

Final Report

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

Public Authority	City of Burnside
Public Officer	Cr Lance Bagster
Ombudsman reference	2017/07226
ICAC reference	2017/000617; 2017/000622; 2017/000625; 2017/000633; 2017/000773; 2017/000776
Date of referral	12 July 2017
Issues	<ol style="list-style-type: none">1. Whether Cr Lance Bagster divulged confidential information to the public at a meeting of the City of Burnside on 9 May 2017, thereby committing misconduct in public administration2. Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 14.3 at a meeting of the City of Burnside on 9 May 2017, thereby committing misconduct in public administration3. Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 18.1 at a meeting of the City of Burnside on 23 May 2017, thereby committing misconduct in public administration4. Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 18.2 at a meeting of the City of Burnside on 23 May 2017, thereby committing misconduct in public administration5. Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 18.5 at a meeting of the City of Burnside on 23 May 2017, thereby committing misconduct in public administration

Jurisdiction

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

Section 14B of the Ombudsman Act provides:

14B—Referral of matter by OPI or ICAC

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

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

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

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

The referral arose out of a number of reports made to the Office for Public Integrity.

The referral concerns, broadly, the alleged conduct of Cr Lance Bagster during two ordinary meetings of the City of Burnside (**the council**). Specifically, it is alleged that during the council's 9 May 2017 ordinary meeting, Cr Bagster:

- divulged information the subject of a confidentiality order
- failed to declare and appropriately deal with a material conflict of interest in Agenda Item 14.3.

It is further alleged that during the council's 23 May 2017 ordinary meeting, Cr Bagster:

- failed to declare and appropriately deal with a material conflict of interest in Agenda Item 18.1
- failed to declare and appropriately deal with a material conflict of interest in Agenda Item 18.2
- failed to declare and appropriately deal with a material conflict of interest in Agenda Item 18.5.

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

In addition, as a breach of the Code is a breach of section 63(2) of the Local Government Act, and a matter referred to me under the ICAC Act will be taken to relate to administrative acts for the purposes of the Ombudsman Act, I have considered whether Cr Bagster's conduct

relates to administrative acts that have been made contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the reporters
- seeking a response from Cr Bagster
- seeking further information from the council
- reviewing audio and video recordings of the council's 9 May 2017 ordinary meeting
- reviewing CCTV footage of the council's 23 May 2017 ordinary meeting
- considering:
 - the Local Government Act
 - the Code
 - the council's *Council Member Code of Conduct — Complaint Handling Procedure*
 - the council's *Internal Review of Council Decisions (Section 270) Procedures*
- preparing a provisional report and seeking the views of the parties
- preparing this final report.

Standard of proof

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

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

Response to my provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 24 October 2017.
2. Cr Bagster responded to my provisional report by way of two emails dated 28 October 2017 to which Cr Bagster copied a range of external parties.³ In doing so, Cr Bagster appears to have deliberately circulated a copy of my provisional report and covering letter to these parties. Cr Bagster did not seek or receive my authorisation to disclose information concerning the referral in this manner. Cr Bagster's conduct in this regard would appear contrary to sections 54(3) and 56 of the ICAC Act. Both are offence provisions.
3. Although I have given serious consideration to reporting the matter to South Australia Police, I have ultimately determined not to do so. In the circumstances, I am not

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

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

³ Specifically, the Office of John Darley MLC; the Office of Nick Xenophon; the Office of Vickie Chapman MP; the Office of Geoff Brock MP; the Office of David Pisoni MP; the Office of Michael Atkinson MP; the Office of John Rau MP; the Office of Vincent Tarzia MP; the Adelaide Magistrates Court registry and SafeWork SA.

satisfied that a criminal prosecution of Cr Bagster would amount to a valuable use of public resources. However in the event of any further breaches, I would reconsider my position.

4. Cr Bagster in his first response expressed dissatisfaction with my provisional views and my Office. His second response was sarcastic in tone. He did not engage with the substance of my provisional report or otherwise seek to persuade me to change my views with respect to any particular matter.
5. I consider that Cr Bagster's responses to my provisional report by their content and tone were generally unbecoming of a public officer.
6. The various reporters each responded to my provisional report by email. Each reporter indicated their satisfaction with the findings foreshadowed by my provisional report.
7. Certain of the reporters expressed dissatisfaction with my foreshadowed recommendations. These parties submitted:
 - my foreshadowed recommendations are insufficient insofar as Cr Bagster's breaches of the Local Government Act are 'ongoing and systemic' and sections 62(4a) and 74 of the Local Government Act are offence provisions that carry substantial penalties
 - Cr Bagster is in any case unlikely to comply with my recommendation that he apologise for his conduct.
8. It is submitted that I should instead recommend that the council report Cr Bagster's 'breaches of section 62 and 73 [sic] of the [Local Government] Act⁴ to the ICAC for investigation'. It is further submitted that I should recommend that the council lodge a complaint against Cr Bagster in the District Court pursuant to sections 263B(1)(d) and 264 of the Local Government Act.
9. Although I have considered these submissions, I am not persuaded to modify my recommendations in the manner suggested. This matter has already been assessed by the Office for Public Integrity and was accordingly referred to my Office for investigation by the Commissioner. A copy of my final report will be provided to the Commissioner as a matter of course. The council in any case does not require a recommendation from my Office to make a report to the Office for Public Integrity under the ICAC Act and the associated Directions and Guidelines.
10. Similarly, I do not consider Cr Bagster's conduct in this matter rises to a level meriting a recommendation under section 263B(1)(d) of the Local Government Act. As I observed in my provisional report, section 264 of the Local Government Act in any case empowers the Chief Executive Officer of the council to lay such a complaint following an investigation by my Office. In the circumstances, I consider it appropriate to leave this matter to the discretion of the council's administration.
11. I do not consider it appropriate to modify my recommendations based on assumptions as to Cr Bagster's preparedness to comply. In the first instance, Cr Bagster should be afforded an opportunity to apologise in the manner recommended. Section 263B(2) of the Local Government Act will oblige the council to ensure that a complaint against Cr Bagster is lodged in the District Court should he fail to act in accordance with a requirement issued in accordance with this recommendation.

⁴ It should be noted that I have not formally found that Cr Bagster has contravened either section 62(4a) or 74(1) of the Local Government Act; these sections being offence provisions.

12. I otherwise make it clear that nothing within my recommendations should be read to require or otherwise permit Cr Bagster to act in a manner contrary to any intervention order to which he may be subject.

Background

13. Cr Lance Bagster is an elected member of the council, representing the Burnside Ward.

Alleged breach of confidentiality order – 9 May 2017

14. On 19 April 2017 Cr Bagster sent an email to Mayor David Parkin containing the following request:

I kindly request that you have a Motion, and your recommendation, put before Council that provides me temporary leave from Council over the period Sunday 23 Apr 2017 to Sunday 25 Jun 2017.

Further, I request that – if granted – my appearance in Council during this time does not negate the granting of leave, as my reason for requesting it will not change my need of it.

Over this time I have important family, work and legal issues to attend to and I cannot guarantee my ability to attend Council meetings or workshops over this time.

Also my current tussles with Council and Administration over the undemocratic Resolution C11112 have taken their personal toll on me and I am struggling to cope with the censure and humiliation caused by the associated actions and the unjust and unfair punishment and defamation that has resulted.

I am very keen to know if the CEO is considering making a public apology and explanation to me that would have made all this anxiety go away a long time ago.

15. An ordinary meeting of the council was convened on 27 April 2017. The minutes concerning this meeting record that Cr Bagster was not in attendance. Cr Bagster's request for a leave of absence was considered as Agenda Item 18.2. The minutes concerning the meeting relevantly record:

Confidential Items

Paul Deb left the meeting at 10.33 pm.

18.2 Leave of absence – Councillor Bagster (4.2)

C11165

Pursuant to section 90(2) of the *Local Government Act 1999*, the Council orders that all members of the public be excluded, with the exception of the Elected Members of the City of Burnside; the General Manager, Corporate Services; the General Manager, Urban Services; the Principal Governance Officer; the Executive Officer and the Executive Assistant, on the basis that it will receive and consider Item 18.2 '*Leave of Absence – Councillor Bagster*'.

The Council is satisfied that pursuant to section 90(3)(a) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is information that would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead) and to do so would, on balance, be contrary to the public interest. The information concerns the personal attributes and affairs of the persons involved and noted in the request. The public interest in disclosing these details to the public is outweighed by the public interest [sic].

The Council is also satisfied, pursuant to section 90(3)(g) of the Act, that the information to be received, discussed or considered in relation to this Agenda Item is information

concerning matters that must be considered in confidence in order to ensure that the council does not breach any law or other legal obligation or duty in relation to a matter or subject of a confidential council resolution. The information relating to the request is part of a confidential resolution of Council.

Further, the principle that the meeting should be conducted in a place open to the public has been outweighed in the circumstances because of both the legal responsibilities upon the Council and the public interest, generally, in maintaining confidentiality in the Council resolution and its legal advice.

Moved Councillor Monceaux, Seconded Councillor Wilkins CARRIED

[...]

Recommendation:

C11167

That the Leave of Absence not be granted for the period 23 April 2017 to 25 June 2017.

Moved Councillor Davis, Seconded Councillor Osterstock CARRIED

A Division was called by Councillor Ford

IN FAVOUR

Councillor Osterstock
Councillor Lemon
Councillor Wilkins
Councillor Davis
Councillor Davey

AGAINST

Councillor Monceaux
Councillor Lord
Councillor Ford

The Division resulted in the Motion being CARRIED

Confidentiality Recommendation

C11168

1. That, having the report in confidence under section 90(3)(a) and 90(3)(g) of the *Local Government Act 1999*, pursuant to section 91(7) and (9) of that Act, the Council orders that:
 - 1.1 the report and minutes relating to this Agenda item remain confidential on the basis that the disclosure of this information would involve the unreasonable disclosure of personal affairs, pursuant to section 90(3)(a) and of information concerning a matter that the Council considered in confidence, pursuant to section 90(3)(g) of the *Local Government Act 1999*, and
 - 1.2 the report and minutes will not be available for public inspection for the period of five years at which time this order will be reviewed by the Council; and
 - 1.3 this confidentiality order will be reviewed by the Council at least once in every 12 month period.
2. That for the item named in clause 1 and associated sub clauses, unless:
 - 2.1 the period in respect of any order made under Section 91(7) of the Local Government Act 1999 lapses; or
 - 2.2 the CEO/Council resolves to revoke an order made under Section 91(7) of the Local Government Act 1999;

any discussions of Council on the matter and any recording of those discussions are also confidential.

Moved Councillor Wilkins, Seconded Councillor Davis CARRIED

16. It is alleged that Cr Bagster divulged information the subject of the confidentiality order described above by raising questions without notice during a public session of the council's next ordinary meeting on 9 May 2017.

17. The council supplied my investigation with a copy of its audio and video recordings of the relevant discussion. I reproduce the exchange in question below:

Mayor Parkin: Motions without notice.

Cr Bagster: Yes there is a question without notice. Sorry, I thought the queuing system would allow me to do that.

Mayor Parkin: Sorry, no—

Cr Bagster: The question is without notice

Mayor Parkin: Well what I am suggesting is that the queuing system only applies when we are either dealing with reports from officers or motions on notice. Because the rest [is] much easier if I just pick them as they come—

Cr Bagster: My apologies—

Mayor Parkin: You have a question without notice?

Cr Bagster: —it is a new system for me I thought the queue would work. Yes, Mr Mayor, I have a number of questions without notice. Mr Mayor, are you aware of any community issues raised by constituents in the Burnside Ward that I have not dealt with any energy, enthusiasm or dedication? Has anybody raised that to you Mr Mayor or to council administration?

Mayor Parkin: (*conferring*)

Cr Bagster: I take that as a no, Mr Mayor? Is that correct?

Mayor Parkin: I'm not in a position to answer—

Cr Bagster: You're not aware of any community issues that—

Mayor Parkin: That's, that's, that's not a sensible question to ask in the context of where I'm—

Cr Bagster: It's very relevant Mr Mayor, it's relevant to—

Mayor Parkin: It's not relevant, because if I'm going to— If I'm being asked to discuss—

Cr Bagster: Mr Mayor, I simply asked you if you were aware of any community issues raised by constituents in the Burnside ward that I have not dealt with any enthusiasm (unintelligible)—

Mayor Parkin: Cr Bagster— The reason I cannot answer— Thank you, no. The reason I can't answer it is that if you wish me to—

Cr Bagster: I'm just asking if you were aware.

Mayor Parkin: If you wish me to debate and respond on matters—

Cr Bagster: No, no, I'm not asking for a debate, a yes or no would be sufficient.

Mayor Parkin: I can't answer the question.

Cr Bagster: Alright Mr Mayor, that's fine. Have you or council administration ever received a complaint from the community or any of my constituents that involves me not addressing or representing their concerns to council, or perhaps not responding to their issue?

Mayor Parkin: I can't answer that.

Cr Bagster: You can't answer that? I can tell you the answer is no, Mr Mayor, because I'm fairly certain that I've never ignored an issue. Mr Mayor, in the past I have been absent from council either on leave or as an apology. Has there ever been a time when I was absent that I did not offer a fair and reasonable excuse and advance notice or an apology for my absence?

Mayor Parkin: I can't answer that.

Cr Bagster: You can't answer that because you don't know the answer?

- Mayor Parkin: I just don't know what is "fair and reasonable" and I don't know the context and I'm not in a position to discuss the personal affairs of an elected member in public.
- Cr Bagster: Right, well I can tell you Mr Mayor that I have never been absent without offering an excuse or an apology.
- Mayor Parkin: Thank you. You are not here to make an explanation. Just ask the questions.
- Cr Bagster: Correct, Mr Mayor. I just wanted your answer that's all. Mr Mayor, Council has recently approved leave for councillors who are absent tonight for fair and reasonable excuses such as being away for personal reasons, for health reasons—
- Mayor Parkin: Is that a question?
- Cr Bagster: —or for work reasons. There is a question here Mr Mayor. You'll see the number of absences tonight are from approved leave from previous council meetings.
- Mayor Parkin: (*conferring*) If you—
- Cr Bagster: At the last council meeting, my application for—
- Mayor Parkin: Councillor Bagster if you want to raise something that was raised in confidence you cannot do it. The matter of your leave was dealt with in confidence and it cannot be raised here. Thank you.
- Cr Bagster: Mr Mayor I haven't finished my question. At the last council meeting my application for leave in advance—
- Mayor Parkin: No, that was a matter in confidence—
- Cr Bagster: —for a period of absence for personal, health and work issues was—
- Mayor Parkin: Councillor Bagster—
- Cr Bagster: —refused by council. Is there a precedent in council—
- Mayor Parkin: You are breaching the code of conduct—
- Cr Bagster: —is there a precedent in Council for refusing a member's leave?
- Mayor Parkin: —you are breaching the code of conduct and I must ask you to desist and we will move on to the next item on the agenda.
- Cr Bagster: I'm sorry; there is no answer to that question Mr Mayor?
- Mayor Parkin: I have just given you the answer.
- Cr Bagster: I have a series of questions Mr Mayor.
- Mayor Parkin: There is [sic] no more questions that I will take—
- Cr Bagster: So if you refuse to answer that's fine Mr Mayor—
- Mayor Parkin: Councillor Bagster, you have breached—
- Cr Bagster: That's fine Mr Mayor. What are the reasons that Council refused to grant me leave at the last council meeting? And was this referenced—
- Mayor Parkin: You are in breach of code of conduct.
- Cr Bagster: Am I indeed? I haven't seen the requirement that I not put these forward. What code of conduct am I in breach of?
- Cr Davis: New motion.
- Mayor Parkin: Yes, thank you.
- Cr Davis: Can I propose a ten minute break? I move that we (unintelligible)
- Mayor Parkin: Ok. Accepted. All those in favour. Against. Motion is carried.
- Cr Davis: Thank you.

Alleged breach of conflict of interest provisions – 9 May 2017

18. During this same meeting, the council was scheduled to receive and consider a 'Final Investigation Report' prepared by Wallmans Lawyers into a code of conduct complaint against Cr Bagster (**the Wallmans report**).
19. The Wallmans report arose from a complaint made by Cr Graham Bills concerning an email that had been sent by Cr Bagster on 1 June 2016, said to have been derogatory of unidentified former elected members of the council. The Wallmans report considered whether the impugned conduct of Cr Bagster amounted to breaches of clauses 2.2, 2.4, 2.8, 2.9 and 2.10 of Part 2 of the Code.
20. The Wallmans report concluded that Cr Bagster's conduct amounted to a breach of clause 2.4 of Part 2 of the Code. The report recommended that the council take no further action in relation to the complaint, concluding:

Councillor Bagster will have to live with the fact that a finding has been made against him that he has carelessly breached the Code of Conduct. The fact of the complaint and ensuing investigation should highlight to Councillor Bagster the need for more care in making statements, particularly publicly.

21. Agenda Item 14.3 of the council's 9 May 2017 ordinary meeting provided, in part:

Item No:	14.3
To:	Council
Date:	9 May 2017
Author:	Paul Deb - Chief Executive Officer
Contact:	8366 4201
Subject:	COUNCIL MEMBER CODE OF CONDUCT COMPLAINT (COCC-16-1) (OPERATIONAL)
Attachments:	A. Code of Conduct for Council Members B. Council Member Code of Conduct Complaint Handling Procedure C. Wallmans Lawyers Final Investigation Report
Prev. Resolution:	C10929, 8/11/16

Recommendation

1. That the Report be received.
2. That Council note that having investigated the alleged breach of the Code of Conduct, the Independent Assessor finds that Cr Bagster has breached paragraph 2.4 of the Code.
3. That Council further note and adopt the Independent Assessor's recommendation to take no further action against Cr Bagster in respect of his breach of paragraph 2.4 of the Code in Code of Conduct Complaint (COCC-16-1).
4. That Council note that the Code provides that such a breach must be the subject of a report to a public meeting of Council and therefore there is no longer any appropriate reason for confidentiality to be maintained in respect of the Council's prior consideration of the preliminary procedural steps associated with this matter.
5. That the confidentiality order on (Topic 63.1 (Council Member Code of Conduct Complaint (COCC 16-1)) Report 18.1 of 8 November 2016 over the report, attachments, written submissions and minutes be revoked as Cr Bagster was found

on investigation by the Independent Assessor to have breached paragraph 2.4 of the Code of Conduct for Council Members.

22. It is alleged that Cr Bagster failed to declare a material conflict of interest in the matter forming the subject of Agenda Item 14.3. Cr Bagster is further alleged to have failed to appropriately deal with this interest, going so far as to move a motion that the question lie on the table and participate in a subsequent vote concerning the item.
23. The minutes concerning the council's consideration of Agenda Item 14.3 record:

Council Member Code of Conduct Complaint (COCC/16/1) (Operational) (14.3)

Councillor Bills declared an [sic] material conflict of interest, because the matter relates to him, in accordance with Section 73 of the Local Government Act 1999 in relation to Item 14.3 and dealt with this conflict in a transparent and accountable way by leaving the chamber at 7.22 pm and resumed his seat at 7.23 pm.

Councillor Bagster declared an interest in the matter but not a conflict and remained in the Chamber.

Councillor Bills subsequently again declared an [sic] material conflict of interest in accordance with Section 73 of the Local Government Act 1999 in relation to Item 14.3 and dealt with this conflict in a transparent and accountable way by leaving the chamber at 7.24 pm and resumed his seat at the conclusion of debate at 7.27 pm.

Councillor Bagster declared an interest in the matter but not a conflict and remained in the Chamber.

Formal Motion

C11180 That the question lie on the table.

Moved Councillor Bagster, Seconded Councillor Davis

LOST

Recommendation:

C11181

1. That the Report be received.
2. That Council note that having investigated the alleged breach of the Code of Conduct, the Independent Assessor finds that Councillor Bagster has breached paragraph 2.4 of the Code.
3. That Council further note and adopt the Independent Assessor's recommendation to take no further action against Councillor Bagster in respect of his breach of paragraph 2.4 of the Code in Code of Conduct Complaint (COCC-16-1).
4. That Council note that the Code provides that such a breach must be the subject of a report to a public meeting of Council and therefore there is no longer any appropriate reason for confidentiality to be maintained in respect of the Council's prior consideration of the preliminary procedural steps associated with this matter.
5. That the confidentiality order on (Topic [sic] 63.1 (Council Member Code of Conduct Complaint (COCC 16-1)) Report 18.1 of 8 November 2016 over the report, attachments, written submissions and minutes be revoked as Councillor Bagster was found on investigation by the Independent Assessor to have breached paragraph 2.4 of the Code of Conduct for Council Members.

Moved Councillor Davis, Seconded Councillor Lemon

CARRIED UNANIMOUSLY

24. The council supplied my investigation with a copy of its audio and video recordings of the discussion concerning Agenda Item 14.3. Cr Bagster can be observed to remain in the chamber for the duration of the council's consideration of the matter. I reproduce the initial discussion below:

Cr Bills: 14.3, I declare a conflict of interest.

Mayor Parkin: 14.3, you have a conflict of interest?

Cr Bills: I will leave the chamber (unintelligible)

Mayor Parkin: Is that a material conflict, Councillor?

Cr Bills: Well, it relates to me, so I (unintelligible) yes.

Mayor Parkin: Thank you.

(Cr Bills leaves the chamber)

Cr Bagster: With regards to 14.3 I declare an interest but I don't declare that I'm conflicted.

Mayor Parkin: Ah, you can make your own choice on that but I would suggest you consider the matter very gravely and I think you should take the prudent course.

Cr Bagster: Which would be what?

Mayor Parkin: Which would be to absent yourself. I can't advise you but I can— the consequences of not doing so could be serious.

Cr Bagster: I have no conflict of interest, Mr Mayor.

Mr Deb: Just let him go.

Mayor Parkin: Ok thank you. So, 14.3, does anyone wish to pull that for debate?

Cr Bagster: I do actually wish to pull that for debate.

Mayor Parkin: Ok. So we move on to 14.4.

25. The council later returned to Agenda Item 14.3:

Mayor Parkin: You have pulled 14.3 and Councillor Bills this is the one that you have declared an interest for and I suggest you continue your previous custom.

(Cr Bills leaves the chamber)

Mayor Parkin: I can only counsel you Councillor Bagster that you're on very— given this motion concerns you— that you're on very dangerous ground being in the room. And given that you are moving the motion we'll have no option but to consider how we deal with this.

Cr Bagster: What does that mean, Mr Mayor? Sorry, I don't understand (unintelligible)—

Mayor Parkin: Your motion.

Cr Bagster: Sorry Mr Mayor, can you clarify your last comments because they're probably significant to the way I run this (unintelligible)

Mayor Parkin: You— I gave you advice previously and I have very kindly re-emphasised it but I really cannot elaborate because it is not my position to do so. This is at your personal choice.

Cr Bagster: Well thank you, Mr Mayor. Do I get a green light when the speaker goes on or am I actually speaking (unintelligible)

Mayor Parkin: Are you— Have you pressed your button?

Cr Bagster: (unintelligible) it's flashing green (unintelligible)

Unknown: You need to push your speak button

Cr Bagster: Oh terrific. Mr Mayor, I believe having looked through the attachments to this—

Mayor Parkin: What is your motion please Councillor?

Cr Bagster: My motion will be that this issue lie on the table.

Mayor Parkin: That's a formal motion?

Cr Bagster: Correct

- Mayor Parkin: We'll put that– no. Is there a seconder that it lie on the table?
- Cr Davis: I second.
- Mayor Parkin: All those in favour that it lie on the table?
(Cr Bagster raises arm to indicate vote)
- Mayor Parkin: Those against?
(Councillors raise arms to indicate vote)
- Mayor Parkin: Motion's lost.
- Cr Davis: I move for a (unintelligible)
- Mayor Parkin: Thank you. Do I have a seconder to the officer recommendation?
(Cr Lemon raises arm)
(Cr Bagster raises arm)
- Mayor Parkin: Councillor Lemon. All those in favour?
(Cr Bagster raises arm to indicate vote)
- Mayor Parkin: Those against? Motion is carried unanimously. Can we get Councillor Bills back please?

Alleged breaches of conflict of interest provisions – 23 May 2017

26. It is further alleged that Cr Bagster failed to declare and appropriately deal with a conflict of interest in three matters, namely Agenda Items 18.1, 18.2 and 18.5, during the council's 23 May 2017 ordinary meeting.

Agenda Item 18.1

27. Agenda Item 18.1 concerned a report and proposed motion from Mayor Parkin seeking to address a previous resolution of the council passed at its 28 March 2017 ordinary meeting. This resolution provided:
- That the Mayor be delegated to engage an independent HR professional to advise and assist in the implementation of an appropriate mediation and support process between Councillor Bagster and the CEO.
28. Mayor Parkin's report submitted that this resolution was invalid insofar as it purported to delegate to him a function in his capacity as Mayor that was not legally permissible under section 44(2) of the Local Government Act. The report also requested further guidance 'as to the appropriate course of action regarding mediation or "mediation" type assistance that the Council should offer as a means of support for both Cr Bagster and the CEO.'
29. It is alleged that Cr Bagster entered the council chamber shortly after Agenda Item 18.1 was reached. My investigation is advised that the council 'has a practice of declaring conflicts of interest for the purposes of the [Local Government Act] at the time the Agenda item is reached.' Cr Bagster is alleged to have declared an 'interest' in the item; however is reported to have denied having a 'material conflict of interest' of a kind captured by section 73 of the Local Government Act.
30. One report to the Office for Public Integrity, made by a person present at the meeting, alleged:
- It was [...] clear during debate on the matter that Cr Bagster determined to stay in the Chambers.

Subsequently, Cr Lemon moved a formal motion in accordance with regulation 12(14) of the *Local Government (Procedures at Meetings) Regulations 2013* [...] that the question (being the Council's consideration and determination of the recommendations in relation to this matter), be put, the effect of which, if carried, [is] that the debate is terminated and the question put to the vote by [the] presiding member.

The formal motion was carried, with Cr Osterstock calling for a division. On the division it was noted that the only Elected Member who voted against the formal motion that the question be put was Cr Bagster.

[T]he original motion for determination [was then put] to a vote, without further debate, such motion being carried. Cr Bagster called a division, and the Minutes reflect he was the only Elected Member who voted against the proposal to regulate the Councils [sic] determination to obtain a report in relation to appropriateness of support with regards to the matters pertaining to him and the CEO.

By unlawfully remaining in the Chamber for an Agenda item in which he had a material conflict of interest under section 73 of the [Local Government Act], and participating in the discussion of the matter, in my opinion Cr Bagster attempted to frustrate and delay the Council's consideration and determination of this matter. This is a matter in which he had a clear and direct, personal, interest.

31. The minutes concerning the meeting relevantly record:

Guidance to Council following discussion relating to Confidential Council Resolution C11115 (11.1) (18.1)

Councillor Osterstock left the Chamber at 7.46pm and resumed his seat in the Chamber at 7.48pm.

Councillor Bagster entered the Chamber at 7.47pm.

C11190

Pursuant to section 90(2) of the *Local Government Act 1999*, the Council orders that all members of the public be excluded, with the exception of the Elected Members of the City of Burnside, the General Manager, Corporate Services, the General Manager, Urban Services, the Executive Officer and the Group Manager People and Innovation, on the basis that it will receive and consider Item 18.1 'Guidance to Council following discussion relating to Confidential Council Resolution C11115'.

The Council is satisfied that pursuant to section 90(3)(g) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is information concerning matters that must be considered in confidence in order to ensure that the Council does not breach any legal obligation or duty in relation to a matter, subject of a confidential Council resolution.

Further, the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because of both the legal responsibilities upon the Council and the public interest generally, in maintaining confidentiality in the Council resolution and its legal advice.

Moved Councillor Lemon, Seconded Councillor Davis

CARRIED

A Division was called by Councillor Osterstock.

IN FAVOUR

Councillor Monceaux
Councillor Osterstock
Councillor Lemon
Councillor Wilkins
Councillor Davis
Councillor Piggott
Councillor Davey
Councillor Lord
Councillor Cornish

AGAINST

Councillor Bagster

The Division resulted in the Motion being CARRIED

Motion:

That Council Administration provide a report together with a recommendation regarding the appropriateness and type of support that the Council could offer Cr Bagster and the CEO to assist with future relationship and communication improvements.

Moved Councillor Osterstock, Seconded Councillor Wilkins

Formal Motion:

C11191

That the question be put.

Moved Councillor Lemon, Seconded Councillor Davey CARRIED

A Division was called by Councillor Osterstock.

IN FAVOUR

Councillor Monceaux
Councillor Osterstock
Councillor Lemon
Councillor Wilkins
Councillor Davis
Councillor Piggott
Councillor Davey
Councillor Lord
Councillor Cornish

AGAINST

Councillor Bagster

The Division resulted in the Motion being CARRIED

Motion:

C11192

That Council Administration provide a report together with a recommendation regarding the appropriateness and type of support that the Council could offer Cr Bagster and the CEO to assist with future relationship and communication improvements.

Moved Councillor Wilkins, Seconded Councillor Lemon CARRIED

A Division was called by Councillor Bagster.

IN FAVOUR

Councillor Monceaux
Councillor Osterstock
Councillor Lemon
Councillor Wilkins
Councillor Davis
Councillor Piggott
Councillor Davey
Councillor Lord
Councillor Cornish

AGAINST

Councillor Bagster

The Division resulted in the Motion being CARRIED

Councillor Bagster declared an interest but not a material conflict in the matter.

Confidentiality Recommendation

C11193

1. That, having considered the matter in confidence, pursuant to section 91(7) and 91(9) of the *Local Government Act 1999*, the Council orders that:
 - 1.1 the report and minutes relation to this Agenda item remain confidential on the basis that the information to be received, discussed or considered in relation to this Agenda item is information concerning matters that must be considered in confidence in order to ensure that the Council does not breach any legal obligation or duty pursuant to section 90(3)(g) of the *Local Government Act 1999*,

- 1.2 the report and minutes will not be available for public inspection for the period of five years at which time this order will be reviewed by the Council; and
 - 1.3 this confidentiality order will be reviewed by the Council at least once in every 12 months.
2. That for the items named in clause 1 and associated sub clauses, unless;
- 2.1 the period in respect of any order made under section 91(7) of the *Local Government Act 1999* lapses; or
 - 2.2 Council resolves to revoke an order made under section 91(7) of the Local Government Act 1999;
- any discussion of Council on the matter and any recording made of those discussions are to be treated as confidential.

Moved Councillor Wilkins, Seconded Councillor Lemon

CARRIED

A Division was called by Councillor Bagster.

IN FAVOUR

Councillor Monceaux
 Councillor Osterstock
 Councillor Lemon
 Councillor Wilkins
 Councillor Davis
 Councillor Piggott
 Councillor Davey
 Councillor Lord
 Councillor Cornish

AGAINST

Councillor Bagster

The Division resulted in the Motion being

CARRIED

Agenda Item 18.2

32. Agenda Item 18.2 concerned a report and recommendation from the council's General Manager, Corporate Services, proposing that the council engage a consultant to provide a personalised support service to both Cr Bagster and the council's Chief Executive Officer. The report relevantly provided:

Discussion

9. The Administration requested legal advice regarding the validity of confidential Council resolution C11115 and the appropriateness of mediation as a method of conflict resolution between Cr Bagster and the Chief Executive Officer.
10. The Council has been advised that the resolution is legally invalid because it purports to delegate a function to the Mayor. It is not legally possible to delegate any power or function of the Council to any Elected Member, including the Mayor. The status of the said resolution is of no legal consequence if the Council wishes to resolve in accordance with the recommendations in this report.
11. Both the Council's legal and specialist human resource advice support the position that it is inappropriate for the Chief Executive Officer and Cr Bagster to 'come together' to participate in mediation at this point in time. The detailed reasons for this position are set out in a letter of advice from KelledyJones Lawyers dated 26 April 2017. This advice is available for Elected Members to view, on request.
12. Theresa Hines of Employer Global Solutions has recommended the most appropriate alternative for consideration by the Council, is that both parties have the opportunity to "vent", to discuss and have their issues heard, but that it should occur in a one-on-one confidential setting, where the other party is not present.
13. This allows the parties to discuss their issues in a full, non-compromising, confidential and secure setting, providing an opportunity to gain an understanding of what the barriers and/or issues are and to constructively challenge behaviours that

may have contributed to the current position, with an objective of working towards the improvement of the relationship. Once this occurs, Ms Hines believes she would be in a position to provide a considered professional recommendation as to the most appropriate way forward.

14. It is to be noted that the desire to explore this approach and methodology, as a course of action, is not one associated with any recommendation arising from the Code of Conduct investigation undertaken early this year.
33. It is alleged that Cr Bagster again declared an 'interest' in this item; declining however to declare a 'material conflict of interest'.
34. One report to the Office for Public Integrity alleged (emphasis in original):

Cr Bagster remained in the chamber.

[T]he Minutes [reflect] that Cr Osterstock called a point of order pursuant to regulations 28(2) of the Meeting Procedures, prior to the motion being put and sought [a ruling]. Cr Osterstock advised that in his view Cr Bagster had a material conflict of interest in the Agenda item pursuant to section 73 of the [Local Government Act].

[Mayor Parkin] upheld this point of order, and **in the strongest terms possible** urged Cr Bagster to declare his material conflict of interest and leave the Chamber; however he failed to do so and remained, and continued to participate in the Council's determination of this matter.

35. The minutes concerning the meeting relevantly record:

Confidential Council Resolution C11115 and Confidential Motion on Notice (18.2)

C11194

Pursuant to section 90(2) of the *Local Government Act 1999*, the Council orders that all members of the public with the exception of the Elected Members of the City of Burnside, the General Manager, Corporate Services, the General Manager, Urban Services, the Executive Officer and the Group Manager People and Innovation, be excluded from attendance at the meeting for Agenda Item 18.2 *'Confidential Council Resolution C11115 and Confidential Motion on Notice'*.

In making the order under section 90(2) of the *Local Government Act 1999* the Council is satisfied that, pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice as referred to in the body of his report.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because of the public interest generally in maintaining both the confidentiality of and the legal professional privilege in the Council's legal advice.

Moved Councillor Wilkins, Seconded Councillor Lemon

CARRIED

A Division was called by Councillor Osterstock.

IN FAVOUR

Councillor Monceaux
Councillor Osterstock
Councillor Lemon
Councillor Wilkins
Councillor Davis
Councillor Piggott
Councillor Davey
Councillor Cornish

AGAINST

Councillor Bagster
Councillor Lord

The Division resulted in the Motion being

CARRIED

Councillor Bagster declared an interest but not a material conflict of interest.

Councillor Osterstock called a Point of Order pursuant to Regulation 28(2) of the *Local Government (Procedures at Meetings) Regulations 2013* and sought the Presiding Member to rule accordingly. Councillor Osterstock advised that in his view Councillor Bagster has a material conflict of interest in this agenda item pursuant to Section 73 of the *Local Government Act 1999*. The Mayor, as Presiding Member upheld the Point of Order and was in agreement however stated that it is up to the individual Elected Member to determine if a conflict exists.

Recommendation:

C11195

1. That the Report be received.
2. That the Council engage Theresa Hines of Employer Global Solutions to provide a separate but individual and personalised support service (of up to five sessions each) to Councillor Bagster and the Chief Executive Officer for the purpose of addressing relationship and communication improvements and, thereafter, to provide a recommendation to the Council regarding the future management of their relationship.

Moved Councillor Lemon, Seconded Councillor Wilkins

CARRIED

Confidentiality Recommendation

C11196

1. That, having considered the matter in confidence, pursuant to section 91(7) and 91(9) of the *Local Government Act 1999*, the Council orders that:
 - 1.1 the report and minutes relation to this Agenda item remain confidential remain confidential [sic] on the basis that the disclosure of this information would involve the disclosure of Council's legal advice pursuant to section 90(3)(h) of the *Local Government Act 1999*; and
 - 1.2 the report and minutes will not be available for public inspection for the period of five years at which time this order will be reviewed by the Council; and
 - 1.3 this confidentiality order will be reviewed by the Council at least once in every 12 month period.
2. That for the items named in clause 1 and associated sub clauses, unless;
 - 2.1 the period in respect of any order made under section 91(7) of the *Local Government Act 1999* lapses; or
 - 2.2 Council resolves to revoke an order made under section 91(7) of the Local Government Act 1999;

any discussion of Council on the matter and any recording made of those discussions are to be treated as confidential.

Moved Councillor Davis, Seconded Councillor Davey

CARRIED

A Division was called by Councillor Bagster.

IN FAVOUR

Councillor Monceaux
Councillor Osterstock
Councillor Lemon
Councillor Wilkins
Councillor Davis
Councillor Piggott
Councillor Davey
Councillor Lord
Councillor Cornish

AGAINST

Councillor Bagster

The Division resulted in the Motion being

CARRIED

Agenda Item 18.5

36. Agenda Item 18.5 constituted a report and series of recommendations from the council's General Manager, Corporate Services, concerning a report prepared by Griffins Lawyers in accordance with the council's *Internal Review of Council Decisions (Section 270) Procedures (the Griffins report)*.
37. The Griffins Report arose from an application by Cr Bagster for internal review of council resolution C11055, passed during the council's 28 February 2017 ordinary meeting, which itself arose from a complaint by Cr Bagster under the Code of Conduct for Council Employees against the council's Chief Executive Officer.
38. Council resolution C11055 held that correspondence from the council's Chief Executive Officer identified as the subject of Cr Bagster's complaint had been 'inappropriate and inconsistent with the high standards expected' by the council. It required the Chief Executive Officer to provide a formal apology to Cr Bagster.
39. Council resolution C11055 further held that the 'tone and content' of Cr Bagster's communications to the Chief Executive Officer was similarly inappropriate. It required, *inter alia*, that the Chief Executive Officer be 'instructed to cease all correspondence' with Cr Bagster and for staff to establish a communications protocol directing designated correspondence from Cr Bagster to the council's Executive Group. These measures were identified as being intended to achieve 'the elimination of future direct correspondence' between Cr Bagster and the Chief Executive Officer.
40. The Griffins report recommended that the council make certain amendments to resolution C11055. Notably, it recommended that the stated object of the communications protocol be redesignated to the 'elimination of future direct correspondence between [Cr Bagster] and Council staff' (i.e. extending the stated application of the protocol beyond Cr Bagster's communications with the Chief Executive Officer). It also recommended that the 'blanket' instruction to the Chief Executive Officer to cease correspondence with Cr Bagster be revoked.
41. The report accompanying Agenda Item 18.5 ostensibly recommended that the council adopt the recommendations made within the Griffins report.
42. It is alleged that Cr Bagster again declared an 'interest' in this item; declining however to declare a 'material conflict of interest'.
43. It is alleged that Cr Osterstock again called a point of order to advise that in his view Cr Bagster had a material conflict of interest in the matter. This point of order is said to have been upheld. Cr Bagster was allegedly again advised 'on the strongest terms possible' by Mayor Parkin to 'declare his material conflict of interest and leave the Chamber.'
44. According to one report made to the Office for Public Integrity:

Cr Bagster failed to do so and remained, and participated in, the Council's determination of this matter.

Cr Piggott subsequently moved a motion in accordance with the recommendation in the Agenda report that was seconded by Cr Davis, and was then the subject of debate. The Minutes reflect that Cr Bagster subsequently left the Chamber at 8.43pm, prior to the motion being determined by vote, and he did not return to the Meeting.

While it was appropriate that Cr Bagster should leave the Chamber when a matter for which he had a material conflict of interest was discussed, Cr Bagster did not leave when

this Agenda item was reached, rather, he left only after the motion had been put and was currently the subject of debate[.]

45. The minutes concerning the meeting relevantly record:

Section 270 Internal Review into C11055 (Operational) (18.5)

Cr Monceaux left the Chamber at 8.15pm and resumed her seat in the Chamber at 8.17pm.

C11199

Pursuant to section 90(2) of the *Local Government Act 1999*, the Council orders that all members of the public be excluded, with the exception of the Elected Members of the City of Burnside; the General Manager, Corporate Services; the General Manager Urban Services; the Executive Officer; the Group Manager, People and Innovation and Ms Theresa Hines, Managing Director, Employer Global Solutions PL (EGS) on the basis that it will receive and consider Item 18.5 '*Section 270 Internal Review into C11055 (Operational)*'.

The Council is satisfied that pursuant to section 90(3)(g) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is information concerning matters that must be considered in confidence in order to ensure that the Council does not breach any legal obligation or duty in relation to a matter.

Further, the principle that the meeting be conducted in place open to the public has been outweighed in the circumstances because of both the legal responsibilities upon the Council and the public interest generally, in maintaining confidentiality in the Council resolution and its legal advice.

Moved Councillor Cornish, Seconded Councillor Piggott

CARRIED

A Division was called by Councillor Bagster.

IN FAVOUR

Councillor Monceaux
Councillor Osterstock
Councillor Lemon
Councillor Wilkins
Councillor Davis
Councillor Piggott
Councillor Davey
Councillor Lord
Councillor Cornish

AGAINST

Councillor Bagster

The Division resulted in the Motion being

CARRIED

Councillor Bagster declared an interest but not a material conflict of interest.

Councillor Osterstock called a Point of Order pursuant to Regulation 28(2) of the *Local Government (Procedures at Meetings) Regulations 2013* and sought the Presiding Member to rule accordingly. Councillor Osterstock advised that in his view Councillor Bagster has a material conflict of interest in this agenda item pursuant to Section 73 of the *Local Government Act 1999*. The Mayor, as Presiding Member upheld the Point of Order and was in agreement however stated that it is up to the individual Elected Member to determine if a conflict exists.

Cr Lord left the Chamber at 8.35pm and returned at 8.39pm.

Recommendation:

1. That the Report be received.
2. That Council note and adopt the recommendations of the report prepared by Griffins Lawyers and resolves to amend C11055 (as amended by C11112) to:
 - 2.1 reflect its intentions regarding mediation as discussed by the Elected Members at the 28 February 2017 meeting by inserting new Part 7 as follows:

“The recommendation regarding mediation between the CEO and Councillor Bagster be deferred to enable further investigation and discussion to take place.”

2.2 amend Part 5 to read as follows:

5. *That the work health & safety issues raised by the Report are best addressed by the following measures being in place for the next 12 months:*

5.1 *That the CEO be instructed to cease all correspondence with Councillor Bagster, other than through general communications to the entire Elected Member group or to Councillor Bagster as one of several Councillors.*

5.2 *Administration implement a system to direct all correspondence from Councillor Bagster to Administration, to the Executive group, and to Councillor Bagster from Administration, via the Executive group.*

5.3 *An appropriate management protocol is developed to ensure that Councillor Bagster is not unreasonably disadvantaged and is able to fulfil his responsibilities as an Elected Member.*

5.4 *That the GM, Corporate Services provide a report to Council of any concerns with the ongoing implementation of this procedure should he consider it necessary.*

3. That within 48 hours, the General Manager, Corporate Services, advises Councillor Bagster in writing of Council’s decision regarding his s270 internal review, as enunciated in this resolution.

Moved Councillor Piggott, Seconded Councillor Davis

Councillor Bagster left the Chamber at 8.43pm.

An amended motion was moved:

Recommendation:

1. That the Report be received.
2. That Council note and adopt the recommendations of the report prepared by Griffins Lawyers and resolves to amend C11055 (as amended by C11112) to:

2.1 reflect its intentions regarding mediation as discussed by the Elected Members at the 28 February 2017 meeting by inserting new Part 7 as follows:

“The recommendation regarding mediation between the CEO and Councillor Bagster be deferred to enable further investigation and discussion to take place.”

2.2 amend Part 5 to read as follows:

5. *That the work health & safety issues raised by the Report are best addressed by the following measures being in place for the next 12 months:*

5.1 *That the CEO be instructed to cease all correspondence with Councillor Bagster, other than through general communications to the entire Elected Member group or to Councillor Bagster as one of several Councillors.*

5.2 *Administration implement a system to direct all correspondence from Councillor Bagster to Administration, to the Executive group, and to Councillor Bagster from Administration, via the Executive group.*

5.3 *An appropriate management protocol is developed to ensure that Councillor Bagster is not unreasonably disadvantaged and is able to fulfil his responsibilities as an Elected Member.*

5.4 *That the GM, Corporate Services provide a report to Council of any concerns with the ongoing implementation of this procedure should he consider it necessary.*

5.5 *That all Elected Members direct email and correspondence to the Executive Group only.*

3. That within 48 hours, the General Manager, Corporate Services, advises Councillor Bagster in writing of Council's decision regarding his s270 internal review, as enunciated in this resolution.

Moved Councillor Cornish, Seconded Councillor Davey

LOST

An amended motion was moved:

Recommendation:

C11200

1. That the Report be received.
2. That Council note and adopt the recommendations of the report prepared by Griffins Lawyers and resolves to amend C11055 (as amended by C11112) to:
 - 2.1 reflect its intentions regarding mediation as discussed by the Elected Members at the 28 February 2017 meeting by inserting new Part 7 as follows:

"The recommendation regarding mediation between the CEO and Councillor Bagster be deferred to enable further investigation and discussion to take place."
 - 2.2 amend Part 5 to read as follows:
 5. *That the work health & safety issues raised by the Report are best addressed by the following measures being in place for the next 12 months:*
 - 5.1 *That the CEO be instructed to cease all correspondence with Councillor Bagster, other than through general communications to the entire Elected Member group or to Councillor Bagster as one of several Councillors.*
 - 5.2 *Administration implement a system to direct all correspondence from Councillor Bagster to Administration, to the Executive group, and to Councillor Bagster from Administration, via the Executive group.*
 - 5.3 *An appropriate management protocol is developed to ensure that Councillor Bagster is not unreasonably disadvantaged and is able to fulfil his responsibilities as an Elected Member.*
 - 5.4 *That the GM, Corporate Services provide a report to Council of any concerns with the ongoing implementation of this procedure should he consider it necessary.*
3. That within 48 hours, the General Manager, Corporate Services, advises Councillor Bagster in writing of Council's decision regarding his s270 internal review, as enunciated in this resolution.

Moved Councillor Piggott, Seconded Councillor Davis

CARRIED UNANIMOUSLY

The amended motion became the motion that was

CARRIED

Confidentiality Recommendation

C11201

1. That, having considered the matter in confidence, pursuant to section 91(7) and (9) of the *Local Government Act 1999*, the Council orders that:
 - 1.1 the report, minutes and attachments relating to this Agenda item remain confidential on the basis that the disclosure of this information would involve the unreasonable disclosure of information concerning a matter that the

Council considered in confidence, pursuant to section 90(3)(g) of the *Local Government Act 1999*; and

- 1.2 the report, minutes and attachments will not be available for public inspection for the period of five years at which time this order will be reviewed by the Council; and
- 1.3 this confidentiality order will be reviewed by the Council at least once in every 12 month period.
2. That for the item named in clause 1 and associated sub clauses, unless:
 - 2.1 the period in respect of any order made under Section 91(7) of the Local Government Act 1999 lapses; or
 - 2.2 Council resolves to revoke an order made under Section 91(7) of the Local Government Act 1999;

any discussions of Council on the matter and any recording of those discussions are also confidential.

Moved Councillor Monceaux, Seconded Councillor Lemon

CARRIED

46. My investigation wrote to the council to seek a copy of any video recording in the council's possession depicting the consideration of Agenda Items 18.1, 18.2 and 18.5. By letter dated 22 August 2017 the council advised that it is not in the practice of recording proceedings held in confidence.
47. The council was, however, able to source a copy of its CCTV footage concerning the meeting. This footage depicts Cr Bagster entering the chamber at approximately 7:40pm and exiting the chamber after what appears to be a heated exchange at approximately 8:37pm.

Response from Cr Bagster

48. My investigation wrote to Cr Bagster to seek a response to the allegations.
49. Cr Bagster responded by email dated 1 August 2017. Cr Bagster's response commences:

BLUF (Bottom Line up Front): Not guilty your honour! But please hold the Burnside council to account.
50. Cr Bagster's response variously describes the allegations forming the subject of the referral as 'evilly concocted and contrived', 'part of a concerted and deliberate campaign of character assassination', 'a 'ridiculous witch-hunt', and 'trivial, vexatious, baseless, and made in bad faith as retribution and revenge all stemming from the Burnside CEO.'
51. Providing what he described as a 'limited and preliminary response' to the specific enquiries raised by my correspondence, Cr Bagster submitted, *inter alia*:
 1. The central allegation is that I declared that I had an "interest, but not a material interest" in a matters [sic] that were before the Burnside Council on the evening of 9 May 2017 and 23 May 2017. To the very best of my belief, knowledge and understanding I had no material conflict of interest in those matters by the generally accepted definition of what constitutes "a material conflict of interest" in those matters. That is, in the matters before Council, when I made those declarations, the potential outcomes and decisions of the debate and resolutions were not supposed to be detrimental, adverse or disadvantageous to me. Though I declared that I could not be a disinterested person in those matters, I could not reasonably be said to have had any 'material' conflict of interest in the matters,

taking into account the possible outcomes of the debate and decisions, dimension and significance of the matters being debated.

2. I do not believe that I knowingly (and to the best of my recollection I have not) breached a Confidentiality order of the Burnside Council. This allegation is simply untrue, vexatious, [sic] and made in bad faith. Whilst, at some point, I did ask the Mayor why my leave of absence was not approved (or why it had not appeared in the Council Agenda as expected). [sic] That information (that the leave was not approved) was self-evident because the leave approval did not appear in the appropriate Council Meeting agenda (subsequent a valid and public application, free of confidential encumbrances) where it would normally have appeared. I asked a question of the Mayor not knowing that (and having no reason to believe) that Council had (unprecedentedly) held the 'motion' for my leave approval in "Confidence". I was previously absent from Council and had not seen (nor expected to see) any associated confidentiality order applicable to a routine, trivial and ordinary application to Council for an Elected member's Leave of Absence. What a ridiculous allegation!

52. Cr Bagster's response concluded:

Frankly I am gobsmacked that you are being asked to waste your time in pursuit of me instead of the real villains on the Burnside Council.

Relevant law

53. Section 5(3) of the ICAC Act provides:

(3) *Misconduct in public administration* means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

54. Sections 73 and 74 of the Local Government Act concern material conflicts of interest, relevantly providing:

73—Material conflicts of interest

- (1) Subject to this section, for the purposes of this Subdivision, a member of a council has a *material conflict of interest* in a matter to be discussed at a meeting of the council if any of the following persons would gain a benefit, or suffer a loss, (whether directly or indirectly and whether of a personal or pecuniary nature) depending on the outcome of the consideration of the matter at the meeting:
 - (a) the member[.]
 - [...]
- (2) A member of a council will not be taken to have a material conflict of interest in a matter to be discussed at a meeting of the council—
 - (a) if the relevant benefit or loss would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the council area; or
 - (b) on account of an interest under subsection (1) of a relative of the member, other than the member's spouse or domestic partner, if the member does not know, and could not reasonably be expected to know, of the interest.
- (3) A member of a council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having a material conflict of interest in a matter before the council if the matter directly concerns that agency or

instrumentality but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.

[...]

74—Dealing with material conflicts of interest

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

Maximum penalty:

- (a) if the member votes on the matter with an intention to gain a benefit, or avoid a loss, for the member or another person—\$15 000 or 4 years imprisonment; or
 - (b) in any other case—\$5 000.
- (2) However, a member of the council does not contravene subsection (1) by taking part in the meeting, or being in the chamber where the meeting is being conducted, if the member—
 - (a) has been granted an approval under subsection (3); and
 - (b) is complying with the conditions of the approval.
 - (3) The Minister may grant an approval in writing to a member of the council to take part in the meeting, or to be in the chamber where the meeting is being conducted, if—
 - (a) because of the number of members subject to the obligation under this section, conduct of the meeting would be obstructed if the approval were not given; or
 - (b) it appears to the Minister to be in the interests of the council's community and area.
 - (4) The Minister may grant an approval under subsection (3) subject to any conditions determined by the Minister.
 - (5) If a member of a council discloses a material conflict of interest in a matter to be discussed at a meeting of the council, the following details must be recorded in the minutes of the meeting and on a website determined by the chief executive officer:
 - (a) the member's name;
 - (b) the nature of the interest, as described by the member;
 - (c) if the member took part in the meeting, or was in the chamber during the meeting, under an approval under subsection (3), the fact that the member took part in the meeting, or was in the chamber during the meeting (as the case requires).
 - (6) This section does not apply to a matter of ordinary business of the council of a kind prescribed by regulation for the purposes of this section.

55. Sections 75 and 75A of the Local Government Act concern actual and perceived conflicts of interest, relevantly providing:

75—Actual and perceived conflicts of interest

- (1) In this Subdivision—

actual conflict of interest—see section 75A(1)(a);

conflict of interest—see subsections (2) and (3);

perceived conflict of interest—see section 75A(1)(b).

- (2) For the purposes of this Subdivision but subject to this section, a conflict of interest is a conflict between—
- (a) a member of a council's interests (whether direct or indirect personal or pecuniary); and
 - (b) the public interest,
- that might lead to a decision that is contrary to the public interest.

[...]

- (4) A member of a council will not be taken, for the purposes of this Subdivision, to have a conflict of interest in a matter to be discussed at a meeting of the council if the relevant member's interest in the matter is held in common with all or a substantial proportion of the ratepayers, electors or residents of the council area.

75A—Dealing with actual and perceived conflicts of interest

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

the member must deal with the actual or perceived conflict of interest in a transparent and accountable way.

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

[...]

- (4) If a member of a council discloses an actual or perceived conflict of interest in a matter to be discussed at a meeting of the council, the following details must be recorded in the minutes of the meeting and on a website determined by the chief executive officer:
- (a) the member's name;
 - (b) the nature of the interest, as described by the member;
 - (c) the manner in which the member dealt with the actual or perceived conflict of interest;
 - (d) if the member voted on the matter, the manner in which he or she voted;
 - (e) the manner in which the majority of persons who were entitled to vote at the meeting voted on the matter.
- (5) To avoid doubt, it is declared that non-participation in a meeting of a council is not the only way in which a member of the council may appropriately deal in a transparent and accountable way with an actual or perceived conflict of interest of the member in a matter to be discussed at the meeting.

56. Section 63 of the Local Government Act provides:

63—Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.

(2) Council members must observe the code of conduct.

57. Clause 3.3 of Part 3 of the Code establishes that council members must:

3.3 Not release or divulge information that the Council has ordered be kept confidential, or that the Council member should reasonably know is information that is confidential, including information that is considered by Council in confidence.

58. Clause 3.13 of Part 3 of the Code provides:

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

Whether Cr Lance Bagster divulged confidential information to the public at a meeting of the City of Burnside on 9 May 2017, thereby committing misconduct in public administration

59. In light of the minutes provided to my investigation, I am satisfied that the council's consideration of Cr Bagster's request for a leave of absence occurred during a confidential session of the council. The terms of council resolution C11167 – that the requested leave of absence be declined – were accordingly confidential at the time of the council's 9 May 2017 ordinary meeting.

60. It is plain from the recording supplied to my investigation that Cr Bagster disclosed the outcome of council resolution C11167 through his questions to Mayor Parkin.

61. Cr Bagster in his response to my investigation denied disclosing information the council had ordered be kept confidential, stating:

I do not believe that I knowingly (and to the best of my recollection I have not) breached a Confidentiality order of the Burnside Council.

62. Cr Bagster submitted that the fact that his request for leave was declined was 'self-evident because the leave did not appear in the appropriate Council Meeting agenda [...] where it would normally have appeared.'

63. I take Cr Bagster to be suggesting that the substance of resolution C11167 was capable of being inferred by a member of the public because the agenda to the 9 May 2017 meeting did not state that he had been granted a leave of absence covering that meeting.

64. I am not persuaded by this submission. Clause 3.3 of Part 3 of the Code prohibits an elected member from divulging 'information that the Council has ordered be kept confidential, [...] including information that is considered by the Council in confidence.' Council resolution C11167 was unambiguously considered and adopted by the council in confidence.

65. Cr Bagster's submissions in any case presuppose that a member of the public consulting the agenda to the 9 May 2017 ordinary meeting might have been aware that Cr Bagster's requested period of absence encompassed that meeting. This fact was not evident on the information available to the public; neither the public agenda nor the minutes to the 27 April 2017 meeting identified the period of leave requested by Cr Bagster.

66. Cr Bagster otherwise submitted that his questions without notice were put to Mayor Parkin:

not knowing (and having no reason to believe) that Council had (unprecedentedly) held the 'motion' for my leave in "Confidence". I was previously absent from Council and had not seen (nor expected to see) any associated confidentiality order applicable to a routine, trivial and ordinary application to Council for an Elected member's Leave of Absence.

67. This argument is not supported by the recording of the relevant exchange. Cr Bagster, when first attempting to discuss council resolution C11167, was explicitly made aware of the relevant confidentiality order. Notwithstanding this warning, Cr Bagster persisted with his question. He divulged the substance of council resolution C11167 and, in the face of Mayor Parkin's explicit invocation of the Code, he proceeded to repeat the question. Cr Bagster's conduct clearly cannot be attributed to mere inadvertence or confusion as to the status of the relevant resolution.
68. As an elected member of the council, Cr Bagster should in any case have made appropriate enquiries into the status of council resolution C11167 before divulging its substance to the public.
69. While the substance of council resolution C11167 may not have been particularly sensitive in the circumstances, I am nevertheless concerned by the obstinacy displayed by Cr Bagster in refusing to heed Mayor's Parkin's advice to desist from his line of questioning.
70. Cr Bagster in his response to my investigation sought to cast aspersions on the motives of Mayor Parkin in (he supposes) reporting this matter to the Office for Public Integrity. That is most unfortunate. Cr Bagster's response to my investigation displays a concerning lack of insight into his own behaviour.
71. On the information before me, I am satisfied that Cr Bagster, through his questions without notice during the council's 9 May 2017 ordinary meeting, divulged information that the council had ordered be kept confidential.
72. On this basis, I am satisfied that Cr Bagster by his conduct contravened clause 3.3 of Part 3 of the Code and, accordingly, committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
73. It follows that I consider Cr Bagster's conduct in divulging confidential information to the public was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

It is my final view that Cr Bagster committed misconduct in public administration by divulging confidential information to the public at a meeting of the City of Burnside on 9 May 2017.

It is also my final view that Cr Bagster's conduct in divulging confidential information to the public was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 14.3 at a meeting of the City of Burnside on 9 May 2017, thereby committing misconduct in public administration

74. Pursuant to section 73(1) of the Local Government Act, an elected member has a material conflict of interest in a matter to be discussed at a meeting if, *inter alia*, he or

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

75. With regard to the various alleged failures to comply with the conflict of interest provisions of the Local Government Act, Cr Bagster submitted:

To the very best of my belief, knowledge and understanding I had no material conflict of interest in [the] matters by the generally accepted definition of what constitutes a "material conflict of interest" in [the] matters. That is, in the matters before Council, when I made [the] declarations, the potential outcomes and decisions of the debate and resolutions were not supposed to be detrimental, adverse or disadvantageous to me. Though I declared that I could not be a disinterested person in [the] matters, I could not reasonably be said to have had any 'material' conflict of interest in the matters, taking into account the possible outcomes of the debate and decisions, dimension and significance of the matters being debated.

76. The relevant question, per section 73(1) of the Local Government Act, is whether Cr Bagster stood to gain a benefit or suffer a loss depending on the outcome of the council's consideration of Agenda Item 14.3.
77. Sections 73 and 74 of the Local Government Act both speak of an elected member's material conflict of interest in 'a matter to be discussed at a meeting of the council'.
78. Clayton DCJ in *Petrovski v Dolling*, in considering the operation of sections 73 and 74 of the Local Government Act under the previous conflict of interest regime, observed that the 'matter' in which an interest is said to arise 'must be linked to an actual or potential decision of the Council.'⁵ The question 'must be determined by a consideration of the terms of the resolutions' before the council.⁶
79. Council resolution C11181 wholly adopted the recommendations put to the council by the associated report of the Chief Executive Officer. The council, in accordance with these recommendations, resolved to:
- receive the Wallmans report
 - note the independent assessor's finding that Cr Bagster had breached clause 2.4 of Part 2 of the Code
 - note and adopt the recommendation of the independent assessor to take no further action with respect to that breach
 - revoke the confidentiality order over the council's prior consideration of the complaint.
80. Section 73(1) of the Local Government Act requires that I consider whether Cr Bagster *would* have gained a benefit or suffered a loss *depending on the outcome* of the consideration of the matter at the meeting.
81. In my view, this obliges me to consider both the *actual outcome* settled upon by the council in relation to the matter (which is known) and, given the resolution to be adopted by the council was by no means certain when the council commenced its consideration of the item, the reasonably foreseeable *potential outcomes* at this time.⁷
82. It is important, however, that I avoid speculating as to what might have flowed from a particular outcome in the absence of evidence supporting that conclusion.⁸

⁵ *Petrovski v Dolling* [2013] SADC 27 at [44].

⁶ *Ibid* at [34].

⁷ *Ibid* at [46] ('I accept the defendant's argument and find the complainant's particularisation of "the Fishermans Bay Development generally" does not adequately identify "the matter" because it does not draw a connection between "a matter before the council" and an actual or potential decision with respect to that matter.')

⁸ *Ibid* at [42].

83. It is appropriate that I have regard to the council's *Council Member Code of Conduct – Complaint Handling Procedure (the Complaint Procedure)*, which establishes the range of possible outcomes available to the council in receipt of a final investigation report into an elected member's breach of Part 2 of the Code.
84. Part 7 of the Complaint Procedure relevantly provides:

Council's Consideration of the Final Report

- 7.1 A breach of Part 2 of the Code must be the subject of a Final Investigation Report to a public meeting of the Council.
- 7.2 For the avoidance of doubt, when the Final Investigation Report is considered by the Council, the Subject Member (and, if applicable, the Complainant if the Complainant is a Council Member) will have a material conflict of interest in the matter pursuant to section 73 of the Local Government Act, 1999. Accordingly, the Subject Member and the Complainant must disclose the interest at the time the matter is to be discussed, leave the Chamber and not participate in the Council's consideration of the matter.
- 7.3 The role of the Council in relation to a Final Investigation Report is to consider imposing the recommended sanction (if any) where the Independent Assessor determines that there has been a breach of the Code (or where training or education could benefit the Subject Member) and makes a recommendation in their Final Investigation Report, which the Council can resolve to adopt in its entirety.
- 7.4 The Council is not obliged to adopt the Independent Assessor's recommendation(s) as set out in the Final Investigation Report. Where the Council does not adopt the Independent Assessor's recommendation(s), the Council must resolve not to adopt the recommendation and state in its resolution the reasons for its decision.
- 7.5 If, following investigation by the Independent Assessor, a breach of Part 2 of the Code is found. The Council may resolve within a specified time, pursuant to clause 2.24 of the Code, take any of the following actions:
- 7.5.1 take no action;
- 7.5.2 pass a censure motion in respect of the Subject Member;
- 7.5.3 request a public apology, whether written or verbal;
- 7.5.4 request the Subject Member to attend training on the specific topic found to have been breached;
- 7.5.5 resolve to remove or suspend the Subject Member from a position within the Council (which does not extend to the Subject Member's elected position on Council);
- 7.5.6 request the member to repay monies to the Council; and
- 7.5.7 refer the matter to the relevant Appropriate Authorities for further investigation and/or action.
- 7.6 If the Subject Member fails to comply with the sanctions imposed by the Council within a specified time, this will result in the Council elevating the issue to the Ombudsman under Part 3 of the Code.
- 7.7 The Council must not invite oral submissions from other persons for the purpose of seeking to rehear evidence previously considered by the Independent Assessor.
- 7.8 Prior to imposing a sanction (if any), the Council has the capacity to ask the Independent Assessor additional questions. The Council may, by resolution, request that the Independent Assessor make additional enquiries and/or provide additional information to it in the form of a Supplementary Report (**Supplementary Report**).
- 7.9 The Council may, by resolution, defer further consideration of the matter pending the receipt of a Supplementary Report from the Independent Assessor.

[...]

7.13 Where the Council passes a resolution of its final determination in connection with the Final Investigation Report and the sanctions (if any) that will be imposed, the Council must notify the Subject Member and the Complainant of its decision in writing in accordance with paragraph 6.7.4.

85. Clause 7.2 of the Complaint Procedure asserts that an elected member the subject of a final investigation report will have a material conflict of interest in the matter for the purposes of section 73 of the Local Government Act. This may be the council's position at the policy level; however it does not settle the matter for the purposes of my investigation.
86. It may be seen from the Complaint Procedure that the council, in possession of a final investigation report *must*:
- table the report at a public meeting of the council
 - consider imposing any sanction recommended by the independent assessor
 - set out reasons for declining to impose a sanction recommended by the independent assessor
 - formally notify the elected member and complainant of its decision.
87. The council *may*:
- resolve or decline to impose sanctions recommended by the independent assessor
 - independently resolve to take any of the actions identified in clause 2.25 of Part 2 of the Code, namely:
 - take no action
 - pass a censure motion with respect to the elected member
 - request a public apology
 - request the elected member to attend further training
 - resolve to remove or suspend the elected member from a position
 - request the elected member to repay monies to the council
 - refer the matter to another body for further investigation or action
 - put questions to the independent assessor
 - request that the independent assessor prepare a supplementary report
 - defer consideration of the matter pending receipt of a supplementary report.
88. Part 7.6 of the Complaint Procedure clarifies that an elected member's failure to comply with a sanction of the council may be referred to my Office under Part 3 of the Code.
89. It appears from the Complaint Procedure that the council lacks the discretion to substitute its own views for that of the independent assessor's on the question of the elected member's breach of Part 2 of the Code. That is, although the council may decline to impose sanctions recommended by the independent assessor, the question of whether an elected member has breached Part 2 of the Code is to be determined by the independent assessor alone.
90. It does not appear from the Complaint Procedure that there is any specific obligation upon the council to revoke a confidentiality order over the preliminary assessment of a complaint.
91. With regard to the question of what action was to be taken in response to Cr Bagster's breach of Part 2 of the Code, the council was ostensibly faced with three choices:
- adopt the recommendation of the independent assessor to take no further action with respect to the breach

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- decline to adopt the recommendation of the independent assessor and instead impose a sanction in accordance with clause 7.5 of the Complaint Procedure and clause 2.25 of Part 2 of the Code
 - request a supplementary report from the independent assessor and defer consideration of the matter pending receipt of that report.
92. This is not to suggest that these options were specifically put to the council by either the Wallmans Report or the report of the Chief Executive Officer accompanying Item 14.3. Rather, these were the options available to the council in receiving the Wallmans Report under the Complaint Procedure.
93. In my view, the first option clearly presented a direct personal benefit to Cr Bagster. In the event that the council determined to adopt the independent assessor's recommendation, Cr Bagster stood to avoid receiving a sanction in relation to his conduct.
94. The second option, if adopted, clearly would have presented a direct personal loss to Cr Bagster, insofar as it would have resulted in the imposition of a sanction upon him in accordance with the Complaint Procedure and Part 2 of the Code. It would have suggested that the council viewed Cr Bagster's conduct as being more serious than as assessed by the independent assessor. I consider that the imposition of a sanction would have been detrimental to Cr Bagster's reputation. The sanction itself would also have been detrimental to Cr Bagster in that it would cause him personal inconvenience or cost depending on its form.
95. For the reasons identified above, I am satisfied that Cr Bagster alternatively stood to gain a direct personal benefit or suffer a direct personal loss depending on the outcome of the matter.
96. It follows that I am satisfied that Cr Bagster had a material conflict of interest in the matter within the meaning of section 73(1) of the Local Government Act.
97. Section 74(1) of the Local Government Act requires an elected member with a material conflict of interest in a matter to be discussed at a meeting of the council to:
- inform the meeting of that material conflict of interest; and
 - absent approval of the Minister for Local Government, leave the meeting room 'such that the member cannot view or hear any discussion or voting at the meeting' and remain outside of the meeting room while the matter is being discussed and voted on.
98. On the evidence before me, I am satisfied that Cr Bagster did not declare his material conflict of interest in Agenda Item 14.3 or leave the meeting room as required. Although Cr Bagster declared 'an interest' in the matter, I do not consider this to satisfy the requirement to declare a *material conflict of interest* under section 74(1)(a) of the Local Government Act.
99. Consistent with my remarks earlier in this report, I am greatly concerned by Cr Bagster's determination to remain in the chamber in light of the specific advice provided to him by Mayor Parkin. I am even more concerned by Cr Bagster's subsequent conduct in pulling the item for debate, moving a motion and voting on the recommendation before the council.
100. In my view, Cr Bagster through his behaviour displayed a contumacious disregard for his obligation to remain, and be seen to remain, free from bias in the performance of his official functions.

101. I am satisfied that Cr Bagster failed to comply with the relevant conflict of interest provisions of the Local Government Act and, in doing so, contravened clause 3.13 of Part 3 of the Code. I am accordingly satisfied that Cr Bagster committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
102. It follows that I consider Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

It is my final view that Cr Bagster committed misconduct in public administration by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 14.3 at a meeting of the City of Burnside on 9 May 2017.

It is also my final view that Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 14.3 was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 18.1 at a meeting of the City of Burnside on 23 May 2017, thereby committing misconduct in public administration

103. Agenda Item 18.1 concerned the recommendation that the council's administration:
- provide a report together with a recommendation regarding the appropriateness and type of support that the Council could offer Cr Bagster and the CEO to assist with future relationship and communication improvements.
104. It must be observed that the proposal before the council did not require the council to determine whether the mooted support would ultimately be provided to Cr Bagster and the Chief Executive Officer; rather, the matter under consideration was whether to solicit a report and recommendation on the 'appropriateness and type' of support that *could* be provided by the council in the circumstances.
105. In my view, Cr Bagster did not stand to receive a benefit or suffer a loss depending on the outcome of Agenda Item 18.1. The effect of the resolution was to commission a report into the support that could be offered to Cr Bagster. It did not cause Cr Bagster to receive that support. Therefore, he did not have a 'material' conflict of interest with respect to this item.
106. It is appropriate that I consider whether Cr Bagster had an actual or perceived conflict of interest in Agenda Item 18.1.
107. I must first consider whether Cr Bagster had a 'conflict of interest' in the matter within the meaning of section 75(2) of the Local Government Act, which provides:
- (2) For the purposes of this Subdivision but subject to this section, a conflict of interest is a conflict between—
- (a) a member of a council's interests (whether direct or indirect personal or pecuniary); and
- (b) the public interest,

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

108. In my view, Cr Bagster had a clear personal interest in the outcome of the relevant motion. The motion directly concerned his personal affairs. I note that Cr Bagster declared an interest in the item.
109. In my view, there is a clear public interest in matters before a council being decided in a fair and unbiased manner and in the ultimate interests of ratepayers.
110. There is also a clear public interest in a council being able to perform its functions efficiently and in a manner that is not inhibited by internal dysfunction.
111. The question that arises is whether Cr Bagster's personal interest in this matter came into conflict with the public interest in a manner that had the potential to lead to a decision that was contrary to the public interest. That is, whether in the circumstances there was some variance or active disagreement between Cr Bagster's personal interest and the public interest.
112. It is evident from Cr Bagster's response to my investigation that, if nothing else, he has something of an acrimonious relationship with the council's Chief Executive Officer.
113. Correspondence forwarded to my Office by Cr Bagster suggests that he is also profoundly aggrieved by certain of the measures adopted by the council to manage this relationship.⁹ He has been prolific and emotive in voicing his displeasure with these arrangements. I understand that the nature and volume of Cr Bagster's communications with council administration concerning the issue has caused the council to seek intervention orders restraining Cr Bagster's interactions with certain council officers.¹⁰
114. I note that at least one report to the Office for Public Integrity alleged that Cr Bagster in voting against the various motions concerning the item intended to frustrate or delay the council's consideration of the matter.
115. I note that Cr Bagster was the only elected member to vote against the relevant resolutions. Cr Bagster's response to my investigation did not seek to explain the apparent variance in his views from those of the other elected members.
116. Cr Bagster's response to my investigation, coupled with the weight of the correspondence supplied to my Office, leads me to the inescapable conclusion that he is so personally invested in the outcome of his feud with the council's Chief Executive Officer that he is unlikely to be able to consider a matter before the council touching upon these issues in a fair and impartial manner.
117. In all the circumstances, I am satisfied to the *Briginshaw* standard that Cr Bagster's personal interest in the matter the subject of Agenda Item 18.1 came into conflict with the public interest in a manner capable of leading to a decision contrary to the latter.
118. It follows that I am satisfied that Cr Bagster had an actual conflict of interest in the matter forming the subject of Agenda Item 18.1.
119. Even if I am wrong in this assessment, on the weight of the evidence before me I am satisfied that Cr Bagster could reasonably have been taken, from the perspective of an impartial, fair-minded person, to have had a conflict of interest in the matter so as to

⁹ See, e.g., attachments to email dated 1 October 2017.

¹⁰ Burnside City Council, Media Release: 'Interim Intervention Orders Issued Against City of Burnside Councillor', 20 September 2017, available at <<https://www.burnside.sa.gov.au/Latest-News/Media-Releases/Interim-Intervention-Orders-Issued-Against-City-of-Burnside-Councillor>>, last accessed 3 October 2017; see also email dated 1 October 2017.

give rise to a perceived conflict of interest within the meaning of section 75A(1)(b) of the Local Government Act.

120. I am satisfied that Cr Bagster declared an interest in the matter as required by section 75A(2)(a) of the Local Government Act.
121. On the minutes concerning the meeting and the account of the proceedings supplied to the Office for Public Integrity, I do not consider Cr Bagster complied with his obligation, arising from his decision to participate in the meeting, to inform the council of how he intended to deal with his conflict of interest in accordance with section 75A(2)(b) of the Local Government Act.
122. Although mindful of the operation of section 75(5) of the Local Government Act, in the circumstances I consider it would have been most appropriate for Cr Bagster to leave the chamber for the duration of the council's consideration of the matter.
123. I am satisfied that in failing to comply with the relevant conflict of interest provisions of the Local Government Act (namely section 75(2)(b)), Cr Bagster contravened clause 3.13 of Part 3 of the Code. I am accordingly satisfied that Cr Bagster committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
124. It follows that I consider Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

It is my final view that Cr Bagster committed misconduct in public administration by failing to appropriately deal with an actual conflict of interest in Agenda Item 18.1 at a meeting of the City of Burnside on 23 May 2017.

It is also my final view that Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 18.1 was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 18.2 at a meeting of the City of Burnside on 23 May 2017, thereby committing misconduct in public administration

125. Agenda Item 18.2 ostensibly concerned the recommendation that the council engage a nominated HR Consultant:

to provide a separate but individual and personalised support service (of up to five sessions each) to Councillor Bagster and the Chief Executive Officer for the purpose of addressing relationship and communication improvements and, thereafter, to provide a recommendation to the Council regarding the future management of their relationship.
126. In my view, Cr Bagster unambiguously stood to receive a direct personal benefit, namely, up to five personalised support sessions from the nominated consultant, in the event the council adopted the relevant recommendation.
127. I do not consider it material to this assessment that Cr Bagster appears to have been opposed to the passage of the resolution in question (or, at least, the passage of a

resolution on the recommended terms). Section 73(1) of the Local Government Act requires an objective assessment of an elected member's potential to gain a benefit or suffer a loss based on the outcome of a matter before the council.

128. It follows that I am satisfied that Cr Bagster had a material conflict of interest in the matter within the meaning of section 73(1) of the Local Government Act.
129. On the evidence before me, I am satisfied that Cr Bagster did not declare his material conflict of interest in Agenda Item 18.2 or leave the meeting room as required. Although Cr Bagster declared 'an interest' in the matter, I do not consider this to satisfy the requirement to declare a *material conflict of interest* under section 74(1)(a) of the Local Government.
130. I note that Cr Bagster again appears to have disregarded the advice of his colleagues to declare a material conflict of interest and refrain from participating in the discussion concerning the matter.
131. I am satisfied that Cr Bagster failed to comply with the relevant conflict of interest provisions of the Local Government Act and, in doing so, contravened clause 3.13 of Part 3 of the Code. I am accordingly satisfied that Cr Bagster committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
132. It follows that I consider Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

It is my final view that Cr Bagster committed misconduct in public administration by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 18.2 at a meeting of the City of Burnside on 23 May 2017.

It is also my final view that Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 18.2 was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Whether Cr Lance Bagster failed to declare and appropriately deal with a conflict of interest in Agenda Item 18.5 at a meeting of the City of Burnside on 23 May 2017, thereby committing misconduct in public administration

133. Agenda Item 18.5 concerned the council's receipt and consideration of the Griffins report, arising from Cr Bagster's request for internal review of council resolution C11055, which, *inter alia*, imposed a 'communication protocol' on correspondence between Cr Bagster and the Chief Executive Officer. The resolution itself resulted from the council's consideration of a report prepared for the purposes of a complaint made by Cr Bagster against the council's Chief Executive Officer.
134. The substantive recommendation before the council was expressed in the following terms:
 1. That the [Griffins] Report be received.
 2. That Council note and adopt the recommendations of the report prepared by Griffins Lawyers and resolves to amend C11055 (as amended by C11112) to:

- 2.1 reflect its intentions regarding mediation as discussed by the Elected Members at the 28 February 2017 meeting by inserting new Part 7 as follows:

“The recommendation regarding mediation between the CEO and Councillor Bagster be deferred to enable further investigation and discussion to take place.”

- 2.2 amend Part 5 to read as follows:

“5. In relation to the work, health and safety issues raised by the report, the stated objectives of Councillor Bagster to fulfil his responsibilities is best served by the elimination of future direct correspondence between him and Council staff for a period of 12 months, to be achieved by:

5.1 Administration implement a system to direct all correspondence from Councillor Bagster to Administration, to the Executive group, and to Councillor Bagster from Administration, via the Executive group.

5.2 An appropriate Management Protocol is developed to ensure that Councillor Bagster is not unreasonably disadvantaged and is able to fulfil his responsibilities as an Elected Member; and

5.3 That the GM, Corporate Services provide a report to Council of any concerns with the ongoing implementation of this procedure should he consider it necessary.”

3. That within 48 hours, the General Manager, Corporate Services advise Councillor Bagster in writing of Council’s decision regarding his s270 internal review, as enunciated in this resolution.

135. Among other things, the recommendation before the council, if passed, would have served to revoke the instruction then in place preventing the Chief Executive Officer from corresponding directly with Cr Bagster. I note that it appears from the minutes of the 23 May 2017 meeting that the council ultimately determined to modify, rather than revoke, this instruction.
136. The recommendation also proposed to extend the application of the ‘communication protocol’ then in place so as to direct that all correspondence *to* Cr Bagster from the council’s administration be communicated via the council’s Executive group. The recommendation further proposed to amend the object of the communication protocol from the ‘elimination of future direct correspondence between [Cr Bagster and the Chief Executive Officer]’ to the ‘elimination of future direct correspondence between [Cr Bagster] and *Council staff*’ (emphasis added).
137. In considering the potential outcomes of the council’s consideration of the matter, I have had regard to the council’s *Internal Review of Council Decisions (Section 270) Procedures (the Internal Review Procedures)*, clause 10.4 and 10.5 of which provide:
- 10.4 The CEO or delegate may determine that it is appropriate to request an independent person or organisation or a review panel formed for the purpose of reviewing the application (which may, for example, comprise of Council staff and/or one or more Elected Members of Council or external consultants) to review the application and prepare a report and recommendation(s) in relation to the application to assist in the consideration, reconsideration or further consideration of the decision under review by the CEO or delegate or by the Council.
- 10.5 The CEO or delegate may reconsider a decision under review or the application for review may be referred by the CEO or delegate to:
- 10.5.1 the relevant General Manager to reconsider a decision under review; or
- 10.5.2 a senior Council officer independent of the original decision to reconsider a decision under review; or
- 10.5.3 the Council itself for consideration or further consideration.

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138. It appears from clauses 10.4 and 10.5 that the council (represented by the Chief Executive Officer, delegate or the elected members, as the case may be) has ultimate responsibility for determining an application for internal review. The preparation of a report by an external consultant may, however, 'assist in the consideration, reconsideration or further consideration' of the impugned decision 'by the CEO or delegate or by the Council.'
139. It follows that the council in considering Agenda Item 18.5 retained the discretion, *inter alia*, to dismiss or uphold, whether wholly or in part, Cr Bagster's application for internal review. The council also retained the discretion to revoke, modify or confirm the operation of council resolution C11055 as it saw fit.
140. It is plain from the correspondence forwarded to my Office that Cr Bagster is fiercely opposed to the communication protocol imposed by council resolution C11055. In documents supplied to my Office, he has described the protocol as being intended to 'punish' him and as an attempt to 'unlawfully supercede [sic] [his] statutory obligations as an elected member'.
141. Cr Bagster's present position appears broadly consistent with the basis for his request for internal review, as summarised in the report accompanying Agenda Item 18.5:
13. The basis of Cr Bagster's Application can, broadly, be described as:
 - 13.1 the resolution is "*unjust, unfair and inappropriate*";
 - 13.2 the resolution "*punished*" him;
 - 13.3 the resolution disadvantages him and prevents him from undertaking his role and responsibilities as an Elected Member; and
 - 13.4 the "*confidential apology*" set out under paragraph 3 of the resolution is inappropriate and insufficient in the circumstances of this matter.
142. Although relevant to whether Cr Bagster had an actual or perceived conflict of interest, I do not consider Cr Bagster's personal views, as summarised above, to be a relevant consideration when assessing whether he had a material conflict of interest in the matter.
143. Consistent with the views expressed earlier in this report, the question of whether an elected member has a material conflict of interest in a matter before a council requires an objective assessment of the potential for that council member to gain a benefit or suffer a loss as a result of the relevant discussion.
144. At the time, it was open to the council to resolve to uphold Cr Bagster's request for internal review and revoke the communication protocol either in its entirety or insofar as it pertained to his correspondence.
145. In my view, such an outcome would have constituted a direct personal benefit to Cr Bagster. The communication protocol, whether justifiably imposed or not, plainly imposed restrictions upon Cr Bagster's ability to directly communicate with the Chief Executive Officer and other council staff. It is not necessary for one to accept the assertion that the protocol operated to punish Cr Bagster to be satisfied that its revocation was in his direct personal interests.
146. Consistent with this view, I consider the resolution adopted by the council caused Cr Bagster to suffer a direct personal loss. Cr Bagster had requested, *inter alia*, that the council revoke a decision that operated to impose restrictions upon his behaviour. The resolution adopted by the council amounted to a refusal to uphold that request.

147. In the circumstances, I am satisfied that Cr Bagster alternatively stood to gain a direct personal benefit or suffer a direct personal loss depending on the outcome of the council's consideration of the matter.
148. It follows that I am satisfied that Cr Bagster had a material conflict of interest in the matter within the meaning of section 73(1) of the Local Government Act.
149. On the evidence before me, I am satisfied that Cr Bagster did not declare his material conflict of interest in Agenda Item 18.2 or leave the meeting room as required. Although Cr Bagster declared 'an interest' in the matter, I do not consider this to satisfy the requirement to declare a *material conflict of interest* under section 74(1)(a) of the Local Government Act.
150. I also note that Cr Bagster failed to immediately leave the chamber as required by section 74(1)(b) of the Local Government Act.
151. I am satisfied that Cr Bagster failed to comply with the relevant conflict of interest provisions of the Local Government Act and, in doing so, contravened clause 3.13 of Part 3 of the Code. I am accordingly satisfied that Cr Bagster committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
152. It follows that I consider Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

It is my final view that Cr Bagster committed misconduct in public administration by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 18.5 at a meeting of the City of Burnside on 23 May 2017.

It is also my final view that Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 18.5 was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Summary and recommendations

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

1. Cr Bagster committed misconduct in public administration by divulging confidential information to the public at a meeting of the City of Burnside on 9 May 2017.
2. Cr Bagster's conduct in divulging confidential information to the public was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.
3. Cr Bagster committed misconduct in public administration by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 14.3 at a meeting of the City of Burnside on 9 May 2017.
4. Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 14.3 was contrary to section

63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

5. Cr Bagster committed misconduct in public administration by failing to appropriately deal with an actual conflict of interest in Agenda Item 18.1 at a meeting of the City of Burnside on 23 May 2017.
6. Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 18.1 was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.
7. Cr Bagster committed misconduct in public administration by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 18.2 at a meeting of the City of Burnside on 23 May 2017.
8. Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 18.2 was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.
9. Cr Bagster committed misconduct in public administration by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 18.5 at a meeting of the City of Burnside on 23 May 2017.
10. Cr Bagster's conduct in failing to comply with the relevant conflict of interest provisions of the Local Government Act in relation to Agenda Item 18.5 was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

To remedy these errors, I make the following recommendations under section 25(2) of the Ombudsman Act and in accordance with section 263B(1) of the Local Government Act:

1. That the council, by means of a public statement, reprimand Cr Bagster for each breach of the Code.
2. That the council require Cr Bagster to issue an unqualified public apology for each breach of the Code.

Conscious of the intervention orders to which Cr Bagster is presently subject, I leave it for the council to determine the manner and form in which Cr Bagster is to apologise in accordance with my recommendation.

Final comment

Over the course of the events described in this report, Cr Bagster has consistently refused to heed the advice of his colleagues and desist from inappropriately involving himself in matters in which he has had a direct personal interest.

In my view, Cr Bagster's conduct evidences a wilful and contumacious disregard for his obligations as a public officer and elected member of the council.

Cr Bagster in responding to my investigation and through his response to my provisional report has similarly demonstrated a concerning lack of insight into his behaviour. I am not satisfied that Cr Bagster is likely to refrain from further similar conduct.

While I do not formally recommend as such, I note that section 264 of the Local Government Act empowers the council to lodge a complaint in the District Court concerning an elected member's alleged breach of the Code following an investigation by my Office.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as those above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the District Court.

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

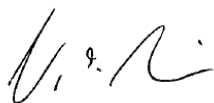
In accordance with Part 3 of the Code, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, the council should report to me by **21 February 2018** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions to implement the recommendations

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

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

21 November 2017