

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	District Council of Mallala (the council)
Ombudsman reference	2013/06129
Date complaint received	19 June 2013
Issues	<ol style="list-style-type: none">1. Whether Cr Steve Jones breached the conflict of interest provisions of the <i>Local Government Act 1999</i> at the council meeting of 17 December 2012.2. Whether Cr Jones breached the conflict of interest provisions of the <i>Local Government Act 1999</i> at the council meeting of 25 February 2013.3. Whether Cr Jones breached the council's Elected Member Code of Conduct by making comments to the media.

Jurisdiction

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

I received two complaints that at the council meeting of 25 February 2013, Cr Steve Jones acted contrary to the conflict of interest provisions of the *Local Government Act 1999*.

In order to protect the identity of the complainants, I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

During the course of my investigation, it became apparent that Cr Jones may have acted contrary to the conflict of interest provisions at the meeting of council of 17 December 2012. I decided to investigate this matter also.

During the course of my investigation, another complaint was made about Cr Jones. I decided to incorporate this into my investigation. It was alleged that Cr Jones breached the council's Code of Conduct - Elected Members (**the code of conduct**)¹ by speaking on the Channel 7 news on 3 July 2013.

Under the definition of 'administrative act' in section 3 of the Ombudsman Act, I may investigate 'an act relating to a matter of administration on the part of a person engaged in

¹ District Council of Mallala, 'Code of Conduct - Elected Members', version 2.0, 22 April 2013.

the work of ... an agency'. This provides the jurisdictional basis for me to investigate whether an elected member of a council breached the conflict of interest obligations pursuant to the provisions of the Local Government Act.²

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- seeking and considering a response from Cr Jones
- considering sections 73 and 74 of the Local Government Act
- considering the District Court of SA decisions of *Petrovski v Pain* [2013] SADC 6 and *Petrovski v Dolling* [2013] SADC 27
- considering the code of conduct
- 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

Cr Jones responded to my provisional report by email dated 16 September 2013. He commented that:

- at the time, he was of the belief that he did not have a conflict of interest; but he now has 'a greater understanding of conflict obligations' and 'will not put [himself] or the council in that position in the future'
- he intended to attend the 'Code of Conduct, Grievance Procedures and Records Management Policy' training,⁵ but an issue arose at the last minute that meant he was unable to attend
- he made it clear to the Channel 7 news reporter that he was commenting in a private capacity. In the future he will 'provide a written media release [and] any comment from me will be in a personal capacity.'

The council did not respond to my provisional report.

² However, by virtue of an amendment to the Local Government Act under clause 42 of Schedule 3 to the *Independent Commissioner Against Corruption Act 2012*, from 1 September 2013 an act of an elected member of a council 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.

³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

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

⁵ As per resolution 2012/342 of Item 15.2 at the 17 December 2012 council meeting.

I have amended my views in relation to issue 3 in response. I have not amended my views on issues 1 and 2.

Background

1. On 1 May 2012, I received a complaint from Cr Strudwicke (the then mayor of the council) against three of the elected members of the council. The three members were Cr Anne Picard, Cr Duncan Kennington (now Mayor Kennington) and Cr Jones. I decided to investigate the allegations against the councillors as three separate complaints.
2. The findings in my report of the investigation relating to Cr Jones dated 29 October 2012 (**the report**) were that:
 - by forwarding emails to members of the public, Cr Jones had not acted in a manner which was contrary to the code of conduct
 - Cr Jones may have breached the *State Records Act 1997* and the council's record management policy
 - Cr Jones failed to comply with the code of conduct by making statements to the media.
3. I did not find any misconduct in relation to Cr Picard and Cr Kennington.
4. In accordance with section 18(5) of the Ombudsman Act, I reported Cr Jones' misconduct to the principal officer of the council.
5. I also sent a copy of the report to the Minister for State/Local Government Relations (**the Minister**) as I was required to do under section 25(3) of the Ombudsman Act.
6. The council then considered the report at item 15.2 of its meeting on 17 December 2012. The minutes record the following:

Ombudsman Investigation and Report - Allegations of Various Breaches (Confidential)
(D12/7331)

Cr Strudwicke, as the complainant in the investigation undertaken by the Ombudsman, declared a conflict of interest in this matter and left the chamber at 9:10pm

Cr Jones declared his interest in the matter.

...

Moved Cr Wasley / Seconded Cr McColl

“that Council having considered Item 15.2 Ombudsman Investigations and Report - allegations of Various Breaches - Confidential, dated 17 December 2012, receives and notes the report and attached documents.”

CARRIED (2012/340)

Moved Cr Summerton / Seconded Cr Wasley

“that Council having considered Item 15.2 *Ombudsman Investigations and Report - allegations of Various Breaches - Confidential*, dated 17 December 2012, considers the findings and any associated actions.”

CARRIED (2012/341)

Moved Cr Howard / Seconded Cr Wasley

“that Cr Jones and any other interested Elected Members attend training on the Code of Conduct and Grievance Procedures.”

Amendment

Moved Cr Summerton / Seconded Cr Keen

“that Council having considered Item 15.2 Ombudsman Investigations and Report - allegations of Various Breaches - Confidential dated 17 December 2012 requests that staff organise training for all Elected Members on the Code of Conduct, Grievance Procedures and Records Management Policy.”

Carried

The amendment became the motion

“that Council having considered Item 15.2 Ombudsman Investigations and Report - allegations of Various Breaches - Confidential dated 17 December 2012 request staff organise training for all Elected Members on the Code of Conduct, Grievance Procedures and Records Management Policy.”

CARRIED (2012/342)

Division

Cr Howard called a division. Councillors voting in the affirmative are Howard, Keen, Daniele, Summerton, Jones, Heley, Wasley and Kennington

7. Cr Jones declared ‘his interest in the matter’. According to the minutes of the meeting, it appears that Cr Jones remained in the chamber and participated in the voting and debate on the item.
8. The Minister wrote to Mayor Kennington by letter dated 18 January 2013. The letter addressed my findings about Cr Jones and included the following:

I am concerned not only by the Ombudsman’s findings in relation to Cr Jones but by the behaviour of some other members of the Council involved in the matters that were investigated.

It appears that at the time of the Ombudsman’s investigation, the Council’s Code of Ethics⁶ was insufficient in relation to the behaviour displayed by some of the members of Council, particularly the standards expected of public officers in areas of respect towards Council staff, maintenance of confidentiality and communication between Council members and staff members and enhancing the role and image of the Council.

Accordingly, I request that you provide me with a response, within four weeks of the date of this letter, detailing what action the Council has taken, or is taking, in response to the Ombudsman’s findings, including the following actions:

- Reviewing the Council’s Code of Ethics to ensure that it clearly defines the standards expected of members of Council, including respect towards Council staff and maintenance of confidentiality of communication between Council members and staff members.
- Reminding Council members of their obligations in relation to the Council’s Records Management Policy and the processes to be followed in relation to its Grievance Procedure.
- Reinforcing that the responsibility of Council members and Council staff is to work together for the good of the community they represent.

...

Once I receive your response, I will decide whether any further action is warranted.

9. The council sought and was provided an extension to consider the Minister’s letter and to endorse a response.

⁶ As far as I can establish, the Code of Ethics referred to by the Minister is the council’s Code of Conduct.

10. The council considered the Minister's letter at item 13.1 of the council meeting on 25 February 2013. The minutes record:

Response to Minister of State & Local Government - Ombudsman's Final Report

Cr Strudwicke advised [of] the following and left the chamber at 8:36pm

"I declare an interest in this matter as the initiator of the ombudsman investigation and note that a conflict of interest may arise as a result of correspondence between myself and the Minister of State/Local Government Relations, regarding Council's response to the Ombudsman's Report."

Cr Jones declared an interest as the subject of the investigation.

Moved Cr Summerton / Seconded Cr McColl

"that Council having considered Item 13.1 Response to Minister of State & Local Government - Ombudsman's Final Report, dated 25 February 2013 endorses the letter attached to this report and authorises the Mayor to forward the letter to the Minister of State & Local Government Relations."

Division

Cr Howard called for a Division

Councillors voting in the affirmative - Kennington, McColl, Jones, Summerton and Daniele

Councillors voting in the negative Howard and Heley

CARRIED (2013/079)

11. Cr Jones declared 'an interest as the subject of the investigation'. According to the minutes of the meeting, it appears that Cr Jones remained in the chamber and participated in the voting and debate on the item.
12. The 'Code of Conduct, Grievance Procedures and Records Management Policy' training was held on 20 March 2013. Cr Jones did not attend the training.
13. On 3 July 2013 Cr Jones appeared on the Channel 7 news. The Channel 7 news website includes the following article on the report:

Residents furious over illegal dumping

Peter Caldicott, 7News Adelaide, Yahoo!7 Updated July 3, 2013, 6:30pm

Residents of a coastal town north of Adelaide are furious illegal dumpers are using their suburbs as a tip, dumping rubbish on vacant land right next to their homes.

Port Parham is a paradise for those who live in the tiny town, but just beyond their beach, an illegal dump is ruining their neighbourhood.

"Building materials, household materials, tv sets, even drums of poison we've seen, you name it, councillor Steve Jones said.

Parents are horrified children have been playing where there appears to be asbestos.

"I've seen a lot of asbestos over time and can tell you which one's which and I think there's quite a bit here," Barb Reid from the Foreshore Advisory Committee said.

The property owner claims vandals repeatedly cut his fence to gain access.

The Environmental Protection Agency (EPA) said it is his responsibility to clean up the mess and make sure his block is secure.

“Somebody needs to get here and clean it up,” resident Lyn LeCouter told 7News.

“I don’t know who, but get your butts out here and do it.”

Mallala Council spends more than \$80,000 a year cleaning up illegal dumping.

One proposal is for council to purchase the property and turn it into a park.

“I’m sure many would love to see this particular land purchased on behalf of the community so we could look after it,” Mr Jones said.

Meanwhile, following recent stories on 7News, government contractors have now fully removed material, believed to be asbestos, on Port Wakefield Rd at Dublin.⁷

Conflict of interest provisions of the Local Government Act

14. Section 73(1) of the Local Government Act defines the circumstances in which an elected member has ‘an interest in a matter’ as follows:

73–Conflict of interest

- (1) A member of a council has an interest in a matter before the council if–
- (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
 - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,
- (not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

15. Section 74(1) provides:

A member of a council who has an interest in a matter before the council must disclose the interest to the council.

16. Section 74(2) provides:

A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.

17. Section 74(4) provides:

A member of a council who has an interest in a matter before the council must not:

- (a) propose or second a motion relating to the matter; or

⁷ <http://au.news.yahoo.com/latest/a/-/latest/17856462/residents-furious-over-illegal-dumping/> (accessed on 4 July 2013).

- (b) take part in discussion by the council relating to that matter; or
- (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
- (d) vote in relation to that matter.

Whether Cr Jones breached the conflict of interest provisions of the Local Government Act

18. It is alleged that at the council meetings on 17 December 2012 and 25 February 2013 Cr Jones breached section 74(2) of the Local Government Act. This section requires that, after declaring an interest under subsection (1), a member of a council must provide full and accurate details of the relevant interest.
19. It is also alleged that Cr Jones breached section 74(4) of the Local Government Act. This section requires that after declaring an interest under subsection (1), a member must not remain in the room, take part in discussions or vote on matters.
20. To decide whether Cr Jones breached the conflict provisions of the Local Government Act, I must first be satisfied that Cr Jones had an 'interest in a matter' in relation to the decisions at the two meetings, within the meaning of section 73(1). That is, I must be satisfied that by participating in the council's voting as he did, Cr Jones would receive a benefit or suffer a detriment or would have a reasonable expectation of receiving a benefit or suffering a detriment of the type described in section 73. Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the area or a ward or some other substantial class of persons.
21. In the recent case of *Petrovski v Dolling*,⁸ the District Court emphasised that the legislation is confined to the type of interest referred to in section 73 and 'not to conflicts of interest at large'.⁹ The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
22. Further, the court said that the question of whether a council's resolution gives rise to a section 73 interest, must be determined by a consideration of the actual terms of the resolution.¹⁰ In addition, the test is that the elected member 'would' receive a benefit or suffer a detriment or 'would have a reasonable expectation' of receiving a benefit or suffering a detriment. Speculation about the consequences of the matter being decided in a particular manner is not sufficient.

The council meeting on 17 December 2012

23. I consider that resolutions 2012/340, 2012/341 and 2012/342 of item 15.3 of the 17 December 2012 council meeting gave rise to a section 73(1) interest on the part of Cr Jones. I consider that the 'matter' for each of these resolutions, for the purposes of the sub-section, was the consideration of my report into the conduct of Cr Jones and the determination of how to address his misconduct. The passing of resolutions considering my investigation of Cr Jones, and determining the action to be taken in response to it, would have given him a reasonable expectation of receiving a non-pecuniary detriment due to the impact that could be caused to his reputation.
24. The minutes record that Cr Jones 'declared his interest' in the matter'.¹¹

⁸ *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

⁹ *Ibid*, [41].

¹⁰ *Ibid*, [34].

¹¹ Minutes of the council meeting held on 17 December 2012.

25. It appears also that Cr Jones breached section 74(2) by failing to provide full and accurate details of his interest.
26. Further, I am of the view that Cr Jones breached section 74(4) by remaining in the room, taking part in discussion and voting on resolutions 2012/340, 2012/341 and 2012/342 in item 15.2 of the meeting.

The council meeting on 25 February 2013

27. I have considered resolution 2013/079 of item 13.1 of the 25 February 2013 council meeting. I am of the view that the resolution gave rise to a section 73(1) interest on the part of Cr Jones. I consider that the 'matter' in question, was the consideration of the Minister's response to my report into the conduct of Cr Jones and the determination of how to respond to the Minister about my investigation. I consider that the passing of this resolution would have given Cr Jones a reasonable expectation of receiving a non-pecuniary benefit or detriment because of the impact on his reputation.
28. In this case, the minutes record that Cr Jones 'declared an interest' in the matter 'as the subject of the investigation'.¹² I consider that this constitutes full and accurate details of the interest as required by section 74(2) of the Local Government Act.
29. However, I am of the view that Cr Jones breached section 74(4) by remaining in the room, taking part in discussion, and voting on resolution 2013/079 in item 15.2 of the meeting.

Opinion

In light of my conclusions outlined above, I consider that Cr Jones breached section 74(2) and 74(4) of the Local Government Act, and as such acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I now report Cr Jones misconduct to the mayor of the council, in accordance with my responsibilities under section 18(5) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that Cr Jones attend conflict of interest training before 15 December 2013.

I note that at the council meeting on 17 December 2012 it was resolved that 'that Cr Jones and any other interested elected members attend training on the Code of Conduct and Grievance Procedures', and that Cr Jones failed to attend this training.

I recommend that the council report to me the date/s on which Cr Jones is to attend conflict of interest training, and also that the council inform me when Cr Jones has completed this training.

Whether Cr Jones breached the council's code of conduct by making comments to the media.

30. It is alleged that by speaking on the Channel 7 news on 3 July 2013, Cr Jones was acting as a representative of the council without the authority of the council, in breach of item 5.3 of the code of conduct.
31. Item 5.3 of the code of conduct provides that elected members must:

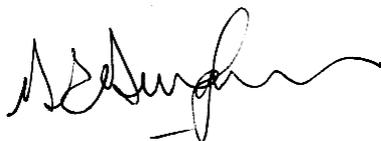
¹² Minutes of the council meeting held on 25 February 2013.

Ensure that personal comments to the media or other members of the public, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council.

32. It appears that the views Cr Jones expressed about the council purchasing the property and turning it into a private park were private views held by him and not the council. The council had never considered any proposal to purchase the property and turn it into a park.
33. Whilst Cr Jones was referred to as 'Mr Jones' in the article on Channel 7 news' website when he commented about the council purchasing the property, the item earlier introduced him as 'councillor Steve Jones'. Cr Jones, in his response to my provisional report, said that he did make it clear that he was expressing a private view, but that this was not conveyed in the report.
34. I consider that a member of the public may have reasonably thought that Cr Jones was expressing a view of the council when he made his comments. However, without more, I have no reason to disbelieve that Cr Jones did not indicate to the journalist that he was expressing a private view. I have decided not to investigate this issue further.

Opinion

In light of the above, my view is that continued investigation of this issue is not justifiable under section 17(2)(d) of the Ombudsman Act.



Richard Bingham
SA OMBUDSMAN

15 October 2013