



OmbudsmanSA

## Report

### Full investigation - *Ombudsman Act 1972*

Complainant	Mr Robert Osmond
Agency	City of Port Adelaide Enfield (the council)
Ombudsman reference	2013/01120
Agency reference	KK:kah
Date complaint received	31 January 2013
Issues	Whether it was wrong for the council to engage J&G Salvage Pty Ltd (J&G) to transfer and dispose of tyres despite it not having development approval or an appropriate EPA Licence

#### Jurisdiction

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

#### Investigation

My investigation involved:

- assessing the information provided by the complainant
- seeking a response from the council
- clarifying the response with the council's lawyers
- considering the council's 'Contracts and Tendering Policy' and 'Procurement Procedures'
- preparing this report.

#### Responses to my provisional report

In response to my provisional report, the complainant commented in a letter dated 16 April 2013 that he agreed with my proposed recommendations.

The council responded by letter dated 10 April 2013, further to a telephone conversation my officer had with the council's lawyer Ms Natasha Jones from Kelledy Jones Lawyers, on 4 April 2013. The council opposes the views expressed in my provisional report for several reasons including:

- that the complainant, Mr Osmond was not directly affected by the administrative act (of transporting and disposing of the tyres)
- that the council is not obliged to discover what happened to the tyres under the rules of contract for service

- that the council engaged J&G at the recommendation of another council and that it was appropriate for the council to assume that J&G Salvage held itself out as having the relevant approvals in place
- that I do not have power to investigate matters of policy and as such cannot make comment in respect of the council's Contracts and Tendering Policy

I disagree with the council's argument. The complainant was directly affected by the disposing of tyres on his private property. In my view, the council does have an obligation and responsibility to conduct reasonable enquiries in order to satisfy itself that activities being undertaken on its behalf are undertaken in compliance with the law. I accept that the council received a recommendation from another council to engage J&G and that this is a relevant consideration in determining whether it conducted reasonable enquiries. However I still consider that the council did not meet its obligations in this regard. My view in this matter is therefore unchanged.

### Background

1. The complainant is the owner of an industrial property at 14 Deuter Road, Burton (the **Burton property**). J&G operated a tyre transfer and disposal business which operated mainly from the Burton property. J&G also operated another premises at 26 Hewittson Road, Elizabeth West (the **Elizabeth property**) where they sorted and stored (but did not dispose of) tyres.
2. J&G already had a transfer licence issued by the Environment Protection Agency (EPA) which allowed it to transfer waste. However, J&G did not have development nor EPA approval to operate a waste transfer facility on the Burton property, which is the subject of a separate complaint and investigation by my office in relation to the City of Salisbury. Nor did J&G have development approval or an EPA licence to operate a tyre sorting facility at the Elizabeth property.
3. The complainant makes the allegation that the council engaged J&G to transfer tyres from the council depot to the Burton property. The complainant was not aware whether the council knew or checked what approvals J&G possessed for the Burton property, which was under the control of the City of Salisbury.
4. In support of his contention, the complainant has submitted documents that he obtained from the council under Freedom of Information (FOI) legislation on 9 August 2012. These documents consist of:
  - a. An invoice from J&G (number 58) dated 10 May 2011 (but showing transfer of tyres occurred on the 9 and 10 May 2011) for \$781.65 showing 285 tyres being disposed of (paid 3 June 2011)
  - b. An invoice from J&G (number 65) dated 7 July 2011 for \$534.45 showing 250 tyres being disposed of (paid 21 July 2012)
5. I wrote to the council on 6 February 2013 to ask it for information to assist my investigation. In addition to the information above, the council provided the following information by letter dated 22 February 2013:
  - a. a list of telephone calls that it made to J&G from 2 June 2011 to 11 October 2011
  - b. that an employee of the council, Mr Mark Rooney contacted a counterpart at another council about companies that would take scrap tyres. On 14 April 2011 that counterpart emailed Mr Rooney a price list from J&G. It is noted on the price

list attached to the email that it states 'All waste tyres go to CY International Group P/L (based in China)'

6. The council noted in its letter that it has no paper or electronic records as to whether its staff checked that the contractor J&G had the appropriate approvals (such as EPA licence and development approval) to dispose of the tyres. I note that two invoices provided to me by the council list J&G's address as the Burton property.
7. The council has therefore confirmed that it engaged J&G to transfer and dispose of 535 tyres on 9, 10 May and 7 July 2011 and paid J&G the sum of \$1,316.10.

**Whether it was wrong for the council to engage J&G Salvage Pty Ltd to transfer and dispose of tyres despite it not having development approval or an appropriate EPA Licence**

8. The question is whether it was wrong of the council to engage J&G to transfer and dispose of tyres in circumstances where:
  - a. it is possible that there was no proper assessment as to what approvals (if any) J&G had to dispose of the tyres
  - b. it is possible that there was no proper assessment by the council as to where the tyres were taken before disposal
9. The complainant alleges that all tyres removed at the instruction of the council by J&G ended up at the Burton property.
10. The council has a 'Contracts and Tendering Policy' (the policy) that was adopted on 23 March 2004. The policy lists eight principles as guidelines for the purchasing of all goods and services by the council:
  - a. Provide value for money outcomes, based on a whole of service life costing
  - b. Encourage fair and even competition
  - c. Accountability and transparency
  - d. Based on sound risk management, professional integrity and probity
  - e. Consideration of environmental sustainability
  - f. Encourage local suppliers and manufacturers
  - g. Compliant with the requirements of relevant legislation
  - h. Consistent with council's strategic, corporate and financial directions
11. The policy states that for purchase amounts \$1,001 to \$5,000 excluding GST the minimum process required is at least 2 verbal or written quotations. The policy is silent on whether the amount of \$1,001 is to be made in a single purchase.
12. The council's 'Procurement Procedures' (the procedures) give further guidance in addition to the policy. They provide a list of 'general purchasing guidelines' which include:

All purchasing arrangements will be fair and open and all suppliers treated equally.

Staff will strive to achieve value for money in the expenditure of Council funds.

Expenditure will be consistent with Council's Corporate Plan and the Program Performance Budget and Annual Statement.

Consideration will be given to suppliers who can demonstrate that their products and services minimise waste and/or contain recycled products and/or are environmentally sustainable.

All purchasing processes will be conducted on a confidential basis and no confidential information will be divulged to unauthorised persons.

Note: Staff are also to be aware that all Purchasing, Contract and Tender records remain public documents and are able to be accessed via the Freedom of Information process.

Staff will always conduct themselves with honesty, propriety and the highest standards of ethical conduct.

All purchasing decisions must be transparent, clearly documented and justifiable if subjected to audit, public scrutiny, and any potential legal challenge.<sup>1</sup>

13. It is clear that neither the policy nor the procedures cover a situation where expenditure may be less than \$1,001 (as were the two invoiced amounts paid to J&G if counted separately). It is also unclear whether the policy and the procedures were followed in the case of purchases between \$1,001 - \$5,000 where two other quotations are required.
14. I therefore find that the council did not comply with the policy's requirement that purchases 'must be compliant with the requirements of relevant legislation'.
15. In my view, it was wrong of the council not to make some enquiries as to what approvals were in place for the storage of tyres, and where and how J&G would recycle the tyres. As a good corporate citizen, I consider that it is not enough for the council to engage a contractor and not perform any background checks into how the work is going to be performed and the outcome delivered, particularly in areas of environmental significance.

## Opinion

In light of the above, my final view is that the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act because it breached the policy which required all purchases to be compliant with the requirements of relevant legislation.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council collect the tyres it authorised to be transported by J&G from the Burton property and deal with them appropriately.



Richard Bingham  
SA OMBUDSMAN

1 May 2013

---

<sup>1</sup> 'Procurement Procedures' March 2010, p 4