

## Report

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

Complainant	Anonymous
Council member	Councillor Faye Davis
Council	City of Port Lincoln
Ombudsman reference	2018/10288; 2019/10157
ICAC reference	2018/004671; 2020/002430
Date of referral	20 September 2018
Issues	<ol style="list-style-type: none"><li>1. Whether Cr Davis divulged information that was the subject of a confidentiality order by the City of Port Lincoln, thereby committing misconduct in public administration</li><li>2. Whether Cr Davis failed to declare an interest at the ordinary meetings of the City of Port Lincoln held on 16 April 2018, 4 June 2018, 5 June 2018, 18 June 2018, and 3 September 2018, thereby committing misconduct in public administration</li></ol>

### Jurisdiction

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

The referral was based on a report to the Office for Public Integrity (**the OPI**).

Section 14B of the *Ombudsman Act 1972* 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 concerned the alleged conduct of Councillor Faye Davis of the City of Port Lincoln (**the council**). Specifically, it was alleged that Cr Davis divulged information that was the subject of confidentiality orders by the council, and failed to declare a conflict of interest at five ordinary council meetings between April and September 2018. I consider that clauses 3.1, 3.3, 3.6 and 3.13 of Part 3 of the Code of Conduct for Council Members (**the Code of Conduct**) are relevant.

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.

I have also considered whether Cr Davis acted in a manner that was contrary to law within the meaning of section 25 of the Ombudsman Act. In doing so, I have utilised my powers to conduct an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

Having assessed the information provided, I have determined that the issues raised should most appropriately be considered as potential misconduct rather than maladministration. On that basis, I have confined my consideration in this report to the alleged misconduct.

## Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a response from Cr Davis
- seeking further information from the reporter and other relevant parties
- clarifying the response with Cr Davis
- considering:
  - The Code of Conduct
  - The Local Government Act
- providing a provisional report and seeking a response to that report from the parties
- considering the responses to my provisional report
- preparing this report.

## Standard of proof

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

upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>1</sup> 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 ...<sup>2</sup>

## Procedural fairness

In response to my provisional report, Cr Davis stated:

I am incredibly disappointed with the outcome of this investigation and find I am reading information that concerns me and find myself not in a position to defend myself.<sup>3</sup>

Cr Davis went on to make a number of submissions in regard to:

- her statement at a council meeting on 18 June 2018
- her relationship with Mr Kym Clarke and Ms Ann Clarke, and private matters that transpired after the relevant events in this investigation.

Cr Davis also made submissions about the conduct of other elected members, council staff and private individuals. It is unclear how these submissions were relevant to whether she divulged confidential information or whether she had a conflict of interest at the relevant council meetings in this matter.

Cr Davis concluded that, 'I am gravely disappointed by the decision of guilt I have been charged with in your Provisional report'. I have considered Cr Davis' submissions and referred to them, where relevant, later in this report.

Mayor Brad Flaherty also responded to my provisional report. Mayor Flaherty noted that he was elected to his mayoral position after the events that are the subject of this investigation and, on that basis, he did not dispute the facts of this matter. Nevertheless, Mayor Flaherty provided submissions in regard to:

- Cr Davis' experience as an elected member
- his perception of her character generally, and in regard to the events that are the subject of this report.

Mayor Flaherty also directed my attention to the following general arguments:

- that 'City based Legislation and Regulation can at times be difficult to comply with in rural and remote settings' due to increased familiarity between elected members and residents
- in some cases, 'ignorance of complex legislation that charges good minded community people with offences when in fact they have merely made an error' results in elected members looking over their shoulders out of concern that 'we may have committed some breach of mal-administration [sic] or misconduct'
- he finds it 'abhorrent' that 'considerable' investigative powers can contribute to findings of misconduct and that 'draconian and even oppressive' legislation makes it difficult to

attract community minded people to the ranks of Council when at every corner they are to be investigated and those good intentions threatened with the possibility of criminal action against them – merely through ignorance or actions that are undertaken with no guilty intent at all.

<sup>1</sup> 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.

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

<sup>3</sup> Email to my Officer, 5 October 2020.

- and that,

Even with very good training programs and constant reinforcement, the complexities of the Legislation, Regulation, policies and procedures make it difficult to comprehend that one may be committing an offence for merely speaking.<sup>4</sup>

The then acting Chief Executive Officer of the council, Mr Rob Donaldson, also responded to my provisional report. Mr Donaldson noted that while he was not employed by the council at the relevant times, he had been the CEO of the council between 2013 and 2017 and was familiar with the history of the matter. After this point, according to Mr Donaldson, ‘the procurement then subsequently proceeded as [my] report outlines.’<sup>5</sup>

Mr Donaldson went on to make submissions in regard to Mr Clarke’s history as a local builder in Port Lincoln, the local economic development principles, and the effect these principles may have had on Mr Clarke’s interactions with the council in this matter.

Finally, Mr Donaldson submitted

I encourage you to consider and give appropriate weight to the practical context of local government dealings in regional communities. While the law and governance principles are uniformly applicable, the likelihood of staff and/or Council Elected Members having community-based relationships with people seeking to do business with the Council is much greater in the smaller, non-metropolitan setting. It is more likely that the kind of relationship described in your provisional report will intersect with matters of Council business, more often. This does not excuse alleged improper actions but may be important in understanding the context in which Cr Davis and Cr Papazoglov were approached.<sup>6</sup>

In response to my provisional report, the reporter advised my Office that they did not wish to make any submissions.

I have considered the responses I received and have addressed the submissions, where necessary, in the body of this report. Ultimately, the responses did not persuade me to alter my conclusions.

I recognise that, as Mr Donaldson described, personal relationships may be more likely to intersect with council business in regional and remote areas. However, this does not absolve elected members of their responsibilities. Rather, it highlights the need for openness and transparency in decision-making and the expenditure of public funds. Given the scope of action available to an elected member in managing a conflict of interest<sup>7</sup> (once it is declared and depending on its nature) I do not consider that the practical context of regional communities alters an elected member’s obligations. I do not consider that the legislation places an unreasonable burden on council members, regional or otherwise.

## Background

1. In early 2018, the council commenced a tender process for the completion of construction works relating to the Port Lincoln Leisure Centre Stadium Expansion (**the expansion works**). After an expression of interest and subsequent request for tender, the council received five tender applications.
2. On 9 April 2018, the tenders were reviewed by the council’s Leisure Centre Stadium Expansion Committee and the council’s Audit Committee. Kim Clarke Constructions

<sup>4</sup> Email to my Office, 6 August 2020.

<sup>5</sup> Email to my Office, 26 August 2020.

<sup>6</sup> Ibid.

<sup>7</sup> Section 75A(5), *Local Government Act 1999*.

(KCC) was recommended as the preferred tenderer in a report to the council (**the first report**).

#### *16 April 2018 council meeting*

3. The meeting agenda for the council meeting on 16 April 2018 included agenda item 19.1, the purpose of which was to discuss the appointment of the preferred tenderer to undertake the expansion works. The recommendation was that KCC be nominated as the preferred tenderer. The first report was also tabled for agenda item 19.1.
4. Pursuant to sections 90(2) and 90(3) of the Local Government Act, the council ordered that agenda item 19.1 be considered in confidence. Two councillors then declared conflicts of interest and left the meeting. The council also ordered that the first report be confidential, pursuant to section 91(7) of the Local Government Act.
5. Cr Davis was present for the discussion of agenda item 19.1. She seconded the motion to endorse the recommendation to nominate KCC as the preferred tenderer, and to delegate authority for the Chief Executive Officer of the council, Mr Stephen Rufus, to undertake contract negotiations with KCC. Cr Davis also moved the motion that the council make an order that the first report be confidential, pursuant to section 91(7) of the Local Government Act.
6. Cr Davis did not declare any interest in relation to agenda item 19.1.

#### *Subsequent negotiations with KCC*

7. On 17 April 2018, the council contacted the principal of KCC, Mr Kym Clarke, to advise that KCC was the preferred tenderer. On 24 April 2018, the council commenced contract negotiations with Mr Clarke.
8. On 23 May 2018, a meeting was held between Mr Clarke, Mr Rufus and two other council employees. Mr Rufus advised Mr Clarke that if the parties failed to find some resolution to bring the final tender price within the price presented to council, the matter would have to return to council for consideration. Mr Rufus also advised Mr Clarke not to canvas discussions with anyone.
9. On 29 May 2018, another meeting was held between Mr Clarke, Mr Rufus and another council employee. Mr Rufus advised that the tender negotiations may need to be referred back to the council and that Mr Clarke was not to canvas councillors.
10. On 31 May 2018, another meeting was held between Mr Clarke, Mr Rufus and two other council employees. Mr Clarke was told again that the matter would need to be taken back to the council, and that this may lead to a re-evaluation of the tender process.
11. By June 2018, negotiations between the council and KCC had stalled.

#### *4 June 2018 council meeting*

12. Council administration then prepared a report about the negotiations with KCC (**the second report**). The second report was tabled to be discussed as a part of an update to the council under agenda item 19.1 at a council meeting on 4 June 2018. The second report presented two options to the council:
  1. accept the KCC tender at the new negotiated cost
  2. authorise council administration to negotiate with an alternative tenderer from the original pool of tender applications.

13. A presentation accompanying the second report recommended that the council commence negotiations with the alternative tenderer, and that KCC be asked to provide a final tender price and project timeframe.
14. It was recommended that agenda item 19.1 be discussed in confidence, pursuant to section 90(2) of the Local Government Act, and that the second report be ordered to be confidential, pursuant to section 91(7) of the Local Government Act.
15. At the council meeting on 4 June 2018, apologies were received from three councillors and two others declared a conflict of interest for agenda item 19.1. Quorum for the meeting was lost and the meeting was adjourned to 5 June 2018. No confidentiality orders were made on 4 June 2018 in relation to agenda item 19.1.
16. Cr Davis did not declare any interest in relation to agenda item 19.1.

#### *5 June 2018 council meeting*

17. On the morning of 5 June 2018, Mr Clarke contacted the council and spoke with a council employee. Mr Clarke was advised that the council meeting on 4 June 2018 had been adjourned and would recommence that evening. At the time, Mr Rufus was in Adelaide. By telephone, he instructed a senior council employee to request a letter from Mr Clarke, confirming KCC's commitment to the expansion works and providing the final contract offer. At 12:46pm on 5 June 2018, Mr Clarke sent a letter to Mr Rufus by email. The letter contained KCC's final price following the negotiations.
18. At the council meeting on 5 June 2018, Cr Davis seconded the motion that the council make an order, pursuant to sections 90(2) and 90(3) of the Local Government Act, that agenda item 19.1 be discussed in confidence. Following the motion, two councillors declared conflicts of interest and left the meeting. One of the councillors was Cr Jim Papazoglov.<sup>8</sup> The council also ordered that the second report be confidential, pursuant to section 91(7) of the Local Government Act.
19. During the council's discussion of agenda item 19.1, the council considered the second report and the letter from Mr Clarke. The council endorsed the recommendation to authorise Mr Rufus to engage in negotiations with the alternative tenderer. The council also resolved that KCC:
  - be advised that the council was continuing with further deliberations of the tenders, with a final report to be presented at the 18 June 2018 council meeting
  - be asked to provide a final tender price and project timeframe.
20. The council's endorsement of the recommendation was not unanimous; Cr Davis called for a division and a council vote on the motion ensued. Five council members voted in favour of the recommendations in the second report. Cr Davis voted in the negative.
21. Cr Davis did not declare an interest in response to any of the relevant motions.
22. In response to my enquiries, Cr Davis explained that:

I have a long history over the 2 terms I have been in local government of calling for a division on any given subject within Council. Information pertaining [to] this can be obtained from Council records. I consider calling for a division is a democratic process that allows the community to identify individual elected members who vote on any given matter. My reason for calling for a division on this particular matter was because I was concerned with the decision made by my fellow councilors [sic] based on the information presented to elected members by staff after discussion and questions asked in the

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<sup>8</sup> Mr Papazoglov is no longer an elected member. He was, however, an elected member at all relevant times in this matter.

chamber by Elected Members. I considered the tender process had been decided previously and considering the overall budget for the project I did not believe the amount of money being discussed was significant and was concerned personal comments regarding Kym Clarke were made by staff and an elected member which you will find on the council meeting transcript. The company Kym Clarke Constructions who had been granted the tender has a long history of construction with the City of Port Lincoln, government departments, schools and private businesses constructing restaurants, veterinary clinics, shopping centre's, [sic] etc.<sup>9</sup>

23. According to another councillor, Cr Papazoglov contacted them the following day to ask about the outcome of the reconvened council meeting on 5 June 2018. Having declared a conflict of interest at the council meeting on 4 June 2018, Cr Papazoglov had not attended the reconvened meeting. According to the councillor, it had been common practice for the Mayor to provide such advice to councillors who left meetings due to declared conflicts of interest. The councillor advised Cr Papazoglov of the outcome but, in response to my Office, could not recall the level of detail provided.
24. On 6 June 2018, council staff contacted Mr Clarke, requesting the submission of KCC's final revised tender offer by 13 June 2018. The letter did not mention another company or advise that the final revised tender price would be compared with that of another company.
25. On 7 June 2018, an employee of KCC contacted the then Deputy Mayor, Mr Neville Starke.<sup>10</sup> According to Deputy Mayor Starke, the employee requested that Mr Clarke be able to make a deputation at the council meeting on 18 June 2018.<sup>11</sup> Deputy Mayor Starke replied that KCC would need to send a written request for a deputation to Mr Rufus, the Mayor, and himself. The employee asked if KCC could send additional information to the elected members but Deputy Mayor Starke advised against this. The employee stated that KCC wanted to explain its side of the story as they believed KCC was being compared to another company. Deputy Mayor Starke declined to comment.
26. On 12 June 2018, Deputy Mayor Starke received an email from Mr Clarke, seeking to confirm that permission had been granted for him to make a deputation to the council on 18 June 2018. On 13 June 2018, Mr Rufus emailed Mr Clarke, explaining that the request for a deputation had been denied.

*13 June 2018 meeting between Mr Clarke, Cr Davis, Cr Jim Papazoglov*

27. On 13 June 2018, Mr Clarke contacted Cr Davis and Cr Papazoglov, and requested a meeting with them. The meeting occurred sometime between 10am and 3pm that day. Another KCC employee was present, though not for the entire meeting.
28. According to Cr Papazoglov, Mr Clarke explained that he wished to present to the council, and provided a folder of information to Cr Papazoglov and Cr Davis but neither viewed its contents. Cr Papazoglov explained that Mr Clarke described his dissatisfaction with the tender process. In response, Cr Papazoglov advised Mr Clarke that he could not answer any questions as he had not been present for any council discussions. Cr Papazoglov directed Mr Clarke to contact Mr Rufus or the Mayor.
29. In response to my enquiries, Mr Clarke confirmed that he initiated the meeting on 13 June 2018. Mr Clarke denied that:
  - any council documents were shown to him by either Cr Davis or Cr Papazoglov
  - either Cr Davis or Cr Papazoglov had discussed or described how the council had considered the tender process

<sup>9</sup> Email to my Office, 6 November 2018.

<sup>10</sup> Mr Starke is no longer an elected member. He was, however, the Deputy Mayor at all relevant times in this matter.

<sup>11</sup> The Deputy Mayor was designated to chair the meeting on 18 June 2018 due to the Mayor's anticipated absence from that meeting.

at the meeting that day.

30. According to Cr Davis, Mr Clarke queried why KCC had not been able to sign the contract for the expansion works and why he had not been allowed to make a deputation to the council. Cr Davis replied that she did not know and that he needed to communicate his concerns to council staff.
31. In response to my enquiries, Cr Davis initially explained that she was unsure whether she had advised Mr Clarke of the outcome of the council vote on 5 June 2018. Later, she submitted that she had not divulged any information from the council chambers to Mr Clarke. At that stage, Cr Davis also noted that she had been reassured by both Mr Clarke and Cr Papazoglov that she did not divulge the outcome of the council vote, but that Cr Papazoglov had done so. These reassurances were allegedly given by each in separate conversations with Cr Davis in late June 2018.
32. In response to my provisional report, Cr Davis stated, 'I can categorically declare I did not disclose the vote to Mr Clarke nor Mr Papazoglov or anyone else.'<sup>12</sup>
33. At 5:31pm on 13 June 2018, Deputy Mayor Starke received a phone call from Mr Clarke. According to Deputy Mayor Starke, Mr Clarke asked after his request to make a deputation to the council and detailed KCC's efforts since the negotiations had stalled. Deputy Mayor Starke replied that councillors were not involved in the negotiation process, and made decisions based on reports provided to them. Deputy Mayor Starke clarified that the matter was confidential and that the conversation was not appropriate.
34. According to Deputy Mayor Starke, Mr Clarke was not satisfied that councillors did not appear to be aware of KCC's efforts but had voted on the matter. Deputy Mayor Starke recalled Mr Clarke mentioning the vote taken by the council on 5 June 2018 and its outcome on more than one occasion, and that he offered his opinion of the alternative tenderer.
35. In response to my enquiries, Mr Clarke denied mentioning any information about the council vote in his phone call with the Deputy Mayor.

#### *18 June 2018 council meeting*

36. The agenda for the council meeting on 18 June 2018 included agenda item 19.1, which concerned an update on the tender negotiations and a report prepared by council staff. The council ordered that discussion and consideration of agenda item 19.1 at the meeting on 18 June 2018 be confidential. After the motion was carried, two councillors, including Cr Papazoglov, declared a conflict of interest and left the meeting. Cr Davis did not declare any interest in agenda item 19.1 at that stage.
37. Mr Rufus then tabled legal advice detailing the tender process up to that point in time, and concerns around the alleged conduct of Cr Papazoglov. In particular, the advice noted that:
  - KCC had potentially breached provisions of the Conditions of Tender in obtaining and improperly using confidential council information, particularly in regard to the council vote on 5 June 2018
  - although the confidential information may have been obtained from one or more of the elected members, the information available did not indicate or suggest the precise source.
38. The meeting minutes note, 'Councillor Davis left the meeting at 10:04pm and did not return'. Accounts of what occurred prior to this allege the following:

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<sup>12</sup> Email to my Officer, 5 October 2020.

- after councillors had read the legal advice, Cr Davis stated that she had compromised her position and the position of the council
- Cr Davis noted her personal friendship with Mr Clarke and his family, that she had put her friendship ahead of her obligations to the council, and that she had engaged or was planning on engaging with KCC in the construction of her home
- Cr Davis admitted to having discussed the tender process and disclosed the outcome of the council vote on 5 June 2018 to Mr Clarke.

39. In response to my enquiries, Cr Davis stated that:

Based on the comments of the CEO, the Mayor and the Deputy Mayor on the spur of the moment I considered I may have compromised the council by meeting with Mr Clark [sic]. Upon reflection I do not believe I compromised council.<sup>13</sup>

40. In response to my enquiries, Cr Davis did not provide an account of her statement to the council, instead referring to a transcript of the meeting and advising that she did not recall what she had said. I am unable to rely upon transcripts of the council meeting as the recording was stopped when the council moved into confidence. In any event, the council does not keep recordings after they have been used to complete the minutes of each meeting.

41. In response to my provisional report, Cr Davis stated:

In relation to “multiple accounts provide that Cr Davis admitted at the council meeting on the 18 June that she divulged the outcome of the vote”.<sup>14</sup> The word I used was MAY - I **may** have divulged the outcome of the vote and I **may** have compromised council. I can categorically declare that I did not disclose the vote to Mr Clarke nor Mr Papazoglov or anyone else.<sup>15</sup>

[Original emphasis]

42. After Cr Davis left the meeting, discussion continued and four motions were carried:

1. That after considering the report on the tenders received for the Construction of the Leisure Centre Expansion Works and the legal advice received from Kelledy Jones Lawyers with respect to the tender process, Council determines that the tender process has been compromised and therefore, in accordance with the power available to it under the Conditions of Tender, determines not to accept any tender and declares the current process abandoned.
2. That Council recommences the tender process for the Construction of the Leisure Centre Expansion Works with the tender process to be conducted by an independent agent engaged by the Council that will call for tenders, assess all tenders received against an agreement tender evaluation and provide a confidential report direct to the Chief Executive Officer for reporting and consideration of Council.
3. That the Chief Executive Officer be authorized to appoint Grieve Gillett Andersen and Rider Levett Bucknall as the independent agent to undertake the tender process.
4. That the tenderers be formally advised of the Council decision not to accept any tender and to abandon the current tender process.

43. I understand that the council’s reasons for abandoning the tender process included the following:

<sup>13</sup> Email to my Office, 3 April 2020.

<sup>14</sup> Point 2, paragraph 67 of my provisional report.

<sup>15</sup> Email to my Officer, 5 October 2020.

- an alleged breach of confidentiality by Cr Papazoglov, though the legal advice stated that there was no clear evidence at the time to support a conclusion to that effect
  - Cr Davis' statement to the council before she left the meeting
  - KCC's alleged breach of the Conditions of Tender
  - that negotiations between KCC and the council had stalled and a point of contention had arisen between the parties as to when the initial tender process had concluded and when contract negotiations had begun.
44. As with previous consideration of agenda item 19.1 the council then declared that the presented information be retained in confidence pursuant to section 91(7) of the Local Government Act.

*19 June 2018 meeting between Mr Rufus and Cr Davis*

45. The next day, Cr Davis met with Mr Rufus and discussed the events of the previous evening.
46. Mr Rufus described the meeting as follows:
- Cr Davis advised Mr Rufus of her meeting with Mr Clarke and Cr Papazoglov on 13 June 2018:
    - upon arriving, she was met by Mr Clarke and Cr Papazoglov and was advised that the purpose of the meeting was to discuss the tender process
    - the second report and the outcome of the vote at the council meeting on 5 June 2018 had been discussed but her involvement in the conversation was limited
  - Cr Davis explained that she was a long-time friend of Mr Clarke and his wife, and at the time had been considering using KCC as a builder for her new home
  - Cr Davis admitted that she had acted inappropriately and had allowed herself to be placed in a situation that compromised her position and that of the council.
47. In response to my enquiries, Cr Davis described that she had explained the following to Mr Rufus:
- it had not been her intention to compromise council by meeting with Mr Clarke 'as this had been the practice in the past'
  - she did not consider that she had a conflict of interest
  - she had attended the meeting with Mr Clarke and Cr Papazoglov due to her concerns for Mr Clarke's wellbeing.
48. Mr Rufus advised Cr Davis of his opinion that her conduct had been serious and disappointing, and that he was required to report it to the OPI.

*3 September council meeting*

49. On 6 July 2018, Grieve Gillett Andersen and Rider Levett Bucknall (**the independent agents**) were jointly engaged by the council to undertake the second tender process (**the re-tender process**) and to provide an evaluation to Mr Rufus. Five tenders were considered, including that of KCC. On 29 August 2018, Mr Rufus received the evaluation report which recommended another tenderer, Unique Urban Built.
50. The agenda for the council meeting on 3 September 2018 included item 17.2 for the re-tender evaluation. A report, detailing the re-tender process and outcome, was tabled for agenda item 17.2.

51. Two councillors, including Cr Papazoglov, declared conflicts of interest in relation to agenda item 17.2 and left the meeting. Pursuant to section 90(2) of the Local Government Act, the council then ordered that agenda item 17.2 be considered in confidence.
52. Agenda item 17.2 included the following motion:
- that council receive and endorse the recommendation of the independent evaluation and approve that Mr Rufus appoint Unique Urban Built to undertake the construction of the expansion works
  - that council further agrees that, on condition that the council was successful in securing additional grant funding, delegated authority would be given to Mr Rufus to engage Unique Urban Built to complete separable item works specified in the tender to the extent that additional grant funding allowed and as agreed by the expansion works board.
53. Cr Davis did not declare any interest in relation to agenda item 17.2.
54. Cr Davis called for a division on the motion. The Mayor declared the vote be set aside and asked that members in favour stand, while members opposed remain seated. Cr Davis, amongst others, voted in the negative but the affirmative vote succeeded and the motion was carried.

### Relevant law

55. Section 5 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.
56. Section 90 of the Local Government Act provides that while a council or council committee meeting must ordinarily be conducted in public, either may order that a meeting be conducted in confidence:

#### 90—Meetings to be held in public except in special circumstances

- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (2) 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).
- (3) The following information and matters are listed for the purposes of subsection (2):
  - [...]
  - (h) legal advice
  - [...]

- (k) tenders for the supply of goods, the provision of services or the carrying out of works;
- (7) If an order is made under subsection (2), a note must be made in the minutes of the making of the order and specifying–
- (a) the grounds on which the order was made; and
  - (b) the basis on which the information or matter to which the order relates falls within the ambit of each ground on which the order was made; and
  - (c) if relevant, the reasons that receipt, consideration or discussion of the information or matter in a meeting open to the public would be contrary to the public interest.

57. Section 73 of the Local Government Act defines the circumstances in which an elected member has a material conflict of interest in a matter:

### **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 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;
  - (b) a relative of the member;
  - (c) a body corporate of which the member is a director or a member of the governing body;
  - (d) a proprietary company in which the member is a shareholder;
  - (e) a beneficiary under a trust or an object of a discretionary trust of which the member is a trustee;
  - (f) a partner of the member;
  - (g) the employer or an employee of the member;
  - (h) a person from whom the member has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services;
  - (i) a person of a prescribed class.
- (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 a 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, or 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.

(4) In this section—

*agency or instrumentality of the Crown* includes—

- (a) an administrative unit of the Public Service;
- (b) a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons by the Governor or a Minister or other agency or instrumentality of the Crown.

58. Section 74 sets out requirements for elected members if they have a material conflict of interest:

#### **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 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 to 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 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.
59. Section 75 defines the circumstances in which an elected member has an actual or perceived conflict of interest and section 75A sets out the requirements for elected members in such circumstances:

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

#### **75A—Dealing with actual and perceived conflicts of interest**

- (1) If, in relation to a matter to be discussed at a meeting of a council, a member of the council—

- (a) has a conflict of interest in the matter (an *actual conflict of interest*); or
- (b) could reasonably be taken, from the perspective of an impartial, fair-minded person, to have a conflict of interest in the matter (a *perceived conflict of interest*),

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

- (2) Without limiting subsection (1), the member must inform the meeting of–
  - (a) the member’s interest in the matter; and
  - (b) if the member proposes to participate in the meeting in relation to the matter, how the member intends to deal with the actual or perceived conflict of interest.
- (3) If quorum at a meeting cannot be formed because a member of a council proposes to exclude himself or herself from the meeting in order to comply with subsection (1), the member will not be taken to have contravened subsection (1) by participating (including by voting, for example) in the meeting in relation to the matter if the attendance of the member, together with any other required number of members, forms a quorum for the meeting.
- (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.
- (6) This sections does not apply to a matter of ordinary business of the council of a kind prescribed by regulation for the purposes of this section.

60. Finally, 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.

61. Part 3 of the Code of Code of Conduct relevantly provides:

**Member duties**

Council members must:

- 3.1 Act honestly at all times in the performance and discharge of their official functions and duties;
- [...]
- 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;
- [...]
- 3.6 Ensure that relationships with external parties cannot amount to interference by improper influence affecting judgement, decisions and/or actions;
- [...]
- 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 Davis divulged information that was the subject of a confidentiality order by the council, thereby committing misconduct in public administration**

62. The alleged breaches of confidentiality occurred after the council considered the second report and voted upon agenda item 19.1 at the council meeting on 5 June 2018.
63. The accounts of Deputy Mayor Starke and Mr Clarke of their conversations over the telephone on the evening of 13 June 2018 are inconsistent. In response to my enquiries, Mr Clarke denied mentioning any information in relation to how the council had considered or voted upon agenda items concerning the tender process. In contrast, Deputy Mayor Starke described Mr Clarke mentioning the confidential vote on multiple occasions, as well as the outcome of the vote and the name of the other tenderer considered by the council. The conversation occurred within 12 hours of Mr Clarke's meeting with Cr Davis and Cr Papazoglov. The Deputy Mayor's account was completed the day after the phone call occurred.<sup>16</sup>
64. On the information available, I am prepared to accept the Deputy Mayor's account of the conversation with Mr Clarke. He made a reasonably contemporaneous note of it and I have no reason to believe his account is inaccurate. It appears, then, that Mr Clarke was aware of and mentioned confidential information arising out of the council meeting on 5 June 2018 in his telephone conversation with Deputy Mayor Starke on the evening of 13 June 2018.
65. Accounts of the council meeting on 18 June 2018, other than that of Cr Davis, have been largely consistent in describing that Cr Davis admitted to divulging the outcome of the vote on 5 June 2018 to Mr Clarke. Cr Davis' account of her declaration is provided above at paragraphs 39 to 41.
66. Cr Davis has been inconsistent in her accounts to my Office.
67. Initially, Cr Davis advised that she was unsure whether she had informed Mr Clarke of the vote.<sup>17</sup> In a later account, Cr Davis submitted that she did not disclose any confidential information to Mr Clarke and detailed Mr Clarke's and Cr Papazoglov's alleged reassurances.<sup>18</sup>

<sup>16</sup> Deputy Mayor Starke's account is signed and dated 14 June 2018.

<sup>17</sup> Email to my Office, 6 November 2018.

<sup>18</sup> Email to my Office, 3 April 2020.

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68. It is unclear why this information did not have an effect on her first response to my investigation. In response to my investigation, neither Mr Clarke nor Cr Papazoglov mentioned their alleged reassurances to Cr Davis, or provided information consistent with this alleged reassurance.
69. If Cr Davis' limited account of her declaration at the council meeting on 18 June 2018 is accurate, she was, at that stage, unsure of whether she had disclosed the outcome of the vote five days earlier. In response to my provisional report, Cr Davis has categorically denied that she disclosed the outcome of the vote. It is unclear why Cr Davis was uncertain of this within a week of the meeting with Mr Clarke and Cr Papazoglov, or when she first responded to my investigation, but is now certain that she did not disclose the vote.
70. I have concerns about Cr Davis' candour in response to my investigation.
71. In forming my final view whether Cr Davis divulged confidential information, I have had regard to the following considerations.
72. On the one hand:
- Cr Davis denies having revealed the outcome of the vote or the second report to Mr Clarke, and stated that Cr Papazaglov and Mr Clarke have confirmed that version of events with her
  - there is no record of the meeting with Mr Clarke, Cr Papazaglov and Cr Davis on 13 June 2018
  - by 13 June 2018, Cr Papazoglov had been advised of the outcome of the vote.
73. On the other hand:
- Deputy Mayor Starke provided a detailed and relatively contemporaneous account of his conversation with Mr Clarke, to the effect that someone had disclosed the outcome of the vote. I have no reason to doubt Deputy Mayor Starke's credibility
  - multiple accounts provide that Cr Davis admitted at the council meeting on 18 June 2018 that she divulged the outcome of the vote
  - Cr Davis' initial response to my Office was that she was unsure whether she disclosed the outcome of the vote, and, according to Cr Davis, her declaration to the council on 18 June 2018 was that she *may* have disclosed the outcome of the vote. It was only later that Cr Davis explained that Mr Clarke and Cr Papazaglov had advised her that she had not done so. Mr Clarke and Cr Papazoglov's accounts to my Office are not consistent with this.
74. On balance, and having regard to *Briginshaw*, I consider it more probable than not that Cr Davis disclosed the outcome of the vote to Mr Clarke.
75. While I cannot confidently conclude that the second report itself was provided to Mr Clarke, I consider that its content was effectively divulged when the outcome of the vote was revealed to him. The Deputy Mayor's account of his telephone conversation with Mr Clarke and Mr Clarke's knowledge of the other tenderer are particularly persuasive in this regard.
76. While there is no evidence of an improper intention on Cr Davis' part, I consider that this is a serious matter. It is to Cr Davis' credit that she ultimately raised with the council her discussions with Mr Clarke. Nevertheless, her conduct appears to have contributed to the council abandoning a tender process which could have had significant financial and reputational repercussions. If the issue had not been raised with the council, I consider that the tender process would have been irrevocably tainted by a lack of transparency and fairness. This is a matter of great concern.

## Opinion

In light of the above, my final view is that by disclosing the confidential outcome of the council vote of 5 June 2018, Cr Davis breached clause 3.3 of the Code of Conduct and thereby committed misconduct in public administration.

I am also of the view that Cr Davis' conduct appears contrary to section 63(2) of the Local Government Act and, accordingly, appears contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

### **Whether Cr Davis failed to declare an interest at the ordinary meetings of the council held on 16 April 2018, 4 June 2018, 5 June 2018, 18 June 2018, and 3 September 2018, thereby committing misconduct in public administration**

77. Prior to my provisional report, Cr Davis described her relationship with Mr Clarke and his wife, Ann Clarke, as follows:

- Cr Davis met Ann Clarke in 1979 when their children were in a playgroup together but had no further contact after the children started attending preschool
- in 2002, Cr Davis began having contact with Ann Clarke again while they were walking their dogs. Cr Davis explained that,

Our friendship over the years has been focussed on our dogs and on odd occasions we may talk about our children and family. We never discuss business or council<sup>19</sup>

- Cr Davis met with Ann Clarke every couple of months or so to have lunch, but she 'does not socialise in public with Ann and Kym Clarke'
- Cr Davis cared for the Clarke's dogs while they are away
- for a number of years, Cr Davis would visit Ann Clarke's elderly parents, and, more recently, visited Ann's mother once a week
- Cr Davis had engaged KCC, and a subsidiary of the business, on three occasions since 2010, and was considering engaging KCC to build her home in 2018, when the events that are the subject of this investigation occurred
- through her friendship with Ann Clarke, Cr Davis gained an understanding of Mr Clarke's wellbeing, but had 'no role in his care or conversation [sic] pertaining to his health.'<sup>20</sup>

78. Cr Davis has also stated that:

- she attended the meeting with Mr Clarke and Cr Papazoglov on 13 June 2018 because she was concerned for Mr Clarke's wellbeing
- during the meeting, her focus was on Mr Clarke's wellbeing as he expressed his frustration and feelings of betrayal by the council.<sup>21</sup>

79. On whether she had a material, actual or perceived conflict of interest, Cr Davis submitted that:

I do not consider that the relationships between me or Ann or Kym Clarke ... could be characterized as giving rise to either a material, actual or perceived conflict of interest under the Local Government Act in relation to any motions considered by the Council because the relationship I have with Ann Clarke does not pertain to any direct business dealings. Our relationship is around her 2 beautiful dogs and her 98 year old Mother. My business dealings with Kym Clarke of Kym Clarke Constructions have always been

<sup>19</sup> Email to my Office, 6 November 2018.

<sup>20</sup> Ibid.

<sup>21</sup> Email to my Office, 6 November 2018.

administered in a business like manner and have been of an insignificant monetary amount considering Kym and Ann's personal and business wealth.<sup>22</sup>

[Original emphasis]

80. In response to my provisional report, Cr Davis:
- explained that she had considered KCC to build her home but decided otherwise
  - noted that her relationship with Mr Clarke and Mrs Clarke 'does not extend to their business'
  - provided an account of her relationship with Mr Clarke that appears inconsistent with her earlier submissions to my Office.
81. Cr Davis later confirmed that her decision not to engage KCC, and the events leading to that decision, occurred after September 2018. It is not clear to me why this information is relevant to whether Cr Davis had a conflict of interest at the relevant council meetings in this matter.
82. Throughout my investigation, I do not consider that Cr Davis has provided a detailed explanation or account of her statement to the council at the meeting on 18 June 2018 other than that, on the spur of the moment, she considered that she may have compromised the council.
83. Prior to my provisional report, Cr Davis advised me to consider the transcripts of the meeting. The council does not retain audio recordings of council meetings, or transcripts of those recordings. Cr Davis did not provide any further detail in response to my provisional report, which noted that recordings and transcripts are not available.
84. Given the limited details provided by Cr Davis, I find cause to rely on the accounts of others present at the council meeting on 18 June 2018. In any event, Cr Davis has acknowledged that she made a statement to the effect that she may have compromised the council's position, though she no longer considers this to have been the case.

#### *Material conflict of interest*

85. The first issue to consider is whether Cr Davis had a material conflict of interest in relation to:
- agenda item 19.1 of the council meeting on 16 April 2018
  - agenda item 19.1 of the council meeting on 4 June 2018
  - agenda item 19.1 of the council meeting on 5 June 2018
  - agenda item 19.1 of the council meeting on 18 June 2018
  - agenda item 17.2 of the council meeting on 3 September 2018
- for the purposes of section 73(1) of the Local Government Act.
86. To determine whether Cr Davis had a material conflict of interest, I must be satisfied that she had a relevant interest in a matter in relation to the agenda items above. That is, I must be satisfied that either Cr Davis, or an associated person as defined by section 73(1) of the Local Government Act, would receive a benefit or suffer a detriment as described in section 73(1); either a direct or indirect, personal or pecuniary benefit or detriment depending on the outcome of the consideration of the matters above. Moreover, such a benefit or detriment should not be shared with all or substantial proportion of the ratepayers, electors or residents of the council area.<sup>23</sup>
87. The effects of the motions passed at each of the relevant meetings<sup>24</sup> were as follows:

<sup>22</sup> Email to my Office, 6 November 2018.

<sup>23</sup> Local Government Act 1999, section 73(2).

<sup>24</sup> No relevant motions were passed at the council meeting on 4 June 2018. That said, the relevant agenda item was the same as the one considered at the meeting the next day.

- on 16 April 2018, the council endorsed the recommendation of the first report to nominate KCC as the preferred tender to undertake the expansion works, and delegated authority for Mr Rufus to undertake contract negotiations with KCC
- on 5 June 2018, the council authorised Mr Rufus to commence negotiations with another tenderer and request a final tender price and project timeframe from KCC
- on 18 June 2018, the council abandoned the tender process, commenced the re-tender process and authorised Mr Rufus to appoint independent agents to conduct that process
- on 3 September 2018, the council endorsed the recommendation of the independent agents and approved that Mr Rufus appoint Unique Urban Built to undertake the expansion works.

88. The use of the word 'would' in section 73(1) indicates that there must be more than a strong possibility that the relevant elected member, or an associated person, would gain a benefit or suffer a detriment. It is therefore necessary to establish a clear link between the effects of the member's vote and that member then obtaining a benefit or suffering a detriment.
89. I do not consider that Cr Davis, or an associated person, would obtain a benefit or suffer a detriment as a result of the motions provided above. While Mr Clarke may have suffered benefit or detriment as a result of the council decisions, he does not meet the definition of a relevant associated person. My view is that Cr Davis did not have a material conflict of interest in relation to:
- agenda item 19.1 of the council meeting on 16 April 2018
  - agenda item 19.1 of the council meeting on 4 June 2018
  - agenda item 19.1 of the council meeting on 5 June 2018
  - agenda item 19.1 of the council meeting on 18 June 2018
  - agenda item 17.2 of the council meeting on 3 September 2018.

#### *Actual conflict of interest*

90. Section 75(2) defines a conflict of interest as being a conflict between:
- a council member's interest (whether that interest is direct, indirect, personal or pecuniary), and
  - the public interest
- that might lead to a decision that is contrary to the public interest.
91. I do not accept that, at the time, Cr Davis' relationship with Mr Clarke was so unfamiliar and inconsequential that it did not give rise to an interest. Rather, her submissions prior to my provisional report appear to depict a friend involved in a number of personal aspects of the Clarkes' lives. I find it difficult to reconcile Cr Davis' argument with her submissions that she has, for some time, been aware of Mr Clarke's wellbeing and, in the course of the events described in this report, became particularly concerned for Mr Clarke and acted upon those concerns.
92. In response to my provisional report Cr Davis provided an account of her relationship with Mr Clarke that appeared inconsistent with her earlier submissions. This does not, in my view, address or negate her decision to attend the meeting on 13 June 2018 because of her concerns for Mr Clarke, or its weight in my consideration of her interests.
93. In all of the circumstances, I consider that Cr Davis had a personal interest through her relationship with Mr Clarke and his wife, Ann Clarke.
94. At each council meeting, I consider that the public interest was in the council's decision being made in the best interests of the community, rather than based on an individual's

interest. I consider that the best interests of the community were in fair and unbiased council decisions that would result in efficient and financially sound expansion works to the Port Lincoln Leisure Centre Stadium.

95. The word 'conflict' is given its natural and ordinary meaning. That is, there must be a variance or active disagreement between the two interests.
96. Having regard to the first report and its recommendation, and the circumstances at the time, I do not consider that an actual conflict arose between Cr Davis' interest and that of the public when the council considered agenda item 19.1 at the meeting on 16 April 2018.
97. However, given:
- Cr Davis' pre-existing friendship with the Clarkes
  - her knowledge of and concern for Mr Clarke's wellbeing
  - the difficulties that had arisen in the council's negotiations with KCC
  - the second report and the nature of its recommendations
- I consider that a conflict between Cr Davis' personal interest and the public interest arose when the council prepared to and then considered agenda item 19.1 at the council meetings on 4 June and 5 June 2018, respectively.
98. Having regard to Cr Davis' explanation for why she attended the meeting with Mr Clarke on 13 June 2018 and the circumstances surrounding it, I consider that a conflict also arose at the council meetings on 18 June and 3 September 2018. Accounts of Cr Davis' statement at the 18 June 2018 meeting are particularly persuasive in this regard.
99. It is not necessary for me to be satisfied that the conflicts would have led to a decision contrary to the public interest. Rather, it is sufficient that the conflicts between the two interests might have led to a decision that was contrary to the public interest.
100. Having regard:
- to the recommendations of the second report
  - the content of the legal advice tabled at the council meeting on 18 June 2018
  - the content and recommendations of the independent agents' report following the re-tender process
- I consider that there was the potential for the conflicts to lead to a decision that was contrary to the public interest at the council meetings on 4 June, 5 June, 18 June and 3 September 2018, in the event that Cr Davis' decision making was influenced by her association with Mr Clarke rather than concern for the broader community interest.
101. Therefore, my final view is that Cr Davis had a conflict of interest in relation to:
- agenda item 19.1 at the council meeting on 4 June 2018
  - agenda item 19.1 at the council meeting on 5 June 2018
  - agenda item 19.1 at the council meeting on 18 June 2018
  - agenda item 17.2 at the council meeting on 3 September 2018
- within the meaning of sections 75(2) and 75A(1)(a) of the Local Government Act. I do not consider that the exceptions provided by sections 75(3) or 75(4) apply in the circumstances.
102. For the sake of completeness, I shall also consider whether Cr Davis had a perceived conflict of interest in relation to the agenda items above.

#### *Perceived conflict of interest*

103. First, I turn to consider whether Cr Davis had a perceived conflict of interest in relation to agenda item 19.1 at the council meeting on 16 April 2018. The relevant decision at

that stage was whether to appoint KCC as the preferred tenderer for the expansion works. This course of action was recommended by the first report.

104. A perceived conflict of interest, under section 75A(1)(b) of the Local Government Act, exists where a council member could reasonably be taken, from the perspective of an impartial, fair-minded person, to have a conflict of interest in a matter. This is, necessarily, a matter of perception, and does not require the council member to have an actual conflict of interest.
105. Courts have generally imbued the fair-minded observer with detailed knowledge. The fair-minded person must be properly informed as to the nature of the proceedings and the matters in issue.<sup>25</sup> The fair-minded person must be aware and take account of the circumstances of a particular case at hand, but is not unduly sensitive or suspicious.<sup>26</sup>
106. As described above, I consider that Cr Davis' relationship with Mr Clarke and Mrs Clarke was significantly more than that of a mere acquaintance. Assuming that they were equipped with knowledge of:
- the relationship between Cr Davis and Mr Clarke, including its duration and the level of care and interest Cr Davis had taken in the lives of Mr and Mrs Clarke
  - the content and recommendation of the first report
- I consider that it is likely that an impartial, fair-minded person could reasonably perceive that Cr Davis had a conflict of interest when the council considered whether to appoint KCC as the preferred tenderer. Therefore, my view is that Cr Davis had a perceived conflict of interest in regard to agenda item 19.1 at the council meeting on 16 April 2018.
107. Having regard to:
- the standstill in negotiations between KCC and the council as of 4 June 2018
  - Mr Clarke's frustration with the tender process and negotiations
  - the recommendations made to the council at the meetings on 4 and 5 June 2018, 18 June 2018 and 3 September 2018
  - Cr Davis' concern for Mr Clarke and the effect that this concern had on her actions, such as attending a meeting which she later acknowledged to be foolish

and assuming that an impartial, fair-minded person is equipped with this knowledge, my view is that Cr Davis had a perceived conflict of interest in regard to:

- agenda item 19.1 at the council meeting on 4 June 2018
- agenda item 19.1 at the council meeting on 5 June 2018
- agenda item 19.1 at the council meeting on 18 June 2018
- agenda item 17.2 at the council meeting on 3 September 2018.

#### *Dealing with conflicts in an appropriate manner*

108. I must now consider whether Cr Davis appropriately dealt with the actual and perceived conflicts of interest, in accordance with section 75A of the Local Government Act, at the council meetings on 16 April, 4 June, 5 June, 18 June and 3 September 2018.
109. Section 75A(1) of the Local Government Act requires a council member who has an actual or perceived conflict of interest in a matter to be discussed at a meeting of the council, to deal with that conflict of interest in a transparent and accountable way.
110. To do so, the council member must inform the meeting of their interest in the matter and whether or not they propose to participate in the meeting in relation to that matter. They are not necessarily required to be excluded from participating in the discussion

<sup>25</sup> *Singh v Minister of Immigration and Border Protection* [2017] FCCA 1706 at [65].

<sup>26</sup> *Johnson v Johnson* (2000) 201 CLR 488 at [53].

and voting in relation to the matter.<sup>27</sup> However, if the council member proposes to participate, they must inform the meeting of how they intend to deal with the actual or perceived conflict of interest.

111. Cr Davis did not declare any interest at the council meetings on 16 April, 4 June, 5 June and 3 September 2018. I am satisfied that she did not deal with her actual and perceived conflicts of interest in relation to agenda item 19.1 at the April and June meetings and agenda item 17.2 at the September meeting in an appropriate manner.
112. After the legal advice had been distributed and read at the council meeting on 18 June 2018, Cr Davis either informed the council that she had or may have compromised her position and that of the council in relation to agenda item 19.1, and left the meeting. However, no information has been provided to my Office that suggests that Cr Davis informed the council that she had an interest in relation to agenda item 19.1. Given that section 75A(2)(a) requires the member to inform the meeting of their interest in the matter, I consider that Cr Davis failed to appropriately deal with her conflict of interest at the meeting on 18 June 2018.

## Opinion

In light of the above, my final view is that by failing to declare and appropriately deal with actual and perceived conflicts of interest at the council meetings on 16 April, 4 June, 5 June, 18 June and 3 September 2018, Cr Davis breached the provisions of section 75A(1) of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct, thereby committing misconduct.

I am also of the view that Cr Davis' conduct appears contrary to section 63(2) of the Local Government Act and, accordingly, appears contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

In light of my view, and having regard to the information available to me, I do not consider that it is necessary to consider the additional alleged breaches of clauses 3.1 and 3.6 of the Code of Conduct. In the circumstances, I decline to investigate these alleged breaches further.

## Summary and Recommendation

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

1. Cr Davis divulged information that the council had declared confidential pursuant to sections 90(2) and 90(3) of the Local Government Act at the council meeting on 5 June 2018, and in doing so, breached clause 3.3 of the Code of Conduct, thereby committing misconduct in public administration.
2. Cr Davis failed to declare an interest in relation to:
  - agenda item 19.1 at the council meeting on 16 April 2018
  - agenda item 19.1 at the council meeting on 4 June 2018
  - agenda item 19.1 at the council meeting on 5 June 2018
  - agenda item 19.1 at the council meeting on 18 June 2018
  - agenda item 17.2 at the council meeting on 3 September 2018and in doing so, breached the provisions of section 75A(1) of the Local Government Act and clause 3.13 of the Code of Conduct, thereby committing misconduct in public administration.

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<sup>27</sup> Section 75A(5), *Local Government Act 1999*.

Further, my final view is that Cr Davis' conduct appears contrary to section 63(2) of the Local Government Act and, accordingly, appears contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I make the following recommendations under section 25(2) of the Ombudsman Act:

1. That the City of Port Lincoln, by means of a public statement, reprimand Cr Davis for misconduct in public administration
2. That the City of Port Lincoln require Cr Davis to attend training on the application of the Code of Conduct for Council Members
3. That the City of Port Lincoln require Cr Davis to issue a public apology at an ordinary meeting of the council.

### Final comment

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

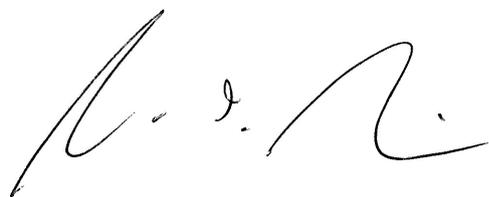
In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 16 February 2021 on what steps have been taken to give effect to my recommendations above; including:

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

In the event that no action has been taken, reasons for the inaction should be provided to me by the council.

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 with the South Australian Civil and Administrative Tribunal.

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



Wayne Lines  
**SA OMBUDSMAN**

11 December 2020