

Final Report - City of Victor Harbor
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	2019/05115
ICAC reference	2019/04427
Date of referral	23 May 2019
Issues	Whether Cr Peter Charles disclosed confidential details about a council briefing by copying an email about the briefing to the Victor Harbor Community Action Group thereby committing misconduct in public administration

Jurisdiction

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

This matter concerns alleged breaches by Cr Charles of clauses 3.1, 3.2 and 3.3 of Part 3 of the Code of Conduct for Council Members (**the Code**). Failure by a council member to comply with Part 3 of the Code constitutes misconduct. As a contravention of Part 3 can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

I have also considered whether Cr Charles 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.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a response from Cr Charles
- seeking a response from the City of Victor Harbor (**the council**)
- seeking more particulars from the reporter
- considering the Code, the Local Government Act, the ICAC Act and the Ombudsman Act
- providing Cr Charles, the council and the reporter 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

1. I provided my tentative views to the parties by way of my provisional report dated 16 October 2019.
2. Cr Charles responded to my provisional report by emails dated 17 October 2019 and 27 November 2019. In both emails, Cr Charles largely reiterated views already expressed to my investigation. Cr Charles' comments are referred to in the body of this report as relevant.
3. Cr Charles' first email also sought clarification regarding the specific words and statements in his email of 18 February 2019 that are said to have been of a confidential nature. I responded to this request by subsequent letter on 25 November 2019.

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.

4. On 24 October 2019, I received a letter from the Mayor of the council, Ms Moira Jenkins. The letter responded to a request in my provisional report for submissions from the Mayor on whether I should require the council to lodge a complaint with SACAT with a view to obtaining an order imposing a fine, a period of suspension or some other penalty on Cr Charles. Ms Jenkins made the following submissions:
 - that I should require the council to lodge a complaint to SACAT with a view to obtaining an order imposing a penalty on Cr Charles
 - that there have been a number of previous occasions on which Cr Charles has breached the Code as well as internal investigations by the council into previous behavioural breaches of the Code
 - that Cr Charles appears to have been aware of the confidential nature of the briefing and that he nonetheless knowingly chose to divulge confidential information
 - that there was potential for this information to be seriously detrimental to the interests of the council
 - that there has been an ongoing pattern of behaviour by Cr Charles and that past apologies and reprimands have not been a deterrent.
5. I did not receive any other responses.
6. I have carefully considered the above responses and have not been persuaded to change my provisional views except to make a recommendation that the council lodge a complaint with SACAT with a view to obtaining an order imposing a fine, a period of suspension or some other penalty on Cr Charles.

Background

1. Cr Charles is an elected member of the council.
2. Three individuals have foreshadowed potential civil claims against the council in relation to a development approved by council approximately 20 years ago, known as the Crozier Hill Estate development. The council has been granted indemnity by the Local Government Association Mutual Liability Scheme (**the MLS**) in relation to the potential claims and, as such, the MLS has taken carriage of the claims on behalf of the council.
3. On 14 February 2019, the elected members of the council attended an informal briefing with members of the MLS to discuss the claims. Solicitors representing MLS were also in attendance. Evidence provided by persons at the briefing indicates that attendees were informed both prior to and at the briefing that the briefing was confidential because it would include advice and discussion regarding potential claims against council. The evidence also indicates that Cr Charles was expressly advised that he could not make an audio recording of the briefing as it was to be held in confidence and was legally privileged.
4. As I understand, the purpose of the briefing was:
 - for MLS and its solicitors to provide the elected members with information about the potential litigation against the council
 - for MLS and its solicitors to explain the process that would be undertaken to review the merits of the claims so that MLS's solicitors could provide advice on the prospects of success of the claims
 - to discuss how MLS and the council would communicate with the community about the claims, with a view to ensuring that information divulged would not

obstruct the ability of the MLS and its solicitors to review the merits of the claims and seek a resolution where appropriate.

5. On 18 February 2019, Cr Charles sent an email to the Chief Executive Officer of the council and the elected members, titled 'RE: Withdrawal of Questions'. Cr Charles' email was also copied to the email address of the Victor Harbor Community Action Group, which is a public community group within the Victor Harbor Region. The email from Cr Charles:
 - made reference to an 'investigation' being conducted by the MLS in relation to the claims
 - purported to quote statements made by another council member
 - purported to quote statements made at the briefing by MLS's legal counsel, concerning the process that would be undertaken to review the legal merits of the claims, and possible strategy to resolve the claims
 - provided his personal view on the process.

Relevant law

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

(3) *Misconduct in public administration* means—

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

7. 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

8. Clauses 3.1-3.3 of the Code of Conduct provide that council members must:

- 3.1 Act honestly at all times in the performance and discharge of their official functions and duties
- 3.2 Perform and discharge their official functions and duties with reasonable care and diligence at all times
- 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.

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9. In response to the allegation against him Cr Charles initially offered no explanation and indicated that his email was an error of judgement and that he would not do it again³. In a subsequent response⁴, Cr Charles informed my investigation that:
 - he considered the information discussed at the informal briefing to have been discussed in confidence
 - he did not consider the information contained in his email of 18 February 2019 to be confidential because it was of a general nature only
 - he did not intend to misrepresent statements made at the informal briefing, only to report what he heard and understood and present his own personal appraisal
 - in copying the email to the Victor Harbor Community Action Group he considers that he acted openly and honestly and in the best interests of the community.
10. Cr Charles' responses to my provisional report⁵ essentially reiterated the above views and emphasised Cr Charles' view that his email contained only superficial statements that described a process no different to that commonly adopted by insurance company assessors.
11. According to Cr Charles, he considered that it was in the public interest to reveal the information in his email of 18 February 2019. However, in my view Cr Charles should have known (and has accepted that he did know) that the information discussed at the informal briefing was confidential. I accept, based on the evidence provided by persons in attendance at the briefing, that attendees were expressly informed of that fact. In any case, having regard to the subject matter and purpose of the briefing I consider that Cr Charles ought reasonably to have known that the discussion should be kept confidential.
12. In my view, in disclosing both the fact of the briefing and purported statements made during the briefing in his email of 18 February 2019, Cr Charles breached clause 3.3 of the Code because he should reasonably have known that this information was confidential.
13. Whilst I also have concerns regarding the accuracy of the information presented in Cr Charles' email, given my finding that he should not have disclosed the information at all, I have chosen not to give further consideration to whether there has also been a breach of clauses 3.1 and 3.2 of the Code (i.e. whether Cr Charles' failed to act honestly or to exercise due care and diligence in the exercise of his official functions).

Opinion

In light of the above, it is my final view that in disclosing details of the confidential council briefing Cr Charles breached clause 3.3 of Part 3 of the Code of Conduct, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

It is also my final view that Cr Charles' contravention of clause 3.3 of Part 3 of the Code of Conduct was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act because Cr Charles breached the Code and therefore section 63 of the Local Government Act.

³ Email from Cr Charles dated 5 June 2019.

⁴ Email from Cr Charles dated 12 June 2019.

⁵ Emails from Cr Charles dated 17 October 2019 and 27 November 2019.

I note with concern that Cr Charles has been found by this Office to have breached the Code on a number of prior occasions. Although Cr Charles initially accepted that he had made an error in this instance and that he would not do it again, he subsequently attempted to justify his conduct.

In my provisional report, I foreshadowed that I was considering whether I should require the council to lodge a complaint with SACAT with a view to obtaining an order imposing a fine, a period of suspension or some other penalty on Cr Charles. I sought submissions from Cr Charles and the Mayor on this subject.

The Mayor was supportive of such a recommendation, citing ongoing breaches of the Code by Cr Charles and a pattern of disregard to the due care and diligence expected of a public officer. Cr Charles did not provide a specific response. However, in my view, Cr Charles continues to deny that his actions in this instance were inappropriate.

Having regard to the above, I recommend under section 25(2) of the Ombudsman Act that the council lodge a complaint with SACAT with a view to obtaining an order imposing a fine, a period of suspension or some other penalty on Cr Charles.

Summary and Recommendations

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

1. By disclosing the fact of the informal council briefing and purported statements made at the briefing in his email of 18 February 2019, Cr Charles breached clause 3.3 of Part 3 of the Code of Conduct, thereby committing misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
2. Cr Charles's contravention of clause 3.3. of Part 3 of the Code was contrary to section 63 of the Local Government Act and, accordingly, appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council lodge a complaint with SACAT with a view to obtaining an order imposing a fine, a period of suspension or some other penalty on Cr Charles.

Final comment

I now report Cr Charles' 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 **10 February 2020** 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.

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

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines
SA OMBUDSMAN

10 December 2019