie during confidence well how can any one question it! As theoretically I can't speak of it. I suggest let's just keep that as a trump card.
I'll ask Michael also if that's what he heard because Simon made it sound very convincing and I had never heard him say this before.
Wayne is the one who said to him was the band actually playing! (And I suspect that perhaps it was during a set break). But he reckons he went inside to check if the band was playing. Something odd is going on here.
But I'll ask Michael what he heard and just get this recorded on the record.

And go from there.

The IP: OK. He could not have gone in without a ticket or a wrist band. There would be proof he paid to get in. No ticket, no entry it states that. I feel he is again throwing me under the bus to save himself.

Cr de Graaf: I'll talk to Michael later and check what he heard him say

He was questioned But he will probably change his statement to he went into the car park to make sure he could hear it

...

The IP: Won't his statement be in the minutes of the meeting?

Cr de Graaf: Unfortunately anything discussed during those sessions is not recorded.

108. Both the reference to 'a lie during confidence' and the statement that discussions 'during those sessions is not recorded' leads me to believe that the above conversation refers to a confidential information session of the council. The timing of the message and surrounding context indicates specifically that the subject is the briefing of 2 November 2021. This is further supported by Cr de Graaf's submission to this Office that 'If Cr McMahon reminded me the EM workshop was confidential - he only meant he doesn't want his lie exposed'.
109. In light of the above, it is my view that Cr de Graaf breached clause 3.3 of the Code by disclosing information discussed at the confidential information session to the IP, namely:
- reference to the IP's mental health
 - the decibel readings
 - the fact that Cr McMahon attended the Pepper Tree.

Email from Mr Lawrence

110. Following the confidential council information session, on 11 November 2021 Mr Lawrence sent an email to all elected members regarding the noise data. I am of the view that all elected members ought to have known that the information contained in Mr Lawrence's email was confidential, given that the:
- email itself states that the information was being provided to council members in response to questions raised during the 'confidential elected member session Tuesday 2 November 2021 (sic)'¹⁸
 - data in that email was obtained by the council, and was communicated internally to a limited audience
 - data related to a complaint that was considered likely, by the council, to result in legal proceedings being initiated against the council.
111. I note that the decibel readings referred to in the IP's email of complaint to the council dated 11 November 2021 are similar to those referred to in previous communications from the 6 November 2021 email exchange that occurred prior to Mr Lawrence's email containing noise data.
112. I therefore noted in my provisional report the possibility that Cr de Graaf did not provide the IP with information from Mr Lawrence's email dated 11 November 2021 specifically, and it may have simply been a coincidence that the IP lodged her complaint with the council shortly after that email was sent. That said, my provisional view was that this is unlikely to be the case given:
- that the IP's email to the council was sent less than an hour after Mr Lawrence's email was sent

¹⁸ Email from Mr Lawrence dated 11 November 2021.

- Cr de Graaf's extensive history of communicating information regarding this issue to the IP, as demonstrated by emails provided by the reporter and the IP.
113. I therefore advised in my provisional report that I was persuaded, on balance, that Cr de Graaf communicated the contents of Mr Lawrence's email to the IP either by forwarding the email or through other means (electronic message or by telephone).
114. Cr de Graaf has denied on multiple occasions having forwarded Mr Lawrence's email or divulging the information contained therein. Upon reconsideration of this particular allegation, together with the additional information provided to my Office, I am inclined to alter the views expressed in my provisional report. Although I remain of the view that all elected members ought to know that the information contained in Mr Lawrence's email was confidential, I am not satisfied on balance that Cr de Graaf forwarded that email to the IP.
115. In my provisional report I observed that the IP's email to the council was sent less than an hour after Mr Lawrence's email was sent. Although this timing certainly appears suspicious, upon considering the events which needed to occur for the IP's email to have been in response to Mr Lawrence's email, that window becomes implausibly small.
116. Mr Lawrence's email was sent at 12:36pm, and the IP's was subsequently received by the council at 1:19pm. This leaves only 43 minutes for:
- Cr de Graaf to receive, read and forward the email to the IP
 - The IP to receive and read the forwarded email
 - The IP to draft and send her email to the council.
- This timeframe assumes that both Cr de Graaf and the IP were monitoring their emails closely within that window.
117. I have also had further consideration of the content of both emails. The IP's email appears to be largely focussed on an issue not raised in Mr Lawrence's email. In fact, none of the matters raised in Mr Lawrence's email are prominent in the IP's email, indicating that her email to the council was likely prompted by some other factor.
118. Having considered the information provided by the IP, I consider it likely that her email of 11 November 2021 was in fact prompted by a conversation had with Cr de Graaf in the days prior:
- Cr de Graaf:** Unfortunately there are not many rules in this very strange place.
Only the Code of Conduct
Which u know about don't u?
Cr de Graaf: If u wanted to u have that option too
Cr de Graaf: Might be better actually than doing an ombudsman report
Cr de Graaf: It's on our website on the transparency portal.
119. The first line of the IP's email queries which form should be used to lodge a Code of Conduct complaint. It therefore appears likely that the email may have been prompted by the conversation with Cr de Graaf above.
120. Finally, at the time of issuing my provisional report I was not fully aware of the breadth of information shared between Cr de Graaf and the IP. Given the coincidental timing of the IP's email, it appeared that it could only have been prompted by Mr Lawrence's email. I now see that during November 2021 Cr de Graaf was apparently engaged in multiple lengthy conversations with the IP about the issues surrounding the Pepper

Tree, and am satisfied that the IP's email may have been prompted by any one of those conversations if not the one referred to above.

121. In light of the above, I am of the revised view that I cannot be satisfied that Cr de Graaf shared the information sent by Mr Lawrence in the email dated 11 November 2021 with the IP.

Email from Cr O'Brien

122. Cr de Graaf has submitted that she did send Cr O'Brien's email containing noise data for the Pepper Tree, but that there is no basis for the suggestion that she ought to have known it was confidential.
123. In response to my enquiries Cr de Graaf provided a chain of emails that reflect information of the nature described by the reporter that was sent to the IP:

From: Alayna de Graaf <Alayna.deGraaf@onkaparinga.sa.gov.au>
Sent: Friday, 26 November 2021 2:49 AM [my emphasis]
To: [the IP]
Subject: Fwd: Cr O'Brien -- CR 1862932 -- FW: Pepper Tree Cafe Noise Levels

Hello [the IP]

Here are the data of the trials into to the recent Enquiries about the noise at that pub near your house.

Incidentally It doesn't seem to be a cafe at all. So it's weird the place is called a cafe. The name is quite a misnomer.

I wonder what the criteria was awarding a business award to an actual pub that is only open on weekends! How unusual. I just figured they did food like an actual cafe Monday to Friday, I was surprised to hear they don't.

Please be assured by the results and emails below council are taking the development compliance seriously and matters are being monitored. Even if many years have passed by, sadly!

I do look forward to meeting you and your neighbours soon as discussed some time ago now.

I'd prefer if you write back here don't include all as I would rather avoid the group discussions right now if possible.

Oh also if the sound readings aren't necessarily showing up very well at this point it may just mean the sound equipment needs to be moved around or more accurately monitored etc.

Catchup soon

Kind regards Alayna.

124. The above email, together with the submissions received from Cr de Graaf above indicate that Cr de Graaf acknowledged that she had shared noise data on at least one occasion, following the email that was forwarded by Cr O'Brien on 26 November 2021.
125. As outlined above, Cr de Graaf has made numerous submissions outlining her views that information obtained via the Portal is not confidential. For the reasons already canvassed, it is my view that information obtained via the Portal is neither inherently

confidential nor open to the public; disclosure by any elected member should be assessed on a case-by-case basis.

126. Cr de Graaf provided further submissions outlining why she believes that the information in Cr O'Brien's email ought not to be treated as confidential, regardless of how it was obtained. In response to the letter dated 22 December 2021, Cr de Graaf submitted the following by email dated 18 January 2022:

The documents in question were not marked confidential, and I have no way of assuming that might be. This document from the CEO in August 2021 - clearly says that the sound monitoring equipment had been sharing data with [the IP] on a regular basis. I would assume that that machine has been installed for that actual purpose - to tell the residents how loud noise is in the area. Measuring the noise in any area is not confidential information as far as I'm aware. I can go there myself and use a decibel measuring app from my phone, and it would provide similar results to the council device. I cannot see how in any way - data about noise in the area is confidential.

I have attached some documents, and this screenshot below seems to make it very clear to me that sharing these audio files is quite OK, and it is indeed why that device was purchased (to openly keep all residents informed about noise in the area). I can't see why else they would install the device for otherwise?

Please let me know your view point now that I have presented more information. I do have more information as well that I was collecting - that says the EM enquiry system is a public record area, and basically these are public records. But I will hold off on doing further research at this point - as I believe what I have provided below and attached is fairly definitive.

Supporting evidence preparation

Noise Complaints

As noted above, the Council has now installed, **at its cost**, an external noise monitoring device on private land not associated with the Café. This device has the capacity to transmit decibel levels to Council for review at any time, in 'real time'.

The Café was also required to install a hard-wired noise limiter to its in-house speaker System. This has been in place since early 2019.

When combined with the Café's own records from its existing electronic equipment, the Council has access to a full suite of information of the audio levels at the Café on any given night.

You have previously been provided with data from the noise monitoring device, most recently in Ms Mitchell's response to you on 13 August 2021, which included a copy of decibel volume readings for the period 4-9 August 2021. These readings showed decibel volumes were consistent across several nights, including those nights when no events were being held at the venue. We will continue to monitor this data into the future.

127. In response to that email, I sent a further letter dated 31 January 2022 to Cr de Graaf stating that:

My legal officer requested clarification in regard to your submission that a letter to the IP from the Chief Executive of the City of Onkaparinga (**the council**) dated August 2021 demonstrates that the noise data had been shared with the IP in the past and would continue to be shared with the IP. My legal officer highlighted that the letter merely stated

that the owner of the Pepper Tree Café had shared private data with the IP, and that the council would monitor the issue of noise from the café.

In response to that enquiry, you replied as follows:

I agree the letter does not say that - but to me, it seemed to imply they were happy to share those files and it was no issue, and so it seemed, more would be shared, on other occasions (sic) - OR indeed - the machine would be available for all members of the public to access.

I do not consider the letter dated August 2021 implies that council data would be shared publicly.

...

Ultimately, the Council's Allowances Benefits and Support Procedure, highlighted in my previous letter to you, makes clear that:

2.3.2 Elected member website

Access to the elected member secure website is provided for the purpose of providing relevant council information for elected member access only. Confidential agendas and minutes are also made available on the Elected Member website.

A user name and password are issued to elected members at the commencement of a new council term or at a supplementary election.

As a council member, it is incumbent on you to understand your obligations and to be aware of relevant policies.

You have also queried the likelihood of legal action by the IP against the council. The likelihood of such action being taken is irrelevant, in my view, as the fact that the noise data may be used for such purposes is significant itself and relevant to the sensitivity of the information.

You have also stated that anyone can obtain their own noise data, therefore the council's own data should not be considered confidential. I do not consider this submission persuasive, as the council's data has been obtained for a specific purpose and belongs to the council. It is not appropriate, in my view, for a council member to take it upon themselves to share this information without authorisation from the council.

I remain of the view that it is likely you ought to have known the information was confidential, and have set out comprehensive reasons in this letter and my letter dated 22 December 2021 as to why that is my view.

128. The same day the above letter was sent, Cr de Graaf sent an email to my Legal Officer stating the following:

The reason why I shared those files, is because it was absolutely and completely clear that Cr O'Brien did the enquiry for the residents, he states it in his email. It is very clear - this is why he did the enquiry. So this is one of those cases, whereby the enquiry is on behalf of the resident, and it is intended to be shared with them. That is what occurred (sic) - by him, and I will send you the files this afternoon. I haven't discussed the confidential matters with him, but I did simply ask him why did he lodge that enquiry for her, and has he shared it with her, and was that his intention from the start (or did I misunderstand his em [sic] enquiry). I didn't misunderstand anything - he did it to share it with her, and so far as I know he has shared it with her.

In most cases, EM enquiries are lodged directly for residents, and are intended to be shared with them - this is one of those cases.

As you stated as well - the legal conversation is a different matter - and does not relate here.

The noise data may not be used for any legal purpose - as it does not show any sound incursions, that are high enough to report any noise abatement issue. When the staff provided the em [sic] enquiry reply back to Cr O'Brien, that is when they should have stated, NOT to directly share it with the IP - if that was there [sic] intention then. Although Cr O'Brien's email makes it clear, he was going to be sharing it with the residents. That is when staff should have said "NO you can't share this with the IP". Instead they simply gave him they [sic] files, and then he went about the business of sharing that - so far as I know. As this em [sic] enquiry originated with him - I would request you please ring him to clarify things -

129. Cr de Graaf also highlighted the wording of Cr O'Brien's email dated 14 November 2021:

After recently receiving the explanation on how the monitor works I think that it would be prudent to check and share the reading from last night with elected members and the residents.

130. In light of the above, a response from Cr O'Brien was sought as to whether Cr de Graaf's understanding was an accurate reflection of his intentions for seeking information, and whether he had been provided with any authorisation to share the data with residents directly. Cr O'Brien responded as follows by email dated 7 February 2022:

No this isn't an accurate reflection. I did request a reading based on a complaint from a resident through the Elected Member Enquiry system but have never shared that reading with any resident. I wanted to see whether the resident had legitimate concerns regarding excessive noise and as it turned out wind and traffic noise were greater than the noise coming from a local venue which was the subject of the complaint.

I did however receive an email request from Cr De Graaf regarding the reading and forwarded the reading to her as requested. I did not believe I was in breach of any confidences. All Elected Member Enquiries can be accessed from a central portal.

131. On 8 February 2022 my Legal Officer informed Cr de Graaf of Cr O'Brien's statement that he did not agree the information was intended to be shared with residents. In response to my provisional report Cr de Graaf reiterated her view that Cr O'Brien did not consider his EM Enquiry to be confidential, but did not raise any other matter which I have not already addressed. I therefore maintain my view that Cr O'Brien did not intend to share the information with residents.

132. I note Cr de Graaf has submitted that she has not been provided with adequate training regarding her confidentiality obligations. In response to that, I comment that:

- the Code clearly sets out that council members must comply with all policies, codes and resolutions,¹⁹ therefore, as a council member Cr de Graaf has an obligation to familiarise herself with policies, including the Council's Allowances Benefits and Support Procedure
- fellow councillors have attempted to remind Cr de Graaf of her confidentiality obligations,²⁰ and those reminders have been ignored
- determining whether information is confidential requires consideration on a case-by-case basis, and good judgement

¹⁹ Clause 2.6.

²⁰ Email from Cr Simon McMahon to Ce de Graaf dated 6 November 2021.

- in November 2018 Cr de Graaf underwent training regarding the legal and statutory responsibilities of elected members, which included an overview of the Code of Conduct for Council Members.
133. As outlined above, I reject the assertion by Cr de Graaf that any information that is confidential is required to be labelled as such.
134. My reasons as to why I consider that the information in Cr O'Brien's email ought to have been considered confidential have been set out previously in this report, but to summarise, the data:
- was obtained by the council, and is therefore the property of the council
 - was distributed internally to a limited audience for council purposes
 - had/has the potential to be used by the IP in legal proceedings against the council, implying that the information carries a certain degree of sensitivity.
135. It is also apparent from my enquiries in this investigation that the council's relationship with the IP is highly contentious, and any information relating to the noise complaint should be handled in a sensitive manner. The IP's own submissions indicate that she viewed the information as confidential, and has been distressed by Cr de Graaf's actions in providing her with the information directly.
136. Cr de Graaf submitted that Cr O'Brien stated in his request for information that the purpose of his request for information was to share the information with residents:
- After recently receiving the explanation on how the monitor works I think that it would be prudent to check and share the reading from last night with elected members and the residents. From the correspondence provided to me I believe that the residents intend to escalate their complaints so it would be good to have the reading as soon as possible.²¹
137. I do not consider it is reasonable for Cr de Graaf to assume the information was no longer confidential based on the wording of Cr O'Brien's request. Cr O'Brien himself did not share the information externally, as reflected by his email to my Office dated 2 February 2022.
138. Even if Cr O'Brien had shared the information with residents, in the absence of any authorisation from the council to do so, he himself may have been in breach of his confidentiality obligations. Although Cr O'Brien did indicate that he potentially wished to share information with residents, Ms Ingram's response does not imply that authorisation was given by the council to provide noise data, or the contents of her email, to external parties:

Good morning Cr O'Brien,

Thank you for your enquiry regarding noise levels from the Pepper Tree Cafe for last Saturday night 13 November 2021.

The following information has been provided by Matthew Lawrence, Manager Development Services.

The attached graphs are the readings for the last two Saturday nights, to allow for a comparison of data. I have also attached the November wind readings from the closest station (Noarlunga).

The graphs do show higher average dB levels for the 13 November, however this night was the windiest night of the month to date, and the high readings actually increased

²¹ Email from Cr O'Brien dated 14 November 2021.

through to 7am which is very unusual. I have confirmed with residents that the band did not play much past 11.30pm - the conditions of approval allow music until 12 midnight. I can confirm that we are monitoring these readings following every weekend as well as implementing other monitoring measures to ensure compliance with development approval conditions.

Residents have provided some feedback regarding a recent perceived increase in volume, which we are addressing directly with the owners.

Kind regards,
Karen Ingram
Councillor Liaison Officer
Corporate

139. In responding to my provisional report, Cr de Graaf provided further submissions asserting that the information within Cr O'Brien's email was not confidential:

Cr OBrien has provided a further update to me, about his intentions towards the residents with his EM Enquiries, for sound readings. I have attached that too, as he makes it more clear, he also does not believe those sound recordings were supposed to be confidential - when it applies to instances, where he has asked for them. I believe we were all of the opinion, that the sound readings were actually for the residents, and that's why the machine was ordered in. I do not understand why the staff would apparently be taking a different point of view on this matter (if they are) - and if that is the case, why didn't they ever state that anywhere. Including on the replies to the elected member enquiries.

140. Cr de Graaf provided my Office with a screen shot of the email from Cr O'Brien that she has referred to above, which I provide below:

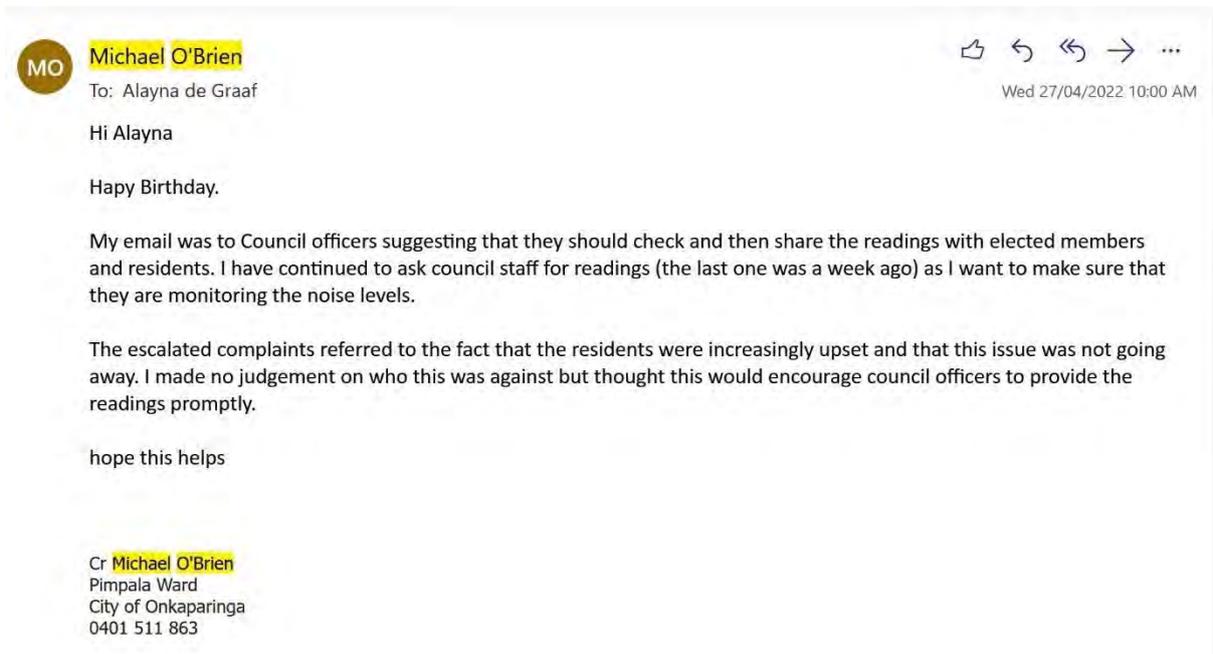


Image 8: email from Cr O'Brien to Cr de Graaf

141. I disagree with Cr de Graaf's interpretation of Cr O'Brien's email. I am not persuaded that Cr O'Brien has suggested that the sound recordings were not confidential.
142. In light of the above, I do not consider there is any evidence that the information was authorised to be shared with external parties, and I remain of the view that Cr de Graaf

ought to have reasonably known the noise data and Ms Ingram's email that was forwarded by Cr O'Brien was confidential.

143. When considering whether information ought to be treated as confidential, it is important that elected members also consider all relevant context. Whilst the contents of the email alone might not appear particularly sensitive, Cr de Graaf ought to have also considered the IP's ongoing issues with the council, as well as the recently held confidential information session.
144. Accordingly, I am of the view that by sharing Cr O'Brien's email containing Ms Ingram's email and noise data, Cr de Graaf acted in breach of clause 3.3 of the Code.

Email advising elected members of confidential briefing

145. The IP has provided me the following photograph, showing she has received an internal council email sent to elected members.

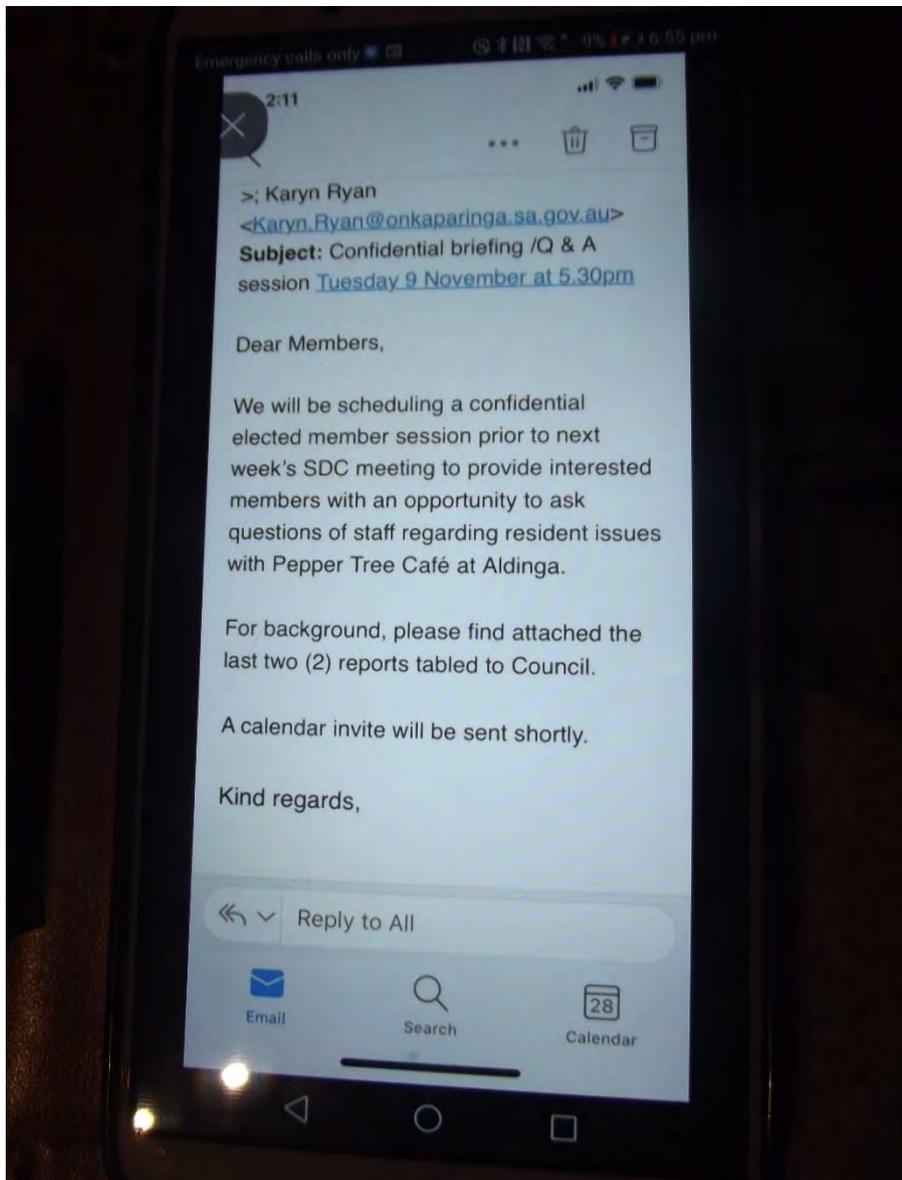


Image 9: email to elected members advising of confidential information session

146. It is noted that the subject line refers to a confidential briefing occurring on Tuesday 9 November, however I am satisfied from the content of the email that it in fact refers to the briefing which ultimately took place on 2 November 2021.
147. Although this particular photograph does not explicitly show that the email was forwarded to the IP by Cr de Graaf, based on the information before me I accept the IP's submission that this was the case. In forming this view, I have had particular regard to the other information provided by the IP to this Office. It is clear that a substantial amount of information was provided by Cr de Graaf to the IP, in particular in relation to the Pepper Tree.
148. Regardless, Cr de Graaf has not denied having forwarded the above email to the IP, submitting to this Office that:
- That briefing sheet was Public. It was only the workshop itself that was confidential, and as I stated, the workshop was not initially meant to even be confidential. But it is not up to me to question the CEO decided to make it confidential in the end.
149. As outlined above, I am satisfied that the briefing was subject to a confidentiality order and therefore it is irrelevant whether or not Cr de Graaf intended or expected the briefing to be confidential. Although at the time of this email being sent to elected members the confidentiality order had not yet been made, I am satisfied that the subject line and content of the email was sufficient for Cr de Graaf to know that the email ought to be treated as confidential.
150. I acknowledge that notice of the confidential briefing is not itself confidential; to the contrary the council published the notice on its website. However, the notice refers to the topic to be discussed as only 'Compliance matter', whereas the email above conveys additional information about the briefing.
151. In any event, even if the email relayed only the same information as appears in the public notice of the briefing, I would remain satisfied that Cr de Graaf should reasonably have known that the email was confidential. I do not consider that an internal council email which was sent only to elected members is an appropriate method of communicating notice of the briefing to members of the public, nor was it appropriate for a single elected member to take it upon themselves to notify a resident of the briefing before the council had publicly provided notice of same.
152. In light of the above, I am of the view that Cr de Graaf forwarded the above email notifying elected members of a confidential council briefing to the IP, thereby breaching clause 3.3 of the Code, by sharing information she ought to have known was confidential.

Email chain between Crs de Graaf, McMahon and Peat

153. Cr de Graaf has submitted to this Office:

I don't know what we are talking about here, as I can't see it. Are staff applying the same scrutiny to others, as it would appear not. If it was not marked confidential - then I can't see why that would be a concern.

154. I am satisfied that Cr de Graaf was given sufficient information to respond to this allegation. In my letter dated 20 July 2022 I advised Cr de Graaf that the email chain in question is from 6 November 2021 and primarily involved a discussion between Crs de

Graaf, McMahon and Peat. Given the specificity of my letter, I consider it likely that Cr de Graaf does in fact know which emails I have referred to.

155. I refer to the following transcripts and photographs which are relevant to this particular allegation:

Cr de Graaf: I've sent in an enquiry email asking why Richard and Simon have ignored u And I've asked some other stuff.

U have a copy anyway



The IP: Thanks x

Cr de Graaf: Heya

I'll let u know what they reply

The IP: [sticker of an animated cat]

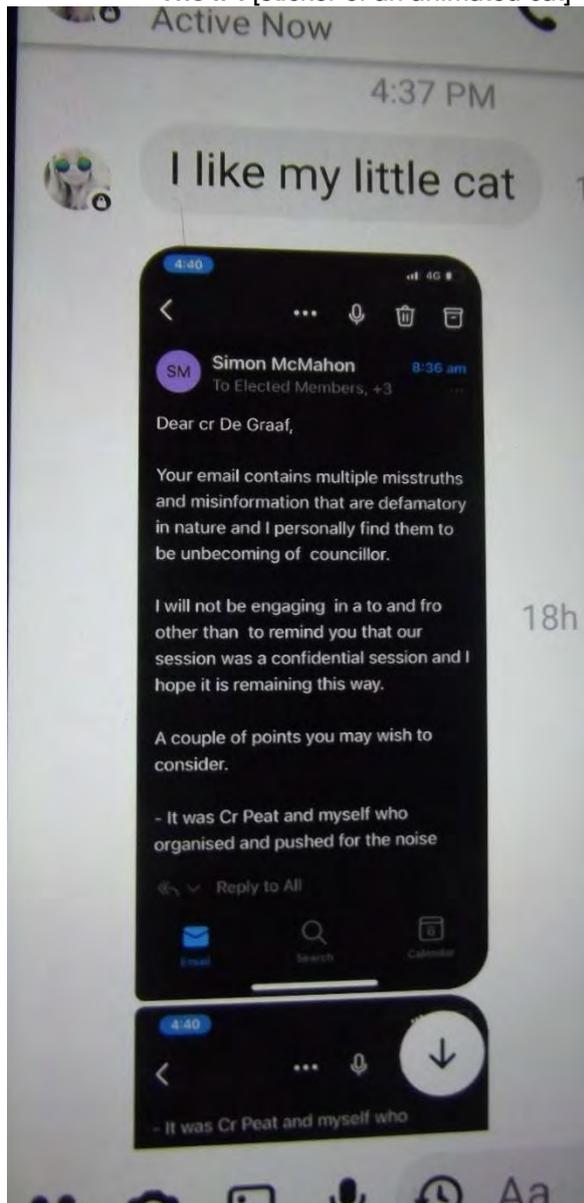


Image 10: excerpt of Facebook Messenger messages from Cr de Graaf to the IP

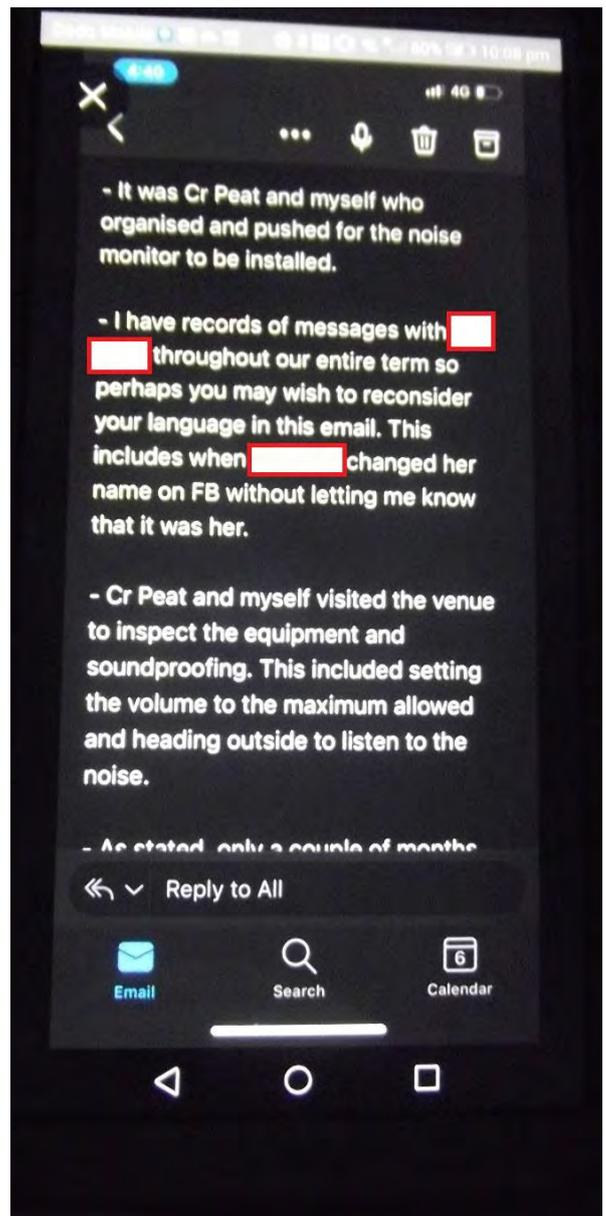


Image 11: excerpt of email sent from Cr McMahon to Cr de Graaf

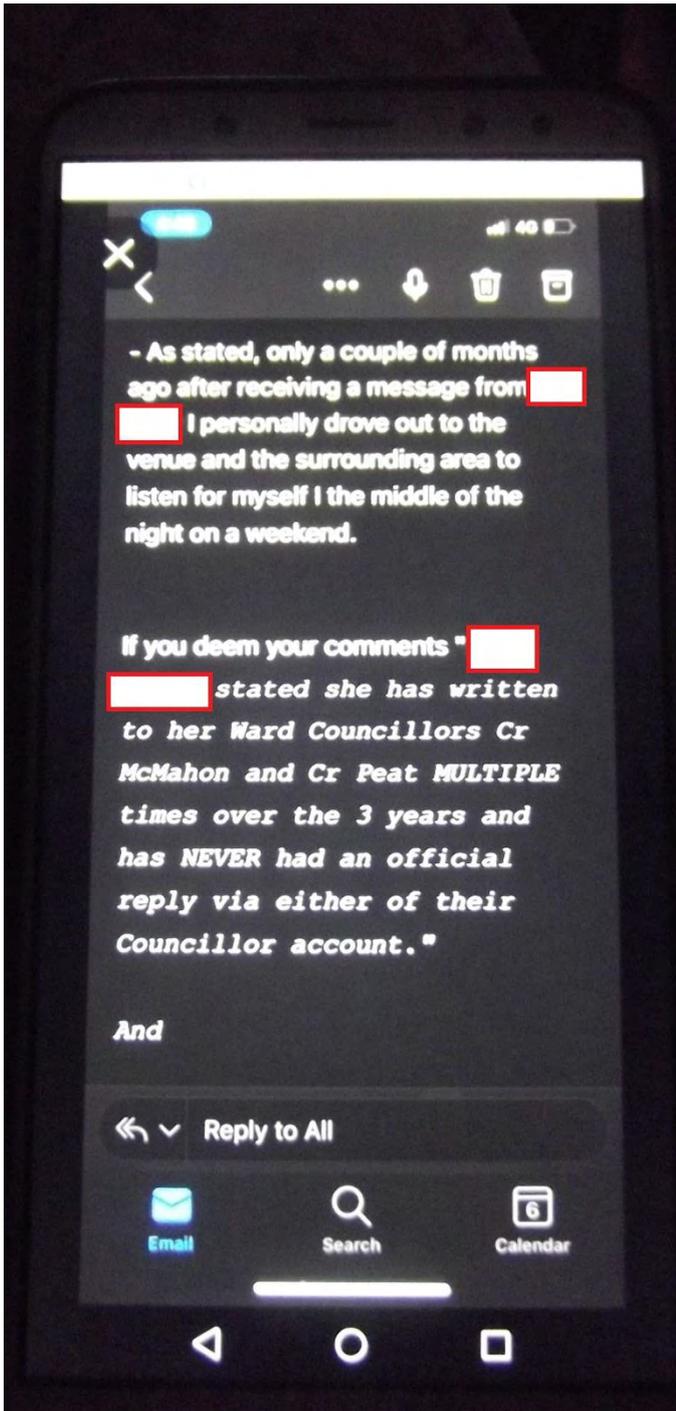


Image 12: excerpt of email sent from Cr McMahon to Cr de Graaf

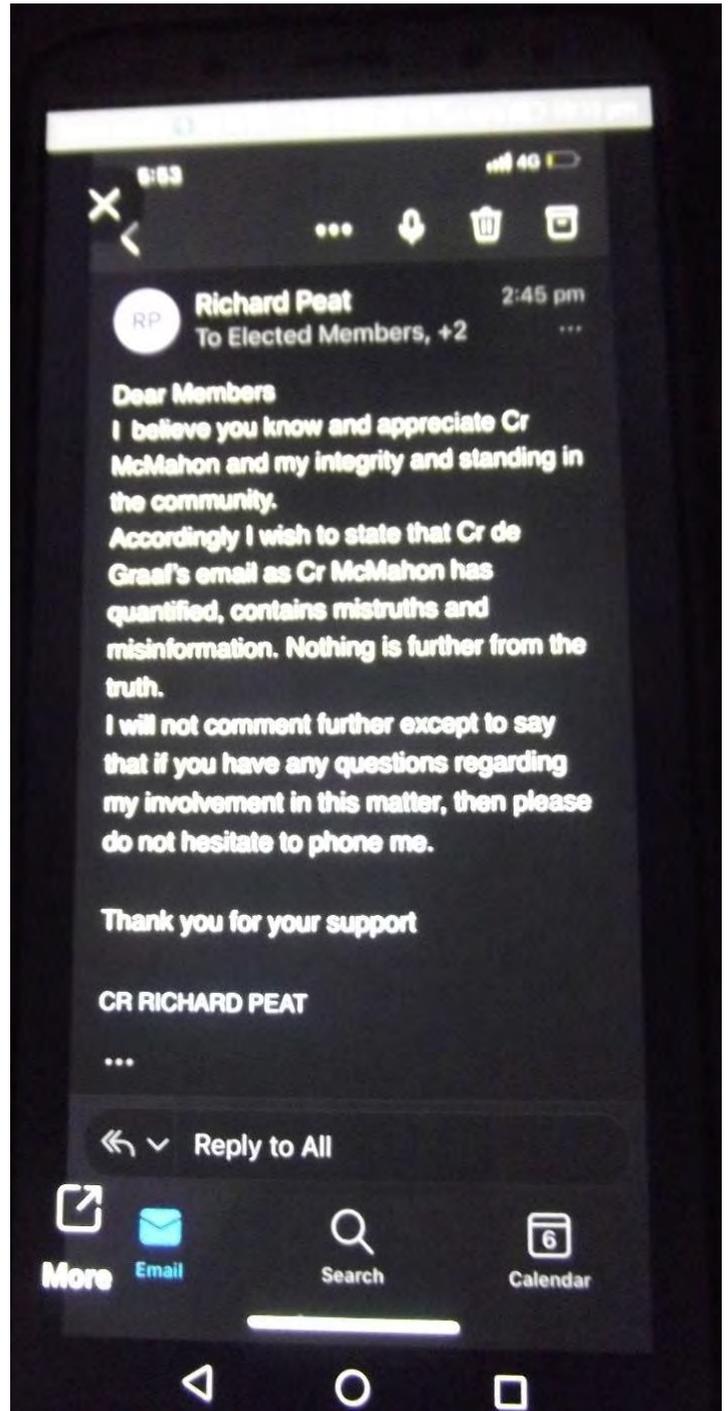


Image 13: email sent from Cr Peat to elected members

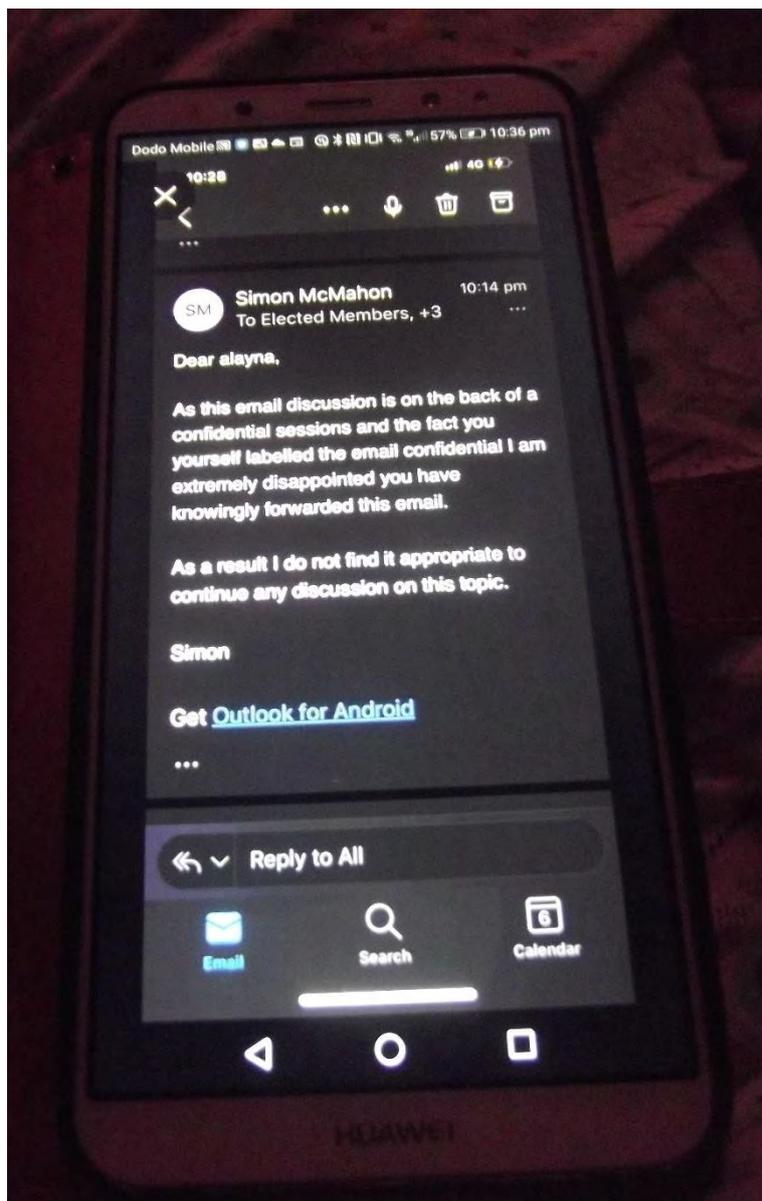


Image 14: email sent from Cr McMahon to Cr de Graaf

156. Further to the above, a number of Cr de Graaf's messages to the IP appear to have been copied and pasted from Cr de Graaf's responses to the above emails from other elected members. The photograph used as an example early in this report shows the end of one such email from Cr de Graaf to Cr McMahon:

Cr de Graaf: confusion with the response.

Asking if communication has occurred with [the IP] via emails with councillors isn't an unreasonable question particularly given [the IP] refutes such contact.

Regarding the sound proofing. If I recall correctly I think those options were ones myself Cr Bray and CR [sic] O'Brien were "pushing" and we also moved the motions.

I can't recall having you heard in favour whatsoever of any audio measuring or any other aspect.

I take your allegations of defamatory comment seriously, could you please forward me what you are if [sic] the view is defamatory so I can re consider what exactly is in question.

With thanks Alayna

Cr de Graaf: Cr de Graaf

I have never suggested to you that Council would settle [the IP]'s noise complaint matter and offer a payment to [the IP] towards her soundproofing.

I note [the IP] incurred the sound proofing costs of her own choice and this was not on the advice an officer of Council, as far as I am aware.

I have always been of the view and given advice that [the IP] must therefore make the case that soundproofing was required if the noise....²²

Cr de Graaf: ...if she had further information/evidence then they would look at it again. I understand that [the IP] still has not provided further information to our insurer as they have requested.

I may have encouraged you to encourage [the IP] to engage further with our insurer, that is to provide all of her information into the proper process. The insurer then assesses whether or not a claim is valid. I will check my records.

It is up to you whether you bring a Motion forward but I caution you not to misrepresent my advice. Given our insurer has knocked back [the IP]'s claim to date, this would also need to be brought to Council's attention.

Regards

157. The IP has been able to demonstrate through the information provided to this Office that she is in receipt of numerous emails between elected members; if not the original email certainly the text in a copied and pasted form. Again noting the breadth of information shared between Cr de Graaf and the IP, I am satisfied that the IP obtained this information from Cr de Graaf.
158. In support of this conclusion, I note a further message from Cr de Graaf to the IP which states 'So the screenshots from The chats with Simon and peat about me asking them questions. U haven't sent anywhere to anyone else at all'.
159. I consider that Cr de Graaf ought to have known that these emails were confidential for the following reasons:
- as outlined in the email from Cr McMahon on 6 November 2021, the email chain follows on from and relates to the confidential council information session on 2 November 2021
 - Cr de Graaf herself appears to have acknowledged that the information is confidential by labelling her first email at 6:02am as such, and implicitly by her comment to the IP above about not forwarding the screenshots of the emails.
 - at this stage it was still considered likely by the council that legal proceedings might be initiated against the council, and the information contained within the emails could reasonably put the council at a disadvantage in such proceedings
 - the emails were sent internally and to a very limited audience
 - the emails contain sensitive information, including unsubstantiated allegations.
160. In light of the above, my view is that Cr de Graaf breached clause 3.3 of the Code by sharing the content of the email chain between Crs de Graaf, McMahon and Peat with the IP, which she ought to have known was confidential.

Email from Cr Themeliotis

161. In a letter dated 20 July 2022 I invited Cr de Graaf to respond to the allegation that she had forwarded to the IP an email from Cr Themeliotis to elected members on 6 November 2021. Cr de Graaf submitted in response:

²² This particular transcript reflects a Facebook message sent from Cr de Graaf to the IP, which appears to have been copied and pasted from an email which Cr de Graaf received. In keeping with the transcript style adopted throughout this report, the excerpt begins with '**Cr de Graaf**' to show that the following text was sent from Cr de Graaf to the IP.

I don't know what we are talking about here, as I can't see it. Are staff applying the same scrutiny to others, as it would appear not. If it was not marked confidential - then I can't see why that would be a concern. I would not have forwarded on something that had confidentiality orders made by the CEO, to any person not intended to receive that, OR not already a part of the discussions. If I had sent on something to [the IP], then it would not have been confidential materials.

162. It is clear that Cr de Graaf has neglected to take on board the comments in my provisional report that a confidential classification, or lack thereof, is inconclusive in considering whether council information can be disclosed.
163. As to Cr de Graaf's comments that she is unsure which email is referred to, I note that it does appear that Cr de Graaf forwarded more than one of Cr Themeliotis' emails to the IP on 6 November 2021, however it appears that only one of those emails was originally sent to all elected members, set out below:

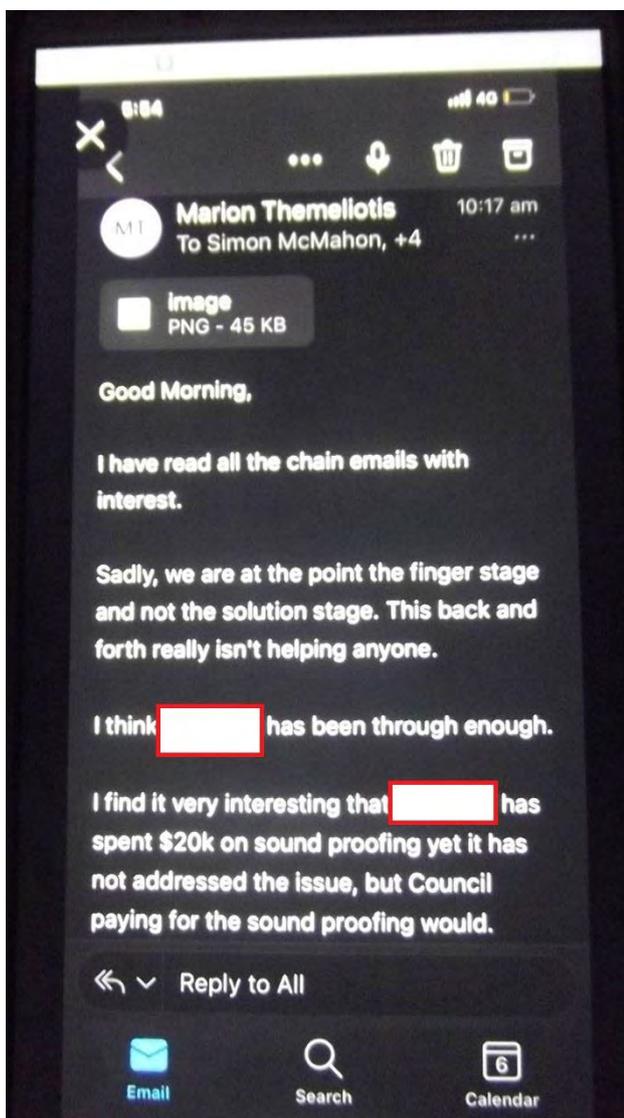


Image 15: email from Cr Themeliotis to elected members, part 1

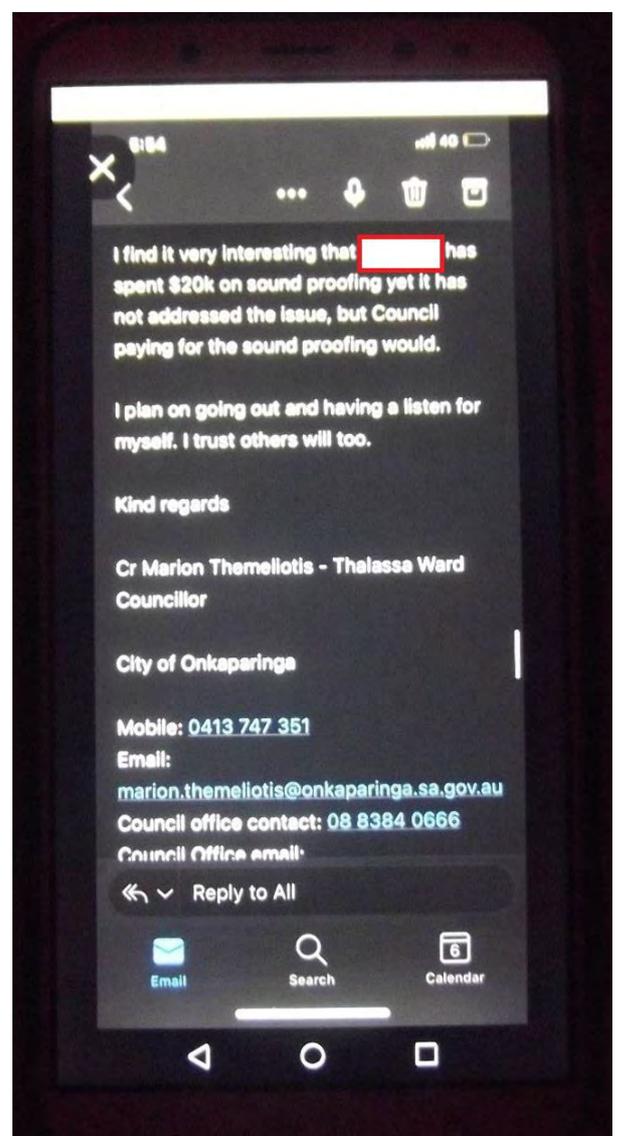


Image 16: email from Cr Themeliotis to elected members, part 2

164. I am satisfied that Cr de Graaf forwarded the above email to the IP.
165. I note that this email appears to be in response to the chain of emails between Crs de Graaf, McMahon and Peat addressed in the prior allegation. I therefore consider that Cr de Graaf ought to have known that Cr Themeliotis' email was also confidential for the same reasons canvassed above.
166. As to the other email which appears to have been forwarded to the IP by Cr de Graaf, although it is of concern that an internal council email was forwarded without any apparent consideration of perhaps instead relaying or paraphrasing the information to the IP, I formed the early view that there is insufficient information for me to conclude that Cr de Graaf ought to have known that the email was confidential and therefore did not put this allegation to Cr de Graaf.

Information about a prior employee

167. Due to the sensitivity of the information in question, the person the subject of this allegation will be referred to as **'the employee'**.

168. The information in issue consists of an excerpt of Transcript 1:

Cr de Graaf: ...We will see what happens once they finish with their witch hunt on me. I've not heard a think for weeks now. I just hope my lawyer wins. Because I feel like my life will be over if they say I'm a bully and then tell that to the whole world. That in itself is bullying by putting this obscene threat on my good name. 😞
All because I asked about a guy who was forced out of the organisation. From these exact bullies. And then he fought a wrongful dismissal battle then suicided about two years after. Apparently it all took a lot out of him. And I BET u Kelledy Jones or Norman Waterhouse KNOW something about some of what went down.
I just wish anyone would listen and help.
If my lawyer doesn't help. I just don't know what else I can do. For me or anyone else. None of the others even seem to get it. They just feel bad about things. Or they don't quite understand. But at least three of the councillors are on my side. I missed several meetings as it was so stressful at one point. [emphasis added]

169. I also note the following comment in the IP's email to this Office on 7 March 2022:

Alayna kept harassing me even after I asked for it to stop. Telling me peoples names, people who had committed suicide and joining a class action with her lawyer which I felt was pie in the sky.

170. I consider it appropriate to advise that I do not intend to comment on the accuracy of the information disclosed to the IP.
171. It was not immediately clear to me that the underlined information above constituted council information as it appeared to relate more closely to the employee than the council. That said, given the obvious sensitivity of the information I considered it appropriate to obtain further information from both the council and Cr de Graaf about this matter.
172. In response, the council provided submissions and several further attachments. It is clear from that information that Cr de Graaf has made numerous attempts to obtain information from the council about this matter, apparently to little avail. The council submits that:

Elected members are aware that under the Local Government Act all employment matters are the responsibility of the Chief Executive Officer and any industrial relations matters involving past and present employees are confidential.

...

Cr de Graaf continues to be persistent in seeking information regarding this matter that she is well aware is out of the remit of an elected member and are confidential matters as demonstrated by attachments 8-14. In particular, attachment 9 is a letter to Cr de Graaf from former CEO Scott Ashby, where he states:

"Information regarding the dismissal case of a former employee

It is not appropriate to divulge any information to an elected member regarding employment matters of any employee, past or present. No information will be provided to you regarding this matter."

173. The above submission, in particular the extract of the letter to Cr de Graaf, indicates that the council has declined to provide Cr de Graaf any information about this matter. It therefore follows that Cr de Graaf's comments to the IP were likely based on either speculation or information obtained from some other source. This is supported by Cr de Graaf's submissions:

That is information that was shared with me by the [deceased's sibling], and some other parties. I was aware of that information, it was not information that came from the Council. In fact, MR [sic] Jordan Littlefair, the Human Resources Manager, said that he thought [the employee] was working in the UK and still alive - and then I was brow beaten for pretending a person had suicided, when apparently they had not. But when I checked further, he had indeed suicided. AS I understand it, there was no wrongful dismissal, and I query who the lawyers were who managed the matters, and if they had a direct conflict over the materials that mentioned this, and in the code of conduct on me from 14/12/2022. Instead, it was bullying at the council, and this person [the employee], had been pressured to terminate the employment of [another council employee]. I am across all of the details of this matter, and I do not believe at all that [the employee] actually had done something wrong.

174. Based on the information before me, it does not appear that Cr de Graaf obtained the information from the council or in the course of her official functions as an elected member. I therefore consider that, without any further context, disclosure of the information about the employee would not amount to a breach of clause 3.3 of Part 3 of the Code.

175. That said, it is necessary for me to consider the broader context of the statement. In response to my enquiries the council further submitted:

Additionally, the issue regarding her communications about [the employee] were part of evidence provided to the independent investigator in the investigation into Cr de Graaf's breaches of the Code of Conduct for Council members, provided by report to Council on 14 December 2021. Despite the findings of breaches of the Code of Conduct, Cr de Graaf continues to raise the matter.

176. In light of this, I have considered the investigation report of Kelledy Jones which was accepted by the council at its meeting on 14 December 2021. It is noted that the investigation considered whether the following comment in an email sent by Cr de Graaf amounted to a breach of the Code:

This is the extent of the control that higher levels push onto members at times - and onto some staff, from what I have been directly told - with one person committing suicide, sadly after one such incident.

177. The investigation was conducted in accordance with the council's Investigating Complaints under the Code of Conduct for Council Members Procedure (**the Procedure**). Relevantly, clause 4.3a of the Procedure states:

4.3a Confidentiality

All deliberations during the complaint process in regard to an alleged breach of the Code will be conducted in confidence. The complainant, the subject of the complaint, necessary witnesses and those relevant to processing the complaint must maintain the confidentiality of the complaint.

Preliminary Assessment reports to Council will be presented in confidence.

Where a breach of the Code is determined, the Final Investigation report to Council will be presented as a public report, as required by the mandatory Code of Conduct for Council Members.

178. When considered in conjunction with the remainder of the excerpt of Transcript 1, it is clear that the underlined portion reveals the subject matter of the investigation by Kelledy Jones, and that at the time of the comment being made the investigation had not yet finalised. Accordingly, clause 4.3a of the Procedure was operational and on this basis I am satisfied that Cr de Graaf ought to have known that the information she disclosed to the IP was confidential at that time.
179. It is therefore my view that this disclosure amounts to a breach of clause 3.3 of the Code.

Reimbursement for attendance at CAP meetings

180. I refer to the end of Transcript 1 in which Cr de Graaf advised the IP that Cr Greaves receives a payment of \$275.00 for attendance at each meeting of the Council Assessment Panel.
181. In response to my enquiries the council has advised:

Remuneration for Council Members to sit on CAP is approved by Council in a public agenda therefore not considered to be confidential for the purposes of the Local Government Act.

182. Having reviewed the minutes of the council meeting on 21 September 2021, I query whether the amount of \$275.00 is accurate, but am nevertheless satisfied that the information is not confidential.
183. Accordingly, I am satisfied that the disclosure of this information by Cr de Graaf to the IP does not amount to a breach of clause 3.3 of the Code.

Information about another ratepayer

184. In my letter of 20 July 2022 I invited Cr de Graaf to respond to the allegation that she shared information about a council matter involving Mr Lawrence and a ratepayer known as 'Anthony', which included sharing a file titled 'OFFENSIVE MEMO', to the IP. Although Cr de Graaf provided a response, the response does not appear to address this allegation specifically:

I have not forwarded on any emails marked out as Confidential. Neither have I shared any emails that I should reasonably assume are Confidential. Bearing in mind, that is vague and open to interpretation. I help residents and rate payers. They are my prime concern.

...
I fail to see what something to do with a person named "Anthony" has to do with [the IP].
There is nothing wrong with my assisting our rate payers, especially if that help is totally
in line with the objectives of the Local Government Act. Which I do believe my actions
have been. I resent being characterised otherwise - by anyone making that assumption.

185. It appears that there may have been numerous instances where Cr de Graaf discussed
Anthony's council grievances with the IP. The content of those communications
indicate that the initial conversations likely took place without Anthony's consent, and
the later conversations possibly with his consent.

186. I refer first to the earlier conversations with the IP:

Cr de Graaf: Hi

This other guy Tony Has told me Matt Lawrence has said exactly same thing about him
"Youre [sic] the only complaining" etc etc And we aren't going to ring u any more or
answer your questions anymore
I bet u this is the tip of the ice berg

Cr de Graaf: Hi

See this guy is saying a very similar thing to u
I wouldn't normally share in this way. But I know he wouldn't mind at all. And it may rest
your mind to know they attach everyone equally once you question "the machine!"
It's like an arm of capitalism or something! Quite bizarre really and defies logic
When it comes to cash all logic goes out the door

Cr de Graaf: [screenshot]:

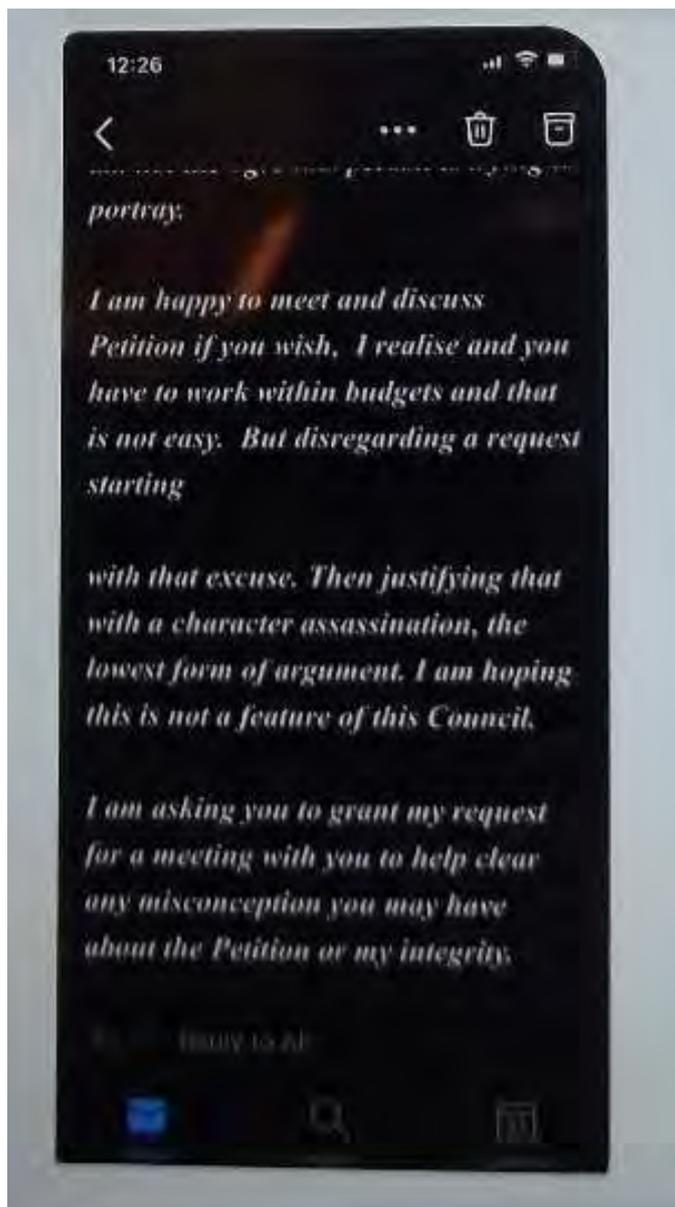


Image 17: excerpt of email sent from Anthony to the council

187. I have had particular regard to Cr de Graaf's comment 'I wouldn't normally share in this way. But I know he wouldn't mind at all'. I consider that this indicates speculation on Cr de Graaf's part rather than Anthony having given explicit consent for his matter to be discussed.
188. I refer to the council's Privacy Statement, in particular clause 4.3 which states that the council will not provide any personal information about residents and/or ratepayers to third parties without the consent of that person. I am satisfied that information about a person's grievance with the council would certainly constitute personal information. Accordingly, any disclosure of information about Anthony's grievance to another person prior to obtaining his consent would be contrary to the council's Privacy Statement.
189. On this basis, I consider that Cr de Graaf ought to have known that the information initially relayed to the IP about Anthony's grievance was confidential.

190. At some stage it appears that Anthony may have given consent for Cr de Graaf to share information about his grievance with other residents, as evidenced by comments in Transcript 1, in particular the reference to 'Tony's current battle' and:

Cr de Graaf: But Anthony has mounted a food fight against them too. Just as u have done. Anthony gave me the permission to share that with u too.

191. I also refer to the following image, which shows the screenshot referred to in the fourth line of Transcript 1:

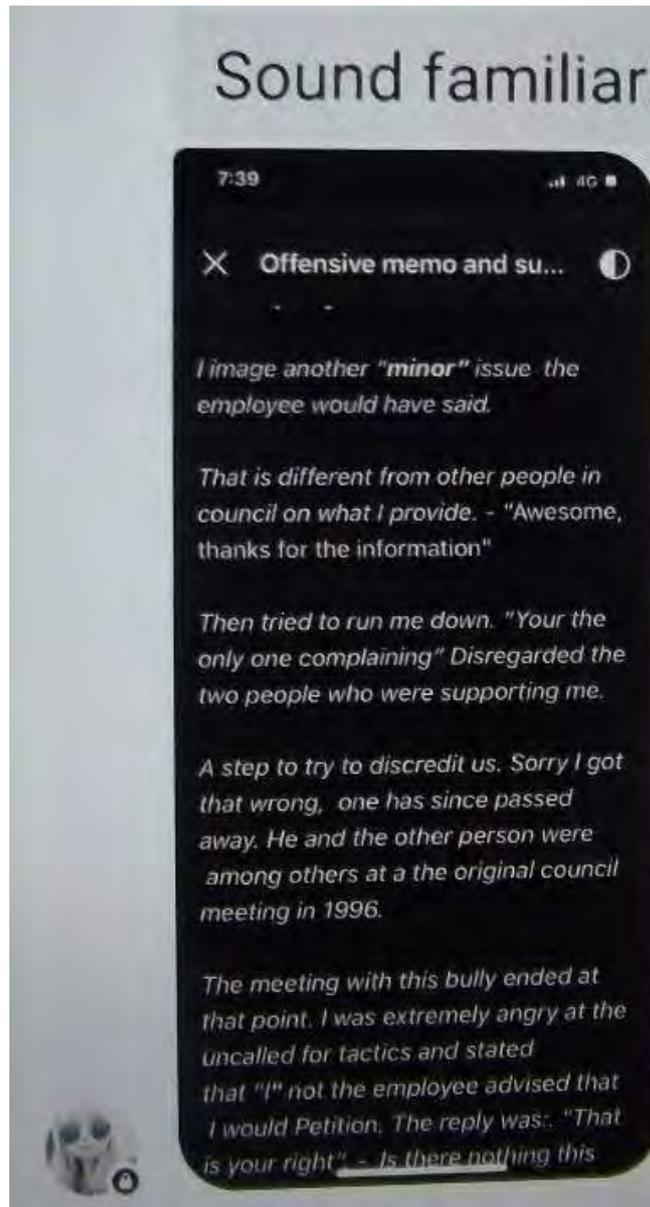


Image 18: excerpt of email from Anthony to the council (2)

192. In response to my revised provisional report, Cr de Graaf submitted that Anthony and the IP 'were both fully aware that I was talking with the both of them, and both of their matters...'. Whilst this statement might be accurate, as indicated by the above transcript excerpt, then Cr de Graaf's disclosures to the IP may not be contrary to the council's Privacy Statement. That said, I consider that Cr de Graaf still ought to have known that

the information should remain confidential. Whilst the information may relate to Anthony, it also relates to the council and so his interests are not the only ones which should be considered.

193. It is expected that elected members will act in the interests of their council, and in a manner that will 'foster community confidence and trust in Local Government'.²³ As outlined above, it was anticipated that the IP might seek to initiate legal proceedings against the council. Had that eventuated, the information relayed to the IP about Anthony's matter may have been used by the IP to the council's detriment.
194. Accordingly, I consider that Cr de Graaf ought to have known that it would not be in the interests of the council to share with the IP the details of another resident's grievance with the council, and therefore the information ought to be confidential.
195. I am therefore satisfied that Cr de Graaf has breached clause 3.3 of the Code by disclosing information about Anthony's grievance with the council to the IP.

Misconduct for the purposes of the Ombudsman Act

196. The conduct of Cr de Graaf under consideration in this matter is sufficiently similar that it could be cumulatively characterised as a pattern. Each allegation involved the disclosure of information regarding Pepper Tree to the IP and it appears that all of the events occurred within the span of a couple of months at most.
197. I am of the view that there is evidence to suggest that this pattern of conduct of divulging confidential council information to the IP is 'intentional and serious' enough to amount to misconduct for the purposes of the Ombudsman Act.

Intentional

198. There are multiple instances in which Cr de Graaf appears to demonstrate awareness of the confidentiality of certain information, but then apparently intentionally disregards her confidentiality obligations. One such example is Cr de Graaf labelling her email dated 6 November 2021 as confidential, but then forwarding that email and the responses from other elected members to the IP. It is noted that Cr de Graaf was also specifically reminded by Cr McMahon in his response that she was required to maintain confidentiality but nevertheless forwarded that email to the IP.
199. As to the information about the previous employee, as outlined above, at the time of disclosing this information Cr de Graaf was the subject of an independent investigation for making almost the exact same comment to other elected members in an email. Although Kelledy Jones had not yet presented its findings that Cr de Graaf had breached Part 2 of the Code, at the very least I consider that a repetition of a comment already the subject of an investigation shows a willful disregard for both the confidentiality of the information and the integrity of the investigation.
200. In addition, there are numerous messages between Cr de Graaf and the IP which appear to indicate Cr de Graaf's awareness that the information divulged ought to be confidential:

[discussing what was said during the confidential information briefing]
Cr de Graaf: Hey

²³ Code of Conduct for Council Members, Overarching Statement.

I'll write down a confidential affidavit and ask Michael also what he heard. But I don't know if I'll be able to question this. Because think of it this way. If he says something that's a lie during confidence well how can any one question it! As theoretically I can't speak of it. I suggest let's just keep that as a trump card. [emphasis added]

[discussing the emails between Crs de Graaf, McMahon and Peat on 6 November 2021]

Cr de Graaf: Hey

U didn't tell Marion or Simon anything Bout our conversations did u

[screenshot of Cr McMahon's email on 6 November 2021]

Not sure what he's talking about.

The IP: Not sure.

Neither of them know about our discussions.

Cr de Graaf: Weird

Ok cool

Thanx [the IP]

...

Cr de Graaf: So the screenshots from The chats with Simon and peat about me asking them questions. U haven't sent any anywhere to anyone else at all.

Thanks just want to be sure before I reply

The IP: No I haven't. I've told Miles certain things but I refused to give names. I told him to contact Michael O'brien for details of my case.

Cr de Graaf: Ok

Cr de Graaf: 😊

Cr de Graaf: I wouldn't think that would be it

Cr de Graaf: Yeah just so long as no screenshots etc

Cr de Graaf: Hi

I hope that hasn't given away any clue that we discussed their responses etc.

As it was being handled privately to begin with.

I'm planning to follow up with a public enquiry on the record.

Simons been grilling me about what I did or didn't discuss with u etc a lot

😊

Just don't want him having more ammunition.

Although I told them I asked me [sic] weeks ago to follow up on that fact no one had ever written back to u

The IP: They can't blame you. I've been dealing with others as well. I had to address it. I can't live with their lies.

Cr de Graaf: That's OK

Just so long as they aren't aware Of some information ive said to u

If u stick with the facts u already know and approach form There it should cover it

le u asked me to follow up about why Simon and Richard have never replied to u

But leave at that.

As I haven't got an official reply from Them in that as yet.

So u can't already have that information U know what I mean.

I definitely don't want them having ammunition.

Anyway.

Hopefully that email you have sent helps matters.

😊

I think you have a right to tell all ems that they have never emailed u back

201. Further supporting my view that Cr de Graaf's pattern of conduct was intentional, I note that Cr de Graaf appeared to take steps to avoid her disclosures to the IP being detected, such as sending emails from a new email address, using code names to avoid her name being searchable, and starting a conversation with encrypted messaging labelled 'Secret Conversation':

Cr de Graaf: Hiya

Cr de Graaf: I sent U an email.

Cr de Graaf: From my work account.

OFFICIAL: Sensitive//Legislative secrecy

Cr de Graaf: If there are other emails to share with me in private.
From now on... Please check this new account I am sending to U.

The IP: Thanks will have a look.

Cr de Graaf: It will be signed off "Advocate". Check your junk mail folder and make sure U receive it...



I suggest only share info there... But don't use my name. And use your name only as [the IP's initials] if possible.

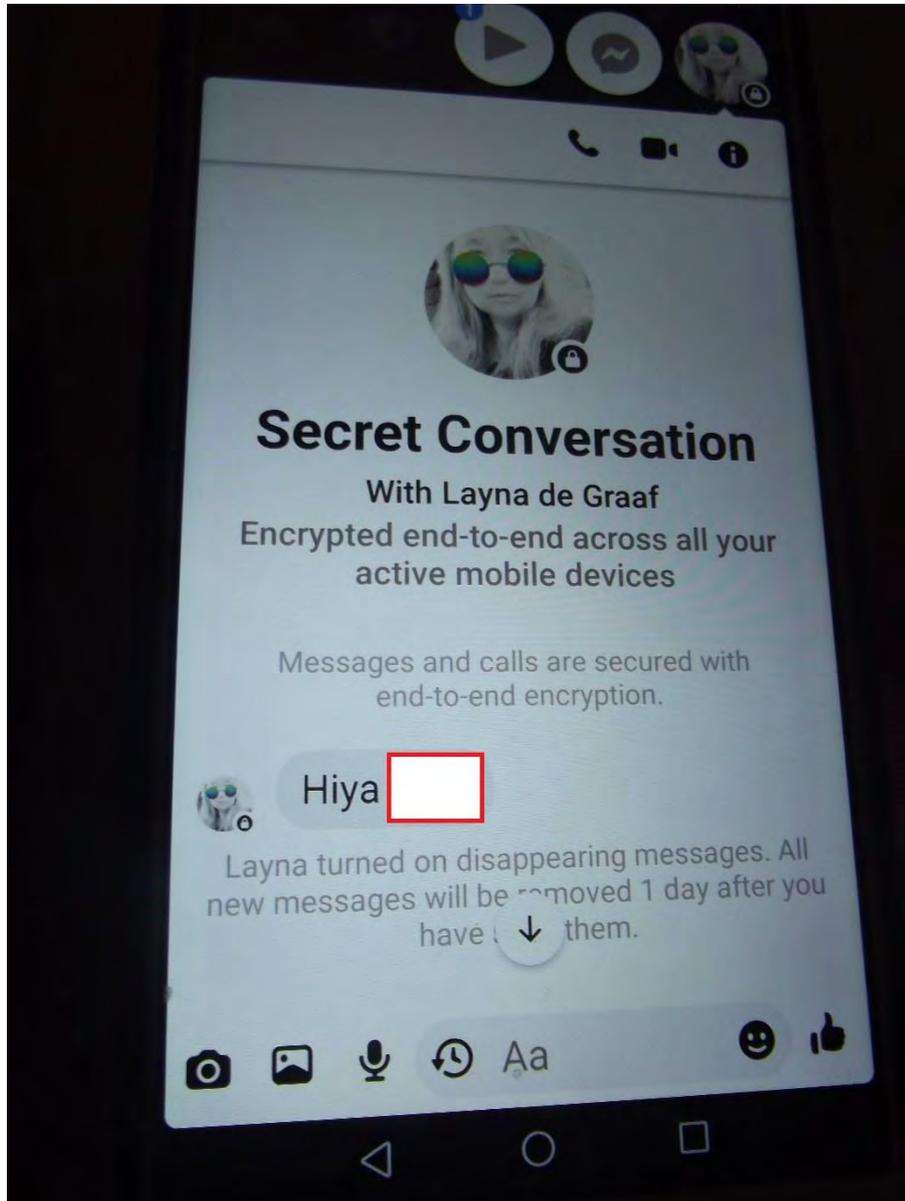


Image 19: encrypted conversation with the IP started by Cr de Graaf

202. Having considered all of the information before me, I am satisfied that Cr de Graaf's pattern of conduct was intentional.

Serious

203. There are numerous features to Cr de Graaf's pattern of conduct that, in my view, reflect its serious nature.

204. Firstly, a pattern of conduct can be established. Any disclosure of confidential council information by an elected member would be concerning, much less a pattern of multiple disclosures across a short period of time. As outlined above, there appear to have been multiple instances where Cr de Graaf either demonstrated awareness or was reminded of the confidentiality of the relevant information, however Cr de Graaf continued to disclose such information to the IP.
205. Secondly, I consider that if Cr de Graaf was genuinely unsure of her confidentiality obligations, she could have sought clarification from the council accordingly, but it appears that she declined to do so.
206. Thirdly, it is a matter for the council to determine how it utilises information, and it is inappropriate for an individual council member to take it upon themselves to disseminate information without regard for potential consequences of that disclosure. Additionally, in this particular matter Cr de Graaf's actions had the potential to diminish the possibility of resolving matters with the IP amicably, and its ability to defend itself in any potential legal proceedings.
207. In response to my revised provisional report, Cr de Graaf has submitted that even if she has disclosed something she ought to have known was confidential, no harm has eventuated. I am not persuaded by this submission. Cr de Graaf's disclosures to the IP had the potential to cause harm to the council, regardless of whether that harm eventuated or not.
208. Additionally, I do not agree that Cr de Graaf's disclosures have not caused harm. As set out in my revised provisional report and repeated here, those disclosures had a harmful effect on the IP.
209. The IP has highlighted that the disclosure of information by Cr de Graaf has had a significant impact on her wellbeing. The IP further submitted that she felt Cr de Graaf's disclosure of information to her was distressing enough that she requested Cr de Graaf cease communicating with her:
- Cr de Graaf:** Hi looks like I have busted desma or someone reading thru my emails.
But do u prefer I don't tell u
Cr de Graaf: If it's too stressful I won't give u the updates.
As I don't want to make u stressed.
Just let me know
210. Despite this request, the IP subsequently advised my Office that Cr de Graaf continued to contact her despite my investigation being underway. This caused me to write to Cr de Graaf on 4 May 2022 advising that it was not appropriate for her to contact the IP about this matter. I cautioned Cr de Graaf that further communication with the IP might result in a further investigation by my Office.
211. Despite my letter, as well as a previous direction from the council that Cr de Graaf refrain from contacting the IP, the IP has advised my Office that Cr de Graaf has contacted her most recently on 10 November 2022 and 27 November 2022. The earlier contact occurred whilst Cr de Graaf was still an elected member and would therefore appear to be in contravention of the council's direction. Although the later contact occurred after Cr de Graaf had not been re-elected as a council member, I am satisfied that it was nevertheless inappropriate noting that:
- the IP had asked Cr de Graaf not to contact her

- my investigation had not yet finalised and I had not authorised Cr de Graaf to discuss this matter with the IP. As such Cr de Graaf has likely breached the confidentiality provisions within the Ombudsman Act 1972
- the content of the email was highly inappropriate and contained numerous accusations about the IP.

212. Cr de Graaf's continued contact with the IP indicates not only a disregard for the integrity of my investigation, but an alarming lack of insight into the effect of her behaviour on the IP. The latter is further evidenced by Cr de Graaf's further submissions disputing the credibility of the IP:

And is [the IP] a credible witness. Did she accuse [sic] your office and other people of a few things? Is that why I'm [sic] getting the blame is it. Wasn't it claimed she had mental health issues? Is it possible she's also been MAKING THINGS UP?

213. It is baffling to me that Cr de Graaf has identified the inappropriateness of discussing the IP's mental health at the information session on 2 November 2021 but saw fit to make the above submission to my Office.
214. Cr de Graaf's actions and comments indicate a complete lack of regard for the IP's wellbeing, and I am satisfied that the submission above is nothing more than an attempt by Cr de Graaf to avoid any consequences for her conduct.
215. Having regard to each of these factors, I consider that Cr de Graaf's pattern of conduct of divulging confidential council information to the IP was serious. It is therefore my view that Cr de Graaf's conduct amounts to misconduct in public administration.

Opinion and Recommendations

In light of the above, my provisional view is that by:

- sharing information discussed at the Elected Members Information Session held in confidence on 2 November 2021
- forwarding the email and noise data sent to Cr de Graaf by Cr O'Brien on 25 November 2021
- forwarding an email addressed to all elected members with the subject line 'Confidential briefing /Q & A session Tuesday 9 November at 5:30pm' which disclosed the topic to be discussed at a confidential briefing at a confidential session
- forwarding emails from an email chain involving all elected members but primarily Crs de Graaf, McMahon and Peat on 6 November 2021
- forwarding an email from Cr Themeliotis to elected members on 6 November 2021
- disclosing information about a previous councillor or employee who was engaged in a wrongful dismissal claim before later ending his life
- sharing information about a council matter involving Mr Matthew Lawrence and a ratepayer referred to as 'Anthony', including sharing a file titled 'OFFENSIVE MEMO', Cr de Graaf breached section 63(2) of the Local Government Act and clause 3.3 of Part 3 of the Code. On that basis, Cr de Graaf acted in error for the purposes of the Ombudsman Act.

I am also of the view that the above breaches cumulatively amount to a pattern of conduct which is both intentional and serious, and therefore amounts to misconduct in public administration.

In my revised provisional report I foreshadowed recommending under section 25(2) of the Ombudsman Act and section 263B(1) of the Local Government Act that the council lodge a

complaint with the South Australian Civil and Administrative Tribunal seeking an order that Cr de Graaf be suspended from membership of the council and any committees of the council for such period as the Tribunal deems appropriate.

I acknowledged the gravity of making such a recommendation and advised that I would not do so lightly, however in all of the circumstances I considered that recommendation to be most appropriate having regard to:

- the number of breaches of the Code
- the intentional and serious nature of the breaches amounting to misconduct
- the false submissions provided to my Office in the course of my investigation
- Cr de Graaf's apparent inability or unwillingness to understand the confidentiality obligations imposed by the Code, noting that she has undergone training on this topic.

Since issuing my revised provisional report, the council has undergone an election which resulted in Cr de Graaf not being re-elected as a council member. As such, I no longer consider it appropriate or necessary to make the recommendation that the council seek an order of suspension from membership of the council in relation to Cr de Graaf.

However, as I have made a finding that Cr de Graaf's conduct constitutes misconduct under both the Local Government Act as it existed at the time as well as the Ombudsman Act, I still consider it appropriate that the council consider those findings at a public meeting of the council.

Accordingly, I recommend pursuant to section 25(2) of the Ombudsman Act that the council provide a redacted copy of this report to a public meeting of the council within two ordinary meetings of the council following receipt of my report. The redacted copy to be considered will be provided directly to the council together with this report.

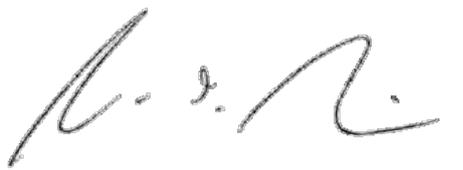
Final comment

I now report Cr de Graaf's misconduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me within three months to confirm that the redacted report has been provided at a public meeting of the council.

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.



Wayne Lines
SA OMBUDSMAN

6 December 2022