

Final Report

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

Public Authority	City of Victor Harbor
Public Officer	Councillor Peter Charles
Ombudsman reference	2017/04344
ICAC reference	2017/000368
Date of referral	21 April 2017
Issues	Whether Councillor Peter Charles committed misconduct for the purposes of section 5(3)(a) of the ICAC Act by breaching Clauses 3.2 and 3.3 of the Code of Conduct for Council Members by publically disclosing confidential information included within a special council meeting agenda.

Jurisdiction

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

Section 14B of the Ombudsman Act 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.

These issues concern alleged breaches by Cr Charles of clauses 3.2 and 3.3 of Part 3 of the Code of Conduct for Council Members (**the Code of Conduct**). Failure by a council member to comply with Part 3 of the Code constitutes misconduct, a finding of which may also constitute grounds for disciplinary action under the *Local Government Act 1999*.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a response from Cr Charles
- considering the *Local Government Act 1999* (**the Act**)
- considering the Code of Conduct for Council Members (**the Code of Conduct**)
- considering the Local Government Association of South Australia's Confidentiality Guidelines: How to Apply Section 90 of the Local Government Act 1999
- providing the council and Cr Charles with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

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

In response to my provisional report Cr Charles commented that:

- he is not a ward councillor as stated in my provisional report, as the council does not have wards
- he has only recently had cataracts removed
- he acknowledged that he contravened the Act
- there was nothing furtive about his actions, given that he used a council electronic tablet and that he copied a 'Philp' into the email (noting in his response that he emailed council employee Alison Philp by accident rather than the intended recipient, Mayor Graham Philp)
- the electronic tablet is difficult to read
- the council has since started using a 'Confidential' watermark in relation to such items
- he has already completed training in relation to confidentiality obligations
- he considers that he has been victimised and bullied by excessive code of conduct complaints and is treated differently to other council members.

In response to my provisional report the council provided the following:

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.

- it is a common understanding in most councils that all agenda material is sensitive information largely prepared/based on staff research and opinion
- although the agenda is available for the public to view for a statutory period prior to a meeting (unless protected under section 90 of the Act) there is no certainty that the elected body will concur with staff recommendations when formally considering the matter
- it is improper for an elected member to presume prior to the meeting that the recommendations of staff will be supported by the council, in this instance, potentially giving ratepayers false hope
- by his own admission Cr Charles did not read the full report before circulating information to the broader community. This in itself is a possible departure from his obligations under section 6(a) of the Act, to be a representative, informed and responsible decision maker
- the council's procedure with regard to the preparation of the agenda and presentation of confidential items has not changed in the three years that Cr Charles has been an elected member, therefore it is inconceivable given the consistency of approach and Cr Charles' training that he could have been confused by the confidential intentions.

I have considered the submissions from the parties, however they have not caused me to change the views I expressed in my provisional report other than to acknowledge the incorrect information in relation to Cr Charles being a ward councillor. I have altered the final report to reflect this information.

Background

1. Councillor Peter Charles is a councillor for the City of Victor Harbour (**the council**) and has held that position since 2014. Cr Charles is also a member of the council's Development Assessment Panel.
2. The reporter alleges that Cr Charles breached Part 3 of the Code of Conduct by publically disclosing information included in a special council meeting agenda identified for confidential consideration, prior to the meeting being convened on 20 March 2017.
3. On 16 March 2017 notice was given pursuant to section 83(2) of the Local Government Act that a special council meeting had been called for 20 March 2017. The purpose of the meeting was to consider the 2017/18 Draft Council Budget and a confidential item in relation to a tender for the Mainstreet Precinct Master Plan Construction Stage 2.
4. On 16 March 2017 Elected Members received a copy of the full agenda up-loaded to their electronic tablets.
5. On 17 March 2017 Cr Charles also collected a hard copy of the agenda from the council offices. I understand that Cr Charles collected the hard copy of the agenda at approximately 9:30am.
6. The Mainstreet Precinct Upgrade (**MPU**) is a joint initiative project between the council and the Department of Planning, Transport and Infrastructure. The aim of the MPU is to address both the short and long term needs of businesses and the wider community, for example, to address traffic and movement flows, provide improved security and safety and increase environmental sustainability.
7. I note that the council undertook extensive research and planning over a period of approximately six years in relation to the MPU prior to adopting the Master Plan for the project in May 2014.

8. Item 5.1 of the agenda for the special council meeting was marked 'CONFIDENTIAL' in the Index and included the following recommendation:

1. That pursuant to Section 90(2) of the Local Government Act 1999, the public be excluded from attendance at the meeting for this agenda item, with the exception of the Chief Executive Officer (Graeme Maxwell), Director of Corporate & Community Services (Kate Jessep), Director of Planning & Regulatory Services (Graham Pathuis), Director Environment and Infrastructure (Glenn Sanford) and Executive Assistant (Karina Overall) to enable the Council to consider information in relation to agenda item Tender T20/16 - 'Mainstreet Precinct Master Plan Construction - Stage 2', as Council is satisfied that, pursuant to section 90(3)(k) of the Act, the information to be received, discussed or considered in relation to the agenda item is a matter related to tenders for the for the [sic] supply of goods, the provision of services or the carrying out of works and the public release of the information during the negotiation of the contract may jeopardise Council's ability to secure the best value for money.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in these circumstances because the information could jeopardise the commercial position of third parties.

2. That Council not award the Tender at this time.
3. That Council reassess the project programming with the view to calling for tenders in the 2017/18 financial year.
4. That having considered this agenda item, the Council -
 - i. pursuant to Section 91(7) of the Act, orders that the report and associated attachments be retained in confidence until a contract for delivery of the next stage of the 'Main Street Precinct Master Plan Construction' project has been executed; and
 - ii. the public be readmitted to the meeting.

9. On 17 March 2017 Cr Charles sent an email from his council email address to admin@vhcityinn.com.au, trishbarclay@hotmail.com and aphilp@victor.sa.gov.au. The email stated the following:

MAIN STREET UP GRADE STAGE TWO WILL NOW BE DONE IN 2018.

Reason; only one tender received therefore not necessarily cost effective.

Saved by extenuating circumstances I say.

Good luck and every success in trading from now until then.

Oopsy

10. The minutes of the council meeting held on 20 March 2017 record the following in relation to Item 5.1:

5.1 Mainstreet Precinct Master Plan Construction - Stage 2 (Tender)

SC172017 Moved: Cr Pat Chigwidden
Seconded: Cr Carol Schofield

That pursuant to Section 90(2) of the Local Government Act 1999, the public be excluded from attendance at the meeting for this agenda item, with the exception of the Chief Executive Officer (Graeme Maxwell), Director of Corporate & Community Services (Kate Jessup), Director of Planning & Regulatory Services (Graham Pathius), Director Environment and Infrastructure (Glenn Sanford) and Executive Assistant (Karina Overall) to enable the Council to consider information in relation to agenda item Tender T20/16 - 'Mainstreet Precinct Master Plan Construction - Stage 2', as Council is satisfied that, pursuant to section 90(3)(k) of the Act, the information to be received, discussed or considered in relation to the agenda item is a matter related to tenders for the for the [sic] of goods, the provision of services of the carrying out of works and the public release of information during the negotiation of the contract may jeopardise Council's ability to secure the best value for money.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in these circumstances because the information could jeopardise the commercial position of third parties.

SC182017 Moved: Cr Moira Jenkins
Seconded: Cr Karen Dutton

That Council not award the Mainstreet Master Plan Construction Stage 2 tender at this time.

SC192017 Moved: Cr Time Glazbrook
Seconded: Cr Moira Jenkins

That Council reassess the Mainstreet Master Plan Construction Stage 2 project programming with the view to calling for tenders in the 2017/18 financial year and that Council stagger future stages alternating between Ocean Street and other areas within the precinct.

SC202017 Moved: Cr Pat Chigwidden
Seconded: Cr Karen Dutton

That having considered this agenda item, the Council -

- i. pursuant to Section 91(7) of the Act, orders that the report and associated attachments be retained in confident until a contract for the delivery of the next stage of the 'Mainstreet Precinct Master Plan Construction' project has been executed and the resolution be released from confidence to enable the Mainstreet businesses to be advised as soon as possible; and
- ii. the public be readmitted to the meeting.

Cr Charles' response to my investigation

11. On 11 July 2017 Cr Charles' legal representative provided a written response to my Office in relation to the allegations put to Cr Charles, noting that:
- Cr Charles confirmed that he sent the email to three recipients with the reason being to inform his constituents that the Main Street upgrade would be deferred until 2018
 - the Main Street traders had expressed concern to Cr Charles that further upgrade work in 2017 would have a 'devastating financial effect on their business' therefore news of the upgrade being deferred would be a relief to those traders who had expressed concern
 - the email was also sent to a council employee, however this was in error due to Cr Charles' poor eyesight as it was Cr Charles' intention to send the email to the Mayor
 - on 16 March 2017 Cr Charles received an electronic copy of the full agenda for the special council meeting dated 20 March 2017
 - Cr Charles did not access the electronic copy because the text of the agenda on the tablet screen was too small for him to read and work from, given his poor eyesight and given the number of pages comprising the agenda
 - on 17 March 2017 Cr Charles collected a hard copy of the agenda from the council when he was delivering a Motion with Notice (requesting a delay of 12 months to the Main Street upgrade) for inclusion in the agenda for the council meeting scheduled for 27 March 2017. When handing the agenda to Cr Charles a council staff member advised him that the motion may not be required and he would find out why when he read the agenda. The staff member did not inform Cr Charles that the information was confidential
 - Cr Charles subsequently flicked through the hard copy of the agenda and fortuitously opened at pages 11 and 12 where he read that the Main Street upgrade would not be going ahead in 2017
 - Cr Charles did not read the confidential heading on page 10 as all of the information in relation to the upgrade was contained on pages 11 and 12
 - nowhere on pages 11 and 12 was the information identified as confidential and as such it was not reasonable for Cr Charles to know that the information was confidential
 - if it had been Cr Charles' intention to disclose confidential information he would not have used his council tablet and he would not have intended to include the Mayor as an email recipient
 - Cr Charles states that he exercised reasonable care and diligence in carrying out his duties of informing his constituents of relevant matters
 - Cr Charles is fully aware of his obligations and responsibilities in managing confidential information and would have complied if the information had been adequately marked as confidential
 - it is the responsibility of the council to adequately mark as confidential matters that are to be considered in confidence, and in this instance the council failed to do so
 - a failure to exercise reasonable care and diligence in the exercise of his duties should not be attributed to Cr Charles when it was a failure of the council to adequately communicate to elected members
 - Cr Charles acted honestly and in good faith at all times when carrying out his duties in relation to keeping his constituents informed of matters that were of concern to them
 - Cr Charles did not seek any benefit or unfair advantage for himself or for the recipients of the emails, rather acting in the legitimate interests of the Main Street traders who had contacted him regarding their concerns

- it is also relevant to note that no harm was caused to the council or any other party in the disclosure of the information. The disclosure was innocent, inadvertent and trivial.

Relevant law

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

(3) *Misconduct in public administration* means—

- 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
- other misconduct of a public officer while acting in his or her capacity as a public officer.

13. Section 83 of the Local Government Act provides:

83 - Notice of ordinary or special meetings

- In the case of an ordinary meeting, the chief executive officer must give each member of the council notice of the meeting at least three clear days before the date of the meeting.
- In the case of a special meeting, the chief executive officer must give each member of the council notice of the meeting at least four hours before the commencement of the meeting.
- Notice of a meeting of the council must—
 - be in writing; and
 - set out the date, time and place of the meeting; and
 - be signed by the chief executive officer; and
 - contain, or be accompanied by, the agenda for the meeting.
- The chief executive officer must, insofar as is reasonably practicable—
 - ensure that items on an agenda given to members of the council under this section are described with reasonable particularity and accuracy; and
 - supply to each member of the council at the time that notice of a meeting is given a copy of any documents or reports that are to be considered at the meeting (so far as this is practicable).
- The chief executive officer may indicate on a document or report provided to members of the council under subsection (4) (or on a separate notice) any information or matter contained in or arising from a document or report that may, if the council so determines, be considered in confidence under Part 3, provided that the chief executive officer at the same time specifies the basis on which an order could be made under that Part.
- Notice may be given to a member of a council under this section—
 - personally; or
 - by delivering the notice (whether by post or otherwise) to the usual place of residence of the member or to another place authorised in writing by the member; or
 - by leaving the notice for the member at an appropriate place at the principal office of the council, if authorised in writing by the member to do so; or

- (d) by a means authorised in writing by the member as being an available means of giving notice (eg facsimile transmission).
- (7) A notice that is not given in accordance with subsection (6) is taken to have been validly given if the chief executive officer considers it impracticable to give the notice in accordance with that subsection and takes action the chief executive officer considers reasonably practicable in the circumstances to bring the notice to the attention of the member.
- (8) The chief executive officer must maintain a record of all notices of meetings given under this section to members of the council.
- (9) The fact that a notice of a meeting has not been given to a member of a council in accordance with this section does not, of itself, invalidate the holding of the meeting or a resolution or decision passed or made at the meeting but the District Court may, on the application of the Minister, annul a resolution or decision passed or made at the meeting and make such ancillary or consequential orders as it thinks fit if satisfied that such action is warranted in the circumstances of the particular case.

14. Section 90 of the Local Government Act provides:

90 - Meetings to be held in public except in special circumstances

- (1) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (2) The following information and matters are listed for the purposes of subsection (2):
 - (k) tenders for the supply of goods, the provision of services or the carrying out of works

15. Clause 3.2 of Part 3 of the Code of Code of Conduct provides:

Council members must:

Perform and discharge their official functions and duties with reasonable care and diligence at all times.

16. Clause 3.3 of Part 3 of the Code of Conduct provides:

Council members:

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

Whether Councillor Peter Charles committed misconduct for the purposes of section 5(3)(a) of the ICAC Act by breaching Clauses 3.2 and 3.3 of the Code of Conduct for Council Members by publically disclosing confidential information included within a special council meeting agenda

- 17. Clause 3.2 of the Code of Conduct provides that council members must perform and discharge their duties with reasonable care and diligence at all times.
- 18. Clause 3.3 of the Code of Conduct provides that council members must not release or divulge information that the council has ordered be kept confidential, or that the Council

member should reasonably have known is information that is confidential, including information that is considered by the council in confidence.

19. The agenda for the special council meeting to be held on 20 March 2017 referred to the recommendation only that the council make an order. I note that the order that the matter be considered in confidence under section 90 of the Local Government Act was not made until 20 March 2017. When the information was released by Cr Charles by email dated 17 March 2017, there was no confidentiality order in place. The relevant enquiry is, therefore, whether Cr Charles should reasonably have known that the information was confidential.
20. It is evident that agenda Item 5.1 was clearly marked as confidential in the Index as allowed for by section 83(5) of the Local Government Act, and the agenda also included a recommendation that the public be excluded from the meeting pursuant to section 90(2) of the Local Government Act on the basis that the matter to be discussed related to a tender process and the public release of information may have compromised the contract negotiation process.
21. I note that Cr Charles has provided several explanations as to why he emailed information about the MPU to a number of recipients, including his poor eyesight, not reading the agenda in its entirety and being unaware of the confidential quality of the information. Cr Charles has also expressed a view that the council failed to inform him that the information was confidential and in any case, he is of the view that it is the responsibility of the council to adequately mark as confidential matters that are to be considered in confidence.
22. While I accept that Cr Charles may not have read the electronic version of the agenda given the font size and the number of pages, I do not accept that it was onerous for him to read the hard copy agenda in its entirety. I also consider that in order to exercise his role with reasonable care and diligence he was required to read the entire agenda prior to determining to take any action to release the information in the agenda.
23. I also note that Cr Charles has been a council member since 2014 and that the matter of the MPU was before the council on a number of occasions since Cr Charles' commencement as a council member. Therefore, I consider that he ought to have turned his mind to whether the information was of a sensitive, confidential nature.
24. While Cr Charles has expressed a view that the council failed to inform him that the matter to be discussed was confidential, in my view the requirements of section 83(5) of the Local Government Act were met. The agenda item was clearly marked as confidential.
25. Therefore, in my view by disclosing the information about the MPU Cr Charles breached clauses 3.2 and 3.3 of the Code of Conduct. As section 63 of the Local Government Act requires council members to observe the Code of Conduct, I also consider that Cr Charles acted in a way that appears to have been contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.
26. By way of comment, I note with concern that I have previously found that Cr Charles breached clauses 3.2 and 3.3 of the Code of Conduct by distributing confidential information to constituents.³ On that occasion, I recommended that Cr Charles be reprimanded by the council in relation to his disclosure of confidential information. I also recommended that Cr Charles attend training on the requirements of the council's Record Management Policy, on the basis that he had inappropriately used a private email account for corresponding about council matters. This Office was subsequently

³ Ombudsman Report 2015/04205, 22 March 2016.

advised by the council that my report in that matter was considered by the council at a meeting on 26 April 2016 (attended by Cr Charles) and that both recommendations were implemented.

Opinion

In light of the above, I consider that Cr Charles:

- breached clauses 3.2 and 3.3 of the Code of Conduct and therefore committed misconduct in public administration within the meaning of section 5(3)(a) of the ICAC Act
- acted in a way that appears to be contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Recommendations

I make the following recommendations under section 263B(1)(a) and (b) of the Local Government Act:

1. That the council arrange for Cr Charles to attend training relevant to confidentiality provisions
2. That Cr Charles issues a public apology to the council in relation to his disclosure of confidential information.

Final comment

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

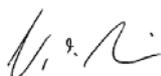
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **22 December 2017** on what steps have been taken to give effect to my recommendation/s above; including:

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

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

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as 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.



Wayne Lines
SA OMBUDSMAN

20 October 2017