

27 September 2021

Report for the Invercargill City Council on the Review of Arrangements for Electronic Access to the Mayor's Email Account

Introduction

1. This is my report to Council on my independent review of certain aspects of the steps required by Council on 27 April 2021 for the Chief Executive to support the Deputy Mayor, Councillor Nobby Clark, in supporting His Worship the Mayor, Sir Tim Shadbolt KNZM JP in representing the City.
2. The arrangements included officers having access to the Mayor's Council (@icc.govt.nz) email account.
3. The origin of the review is that on 9 and 10 August 2021 there was an email exchange between an *Otago Daily Times* reporter and the Mayor on the Mayor's Council email account. The reporter had written to the Mayor's Council email address, and the Mayor had responded using the same address.
4. The exchange came to the attention of the staff member who had access to the Mayor's account. The staff member drew the exchange to the Chief Executive's attention. On 12 August, the Chief Executive took the email to a meeting of the Chairs' Group, which Council had established under its Working on Working Together ("WWT") project.
5. The Chief Executive later said publicly that the agreed arrangements to support the work of the Mayor and the Deputy Mayor included discussion of the need to utilise electronic access and to share information about the Mayor's activities; but that the arrangements would be reviewed.
6. The terms of reference explain these matters in more detail. The full terms of reference, including the Chief Executive's statement just referred to, are in **Appendix 1**.
7. My review was not concerned with the contents of the email exchange, nor what transpired at the Chairs' Group meeting, nor any questions about the conduct of any individuals.

My process

8. This was primarily a documentary review, based on a range of papers which the Council administration provided me, as well as answers to a number of written questions. I put similar questions to the Mayor, and received a preliminary response from a lawyer acting for him.¹ The Mayor did not respond to a request to provide a further response by a date that had been stipulated by the Council. The Council then instructed me to complete my report. **[Note: I subsequently received some comments, and have prepared an Addendum to address them: see page 20.]**
9. I also held discussions with the Deputy Mayor, the two External Appointees to Council ("EAs"), and two elected members who chair WWT working groups. I had offered the Mayor the same opportunity.

¹ The information sent to me was in the form of a briefing paper prepared by the lawyer for the Mayor and his partner. Because it was sent to me directly, I took it as a preliminary response to my questions.

In addition, I spoke with the Council's consultant who is responsible for advising on the WWT project. The sole purpose of all the discussions was to ensure that I understood the support arrangements and the respective responsibilities, relevant to my terms of reference.

Structure

10. I will first set out the relevant background and context, based on the information I was given and referring to a number of relevant documents, the most pertinent of which I have appendicised. I will then set out briefly the events that gave rise to the review, drawing from my Terms of Reference. That will be followed by my report on each of the questions I was asked to address, in the order in which the terms of reference listed them. I will then make a brief concluding comment, referring back to the Terms of Reference. **[Note: see also the Addendum on page 20.]**
11. Throughout the report I will make some suggestions on learnings and improvements that I have identified.

Background and context

12. There are two elements to the background, both of which provide necessary context. The first involves a series of arrangements which Council itself put in place between February and May 2021 to promote effective governance, including media support for the Mayor and Deputy Mayor. The second involves the Council's information management practices, and recent steps taken to improve them.

Background to Council's arrangements to support the Mayor and Deputy Mayor

13. In late 2020 Council established a Project Governance Group ("PGG") to oversee the final formulation of Council's Action Plan to address the findings of the independent governance review (known as the Thomson report). The Action Plan included the establishment of a number of working groups, each chaired by an elected member. These can be seen in the WWT framework, which is in **Appendix 2**.
14. One of the working groups is named *Supporting the Mayor and [Chief Executive] and clarifying the role of the [Deputy Mayor]*. Its purpose, at February 2021, included clarifying the responsibilities of the Deputy Mayor and having them signed off by Council, with support to be in place by 15 April.
15. Another working group is named *Developing Media Protocols and Bringing the Community Along*. Its purpose, at February 2021, was to:
 - ... develop media protocols which ensure the organisation has a professional reputation and a "no surprises" approach to media coverage.
16. The group's deliverables at February 2021 were:
 - Draft protocols developed for Council's consideration by 28 February 2021
 - Protocols in place from mid-March 2021
 - Communication Plan in place from 31 January 2021.

17. The PGG's report to Council's regular meeting in February 2021 noted the following:

CLARIFYING THE ROLE OF DEPUTY MAYOR AT ICC

The Thomson report recommended that Council establish a clear set of delegations for the Deputy Mayor that are explicit as to the role. Council requested that officers provide advice on this initially to the December meeting and subsequently to the February meeting. This work was incorporated into the Working Group "Supporting the Mayor and Chief Executive".

While good progress has been made gathering information, discussions have been held with the Mayor, the Deputy Mayor and the Chief Executive to find a way forward. ...

18. The PGG's report also included a draft media protocol, which the PGG said its members had discussed and now requested Council to adopt. The minutes record that Council did so. The protocol, as adopted, is in **Appendix 3**.

19. Immediately after the meeting, the PGG's Chairperson (Mr Grant, who is one of the EAs) issued a public statement about the media protocol. The statement is in **Appendix 4**.²

20. Next, the PGG's report to the March 2021 regular Council meeting included a recommendation to approve terms of reference for the Chairs' Group. The Group had been established to:

manage the political processes necessary to ensure the effective functioning of the Council's governance structure, through:

- a) having oversight of the work of the Committees and of Council; and
- b) providing a conduit for officers, through the Chief Executive, to engage and advise governance leaders.

21. Council approved the terms of reference. They are in **Appendix 5**. It will be noted that the members of the Group are the Mayor, the Deputy Mayor, and the Chairs and Deputy Chairs of Council's two Committees; and that one of the EAs (Mr McKenzie) chairs the Group but without voting rights. It will also be noted that the Group's functions are to:

- maintain effective dialogue across the committees of council and Council to enable the efficient and effective running of the governance processes;
- ensure coordination of the allocation of work among committees and between committees and Council;
- provide a conduit for the Chief Executive to work collectively with governance leadership;
- receive advice from and give advice to the Chief Executive relevant to the Group's purpose;
- carry out expressly delegated functions and make expressly delegated decisions;
- keep councillors informed of its activities.

22. Those terms of reference are of some importance to this review, since it was to that Group that the Chief Executive communicated the Mayor's email exchange with the *Otago Daily Times* reporter.

23. At Council's April 2021 regular meeting, the PGG presented for consideration a proposed Memorandum of Understanding ("MOU") between the Mayor and the Deputy Mayor, which it recommended that Council endorse and the parties sign. The minutes record that Council:

[endorsed] the Memorandum of Understanding (MoU) between His Worship the Mayor, Sir Tim Shadbolt KNZM, JP and Deputy Mayor Nobby Clark ...; and that the Chief Executive take the necessary steps to support the Deputy Mayor in supporting the Mayor in representing the City.

24. The second half of this sentence, in particular, is relevant to this review.

25. The Mayor and the Deputy Mayor then signed the MOU. An unsigned version is in **Appendix 6**. Relevant to this review, it will be noted that clause 4 addressed "day to day support" for the Mayor by the Deputy Mayor. This included the Deputy Mayor working with the Mayor "to ensure there is daily support to the Mayor in the office".

26. Clause 9 then addressed the subject of media relationships. It said:

Support will be made available to both His Worship and the Deputy Mayor where any issues arise from contact by Media.

² I note, as a matter of fact, that Mr Thomson's *Six Month Review* report included comments on the media protocol at paragraphs 82, 85, and 102.

Media Protocols developed through the wider Governance Review will consider appropriate procedures for responding to queries from the media. These may be applied more widely by Elected Members to support a cohesive approach to media relationships.

Media Training offered through the wider Governance Review will consider scenarios where His Worship or the Deputy Mayor may face pressure from the media, and will offer advice on how to respond effectively.

27. The Deputy Mayor subsequently terminated the MOU. He told me that he has taken a more *ad hoc* approach to his support for the Mayor since then. However, the MOU remains relevant to the extent that it is the primary origin of the support arrangements.
28. The PGG also presented at the April meeting a draft Council Charter. Council endorsed the Charter, and the minutes record that the Mayor and all Councillors signed it. The Charter is not directly relevant to this review, but is reproduced for completeness in **Appendix 7**.
29. The minutes of the April meeting also record that a discussion took place at the meeting with regard to statements made by the Mayor in the *Otago Daily Times* about a lack of IT support for himself.
30. The final item to mention is the Communications Framework, which the PGG presented to Council's May 2021 regular meeting for approval. The Framework was a deliverable of the *Developing Media Protocols and Bringing the Community Along* working group. The PGG said in its report to Council:

An action-focused Communications Framework ... has been prepared to offer some short-term activities and actions that will support Invercargill City Council's communications with the community. The Framework, which draws on recent research into community media consumption, a review of current practices and a survey of elected members and senior leaders, sets out a series of recommendations that can either be implemented immediately, or work can begin now for progression. It will inform the development of a broader organisational communications strategy, which will be the priority of a new Strategic Communications Manager role now under appointment.

31. The Framework (as it was presented to Council) is in **Appendix 8**. The PGG recommended that a number of the Framework's proposed action steps be implemented immediately. They included the action of "clarify[ing] communications and media processes for elected members".

Information management practices

32. There are three main dimensions to any local authority's information management practices. The first is the record-keeping arrangements themselves, including file sharing, storage, retention, security, and disposal. There is no need to discuss those arrangements here. The second is the authority's practices in relation to personal information. The third is the practices in relation to external communications, which includes compliance with the Local Government Official Information and Meetings Act 1987 ("LGOIMA"). And the fourth involves ensuring that those who use the Council's electronic information systems do so appropriately.
33. I will briefly address the second, third, and fourth of these dimensions in turn, to the extent they are relevant to my Terms of Reference.

Personal information and privacy

34. Any entity's management of personal information is governed by the Privacy Act 2020. The Act deals with "personal information", which is defined simply by section 7(1) to mean "information about an identifiable individual".
35. One focus of the Act is on requests for information, specifically requests by individuals for access to personal information that an agency holds about them. More broadly, and relevant to this review, the Act contains principles about the collection, storage, use and disclosure of personal information by

the agency which holds the information. The principles are that where an agency holds personal information about an individual, it³:

must ensure that the information is protected, by such security safeguards as are reasonable in the circumstances to take, against—

- (i) loss; and
- (ii) **access, use**, modification, or **disclosure that is not authorised by the agency**; and
- (iii) other misuse ...

and⁴:

must not use or disclose that information without taking any steps that are, in the circumstances, reasonable to ensure that the information is accurate, up to date, complete, relevant, and not misleading ...

and, where the agency that holds personal information that was obtained in connection with one purpose⁵:

may not use the information for any other purpose unless the agency believes, on reasonable grounds—

- (a) that the purpose for which the information is to be used is **directly related** to the purpose in connection with which the information was obtained; or
- (b) ...
- (c) that the use of the information for that other purpose is **authorised** by the individual concerned ...

and⁶:

must not disclose the information to any other agency **or to any person** unless the agency believes, on reasonable grounds—

- (a) that the disclosure of the information is **one of the purposes** in connection with which the information was obtained or is **directly related** to the purposes in connection with which the information was obtained; or
- (b) ...
- (c) that the disclosure is **authorised** by the individual concerned

36. The Council has a Privacy Policy, which embraces all the Information Privacy Principles. But the Policy contains no specific guidance as to how the principles should be applied in a given circumstance.

External communication and official information

37. The LGOIMA is the centrepiece of any local authority's external communications. There is no need to describe the Act at any length, although I will come back to some of its key provisions later. My terms of reference asked me specifically to examine recent steps the Council has taken to improve its practices under the Act.

38. The Office of the Ombudsman is of course responsible for reviewing decisions on official information requests. The Ombudsman also has a wider role under the Ombudsmen Act 1975, which is to investigate complaints about matters of administration. That Act includes a power to undertake "own motion" investigations of such matters.

39. Consistent with that mandate, the Chief Ombudsman has been implementing a programme of targeted investigations to monitor local authorities' (and other agencies') official information practices, resources, and systems and publishing reports of its findings. In 2020 his Office undertook a detailed

³ Section 22, privacy principle 5(a). Emphasis added in this and ensuing quotes.

⁴ Section 22, privacy principle 8.

⁵ Section 22, privacy principle 10.

⁶ Section 22, information privacy principle 11.

review of the Council's practices. The Office presented its findings and recommendations in a report in February 2021.

40. The report is wide-ranging. It covers a number of aspects of elected members' responsibilities and practices in relation to internal and external communication, including their responsibilities as elected members of the Council in relation to its responsibilities under the LGOIMA. Of relevance to this review are the report's findings on openness and transparency and the manner in which elected members communicate externally.

41. One of the key findings was that the Council had no policy or procedures for managing official information requests. The report recommended that the Council develop an official information policy, procedures, and guidance for staff. In relation to elected members, it noted that all information held by elected members in their official capacity is "official information" for LGOIMA purposes. It said:

Every elected member is offered the use of a Council email address, but some choose to use their personal email address instead. Considering all information held by an elected member in their capacity as an elected member can be requested under LGOIMA, I suggest the Council encourage elected members to use their Council email addresses for all Council business. ...

42. The last sentence is of central importance to this review.

43. In relation to openness and transparency, the report referred to the recent tensions between the Mayor, elected members, and Council staff and noted that:

Such tensions can have a negative impact when seeking to build a culture of openness and transparency. From meetings my investigators had with Council staff and the Chief Executive, it was clear the Chief Executive is working to encourage openness and champion accountability at the Council.

44. Under the heading "Leadership and Culture", the report stated the Chief Ombudsman's view that:

I believe the Mayor and elected members could be more active within the organisation and publicly in promoting openness and transparency. While elected members have received some training on the meeting provisions of LGOIMA, they have not received any training on official information requests. Training on this topic should be provided without undue delay. Furthermore, refresher training on both meeting provisions and official information would be beneficial.

45. The Council has accepted and has been actioning the report's recommendations. This has included progressing the Ombudsman's recommendation about LGOIMA training. It has been doing so in the broader context of elected members' professional development. I was told that a training session for elected members on the "LGOIMA from a governance perspective" took place in June 2021, and that the Mayor was in attendance.

46. It is usual practice for a local authority to support the implementation of the LGOIMA with the use of communications policies (including media policies). Reference has been made to the media protocol which Council adopted in February 2021. The *Developing Media Protocols and Bringing the Community Along* Working Group had also intended to develop a Communications Plan by that time. However, this and further media-related work was delayed because the Council at the time had no communications manager. The Communications Framework was eventually presented to Council and adopted at the May 2021 meeting. LGOIMA training was an immediate deliverable of the Framework.

Appropriate use of systems

47. It is essential, in the information age, that any entity which makes its electronic systems available for its personnel to access and use has controls in place to ensure that the personnel recognise the entity's ownership of the systems and use them appropriately.

48. The Council has had an “acceptable use” policy in place for many years. The Chief Executive approved the current version of the policy, entitled *Electronic Access Acceptable Use Policy* (“the Policy” or “the *Acceptable Use Policy*”) in March 2021.
49. The Policy applies to all “users” of Council information systems, including employees, contractors, and elected members. There is a separate version of the Policy for elected members, which includes an “Acknowledgment of Receipt and Understanding” which each elected member is expected to sign. This version is in **Appendix 9**. I will discuss the implementation of the Policy in later sections.

The events giving rise to this review

50. My terms of reference described the events as follows:

On Tuesday 10 August the Mayor sent an email response to a media enquiry. His statement referred to the current regime and spoke of his humiliation of a staff member going through every single page I own. The email was shared with the Chairs’ Group (Mayor, Deputy Mayor, Chairs and Deputy Chairs of Council’s Standing Committees) by the Chief Executive.

On 17 August 2021, a media query from the Otago Daily Times regarding access to the Mayor’s emails from his ICC account was received. This related to the statement – sent by email from the Mayor - the previous week. The query was as to how the Chief Executive had knowledge of the statement on 10 August.

In reply to the query, the Chief Executive issued the following media statement:

Recognising the unique circumstances at Invercargill City Council, earlier this year Council asked the Deputy Mayor to assume some mayoral duties. To support that work, the need to utilise electronic access and to share information about the Mayor’s activities was discussed. It is common for council staff to assist the Mayor, elected members and executive staff with administration to ensure timely response to emails. This does not include monitoring.

Although these arrangements were agreed, I should not have shared the contents of an email the Mayor issued to media last week. A review of arrangements will be undertaken.

51. As a consequence of these events, my brief was that:

Council now wishes to review the arrangements implemented for electronic communications, as a result of the resolution of Council on 27 April 2021, to ensure they are lawful, appropriate and meets expectations. They seek to satisfy stakeholders that they can have confidence in those systems and processes.

In particular, it wishes to understand that the systems and processes set up to implement Council’s April resolution are appropriate, understood and were followed with regard to the email the Mayor issued to media during the week ending Friday 13 August.

52. I have already noted in paragraph 7 the limited scope of my review.

Report against the Terms of Reference

53. I now report against each of the specific points of the Terms of Reference in turn. The points are under two headings: the general approach; and the approach to support the Mayor through access to his email account.

A. *General Approach*

Reviewing the Council's [Acceptable Use] Policy for staff and for non staff (non staff being elected members, contractors and any other party accessing Council's electronic systems)

54. The *Acceptable Use* Policy is a standard type of policy governing access to electronic systems owned by an entity. One purpose of policies of this nature is to establish expectations for those who use an entity's systems about who owns the system (i.e., the entity) and the acceptable purposes for which the system may be used by those who are given access to it for work purposes. Another purpose is to ensure that the entity is able to monitor the use of the system effectively. The non-staff version of the Policy is almost identical to that which applies to staff.

55. I have already noted that the current Policy is dated March 2021. But I was informed that similar policies have been in place at the Council for many years.

56. As would be expected, the Policy includes policies and procedures on the use of Council's email system. It notes, relevantly to this review, that:

Invercargill City Council's email system is designed to improve service to our customers, enhance internal communications, and reduce paperwork. Users of Invercargill City Council's email system must adhere to the following policies and procedures:

- Invercargill City Council's email system is provided primarily for Council business related activities. Personal use is to be minimal, appropriate, and ...

...

- The email system is the property of Invercargill City Council and all messages sent or received by it, or stored within it, are owned by Invercargill City Council. Invercargill City Council reserves the right to access and disclose all messages sent over its email system if required by law or valid business purpose providing permission has been granted by a Group Manager or the Chief Executive.

...

- Users shall not attempt to monitor or tamper with another's email, send on behalf of another user, or send emails attributed to another user, without that user's agreement, unless specifically authorised to do so by the Chief Executive or Group Manager. Only authorised managers are permitted to access another person's email without consent.

...

57. The Policy defines "personal use" of the email system as "email of a personal nature that has no relevance to the business of Invercargill City Council".

58. Under the heading "Privacy", the Policy says:

Privacy Network and internet access is provided as a tool for Invercargill City Council's business. Invercargill City Council reserves the right to monitor, inspect, copy, review, and store at any time, without prior notice, any and all usage of the internet, as well as any and all materials, files, information, software, communications, and other content transmitted, received or stored in connection with this usage. All such information, content, and files are the property of Invercargill City Council. Users should have no expectation of privacy regarding them. Information Systems staff members may review files and intercept communications for any reason including, but not limited to, maintaining system integrity and ensuring users are using the system consistently with this Policy.

59. There is a declaration form at the end of the Policy. The declaration is signed by each person to whom the Policy applies. The person signing the declaration acknowledges receipt of the Policy and that they understand its contents. The contents can be taken to include the waiver of privacy just quoted.

60. These are all standard types of controls. The Council's Policy is broadly consistent with other policies I have seen that have been developed by both public and private sector entities. It should be taken to represent good practice.
61. I asked both the Council administration and the Mayor whether the Mayor had been taken individually through the Policy, and/or whether he had signed the declaration. I asked the Council administration the same question in relation to other elected members, and I also asked the elected members to whom I spoke whether they could recall having been briefed on the Policy or signing the declaration.
62. The Council administration was unable to provide me with any evidence that the Mayor had signed the declaration attached to the March 2021 Policy. Similarly, none of the elected members whom I spoke to could recall doing so. However, the Council did provide me a copy of the Mayor's signed declaration under an earlier version of the Policy. The declaration was dated 31 October 2000. The acknowledgments on the form included:
- I have received adequate training in the use of Invercargill City Council's email and internet (if applicable) systems. [This was crossed out.]
 - I have read and understand the Invercargill City Council's Acceptable Use Policy and Guidelines for internet access, e-mail and computer systems and agree to abide and adhere to the Acceptable Use Policy and Guidelines.
 - I authorise the Council to monitor my use of all e-mail and internet access provided by the Council and I understand I waive any right to privacy in any e-mail messages I send or receive or anything I write, send or receive on the PC, the internet or other Council provided electronic communications facilities.
 - I understand that if I fail to comply with the Acceptable Use Policy and Guidelines my computer systems and network privileges may be suspended, withdrawn or modified or other disciplinary action taken as set out in the Acceptable Use Policy and Guidelines and Process Appendix I.
63. The Mayor has had continuous tenure since 2000. The declaration he signed at that time can be presumed still to be in effect, despite the subsequent updating of the policy then in effect.⁷ However, it does not appear that the Mayor has had any training on the current Policy since it was issued.
64. The Policy and the Mayor's earlier declaration, including the waiver of privacy, are significant in that they confirm the Council's ownership of the email accounts (with the user name @icc.govt.nz) that it makes available for its personnel, including its elected members. My Terms of Reference require me to review the use of the 10 August email against the Policy, and I have done so and will record my conclusions below.
65. But, at this point, I observe that the Policy exists for quite a different reason than to govern arrangements by which Council personnel have access to an elected member's Council email account for what may be termed operational, as opposed to administrative or information security or acceptable use, purposes. Despite the waiver's wide scope (including that Council staff may access personal information on the system "for any reason"), I do not consider that either the Policy or the Mayor's declaration (irrespective of when it was made) are determinative of the question that arises about the administration's accessing and use and/or internal disclosure of the 10 August email. My reason for saying this will become clear in the next and subsequent sections.
66. That said, there is a clear **learning** about the importance of ensuring that all elected members are taken through the applicable policy on IT systems and are asked to sign the declaration of acceptance, both at the time of their election and periodically afterwards.

⁷ I was not told how many times the policy has been updated since 2000.

The intersection between ICC practice, LGOIMA and Privacy Act requirements

67. There is a clear intersection between the Council's administrative practices, as described in the preceding section, and the requirements of the Privacy Act and the LGOIMA. As I understand the intention of this term of reference, it is to establish the common feature that information generated by and retained in the Council's information systems (including in @icc.govt.nz email accounts) is not only owned by the Council (as stated in the *Acceptable Use Policy*) but is information "held" by the Council for the purposes of both Acts.
68. That means, for the purposes of the Privacy Act in particular, that any such information may be "personal information" which is subject to the Information Privacy Principles (and the Council's Privacy Policy).⁸
69. Before turning to the implications for the 10 August email, there is one aspect of both Acts which will be significant in the analysis to follow. It is that neither the definition of "personal information" nor that of "official information" are dependent on the means by which, or the form in which, information is "held". In other words, personal information or official information can be "held" by the Council even if it is not stored on the Council's information systems. Both Acts reinforce this by saying that information that is held by a member of an agency (in the case of the Privacy Act) or a local authority (in the case of LGOIMA) *in that person's capacity as a member* "shall be deemed to be held" by the entity of which that person is a member.
70. These points are generally well understood by elected members of local authorities. They can be expected to be covered in any induction programme for newly-elected members. The Ombudsman's recommendation that the Council's elected members receive additional training on LGOIMA matters (see paragraph 43 above) was doubtless made in the expectation that the training would cover this too. I expect that the training delivered in June 2021 will have done so.
71. It is also important to note the Ombudsman's suggestion that the Council encourage elected members to use their Council email addresses for all Council business (see paragraph 41 above). The intention behind that suggestion was, presumably, to reinforce to elected members the scope of the definition of "official information", as well as making it administratively easier for the Council to exercise its responsibilities in responding to requests that involve access to information involving elected members.
72. But there is a counter-argument to that suggestion, which is relevant to this matter. I will foreshadow it now. It concerns the distinction between an elected member acting in an "official" capacity (for example, as a Council spokesperson) and "on their own behalf" as a member. Communications "on their own behalf" might include communications as an elected member with their constituencies, and communications of a "political" nature with each other and with the media.⁹
73. I will further discuss the significance of the distinction later on, but at this point note that this is an area of uncertainty across the local government sector. Many elected members, and not only at this Council, prefer to use personal email accounts (i.e. those not owned by their local authority) to carry out their responsibilities as elected members on their own behalf, as opposed to when they are acting in an "official" capacity for the Council. The same goes for members' use of social media, for example using personal Facebook pages to communicate with constituents. There are some other inherent difficulties with these practices, which need not be discussed here. But the practice of using a

⁸ The LGOIMA has no direct relevance to the matter in hand, because it did not involve any request made under it (except, perhaps, the request made by the *Otago Daily Times* reporter to the Mayor which resulted in his 10 August email response).

⁹ Communications by an elected member of this type are sometimes referred to as "private" communications. However, that term is misleading in that it implies an entirely personal capacity, as distinct from the capacity as an elected member but not as a spokesperson for the Council. For this reason, I will use the term "on own behalf" to describe these types of communications – that term also being used in the Code of Conduct; see paragraph 108 below.

personal account for “on own behalf” communications is understandable when the reason for doing so is to preserve the legitimate confidentiality¹⁰ that attaches to “political” communications.

74. Returning to the Privacy Act, it is, I think, beyond doubt that the information generated by the Mayor in his email to the *Otago Daily Times* reporter was information both generated in his capacity as an elected member and personal information “about” him as an individual. The Council “obtained” and “holds” the information because the Mayor chose to use his Council-owned email account to generate it.¹¹ The Privacy Act, including Information Privacy Principles 5, 8, 10, and 11 (see paragraph 35 above) therefore applied to how the Council protected, used and disclosed the information.
75. It will be noted that the Information Privacy Principles are only principles, and that their application involves question of judgment. I will return to these questions in the final section of this report.
76. To summarise this section:
- (a) Information generated by and retained in the Council's information systems (including in @icc.govt.nz email accounts) is not only owned by the Council but is information “held” by the Council for the purposes of the Privacy Act and the LGOIMA.
 - (b) The Mayor's 10 August email was almost certainly “personal information” for the purposes of the Privacy Act (as well as being “official information” for the purposes of the LGOIMA).
 - (c) As “personal information”, the Information Privacy Principles set out in both the Privacy Act and the Council's Privacy Policy applied in relation to how the information was to be held and protected, as well as when, how and subject to what conditions the information could be used or disclosed (including internally).
 - (d) The privacy “waiver” under the *Acceptable Use* Policy was for a limited purpose (maintaining IT security and enforcing standards of acceptable use of IT systems). Despite its breadth, care would be needed before relying on it for other purposes (for example, when applying the Privacy Policy).

Whether all parties (i.e. staff, the Mayor, the Deputy Mayor and other elected members) had the same understanding of the systems and processes in place (touching on councillors' appreciation of their obligations under the relevant policies and legislation)

77. I have approached this question in general terms, with reference to the policies and legislation that I have discussed in the preceding sections. I will address in later sections the more specific understandings about the support arrangements for the Mayor and the Deputy Mayor.
78. In relation to the *Acceptable Use* Policy, I asked the Council administration to confirm whether the Mayor had been taken individually through the Policy, and/or signed the declaration in the Elected Members version of the Policy. As already noted, the administration produced only the copy of the Mayor's declaration under an earlier version of the Policy, dating from October 2000.
79. I put similar written questions to the Mayor. The preliminary written response from his lawyer accepted that the Mayor had signed the 2000 declaration, but added that it needed to be acknowledged that that document (which I took to refer to the earlier policy under which the declaration had been made) had been superseded by “the protocols which were put in place in 2021”.
80. The Mayor's preliminary response added that the 2000 declaration needed to be seen in the context of managing emails generally within the Council, and also to support the Mayor in his dealings with

¹⁰ For the same reasons, I prefer the term “confidentiality” rather than “privacy” here.

¹¹ This may be a more open question had the Mayor chosen to use his personal email account, but section 10(1) of the Privacy Act may mean that it did. But that is not relevant here, because the only way the Council could have identified the email was through its own email system.

the media, as well as the “overlay” of the LGOIMA which created the need for new protocols across the Council. The response said that the Mayor was well aware of the introduction of the protocols.

81. In relation to the LGOIMA and the training needs identified by the Ombudsman’s report, I have already noted that there was a training session for elected members on 30 June, and that the Mayor was in attendance. Some of the elected members to whom I spoke also confirmed they had attended. But they seemed to have limited awareness of the Ombudsman’s review itself.
82. Despite that, the elected members expressed confidence in their understanding of the information management matters I have discussed, in particular the wide application of the LGOIMA to any information they hold in their capacity as elected members. One member recalled being asked on at least one occasion by the administration to extract information from their personal email account, to enable the Council to respond to a LGOIMA request.
83. I also asked the elected members about their appreciation of the distinction between the information that they generate and hold in their “official” capacity and “on their own behalf”. All the members understood the distinction, and recognised it as important. One member pointed to the express recognition of the distinction in the Code of Conduct (to which I will refer later). Another member pointed to the principle that, while a member must support the outcome of a Council decision, the member should always be free to issue a personal statement (as an elected member, on their own behalf) saying why they disagreed with it.
84. The members all made it clear that they expect their “on own behalf” communications to be confidential, except where (for example) a LGOIMA request might require their disclosure.
85. In connection with that, I asked the elected members whether they were comfortable with the Ombudsman’s suggestion that they use the Council’s email system for all their communications as elected members (whether “official” or “on their own behalf”).¹²
86. One experienced member was concerned by the suggestion. While understanding and respecting the wide reach of the LGOIMA, the member intended to continue using their private email address for their confidential “own behalf” communications. Another member noted the same point, and said that any communication that went through a member’s official (@icc.govt.nz) account should be presumed to fall on the “official” side of the line. And another member considered that all “own behalf” communications as an elected member should be done through a private email address, while stressing the need always to say clearly that the member is speaking in a personal, not an official, capacity.
87. I have no doubt that the Council administration also understands these distinctions.
88. To summarise this section:
 - (a) There is a good basis for saying that all parties broadly understood the systems and processes in place. The LGOIMA training in June 2021 for elected members will have helped in that.
 - (b) One exception to that conclusion involves the *Acceptable Use Policy*. As I have already noted, it does not appear that the Council has briefed elected members on the March 2021 version of the Policy, or ensured that all members have signed the attached declaration.
89. As a **learning** from this review, there may be benefit in the Council doing further work to enable a common understanding about the distinction between elected members’ “official” and “on own behalf” communications and applying the distinction when the ongoing support arrangements for the Mayor and the Deputy Mayor are next updated. More broadly (although outside the scope of this review), further training might be considered for elected members and Council staff on the use of their Council

¹² The Council administration had told me that all elected members had been asked after the 2019 election to use their ICC email addresses, although it was aware that many members continued to use their private addresses.

email accounts (noting both the Ombudsman's suggestion and the comments of the elected members to whom I spoke), and how the Privacy Act applies to members' "on own behalf" communications.

B. Approach to support the Mayor through [Council staff] access to his ICC email account

Consideration of the Council deliberations and the resolution with regard to the issue in the April Council Meeting establishing what was intended in support of the Mayor and [Council staff] access to his ICC email account

90. I have set out the deliberations and the resolution at the April Council meeting in the Background and Context section. But to repeat, the minutes record that Council:

[endorsed] the Memorandum of Understanding (MoU) between His Worship the Mayor, Sir Tim Shadbolt KNZM, JP and Deputy Mayor Nobby Clark ...; and that the Chief Executive take the necessary steps to support the Deputy Mayor in supporting the Mayor in representing the City.

91. Council made no direction as to what the "necessary steps" might have been. It appears to have left these to the Chief Executive to determine, but with the MOU as context. To repeat, clause 4 of the MOU addressed "day to day support" for the Mayor by the Deputy Mayor. This included the Deputy Mayor working with the Mayor "to ensure there is daily support to the Mayor in the office". And clause 9 referred to support to both the Mayor and Deputy Mayor where any issues arise from contact by the media; the application of the Media Protocols; and the delivery of LGOIMA training.

92. I discussed the origins of these MOU provisions with the chairs of the two working groups that were involved in implementing these aspects of Council's WWT Action Plan, and with the consultant who advised the groups. To recall, the names of these working groups were *Supporting the Mayor and [Chief Executive] and clarifying the role of the [Deputy Mayor]* and *Developing Media Protocols and Bringing the Community Along*. Both groups had been meeting regularly up until Council's April meeting, considering how best the Council might give effect to the support arrangements and media management. The chairs told me that they regarded that work as having been superseded by the MOU. For that reason, I will not report on the work in any detail. Neither working group met again until August 2021.

93. I also asked the Council administration to tell me what support arrangements the Chief Executive put in place in relation to the Mayor's email account. To make sense of the question, I sought information about the practice both historically and after the signing of the MOU. I put the same questions to the Mayor, but they were not addressed in his lawyer's preliminary response. I also asked one of the elected members to whom I spoke what her recollection was of the arrangements from her former time as Deputy Mayor.

Historical arrangements

94. Both the administration and the former Deputy Mayor confirmed that the Mayor had historically had a Personal Assistant ("PA") who provided support to him for a wide range of matters both official and personal. The arrangements included having access to the Mayor's Council email account and his diary. The PA was a Council employee, and as such was responsible to the Chief Executive (consistent with the Local Government Act 2002 and standard practice in the sector). When the PA was on leave, or seconded to another department, another staff member would be designated as an interim PA to the Mayor with the same level of access.

95. Arrangements like these are standard practice across the local government sector (and indeed elsewhere). The former Deputy Mayor told me that she had offered to support the Mayor, including meeting regularly with him and helping manage his diary. She had been aware that the Mayor's PA had access to the Mayor's email and calendar. However, she had not herself been given access. Instead, she had to work through the Chief Executive to know about matters of Council business, such as invitations to external meetings which had come directly to the Mayor.

96. The Council administration, the former Deputy Mayor, and the current Deputy Mayor all told me that the Mayor's partner has for some time had access to the Mayor's Council email account. I will not comment on that aspect of the arrangements.

Pre-MOU arrangements

97. The Council administration informed me that the arrangements for PA support changed in early 2021 when the Mayor's PA was transferred to other duties. One reason for this was the limited amount of time the Mayor was, by then, spending in the Council office. A rostering system was put in place for the Mayor's, as well as senior managers', PAs. The Mayor found the different faces confusing, and the arrangement was changed so that only two PA staff were rostered to the Mayor. Only one of those staff had access to the Mayor's email and calendar.
98. The current Deputy Mayor does not have access to the Mayor's Council email account. Both he and the Council administration told me that this became problematic because not all invitations coming through the account were being picked up. Councillors (both through the Chairs' Group and at Council) discussed how best to work around the issue, with the Mayor in attendance. As a result, arrangements were made for the Deputy Mayor to receive on each Friday a copy of the Mayor's schedule for the coming week (extracted by the PA from his calendar).

Post-MOU arrangements

99. The arrangements just mentioned continued after the signing of the MOU. In addition, the Council responded to the Mayor's unhappiness about no longer having a dedicated PA. The administration informed me that the two EAs spoke separately with the Mayor about the support he needed. It was then agreed that a part-time Assistant could be appointed (for up to 12 hours per week). The then Executive Manager was responsible for the recruitment. He arranged for the development of a job description. He spoke with the Mayor and his partner about the role and the required skills before he advertised the position, and later about the appointment he had made. The new Assistant took up duties in August 2021.
100. I asked about whether the Mayor's PA still has access to his email account or diary, and if so for what purposes. The Council administration replied that:

The role of a PA is to act as the first point of contact, scheduling meetings and managing diaries, answering phone calls and emails, booking travel, transport and accommodation.

Two staff members have access to the Mayor's email and diary – the interim PA and the new Assistant.

101. The administration gave me a copy of the Assistant's job description. It is broadly consistent with the above. It includes reference to co-ordination and administration of day to day arrangements with the Mayor (including his diary commitments); secretarial duties which include responding to routine correspondence; and standards of communication which include maintaining discretion and confidentiality at all times and applying "a degree of political awareness in any communication undertaken, and ensur[ing] diplomacy in responses with sensitive information".

Reviewing any special arrangements which were subsequently put in place with regard to the Mayor's Office and confirming their reasonableness in relation to Council's objective for revised support arrangements and compliance with Council policy, LGOIMA, and the Privacy Act

102. I have reviewed the support arrangements which were put in place with regard to the Mayor's office. As I have said, the arrangements are typical of what would be expected for any support role for a busy mayor or chairperson. Access to the Mayor's email account is limited to those providing PA support. That is appropriate, given the political sensitivities referred to in the Assistant's job description.
103. There is no specific description of the purposes for which the email access may be used. However, it is clear that the main reasons for the access have been, and still are, to ensure that the Council

administration can identify matters of official business coming through the account, such as invitations to meetings and events, and to inform the Chief Executive and other staff members as appropriate as well as managing the Mayor's diary. Although I did not have an opportunity to hear the Mayor's view of the arrangements or their purposes, I find the arrangements to be reasonable both generally and in relation to Council's objective for the revised support arrangements that Council asked the Chief Executive to put in place after its April meeting.

104. However, it is unclear how the arrangements, either before or after the MOU, were intended to work in relation to external communications and media management. That is an important factor, because it is generally recognised that a mayor acts as the principal spokesperson for a council. The media can be expected to use the mayor as a first port of call for a media inquiry. But (as I will confirm in the next section) it is usual practice for a local authority to take an integrated approach to managing external communications (including with the media). That should, and commonly does, involve the mayor, the chief executive, and communications advisers working together to manage media responses.
105. The media protocols of February 2021 appear to have been part of an effort to develop such an approach. But, although approved by Council, they appear to have had little relevance to the support arrangements subsequently put in place. The Communications Framework approved at the May meeting was directed at the Council's corporate communications, and made no reference to media management. It too appears to have little if any relevance to the arrangements. As I have noted earlier, while the LGOIMA is an important element of a council's communications approach, and the Council was working to respond to the Chief Ombudsman's practice review (including by developing a LGOIMA policy), the Act does not on its own serve as a communications approach.
106. I discussed the media support arrangements with the Deputy Mayor. He told me that there had been nothing formal about the transfer of responsibilities for communications or media support in consequence of clause 9 of the MOU. He described an understanding that he had with the Mayor and his partner that they would sound each other out about media matters. This worked well for a time, including on occasions when the Mayor might be asked by news media to speak about matters of strategic significance to the Council and the city or the region. However, these understandings had since lapsed.
107. I can only conclude from this evidence that there has been, and remains, something of a vacuum at the Council in relation to its media management. There appear to be no clear understandings with the Mayor about how his communications with the media fit with that management. The Deputy Mayor made it clear to me that he has attempted to work with the Chief Executive and communications staff on media matters. But, as I have noted, his working arrangements with the Mayor and his partner have lapsed. That may be one of the underlying causes of the problem that arose with the administration's use of the Mayor's 10 August email.
108. This brings me back to the discussion about the distinction between an elected member's "official" and "on own behalf" communications with the media. The Council's Code of Conduct recognises this distinction. This part of the Code is based on a template that is widely used in the local government sector. It says, at sections 6.1 and 6.2:

6.1 MEDIA CONTACT ON BEHALF OF THE COUNCIL

- the mayor or chairperson is the first point of contact for an official view on any issue, unless delegations state otherwise. Where the mayor/chair is absent requests for comment will be referred to the deputy mayor/chair or relevant committee chairperson or portfolio holder;
- the mayor/chair may refer any matter to the relevant committee chairperson or to the chief executive for their comment; and
- no other member may comment on behalf of the council without having first obtained the approval of the mayor/chair.

6.2 MEDIA COMMENT ON A MEMBER'S OWN BEHALF

Elected members are free to express a personal view in the media, at any time, provided the following rules are observed:

- media comments must not state or imply that they represent the views of the council;
- media comments which are contrary to a council decision or policy must clearly state that they do not represent the views of the majority of members;
- media comments must observe the other requirements of the Code; for example, comments should not disclose confidential information, criticize, or compromise the impartiality or integrity of staff; and
- media comments must not be misleading and should be accurate within the bounds of reasonableness.

109. The Chief Ombudsman would have had sound reasons for suggesting that all elected members start using their Council email accounts for all their communications as elected members. The Council administration would have acted appropriately in asking the elected members to do so. But neither the Ombudsman's report nor the ensuing request by the administration to elected members appears to have considered the implications for managing the confidentiality that is widely regarded as attaching to a member's communications on their own behalf.
110. As I have also discussed, this has an impact on the Council's compliance with the Privacy Act. An elected member's "on own behalf" communications should generally be regarded as "personal information" because they are information "about" the member. That makes the information subject to the Information Privacy Principles in relation to its security and its use or disclosure. Although the principles apply to personal information held in any form (including in a personal email account, as acknowledged earlier), the move to centralise all elected members' communications into their Council-owned accounts would have magnified the importance of observing the Principles – particularly if the member's email account were visible to Council staff (as is the case in relation to the Mayor). There seems a need for clarity about which communications fall into the "own behalf" category, so that their confidentiality can be respected.
111. There is no evidence that these issues were considered when making the support arrangements for the Mayor. In one sense, the issue may be seen as arcane. It may be irrelevant, or be easily managed, in the circumstances of other councils where there is an integrated approach to managing media communications and the mayor's email account is openly accessed by communications staff for that purpose. But in the circumstances prevailing at Invercargill, it seems to have had serious consequences on this one occasion.
112. I was informed that the Mayor has a personal email account, and is understood to have used it for his business as an elected member. I did not have an opportunity to get his view on whether his email exchange with the reporter was in his "official" or his "on own behalf" capacity. I was also unable to learn whether his use of his Council email account for this particular communication reflected an understanding of, and a wish to implement, the Chief Ombudsman's suggestion about using such accounts for all elected member business. However, as I have noted, his lawyer's preliminary response said that the Mayor understands the protocols surrounding the LGOIMA.
113. To the extent that the support arrangements did not anticipate these issues arising, they might be considered unreasonable. However, there is an element of hindsight in that judgment. A similar issue could have arisen at any other council. To the extent that a judgment needs to be formed about the particular incident, the responsibility may be seen as shared. For example, the Mayor did not say whether he was speaking in an "official" or "on his own behalf" capacity when he used his Council email account to reply to the reporter. Had he said he was speaking on his own behalf, it might have created a "flag" for the Council staff who saw and then extracted the email. On the other hand, even without such a "flag", the Council staff may not have considered the full implications of the Mayor's

statement to the reporter being “personal information” for the purposes of the Privacy Policy and the Privacy Act.

Reviewing the established practice and comparing and contrasting that with practice elsewhere

114. I have made a number of references to standard practice in the local government sector throughout my report. I will not repeat them all here. To summarise, there are three key areas.
115. The first is the support arrangements for a mayor’s office. I have noted that the provision of PA support is standard practice across the sector, and that that typically includes support staff having access to a mayor’s email account. The Council’s established practice compares favourably with practice elsewhere.
116. The second area involves the arrangements for external communications. I have already noted the apparent lack of an integrated approach involving the Mayor in the Council’s media management. Practices vary across the sector, and there is no “right” way of doing things. Factors such as the size of the local authority, as well as the preferences and practices of a mayor, the chief executive, and communications staff, may influence what practice will be used.
117. To the extent that there is a “good practice” standard, it may be found in Local Government New Zealand’s CouncilMARK™ assessment framework for New Zealand local authorities.¹³ Under the heading *Communicating and engaging with the public and business*, the framework invites an assessment against the following:

Communications and engagement	Indicators
<ol style="list-style-type: none"> 1. Does the Council have a communications strategy that complements its Significance and Engagement Policy? 2. How do its communication documents align with the Council’s vision, goals and strategies? 3. How does the Council promote two-way communication with its community? 4. Is the Council’s communications and engagement strategy well understood and implemented by elected members and staff? 	<ul style="list-style-type: none"> • An effective communications strategy that promotes the vision, strategy and values (internally and publicly) is in use. • Pro-active, two-way and open system in place for communication, with appropriate mechanisms for both community and staff feedback. • Key messages are clearly, unambiguously and consistently articulated in all internal and external messaging across print, social, online and other channels.

and:

<ol style="list-style-type: none"> 5. Does the Council have a media and social media strategy? 6. Have relevant designated staff and elected members received media training? 7. Do the Mayor and Chief Executive meet regularly with media to discuss key matters? 8. Has Council established clear protocols and expectations around the use of social media by both elected members and officers? 	<ul style="list-style-type: none"> • Media strategy effectively promotes the key goals and outcomes. • Mayor, Chief Executive, other nominated elected members and staff are effective media communicators. • Effective media relationships enables the Council to be portrayed in a fair and balanced manner. • Social media used for direct communication with selected stakeholders (as appropriate). • Effectiveness of communication is monitored and evaluated.
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¹³ See www.councilmark.co.nz.

	<ul style="list-style-type: none"> The Media Policy extends to the use of social media (organisation and personal accounts) and is managed and monitored accordingly with appropriate follow-up actions and accountabilities.
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118. A **learning** from this review is that the Council and the Mayor might usefully draw on these standards when next updating the support arrangements. In this connection, I also note the comment in the Ombudsman’s report (see paragraph 42 above) that the Chief Executive was working to encourage openness and champion accountability at the Council. The LGOIMA training provided for elected members is also relevant here (see paragraph 44 above).

119. The third area involves the practices concerning elected members’ “on own behalf” communications, and how they are to be distinguished from their “official” communications. I have discussed those practices at length; noted that they are also an area of uncertainty across the sector; and made some suggestions as to what the Council could do to improve their implementation. There is no need for further comment.

Reviewing whether the use of the email dated 10 August 2021 was in accordance with the [Acceptable Use] Policy and the Privacy Act

120. This is the final task under my terms of reference. Again, I do not need to repeat the previous discussion at any length. I emphasise again that my review has been about the support arrangements, and has not been concerned with anyone’s personal conduct.

121. As regards the *Acceptable Use* Policy, I have already stated my view that neither the privacy “waiver” stated in the Policy nor the Mayor’s declaration that he would be bound by the Policy (irrespective of when he made the declaration) are determinative of the question that arises about the Council administration’s accessing and use of the Mayor’s email.

122. That leaves the Privacy Act (and the Council’s Privacy Policy). Accepting that the Mayor’s email to the reporter is “personal information” for the purposes of the Act, and that the email was accessible to Council staff under the established support arrangements, the first question arising in relation to its use or (internal) disclosure was to understand the “purpose” for which the Council had “obtained” the information, by which I mean the Mayor generating the information using his Council email account.

123. Had the administration turned its mind to that question, it needed then to consider whether the purpose of its intended use of the information (which might, for example, have been to address the implications for the staff referred to in the email, or to manage Council’s reputational risk) was either consistent with the purpose for which it had been obtained or for a “directly related” purpose. Alternatively, it would have needed to consider whether the use was “authorised” by the individual concerned, i.e., the Mayor.¹⁴

124. A similar test applies to the extent that the use of the information also extended to an internal “disclosure” to members of the Chairs’ Group.¹⁵

125. I have noted earlier that the mayoral support arrangements were put in place primarily to ensure that the Council administration could identify matters of official business coming through the Mayor’s account, and to inform the Chief Executive and other staff members as appropriate as well as managing the Mayor’s diary. Information from the account could clearly be “used” or internally “disclosed” for that purpose. But to conclude on whether the other purpose or purposes I have postulated were “directly related” to that purpose would require a level of investigation that goes

¹⁴ Information Privacy Principle 10, quoted earlier.

¹⁵ Principle 11, also quoted earlier.

beyond what this review involved. As this report will have shown, there are other factors that could have been relevant when determining the purpose. They may include the nature of the other support arrangements for the Mayor as they existed following the Deputy Mayor's termination of the MOU, including for media management; and what the Mayor's intention was in using his Council email account to make a media statement that did not appear to make clear whether it was in his capacity as Council's primary spokesperson or made on his own behalf.

126. For that reason, it would not in my professional opinion be appropriate, within the confines of this review, to reach a definitive conclusion on whether the Chief Executive's use of the Mayor's email was "in accordance with" the Privacy Act. That said, the Act and the Council's Privacy Policy applied, to the extent the email contained personal information. The Information Privacy Principles would then have provided an appropriate framework for determining what, if any, use was appropriate.

Concluding comment

127. The title of this review was "Review of Arrangements". My brief was that Council wished to review the arrangements implemented for electronic communications, as a result of the resolution of Council on 27 April 2021, to ensure they are lawful, appropriate and meet expectations. In doing so, it wished to satisfy stakeholders that they can have confidence in the systems and processes involved. In particular, Council wished to understand that the systems and processes set up to implement the resolution were appropriate, understood, and were followed with regard to the Mayor's email.

128. It is clear that the arrangements and the associated systems and processes are lawful and, by and large, appropriate – as the comparison with established practice elsewhere will have shown. It appears they were also understood by all parties.

129. The arrangements for staff access to the Mayor's Council email account did not extend to purposes of media management. In that sense, the arrangements differed from many other councils. But there were areas of uncertainty, in particular the lack of clear arrangements for media management and the lack of clarity about the capacity in which the Mayor sent the email to the reporter (i.e., whether as the Council's spokesperson or on his own behalf). The Privacy Act enables personal information (as the email appears to have been) to be used for the purpose for which it was obtained or for a directly related purpose. The degree of uncertainty has made it difficult, in a review of this nature, to form a conclusion on whether the use made of the email was for such a related purpose. That, in turn, makes it difficult to say whether the established systems and processes were followed with regard to the email.

130. I nevertheless hope that the areas for clarification and improvement that I have identified could be addressed when the arrangements are next discussed and reviewed. That should, I hope, enhance stakeholder confidence in them.

Robert Buchanan
Wellington
27 September 2021

Addendum – 28 September 2021

I submitted my report to Council on the morning of 27 September 2021. Later that day, I received a late submission from the Mayor.

I agreed to review the submission. I have done so, and have prepared this addendum to my report as a result.

The Mayor first expressed concern about the narrow scope of my terms of reference, and raised a number of matters, both about the 10 April email itself and events subsequent to its use. I record here that other elected members I spoke to were also keen to discuss and comment on those events. I made no reference to those comments in my report because they fell outside the scope of the review. I apply the same approach to that aspect of the Mayor's response.

Comments on the administrative arrangements

The Mayor responded to my written question about the administrative arrangements for his PA to access his email account (both historically and since April 2021), and the purpose of the access. His response largely confirms what the council administration told me, and what I recorded in paragraphs 94 to 101 of the report. One added point is that the work of his PA was always under his direction (even though the PA is an employee of the Council).

His response also largely confirmed what the Deputy Mayor told me about the discussions between the two of them in advance of the MOU (see paragraph 96 of the report). The Mayor confirmed that the Deputy Mayor had asked him for access to his Council email account, but that he never formally agreed to that. This comment correlates to what the Deputy Mayor told me about his level of access to the Mayor's weekly schedule in lieu of such access (see paragraph 98).

In relation to the establishment of the support arrangements after the MOU had been signed, the Mayor said that there was no mention of access to his email account and no documentation. He was also not aware of any change to the diary management system. There was no discussion of the need to utilise his email account.

These comments are all consistent with what I was told from other sources.

The Acceptable Use Policy

The Mayor restated what he had said in his preliminary response about the declaration he made in 2000 on an earlier version of the *Acceptable Use Policy*. Like the other elected members I spoke to, he said that the 2021 Policy was not brought to his attention or explained to him in any detail.

The response also questioned the relevance of the Policy. There is no need for me to discuss that any further, given the view I formed about it.

Media management

In relation to media management, the Mayor said that there has been no media management system in place. He has "always been very direct with the media", and he, personally, responds to all media enquiries to his office unless he chooses to refer an issue to another member of staff. This comment is relevant to my discussion of media management at paragraphs 104 to 107 of the report. It tends to confirm my conclusion that there is no integrated approach to media management of the type which is found at other councils.

The Mayor also said that he has not received any media training. (The report notes that he attended LGOIMA training on 30 June.)

Relevance of the Privacy Act

The Mayor restated his concern that the accessing of his email had breached his privacy. He also confirmed that he had not authorised the use of the email. This is relevant to paragraph 123 of the report (authorisation being one basis on which an agency may use or disclose personal information in accordance with the Information Privacy Principles). More generally, the Mayor's comment confirms to me that the Privacy Act, supported by the Council's Privacy Policy, was the appropriate framework in which the use (or internal disclosure) of his personal information could have been considered.¹⁶

The distinction between "official" and "on own behalf" communications

My report discusses at some length the distinction between elected members' "official" communications, including with the media as the Council's spokesperson, and those sent on the member's own behalf as an elected member. The latter types of communication are widely regarded as confidential to the member. This was confirmed by the other elected members I spoke to (see paragraph 84 of the report). While the Mayor did not address the distinction directly in his response, the inference that I take from his comments is that he shares that view.

However, I also noted in the report that there is room for uncertainty when the same email address is used for both types of communications, especially in relation to a mayor who is commonly regarded as the principal spokesperson for Council and whose Council email account may be accessible by staff for that purpose. I also made a reference to the Mayor's personal email account (see paragraph 112).

The Mayor's response informed me that he had not used a personal email account for Council business. However, for some time he did have two Council email accounts to distinguish between official mayoral business and "other Mayoral projects". The name of the other account was shadboltprivate@icc.govt.nz. He told me that the account was deactivated in 2020. I am uncertain of the relevance of this to the question about "official" and "on own behalf" communications by elected members, but consider it important to mention the point. The timing of the deactivation seems to make clear that this point is not directly relevant to the support arrangements put in place after April 2021.

The Mayor also said in his response that, "as Mayor", he has every right to address the media about his "concerns/activities", including to defend himself against allegations such as those that were in issue relating to the 10 August email.

To be fair, this comment was not made with any knowledge that I intended to emphasise in my report the distinction between "official" and "on own behalf" communications. But the reference to defending himself "as Mayor" against allegations does tend to blur the distinction. This may, therefore, be relevant to my discussion about how elected members and the Council administration can distinguish between "official" and "on own behalf" communications, especially when the same Council-owned email account is used for both (see paragraph 89 and other parts of the report). Perhaps the better emphasis would be to say "as an elected member" (i.e., on his own behalf rather than "as Mayor").

Conclusion

Having reviewed this further information, I do not find it necessary to change any of the conclusions that I formed. The Mayor's comments tend to reinforce the need I identified for more clarity in certain aspects of the arrangements.

¹⁶ Both the Mayor's preliminary response and his late response also referred to other legislation under which he considered the use of the email to have been unlawful. That included the Telecommunications (Interception Capability and Security) Act 2013. I have not reviewed that Act in relation to either the support arrangements or the use of the email, noting that the email account is owned by the Council and subject to its *Acceptable Use Policy*.

Appendix 1: Terms of Reference

Terms of Reference – Independent Review of Electronic Access

Date: 24 August 2021

Background and Context

For reasons documented in the October 2020 Independent Governance Review, earlier this year Council asked the Deputy Mayor to assume some mayoral duties.

In November 2020 Council received the report of the Ombudsman into its *Local Government Official Information and Meetings Act 1987*. Relevantly that report found:

I believe the Mayor and elected members could be more active within the organisation and publicly in promoting openness and transparency. While elected members have received some training on the meeting provisions of LGOIMA, they have not received any training on official information requests.

At its meeting on 27 April 2021, Council resolved that “the Chief Executive take the necessary steps to support the Deputy Mayor in supporting the Mayor in representing the City”. To support that work, the need to utilise electronic access to the Mayor’s ICC email account and to share information about the Mayor’s activities was discussed.

On Tuesday 10 August the Mayor sent an email response to a media enquiry. His statement referred to *the current regime* and spoke of his *humiliation of a staff member going through every single page I own*. The email was shared with the Chairs’ Group (Mayor, Deputy Mayor, Chairs and Deputy Chairs of Council’s Standing Committees) by the Chief Executive.

On 17 August 2021, a media query from the Otago Daily Times regarding access to the Mayor’s emails from his ICC account was received. This related to the statement – sent by email from the Mayor - the previous week. The query was as to how the Chief Executive had knowledge of the statement on 10 August.

In reply to the query, the Chief Executive issued the following media statement:

“Recognising the unique circumstances at Invercargill City Council, earlier this year Council asked the Deputy Mayor to assume some mayoral duties. To support that work, the need to utilise electronic access and to share information about the Mayor’s activities was discussed. It is common for council staff to assist the Mayor, elected members and executive staff with administration to ensure timely response to emails. This does not include monitoring.

Although these arrangements were agreed, I should not have shared the contents of an email the Mayor issued to media last week. A review of arrangements will be undertaken.”

The Brief

Council now wishes to review the arrangements implemented for electronic communications, as a result of the resolution of Council on 27 April 2021, to ensure they are lawful, appropriate and meet expectations. They seek to satisfy stakeholders that they can have confidence in those systems and processes.

In particular, it wishes to understand that the systems and processes set up to implement Council’s April resolution are appropriate, understood and were followed with regard to the email the Mayor issued to media during the week ending Friday 13 August.

The Approach

Our expectation is that the review would include, but not be limited to:

General Approach

- Reviewing the Council's Electronic Access and Use Policy for staff and for non staff (non staff being elected members, contractors and any other party accessing Council's electronic systems).
- The intersection between ICC practice, Local Government Official Information and Meetings Act and Privacy Act requirements.
- Considering whether all parties (i.e. staff, the Mayor, the Deputy Mayor and other elected members) had the same understanding of the systems and processes in place. The reviewer needs to touch on councillors' appreciation of their obligations under the relevant policies and legislation.

Approach to support of the Mayor through access to his ICC email account

- Consideration of the Council deliberations and the resolution with regard to the issue in the April Council Meeting establishing what was intended in support of the Mayor and access to his ICC email account.
- Reviewing any special arrangements which were subsequently put in place with regard to the Mayor's Office and confirming their reasonableness in relation to Council's objective for revised support arrangements and compliance with Council policy, LGOIMA, and the Privacy Act.
- Reviewing the established practice and comparing and contrasting that with practice elsewhere.
- Reviewing whether the use of the email dated 10 August 2021 was in accordance with the Policy and the Privacy Act.

Out of Scope

This is not a whole of organisation review. It is more focused upon arrangements to support the Mayor's Office and the Council's desire for greater visibility of the Mayor's activities.

It should be noted that Invercargill City Council was the subject of an Official Information Practice review by the Ombudsman in 2020 (reported early 2021).

Recommendations

Our expectation is that the reviewer will recommend any learnings or improvements that are identified.

Timeframe

The review will commence on Wednesday 25 August and the aim is to have a report back to Council by Wednesday 15 September.

Note: depending on alert level, the reviewer will either spend a day in Invercargill or conduct his interviews by zoom.

Appendix 2: Working on Working Together Action Plan
[Supplied separately]

Appendix 3: Media Protocols

Invercargill City Council Media Protocols 2021

Purpose

Invercargill City Council's Media Protocols have been developed to support and guide elected members in recognition of the critical role interactions with the media play in supporting the organisation's reputation in the community.

The protocols recognise the right of all elected members to share their views with the media and have differing opinions. This right, along with a series of provisions which govern matters such as agreed spokespeople on official business, matters of confidence and staff interactions, are set out in the Council Code of Conduct.

Rather than reiterate these rules, the Media Protocols offer a guide to how elected members approach media interactions to support the Council's good reputation. It is noted that council staff are also guided by protocols and processes in their interactions with the media.

Media Protocols

- Media training will be offered to all elected members to assist them in their interactions with reporters and advise them on the best way of working with media that assists the news media as well as the Council.
- A "no surprises" approach to media interactions is agreed, whereby elected members and staff will share information about relevant media activities.
- Staff will offer support to elected members around key city issues, such as official talking points or background information, to assist their commentary to media and the public.
- Elected members acknowledge that sometimes the council makes unpopular decisions for the right reasons (e.g. legal requirements, health and safety etc). When this happens, they agree to acknowledge background issues publicly even when they have disagreed with a decision.
- Elected members agree to focus on council issues and activities when speaking to the media, rather than the actions or decisions of other elected members or staff.
- The media has the ability to shape and influence community views of the organisation and therefore elected members agree the need to take care when sharing views about council decisions or activities.
- New and proactive media and public communications activities are being considered in the development of the ICC Communications Strategy 2021. As part of this strategy, when finalised, elected members will be offered opportunities to participate in positive communications activities and channels will be provided for them to raise ideas with staff.

Appendix 4: Public Statement about the Media Protocols (made after the February 2021 Council meeting)

Statement from ICC External Appointee and Governance Group Chair Jeff Grant:

I've contacted elected members today to share my thoughts on debate around our draft Media Protocols this week.

I'm also reaching out to local media to share a little more background about how the protocols came to be – it's hard to do that just in short media responses.

I would like to make it really clear that the intent behind the protocols is to support councillors and offer some help for those that need it when talking to media. In no way do the protocols stop councillors sharing their views and speaking with the media and public.

The media protocols were developed based on the recommendations of the Thomson report and the Action Plan that was prepared to address the issues raised. Elected members voted unanimously on both of those documents, so it was at their direction the protocols have been prepared.

The draft protocols have been prepared by an elected member-led working group; they are the result of discussion between elected members and staff with the aim of agreeing a supportive, positive way of working together.

They do not, in any way, stop elected members sharing their views and opinions.

The Thomson report noted that "The use of media to try to influence outcomes by creating public pressure is a matter that many councillors commented negatively on". It went on to note that councillors are free to speak to media, however that did not preclude an agreed methodology or approach to media interactions.

It's important to recognise the power that the media wield. Like it or not, the media will focus on any arguments and disagreements of elected members if they chose to voice them. The protocols are positive, supportive and intended to help elected members.

What happens now is up to the council to decide, and they may wish to revisit the protocols in an effort to seek a way forward agreed by all. Ultimately, the intention was to come up with a way of working with the media that made all elected members comfortable and that guided our public conversations. There was opportunity to amend the protocols at this week's council meeting; that opportunity was not taken, but it doesn't mean we can't look to amend the protocols to get to a stage where we all agree.

Appendix 5: Chairs' Group Terms of Reference

CHAIRS' GROUP – TERMS OF REFERENCE

Purpose

The purpose of this Group is to manage the political processes necessary to ensure the effective functioning of the Council's governance structure, through:

- a) having oversight of the work of the Committees and of Council, and
- b) providing a conduit for officers, through the Chief Executive, to engage and advise governance leaders.

Membership

The members are the Mayor, Deputy Mayor, Chairs and Deputy Chairs of the Infrastructural Services Committee and Performance, Policy and Partnerships Committee. The External Appointee (Lindsay McKenzie) shall be a member of the Group without voting rights and will Chair the Group for the term of their appointment by Council.

Function

The Group will -

- maintain effective dialogue across the committees of council and Council to enable the efficient
- and effective running of the governance processes;
- ensure coordination of the allocation of work among committees and between committees and
- Council;
- provide a conduit for the Chief Executive to work collectively with governance leadership;
- receive advice from and give advice to the Chief Executive relevant to the Group's purpose;
- carry out expressly delegated functions and make expressly delegated decisions;
- keep councillors informed of its activities.

Authority

The Group has no formal decision making power other than that expressly delegated by the Council or other committees having such authority.

Administration

The Group shall -

- meet weekly or as required;
- be serviced by the Chief Executive's office;
- appoint its own Chair once the External Appointees term ends;
- enable the Chief Executive or their delegate to attend all committee meetings as of right in the role of principal adviser;
- maintain a record of its meetings in note form.

Appendix 6: (Unsigned copy of) Memorandum of Understanding (from April 2021 Council Agenda)

**Memorandum of Understanding
between
His Worship the Mayor, Sir Tim Shadbolt KNZM, JP
and
Deputy Mayor Nobby Clark**

DATED: XX March 2021

ENDORSED BY COUNCIL ON: XX April 2021

INTRODUCTION AND BACKGROUND

One of the key findings in the Independent Governance Review (The Thomson Report) was the need to ensure clarity around the role of the Deputy Mayor at Invercargill City Council (ICC). Council acknowledged that “Clarifying the Role of the Deputy Mayor” was one of the key foundations to implementing its action plan and requested that it be included in the brief of the Working Group dealing with support for the Mayor and the Chief Executive. The Working Group then decided to capture the arrangements between His Worship the Mayor and the Deputy Mayor in a Memorandum of Understanding (MoU) to enable each elected member, the Chief Executive and the External Appointees to be clear on and endorse the role of the Deputy Mayor for the balance of the triennium. In the event of a change in Deputy Mayor, it is envisaged that this MoU may need to be revisited.

PRIMARY PURPOSE

The primary purpose of this Memorandum of Understanding (MOU) is to record the agreement between His Worship the Mayor and the Deputy Mayor with regard to the role of the Deputy Mayor at ICC. The MOU is intended to record the mutual understanding and good faith of the Parties. Relationship between MOU, all other Statutory Responsibilities and Council resolutions
This MOU cannot over-ride the Local Government Act 2002 (LGA) provisions, nor is it intended that Mayoral Responsibilities captured in other Council Documents are changed. As documented in Phase 1 of the “Working on Working Together” framework which was endorsed by Council, it captures the foundational arrangements with regard to how His Worship, the Deputy Mayor, Elected Members and Chief Executive operate together for the term of this MOU. The employment relationship between Council and the Chief Executive is not part of this document.

PARTIES

His Worship the Mayor, Sir Tim Shadbolt KNZM, JP (“His Worship”)

AND

Deputy Mayor Nobby Clark (“Deputy Mayor”)

ENDORSED BY

The Chief Executive

AND

Elected Members

AND

External Appointees for the term of their appointment to Invercargill City Council

THE ROLE OF THE MAYOR

Mayoral Responsibilities are covered in the Local Government Act 2002. In addition, Council has itself allocated certain roles and responsibilities to the Mayor. They are captured in the following documents:

- Code of Conduct

- Joint Committees
- Governance Statement
- Delegations
- Standing Orders

Mayoral responsibilities related to Civil Defence and Emergency Management are covered in The Southland Civil Defence Group Plan.

The parties agree that the core Role of the Deputy Mayor at Invercargill City Council is as follows:

1. Leadership of Elected Members

To build a team by engaging positively and proactively with all elected members both individually and collectively.

To lead the development of a supportive and inclusive environment and a culture of mutual trust, respect and tolerance.

To play the major role in addressing the leadership issues described in the Thomson Report.

2. Support at Council Meetings

His Worship shall preside when he is present at Council meetings. In the absence of His Worship, the Deputy Mayor shall preside over Council meetings.

The Deputy Mayor shall be available to sit by the Mayor at Council meetings and assist as requested by the Mayor.

3. Working Relationship with the Chief Executive, and through her, the Executive Leadership Team (ELT)

The Deputy Mayor and Chief Executive will work together to keep Council safe and protected financially, legally and reputationally. They will facilitate positive and constructive working relationships, engagement and communications between Elected Members and members of the ELT. This collaborative relationship will be consistent with the Elected Members Charter Guiding Principles towards the agreed focus areas and outcomes.

This includes and is not limited to:

- Supporting the Office of the Mayor
- Liaising between the Chairs of committees and subcommittees and ELT members
- Facilitating discourse that is strategically or culturally relevant to Council

4. Day to day support for the Mayor by the Deputy Mayor

The Mayor appreciates support from the Deputy Mayor in clarifying requests and requirements from other Councillors and staff. The Deputy Mayor will also assist the Mayor in understanding expectations from community representatives when asked to attend functions. The Mayor appreciates the Deputy Mayor's assistance with external stakeholders. This support will be ongoing.

4.1 The Deputy Mayor acknowledges the elected role of the Mayor and Mayor's ability to attend all meetings in his role as Mayor (subject to Council approval for attendance at non-LGNZ events, being held outside the region).

4.2 The Deputy Mayor will notify the Mayor of any delegation being undertaken before the event occurs.

4.3 The Deputy Mayor will brief the Mayor on any dealing with the Chief Executive or Councillors on a weekly basis or as needed.

4.4 The Deputy Mayor will brief the Mayor of any discussions with any external stakeholder, as soon as possible, after the event.

4.5 The Deputy Mayor will work with the Mayor to ensure there is daily support to the Mayor in the office.

5. Sponsorship of Council Charter

As part of his role in building a Council team, the Deputy Mayor will role-model behaviours that all elected members (and External Appointees) have subscribed to in the Council Charter.

6. Formal Communication (between Mayor, Deputy Mayor and CEO)

His Worship and the Deputy Mayor will communicate formally every week to discuss the forward meeting schedule of His Worship.

This communication will take place at an agreed time that is recorded in both His Worship's and the Deputy Mayor's Invercargill City Council Outlook Calendars.

A Friday morning appointment is preferred.

The Mayor, Deputy Mayor and CEO are all committed to a "no surprises" approach which means that communication will take place as and when required between formal meetings to ensure there are no surprises.

It is recognised that all three parties will attend the Chairs' Group meetings on Tuesdays.

8. Reporting to Council –

Monthly Report on Council Agenda

His Worship will continue to provide a monthly report to Council on his attendances. His Worship may ask the Deputy Mayor to provide additional information where the Deputy Mayor has attended on His Worship's behalf.

Attendance at and reporting back from External Meetings

His Worship and the Deputy Mayor will agree on attendance at external meetings in their weekly communication appointment as detailed above.

His Worship will continue to provide a monthly report to Council regarding his external meetings. If requested by Elected Members, His Worship may provide a verbal update at meetings in between scheduled Council meetings of the Whole. The Deputy Mayor will communicate with Elected Members and the CEO via email after attendance at events related to the role of the Deputy Mayor, or in support of the Mayor.

The Deputy Mayor will provide a verbal update to Elected Members at Council meetings, to allow Elected Members the opportunity to provide feedback.

9. Media Relationships

Support will be made available to both His Worship and the Deputy Mayor where any issues arise from contact by Media.

Media Protocols developed through the wider Governance Review will consider appropriate procedures for responding to queries from the media. These may be applied more widely by Elected Members to support a cohesive approach to media relationships.

Media Training offered through the wider Governance Review will consider scenarios where His Worship or the Deputy Mayor may face pressure from the media, and will offer advice on how to respond effectively.

TERM OF MOU

The MOU will be reviewed at the same time as the Working on Working Together arrangements (specifically the appointment of External Appointees). The first review will take place by the end of June 2021.

A meeting, facilitated by one of the External Appointees, will be held by the parties to discuss the effectiveness of this MOU and to review any issues that may have arisen during the period. Elected Members will also have the opportunity for input into the review to share their reflections on the arrangement.

The outcome of the review will be reported to Council at the next Council meeting after the review date.

The MOU shall be terminated at the end of the current electoral term or where either party is no longer incumbent in their roles as defined above.

DISAGREEMENT

Appendix 7: Council Charter
[Supplied separately]

Appendix 8: Communications Framework (as presented to Council in May 2021)
[Supplied separately]

Appendix 9: Electronic Access Acceptable Use Policy (for elected members): March 2021
[Supplied separately]