



# Final Investigation Report

Code of Conduct for Council Members

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City of Unley

Subject Member: Mayor Michael Hewitson AM

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## Code of Conduct for Council Members

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<b>Executive summary</b>	<b>3</b>
<b>Report</b>	<b>4</b>
<b>1. COMPLAINT</b>	<b>4</b>
1.1 Allegations	4
1.2 Identity of Complainants	5
<b>2. PROCESS FOR REVIEW AND METHODOLOGY</b>	<b>6</b>
2.1 Framework	6
2.2 Evidence	6
2.3 Staff Member	7
<b>3. NATURE OF CONDUCT</b>	<b>7</b>
3.1 Background	7
3.2 Supplementary Allegations/Evidence	9
3.3 Submissions	13
3.4 Response to Draft Investigation Report	16
<b>4. CONSIDERATION OF COMPLAINT</b>	<b>18</b>
4.1 Clause 2.2 – Act in a way that generates community trust and confidence in the Council.	19
4.2 Clause 2.4 – Show respect for others if making comments publicly.	20
4.3 Clause 2.7 – Deal with information received in their capacity as Council members in a responsible manner.	21
4.4 Clause 2.8 – Endeavour to provide accurate information to the Council and to the public at all times.	24
4.5 Clause 2.14 – Refrain from directing or influencing Council staff with respect to the way in which these employees perform their duties.	26
<b>5. FINDINGS</b>	<b>28</b>
<b>6. RECOMMENDATIONS</b>	<b>29</b>

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# Executive summary

This Code of Conduct investigation concerns two complaints made against Mayor Michael Hewitson AM. The identity of each complainant is confidential.

The complaints together allege breaches of clauses 2.2, 2.4, 2.7, 2.8 and 2.14 of the Code of Conduct for Council Members.

In recent times, the City of Unley (**Council**) and its elected members have considered the extent and appropriateness of assistance and resources allocated to (and used by) the Mayor (and elected members generally). This has resulted in legal advices being received, delineating the extent to which such assistance may be provided.

In response to this legal advice, the Mayor expressed his views via an internal note circulated (primarily) to elected members, as well as an article in the Adelaide East Herald.

The first complaint relates primarily to the Mayor's conduct insofar as it has been alleged these publications are inappropriate and irresponsible, and a breach of the Code of Conduct.

The second complaint raised a separate incident, in which the Mayor recorded and used an unauthorised version of a Mayoral video, with the assistance of a staff member. The discussions that occurred between the Mayor and the staff member were called into question, with the complainant alleging that these communications were inappropriate and demonstrated impermissible 'direction and influence' on behalf of the Mayor.

This investigation had the benefit of extensive written and oral submissions, including a number of interviews with the complainants and the Mayor.

Our findings are that the Mayor breached clause 2.2 and clause 2.7 of the Code of Conduct.

We have found that the Adelaide East Herald article failed to generate community trust and confidence in the Council, primarily because the views expressed by the Mayor include assertions that current local government laws lead to an eroding of truth and democracy in the local government (and Council) context.

We have also found that the Adelaide East Herald irresponsibly referenced a confidential legal advice received by Council. The Mayor was advised not to share the advice but nevertheless did disclose the essence of the advice within the article. Further, the Mayor's use of the unauthorised Mayoral video was irresponsible in circumstances where the video constituted a draft, internal piece of Council media, and where the video was used for the Mayor's personal purposes.

Accordingly, the Mayor has contravened the Code of Conduct. We do not find that the Mayor has breached clauses 2.4, 2.8 and 2.14 of the Code of Conduct.

We recommend that the Council resolve to adopt the findings within this report, and pass a censure motion in respect of the Mayor, expressing disapproval of his conduct in:

- diminishing the community trust and confidence in the Council;
- irresponsibly publishing details of a confidential Council legal advice; and
- irresponsibly sharing an unauthorised Council video.



**Susie Inat**

Special Counsel

T +61 8 8233 5692 M +61 407 710 255

[susie.inat@minterellison.com](mailto:susie.inat@minterellison.com)



**Ryan Feuerherdt**

Lawyer

T +61 8 8233 5573

[ryan.feuerherdt@minterellison.com](mailto:ryan.feuerherdt@minterellison.com)

# Report

## 1. COMPLAINT

By letter dated 4 November 2021, the Council's Chief Executive Officer received a complaint against Mayor Michael Hewitson AM (**First Complaint**).

By letter dated 16 November 2021, the Council's then-Deputy Mayor received a further complaint against Mayor Hewitson (**Second Complaint**).

(To be referred to together as the **Complaints**).

While these are separate complaints by separate complainants, they relate to substantially the same conduct of Mayor Hewitson, and rely on similar evidence. As a result it had been determined to conduct concurrent investigations, within the same Investigation Report.

### 1.1 Allegations

The Complaints relate to the conduct of Mayor Hewitson in responding to a particular legal advice received by the Council, which conduct involved publication of an article in the Adelaide East Herald and circulation of a responsive note to all Elected Members. The Second Complaint also relates to a series of allegedly inappropriate exchanges between Mayor Hewitson and a Council employee.


The Complaints allege, cumulatively, breaches of clauses 2.2, 2.4, 2.7, 2.8, 2.14, 3.1, 3.2, 3.5 and 3.15 of the Code of Conduct for Council members (**Code**). To the extent that the Complaints relate to Part 3 (Misconduct) of the Code, they are not the subject of this investigation or Report.<sup>1</sup>

The Complaints centre on a legal advice, [REDACTED] authored by [REDACTED] and addressed to Mayor Hewitson and Peter Tsokas (Council CEO) (**Legal Advice**). The Legal Advice concerns the extent to which Council administration can lawfully provide assistance to elected members.

Against this background, the Complainants take issue with the publication of Mayor Hewitson's article in the Adelaide East Herald, dated 21 October 2021 and titled 'Silly Rules and Silly Application make for Bad Governance?' (**Herald Article**), asserting that it 'mocks the law and legal advice provided to Council' and reflects poorly on the position of Mayor and the Council staff. The Second Complaint additionally asserts that the Herald Article inappropriately conveyed the essence of confidential legal advice.

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<sup>1</sup> Complaints against Part 3 (Misconduct) of the Code must be referred to appropriate authorities and do not fall within Council's jurisdiction, nor the scope of this Report.



The Complainants also consider that a note circulated by Mayor Hewitson to all elected members titled 'Are Truth and Transparency the cornerstones for Local Government?' in response to the Legal Advice (**Legal Advice Response**) is offensive and 'deriding' of that legal advice.

The Second Complaint also relies on a chain of email communications between Mayor Hewitson and a staff member, dated between 1 October 2021 and 5 November 2021, which allegedly demonstrate the Mayor improperly accepting assistance from that staff member in relation to the preparation of a 'Mayoral video' (**Video Editing Emails**).

The Complainants subsequently supplemented their complaints with additional details and assertions by way of interviews. These are outlined in more detail below.

The Complaints require an investigation as to whether Mayor Hewitson's conduct was in contravention of clauses 2.2, 2.4, 2.7, 2.8 and/or 2.14 of the Code, being as follows:

- 2.2 *Act in a way that generates community trust and confidence in the Council.*
- 2.4 *Show respect for others if making comments publicly.*
- 2.7 *Deal with information received in their capacity as Council members in a responsible manner.*
- 2.8 *Endeavour to provide accurate information to the Council and to the public at all times.*
- 2.14 *Refrain from directing or influencing Council staff with respect to the way in which these employees perform their duties.*

## 1.2 Identity of Complainants

The *Public Interest Disclosure Act 2018* (SA) (**PID Act**) applies to information that raises a potential issue of misconduct (which can include contravention of a code of conduct by a public officer).

As the Complaints assert a contravention of the Code, the PID Act confidentiality regime applies and likely renders each Complainant an 'informant' for the purposes of that Act. Section 8 of the PID Act requires that any person to whom a disclosure under the PID Act has been made, or who otherwise knows that such a disclosure has been made, must not knowingly divulge the identity of an informant, except so far as may be necessary to ensure the matters are investigated, or otherwise with the consent of the informant. The parties were advised of their confidentiality obligations pursuant to the PID Act. The Complainants did not authorise their identities to be divulged for the purpose of this investigation and Report, and as a result, their identities were not divulged to Mayor Hewitson as part of this investigation and will not be revealed within this Report (in compliance with the Council's and the independent investigator's obligations in the PID Act).

## 2. PROCESS FOR REVIEW AND METHODOLOGY

### 2.1 Framework

In accordance with Council's '*Complaints Handling Procedure under Council Members' Code of Conduct*' (**Council's Procedure**), the Principal Member of Council has the discretion to determine how a complaint should be dealt with. If the complaint relates to the Principal Member, their deputy will assume this responsibility (as occurred in this instance). The Deputy Principal Member of Council (i.e. then-Deputy Mayor) determined that the Complaints should be investigated by an independent legal services provider. MinterEllison was subsequently appointed to conduct an independent investigation into the Complaints on behalf of Council.

Given Council's Procedure does not prescribe a framework for the investigation of complaints by an independent legal services provider, we prepared a framework to govern the investigation of the Complaint. The framework is reflective of complaints handling frameworks adopted by other councils.

- *Undertake the investigation in confidence and ensure that both the subject member and complainant are afforded natural justice and procedural fairness;*
- *Review the complaint and all relevant supporting documents;*
- *As soon as possible after reviewing the complaint:*
  - *Write to the subject member and confirm the scope of the investigation to be undertaken;*
  - *Write to the complainant and confirm the scope of the investigation to be undertaken;*
  - *Invite the complainant and subject member to both attend separate interviews to discuss the complaint, and/or provide written submissions in respect of the complaint;*
- *Prepare a draft investigation report subsequent to completing the interviews of the complainant and subject member;*
- *Provide a copy of the draft investigation report to the subject member and complainant and invite any comments on said report; and*
- *Provide a final report to Council as per the Council's Procedure and Code of Conduct for Council Members.*

As explained above, for administrative convenience the two Complaints have been investigated concurrently and our findings in relation to each have been combined into a single Investigation Report.

### 2.2 Evidence

In conducting our investigation into the Complaints we have had regard to the Complaints (and documents annexed thereto), evidence adduced at interviews and additional documents provided by the Complainants.



In accordance with the framework adopted above, the Complainants and Mayor Hewitson were invited to make submissions regarding their respective Complaints, or attend an interview with the independent investigator by teleconference.

Interviews were held with the Complainants (occurring separately), and also with Mayor Hewitson, all of whom made oral submissions. See a summary of key submissions below.

The standard of proof we have applied when assessing and accepting evidence in this 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, we have considered the nature of the assertions made and the consequences if they were to be upheld.

### 2.3 Staff Member

The involvement of the staff member is a relevant component of this Investigation and Report. This Report necessarily considers and analyses the communications and conversations transpiring between the staff member and the Mayor.

This analysis occurs for the purpose of assessing the extent to which the Mayor influenced or directed the staff member. This Report does not seek to make any adverse findings or judgement in respect of the staff member, nor suggest any wrongdoing on behalf of the staff member. We do not purport to criticise or question the staff member's behaviour. To this end, the staff member's name has been redacted and their identity will remain confidential.

## 3. NATURE OF CONDUCT

### 3.1 Background

Council commissioned and received legal advice from [REDACTED] in relation to the assistance which may (lawfully) be given to elected members by Council administration (being the Legal Advice). The Legal Advice addressed five questions as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Legal Advice concluded with the following paragraph:

Finally, I recommend that the questions posed by the Mayor and the advice and responses thereto, are matters of relevance and interest to other elected members and senior staff and that this document be circulated to those persons as part of a training and development focus. However, as it also includes privileged legal advice to the Council (i.e. the corporate entity that it not be subject to any wider dissemination, in particular by providing it to any member of the public).

We are advised that the Legal Advice was subsequently circulated to elected members and senior staff.

Along with the Legal Advice, Mayor Hewitson circulated to all other elected members a note, in which he authored an apparent response to the content of that advice, (being the Legal Advice Response). Within that Legal Advice Response, Mayor Hewitson made comments including the following:

- It is a pity that the reasons are not allowed to be quoted publically. [*seemingly in reference to the confidentiality of the legal advice*]
- This taken literally is silly ...
- This answer avoids the question ...
- The answer given also misses the question ...
- To keep this advice privileged to Council is actually in itself an underlining of the problem for good governance that is open and transparent

On 21 October 2021, Mayor Hewitson published an article in the Adelaide East Herald (being the Herald Article). The Herald Article concerned 'silly rules' and contained statements such as:

- We also have some silly rules in local government. I doubt whether this will surprise your readers.
- For 14 years I have been able to have my newsletters checked by staff for factual accuracy. The views were mine, and I valued feedback on those as well. The responsibility for accuracy must always lie with the elected member. It was good to have inadvertent mistakes corrected to ensure Unley's debates were based on agreed facts.
- Weaponised legal attacks ensure truth is hidden and truth is hard to see.
- 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.
- Is there a way for our staff and elected members to be able to work together, even though there are rules which are silly when applied to willing partners working for truth.
- Legal rules will always be a blunt instrument applied badly, and they can be bad for our democracy.



- By the way, I am unable to share the legal advice I have had about this with you. Silly rules need to be called out.

The Herald Article concluded with the statement: 'These are my personal views and are not necessarily council policy.'<sup>2</sup>

### 3.2 Supplementary Allegations/Evidence

#### First Complaint

The First Complaint centred on the views expressed by the Mayor in the Herald Article, and the fact he publicised these views 'despite being advised by a legal opinion that the views he held were contrary to the law.' It is asserted that the Herald Article 'mocks the law and legal advice provided to Council', and 'reflects poorly on the person, the position of Mayor and the staff of the Council and the residents of the city of Unley.'

The First Complaint cites an example of a staff member making a complaint about the way they were directed to act on behalf of the Mayor, and raises concerns that the Mayor's conduct may have led other staff members to cease employment with Council.<sup>3</sup>

The First Complaint emphasises that communications from elected members 'need to be clear about whose views we are representing or supporting', for they may be personal views, Council views, community views or the views of the Mayor.

Interviews were held with Complainants in relation to the First Complaint.

A Complainant requested that certain persons (including Council CEO Mr Tsokas) be interviewed as part of this investigation, so as to provide better context regarding the use of staff resources. ■■■ provided an email from earlier in the Mayor's tenure, within which then-councillor Hewitson circulated a personal newsletter to Council staff with the following comments:

I have written to staff to ensure the factual content of the attached document rather than the opinion expressed is accurate. ...

I am not wanting endorsement but rather to check whether the information I state about the plan is accurate. ...


I have valued comments from you and the staff about my newsletters and I have altered them if there were any factual as against opinion errors.

During ■■■ explained that the Mayor emailed all elected members and indicated his intention to publish the Herald Article. Although he had Council's advice, strong legal advice, and the views of other elected members (that he should not publish the Herald Article), he did so anyway.

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<sup>2</sup> It was submitted that this disclaimer is a standard inclusion in all Herald articles, rather than being inserted by the Mayor himself. We make no finding in this respect and have assessed the effect the disclaimer as it appears.

<sup>3</sup> These assertions were made as background, are not the subject of this complaint, are therefore untested and we made no finding in this respect.



When questioned as to any evidence which could establish a breach of clause 2.14, a Complainant explained this was evidenced through their understanding and information gleaned from conversations with the Council's CEO.

A Complainant asserted that, although the Herald Article asserts to be the Mayor's 'personal views', the position of Mayor is (and remains) the Council's spokesperson and in the eyes of the public, the Mayor (using that office and title) has painted the staff in a poor light.

Finally, it was asserted that the Mayor's use of Council resources is quite significant (as evidenced by a recent Question on Notice).

A Complainant took issue with the publication of the Herald Article. It was asserted that the Mayor ignored legal advice, governance advice, and the CEO's advice in publishing the advice. In relation to the content of the article, it was asserted that the views expressed were not appropriate, and that the Mayor needs to be aware that his comments can come across as damaging (to the Council) when read by the public. A Complainant commented that the Mayor needs to be careful in questioning 'the system' in circumstances where he holds such a high position and is accountable to the community and through the Local Government Act. Although the Mayor explained he was 'always allowed to do it', the Legal Advice [REDACTED]. A Complainant therefore concluded that this comment was inaccurate.

In relation to the attribution of authorship in the Herald Article, the first Complainant acknowledged the disclaimer at the end but emphasised the context and language used. Where an opinion is demeaning and disrespectful, it can be harmful. Further, as a public figure, one's personal views and public views can become blurred.

In a more general sense, it was asserted that there is a 'big picture' of behaviour and conduct of the Mayor which presents a concern, in relation to the use of staff and Council resources. In evidence of a breach of section 2.14 of the Code, a Complainant cited unnamed staff members, discussions with the CEO, and (alleged) high turnover of assistants.<sup>4</sup>

A Complainant provided copies of three emails sent by various elected members in response to the Mayor's indication that he would publish the Herald Article, as well as a copy of a speech read by an elected member on 1 November 2021. These emails express concern and ill-comfort with Mayor Hewitson's comments, and advised that those elected members did not support Mayor Hewitson's position.

A Complainant also pointed to a relevant Question on Notice, being item number 5.3.1 in the meeting agenda for Council's 22 November 2021 meeting, in relation to:

- legal advice sought in relation to this issue;
- the cost of recruiting and training the Mayor's assistants; and

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<sup>4</sup> See our comment above. These assertions are untested and we made no finding in this respect.

- the time spent by the CEO in managing and advising the Mayor (and the cost of this time).

A Complainant had concerns with the content of the Herald Article, noting it was intemperate, unbalanced, and presented a weaponising of legal opinion (as well as bringing the legal advice into disrepute). A Complainant conceded it was acceptable to criticise such material but any criticism should be tempered and balanced, within a calm, clear and considered argument.

In relation to the use of staff resources, ██████████ held concerns with the Mayor's lack of understanding regarding the burden of drawing staff away from their critical Council duties. The Mayor's lack of awareness was cited, insofar as a staff member being *willing* to assist doesn't mean they should be asked to assist. This is particularly relevant in the case of a power imbalance – the staff feel obliged to assist the Mayor, but he fails to understand this imbalance, and the importance of protecting staff.

In relation to the alleged breaches of section 2.14 of the Code, ██████████ noted that the evidence supporting the breach was inferred largely from conversations and a range of instances (e.g. staff members allegedly leaving their positions because of the Mayor).<sup>5</sup>

### Second Complaint


The Second Complaint firstly relates to the publication of the Herald Article and secondly the communications within certain emails between Mayor Hewitson and a staff member (being the Video Editing Emails).

It is asserted that the Mayor's publication of the Herald Article breached clause 2.7 of the Code because it was not a responsible use of legal advice received in an official capacity. That is, it referenced the Legal Advice (despite that advice indicating it should not be publicised). Whilst the Complainant acknowledges the substance of the advice was not shared, it is asserted that the Herald Article clearly conveyed the essence of the advice. The Mayor's comments were also allegedly critical of the Legal Advice insofar as it was labelled the 'silly application of silly rules' which equated to 'bad governance.'

██████████ a series of emails between the Mayor and a Council staff member. ██████████ that these emails evidence the staff member providing the Mayor with an unauthorised version of a 'Mayoral video', prepared for the Mayor's (personal) use. (The Mayor's use of the Mayoral video is discussed in Part 3.3 (page 14) of this Report). The Complainant explains that the Mayor readily accepted the assistance from the staff member, which he knew to be inappropriate, and did not make any effort to reject the assistance. The Mayor did not convey the inappropriateness of the service being provided. It is asserted that this occurred after administrative advice was provided to the Mayor that staff could not assist in

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<sup>5</sup> The comment above is repeated.



matters not directly related to Council business. The Video Editing Emails also contain a subsequent acknowledgment by the staff member that they had made an error of judgement in providing the Mayor with the longer version of the video, which was to be removed from YouTube as it was not approved. The Mayor was requested to remove the video and the emails indicate that the Mayor complied with this request, writing 'It has been removed.' The Complainant asserts that these emails evidence a breach of sections 2.7 and 2.14 of the Code, as the Mayor acknowledges he had been using the unauthorised video.

The Complainant for the Second Complaint attended an interview on 14 December 2021. The Complainant provided useful background context for the 'Mayoral video' in question. It was explained that a video is produced by the Council after each Council meeting, containing a summary of the meeting as presented by the Mayor. The practice of the Council administration was to review the content of the video for factual errors, and it would be approved and published (on Council social media pages) if no errors were found. Ordinarily these videos are two to three minutes in length. In this instance, the shorter video was duly approved and published. However, an unedited and unauthorised 9-minute version of the video was also produced and evidently provided to the Mayor (being the 'longer version').

The Complainant also spoke to the Council resources used by the Mayor. It was explained that, although the Mayor does not seek to do the wrong thing, he can be unreasonably persistent in utilising the services of Council staff. This can be attributable to the level of pressure or influence that staff can feel when receiving requests from the Mayor.

Finally, in relation to the publication of the Herald Article, the Complainant asserted that the article calls into question the Council's practices, and alleges that the Council is not operating reasonably and not applying good governance.

### Other Interviews

A meeting was held with Peter Tsokas, Council's CEO, on 24 January 2022. A majority of Complainants advised that the CEO would be well placed to advise on many of the circumstances underpinning the Complaints and this investigation. The CEO agreed to be interviewed.

In relation to the Herald Article, Mr Tsokas advised that Mayor Hewitson has historically requested and obtained staff assistance to check his personal quarterly newsletter.<sup>6</sup> One to two years ago, it was determined that staff would no longer check the Mayor's newsletters. However, the Mayor continued to request that staff check his publications.<sup>7</sup> In October 2021, Council sought advice from ██████████ (culminating in the Legal Advice) but the Mayor disagreed with its contents and published his responsive Herald Article. The CEO advised that this upset (at least

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<sup>6</sup> This is a newsletter produced by the Mayor personally, not being an official Council publication.

<sup>7</sup> The "requests" referred to were provided (and taken) as background context for the primary Complaints (rather than forming allegations of their own). Accordingly such references to the Mayor's historical conduct are referenced, but not substantially considered or addressed, within this Report.



some) elected members who felt the Mayor was not representing the Council's view, but rather his own opinion, with it being difficult for the public to distinguish between these.

In relation to the Video Editing Emails, Mr Tsokas explained that the Mayor and the staff member in question have been producing monthly Mayoral videos. He understood that the Mayor and the staff member have a good working relationship and the staff member may have in fact offered to assist the Mayor by providing the longer version of the video. Mr Tsokas noted that the staff member was eager to please, and he was not aware of any evidence indicating the Mayor was directing (or influencing) the staff member to provide the video in this instance.

In a more general sense, Mr Tsokas explained that in Mayor Hewitson's tenure as an elected member, he has historically circulated his personal newsletter to Council staff with a comment such as 'any feedback welcome'. This did not involve any 'directions' but was simply an invitation to check the publication. However, upon his election to Mayor, Mayor Hewitson commenced greater involvement with Council administration on a technical level. Council staff have found it difficult to manage the high workloads caused by the Mayor.<sup>8</sup> Pleasingly, since the Legal Advice, the Mayor has adopted a different approach, deliberately attempting to avoid any requests of staff to perform such tasks.

### 3.3 Submissions

An interview was held with Mayor Hewitson on 16 December 2021. During this interview he provided extensive written material comprising lengthy responses to the Complaints.

Mayor Hewitson addressed the allegations in detail and provided a response to all aspects of the Complaints. These have been summarised and grouped into appropriate headings below.

#### Legal Advice Response & Legal Advice

- The Mayor shared the Legal Advice with other councillors so as to be open and transparent.
- The Mayor pointed to a separate but related [REDACTED] advice dated 5 August 2021 and shared by the Mayor to the other councillors with the comment:

[REDACTED]

and the Mayor asserts that this comment 'clearly reinforces the importance of following the law and accepting that this was the law.'

- The Mayor believes the Legal Advice to be accurate and legally sound, and did not deride it.

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<sup>8</sup> Whilst resource intensive, this does not establish that the Mayor's actions have amounted to directing and influencing staff. As explained in this Report, there is a lack of evidence in the context of the Complaints and are unable to make that finding.

- The Legal Advice Response contained the Mayor's personal thoughts and was sent in a confidential context (not to be shared beyond Council or made public).


### Herald Article

- The Mayor was unhappy with the content of the 5 August 2021 advice insofar as the (perceived) negative effect on good governance, and (in collaboration with the CEO) developed the questions the subject of the 6 October 2021 Legal Advice. These questions were developed for the purpose of publicising the advice and rules explained therein, but the Legal Advice was unable to be released publicly. The Mayor was not dissatisfied with the Legal Advice itself, but only the fact he was unable to share the content of it. In fact, it was *because* the Mayor accepted the advice that he wrote the Herald Article.
- Though the title of the Herald Article contained the words 'silly rules', this was not due to the content of the Legal Advice but rather the (perceived) negative effect of the law on local government.
- The Mayor accepted the legal advice contained in the Legal Advice but not the laws it was based on. Accordingly the Mayor's negative comments were directed toward these underlying laws and the need for reform.
- The Mayor commented that if someone in the position of Mayor cannot advocate for local government law reform, then who can? Similarly, if the Mayor is unable to share such concerns with the community, who will?
- It was asserted that it is possible to both respect the rule of law, and argue for a change in the law, particularly where the Herald Article was expressing a private view. The article challenges the application of the law but it also 'supports the existence and importance of law'.
- The Mayor noted that the Herald Article did not contain such strong statements as expressed in the Legal Advice Response, and did not contain any of the confidential content/details of the Legal Advice. Whilst the Herald Article did explain that some advice had been received (to the effect that 'it is against the rules' for elected members to have their publications checked by the administration), the Mayor noted that [REDACTED]  
[REDACTED]  
[REDACTED].
- In respect to the allegations that the publication of the Herald Article lessened trust and confidence in the Council, the Mayor noted that highlighting 'silly rules' to the public actually increases transparency, in the same way that admitting mistakes increases confidence by virtue of that transparency. The Mayor asserted that the community is now better informed as to elected member publications should be read, in light of the fact that the content of those publications is no longer being fact-checked by the administration (as they were for 14 years).

- The Mayor commented that the Legal Advice itself states that [REDACTED].

### Video Editing Emails

- The Mayor explained the process for creating the Mayoral videos from his perspective. Generally a longer, unedited (approximately 7-minute) version would be produced, as well as a shorter, edited (2 – 3 minute) version, which would be the version circulated and publicised.
- On the occasion in question, the Mayor and the staff member had a conversation about the two different versions. It was established that the shorter version would be officially used.
- The Mayor stated that he did not request the longer version, but the staff member said to him, 'I'll send you a copy of the longer one'.
- The Mayor questioned whether the longer version was able to be used, to which the staff member replied, 'It's fine to use, it's the same content, just longer'. The Mayor explains that this sentiment was repeated in the emails from the staff member to the Mayor containing the video – it was not advised to him that the video was unauthorised, and he reasonably believed it was okay for the video to become public. The Mayor was comforted by the staff member's advice that the video '... was good to share and was accurate.'
- The Mayor states that he emphasised to the staff member the need to ensure the governance team checked video content for factual accuracy, due to the importance of the Council website being accurate.
- The Mayor notes that the email to him of 5 November 2021, 9.04am, confirms this, with the staff member stating, 'I didn't see a problem in the longer version ...'.
- The Mayor states he intended to use the longer version for his own learning purposes. The staff member had agreed with this approach, believing the longer version could be used to test the quality of communication within the video, and stating to the Mayor, '... you would learn a lot from seeing your different attempts.'
- In line with this intended purpose, the Mayor posted the longer version of the video on his Facebook page with a caption to the effect of, 'I am seeking feedback on my ability to communicate, and am seeking to improve my videos and aim for 3 minutes. How can I improve?'
- The Mayor states that he removed this post and video immediately upon receiving the email from the staff member on 5 November 2021 and being notified it was unauthorised and had not been officially approved.
- In relation to the allegation of 'directing' or 'influencing', the Mayor notes it is clear from the staff member's correspondence that it was the staff member's idea to circulate that video.

- 
- In relation to the claim that the Mayor 'didn't refuse' the offer of the video, and didn't convey the inappropriateness of the service, the Mayor states that the whole process was initiated and approved by the staff member, hence the apologies in the emails. Indeed the Mayor states that no refusal was provided because he did not know the longer version was unauthorised. This is said to be established by the staff member's email statement of 5 November 2021, advising the Mayor '... I did not get the second one approved...', with this statement indicating that the Mayor did not previously know this.
  - In relation to the claim that the Mayor (in his 5 November 2021 email) admitted to the use of the unauthorised version of the video, the Mayor asserts that he did not know the video was unauthorised. Rather, he was simply complying with a request of the staff member.
  - Finally, the Mayor also emphasised that he took no personal gain from sharing the video – it was simply to seek feedback and improve future videos.

The Mayor also briefly spoke to the apparent allegations of 'influencing' staff members on a more general, historical and broader basis. It was stated that the 'fact-checking' (of newsletters prepared personally by the Mayor – including during his tenure as a councillor) by Council administration which had been occurring for 14 years (and which he expressly referenced in the Herald Article) would not come about from 'requests' (or directions) by the Mayor, but rather were *opportunities* for staff to review a publication. The Mayor stated he never *expected* a response and did not apply pressure to staff. Indeed he would only receive a response half of the time, and when no response was received, no issue was taken. The Mayor acknowledged that it is the author's final responsibility to check the accuracy of their publication. It was asserted that he has been very careful with his dealings with staff to ensure there was no 'direction'.

Mayor Hewitson subsequently provided to the investigator an email dated 19 October 2015 (at the time the Mayor was a councillor but not Mayor), within which he provided a proposed newsletter to Council administration containing the words: 'Any advice to me on errors of fact and all suggestions are most welcome!'. It is said that this demonstrates a longstanding practice of *allowing* staff an opportunity to comment, rather than *requesting* (or directing) feedback.


### **3.4 Response to Draft Investigation Report**

In response to the Draft Investigation Report, submissions and comments were received from the Complainants. We have closely considered all feedback and amendments and alterations have been made to the content of this Final Investigation Report as necessary.

As a general comment, we urge readers of this Report to distinguish passages of this Report which are reproductions or summaries of the assertions, responses, and facts advised to us, as against passages of this Report containing the findings of the investigation.

A number of further submissions were also advanced by Mayor Hewitson's solicitors on his behalf.





In respect to clause 2.2, it was submitted that the comments within the Herald Article are general, and not directed at the City of Unley; and that this report mischaracterises the content of the article (resulting in an unsound finding of breach).


We consider that the content of the Herald Article does invoke the City of Unley's practices and reputation. The City of Unley is expressly referenced four times, as well as other references to 'our city', etc. In any event the mind of the reader would have turned to the City of Unley (rather than simply local government, or government generally), in light of the nature (and circulation) of the publication and the identity of the author, even if this was not the Mayor's intention.

In respect to clause 2.7, it was submitted that the finding of breach is based on a finding that the Mayor acted in a way which was inconsistent with the Council's maintenance of its legal professional privilege. It was submitted that the relevant sentence in the Herald Article only amounts to a disclosure of the "gist" or "effect" of that advice (albeit the article does accurately reflect the gist of the advice), and accordingly the Mayor did not act inconsistently with the maintenance of legal professional privilege by the Council.

To clarify our findings, we do not find that the Mayor acted inconsistently with the Council's maintenance of its legal professional privilege. We find that that the Mayor seemingly paid no regard to the implications of privilege, and the proper processes for disclosure of clearly confidential material. It was not established that the Mayor turned his mind to this. Indeed we do not purport to find that privilege was waived by the Mayor. However, we are satisfied that clause 2.7 can be breached even where privilege is not waived. The Mayor conveyed the essence of a confidential legal advice without following proper processes and without turning his mind to the privilege implications (which may or may not have been waived). This is what constituted the irresponsible conduct, and formed the basis for the finding.

A further submission regarding clause 2.7 was that this Report's finding that Mayor irresponsibly used the unauthorised Mayoral video for personal purposes is unsound, and ignores the fact that the staff member assured the Mayor the longer video was 'good for sharing', and that the staff member was clearly privy to the approval process. It was submitted that, as a result, the Mayor acted entirely appropriately in consulting the staff member, seeking his approval and relying upon his assurances (and therefore his conduct cannot be characterised as irresponsible). It was further submitted that the Mayor's intention in publishing the video 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", and that this "is clearly connected with Council affairs and his role as Mayor."

We do not accept that the Mayor acted appropriately in consulting the staff member, seeking his approval and relying upon his assurances. As has become apparent, the staff member was not the determiner or approver of such publications. It is now known that greater levels of approval



were required, demonstrating the failure for proper processes to be followed at the time. The Mayor himself decided to share the video on his personal Facebook page, and in such circumstances we consider a greater level of prudence was required. For example, investigating through formal channels the proper authorisation procedure, and subsequently, pursuing that formal authorisation prior to publishing the material. Adding further weight to this conclusion is the fact the piece of media was in effect a draft item; being otherwise inaccessible by the public, but circulated publicly by the Mayor for personal purposes. We accept that the sharing of the video was somewhat connected with the Mayor's role, but maintain our view that it was nonetheless shared for his own personal purposes. It was not shared on behalf of the Council.

This Report finds that the sharing of a draft document on the Mayor's personal Facebook page is not a responsible use of that information.

Finally, it was submitted that the recommended sanction (being a censure motion) is disproportionate and excessive. We were urged to recommend a public apology be published in the Adelaide East Herald, clarifying the intended purpose of the Herald Article and apologising if the content of that article was misconstrued.

We have considered the appropriateness of a public apology in place of a censure motion but remain of the view that a censure motion is most apt for the Mayor's conduct. In our view, an apology is best suited to conduct which has personally aggrieved a person or class of persons. The Mayor's conduct does not lend itself to such means of rectification, but rather, requires condemnation and rebuke, so as to express a clear message that such conduct is strongly disapproved by the Council. We disagree that a censure motion is disproportionate and excessive and note that 'censure' is defined in the Macquarie Dictionary as 'an expression of disapproval' (a definition which we adopt). We also emphasise that the recommended wording of the censure motion is carefully delineated and specific – relating only to the conduct found in breach of the Code. It does not seek to censure the Mayor's conduct generally.

#### 4. CONSIDERATION OF COMPLAINT

The Complaints allege breaches of clauses 2.2, 2.4, 2.7, 2.8 and 2.14 of the Code. Each clause of the Code and alleged breach is considered in turn below. In this respect we have grouped together the main assertions within the Complaints, being:

1. That circulation of the Legal Advice Response was offensive and deriding of the Legal Advice.
2. That publication of the Herald Article was inappropriate, particularly as it conveyed the essence of the confidential legal advice.
3. That the Video Editing Emails demonstrate the Mayor improperly accepting assistance from a staff member (and/or directing or influencing that staff member).

## 4.1 **Clause 2.2 – Act in a way that generates community trust and confidence in the Council.**

### Particulars

The specific allegations of the First Complaint are that the Mayor's publication/circulation of the Legal Advice Response and the Herald Article were inappropriate and failed to generate community trust and confidence in the Council. It is said that the Mayor publicised his views notwithstanding the fact the legal advice confirmed his views were contrary to the law. It is also asserted that the content of the Herald Article mocks the Legal Advice and inappropriately questions 'the system' and the law.

### Discussion


Clause 2.2 requires elected members to act in a way that generates community trust and confidence in the Council. We must consider whether the Mayor's conduct generated community trust and confidence in the Council.

We accept the Mayor's submission that the Legal Advice Response was circulated only to elected members in a confidential context. We also accept that the Mayor's primary grievance was the applicable law and its application, rather than the Legal Advice itself or its author. However, within the Legal Advice Response, the Mayor does make criticisms in relation to the Legal Advice. For example, where he categorises particular passages as 'silly', or which 'misses the question' or 'avoids the question'. Nonetheless, these comments were disseminated to primarily elected members and not available to the community at large. We do not consider that the content of the Legal Advice Response failed to generate community trust and confidence in the Council.

In relation to the Herald Article, whilst the criticism of the Legal Advice was muted, it was distributed widely and publicly. The Mayor referred to silly legal rules which can be bad for democracy, and weaponised legal attacks which hide the truth. The Herald Article explained this criticism in more specificity in that it advised readers that the Council received legal advice advising that the previously-practiced 'fact-checking' is not permitted.

We accept the First Complaint's characterisation of these comments as a 'questioning of the system'. We consider that the criticism in the Herald Article is primarily directed toward the law and the rules forming the basis for the legal advice, rather than the legal advice itself. We agree with the Mayor's submission that his negative comments were directed toward the underlying laws and the need for reform, rather than the legal advice itself.

We also accept that the Mayor is in a position to advocate for local government law reform, and is entitled to share concerns with the community. We agree that it is possible to respect the rule of law whilst arguing for a change in the law. The Herald Article seeks to serve these purposes and to a large extent it does.



Of most concern however, is 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 that this is an appropriate or proportionate conclusion to be drawn from the Legal Advice.

Particularly relevant is the fact that the Mayor himself authored this article. Though it expressed personal views, he remains the Mayor and his views carry significant weight in the community.

We consider that the readers of the Herald Article would, by virtue of the Mayor's abovementioned comments, find their trust and confidence in the Council diminished.

### Findings

We find that the Mayor's publication of the Herald Article failed to generate community trust and confidence in the Council. Accordingly the Mayor has breached clause 2.2 of the Code.

## **4.2 Clause 2.4 – Show respect for others if making comments publicly.**

### Particulars

The specific allegations of the First Complaint are that the statements in the Herald Article have painted the staff in a poor light, and have come across as damaging. The Complainants have stressed that, although the article is noted as being the Mayor's personal opinion, he nonetheless used his official title – and expressed an opinion which could be seen as demeaning and disrespectful. Complainants noted that, as a public figure, one's personal views and public views can become blurred.

### Discussion


Clause 2.4 requires elected members to show respect for others if making comments publicly. In considering Mayor Hewitson's compliance with clause 2.4, it is necessary to determine whether the Herald Article constituted 'comments' made 'publicly'.

A 'comment', as defined by the *Macquarie Dictionary*, includes:

- 'a note in explanation, expansion, or criticism of a passage in a writing, book, etc.; an annotation'
- 'explanatory or critical matter added to a text'; and
- 'a remark, observation, or criticism'.

We find the content of the Herald Article constituted 'comments' for the purposes of clause 2.4. We also find that the Herald Article, being a newspaper circulated within the community, was made 'publicly' for the purposes of clause 2.4.

As noted above, the Herald Article contained little criticism of the Legal Advice and its author. We do not consider that the Herald Article was disrespectful in that regard.



The First Complaint asserts that the Council staff have been referred to disrespectfully. References to 'silly application' of 'silly rules' leading to 'bad governance' does appear to have the effect of disparaging the Council staff, particularly governance staff. Similarly, in stating that Council staff have been checking the Mayor's newsletters for 14 years, and then stating that it is against the rules for this to occur, the Mayor has shown that the Council staff have been persistently acting in breach of this law.

However in our view, if the Mayor has referenced Council staff acting unlawfully or improperly, these assertions have been indirect and innocuous – seemingly inadvertent – and likely unapparent to ordinary readers. In our view the Herald Article does not contain disrespectful comments.

#### Findings

We do not find that the Mayor's publication of the Herald Article failed to show respect for others (in making comments publicly) and accordingly we have found no breach of clause 2.4 of the Code.

### **4.3 Clause 2.7 – Deal with information received in their capacity as Council members in a responsible manner.**

#### Particulars

Both the First Complaint and the Second Complaint allege breaches of clause 2.7 of the Code, in relation to the Herald Article and the Video Editing Emails.

#### *Herald Article*

The First Complaint asserts that the Mayor was advised not to publish the Herald Article, by the Council governance staff, the CEO, the Legal Advice, and other elected members. Yet the Mayor ignored this advice in publishing the article. The Complainants spoke of a standard which elected member publications need to meet. It was argued that communications need to be clear about whose views they are representing, and need to be tempered and balanced, containing a calm, clear and considered argument. It is asserted that the Mayor did not meet this standard and rather 'weaponised' the legal opinion within the Herald Article.

The Second Complaint adds that the Herald Article was not a responsible use of legal advice received in an official capacity. This is because it allegedly called into question the Council's governance practices. The Second Complaint also paid particular regard to the fact that the Mayor conveyed the essence of the Legal Advice in circumstances where it was not to be publicised or shared.



## *Video Editing Emails*

The Second Complaint also alleges that the Mayor's involvement in the Video Editing Emails evidences a breach of clause 2.7 of the Code. This is ostensibly because they evidence the Mayor using the unauthorised version of the Mayoral video for his own (personal) purposes, and not rejecting (nor conveying the inappropriateness of) the service being offered by the staff member.

## Discussion

Clause 2.7 of the Code requires elected members to deal with information (received in their capacity as council members) in a responsible manner.

In the Ombudsman's decisions in *Cr Andrews* [2018] SAOmbRp 10 and *Cr Charles* [2018] SAOmbRp 11, the councillors in question were found to be in breach of clause 2.7 of the Code (amongst other clauses), by writing and publishing an inaccurate account of a Council resolution. The publication contained information that was incorrect and misleading.

In the Ombudsman's decision in *City of Charles Sturt* [2011] SAOmbRp 1 (see [502]—[519]), a councillor received emails from an employee of a private company in relation to a council proposal. On their own initiative, the councillor provided these emails to the chief executive of that employee's company. The Ombudsman found that the councillor was trying to 'dob' the employee in to her employer, and had contacted the chief executive for the purposes of discrediting the employee. It was found that the councillor failed to use information (being these emails) obtained as a council member, in a responsible manner.

We have taken guidance from these useful illustrations of conduct which will fall short of the threshold for 'responsible' dealings with information.


## *Herald Article*

The Legal Advice was requested by, addressed to, and provided to the Mayor in his official capacity. We find it was 'information' received by the Mayor in his capacity as an elected member, for the purposes of clause 2.7 of the Code.

The Second Complaint is directed to the question of whether the Mayor disclosing the essence of the Legal Advice was 'irresponsible'.

The Herald Article clearly alludes to the advice received by the Mayor in stating '... 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 ...', and that '... I am unable to share the legal advice I have had about this with you.'

The Mayor submitted that the Herald Article did not contain any of the confidential content or details of the Legal Advice.



In our view, it is an unavoidable conclusion that the Mayor shared the effect of the Legal Advice. This is regrettable, particularly in circumstances where the advice itself stated it should not be disseminated to the public. There is also no evidence that the Mayor had received permission from the Council to share the effect of the Legal Advice (in fact the evidence shows overwhelming opposition to the Mayor's publication).

Whilst the discussion of the Legal Advice was brief, the essence of the advice was conveyed, and was done without permission. It was also done seemingly without regard to implications of confidentiality and legal professional privilege, as well as proper administrative processes.

The First Complaint is directed to the question of whether the discussion of the Legal Advice and its effects was conducted in an irresponsible manner.

It has been said that the argument in the Herald Article should have been, but was not, tempered, balanced, calm and clear. Rather, it is alleged the Mayor used the Legal Advice for his own purposes and effectively 'weaponised' it.

We accept that the Herald Article contained strong and partial statements.

The Mayor's advocacy is clear and the article is certainly not an attempt at summarising opposing sides of a debate.

Notably, the Mayor also made a number of concessions and statements directed at 'the system' (which he was allegedly criticising):

- The responsibility for accuracy must always lie with the elected member.
- The partnership between elected members and our staff is essential for the good governance of our city.
- Staff are required to follow the rules and should do so.
- Yes, staff need to be protected from being politicised by individual councillors or mayor.


These statements do entrench the importance of proper governance and respect for the law.

Such statements do support the view that the Mayor's article was balanced and responsible to some extent (rather than seeking to weaponise the Legal Advice).

In light of the above we conclude that the Mayor's communications within the Herald Article were irresponsible. The discussion of the Legal Advice was largely inconsequential (e.g. it did not convey any sensitive or prejudicial information), but nonetheless it was a confidential legal advice, which was not to be shared. The Mayor knew this, and against the advice of the elected members and CEO, published the material.

#### *Video Editing Emails*

As discussed, the Second Complaint alleges that the Mayor's involvement in the Video Editing Emails evidences a breach of clause 2.7 of the Code (insofar as they demonstrate irresponsible behaviour on the part of the Mayor).



We accept that the Mayor received the information in his capacity as an elected member (i.e. as the Mayor) and used an unauthorised version of the Mayoral video. This was conceded by the Mayor.

It is uncontroversial that Council staff or elected members should not disseminate unauthorised material. It is also clearly apparent that the Mayor should not have relied solely (but did) 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. Additionally, the Mayor should have been able to identify that his intended use of the (unauthorised) Mayoral video could only be characterised as personal use. (Importantly, we make the distinction between using for *personal* use against use *in official capacity* as an extenuating factor only).

We view the unapproved video to be, effectively, a draft and internal piece of Council media.

The Mayor gave evidence that he posted the video to his public Facebook page, accompanied by a caption directed toward seeking public input, for the purposes of his own learning and improvement. We accept this evidence, which was uncontested. In our view, this establishes that the Mayor used the video for his own *personal* purposes.

The above evidence and discussion reveals that the Mayor used a draft and internal piece of Council media for his own personal purposes, without an understanding of the proper authorisation procedures (and without complying with those procedures). In our view, this evidences irresponsible use of information (being the video) on the part of the Mayor. The Mayor's reliance on the staff member endorsing the use of the longer video (whether the staff member knew what the Mayor intended to use it for or not) does not change this finding.


We acknowledge that the Mayor removed the video upon being asked to do so and we have considered this in determining our recommendation in Part 6 below.

### Findings




We find that the Mayor's publication of the Herald Article, and the Mayor's involvement in the Video Editing Emails (insofar as it revealed and demonstrated the use of the unauthorised video), evidences irresponsible conduct in relation to information received in his capacity as an elected member. Accordingly we have found a breach of clause 2.7 of the Code.

## **4.4 Clause 2.8 – Endeavour to provide accurate information to the Council and to the public at all times.**

### Particulars

The First Complaint alleges that the Mayor breached clause 2.8 and provided inaccurate information to the public when stating within the Herald Article: 'For 14 years I have been able to have my newsletters checked by staff for factual accuracy.' 



  
  
  
Discussion

Clause 2.8 requires elected members to provide accurate information to the Council and to the public at all times.




In our view, Mayor Hewitson's conduct in publishing the Herald Article attracted the application of clause 2.8 of the Code, (i.e. the Mayor was providing 'information ... to the public').

The Ombudsman's decisions in *Cr Andrews* [2018] SAOmbRp 10 and *Cr Charles* [2018] SAOmbRp 11 establish that creating, sending and sharing information to the general public can (when inaccurate and/or misleading) fall within this description and attract application of clause 2.8.

In those reports, as explained above, two elected members created and circulated media releases which conveyed wrong information. This conduct breached clause 2.8. The elected members genuinely believed the content of the media release but it was simply inaccurate. Their conduct in 'creating, sending and sharing incorrect information to the general public which was misleading' fell short of their responsibilities pursuant to clause 2.8.

As a result, in our view, if the information conveyed by the Herald Article was inaccurate and/or misleading then the Mayor's conduct will be in breach of clause 2.8 of the Code.

Herald Article

We agree with  assessment of the effect of the Legal Advice ( ).

However, on a reading of the precise words used by the Mayor, it is apparent that he *has*, practically, been able to have his publications checked for factual accuracy. Inescapably, this *has* occurred, and for the duration of the 14 year period, no material concerns have been raised with the permissibility of this arrangement.

The Mayor did not fail to address the effect of the Legal Advice. Nor did he attempt to argue that fact-checking continued to be permissible (i.e. that the Legal Advice was incorrect). In fact, the Mayor makes it abundantly clear that such activity is no longer permitted (or, rather, is now known by Council to be impermissible).

We acknowledge the confusion that may have be caused by the apparently conflicting statements in the Herald Article, but we do not consider this was of a nature which could be categorised as inaccurate or misleading.

Findings

We do not consider that the Herald Article was inaccurate in the nature submitted by the Complainant. We do not find that the Mayor breached clause 2.8 of the Code.

#### **4.5 Clause 2.14 – Refrain from directing or influencing Council staff with respect to the way in which these employees perform their duties.**

##### Particulars

Both the First Complaint and the Second Complaint allege breaches of clause 2.14 of the Code, in relation to the Herald Article and the Video Editing Emails respectively.

##### *Herald Article*

The First Complaint drew on the content of the Herald Article in asserting that the Mayor has directed and/or influenced Council staff, in breach of clause 2.14 of the Code.

The Complainants strongly asserted that the Mayor has an extensive history of directing and influencing staff. Email evidence from previous years was provided in support.

It was noted that, by virtue of the comment in the Herald Article (that fact-checking had occurred for 14 years), the Mayor himself admitted to directing/influencing staff for the duration of that period.

During interviews, it was explained to each Complainant that a finding of breach of clause 2.14 would require convincing, first-hand evidence. Each Complainant conceded that their awareness of the Mayor's conduct has been gleaned through conversations with the CEO and unnamed staff members, as well as observing (alleged) high turnover of Mayoral assistants.

It is said that these facts evidenced a breach of clause 2.14, in the eyes of each Complainant.

##### *Video Editing Emails*

The Second Complaint alleges that the Video Editing Emails evidence a breach of clause 2.14 insofar as they demonstrate the Mayor influencing or directing the staff member in relation to the longer video. It was asserted that the Mayor very likely asked for provision of that video.


The Mayor provided to us a lengthy rebuttal of this allegation, and was insistent that the staff member proffered the video.

The CEO also spoke to this allegation, noting that the Mayor and the staff member had a good working relationship, with the staff member often eager to please (leading to the possibility that the staff member did indeed offer the longer version of the video).

##### Discussion

Clause 2.14 requires elected members to refrain from directing or influencing Council staff with respect to the way in which those employees perform their duties.

In the Ombudsman's decision in *Cr Bagster* [2018] SAOmbRp 24, it was found that Cr Bagster breached clause 2.14 of the Code by seeking to influence council staff with respect to the way in which they perform their duties.



Cr Bagster submitted that he only ever made requests of council staff, and made no demands, and gave no directions.

The Ombudsman found that Cr Bagster persistently attempted to influence several council employees, and it was noted that Cr Bagster's intention to influence the employees was 'manifested in the tone and frequency of the communications at issue.' These findings provide guidance in this investigation as to what conduct may breach clause 2.14 of the Code.

#### *Herald Article*

It was asserted that the Mayor himself admitted to directing/influencing Council staff over the course of 14 years. However, the passage in question (within the Herald Article) does not establish with any certainty that the fact-checking involved any degree of direction/influence on staff and necessarily direction or influence which impacted the way employees performed their duties. In any event, this is not primary evidence which is persuasive in establishing a breach of the Code. We do not accept that this passage evidences a breach of clause 2.14 of the Code.

It was emphatically submitted by each Complainant that the Mayor has consistently exerted pressure on various staff members, over a lengthy period of time, for his own purposes. Complainants were reminded that first-hand and direct evidence of such conduct would be persuasive in making such a finding. As noted above, however, the Complainants were only able to provide second-hand and unsubstantiated allegations. We acknowledge the strength of each Complainants belief and do not consider that their statements were untruthful.

However we are simply unable to make such a finding, in light of the lack of any direct or convincing evidence. It is acknowledged the CEO spoke of a historical pattern of behaviour from the Mayor which may have been seen as falling afoul of clause 2.14 in the past.

Complainants also spoke to the power imbalance between the Mayor and staff members. It was explained how the Mayor can unintentionally direct and influence staff by virtue of his position. Staff can feel obliged to assist the Mayor and in this way, the Mayor often indirectly influences/directs staff, impacting the way in which they perform their duties.

We note these submissions and acknowledge the concerns raised. However, once more, there is regrettably a dearth of actual and direct evidence establishing these assertions so as to demonstrate a breach of clause 2.14.

See our comments in Part 5 below regarding historical and systemic direction and influence on the part of the Mayor.



## *Video Editing Emails*

The Video Editing Emails are raised as an example of an incident wherein the Mayor has in fact directed and/or influenced a staff member. In this case, the alleged 'direction' was for the staff member to provide the Mayor with the longer version of the video. We acknowledge the possibility that the Mayor requested the video. However, based on the (unchallenged) recollections and submissions of the Mayor, the comments of the CEO (as to the relationship between the Mayor and the staff member), and the Video Editing Emails themselves, we are unable to conclude that any direction or request took place.

## Findings

We do not find that the Mayor directed or influenced Council staff with respect to the way they perform their duties. Accordingly we have found no breach of clause 2.14 of the Code. We emphasise that this finding is confined strictly to the incidents raised as part of this investigation, as set out above.


## 5. FINDINGS

We find that the Mayor breached the code of Conduct. Specifically, his conduct in publishing the Herald Article fell short of the obligation found in clause 2.2. Further, his conduct in referencing a confidential legal advice, and sharing an unauthorised Council video, fell short of the obligation found in clause 2.7.

We have not found that the Mayor breached clauses 2.4, 2.8, or 2.14 of the Code. Whilst much of the evidence received was detailed, illustrative and impassioned, we are not satisfied that the Mayor's conduct, confined to the instances in question, constitute breaches of these clauses.

Clause 2.14 commanded particular attention and debate. To reemphasise, we find that the Herald Article and the Video Editing Emails did not display a breach of this clause. We make no finding with respect to any historical, ongoing, or systemic directions or influence exerted by the Mayor. It is apparent that each Complainant takes the view that such direction and influence does (or at least, has historically) occurred. Nonetheless, our investigation must investigate conduct and evidence which can be properly tested, as opposed to general behavioural concerns. A finding of systemic direction and influence could be made, but only with the benefit of extensive, direct, and compelling evidence. In this instance, such evidence was not provided. To the extent that there are concerns for staff welfare, or organisational issues, we also note that a Code complaint is, in our view, an inapposite vehicle for review of systemic workplace culture and practices. We understand the Legal Advice has gone some way to addressing some of these concerns.

We acknowledge the strongly held belief of Complainants, and likely others, that the Mayor has, during his term as Mayor, engaged in 'directing and influencing' of staff in a way that is in breach of the Code. Indeed we see it as highly probable that this has occurred at some point during the Mayor's tenure. However as explained above, we cannot make a definitive finding that this has



occurred (whether on a general basis or in relation to particular instances). This would require the gathering of evidence from (for example) former Mayoral assistants, which is problematic and impractical, in part due to the fact these persons may no longer be employed, or remain employed elsewhere within the Council (and any evidence given by current employees against the Mayor has the potential to put those employees in uncomfortable positions).

Following circulation of the Draft Investigation Report to the Complainants, a number of comments were received, and the responses carried a general theme of disappointment and disagreement with our findings, particularly in relation to the allegations of 'directing and influencing' staff.

To reiterate, we consider it highly probable that the Mayor has engaged in such behaviour during his tenure. However, this investigation was limited to present instances of the Mayor's behaviour, as supported through the evidence and material put before us. This evidence does not tend to establish that the Mayor engaged in 'directing and influencing' in relation to the Herald Article or the Video Editing Emails. Accordingly we have made no such findings.

We acknowledge that various emails were provided to us by various parties (dating back to 2015 and 2016 in some instances) which were said to prove or disprove the Mayor's alleged behaviour. As explained above, we are not investigating historical conduct of the Mayor and place little weight on past instances, especially where the conduct took place six to seven years ago and has little bearing on the circumstances of this present investigation.

## 6. RECOMMENDATIONS

We recommend that the Council pass a censure motion in respect of the Mayor, expressing disapproval of his conduct in:

- diminishing the community trust and confidence in the Council;
- irresponsibly publishing details of a confidential Council legal advice; and
- irresponsibly sharing an unauthorised Council video.

We also recommend that Council, as part of its consideration of this matter, resolve to adopt the findings in this Report, and to take the action recommended above.