

Our Ref: MS HEW002-001

4 March 2022

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Dear Ms Inat and Mr Feuerherdt

Draft Investigation Report – Code of Conduct for Council Members – Mayor Michael Hewitson AM

1. We act for Michael Hewitson AM, the Mayor of City of Unley Council.
2. We write to provide our client's response to the findings set out in the Draft Investigation Report provided to our client on 18 February 2022 ("**Draft Report**"). We have adopted the defined terms within that report.

Overview

3. By way of overview and summary, our client submits that:
 - 3.1 your proposed finding that the Herald Article failed to generate community trust and confidence in the Council is unsound because it reflects an incorrect application of the test in cl 2.2 of the Code and mischaracterises the content of the Article;
 - 3.2 your proposed finding that our client irresponsibly referenced confidential legal advice received by Council in the Herald Article is misplaced. Our client did not act inconsistently with the maintenance of legal privilege in the KJ Advice and acted in accordance with his overarching duty to act transparently and with accountability;
 - 3.3 your proposed finding that our client irresponsibly used an unauthorised Mayoral video for his personal purposes is unsound because it is not supported by the evidence before you and ignores that:
 - 3.3.1 our client made proper inquiry and only shared the video after receiving confirmation that he was approved to do so (and removed it as soon as he was told by the Media and Communications Officer that he had erred in granting approval);

- 3.3.2 our client's purpose was to improve the quality of his reporting to the community in his role as Mayor; and
- 3.3.3 the video did not contain misleading or inaccurate material and simply reported on an open public Council meeting – in contrast to the authorities you have referred to where a breach of cl 2.7 of the Code has been made out;
- 3.4 even if the breaches are made out, the recommended sanction disproportionate to the impugned conduct. The breaches relating to the Herald Article can be dealt with by way of apology. No further action ought to be taken with respect to the use of the unapproved video.

The proposed finding of a breach of cl 2.2 of the Code of Conduct (p. 17 of the Draft Report)

4. Clause 2.2 of the Code of Conduct requires a Council member to "act in a way that generates community trust and confidence in the Council" [emphasis added].
5. The Draft Report states that "[o]f most concern however, is [sic] the Mayor's assertions within the Herald Article that the local government laws, as they currently exist, lead to an eroding of truth and democracy in the local government (and City of Unley) context. We do not consider this is an appropriate or proportionate conclusion to be drawn from the KJ Advice" [emphasis added].
6. We do not accept that the content of the Herald Article, when considered by itself,¹ contains the impugned assertion set out above. The comments relating to truth and democracy are general and not related to local government at all, let alone the City of Unley. The Herald Article confirms that, regardless of the legal framework and its impact on fact checking, "[t]he responsibility for accuracy must always lie with the Elected Member".
7. Further, the test is not whether the conclusions expressed were appropriate or proportionate in considering the KJ Advice. Clause 2.2 is directed at trust and confidence in the Council in which the Council Member operates and not to local government in general. The test is whether the public trust and confidence in the City of Unley would be diminished.
8. The Herald Article is not directed at the City of Unley at all. This is in contrast to *Cr Hull* [2014] SAOmbRp 12 where a breach of cl 2.2 was found where a Councillor had made repeated public criticisms of a decision made by the council in question. The proposed finding is also inconsistent with your acceptance that, as the Mayor, our client was in a position to advocate for local government law reform and entitled to share concerns with the community and that the Herald Article served that purpose "to a large extent" (p. 17). We submit that this is all the Herald Article did.

¹ The Draft Report references the Legal Advice Response memorandum which our client sent to elected members which discussed the KJ Advice. No adverse finding is proposed with respect to the Legal Advice Response. In our submission, there is no justification for using the content of the Legal Advice Response to draw an adverse conclusion regarding the Herald Article. The Herald Article must be considered in isolation.

9. The content of the Herald Article was presented in accordance with our client's overarching duty to serve the best interests of the people within the community he represents; to uphold the values of accountability and transparency and to be a representative of an open, responsive and accountable government (cl 1 of the Code). This would no doubt have the effect of strengthening community trust and confidence in the Council in accordance with his duty in cl 2.2.
10. We are instructed that on 2 March 2022 the Eastern Region Alliance of Mayors, which includes our client, had their monthly meeting. During that meeting, our client provided a copy of the Herald Article and asked each Mayor whether they considered the article diminished trust and confidence in the Council. They all dismissed that suggestion.
11. Finally, the opinions expressed in the Herald Argument are clearly labelled as the personal views of our client and not the views of the Council. The finding (at p. 17) that as Mayor his opinions "carry significant weight in the community" is irrelevant to the test under cl 2.2.

The proposed finding of a breach of cl 2.7 of the Code of Conduct – Mayor's publication of the Herald Article

12. Clause 2.7 of the Code of Conduct requires Council members to "deal with information received in their capacity as Council members in a responsible manner".
13. It is uncontroversial that the KJ Advice was information received by our client in his capacity as an elected member. However, in order to amount to a breach of cl 2.7, our client must have dealt with the KJ Advice in an irresponsible manner.
14. What amounts to dealing with information in a responsible manner is open to interpretation. We agree that the three decisions referenced in the Draft Report give examples of what might be considered an irresponsible use, for example, in the decisions of *Cr Andrews* and *Cr Charles* the sharing inaccurate or misleading information with the general public or in the decision of *City of Charles Sturt* the use of information for an improper purpose – to discredit an individual who had contacted the Councillor with their employer.
15. It appears that the impugned part of the Herald Article is the sentence: "As Mayor of Unley, I have been advised that it is against the rules for Elected Members to be able to have the information they share with you checked by staff who are willing to do so".
16. In order to find a breach of cl 2.7, you must be satisfied to the requisite standard that "I have been advised..." is a reference to the KJ Advice. The Draft Report states that the Herald Article "is blatant" in its reference to the KJ Advice. We disagree with this characterisation and suspect that your construction may be tainted by a consideration of the views expressed by our client in the internal Legal Advice Response which was not publicly disseminated.
17. We are instructed that, in fact, our client's reference to having been "advised" was to administrative advice which was received by the Council on 5 August 2021 and which precipitated the KJ Advice (pp. 11 and 13 of Draft Report). It was not intended as a reference to the KJ Advice at all. This is confirmed by our client's statement that he is "unable to share the legal advice..." – he was clearly aware he was not permitted to share the KJ Advice.

18. Even if satisfied that the reference to "I have been advised" is a reference to the KJ Advice, the proposed finding is based on a finding that our client acted in a way which was inconsistent with the Council's maintenance of its legal professional privilege in the KJ Advice. The impugned sentence can only amount to a disclosure of the "gist" or "effect" of that advice. It did not amount to a dissemination of that advice.
19. Disclosure of the conclusion (or the gist, substance or effect) of a privileged communication does not necessarily equate to a waiver of privilege.² In *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275, following a petition to the Governor of Victoria for mercy by Ms Osland, the Attorney-General of Victoria issued a press release refusing the petition and referring to advice from three Senior Counsel which had recommended the petition be denied. The High Court unanimously held that privilege may not have been waived as the "evident purpose of what was said in the press release was to satisfy the public that due process has been followed... and that the decision was not based on political considerations".³ This was not inconsistent with maintenance of the privilege.
20. We submit that the conduct in question is very different from the examples in the authorities summarised above. Our client did not share inaccurate or misleading information or act for an improper purpose – he accurately reflected no more than the gist of the advice which had been given for the purpose of being transparent and accountable and did not act inconsistently with the maintenance of legal professional privilege by the Council.

The proposed finding of a breach of cl 2.7 of the Code of Conduct – Mayor's involvement in the Video Editing Emails (and the use of the unauthorised video) (p. 21 of the Draft Report)

21. The Draft Investigation Report includes a proposed finding of breach of cl 2.7 by our client's involvement in the Video Editing Emails (and relevantly the use of the unauthorised video) which is said to evidence irresponsible conduct in relation to information received in his capacity as an elected member.
22. It is entirely unclear how you say that our client's involvement in the Video Editing Emails (as opposed to the publication of the unapproved video) amounts to a breach of cl 2.7. Further particulars of this proposed finding are required in order for our client to respond to this finding.
23. With respect to the publication of the unapproved video, the summation of the second complaint set out in the Draft Report suggests that the Mayor influenced a staff member to record/prepare an unauthorised video for his personal use. This is not what occurred (as was confirmed by Peter Tsokas (see p. 12)).
24. As is set out on page 11 of the Draft Report, it is common practice for the staff member in question, Mr Weir, the Council's senior Media and Communications Officer, to record our client talking about highlights of that meeting. This video would then be assessed by the Council's Governance team to ensure that the Mayor had summarised the meeting accurately and made

² *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* [2011] FCAFC 107 at [44] per Keane CJ, Downes and Besanko JJ citing *Secretary, Department of Justice v Osland* (2007) 95 ALD 380 at [29] – [51] per Maxwell P.

³ *Osland v Secretary, Department of Justice* at [48] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

publicly available on the City of Unley social media pages via YouTube including its Facebook entitled "Message from the Mayor".⁴ Our client had no involvement in that approval process.

25. We are instructed that Mr Weir recorded the longer video in question following the September 2021 Council meeting. The video was around seven minutes long. Mr Weir said they ought to record a shorter video which was more engaging for use on social media. A shorter version was produced and posted to the City of Unley's social media pages on 1 October 2021.
26. Mr Weir had discussions with our client where he offered to send him the longer video so that he could get feedback on his presenting style. Mr Weir's opinion was that our client "could learn a lot from seeing [his] different attempts". Prior to the email dated 1 October 2021, our client asked Mr Weir if the content of the longer video was "good for sharing" and was assured that it was.
27. It is uncontroversial that our client uploaded the link to his personal Facebook page and that, upon being informed by Mr Weir that the video was unapproved on 5 October 2021, he immediately removed it.
28. As has already been submitted by our client, he was not aware that the longer video had not been checked by the Governance team and was not authorised. He was told by Mr Weir that the longer version had been uploaded to YouTube along with the shorter video. It is evident from Mr Weir's email of 5 October 2021 that our client was not aware the longer video was not approved and that he had previously indicated to our client that it was suitable for sharing where he states "I made the mistake of not having both approved ... I didn't see a problem with a longer version, but I did not get the second one approved..." [emphasis added].
29. The foundation of the proposed finding that our client "failed to follow proper authorisation procedures in determining to use a draft and internal piece of Council media for his own personal purposes" is not supported by the evidence disclosed in the Draft Report. The conclusion that it is "clearly apparent that the Mayor should not have (but did) relied [sic] solely on assurances from a single staff member (who was not privy to the approval process), in determining that he was permitted to share the Mayoral video" is incorrect in that:
 - 29.1 Mr Weir, as Media and Communications Officer, was clearly privy to the approval process (if not responsible for seeking that approval as his 5 October email suggests) in his role; and
 - 29.2 it ignores the fact that there is no evidence of what the "proper authorisation procedure" was and how it applied to our client (as opposed to Mr Weir or other Communications/Governance staff).

We submit, in the circumstances, our client acted entirely appropriately in consulting Mr Weir, seeking his approval and relying upon Mr Weir's assurances. On any view, our client acted in good faith at all times. Even if, unbeknown to our client at the time, there was some question as to Mr Weir's authority to give our client approval to disseminate the video, having made the

⁴ See for example: <https://fb.watch/bw009GajgE/> and <https://fb.watch/bw0znSEugm/>.

enquiry of him and received approval, our client's conduct cannot be characterised as "irresponsible".

30. We note that Council meetings are open to the public pursuant to cl 7.2(a) of the City of Unley's "Code of Practice – Access to Council Meetings and Documents" dated 27 July 2015. There is no suggestion that, outside of the fact that the video was unapproved (and ignoring that a shorter video dealing with the same material was approved), the unapproved video was misleading or was not an accurate reflection of the September Council meeting – something which our client personally made sure of before it was uploaded – or that in sharing the video, he caused detriment to the Council. This is in contrast to the decisions referred to in the Draft Report of *Cr Andrews* [2018] SAOmbRp 10 and *Cr Charles* [2018] SAOmbRP 11 where the councillors were found to have breach cl 2.7 in publishing "media releases" to their personal Facebook pages where those publications included an inaccurate account of Council resolutions.
31. Further, the suggestion in the Draft Report that the intended use of the unapproved video could only be characterised as personal use ignores our client's evidence. We are instructed that our client's intention was to seek feedback in order to improve the quality of his future reporting of the meetings as part of his public role as Mayor as well as to encourage new constituents to go to the City of Unley website and view the report of that meeting. This is clearly connected with Council affairs and his role as Mayor.

Reference to irrelevant matters

32. Page 16 of the Draft Report sets out the three asserted breaches which formed the scope of your investigation. The Draft Report contains references to irrelevant material which is outside the scope of your investigation as described which ought to be excised, including:
 - 32.1 the vague and unparticularised assertion that a staff member complained about the way they were directed to act by our client and that our client's conduct has led to other staff members to cease employment with the Council (p. 8);
 - 32.2 the unparticularised assertion that our client's improperly used Council resources and unreasonably used the services of Council staff (pp. 9, 10 and 11);
 - 32.3 relatedly, the assertion that our client exercised pressure or influence on Council staff for his own personal gain (pp. 10 and 11);
 - 32.4 the assertion that our client's behaviour has led to a high turnover of assistants at a cost to the Council (p. 10).
33. The reference to the material is prejudicial to our client and his right to natural justice. Our client is concerned that those matters have been taken into account in considering whether the particularised allegations and the serious sanction imposed.

Recommendations

34. The Draft Report includes a recommendation that the Council resolve to adopt the findings in the Report and to pass a censure motion in respect of our client, expressing disapproval of his conduct in:

- 34.1 diminishing the community trust and confidence in the Council;
 - 34.2 irresponsibly publishing details of a confidential Council legal advice; and
 - 34.3 irresponsibly sharing an unauthorised Council video.
35. A censure motion is, with respect, an excessive sanction for conduct especially in circumstances where:
- 35.1 with respect to the Herald Article:
 - 35.1.1 the impugned disclosure was not inconsistent with maintenance of the Council's legal professional privilege;
 - 35.1.2 the discussion of the KJ Advice was "largely inconsequential (e.g. it did not convey any sensitive or prejudicial information)" (p. 20) [emphasis added]; and
 - 35.1.3 the article did not seek to "weaponise" the KJ Advice but rather served the purpose of advocating for local government law reform and sharing concerns with the community about the current system which Mr Hewitson, as an elected representative, was entitled to do.
 - 35.2 with respect to the Video Editing Emails:
 - 35.2.1 it is clear that Mr Hewitson was not aware that the longer video was unauthorised for publication. In fact, it had been uploaded to YouTube and provided to Mr Hewitson by the staff member responsible for Media and Communications within the Council;
 - 35.2.2 there is no suggestion that the content of the longer video was inconsistent with or detrimental to the content of the authorised shorter video or that any detriment to the Council was caused in the short period of time which the unapproved video was publicly available; and
 - 35.2.3 you have not properly considered that the Mayor promptly removed the video upon becoming aware that it was unapproved in recommending the serious sanction that the Council censure Mr Hewitson for "irresponsibly sharing an unauthorised Council video".
36. We note that in *Cr Andrews* and *Cr Charles*, which both involved dissemination of inaccurate, misleading and deceptive information to the general public, the recommendation was a public apology and, in the case of *Cr Andrews*, to also undertake further training. There was no recommendation for a public censure by the council in question.
37. We submit that if, notwithstanding our submissions set out above, the final Investigation Report confirms the findings set out in the Draft Report, the appropriate action:

- 37.1 with respect to the unapproved video, is to take no further action under cl 2.25.2 as our client has already removed the video from his Facebook page and any further sanction is unnecessary; and
- 37.2 with respect to the article, a public apology to be published in the Adelaide East Herald in lieu of a censure motion which clarifies the intended purpose of the Herald Article and apologising unreservedly if the content of the article was misconstrued.

Yours faithfully
ILES SELLEY



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