

Report
Full investigation - *Ombudsman Act 1972*

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| Complainant | Mr B (the complainant) |
| Council | District Council of Mount Remarkable (the council) |
| Ombudsman reference | 2015/09985 |
| Council reference | EM2015-921 - DCMR0163 |
| Date complaint received | 25 November 2015 |
| Issues | <ol style="list-style-type: none">1. Whether the council was wrong to remove water from the complainant's farm property on the basis of the lessee's consent2. Whether the council was unreasonable in its handling of the complainant's complaint |

Jurisdiction

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

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- meeting with the complainant
- seeking and obtaining a response from the council
- considering the *Ombudsman Act 1972* (SA)
- considering the *Local Government (Procedures at Meetings) Regulations 2013* (SA)
- considering the council's Request for Service Policy and Complaints Policy
- providing the council and the complainant with my provisional report for comment, and considering their responses
- 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.¹ It is best summed up in the decision as follows:

¹ 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.

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 ...²

Response to my provisional report

In response to my provisional report the council responded by email on 29 March 2016. The council informed me that:

- the council has not seen the lease between Mr B and Mr A and therefore relied on Mr A's permission in good faith;
- it has implemented a requirement for formal written approval signed by both lessor and lessee prior to any property entry, and that lessees will be required to provide evidence that they are able to grant the council legal access;
- it has identified an anomaly between the website Customer Service Request (CSR) which informs customers that the council does not formally respond to CSR, and the various other methods CSR are received by the council. This is why Mr B's request of 29 March 2015 was not responded to. The council is developing an automated website reply to comply with its Request for Service Policy;
- Mr B's email and further correspondence was not treated by the council as a complaint as per the Complaints Handling Policy because it wasn't 'an expression of dissatisfaction with a product or service delivered by the council' but rather seeking information from the council;
- council intend to review how staff classify requests for service and complaints
- it correctly identified that Mr B was seeking to make a deputation and correctly applied its policy in this regard; and
- it considers the SA water rate adequate payment for the removal of water and it is the only compensation it would consider.

I have considered the above comments of the council but it does not alter the views set out in my provisional report. I do not consider the payment of a water royalty alone adequately compensates the complainant for the infringement of his property rights. I therefore would like the council to reconsider its view in this regard.

The complainant responded by email on 20 March 2016 that he had nothing further to add to the report.

Background

1. The complainant is the co-owner of land with his two brothers. The property is described as (redacted). The property contains a dam.
2. The property is leased to Mr A (**the lessee**). The lease permits the lessee cropping rights only. The lessee is also permitted to graze sheep.
3. On 4, 5, 6 and 11 November 2014 the council removed 330,000 litres of water from the property's dam and used it for the construction and resheeting of a council road in accordance with its Annual Business Plan. The removal of water was made without the knowledge or consent of the complainant or the co-owners.
4. On 29 March 2015 the complainant completed an online form called a Customer Service Request (CSR) on the council's website. It stated:

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Firstly, it has been brought to my attention that water from the dam at the house on the property called [the property] was taken to be used by the Council roadwork team in December 2014 to save them time driving back to Murraytown. Dam water, particularly in summer, is an extremely precious commodity, too precious to put on roads. I would like to know if water was taken from the dam and how many litres. If water was taken then permission to take water from the dam should have been sought from the owners. I am one of the owners and I was not contacted. Secondly, I noticed that Council vehicles were parked on the property without seeking permission. Minor damage has occurred to main gate entrance. I'd like to work with Council but if water was taken I will be seeking compensation in some form. Yours sincerely, [Mr B]

5. The complainant has informed me that he was not aware that the council removed the water until March 2015 as he does not live on or near the property. This is why his query was raised several months after the water was removed.
6. The complainant received no reply from the council to his email of 29 March 2015. On 17 May 2015 he therefore emailed all elected members of the council asking for the matter to be put on the Agenda for the next council meeting in an attempt to obtain a response from the council.
7. On 26 May 2015 a letter from the council's Deputy CEO Ms Jessie White was emailed to the complainant. The letter stated:

Your correspondence has been investigated. I advise that Council sought approval from [Mr A] (who I understand leased the property) to access water from the dam. Council entered the property on the 4, 5, 6 and 11 November 2014 removing 22 loads of water of 15,000L per load. As discussed with [Mr A]. Council only sourced enough water to the agreed minimum water level marker was reached.

Council compensates land holders \$3.49/kl for water used and was preparing a payment to be paid to [Mr A]. Please notify Council at the earliest opportunity if this arrangement was incorrect. In regards to the damage to the entrance gate John Hadley the Manager for Works and Technical Services will investigate and make arrangements for the gate to be repaired.

8. The complainant replied to Ms White later on 26 May 2015 by email. The email stated:

Thank you for your response to the [the property] water query.
 Just to put the Council in the picture, [Mr A] only had the cropping lease on [the property]. He also had sheep on agistment on the property. His name is not on the title and he does not have the authority to speak for the owners. The District Council of Mt Remarkable was out of order seeking permission from [Mr A].
 Permission should have been sought from and issues of compensation discussed with the owners.
 If any compensation is to be paid it does not go to [Mr A]. It needs to go to the owners, [Mr B and his siblings].
 Compensation needs to be further discussed.

9. On 3 June 2015 the complainant received an email reply from Ms White on behalf of the council:

I advised that Council sought approval from [Mr A] as he was the current occupier (leasee) (sic) of the Land. Council was not aware that he was not responsible for the water nor did [Mr A] indicate this was the case and Council apologises for any misunderstanding.

I would like to confirm the water royalty will be forwarded to the landholders via a cheque made out to [Mr B and his siblings].

In regards to the damage to the entrance gate John Hadley the Manager for Works and Technical Services has confirmed this repair will be completed within two weeks.

10. On 18 June 2015 Ms White emailed the complainant asking him to confirm to whom payment for water royalties is to be credited to prior to 22 June 2015. Ms White stated that if no further advice was received a cheque will be raised to the property owners, Mr B and his siblings.
11. On 22 June 2015 the complainant emailed Ms White at the council enclosing his own invoice to the council for the 330,000 litres of water removed in the sum of \$72,600 being 20 cents per litre plus GST.
12. Ms White replied by email later on 22 June 2015 that payment of the invoice was refused because it was considered excessive and a cheque raised in the sum of \$1,195.47 was being sent to the three owners for water royalties.
13. The complainant replied to the council by email later in the evening on 22 June 2015:

I again reiterate that I am not prepared to accept the Council's cheque for \$1,195.47 for water taken from the [the property] dam. \$0.00359 cents per litre is totally inadequate.
14. On 12 July 2015 the complainant emailed Ms White explaining that he was returning the cheque to the council and that he wanted to discuss the matter at the next council meeting on 21 July 2015.
15. On 20 July 2015 the CEO Mr Wayne Hart wrote to the complainant explaining that his request to attend the council meeting on 21 July 2015 and discuss the matter of compensation for water was referred to the presiding member of the council (the Mayor). The letter explains that the Mayor refused the request in accordance with regulation 11(4)(sic) of the *Local Government (Procedures at Meetings) Regulations 2013* on the grounds that the complainant's deputation would be considered an operational matter³.
16. At the ordinary council meeting on 21 July 2015 the elected members were informed of the presiding member's decision in accordance with regulation 11(5).
17. On 25 November 2015 the complainant, whilst in Adelaide made a complaint to my Office.
18. On 30 November 2015 I requested information from the council in relation to the complaint.
19. On 14 December 2015 I received the requested information from the council. The council advised that:
 - it regularly requests permission from property owners for the use of water from dams for road construction as it is council's 'only financially and physically viable access to water'
 - the compensation to landholders for water used by the council is calculated at the SA Water Residential Tier 3 water usage rate (the highest), as if it were River Murray treated water. In 2014/2015 this was set by SA Water at \$3.59 per kilolitre
 - the complainant and his brothers were sent a joint cheque as payment for the water in May 2015 as is the council's practice to send one payment at the end of the financial year rather than each time water is accessed. The payment was for 330,000 litres removed on 4,5,6 and 11 November 2014
 - the complainant's invoice for \$72,600 was refused for being over sixty times the SA Water rate

³ Regulation 11(3) provides that the presiding member may refuse to allow the deputation at the meeting. Regulation 11(4) provides that the CEO of the council must take steps to inform the applicant of the decision.

- it relied on its knowledge of ‘normal lease practices’ to assume that Mr A had rights over the property’s water:
 - [Mr A] advised staff that he leased the property to crop and run stock and that he had rights over the water dam in question and gave permission for the Council to remove the water down to a certain water line (which he marked). Council had not seen the lease between the parties, instead relying on good faith, upon normal lease practices when running stock, that the lessee would have full and free use of the land and water. Council therefore did not contact the owners.
- it apologised to the complainant in its letter dated 2 June 2015
- it is not aware of any other similar complaint in relation to water use from dams or payments
- it did not have a policy or formal procedure for dam water use in place at the time
- the council has since implemented a requirement that formal written approval signed by both parties outlining volume, time and cost, must be sought prior to property entry and that lessees are required to provide evidence that they are able to grant council legal access
- the cheque sent to the owners of the property as payment for water usage has not been cashed.

Relevant Law

Regulation 11(4) of the *Local Government (Procedures at Meetings) Regulations 2013*:

Regulation 11 - Deputations

- i. A person or persons wishing to appear as a deputation at a meeting must deliver (to the principal office of the council) a written request to the council.
- ii. The chief executive officer must transmit a request received under subregulation (1) to the presiding member.
- iii. The presiding member may refuse to allow the deputation to appear at a meeting.
- iv. The chief executive officer must take reasonable steps to ensure that the person or persons who requested a deputation are informed of the outcome of the request.
- v. If the presiding member refuses to allow a deputation to appear at a meeting, the presiding member must report the decision to the next meeting of the council or council committee (as the case may be).
- vi. The council or council committee may resolve to allow a deputation to appear despite a contrary ruling by the presiding member.
- vii. A council may refer the hearing of a deputation to a council committee.

Whether the council was wrong to remove water from the property on the basis of the lessee’s consent

20. The complainant alleges that the council should have asked the owner of the property if it could use water from its dam, and not ask the lessee and occupier of the property. The complainant states that the council knew who the owner of the property was because it sends council rates notices to Mr B and his siblings.
21. The council acknowledge in its response to the complainant and to my Office that its staff relied on the lessee’s information as to ownership of the water, and did not attempt to discover if he was informing them correctly. The council acknowledge that it never asked the owners of the property whether it could take the water.
22. Whilst it was not the council’s error that the lessee arguably misrepresented who the owner of the water was, I consider it wrong of the council to:
 1. assume that ‘normal lease practices’ applied to the property and therefore meant that the lessee had rights over the water

2. rely on the representation of the lessee without properly informing themselves as to whether what he was saying was true, and
 3. for removing the water on the basis of the lessee's assertion only.
23. At the time of the removal of the water the council had no policy in place in relation to the removal of water from private property. The council informs me that whilst it had no formal procedure for dam water use it had never received a complaint from anyone previously about council from dams or payments. I consider it best practice for the council to obtain the permission of the owner in writing prior to removing water from the owner's land. I consider written permission essential in protecting the rights of the land owner, and the council.

Conclusion

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 did not obtain consent of the owners prior to removing water from the property.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council create a formal procedure where it seeks to remove water from a land owner's property that it obtain the written permission of the owner, along with agreement by both parties on the amount, date, etc including what price the land owner will be paid for the water prior to the council entering the property.

Whether the council was unreasonable in its handling of the complainant's complaint

24. In my view, there are three actions by the council in handling the complainant's complaint:
- a. responding to the online CSR form on 26 May 2015 (when it was submitted by the complainant on 29 March 2015);
 - b. not identifying that the complainant's grievance was both the removal of water without his knowledge or consent *and* the issue of water royalties as opposed to compensation; and
 - c. refusing the complainant's request that he attend the council meeting on 21 July 2015 on the basis that he wanted to discuss compensation for the water removal and that this would be 'operational' and therefore able to be refused by the Mayor on the basis of regulation 11(4).
25. In relation to the first action identified above, the council has a 'Request for Service Policy' which states that CSR will be attended to within 10 days of the request. Despite making a CSR on 29 March 2015 the complainant received no response from the council. It was only when, on 17 May 2015 the complainant raised the issue with all elected members that he obtained a response to the CSR almost two months later on 26 May 2015, when he received an email from the Deputy CEO Ms White. In my view this is not in compliance with the council's Request for Service Policy and an unreasonable response to a request for service. This is unsatisfactory from both the council's and complainant's perspective.
26. In relation to the second action identified above, it is clear from the complainant's correspondence that his grievance is both about the removal of water without his permission and that the amount of water royalty applied by the council does not provide adequate compensation for the removal of the water. Whilst Ms White's letters address both of these issues, it is unclear if the council:
- assessed the complainant's complaint in accordance with its Complaints Policy
 - clearly identified that the complainant's grievance is about two different issues of complaint

- were treating the water royalty payment as separate from the issue of compensation for its error in removing the water without the owner's consent
- considered the matter finalised because it sent the cheque to the owners as payment, and refused the complainant addressing the matter with council at its council meeting on 21 July 2015.

27. I consider the council's response (via its emails from Ms White) to the complainant ambiguous and unclear for the above reasons. The response does not identify the grievances, inform the complainant how it will be treated by the council (in terms of which policy or procedure), inform him of timelines or expectations for the resolution of the complaint, nor properly apologise for the delay in responding to the CSR form. The council's Complaints Policy states that a person may make a complaint in a variety of ways including completing the appropriate form on the council's website. It is unclear from Ms White's correspondence how the council intended resolving the grievance. The council's Complaints Policy states at 4.1:

Seven Steps of the Complaint Handling Process

The following steps will be followed by staff to ensure complaints are dealt with efficiently and effectively:

- Acknowledge complaints properly
- Assess the complaint - simple problems may not need to be investigated
- Plan the investigation where one is warranted
- Investigate the complaint
- Respond to the complainant with a clear decision
- Follow up on any customer service concerns
- Consider whether there are systemic issues which need correction.

28. It is unclear from Ms White's correspondence whether the complainant's issue was treated as a complaint, whether it was to be investigated, and what review processes were open to him (both internal and external). In my view this was unreasonable. The outcome from his perspective is that the council's cheque remains uncashed, his attempt to resolve the issue of compensation at the council meeting on 21 July 2015 was refused and therefore he felt no choice but to seek the assistance of my Office.

29. In relation to the third action identified above, the complainant wrote to Ms White on 12 July 2015:

I have returned the cheque from the Mt Remarkable District Council. \$0.00359 per litre is inadequate compensation. I would like to attend the next council meeting on July 21st to discuss the matter.

30. As a result of the above email the council CEO replied informing the complainant that his request for a deputation had been refused. In my view it is unclear from the complainant's email whether he wishes to address the council in relation to this issue by attending the council meeting or merely was attempting to resolve the issue verbally with either council administration or elected members. Either way, I consider his request and the council's interpretation of his request ambiguous. The CEO's letter concludes 'I understand Deputy Chief Executive Officer Jessie White will continue to liaise with you to finalise the matter of water usage compensation.' Again, I do not consider this a resolution of the matter as it was the discourse between Ms White and the complainant that was initially unable to resolve the matter and the reason why the complainant wanted to attend the 21 June 2015 council meeting.

31. I therefore consider the CEO's response to the complainant's request to attend the council meeting on 21 July 2015 unreasonable because it did not explain:

- why he considered the request a deputation;

- identify that the complainant and Ms White had been unable to resolve the complaint between them; and
- offer another alternative, such as a private meeting, in order to resolve his grievance.

Conclusion

In light of the above, my final view is that the council acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council:

- a) review how it identifies and deals with CSR and complaints
- b) revisit the complainant's complaint in accordance with council policy and consider whether compensation as opposed to a royalty based payment should be offered to the complainant.

Summary of Recommendations

I therefore recommend under section 25(2) of the Ombudsman Act that the council:

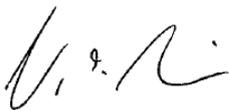
- (a) create a formal procedure where it seeks to remove water from a land owner's property that it obtain the written permission of the owner, along with agreement by both parties on the amount, date, etc including what price the land owner will be paid for the water prior to the council entering the property;
- (b) review how it identifies and deals with CSR and complaints;
- (c) revisit the complainant's complaint in accordance with council policy and consider whether compensation as opposed to a royalty based payment should be offered to the complainant.

Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by 1 July 2016 on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

30 March 2016