

Redacted Final Report

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

Public Authority	City of Marion (the council)
Public Officer	Mr Adrian Skull
Ombudsman reference	2016/06290
ICAC reference	2016/0000692
Date of referral	5 August 2016
Issues	<ol style="list-style-type: none">1. Whether Mr Adrian Skull breached the Code of Conduct for Council Employees by improperly influencing staff to waive an expiation notice issued to [a council resident] and thereby committed misconduct in public administration2. Whether the council took into account irrelevant considerations in withdrawing [a council resident's] expiation notice and on that basis an administrative error occurred

Jurisdiction

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

The referral arose out of a report to the Office for Public Integrity. The identity of the reporter is unknown.

The referral gives rise to the first issue. However, section 14B of the *Ombudsman Act 1972 (SA)* states that an investigation, once referred, is to be considered as though it is an Ombudsman investigation. Therefore I have considered an additional second issue pursuant to section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking and receiving a response from the council's Chief Executive Officer (CEO) Mr Adrian Skull, Unit Manager Community Health and Safety Ms Sharon Perin, Councillor Jason Veliskou and [a council resident]
- considering the Code of Conduct for Council Employees (**the Code**)

- considering the *Expiation of Offences Act 1996* (SA) (**the EO Act**), the *Local Government Act 1999* (SA) and the council's Reviewing and Withdrawing an Expiation Notice Procedure (**the Procedure**)
- providing Mr Skull, Ms Perin and Cr Veliskou with my provisional report for comment, and considering their responses
- 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

Mr Skull responded to my provisional report by letter dated 8 July 2017. Mr Skull continues to deny all allegations. Mr Skull made the following comments:

- whilst he was sympathetic to [a council resident's] plight he did not make an assessment of the request but asked Ms Perin to consider it, which did not evidence misconduct
- he would never try to influence a staff member to make a decision
- the Procedure envisages that the council will assist applicants and that is what Mr Skull considers that he was doing by ensuring that [a council resident's] request was directed to the correct person at the council
- Cr Veliskou exceeded expectations of an elected member by visiting [a council resident] at home and preparing a letter on his behalf
- he is of the belief that Council was not obliged to receive statutory declarations in support of applications for withdrawal of expiation notices unless there were claims another offender was involved (clauses 4.1 and 4.2 of the Procedure) and supported by section 8A(3) of the EO Act. The council's website states that a '*Review of Decision Application Form and Statutory Declaration or Change of Driver Form*' must be completed in support of appeals against expiation notice but this is not a requirement of the Procedure
- the council recently undertook a service review on Parking Management and Regulation and did not uncover any issues with the council's processes when reviewing requests and waiving expiations
- the provisional recommendations are sensible and will help prevent a similar investigation in the future and therefore will be implemented immediately without waiting for a final report
- the council will issue an instruction to all staff reminding them that all requests for withdrawal of expiation notices should be sent by the applicant to the Community Participation Unit (CPU) in the first instance.

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.

Ms Perin responded by letter dated 9 July 2017 and made the following comments:

- whilst the council's website states that applicants who wish to appeal expiation notices must complete the '*Review of Decision Application Form and Statutory Declaration or Change of Driver Form*' it is not used extensively and CPU accepts requests by email or letter alone
- the CPU therefore needs to review its website annually to ensure that it reflects the council's practice
- [a council resident's] expiation notice was withdrawn as it complied with sections 8A and 4(2)(a) of the EO Act and, in her view, the offence was trifling because there were compelling humanitarian reasons for the conduct
- Ms Perin did not previously detail which sections of the EO Act she relied upon in waiving [a council resident's] expiation notice because she was not asked to
- Ms Perin understood Mr Skull's request 'Can we waive this?' was a request for her attention and decision and was not an attempt to determine the matter in a particular way
- the fact that Ms Perin reached her decision in 42 minutes is no indication that she was told how to determine the matter, and she has made decisions in shorter and longer periods of time
- changes will be made to the council's process for processing applications for review of expiation notices including that decision makers must clearly stipulate on databases which section of the EO Act applies, and changes to the website will be made so that it is reflective of the current lodgement process for applications of review of expiation notices.

Cr Veliskou responded by email on 14 July 2017 and stated that he reiterated all previous submissions and that he had no further comment to make.

I acknowledge the changes that the council intends on making prior to this final report and note the following:

- Neither the EO Act nor the Procedure requires applicants for review of expiation notices to submit a statutory declaration form. Section 8A(3) of the EO Act states that an issuing authority 'may require information contained in, or supporting, an application for review to be verified by statutory declaration.' The Procedure requires the reviewing officer to 'consider whether more information or a Statutory Declaration would be of assistance in the circumstances'. The council website currently states that the council requires a Statutory Declaration to be completed along with a Review of Decision Application Form, which is incorrect because the council accepts applications for review without either the form or declaration. I therefore agree with Ms Perin that the council's website ought to be changed in this regard but do not intend on making a formal recommendation as the council already has this change in motion.
- Ms Perin stated that she was not improperly influenced by Mr Skull because she came to her own view that [a council resident's] expiation notice ought to be withdrawn. Whilst it was previously unknown to my Office upon what grounds Ms Perin considered [a council resident's] expiation notice ought to be withdrawn, Ms Perin came to the same view as Mr Skull, that [a council resident's] circumstances constituted compelling humanitarian reasons. I have previously explained why I do not consider this ground relevant in these circumstances. My view in relation to Mr Skull influencing Ms Perin with his request remains unchanged because I consider the words '*Can we please waive this fine? I think there is a compelling case for consideration of this?*' as being instructive from Mr Skull to Ms Perin.
- Whilst Ms Perin was not asked by my Officer what sections of the EO Act she relied upon, she was asked upon what compelling reasons she considered the expiation notice ought to be withdrawn. My view remains unchanged that Mr Skull, whilst possibly inadvertently, did influence Ms Perin in her decision to withdraw the expiation notice.

Background

1. On 30 March 2016 [a council resident] was issued a \$253 expiation notice for parking in a bicycle lane on [address redacted] at Ascot Park.
2. [a council resident] is a member of the council's Neighbourhood Watch Committee (NWC). Councillor Jason Veliskou is the ward councillor for Glengowrie and also a member of the NWC.
3. The council's CEO, Mr Adrian Skull, accepted an offer from the NWC to address its 6 April 2016 meeting and did so. After giving a speech and answering questions from the NWC members, Mr Skull left the meeting. [a council resident] told Cr Veliskou (who was at the meeting) about the expiation notice he had received and that he considered it unjust. Cr Veliskou asked [a council resident] if he could put his concerns in an email. [a council resident] stated that he did not use email.
4. On 18 April 2016 an email from Cr Veliskou to Mr Skull attached an undated letter purporting to be from [a council resident] asking for the expiation notice to be waived as follows:

Dear Adrian

I have attached a request by a resident for a fine to be waived due to the circumstances in the attached letter.

Happy to provide more information if required.

It is due for payment the 30 April.

Kind regards

Jason.

5. The attached letter read:

Dear Mr Skull

Thank you for coming to our neighbourhood watch meeting earlier this month. I wanted to bring this matter up with you after the meeting but you were not able to stay.

On the 30th of March 2016 (Wednesday) I was dropping off some bulky goods to a friend of mine who lives at [address redacted].

He has a spinal injury which has now degenerated meaning he is unable to walk and gets around by gopher.

I arrived at his house at around 5:10pm and had planned to park in his driveway, as close as possible to his house to drop off the items.

But upon getting there(sic) was a tradesman's van parked in his driveway as he was getting his kitchen benches and sinks etc. adjusted (lowered) so he could use it sitting down.

So I parked outside his place on the street as close as possible as I had bulky goods to take inside.

Around 15 minutes later I came out and saw the expiation sticker on my car. I had unknowingly parked in a bike lane.

I have worked as a courier for the last 10 years before retiring aged 76 in February this year; I am very careful where I park. I did not see any signs, nor was I aware this was a restricted parking area. If I knew this I would have come back another time if there was no off-street parking.

As I am no longer working, a fine of \$253 is a lot for someone on a low single income. Under the circumstances I would like to ask if this fine can be waived.

I am not someone who would knowingly park in a restricted area and this is a huge penalty to get for giving up my time to help out a friend.
I have attached a photo of the expiation notice below and hope you are able to assist.

Yours sincerely

[a council resident].

6. Mr Skull recalled receiving the email but he did not respond to it immediately. Cr Veliskou rang Mr Skull on 27 April 2016 to enquire whether Mr Skull had seen the email. Mr Skull then asked his Executive Assistant to find the email and forward it to himself so he could consider his response.
7. At 1:34pm on 27 April 2016 Mr Skull forwarded Cr Veliskou's email to Ms Sharon Perin, the Unit Manager Community Health and Safety. Ms Perin's role in the Community Participation Unit (CPU) is, amongst other tasks, to review applications for withdrawal of expiation notices. Mr Skull stated that he 'forwarded the request for the expiation to be waived to her in her capacity as Reviewing Officer.' Mr Skull's email stated:

Sharon

Could we please waive this fine? I think there is a compelling case for consideration of this?

Thanks

Adrian.

8. At 2:16pm on 27 April 2016 Ms Perin replied:

Hello Adrian

thank(sic) you for forwarding the information.

Yes, this expiation can be waived under the circumstances.

I have just spoken with [a council resident] and advised him that the expiation will be waived and he is not required to make any payment and that he will receive a letter confirming this. [a council resident] was very appreciative of the circumstances being considered and for the expiation being waived.

9. The referral alleges that Mr Skull exerted improper influence on Ms Perin's decision to waive the expiation notice to [a council resident].
10. On 13 October 2016 I wrote to Mr Skull and Ms Perin informing them of the referral and investigation, and asked them each for further information.
11. Mr Skull replied by email on 24 October 2016. Mr Skull denied the allegation and stated that:
 - he has never met [a council resident] and is not a member of the NWC
 - he was invited to speak at the NWC by its coordinator Ms Kelly Van Ruth on 22 March 2016, for 6 April 2016

- he did not speak personally with any attendee and departed prior to the meeting finishing
 - on 18 April 2016 he received an email from Cr Veliskou on behalf of [a council resident]. The email contained a letter from [a council resident] addressed to Mr Skull and photographs of his expiation notice and the address where he incurred the fine
 - he did not respond to Cr Veliskou's email
 - he forwarded Cr Veliskou's email to Ms Perin on 27 April 2016 'for her consideration'
 - he did not believe he coerced Ms Perin into waiving the expiation nor was pre-determinative in his response as he was only asking her consideration of it
 - he would have accepted Ms Perin's professional judgment even if she did not agree to withdraw the expiation notice
 - having looked at [a council resident's] request he was of the opinion that [a council resident] had strong grounds for having the notice withdrawn in accordance with the EOA and the Procedure because of his age (75 years), he was assisting a disabled neighbor, the amount of the fine (\$253) for a pensioner and that he may not have seen the no parking signs
 - he did not have any conversations with Ms Perin in relation to the notice.
12. Ms Perin replied to my investigation by email on 28 October 2016 and stated:
- people lodge requests for an expiation notice to be waived in many different ways including in person, emailing documentation, approaching their elected member
 - the Procedure adopted by the council is the one recommended by the Local Government Association
 - she did not consider Mr Skull's email of 27 April 2016 to be an instruction to withdraw [a council resident's] expiation notice but 'took it to be a question of whether the fine (expiation) could be waived'. Ms Perin stated:
- I considered the information that [a council residents] had provided in his letter, including he was transporting bulky goods, he had intended to park in the driveway of the nearby property but the driveway was blocked by another vehicle, he attempted to park as closely as possible to the property as he was delivering bulky goods, his age with regard to delivering the bulky goods, he was not aware that the road had bicycle lane restrictions. I also understand that Mr Skull considered there were compelling reasons to be considered, by his questioning that he felt there may be compelling reasons, which I understood from his email. I would like to confirm again that I did not feel that Mr Skull was directing me, but rather he wanted the circumstances of [a council resident's] situation at the time [a council resident] parked in the location to be considered.
- she received emails from Mr Skull from time to time in relation to anything to do with her role including expiation notices
 - the council is not obliged to receive statutory declarations in support of applications for withdrawal of expiation notices under the Procedure or the EOA but it can request them.
13. On 27 March 2017 I wrote to Cr Veliskou and [a council resident] and informed them of my investigation and asked for further information.
14. On 4 May 2017 my Officer spoke with [a council resident] about my investigation. [a council resident] stated that:
- he had known Cr Veliskou for several years as they are both members of NWC which meets fortnightly
 - he did not know Mr Skull and only met him once when he came to speak at NWC on 6 April 2017

-
- he received an expiation notice which he thought unjust and so waited until the next NWC meeting to discuss it with Cr Veliskou as it was 'like giving it to the council'
 - Cr Veliskou asked [a council resident] if he could put his concerns in an email
 - [a council resident] informed Cr Veliskou that he does not use email
 - Cr Veliskou offered to take the request for withdrawal of the expiation notice to the council
 - [a council resident] then received a letter from Sharon Perin 7-10 days later informing him that the expiation notice had been withdrawn
 - he did not write a letter to Mr Skull.
 - he queried what a CEO would have to do with a parking infringement notice
 - having been informed of the letter by my Officer [a council resident] assumed Cr Veliskou wrote and sent the letter on his behalf.
15. On 31 May 2017 Cr Veliskou replied in writing to my enquiries. Cr Veliskou stated that he:
- had known [a council resident] for several years from NWC
 - did not usually receive requests for assistance in relation to expiation notices
 - was approached by [a council resident] after the NWC on 6 April 2016. [a council resident] had wanted to approach Mr Skull after he appeared as guest speaker, but Mr Skull had left
 - was told by [a council resident] about the expiation notice and Cr Veliskou made a note in his phone about the circumstances of the fine and [a council resident's] phone number
 - telephoned Mr Skull on 7 April 2016 and thanked him for his attendance at the NWC and raised the issue of [a council resident's] expiation notice and the circumstances of the fine
 - was advised by Mr Skull in the telephone call on 7 April 2016 that Cr Veliskou could either send the letter and the copy of the fine to Mr Skull directly, or to Mr Skull copying in Ms Perin or vice versa
 - then rang [a council resident] on 8 April 2016 and advised [a council resident] that [a council resident] should write a letter that Cr Veliskou 'could pass onto Mr Skull so the appropriate person can consider the matter'; [a council resident] told Cr Veliskou that he did not have access to a computer or email and not much recent experience writing letters
 - offered to assist [a council resident] to compose and write the letter and organised a time on the evening of the 18 April 2016
 - attended [a council resident's] house on the evening of 18 April 2016 and made a rough draft of a letter and took a photo of the expiation notice
 - returned home and typed a final draft of the letter and called [a council resident] (at 9:37pm) to read it out to confirm its accuracy
 - emailed the letter on 18 April 2016 to Mr Skull at 9:50pm and recalled dropping a physical copy in [a council resident's] letter box
 - phoned Mr Skull on 27 April 2016 about the progress of [a council resident's] request for the withdrawal and Mr Skull confirmed that he had forgotten to forward the request
 - was copied into the email that Mr Skull sent to Ms Perin and informed her of [a council resident's] application for withdrawal of an expiation notice
 - then received Ms Perin's response via email, and a telephone call from Ms Perin that informed Cr Veliskou of the outcome
 - emailed both Ms Perin and Mr Skull on 27 April 2016 at 2:34pm thanking them for 'considering this matter and waiving the fine under the circumstance'
 - sent [a council resident's] application for waiver of the expiation notice to Mr Skull directly because Mr Skull asked him to because 'as the CEO he is delegated to

- approve waivers on expiations, and I think he said if it was sent to Ms Perin it would still come to him for approval anyway.’
- knew from his conversation with Mr Skull that Ms Perin would receive a copy of the request in any event therefore Cr Veliskou did not copy her into his original email to Mr Skull on 18 April 2016
 - was not aware of council requirements to submit ‘Review of Decision Application Form and Statutory Declaration’ forms and would have assisted [a council resident] with the paperwork if he was aware of the requirement
 - did not get the impression that [a council resident] and Mr Skull knew each other
 - considered that there were compelling reasons for the expiation notice to be withdrawn because of [a council resident’s] good character, age, unavailability of off-street parking, and the cost of the fine
 - did not consider 42 minutes an unusual amount of time for an expiation notice to be withdrawn because it depended on the situation and context
 - spoke with [a council resident] on 4 May 2016 at the following NWC meeting where [a council resident’s] advised him that Ms Perin rang him and told him his application was successful
 - was approached by another resident at around the same time about an expiation notice and Cr Veliskou made enquiries with Ms Perin directly however the facts in that situation meant that there were no grounds for appeal of the expiation notice; Cr Veliskou considered that [a council resident’s] case qualified as extenuating circumstances
 - obtained statistics from Ms Perin that during the 2015/2016 financial year the council received 624 requests to waive expiation notices and of these, 594 related to parking offences. 215 expiations were waived, 290 were not waived, and for the remaining 120 notices the information was not available yet.
16. The Council’s website has a webpage ‘Appeals against Fines (Expiation Notices)’ which states that appeals against expiation notices must be in writing and that a ‘Review of Decision Application Form and Statutory Declaration’ or ‘Change of Driver Form’ must be completed. The forms are available from the council or downloaded by a link. Appeals can be submitted in person at the Customer Service Centre, by email or mail to the council.

Relevant law/policies/procedures

17. 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.
18. Section 109(1) of the Local Government Act provides:
- 109-General duty
- (1) An employee of a council must at all times act honestly in the performance of official duties.
 - (2) An employee of a council must at all times act with reasonable care and diligence in the performance of official duties

19. The EO Act provides:

4-Interpretation

- (2) an alleged offence will, for the purposes of this Act, be regarded as trifling if, and only if, the circumstances surrounding the commission of the offence were such that the alleged offender ought to be excused from being given an expiation notice on the ground that -
- (a) there were compelling humanitarian or safety reasons for the conduct that allegedly constituted the offence; or
 - (b) the alleged offender could not, in all the circumstances, reasonably have averted committing the offence; or
 - (c) the conduct allegedly constituting the offence was merely a technical, trivial or petty instance of a breach of the relevant enactment.

8A-Review of notices on ground that offence is trifling

- (1) A person who has been given an expiation notice issued after the commencement of this section may apply to the issuing authority for a review of the notice on the ground that an offence to which the notice relates is trifling.
- (2) The issuing authority is not obliged to conduct an enquiry on the application but may require the applicant to provide further information.
- (3) An issuing authority may require information contained in, or supporting, an application for review to be verified by statutory declaration.
- (4)-(7) ...

16-Withdrawal of Expiation notices

- (1) The issuing authority may withdraw an expiation with respect to all or any of the alleged offences to which the notice relates if -
 - (a) the authority is of the opinion that the alleged offender did not commit the offence, or offences, or that the notice should not have been given with respect to the offence, or offences; or
 - (ab) the authority receives a statutory declaration or other document sent to the authority by the alleged offender in accordance with a notice required by law to accompany the expiation notice or expiation reminder notice; or
 - (ac) the notice is defective; or
 - (b) the authority decides that the alleged offender should be prosecuted for the offence, or offences.

20. Section 25(1) of the Ombudsman Act sets out:

25(1) This section applies to any investigation conducted by the Ombudsman as a result of which the Ombudsman is of the opinion that the administrative act to which the investigation relates -

- (a)- (c)

- (c) was done in the exercise of a power or discretion and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations

(e)-(g).

21. The council utilises the Local Government Association's 'Reviewing and Withdrawing an Expiation Notice Procedure' (**the Procedure**):

4 Procedure

4.1 **Request for a review of withdrawal of the notice**

Any person in receipt of an expiation notice is entitled to apply for a review of the decision to issue the notice, which may lead to the withdrawal of the notice. The EO Act provides a range of grounds which allow for the withdrawal of expiation notices. The request should be provided in writing, either by letter, email or Council form. If appropriate, offer assistance to complete the written request

- 4.1.1 Ensure that the request is lodged and forwarded to Council's reviewing officer. Where possible ensure that this person has not been involved with previous decision making on this matter.

- 4.1.2 The decision to withdraw an expiation notice is a legal decision made under the EO Act. A review of the decision to issue a notice should be undertaken formally and in compliance with that Act, after considering the relevant circumstances. 'Informal' decision to withdraw an expiation notices, that is decision made without undertaking all relevant procedural steps, should be avoided.

4.2 Commence the review

Commence the process by considering whether the application for review or withdrawal of the notice falls within any of the grounds under either section 8A or section 16(1) of the EO Act. If no grounds have been specified by the applicant, consider all the grounds available under the EO Act and whether the circumstances of the application fit one or more of the grounds.

Those grounds are that:

- the offence is trifling (see section 8A);
- the person did not commit the offence (see section 16(1)(a));
- the notice should not have been given in respect of the offence (see section 16(1)(a));
- a statutory declaration is received naming another offender (see section 16(1)(ab));
- the expiation notice is defective (see section 16(1)(ac)); or
- the council has decided that the alleged offender should be prosecuted (see section 16(1)(b)).

- 4.2.1 Read the information provided with the request with review and any notes from the issuing officer. While there is no obligation on a review officer to seek further information, if necessary consider whether more information or a Statutory Declaration would be of assistance in the circumstances.

Interview the issuing officer in order to understand how the initiation decision to issue the expiation notice was made. Advise the officer of any claims made in the request for review and seek his/her comments.

4.2.2 The following factors (which are not exclusive) may be relevant to consider, depending on the nature of the alleged offence. These factors mirror those which the issuing officer should have considered when forming the decision to issue an expiation notice in the first instance.

- Has an offence been committed?
- Is the offence expiable?
- If an offence has been committed, is it 'trifling' within the meaning of the Act (see definition above)?
- Has there been an appropriate investigation of the case?
- Is the evidence collected sufficient to support the issuing of the expiation notice?
- Has the available evidence been fully analysed?
- Are any material inconsistencies in the available evidence reasonably explicable?
- Should the alleged offender be interviewed?
- Has the alleged offender made any admissions?
- Has consideration been given to the need to seek professional or other advice that might bear on the case?
- Has consideration been given to the above factors, both separately and together, by the person issuing the expiation notice?

Further factors to consider may also include the following.

- Does council's enforcement policy support this form of enforcement in these circumstances?
- Has an identifiable person or organisation committed the offence?
- How serious is the offence [ie would it be more appropriate to issue a warning, or conversely, move directly to prosecution]?
- What degree of intention was involved in committing the offence?
- What is the past history of offending of the person involved (if known)?
- What is the likely effectiveness of this or other enforcement options?
- Are there any other factors that should be taken into account in the particular circumstances?

22. The Code of Conduct for Council Employees relevantly provides that an employee must:

- 2.2 Act with reasonable care and diligence in the performance of official duties, as required by s109(2) of the *Local Government Act*.
- 2.4 Act in a way that generates community trust and confidence in the Council.
- 2.6 Ensure that personal interests, including financial interests, do not influence or interfere with the performance of their role.
- 2.7 Comply with all relevant Council policies, codes and resolutions of which they have been made aware, relevant to their particular role.
- 2.26 Chief Executive Officers must act in accordance with the provisions specific to their position within the *Local Government Act 1999* at all times.

Whether Mr Skull breached the Code by improperly influencing staff to waive an expiation notice issued to [a council resident]

23. The referral alleged that Mr Skull improperly influenced Ms Perin to waive an expiation notice issued to [a council resident].

24. Mr Skull's actions were that he:

- told Cr Veliskou to forward [a council resident's] application for withdrawal of expiation notice to himself (despite the CPU being the decision maker on these types of applications)
- forgot to forward the application to Ms Perin until 27 April 2016 (after receiving the application from Cr Veliskou on behalf of [a council resident] on 18 April 2016)
- forwarded the application with the words '*Could we please waive this fine? I think there is a compelling case for consideration of this?*
- received an email back from Ms Perin 42 minutes later stating '*Yes, this expiation can be waived under the circumstances*' and that [a council resident] had already been informed of the waiver by telephone call.

Relationship between Mr Skull, Ms Perin and [a council resident]

25. Based on the information provided to me, I am satisfied that there was no pre-existing friendship between Mr Skull, Ms Perin and [a council resident] such that it would assert an improper influence to effect a waiver of [a council resident's] fine.
26. Cr Veliskou by his own admission was an acquaintance of [a council resident] by virtue of the NWC and provided assistance to [a council resident] by writing a letter to apply for the withdrawal of the expiation notice. I have obtained no evidence however, that suggests a friendship outside of this acquaintance.

Letter from [a council resident] to Mr Skull

27. The letter emailed on 18 April 2016 from Cr Veliskou to Mr Skull applying for a withdrawal of the expiation notice purported to come from [a council resident]. I am satisfied however, based on the responses from Cr Veliskou and [a council resident], that the letter was written by Cr Veliskou and not by [a council resident].
28. Based on the responses from Ms Perin and Mr Skull, I consider that neither knew that the letter from [a council resident] was not written by [a council resident], but by Cr Veliskou.
29. I appreciate elected members or council staffs from time to time are required to assist members of the community with paperwork, or to complete an application form. My concern with this letter is that it purports to come from [a council resident] even insofar as to impersonate [a council resident]. While that issue is outside of the scope of the referral, I intend to raise it separately with Cr Veliskou.

Application for Withdrawal of Expiation notice

30. The council's website directs applicants to complete the 'Review of Decision Application Form and Statutory Declaration'. Neither form was completed in relation to [a council resident's] expiation notice, nor did Mr Skull, Ms Perin or Cr Veliskou direct [a council resident] to complete the forms.
31. Of further concern was that [a council resident's] letter did not follow the correct procedure as outlined on the council's website when appealing against expiation notices. Instead, Cr Veliskou wrote the letter, emailed it directly to Mr Skull, the CEO, when he should have directed [a council resident] to attend or ring the council's Customer Service Centre and request assistance in completing the 'Review of Decision Application Form and Statutory Declaration' forms.
32. I am therefore of the view that Mr Skull contravened clause 2.7 of the Code because he did not follow the instruction on the council's website and instead commenced application of the Procedure by considering [a council resident's] grounds for appeal

despite the fact that he was not the appropriate decision maker (given that the CPU should have made the decision).

Grounds for withdrawal of expiation notice

33. The Procedure stated that the grounds for withdrawal of expiation notice are set out in the EO Act. The EO Act sets out the grounds for withdrawal of an expiation notice in section 8A where the offence is 'trifling' or section 16 of the EO Act.
34. Mr Skull stated that he emailed Ms Perin with his opinion as to whether the expiation notice ought to be withdrawn because:

Council implements the guidelines laid out in the Local Government Association of South Australia's *'Reviewing and Withdrawing an Expiation Notice Procedure'* (Attachment 4).

In accordance with the said Procedure and the *Expiation of Offences Act 1996* (SA), expiations may be withdrawn for a variety of reasons, including (but not limited to):

- A medical episode such as a motorist or a passenger being unwell (seizure, vomiting, faint) or a persons with a disability requiring assistance.
- That the alleged offender could not, in all reasonable circumstances, reasonably have averted committing the offence (refer to section 4(2)(b) of the *Expiation of Offences Act 1996*).

I asked Ms Perin if she could consider the waiving of the expiation notice. I did not endeavour to coerce that decision.

Having read the request made by [a council resident's], my judgement of this matter was that [a council resident's] was assisting a disabled neighbour, that he was a professional driver in his working life and was well aware of road rules; that he may not have seen any 'no standing' signs and that the amount of the expiation notice (\$253) was significant for a 76-year-old pensioner. I was sympathetic to [a council resident's] plight, as had been Cr. Veliskou, his Ward Councillor and for this reason I forwarded the request to the appropriate team within council and asked them to consider and make a decision.

35. Mr Skull identified the two grounds in his response to my Office dated 24 October 2016 as (a) that a person with a disability required assistance, and (b) that [a council resident] could not reasonably have averted committing the offence (per section 4(2)(b) of the EO Act) Mr Skull's response demonstrated that:
- Mr Skull considered [a council resident's] circumstances in which the expiation notice was incurred
 - Section 4(2)(b) of the EO Act is concerned with matters that may be considered 'trifling' under section 8A and therefore Mr Skull considered that the offence to which the notice was granted was 'trifling'.
36. Ms Perin's reply to my Office did not refer to which grounds she relied upon to grant [a council resident] a waiver of his expiation notice. This is concerning as it is the role of the CPU to assess and make a determination whether to withdraw an expiation notice by considering what grounds (if any) exist as per the Procedure.
37. The Procedure and the EO Act therefore required an applicant to identify a ground in either section 8A if 'trifling' (as defined by section 4(2)(b) of the EO Act); that is:
- compelling humanitarian, or safety reasons for the conduct
 - the conduct could not reasonably have been averted
 - the conduct was merely technical, trivial or petty instance of the breach

or section 16 of the EO Act, that is if:

-
- the offender did not commit the offence or the notice should not have been given
 - the council received a statutory declaration
 - the expiation notice was defective
 - the recipient of the expiation notice elected to be prosecuted rather than pay the expiation notice.
38. [a council resident] incurred the expiation notice while parked out the front of [redacted address]. A Google map search has revealed a parking sign outside [redacted address] that showed there is a bicycle lane from 3pm to 6pm. The fine was issued at 5:27pm. The parking sign would have been visible and on the same side of the road as [a council resident] parked his vehicle.
39. I appreciate the circumstances considered by Cr Veliskou and Mr Skull were [a council resident's] age and purpose in delivering the bulky goods and I accept that the decision was made in good faith. However, I do not consider that these circumstances meet the requirements of either sections 8A or 16 of the EO Act. I consider that [a council resident] could have avoided parking in the bike lane once he saw that another car was parked in his friend's driveway. I am unconvinced that the offence was 'trifling' because it was a 'compelling humanitarian or safety reason' or that any of the grounds in section 16 apply.
40. From the responses provided to me by Mr Skull and Ms Perin I am of the view that:
- Mr Skull considered the circumstances of the offence and whether the expiation notice should be withdrawn in those circumstances and formed a view that [a council resident's] expiation notice should be withdrawn as evidenced by his request to Ms Perin '*can we please waive this?*'
 - Mr Skull did not advise the applicant [a council resident], via Cr Veliskou, or directly, of the council's requirement to submit 'Review of Decision Application Form and Statutory Declaration' forms
 - Mr Skull communicated his view to Ms Perin, the council employee charged with determining whether the expiation notice ought to have been withdrawn
 - Ms Perin was aware of Mr Skull's view when she received [a council resident's] application by email from Mr Skull.
41. In these circumstances I consider it likely that Mr Skull influenced Ms Perin's decision by expressing his view and requesting that she waive the expiation, noting that:
- Ms Perin had not initially provided my Office with any independent grounds that demonstrated she turned her mind to the circumstances and how these fit the grounds of the EO Act. Ms Perin has since informed me that she considered [a council resident's] circumstances were 'compelling humanitarian reasons' and therefore the expiation notice ought to be considered 'trifling' pursuant to section 4(2)(a) of the EO Act
 - Mr Skull's reasons for why [a council resident's] expiation notice ought to be withdrawn were not reasonably open to the council under the Act
 - Ms Perin quickly reached the same conclusion as Mr Skull and informed the applicant, [a council resident] by telephone initially, and then mail and communicated this to Mr Skull soon thereafter.
42. I consider that the above circumstances, combined with the fact that Mr Skull, (as CEO and not the decision maker in relation to the expiation notice):
- failed to direct Cr Veliskou to forward [a council resident's] application to the council's CPU in accordance with the Procedure
 - exerted influence on Ms Perin's decision as to whether or not the expiation notice ought to be waived by including his comments with the application to Ms Perin and specifically requesting that it be waived.

43. I consider that Mr Skull was not acting in a way that generates community trust and confidence in the council in that he:
- did not treat [a council resident's] application for a withdrawal of the expiation notice as stated on the council's website
 - directed Ms Perin to deal with the application whilst giving his view as to how the matter ought to be decided.
44. I therefore consider that Mr Skull contravened clauses 2.2 and 2.4 of the Code because he did not act with reasonable care and diligence or in a way that generates community trust and confidence in his handling of [a council resident's] application for a review of his expiation notice. As discussed earlier in this report, I also consider that Mr Skull breached clause 2.7 of the Code.

Opinion

In light of the above, my final view is that Mr Adrian Skull breached the provisions of clause 2.2, 2.4 and 2.7 of the Code, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

In addition, as a breach of the Code by Mr Skull is a breach of section 110(4) of the Local Government Act, which stipulates that council employees must observe the Code, my view is that Mr Skull has acted in a way that appears to be contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

On that basis, I recommend under section 25(2) of the Ombudsman Act that:

1. the council issue an instruction to all staff reminding them that all requests for withdrawal of expiation notices should be forwarded by them to the CPU in the first instance.

Whether the council took into account irrelevant considerations in withdrawing [a council resident's] expiation notice and thereby an administrative error occurred

45. I have also considered whether there was an administrative error by the council for the purposes of section 25 of the Ombudsman Act. Based on the responses to my Office from Mr Skull and Ms Perin I consider that the council took into account irrelevant considerations in determining that [a council resident's] expiation notice ought to be withdrawn. Those irrelevant considerations were:
- that the driveway of [a council resident's] friend was blocked by another vehicle
 - that [a council resident] was transporting bulky goods
 - [a council resident's] age in relation to transporting the bulky goods
 - he was not aware of there being bicycle lane restrictions (despite a sign being present and visible from where the expiation notice was incurred)
 - that [a council resident's] was providing assistance to a disabled friend.
46. It appears from Mr Skull and Ms Perin's responses that [a council resident's] expiation notice was withdrawn by the council out of concern for his circumstances which do not, in my view, amount to:
- 'compelling humanitarian or safety reasons'(section 4(2)(a) of the EO Act)
 - that [a council resident] could not 'reasonably have averted committing the offence' (section 4(2)(b) of the EO Act) or
 - that the offence was 'merely a technical, trivial or petty instance' of a breach of the EO Act (section 4(2)(c) of the EO Act).

47. I further consider that Ms Perin did not detail the basis upon which she considered the expiation notice issued to Mr [a council resident] was 'trifling' within the meaning of section 4(2) of the EO Act. Ms Perin stated that she advised the Administration Officer of [a council resident's] request to waive the expiation notice, that [a council resident's] letter was saved to the council's 'BluePoint system'. Further details of expiation notices are stored on the council's database called 'Authority' of which I have been provided a copy. 'Authority' records show that [a council resident's] letter was uploaded but there is no record of which grounds of the EO Act the expiation notice was withdrawn under. Had the grounds been recorded it would reduce confusion about what grounds were considered.

Opinion

In light of the above my final view is that the council took into account irrelevant considerations in determining to withdraw [a council resident's] expiation notice within the meaning of section 25(1)(d) of the Ombudsman Act.

On that basis, I recommend under section 25(2) of the Ombudsman Act that:

2. the council record in its database 'Authority' detailed grounds by reference to section 4(2) of the EO Act.

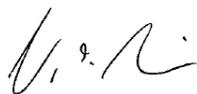
Final comment

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

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **27 October 2017** on what steps have been taken to give effect to my recommendations above; including:

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

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



Wayne Lines
SA OMBUDSMAN

24 July 2017