

Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	[The complainant]; Cr Ken Liu
Council	Kangaroo Island Council
Ombudsman reference	2017/06044; 2017/06633
Agency reference	E2017/3857
Date complaint received	14 June 2017
Issue	Whether the council's disclosure of the identity of a whistleblower in the public minutes of a meeting was contrary to law

Jurisdiction

The complaint was first raised with my Office by a ratepayer residing within the Kangaroo Island council area (**the complainant**).

Cr Ken Liu, an elected member of the Kangaroo Island Council (**the council**), subsequently wrote to my Office to raise substantially the same matter.

The complaint concerns a resolution of the council, passed during its ordinary meeting on 9 May 2017, concerning the outcome of an independent investigation into a conduct complaint lodged by the complainant against the council's Chief Executive Officer. It is alleged that the council in its minutes concerning this meeting, and pursuant to the resolution at issue, disclosed the identity of the complainant to the public at large. It is alleged that in doing so, the council contravened section 7(1) of the *Whistleblowers Protection Act 1993*.

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
- assessing the information provided by Cr Liu
- seeking a response from the council
- seeking more particulars from the complainant
- seeking more particulars from the council
- considering:
 - the *Local Government Act 1999*
 - the *Whistleblowers Protection Act 1993*
 - the *Independent Commissioner Against Corruption Act 2012*
 - the council's *Whistleblower Protection Policy*

- the council's *Code of Conduct for Council Employees – Procedure*
- the Code of Conduct for Council Employees
- preparing a provisional report and seeking the views of the complainant, Cr Liu and the council
- preparing this final report.

Response to my provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 7 September 2017.
2. The complainant responded to my provisional report by letter dated 22 September 2017. The complainant did not express disagreement with my foreshadowed findings, submitting, however, with respect to my characterisation of the council's apparent motivations:

“Incompetent”, “Shoddy” and “Disrespectful” are I believe, to be a more accurate description of Kangaroo Island Council's contravention of the Whistle-blowers [sic] Protection Act than “a degree of carelessness or a genuine misunderstanding”. This Act is too important to be misinterpreted as people's lives can be damaged.
3. With respect to my foreshadowed recommendations, the complainant submitted (emphasis in original):

I wish to have a public apology, without my name given, published in Kangaroo Island's local newspaper, The Islander, and also on Kangaroo Island Council's Facebook page and any other social media used by the Council for the same length of time that my name has been in the public domain. This public apology has to be an admission of wrong doing.
4. Cr Liu responded to my provisional report by email dated 23 September 2017. Cr Liu submitted, *inter alia*:

I believe that it is proper under this circumstance for Council to issue a public apology to the complainant with a statement reassuring its community that they will be protected by the Whistleblowers Protection Act when making complaints against its staff members.
5. In the circumstances, I do not consider it appropriate that I prescribe the precise form or content of the recommended apology to the complainant. However, the council may wish to give consideration to the views of the complainants expressed above in considering how my recommendation should be implemented.
6. By letter dated 16 October 2017, Mayor Peter Clements provided a response on behalf of the council to my provisional report. Mayor Clements summarised the council's submissions as follows:

[T]he Council submits that:

 - there are very real, and cogent reasons, that make it impractical to give effect to the recommendation that there is a positive obligation on persons receiving a complaint made under the Code of Conduct (whether Member or Employee Code) to assess the complaint for the application of the WP Act;
 - an incorrect, or in the alternative, too broad an interpretation, of “*responsible officer*” within the meaning of the WP Act has been applied in the making of your provisional findings; and
 - too narrow an interpretation of clause 5.2.3 of the WP Policy has been applied in the making of your provisional findings.

7. The council otherwise conceded that 'the complainant's initial request that the matter be dealt with "confidentiality" [sic] was not 'suitably managed'. The council indicated that it was prepared to issue an apology to the complainant and take action to remove reference to the complainant's identity in a manner consistent with the first and second recommendations foreshadowed by my provisional report.
8. I have considered the substantive submissions of the council and responded to them where necessary in the body of this report.

Background

9. On 14 March 2017 the complainant wrote to the Mayor of the council to raise a complaint about the conduct of the council's Chief Executive Officer (**the conduct complaint**).
10. The conduct complaint alleged, *inter alia*, that in mid-November 2016 the council's Chief Executive Officer engaged contractors to perform work in connection with the Penneshaw Community Waste Management Scheme in contravention of a resolution passed by the council at its 13 October 2015 meeting.
11. Under the heading 'Maladministration & Misconduct', the conduct complaint suggested that the council's Chief Executive Officer had:
 - contravened specific provisions of the Code of Conduct for Council Employees (**the Code of Conduct**)
 - contravened section 99(1)(a) of the Local Government Act
 - contravened 'section 5' of the Independent Commissioner Against Corruption Act 'for unauthorised use of public money'.
12. The conduct complaint was marked 'Private & Confidential'. It concluded:

I would expect that my concerns will be taken seriously and dealt with in accordance with Council's Code of Conduct policy and investigated by the Ombudsman / OPI for maladministration.
13. At a special meeting of the council on 16 March 2017 the council resolved to appoint an independent investigator to conduct an investigation of the conduct complaint.
14. I understand that a report prepared by that investigator was tabled before the council during a confidential session of its 9 May 2017 ordinary meeting.
15. The council's public minutes concerning this meeting relevantly disclose:

18. IN-CONFIDENCE BUSINESS

18.1 Code of Conduct 2017/01

Moved Cr P Denholm

Seconded Cr G Ricketts

12:50pm That Council approves under the provisions of Section 90 (2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting, excluding CEO, in order to consider, in confidence, a matter on the grounds of Section 90 (3) -

- a) Information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);

This matter relates to an employee code of conduct and as such represents private [sic] interest that should not be divulged in the public realm.

CARRIED.

Minute: C159:2017

12:51pm A Boardman declared an interest and left the meeting

Moved Cr P Denholm

Seconded Cr G Ricketts

1. That the Council note the breaches of Part 1 and Part 2 of the Kangaroo Island Council Policy - Code of Conduct for Employees and Section 99(1)(a) and counsel the CEO Mr Andrew Boardman in relation to the breeches [sic].
2. That it is not considered that the CEO's actions in delivering the extension project constitute maladministration under Section 5 of the ICAC Act, but note that the failure to comply with Council resolutions could lead to the potential for maladministration.
3. Instruct the CEO be directed to initiate a reporting system that captures all resolutions that require a forward action to ensure those actions are undertaken.
4. That a breach of the Council's Public Consultation Policy is not found.
5. That the complainant [Name of the complainant] be advised of the outcome of this investigation.

CARRIED.

Minute: C161:2017

1:25pm A Boardman rejoined the meeting.

Moved Cr L Turner

Seconded Cr P Masters

1:27pm That Council approves:

- a. That all documentation and reports relating to the above matter be kept confidential, pursuant to Section 91 (7) (b) of the said Act.
- b. Resolutions relating to this confidential item within this agenda be public record.
- c. Further, that pursuant to Section 91 (9) (a) of the said Act, that part "a" of this resolution shall cease from 30 June 2017.

The reports relating to an employee code of conduct represents private [sic] interest that should not be divulged in the public realm.

CARRIED.

Minute: C160:2017

16. On 10 May 2017 the Mayor of the council wrote to the complainant to advise that the conduct complaint had been 'fully investigated by an independent investigator'. The complainant was referred to the text of resolution C161:2017.
17. The complainant subsequently wrote to my Office to complain that she did not consent to the council's disclosure of her identity as complainant in relation to the conduct complaint.
18. The complainant submitted that she intended her complaint to the council to be confidential. She submitted that the council did not seek her consent before disclosing her identity in its public minutes. She submitted that she is concerned about the potential for repercussions within the small local community as a result of the council's disclosure of her identity.
19. My investigation wrote to the council to seek a response to the complainant's concerns. By letter dated 26 June 2017, the council advised my investigation:

Council determined to place the Resolutions relating to this confidential item within this agenda on the public record in the interests of transparency. This was done in agreement with the CEO – the Staff member responsible for the breach.

[...]

Council has in no way or form provided any information regarding the original complaint and/or investigation on any website except the published Council Minutes on the Council's own website.¹

20. In response to my query as to whether the council considers it complied with the Whistleblowers Protection Act in this instance, the council advised:

Yes

[...]

Whistleblowers Protection was never invoked by the complainant in this case and the Code of Conduct for Council Employees Procedure was followed throughout the investigation. Further, all documentation, information and communications by the complainant and others interviewed during the course of the investigation remain in-confidence.

21. I understand that the matter was subsequently raised by Cr Liu at the council's 11 July 2017 ordinary meeting. The minutes concerning this meeting relevantly disclose (emphasis in original):

Question 10:

Did [the complainant] give consent to Council to divulge her identity as the complainant in Part 5 of Council's resolution (Minute: C161:2017)? If not, please advise:-

- (a) For what reason did Council need to disclose and publish her full name in the minutes of the meeting and on the Internet?*
- (b) Was Council's decision to divulge the complainant's identity, contrary to Section 7 of the 'Whistleblowers Protection Act' [...] and the 'Confidentiality Provisions' of the ICAC Act, a breach of Section 36(4) of the Local Government Act - "A council must not do anything inconsistent with a law of the State or Commonwealth"?*

[...]

Answer

- a) This would only be a relevant consideration if it were requested by the complainant [sic] or if the complaint [sic] was seeking protection under the *Whistleblowers Protection Act 1993*
- b) As [the complainant] did not seek protection under the *Whistleblowers Protection Act 1993* Council [sic] resolution was lawful.

22. It appears that complainant's identity is currently also disclosed in a separate 'Code of Conduct Report' tabled before the council at its 13 June 2017 meeting and publicly available on the council's website.²

Relevant law

23. Section 7 of the Whistleblowers Protection Act provides:

7—Identity of informant to be kept confidential

- (1) A person to whom another makes an appropriate disclosure of public interest information must not, without the consent of that person, divulge the identity of that

¹ The complainant in her complaint to my Office suggested that the council may have also published her identity on a Facebook page maintained by the council. Following enquiries by my investigation, I am satisfied that the Facebook page in question is not maintained by or under the direction of the council.

² File ref. 14.14.197.

other person except so far as may be necessary to ensure that the matters to which the information relates are properly investigated.

- (2) The obligation to maintain confidentiality imposed by this section applies despite any other statutory provision, or a common law rule, to the contrary.

24. Section 4(1) of the Whistleblowers Protection Act relevantly provides:

public interest information means information that tends to show—

- (a) that an adult person (whether or not a public officer), body corporate or government agency is or has been involved (either before or after the commencement of this Act)—
- (i) in an illegal activity; or
 - (ii) in an irregular and unauthorised use of public money; or
 - (iii) in substantial mismanagement of public resources; or
 - (iv) in conduct that causes a substantial risk to public health or safety, or to the environment; or
- (b) that a public officer is guilty of maladministration in or in relation to the performance (either before or after the commencement of this Act) of official functions;

[...]

(2) The question whether a public officer—

- (a) is or has been involved in—
- (i) an irregular and unauthorised use of public money; or
 - (ii) substantial mismanagement of public resources; or
- (b) is guilty of maladministration in or in relation to the performance of official functions,

is to be determined with due regard to relevant statutory provisions and administrative instructions and directions.

25. Section 5 of the Whistleblowers Protection Act provides:

5—Immunity for appropriate disclosures of public interest information

[...]

- (2) A person makes an appropriate disclosure of public interest information for the purposes of this Act if, and only if—
- (a) the person—
- (i) believes on reasonable grounds that the information is true; or
 - (ii) is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated; and
- (b) the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.
- (3) A disclosure is taken to have been made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure if it is made to an appropriate authority (but this is not intended to suggest that an appropriate authority is the only person to whom a disclosure of public interest information may be reasonably and appropriately made).
- (4) For the purposes of subsection (3), a disclosure of public interest information is made to an appropriate authority if it is made to a Minister of the Crown or—

[...]

- (i) where the information relates to a matter falling within the sphere of responsibility of a local Government body—to a responsible officer of that body[.]

26. Section 302B of the Local Government Act provides:

302B—Whistleblowing

Each council must ensure that a member of the staff of the council (with qualifications prescribed by the regulations) is designated as a responsible officer for the council for the purposes of the *Whistleblowers Protection Act 1993*.

Whether the council’s disclosure of the identity of a whistleblower in the public minutes of a meeting was contrary to law

27. The council has acknowledged disclosing the identity of the complainant in the public minutes concerning its 9 May 2017 ordinary meeting. The complainant’s capacity as complainant in the conduct complaint is readily apparent from these minutes.
28. It is necessary that I first consider whether the complainant was a whistleblower for the purposes of the Whistleblowers Protection Act. That is, I must consider whether in raising the conduct complaint the complainant made an ‘appropriate disclosure of public interest information’ within the meaning of section 7(1) of the Whistleblowers Protection Act.

Did the complainant disclose public interest information?

29. I am satisfied that the conduct complaint communicated information amounting to ‘public interest information’ for the purposes of section 4(1) of the Whistleblowers Protection Act, insofar as the information raised by the complainant tended to show that the Chief Executive Officer:
- had been involved in the ‘irregular and unauthorised use of public money’ (definition (a)(ii))
 - had been involved in the ‘substantial mismanagement of public resources’ (definition (a)(iii))
 - was ‘guilty of maladministration in or in relation to the performance [...] of official functions’ (definition (b)).
30. This is not to conclude that the conduct of the Chief Executive Officer necessarily amounted to conduct of a kind described in section 4(1) (the independent investigator appears to have concluded otherwise). Rather, the conduct complaint *tended to show* (that is, absent a full investigation of the facts) that the impugned conduct of the Chief Executive Officer might have amounted to such conduct.

Did the conduct complaint amount to an appropriate disclosure?

31. The council has not suggested that the conduct complaint was made falsely or for an improper purpose. I am satisfied from the text of the conduct complaint and the complainant’s subsequent communications with my Office that the complainant reasonably believed the information she raised with the council to be true.
32. I am also satisfied that it was appropriate in the circumstances for the complainant to raise the conduct with the council. That is, I am satisfied that, as the information at

issue fell within the sphere of responsibility of the council,³ it was appropriate for the complainant to raise the conduct complaint with a 'responsible officer' of the council.

33. The term 'responsible officer' is not defined within the Whistleblowers Protection Act. Section 302B of the Local Government Act, however, requires each council to designate a 'responsible officer' for the purposes of the Whistleblowers Protection Act.
34. The council advised my investigation that its Deputy Chief Executive Officer is currently designated as the council's 'Whistleblower Officer'.
35. The council's *Whistleblower Protection Policy (the WP Policy)* provides:

5.1 Disclosure Process

- 5.1 A Disclosure is to be made to the Responsible Officer. A Whistleblower may alternatively choose to disclose Public Interest Information directly to an Appropriate Authority.
- 5.2. The following are relevant considerations for the Whistleblower in determining where to direct a Disclosure:
 - 5.2.1 subject to this clause, when choosing to make a Disclosure internally, Disclosures relating to an elected member or a member of council staff, other than the Chief Executive Officer (or person acting in that position), should be made to a Responsible Officer;
 - 5.2.2 any Disclosure relating to a person appointed as a Responsible Officer should be made to the other person appointed as a Responsible Officer or failing this, to an Appropriate Authority external to the Council;
 - 5.2.3 any Disclosure relating to the Chief Executive Officer should be made external to the Council to the Ombudsman or, where it relates to Corruption in public administration to the OPI;
 - 5.2.4 any Disclosure relating to Maladministration or Misconduct in public administration may be reported in accordance with the ICAC Act or, if there is a reasonable suspicion that the Maladministration or Misconduct is serious or systemic, it must be reported to the OPI in accordance with the Directions and Guidelines;

[...]

- 5.3. Nothing in this Procedure prevents a person from making a Disclosure to an Appropriate Authority external to the Council (i.e. the Ombudsman or the OPI). This is a choice to be made by the Whistleblower at his/her discretion.
 - 5.4. A Disclosure made to the Responsible Officer may be made in person, by telephone or in writing. The relevant contact details are:
 - Telephone 08 8553 4559
 - Email Whistle.Blower@kicouncil.sa.gov.au
 - Address Confidential
Kangaroo Island Council
Whistleblowers
PO Box 121
Kingscote SA 5223
36. The Deputy Chief Executive Officer's designation as the 'responsible officer' for the purposes of section 302B of the Local Government Act is not disclosed in the WP Policy. This information also does not appear to be published on the council's website.

³ Whistleblowers Protection Act, section 5(4)(i).

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37. This is in my view problematic in light of clause 5.2.2 of the WP Policy. It is difficult to see how a member of the public could be in a position to identify whether the information they seek to disclose relates to 'a person appointed as Responsible Officer' so as to enliven the process established under this clause.
38. Clause 5.2.3 of the WP Policy purports to direct all disclosures relating to the council's Chief Executive Officer to my Office or, in relation to information suggestive of corruption, to the Office for Public Integrity.
39. This clause is in my view problematic for a number of reasons.
40. Firstly, section 5(4)(i) of the Whistleblowers Protection Act establishes that a disclosure of public interest information that 'relates to a matter falling within the sphere of responsibility of a local Government body' is made to an appropriate authority if, *inter alia*, it is made to a 'responsible officer' of that body.
41. The WP Policy purports to direct a disclosure concerning the council's Chief Executive Officer away from the council and to an external authority. While there would be nothing improper in the council advising employees or members of the public of the existence of other 'appropriate authorities' for the purposes of the Whistleblowers Protection Act (my Office, for example, is designated as an appropriate authority to receive information that 'relates to a public officer' other than 'a member of the police force or a member of the judiciary'), clause 5.2.3 of the WP Policy suggests that an appropriate disclosure of public interest information concerning the council's Chief Executive Officer cannot be made to a responsible officer of the council. This is incorrect as a matter of law.
42. In response to my provisional report, the council submitted (emphasis in original):
- The WP Policy provides that disclosures relating to the CEO should be made external to the Council, but **does not** read to exclude the operation of the WP Act.
- Accordingly, Council submits that your provisional finding that the WP Policy is incorrect as a matter of law cannot be maintained.
43. Although somewhat unclear, I take the council to be submitting that clause 5.2.3 of the WP Policy is not exhaustive in its designation of the authorities that may appropriately receive a disclosure concerning the council's Chief Executive Officer.
44. While there is nothing improper in the council notifying a potential whistleblower of the other bodies that may receive public interest information concerning the council under the Whistleblowers Protection Act, I remain concerned that a member of the public consulting the WP Policy could reasonably interpret clause 5.2.3 to suggest that a disclosure concerning the council's Chief Executive Officer cannot be made to the council in the first instance.
45. Clause 5.2.3 does not appear to contemplate or address the manner in which the WP Policy may interact with the Code of Conduct published for the purposes of section 110(1) of the Local Government Act.
46. Clause 2.29 of the Code of Conduct provides:
- Complaints about a Chief Executive Officer's behaviour that is alleged to have breached the Code should be brought to the attention of the Council's Principal Member.
47. A member of the public in the possession of information suggestive of a breach of the Code of Conduct by the council's Chief Executive Officer is ostensibly directed by the Code to raise the complaint with the Mayor of the council. Again, clause 5.2.3 of the

WP Policy purports to direct a disclosure of public interest information concerning the council's Chief Executive Officer away from the council and to an external authority.

48. Clause 5.2.3 does not acknowledge the possibility that a complaint raising an alleged contravention of the Code of Conduct by the Chief Executive Officer of the council might, by the nature of the information disclosed, entitle the person making the disclosure to take the benefit of the Whistleblowers Protection Act.
49. That is, information giving rise to a complaint under the Code of Conduct may also constitute public interest information for the purposes of the Whistleblowers Protection Act. A person raising such a complaint with the council's principal member, as directed under the Code of Conduct, should not be deemed to have forfeited whistleblower status by that act.
50. In the circumstances, I do not consider the fact that the conduct complaint was submitted to the Mayor, rather than the council's Deputy Chief Executive Officer, to mean that the conduct complaint was not an 'appropriate disclosure' for the purposes of the Whistleblowers Protection Act.
51. Even if the term 'responsible officer' within section 5(4)(i) of the Act is read to refer only to a person designated under section 302B of the Local Government Act (a position I do not necessarily take), section 5(3) of the Act establishes that the list of 'appropriate authorities' provided in subsection (4) is non-exhaustive. The Code of Conduct clearly envisages complaints concerning the conduct of a Chief Executive Officer of a council being made in the first instance to the principal member of the council. It would not be unreasonable for a member of the public, whether cognisant of the Whistleblowers Protection Act or otherwise, to perceive the council's principal officer to be an appropriate recipient of public interest information concerning the council's Chief Executive Officer.
52. The issues with clause 5.2.3 of the WP Policy identified above are in my view representative of an assumption underpinning the council's policy framework that a member of the public entitled to protection under the Whistleblowers Protection Act will ordinarily be cognisant of this fact. In my experience, this is often not the case.
53. In my view, a robust whistleblower policy framework should recognise that a person in possession of public interest information may not always be aware of this fact or of his or her rights as a whistleblower, generally.
54. In the ordinary course, council staff should consider the nature of each complaint or disclosure made and any potential application of the Whistleblowers Protection Act to that information. The recipient of a complaint raising public interest information should ensure that it is forwarded to a responsible officer within the council. This should be the case regardless of how a complainant characterises his or her disclosure.
55. In response to my provisional report, the council submitted:

It has been suggested that when a complaint is received under the Employee Code, an assessment must be made as to whether the complaint amounts to an "*appropriate disclosure of public interest information*", as defined at section 4 of the WP Act. The council has assumed this reasoning would also extend to complaints made against Elected Members under the Code of Conduct for Council Members ("the Member Code"), because on the face of the provisional findings and recommendations, there is no logical reason to take a different approach.

Under the Council's *Code of Conduct for Council Employees – Procedure* ("the Procedure") (and its *Code of Conduct for Elected Members Procedure*) there is no

provision requiring an initial assessment of this nature, however, the Procedure does confirm at paragraph 3 that:

if the complaint is received via the Whistle Blower [sic] process, the Whistle Blower Protection Policy and Procedure take precedence.

Accordingly, the Council submits that this provision alerts a complainant to the fact that a different approach will apply in the receipt and assessment of a complaint, if they wish to be afforded the statutory protections under the WP Act. Failure to follow that statutory process will forfeit the protections of the WP Act.

56. It is unclear precisely what the council is intending to refer to by its use of the term 'statutory process' in the preceding passage. As a matter of law, a person responsible for making an appropriate disclosure of public interest information will not 'forfeit' the protections conferred by the Whistleblowers Protection Act by sole virtue of their failure to observe the requirements of the WP Policy.
57. The council's submissions on this issue again appear to suggest that it considers the onus should fall upon a member of the public to assess whether a complaint raises matters amounting to public interest information for the purposes of the Whistleblowers Protection Act. Such a position is undesirable and arguably runs contrary to the spirit and objects of the Whistleblowers Protection Act.
58. In response to my provisional report, the council further submitted (emphasis in original):

[T]he practical effect of the provisional findings is that every complaint made under the Code (whether Employee or Member Code) is required to be assessed for its application under the WP Act. Not only will this result in a change in the way complaints are currently addressed by the Council, on our review it will change the way in which **all councils** receive and assess complaints.

59. In support of this submission, the council has referred to the Local Government Association of South Australia's *Complaints Handling Procedure under Council Members' Code of Conduct – Model Procedure (the LGA Model Procedure)*. The council has observed that the LGA Model Procedure does not provide for a process by which a complaint against an elected member of a council will be assessed for possible application of the Whistleblowers Protection Act.
60. Similar to the council's Code of Conduct Procedure (which deals with the conduct of council employees), the LGA Model Procedure does not recognise the potential application of the Whistleblowers Protection Act to complaints made under the Code of Conduct for Council Members. The council may be correct to observe that the views expressed in this report are of consequence to other councils working under similar policy frameworks; however, this does not militate against the council reforming its own complaints handling processes.
61. In response to my provisional report, the council further submitted:

Under the Procedure, a complaint made under the Employee Code must be made to the CEO, Middle Manager, Department Director or, if it relates to the CEO, to the Mayor. This consequentially means one of these persons would be required to make an initial assessment as to whether the complaint falls under the WP Act. If the complaint is an appropriate disclosure of public interest information for the purposes of the WP Act, it would then be required to be referred to the "*responsible officer*", who, in the Council's opinion and based on legal advice it has received can only be the person designated under section 302B of the Local Government Act 1999 ("LG Act"), who is defined as an appropriate authority under section 5 of the WP Act.

Accordingly, the proposed amendments to the Procedure, by way of the foreshadowed recommendations, would have potentially unintended, and possibly significant, implications for processing the complaint under the Code from that point, not the least of which being the fact that the person who has received the initial complaint under the process proposed, not being the *“responsible officer”* will have knowledge of the complainant’s identity.

In addition, while the Council accepts the view that there cannot be an assumption that a member of the public will, ordinarily, be cognisant of the WP Act, or that there is an onus on them to identify whether a contemplated disclosure constitutes public interest information, the provisional findings undoubtedly raise a conflict with the Council’s role to act as a transparent and accountable public authority. Historically these duties meant that the protection of the identity of members of the public was not guaranteed in the making of a complaint.

62. This does not strike me as a particularly difficult or unwieldy process for the council to adopt; nor does it appear to me that an employee’s abiding knowledge of a complaint that he or she has confidentially referred to the council’s designated Whistleblower Officer should be of any real consequence to the process.

63. I do not consider the implementation of my findings would require the council to act contrary to its responsibility to act in a transparent and accountable manner. I simply note that the Whistleblowers Protection Act will not ordinarily require an authority to maintain confidentiality over the existence, nature or outcome of a complaint raising public interest information. Section 7(1) is aimed solely at protecting a whistleblower’s identity.

64. In response to my provisional report, the council further submitted (emphasis in original):

Your foreshadowed recommendations will require Council employees to now make an assessment as to whether identity protection should be afforded to members of the public and then, a responsibility being placed on the Council to protect that identity. This has the potential consequence of causing all complaints made under the Code (whether Member or Employee Code) to be assessed and managed under the WP Policy, in order to avoid the risk of incorrectly assessing a complaint.

The provisional findings also raise the immediate concern that if a complaint, assessed as being in accordance with the WP Act against the CEO is to be referred to the Mayor, is the Mayor someone who can even be designated as a *“responsible officer”* for the purposes of the WP Act?

The LG Act does not permit this to be the case, as it specifically provides that each council must ensure that a **member of staff** is designated as a *“responsible officer”* for the purposes of the WP Act. The practical effect, in relation to complaints against the CEO, is that a fellow (more junior) staff member will be the person responsible for investigating or overseeing a complaint made against the CEO, in circumstances where the complaint gives rise an [sic] appropriate disclosure of public interest information for the purposes of the WP Act. This surely cannot be the intended outcome.

65. I do not consider my findings stand for the proposition that all complaints received by the council need be managed under the WP Policy. Rather, council staff ordinarily responsible for receiving complaints about other council officers should be reminded of the requirement to actively consider whether a complaint discloses information to which the Whistleblowers Protection Act applies.

66. Even when satisfied of the application of the Whistleblowers Protection Act to a given complaint, there may be good cause for the council to continue to manage the matter under another policy. What is required, however, is that the council observe the

protections afforded to the complainant by the Whistleblowers Protection Act over the course of any investigation that follows.

67. The council's submissions appear to proceed from the assumption that a report made to a 'responsible officer' under the Whistleblowers Protection Act must always be investigated by that same officer. I do not consider the Whistleblowers Protection Act requires this. The Whistleblowers Protection Act is largely silent on what should follow an appropriate disclosure of public interest information. There is in fact no positive obligation upon an authority to investigate such a disclosure.⁴
68. The Whistleblowers Protection Act does not preclude a person to whom an appropriate disclosure of public interest is made from referring the matter to another person or body for investigation. The identity of the whistleblower should, however, be kept confidential, 'except so far as may be necessary to ensure that matters to which the information relates are properly investigated' (section 7(1)). The responsible officer retains an obligation, wherever practical, to inform the whistleblower of the outcome of any investigation that follows (section 8)).

Did the council contravene section 7(1) in its disclosure of the complainant's identity?

69. It appears to be common ground between the complainant and the council that the consent of the complainant was not sought or obtained before the council determined to disclose the complainant's identity in its public minutes.
70. The council has submitted that its disclosure of the complainant's identity was not contrary to section 7(1) of the Whistleblowers Protection Act as:
- Whistleblowers Protection was never invoked by the complainant in this case and the Code of Conduct for Council Employees Procedure was followed throughout the investigation.
71. It is unclear to me what the council means when it submits that whistleblower protection was 'never invoked by the complainant.'
72. Nothing within the Whistleblowers Protection Act suggests that a person must 'invoke' its protections in order to benefit from section 7(1). If the council has been operating under such an assumption, it is, respectfully, mistaken.
73. I note that the council's *Code of Conduct for Council Employees – Procedure (the Code of Conduct Procedure)* provides:

1.1. The purpose of this Procedure is to ensure that Kangaroo Island Council:

[...]

1.1.5 recognises the need to appropriately support the Disclosure process, the Whistleblower Protection Procedure (if and when invoked), the Responsible Officer and, as appropriate, those Public Officers affected by any allegation impacting upon them.

74. The Code of Conduct Procedure elsewhere provides:

- If the complaint is received via the Whistle Blower [sic] process, the Whistle Blower [sic] Protection Policy and Procedure take precedence.

⁴ See *Sutton and Anor v State of South Australia* [1996] SASC 1964 (2 December 1996) at [3] ('There is nothing in s5 nor is there any other provision in the Act which expressly requires investigation of a disclosure. S6 suggests that there will be an investigation but it imposes no duty to investigate. Instead, it obliges the person who has made the disclosure to assist the police or any other official investigating authority.')

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75. As I have observed above, there may be a degree of overlap between information suggestive of an employee's contravention of the Code of Conduct and information amounting to public interest information for the purposes of the Whistleblowers Protection Act.
 76. The Code of Conduct Procedure appears to distinguish between complaints made under the Code of Conduct depending on whether they are submitted in accordance with the Code of Conduct Procedure or the WP Policy. Again, there appears to be an assumption that a member of the public will ordinarily be cognisant of the Whistleblowers Protection Act and the process established under the WP Policy.
 77. Although there may be nothing improper in establishing a separate procedure governing complaints to which the Whistleblowers Protection Act applies, it is a mistake, in my view, to place the onus on a member of the public to identify whether a contemplated disclosure constitutes 'public interest information' for the purposes of the Whistleblowers Protection Act.
 78. That is, the council's determination as to whether it must observe the Whistleblowers Protection Act in its consideration of a complaint should not be dictated by the policy under which the complaint appears to have been made (if any) or by the complainant's apparent failure to raise the complaint with the designated Whistleblower Officer.
 79. As I have already observed, it is in my view necessary and appropriate that a council independently assess each complaint received for possible application of the Whistleblowers Protection Act.
 80. These observations are underscored by the circumstances giving rise to the present investigation. The complainant became aware of information that suggested the council's Chief Executive Officer had disbursed council funds in a manner contrary to a resolution of the elected members. Not unreasonably, she determined to raise these allegations with the council's principal member and in doing so, she made an appropriate disclosure of public interest information within the meaning of section 7(1) of the Whistleblowers Protection Act. This was the case regardless of whether the disclosure was ostensibly made under the Code of Conduct Procedure, the WP Policy or any other policy that may have applied.
 81. As I am satisfied that the conduct complaint amounted to an appropriate disclosure of public interest information, and as I am satisfied that the council divulged the complainant's identity without her consent and other than in circumstances where this was necessary to ensure that the complaint was properly investigated, I am satisfied that the council has acted contrary to section 7(1) of the Whistleblowers Protection Act in this instance.
 82. It follows that I am satisfied that by disclosing the complainant's identity in the minutes concerning its 9 May 2017 meeting, the council acted contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion and Recommendations

I am of the final view that the council's disclosure of the identity of a whistleblower in the public minutes of a meeting was contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

I note and accept the council's submission that the disclosure was made in accordance with a resolution of the elected members and in circumstances where the council was attempting to

be transparent about the findings of the independent investigator. While I have considered the complainant's submissions, my view remains that the council's contravention of the Whistleblowers Protection Act appears to have arisen from a degree of carelessness or a genuine misunderstanding, rather than any wilful disregard for the Act or the principles underpinning it.

In the circumstances, I make three recommendations under section 25(2) of the Ombudsman Act:

1. That the council issue a written apology to the complainant.
2. That the council take appropriate action to remove reference to the complainant's identity in the publicly available versions of:
 - the minutes concerning its 9 May 2017 meeting
 - the minutes and agenda concerning its 11 July 2017 meeting
 - the Code of Conduct Report tabled before its 13 June 2017 meeting.
3. That the council revise the Code of Conduct Procedure and WP Policy so as to:
 - recognise that a person entitled to whistleblower status may not always be cognisant of this fact
 - recognise that a person making an appropriate disclosure of public interest information need not invoke whistleblower status so as to be afforded the protections of the Whistleblowers Protection Act
 - recognise that each complaint received by the council must be assessed so as to determine any application of the Whistleblowers Protection Act to the information disclosed.

I take the opportunity to note and welcome the council's preparedness to apologise to the complainant, as indicated in its response to my provisional report.

Emily Strickland
DEPUTY OMBUDSMAN

25 October 2017