



Report

Preliminary investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Council member	Councillor Susan Hamilton
Council	Mount Barker District Council
Ombudsman reference	2016/10116
Council reference	DOC/17/12428
Date complaint received	21 December 2016
Issues	Whether Councillor Hamilton breached Part 3 of the Code of Conduct for Council Members by publicly divulging council information subject to a confidentiality order.

Jurisdiction

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (the **Code of Conduct**).¹ An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.²

As envisaged by Part 3 of the Code of Conduct (misconduct), the council's Chief Executive Officer referred a complaint received by the council about Councillor Susan Hamilton to my Office.

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Investigation

My investigation has involved:

- assessing the information provided by Ms Margaret Neila to the council
- seeking a response from the council
- seeking more particulars from the council
- considered the response from Ms Melissa Keogh, reporter for the Courier Newspaper
- considering the *Local Government Act 1999*
- considering the Code of Conduct
- considering the council's Code of Conduct - Complaints Handling Procedure (**Complaints Procedure**)
- referring to the council's Released Confidential Items register: 22 December 2016
- considering the council's meeting minutes for:

¹ The Code of Conduct was gazetted on 29 August 2013.

² Section 263A(4) Local Government Act; section 3, Ombudsman Act.

- 20 October 2003 (Confidential Minutes)
- 6 September 2010
- 16 September 2013
- 23 June 2014 (Special Council Meeting)
- 1 September 2014
- 7 September 2015
- 5 September 2016
- 19 September 2016
- considering the Draft Expression of Interest - Mt Barker Council Offices and Multi-Level Car Parking proposal
- preparing a provisional report and providing it to the parties for comment
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.³ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...⁴

Response to my provisional report

None of the parties provided a response to my provisional report.

Therefore, in light of the above, my view remains as set out in my provisional report.

Background

The complaint to the council

1. In a complaint to the council dated 8 December 2016, Ms Margaret Neila alleged that Cr Hamilton was in breach of the Code of Conduct by divulging information at a council meeting that was subject to a confidentiality order.
2. On 15 December 2016 the council referred Ms Neila's complaint about Cr Hamilton to the Local Government Governance Panel (LGGP). In the referral, the council stated that '...the complaints related to both Part 2 and Part 3 of the Code of Conduct...' however, those related to Part 3 of the Code of Conduct...' have been referred to the Ombudsman for investigation.
3. In his letter dated 16 December 2016, Mr Andrew Stuart, Chief Executive Officer for the council, referred to my Office Ms Neila's complaint. Mr Stuart advised my Office that the council intends to deal with aspects of Ms Neila's complaint which were considered to be possible Part 2 breaches.

³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

4. On 16 December 2016 Mr Stuart wrote to Ms Neila c/- the Post Office, Littlehampton concerning her complaint about Cr Hamilton and advised that the council '...shall forward the complaint about the breach of confidentiality to the Ombudsman to Investigate.' In that letter the council sought further information from Ms Neila about her complaint. On 22 February 2017 Mr Stuart advised my Office that:

...further to Council's letter of 13 February 2017, Council received a returned mail envelope containing Council's acknowledgement letter of 16 December 2016 that was sent to the complainant Ms Neila.

The registered mail correspondence dated 6 February 2017 [referred to in paragraph 14] to Ms Neila has also not been collected from the post office.

5. On 6 February 2017 Mayor Ann Ferguson wrote to Ms Neila referring to Mr Stuart's letter dated 16 December 2016 and advised of the following:

As you have not provided any additional information in relation to the behavioural part of the complaint to Council I have determined it is not a valid complaint for the purposes of the Code of Conduct and I have dismissed this part of your complaint.

The Ombudsman may contact you in relation to your complaint regarding Part 3 of the [Code of Conduct] that he has been asked to investigate.

6. The council provided my Office with a copy of the letter dated 7 February 2017 from Mayor Ferguson to Mr Dominic Agresta, legal representative for Cr Hamilton, in which she confirmed the council's decision to dismiss aspects of Ms Neila's complaint alleging a breach of Part 2 of the Code of Conduct.

7. On 19 December 2016 Ms Andrea Malone, Director Legislation, Local Government Association SA advised the council of the outcome of its assessment of Ms Neila's complaint that was referred to the LGGP. In part, Ms Malone advised of the following outcome about the 'leaking of confidential information':

The issue of 'leaking confidential information', as alleged by [Ms Neila], is not a matter that falls into the remit of the [LGGP]. This issue should be referred to the Ombudsman.

8. I note that there has been speculation by Cr Hamilton and Mr David Leach, acting as advocate for Cr Hamilton with her authority, about the existence of Ms Neila. Mr Leach advised my Office that attempts to identify Ms Neila were unsuccessful because in their opinion, Ms Neila 'did not exist'. In support of his and Cr Hamilton's opinion, Mr Leach raised with my Office the following:

- Did [Mayor Ferguson] establish Margaret Neila was a real person prior to forwarding the complaint given that Margaret Neila did not supply a [sic] address, a full signature, a phone number, is not known by any person in the district, does not appear on any ASIC data base, electoral role, lands title database or any of several other regulatory databases.
- Has [Mayor Ferguson] informed the Ombudsman of our concerns about the veracity of Margaret Neila. [Mayor Ferguson] claims, in a letter to Dominic Agresta that she has made the Ombudsman aware of the lack of contact information for [Ms Neila].
- Margaret Neila does not appear on any electoral role in Australia, in fact there is no person in Australia on an electoral role with the surname Neila.

9. On 20 March 2017 my letter dated 3 February 2017 to Ms Neila was returned to my Office 'unclaimed'. Furthermore, the council advised my Office that its letter to Ms Neila dated 16 December 2016 was returned to the council. The council further advised that it had confirmed with the Littlehampton Post Office that its letter to Ms Neila dated 6 February 2017, sent via registered mail, remained unclaimed.

10. Whilst I acknowledge that the identity or existence of Ms Neila remains unclear, I have given consideration to the matter raised in the Courier newspaper article on 19 October 2016 by Ms Melissa Keogh in which Ms Keogh stated that at the public council meeting on 19 September 2016, during discussions under agenda item 13.4 about the council report 'Gawler Street Entrance Statement Update', Cr Hamilton was heard to have divulged information that was considered by Ms Keogh to be the subject of a confidentiality order. Therefore, I consider those issues raised by Ms Keogh are sufficient for me to conduct an own initiative investigation pursuant to section 13(2) of the Ombudsman Act of a potential breach of Part 3 of the Code of Conduct.

The alleged breach of confidentiality

11. In support of the complaint, Ms Neila provided a copy of an article by Ms Melissa Keogh, reporter for the Courier Newspaper, in which Ms Keogh stated that at the public council meeting on 19 September 2016, during discussions under agenda item 13.4 about the council report 'Gawler Street Entrance Statement Update', Cr Hamilton was heard to have divulged information that was considered by Ms Keogh to be the subject of a confidentiality order. Specifically, Ms Keogh stated in her newspaper article on 19 October 2016 the following:

The Mt Barker Council is considering building a multi-deck car park near Gawler Street to alleviate parking congestion in the growing town.

The council-owned site is at the corner of Stephen and Mann streets and is already used as an unofficial public parking space.

Plans for a multi-deck car park have been discussed behind closed doors by council staff and elected members since 2013.

The discussions have remained confidential but at a recent general council meeting - which was open to the public - Councillor Susan Hamilton let slip that Stephen Street was where the multi-level car park was likely to go.

Mr Stuart said the council was exploring a number of other locations for the multi-deck car park.

12. On 15 December 2016 Ms Keogh advised the council as follows:

In regards to the October 19 Courier article about the multi deck car park, the council meeting in question was September 19. Councillor Hamilton made the comments during discussions about the Gawler Street Entrance Statement Information report [agenda item 13.4].

13. I note from council documents that in 2013 the council began the process of seeking an 'Expression of Interest' (**EOI**) from property developers for the proposed council office accommodation and multi-level parking.
14. At the council meeting on 16 September 2013 council members considered the tabled EOI Report (**EOI Report**) prepared by Leedwell Strategic under agenda item 12.1 - Expressions of Interest for Office Accommodation and Multi-Storey Car Park (**the Project**). At that meeting, the EOI Report was discussed and the following motion was moved by then Councillor, Mr Robert Heath, that council:
1. Approves the commencement of the EOI (Stage 1) for Office Accommodation and a Multi Storey-Car Park
 2. Approves Stage 1 Assessment Panel Membership of Mayor Ann Ferguson (Chair), General Manager Corporate Services (David Peters), Manager Projects (David Morton) and one other Elected Member to be nominated.

3. Notes that it will receive a report with the Assessment Panel's recommendations on a proposed shortlist of proponents to be selected for Stage 2 Request for Proposals.
15. The EOI Report, which was not confidential at that stage, included Stephen Street as a possible site for the car park.
16. At the council meeting on 16 September 2013, the motion referred to under agenda item 12.1 was carried. At that meeting, council members voted to appoint Cr Hamilton '...as the fourth member of Stage 1 Assessment Panel'.
17. At the Special Council Meeting on 23 June 2014 council members considered agenda item 3.1 Confidential Item: Multi-Deck Car Park and Council Office Accommodation and resolved as follows:

That having considered Agenda Item 3.1 Multi-Deck Car Park and Council Office Accommodation in confidence under 90(2) and (3)(b) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the [Local Government Act] orders that the council report, related documents and all minutes be retained in confidence until a contract is in place or such lesser period as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.

18. At the council meetings on 1 September 2014 (agenda item 11.5) and 7 September 2015 (agenda item 12.1) the council resolved that the confidential orders for certain items, including those which relate to the Project, remain in place.
19. The council's register of 'Confidential Items 2003-September 2016' states that the information for agenda item Multi-Deck Car Park & Council Office Accommodation for 23 June 2014, reviewed by council on 5 September 2016, was to remain confidential for the following reasons:

Confidential Order Details

...

The Council is satisfied that pursuant to Section 90(3)(b) of the [Local Government Act], the information to be received, discussed or considered in relation to this Agenda item is information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is:

-proposing to conduct business; and

- would prejudice the commercial position of the Council in that the information to be considered includes detailed plans and other financial information, the disclosure of which could prejudice the Council's commercial position during negotiations.

...the disclosure of the Council's commercial position may severely prejudice Council's ability to be able to negotiate a cost-effective proposal for the benefit of the Council and the community in this matter and in relation to other contract negotiations.

Item being kept confidential - Agenda/Attachment/Minutes

Council report, related documents and all minutes be retained in confidence until a contract is in place or such lesser period as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.

Reason regarding retention or recommend action to release

the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is:

-proposing to conduct business; and would prejudice the commercial position of the Council in that the information to be considered includes detailed plans and other financial information, the disclosure of which could prejudice the Council's commercial position during negotiations.

Resolution Regarding Action

Until a contract is in place or such lesser period as determined by Chief Executive Officer

Review every 12 months.

20. On 13 February 2017 Mr Stuart advised my Office that:

The confidentiality order was not varied as part of any of these reviews.

As the confidentiality orders are regularly reviewed all Council Members are made aware of the Council resolutions that are still subject to a confidentiality order. If you [Ombudsman] are enquiring as to whether Councillor Hamilton was made aware after the Council meeting on 19 September 2016 where she is alleged to have disclosed the confidential matter - no she was not.

There is no transcript of the meeting on 19 September 2016. Council does record Council meetings but they are deleted once the minutes are completed, so there is no recording of the meeting of 19 September 2016.

21. On 14 February 2017 Mr Leach provided information to my Office about Cr Hamilton's role with the Mount Barker community and with the council including information about proposed council developments over the past 23 years. Mr Leach also provided a copy of the minutes for the council meeting on 20 October 2003, which included a copy of the released confidential items register, and a report from Mr Henry Inat, General Manager, Strategy for the council. At that meeting, the council considered Mr Inat's confidential report for agenda item 12.5 'Carparking within the Mount Barker Township'. This item remained subject to a confidentiality order from 20 October 2003 until lifted by the council on 6 September 2010. In his email, Mr Leach stated that

[Cr Hamilton] rejects the Part 3 allegations[sic] and we attach a copy of a released confidential minute, many years old detailing a multi story [sic] car park in the area mentioned in the Courier.

22. Minutes for the meeting of the council on 6 September 2010 show that Cr Hamilton was in attendance at the meeting during which council resolved to accept the Review of Confidential Reports (File 10/030/003) under agenda item 21.10. I note that the report included the matter referred to in paragraph 13 and identified as item 2 in the Confidential Items 2003-September 2016 register being 'Car Parking within the Township'. The register states that item 2 was released on 6 September 2010.
23. In his response to my letter to Cr Hamilton, Mr Dominic Agresta, solicitor acting for Cr Hamilton, provided responses to those questions raised in my letter dated 3 February 2017 about the alleged breach of confidentiality by Cr Hamilton.

- were you aware that at a special meeting on 19 June 2014 the council resolved to make a confidentiality order in relation to the report titled 'Multi-deck Car Park and Council Office Accommodation' (the report)?

'Yes.'

- did you divulge information about the report that was subject to the confidentiality order at a meeting of the council on 19 September 2016 or at any other meeting?

'No.'

- if so, why and in what context?

'N/A'

- do you consider that in disclosing information about the report that was subject to a confidentiality order you breached clause 3.3 of Part 3 of the Code of Conduct?

'N/A'

- any information relevant to the complaint that will assist with my investigation.

In relation to the last dot point, my belief is that the complaint made against me was malicious and made up, falsely, by a person or persons who are intimately aware of the affairs and activities of the Council, including confidential affairs, and it was a complaint made in an attempt to silence me in respect of my opposition to various projects proposed by the Council.

24. On 23 March 2017 Mr Stuart advised my Office as follows:

- 1) ...I did not pick up on the specifics of the comments made by Cr Hamilton but soon after I was aware that her comments provoked some reaction in the gallery.
- 2) On 16 September 2013 there was a public Council report 'Expressions of Interest for Office Accommodation and Multi-Storey Car Park' exploring the possibility of a Council office and car park in the town centre. The report detailed a precinct area that included Stephen Street (amongst others). The fact that Stephen Street would have been a consideration is not confidential. The report of 23 June 2014 which remains confidential expanded on the possible negotiations related to this site. Cr Hamilton's comments do not reflect a resolution of Council, but speculate on a possibility which could have been ascertained from reading public reports in 2013.
On balance I do not consider this a breach.
- 3) As stated in 1) I was not aware that Cr Hamilton may have breached confidentiality. Subsequently (days later) I was questioned by The Courier reporter and the alleged breach was proposed to me by the reporter prior to the article on 19 October 2016. I have reflected on the reporter's assertion and the article in the Courier and this process has informed my response to question 2 above.
- 4) I was not approached by other Council Members regarding a possible breach of a confidentiality order.

26 I note that the evidence tendered in support of this complaint is the article in the Courier newspaper by Ms Keogh which included Ms Keogh's opinion that comments made by Cr Hamilton during discussions about agenda item 13.4 at the meeting of the council on 19 September 2016 were about a matter that was subject to a council confidentiality order. Therefore, in consideration of this evidence, I sought from Ms Keogh a response to the following questions about her recollection and opinion of the events at the council meeting on 19 September 2016 and which thereafter, formed the basis of her article in the Courier newspaper:

- 1) Do you know at which meeting of the council Cr Hamilton was alleged to have breached the confidentiality order?

September 19, 2016.

- 2) Do you recall what was being discussed by the council members at the time it was alleged that Cr Hamilton breached the confidentiality order?

Councillors were discussing item 13.4 Gawler Street Entrance Statement Update, which involved a new entrance statement and upgraded pedestrian crossing at the intersection of Gawler Street and Adelaide Road, Mt Barker. Councillors were talking in favor of the project, and also brought up the car park at the corner of Gawler Street and Adelaide Road, owned by the Gilbert family.

- 3) Did you, at the time Cr Hamilton made those comments, consider she breached a confidentiality order or did someone else alert you to this?

Yes, I did believe that Cr Hamilton had breached a confidentiality order because I thought that discussions about a proposed car park going behind the town hall on Stephen Street were confidential.

I interviewed CEO Andrew Stuart for the Courier story in question and he said that Cr Hamilton had been "a bit naughty" for saying what she said at the meeting. Mr Stuart's comment assured me that Cr Hamilton's comment was information that was not supposed to be known by the public.

- 4) Are you aware of what information was subject to the confidentiality order?

I am aware that a multi-deck car park and office accommodation report was/is subject to confidentiality. I am aware that the car parking topic is sensitive information because it involves past and/or present discussions between the council and developers.

- 5) Are you aware that there was certain information about a proposed multi storey car park within Mt Barker that was and still is in the public domain on the council's website including the proposed location which included Stephen Street?

No, I was not aware of this information prior to the story in question going to print. However, I learnt much later that the possibility of a car park going behind the Barker Hotel or the town hall was no big secret, and that this information had been lifted from the confidentiality order years ago.

Relevant law

27 Section 90 of the Local Government Act 1999 provides:

Meetings to be held in public except in special circumstances

...

- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):

...

- (a) Information the disclosure of which-
 - (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
 - (ii) would, on balance, be contrary to the public interest;
- (c)- (n) ...
- (4) - (9) ...

28 Section 91 of the Local Government Act 1999 provides:

Minutes and release of documents

- (1)-(6) ...
- (7) However, subsections (4),(5) and (6) do not apply to a document or part of a document if -
 - (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3; and
 - (b) the council or council committee orders that the document or part be kept confidential.

29 Clause 3.3 of the Code of Conduct provides that a council member must:

Not release or divulge information that the Council has ordered be kept confidential, or that the Council member should reasonably know is information that is confidential, including information that is considered by Council in confidence.

Whether Councillor Hamilton breached Part 3 of the Code of Conduct for Council Members by publicly divulging council information subject to a confidentiality order.

- 30 On 24 February 2017 Cr Hamilton, through her solicitor, Mr Dominic Agresta, advised my Office that she denies disclosing confidential information. While that response was unhelpful in its brevity, Cr Hamilton has maintained to my investigator that she never disclosed confidential information.
- 31 I note that at a special meeting on 23 June 2014 the council resolved to place a confidentiality order over the report tabled under agenda item 3.1. Furthermore, there is no dispute that the report has remained confidential, for the reasons set out in paragraphs 16 and 17, since 23 June 2014 and was subject to confidentiality from the date of the council meeting on 19 September 2016.
- 32 I have also considered that on 5 September 2016, being 14 days prior to the meeting during which Cr Hamilton is alleged to have breached the confidentiality order, the council reviewed those items that were subject to a confidentiality order and resolved that certain items should remain confidential, including the item about the Multi-Deck Car Park & Office Accommodation.
- 33 Mr Stuart further advised my Office that ‘Council Members are made [during the annual review of the confidential items register] aware of the Council resolutions that are still subject to a confidentiality order.’ It is therefore reasonable to assume that if Cr Hamilton did divulge information that was subject to a confidentiality order, she would have done so in full knowledge that the item was still subject to that order.

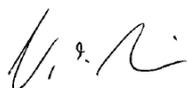
- 34 In considering all submissions made to the council and to my Office about the allegations against Cr Hamilton, I consider that there is information available to the public via the council's website that makes reference to a proposed project about a car park in the township of Mount Barker and which is not subject to the confidentiality order. This view is supported by Mr Stuart who, in his response to my Office, states:
- Cr Hamilton's comments do not reflect a resolution of Council but speculate on a possibility which could have been ascertained from reading public reports in 2013.
- 35 In that regard, I note that the EOI Report (tabled at the meeting of the council on 16 September 2013) provided details about an Expression of Interest for Office Accommodation and Multi-Storey Car Park and for which, listed four potential sites, including Stephen Street and Gawler Street. Gawler Street was the subject of discussions under council meeting agenda item 13.4 during which Ms Keogh and Ms Neila allege Cr Hamilton divulged information that was subject to a confidentiality order.
- 36 On 8 June 2017 Cr Hamilton advised my Office that although she could not remember exactly what she said during discussions about agenda item 13.1, she agreed that what she said at the meeting was as 'printed in the Courier and what appears in the Council minutes.' Furthermore, Cr Hamilton denied breaching confidentiality in anything that she said about the car park and queried why, if she did break confidentiality, the CEO did not raise it at the time, or soon after. In support, Cr Hamilton referred to the Courier newspaper article which 'shows myself and Andrew Stuart said pretty much the same thing about the car park.'
- 37 I note that Ms Keogh told my investigator that Mr Stuart said that 'Cr Hamilton had been a "bit naughty" for saying what she said at the meeting.' That said, I have also considered Mr Stuart's response to my Office whereby he states the 'fact that Stephen Street would have been a consideration [as a likely site for the car park] is not confidential.' The confidential council report of 23 June 2014 'expanded on the possible negotiations related to this site'.
- 38 I also note that Mr Stuart, in his response to my Office, stated that he was not aware that Cr Hamilton may have breached confidentiality and that he had 'reflected on [Ms Keogh's] assertion and the article in the Courier and this process has informed my response' that 'Stephen Street would have been a consideration is not confidential' and that the report of 23 June 2014 'expanded on the possible negotiations related to this site'. Cr Hamilton's comments, in Mr Stuart's view, 'speculate on a possibility which could have been ascertained from reading public reports in 2013'.
- 39 In weighing the evidence before me, I note the following:
- On the one hand:
- Ms Keogh suggests that Cr Hamilton disclosed Stephen Street as a potential site
 - Cr Hamilton acknowledged that the Courier newspaper article reported what she said at the meeting
 - Ms Keogh states that Mr Stuart acknowledges that this should not have been disclosed.
- On the other hand:
- both Cr Hamilton and Mr Stuart deny that Cr Hamilton disclosed confidential information
 - the fact that Stephen Street was a potential site is not confidential (given that it was disclosed in the EOI and EOI Report)
 - the council had not resolved that Stephen Street was the site for the council office and multi-storey car park

- Ms Keogh was not aware that information about a multi storey car park within Mount Barker (including Stephen Street as a location) was and still is in the public domain on the council's website
- Ms Keogh is now aware, since the Courier newspaper article, that information about the locality of a car park was no secret and that the information was no longer confidential.

Opinion

While I consider that Cr Hamilton should have exercised caution during discussions about the matter before council, I am not satisfied on the *Briginshaw* standard, that she disclosed information that was not already in the public domain.

Therefore, in light of the above, I consider that Cr Hamilton did not breach clause 3.3 of Part 3 of the Code of Conduct, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.



Wayne Lines
SA OMBUDSMAN

12 July 2017