OmbudsmanSA

FINAL REPORT

City of Onkaparinga

April 2012

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FINAL REPORT

Date complaint received	**5 July 2011**
Agency	**City of Onkaparinga**
Complainant	**Mr John Houlahan**
Allegations	**1. Alleged failure to follow appropriate procurement procedures** **2. Alleged failure to keep proper records of the project** **3. Alleged breach of caretaker conventions** **4. Alleged failure to conduct proper review of procurement process** **5. Alleged breach of duty by CEO**

JURISDICTION

The complaint is fully within the jurisdiction of the Ombudsman.

The complainant originally raised his complaint with the Electoral Commissioner on 9 November 2010. Because it did not directly relate to electoral issues, she referred it to me. I advised the complainant to first raise his concerns with the council. He did so, but remained dissatisfied and contacted my office again.

I advised the complainant and the council on 16 August 2011 that I would investigate the following issues:

1. Alleged failure to follow appropriate procurement procedures
- lack of value for money
- breach of recording obligations
- failure to update schedule of contractors

2. Alleged breach of caretaker conventions
- use of council resources to justify cost of project
- publication of council magazine during election period

3. Alleged failure to conduct proper review of procurement process
- comparison with non-existent tender
- misleading comment on saving $3 000 in professional fees
- excessive cost of consultancy

4. Alleged breach of duty by CEO
- failure to advise elected members of alternatives
- failure to correct misleading review report.

INVESTIGATION

My investigation has comprised:

- assessing the information provided by the complainant
- commencing a preliminary investigation
- seeking information from the council
- considering relevant provisions in the *Local Government Act 1999*, the *Local Government (Elections) Act 1999*, the relevant council procurement policy in operation at the time[1] (**the procurement policy**); and the council's Caretaker Policy 2010 (**the caretaker policy**) and its supporting procedure[2]
- preparing a provisional report, and providing it to the council for comment
- considering the council's response
- preparing a revised provisional report, and providing it to the complainant and the council for comment
- considering the parties' responses, and seeking further information from the council in relation to matters raised by the complainant
- 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]

RESPONSES TO MY REVISED PROVISIONAL REPORT

In response to my revised provisional report, the council commented on 18 November 2011 as follows:

- it questioned whether the decision to publish the Annual Review constituted a 'designated decision' under section 91A of the Local Government (Elections) Act, in that the use of resources by the council to prepare the Annual Review occurred outside the election period; and that no advantage accrued to a candidate from the Annual Review; because the material which it contained was not 'electoral material' within the meaning of that Act
- it stated its view that 'consideration of the *Briginshaw* principle has not sufficiently moderated (my) consideration of 'reasonable satisfaction' in this matter'; particularly in relation to 'the allegations of fact (that an advantage was provided) on the balance of

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[1] CPOL/00/ADM/03 Procurement Policy, endorsed by the council in September 2000. I note that this policy was replaced by the current 'Contracts, Tenders and Purchasing Policy' on 17 August 2010.

[2] Dataworks Nos 1673625 and 1673673 respectively. As a result of an apparent technical problem, I was unable to download the policy from the council's website.

[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.

probabilities (giving full weight to the seriousness of the matter and the gravity of the consequences following such a finding)'.

The complainant requested an extension of time within which to respond, as he sought further information to assist in the preparation of his response. In the event, he responded by letter dated 24 February 2012. I summarise his comments as follows:

- my report should specifically address the issue of the council's alleged failure to update the schedule of contractors. He provided further information about this issue
- he reiterated his concerns about the alleged 'over-specification' of the Willunga Golf Course toilet block (**the toilet block**)
- he provided further information about the engagement of Mr McEvoy to review the toilet block construction costs and his apparent engagement to review the construction costs of two other toilet blocks. He questioned whether council officers had indeed endeavoured to contact Mr McEvoy when they said they had, and whether information was withheld from Mr McEvoy, 'thereby ensuring he never completed the reports'. He asked me to review my provisional finding, and to find that the engagement of Mr McEvoy was a breach of section 91A of the Local Government (Elections) Act
- he provided a copy of a quantity surveyor's report from Wilde and Woollard, Quantity Surveyors and Construction Cost Consultants, dated 16 January 2009 (**the Wilde and Woollard report**) relating to the toilet block, which the council had not previously produced to my office. He suggested that this document 'raises further serious questions regarding council probity in this matter', and asked some further specific questions about its implications
- he reiterated his view that the failure of the Chief Executive Officer (**the CEO**) to provide information (including the Wilde and Woollard report) to a councillor who was candidate for mayor, was 'a deliberate and serious breach of section 61 of the Local Government Act', and asked that I investigate this matter further.

I have taken account of these comments of both parties as I see fit in finalising my views.

On 29 February 2012 I sought responses from the council in relation to some of the further issues identified by the complainant in his response. Despite several reminders, the council did not respond to my request within what I consider to be a reasonable timeframe (i.e. 6 weeks). I have therefore finalised my views in the absence of the council's response.

I have also received representations from two third parties in relation to the matters which are the subject of this report. I have noted these representations for the purposes of preparing this report, but in my view they do not contain significant new material which is directly relevant to the question of whether administrative error occurred.

BACKGROUND

1. The complainant is a member of the Onkaparinga Residents Association Council Watch Inc., which became concerned about a council decision to construct a toilet on the Willunga Golf Course in 2008. It contends that the process followed for this project was 'seriously flawed and unprofessional'. It maintains that 'the structure was over specified and far and beyond end users needs'. It alleges that accurate records of the project were not kept, and that 'the council is not able to demonstrate that public money has been well spent'.

2. The council has advised that:

> The cost of the Willunga Golf Course Kit Toilet was $14,760. It was purchased through Robin Wilson Agencies who subcontracted S.J Services (SA) P/L to install the structure. As this was

below $50,000, the toilet was able to be purchased without the requirement of any type of tender or contract process.

The plumbing services and the electrical works for the installation of the toilet were sourced through Panel Scheme Contractors, BT & RB Foreman P/L and Cove Contractors P/L. Also being under $50,000, the toilet was able to be purchased without the requirement of any type of tender or contract process.

A Panel Scheme of arrangement allows council staff the ability to procure trades through pre-qualified contractors who list bulk pricing with the council. Suppliers are appointed to the panel scheme for a three year period with an annual review of pricing. Council actively encourages other suppliers to enter the Panel Scheme at all times.

In 2006, the Landmark company was the only company offering kit toilets to the local government market. At that time, the council was aware that the products were extensively utilised by other councils for similar minor capital works projects. The 'Burnside' (K9700) was selected from their catalogue in consultation with the Willunga Golf Club as the current tenant of the council land in the works. The product was inclusive of all design and engineering specifications and standards and was considered to be the most cost effective option available. We considered at that time that we would not be able to design, engineer and construct an architecturally comparable outcome by undertaking competitive bids.

3. The complainant originally raised his complaint with the Electoral Commissioner on 9 November 2010, contending that the council had breached the Local Government (Elections) Act and the caretaker policy. Because the substance of the complaint did not directly relate to electoral issues, the Electoral Commissioner referred it to me. I advised the complainant to first raise his concerns with the council.

4. As a result of this request, the council wrote to the complainant on 6 April 2011. The complainant was dissatisfied with the response and raised his concerns with my office.

Whether the council failed to follow appropriate procurement procedures

5. The council advised the complainant by letter dated 6 April 2011 that the procurement of the toilet facility was governed by the procurement policy. That letter went on to state that:

> At Section 6.1 *Contracting Out, Competitive Tendering*,[5] the policy provides for minor works, such as this, in this way:
>
> > *'where a procurement process anticipates a contract of minor scope or importance, suppliers and potential suppliers will not be subject to overly administrative and costly tendering or other selection procedures'.*
>
> Furthermore, that procedure goes on to provide that:
>
> > *Council employees involved with purchasing have access to a range of existing contracts and other arrangements that have been established by:*
> > - *MAPS Group Contracts South Australia*
> > - *G6 Purchasing Group (G5PG) (including G2, G3, G4 & G5 agreements)*
> > - *Council's own Contracts*
> > - *State Government of South Australia (Government Supplies Contracts)*
> > - *CPC Local Government Association Contract Purchasing Co-operative Contracts*

[5] The procurement policy which was provided to me by the council by letter dated 15 September 2011 with the notation 'current at the relevant time' does not include a section 6.1 nor the heading *Contracting Out Competitive Tendering*. However, the passage quoted above appears at the bottom of page 7

6. In this case, a kit toilet was simply purchased from an individual supplier, and no tendering process was commenced. The council advises that this method of procurement was chosen as it had utilised products from the company in the past and was happy with their performance. Further, the product met approved design standards and this allowed the council to avoid the need to engage a separate design engineer.

7. I have considered the requirements of the procurement policy which was in operation at the relevant time. The policy is largely expressed in terms of 'principle statements' and contains few specific obligations. In these circumstances, I consider that the procurement method adopted was reasonably open to the council under the terms of that policy.

8. I note further that the council's current procurement policy permits purchases of a value less than $50 000 to be made by petty cash (for purchases less than $80), corporate purchase card (within approved transaction limits and financial delegations) and request for quote (maximum limit $50 000 including GST).[6] It appears to me that the procurement method adopted for the toilet facility would also have met these requirements, had the current policy been applicable at the relevant time.

9. In his response to my revised provisional report, the complainant questioned whether the schedule of contractors attached to the council's procurement policy as it applied at the time was up to date. He commented as follows:

> On 11 February 2010 (sic - it may be that this date was actually 2012) Council provided the writer with a copy of their procurement procedures CPOL/00/SADM/03. In the schedule of contractors many of the contracts had expired over 6 years or more before 2010. The failure to update the schedule was a serious breach of numerous stated goals and the intent of Council procurement policy and also breached Section 49 of the Local Government Act. It also disadvantaged other potential contractors and was in direct conflict with its claimed policy considerations regarding competition at pages 4 and 5 of 10 in the introduction to the procurement policy document. We ask that you find accordingly.
>
> In addition Council's claim in Page 2, Item2, Para 3 "Suppliers are appointed to the panel scheme for a three year period is not supported by the facts as detailed above.

10. On 29 February 2012 I sought the council's response to the complainant's contentions, but despite reminders I received no response.

11. I consider that the council's apparent failure to keep the schedule up to date amounted to an administrative error, though I do not agree that it amounted to a breach of section 49 of the Local Government Act because that section permits the council to alter a policy at any time. I note also that the council has now adopted a new policy.

12. In any event, the council's decision to select the company to provide the kit toilet was one of policy, and making a formal finding on the substantive decision is therefore outside my jurisdiction.[7] Nonetheless, I note that in the CEO's letter to the complainant dated 6 April 2011, the council provided the following explanation for its decision:

> The total cost of the project was $37,366 of which Council contributed $26,166 and the Willunga Golf Course contributed the remaining $11,200. The total cost breakdown of the structure was:

Description of Costing	Price
Purchase of kit toilet	$14,760

[6] Procurement Policy (entitled 'Contracts, tenders and purchasing') section 5.2, available at: http://www.onkaparingacity.com/onka/council/policies_strategies/council_policies_procedures.jsp

[7] *City of Salisbury v Biganovsky* (1991) 54 SASR 117

Installation (including site preparation and foundations)		**$4,175**
Plumbing Works (including installation of a septic tank, connection to STED scheme and 90 metres of trenching to house water, wastewater and electrical services).		
	Materials	$6,740
	Labour	$5,850
	Excavation Hire	$792
	Water Meter Connection Fee	$1,750
Plumbing Works SUBTOTAL		**$15,132**
Electrical Works (including electrical connection, cabling and auto security door installation)		
	Material	$2,309
	Labour	$990
Electrical SUBTOTAL		**$3,299**
TOTAL		**$37,366**

The 'Burnside' (K9700) toilet is a standard product available from the company Landmark. It has been installed in other locations within the city for low usage toilets. It was a 'preferred model' for a unisex toilet with disability access in recreational facilities within the local government industry and has assisted in standardising the park infrastructure which provides efficiencies in the maintenance of council assets.

The rationale for choosing the 'Burnside' toilet included:

- The aesthetic of the building fitting in well with the environment
- High quality of materials to withstand coastal environments, vandalism and meet an expected 'useful life of the asset' of 30-40 years with limited ongoing maintenance expenditure
- Disabled rails
- Automatic self locking door to provide after hours security
- All parts were (factory) pre-cut, pre-drilled and ready to assemble which reduces installation time
- Vandal resistant fixings
- Lockable service duct for plumbing and cleaners store
- The installation and connection of an underground septic tank
- A reinforce concrete footings to a depth of 300mm, as required by the Building Rules Consent for H Class soils

It should be noted that consultations with other councils confirms that kit form products are utilised extensively within local government for reserve improvement works. The City of Onkaparinga's use of these products is not out of step with accepted industry practice.

Feedback on the toilet from the Club and visitors to the golf course has been positive.

13. In his response to my provisional report, the complainant reiterated his concerns about what he sees as the over-specification of the toilet block and the consequent unnecessary cost to ratepayers. These concerns extend to matters such as whether the process undertaken by the council ensured value for money, in accordance with the procurement policy objectives; and whether it was necessary for a high quality of materials to be specified to withstand coastal environment when the toilet block is located some 10 kilometres from the coast.

14. Whilst I understand these concerns, because they relate to council's policy decision, they fall outside my jurisdiction, which is limited to a consideration of its administrative acts.

Opinion

In light of the above, I consider that in failing to keep the schedule to its procurement policy up to date, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

In light of the council's subsequent adoption of a new procurement policy, I do not consider it necessary to make any recommendation under section 25(2) of the Ombudsman Act in relation to this issue.

Whether the council failed to keep proper records of the project

15. The complainant has also alleged a failure to maintain proper records relating to the project. In its response to him dated 6 April 2011, the council commented:

> The relevant policy, CPOL/00/ADM/03 Procurement Policy, was endorsed by Council in September 2000 and continued in operation until replaced by the current 'Contracts, Tenders and Purchasing Policy' on 17 August 2010.
>
> No consideration is made within the former policy (CPOL/00/ADM/03) to records management standards with respect to purchasing.
>
> The current policy now contains specific direction on expected records management standards for staff involved in purchasing at Section 5.1:
>
> > *Generally to all purchasing activity:*
> > *All purchases require a purchase order and/or contract except where otherwise exempted in the procedures/guidelines.*
> > *Appropriate records must be kept.'*
>
> Whilst there were no specific records management requirements at that time, purchase orders were raised for the purchase of the toilet kit & installation and the plumbing works. The security works (relating to the auto-closing door) was conducted by council staff. No purchase order was raised for the electrical works supplied through the panel contract.

16. I asked the council to provide me with 'all the records which the council holds concerning the design, purchase, approval and installation of the Willunga Golf Club toilet block'. Based on the 6 April 2011 letter, I understood that these were limited to purchase orders. However, on 15 September 2011, the council provided me with
    - copies of documents relevant to the development application and approval, including plans of the facility and its proposed location
    - a map indicating required water and electricity trenches
    - 'minor supply and services forms' for the septic tank installation, and the kit toilet installation
    - two documents summarising the cost breakdown for the facility, which has been supplied to the complainant
    - supply quotations and supporting emails.

    It did not provide me with a copy of a report prepared by Wilde and Woollard, Quantity Surveyors and Construction Cost Consultants, dated 16 January 2009 (**the Wilde and Woollard report**), which it subsequently provided to the complainant in response to an FOI application.

17. Under section 99(1)(h) of the Local Government Act, the Chief Executive Officer is required to ensure 'that records required under this or another Act are properly kept and maintained'. The Local Government Act requires that records including, for example,

the minutes and agendas of council meetings, the rates assessment book, various registers (e.g. community land register) and statutory policies are kept. I do not consider that these obligations are relevant in the context of this complaint.

18. There are also recording obligations under the *State Records Act 1997*. Under that Act, there is no requirement for the council to keep records of all discussions between council staff and suppliers or potential suppliers. As a matter of law, the council is required only to keep records of 'enduring evidential or informational value'.[8] In this instance, the council has advised that it will maintain as 'official records' the assessment of costs provided by Mr McEvoy and the emails that led to his offer of engagement and his subsequent acceptance.

19. In my view the keeping of full and accurate records is an essential part of good public administration. The New South Wales Ombudsman has commented that:

> Good recordkeeping assists in improving accountability and provides for transparent decision-making.
>
> Agencies and their staff create and maintain records as evidence of business activities and transactions. This evidence, which comprises the corporate memory of the agency and its narrative history:
> • enables the agency and its staff to meet legislative and regulatory requirements
> • protects the interests of the agency and the rights of staff and members of the public
> • supports better performance of business activities throughout the agency by documenting organisational activities, development and achievements and facilitating consistency, continuity and productivity in management and administration
> • provides protection and support in litigation, including the better management of risks associated with the existence or lack of evidence of agency activity, and
> • supports research and development activities.
>
> …
> … … Public officials should help their agency meet this obligation by creating and maintaining full and accurate records of the work in which they are involved and of the decisions they make, including the reasons for those decisions. They should ensure the routine capture of these records into recordkeeping systems, such as file systems, in the course of their duties. They should comply with requirements to keep and manage records which appear in relevant legislation, formal directives and guidelines.[9]

20. It appears to me that the documents supplied to me by the council on 15 September 2011 provide an adequate record of the council's processes regarding this matter, although it is a matter of concern to me that the council was not able to identify and provide the Wilde and Woollard report.

21. In summary, I consider that the council's record-keeping in relation to the project was less than ideal, as evidenced by its failure to produce all documentation when I requested it.

Opinion

I consider that in failing to keep proper records of the project, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

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[8] See section 5(1)(b), which outlines the objects of the Act

[9] NSW Ombudsman *Good Conduct and Administrative Practice Guidelines* (2nd edition) http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Good%20Conduct%202nd%20edition.pdf, Part 4.3.2

In light of the council's subsequent adoption of a new procurement policy which contains revised record-keeping obligations, I do not consider it necessary to make any recommendation under section 25(2) of the Ombudsman Act in relation to this issue.

Whether the council failed to conduct a proper review of procurement process

22. As a result of expressions of concern about the matter, Mr Paul McEvoy, of Rawlinsons (a Perth based company) was engaged to provide independent advice to the council on the costs of the project. The council noted his engagement at the council meeting held on 19 October 2010,[10] and at its meeting on 2 November 2010 considered Mr McEvoy's report and a covering paper from council staff. The council passed a motion noting the report, and also noted that 'Mr McEvoy's review has supported the council's cost of this construction'. It noted also that there were 'unique site specific issues that determined that service connections accounted for approximately 50% of the total project cost.'

23. In his response to my revised provisional report, the complainant stated that on 27 January 2012, the council had provided him with a copy of the Wilde and Woollard report. On 29 February 2012 I asked the council:

    - whether this document was made available to council members at the council meetings held on 19 October 2010 and 2 November 2010, when I understand the Willunga toilet block was considered, and if not, why not?
    - why the council felt it necessary to seek a second report from Mr McEvoy. I understand it was commissioned to allay concerns raised by Mr Houlahan. Why didn't the Wilde and Woollard report fulfil this purpose?
    - why wasn't the Wilde and Woollard report provided to me in response to my request of 24 August 2011 for all the records which the council holds about the design etc of the toilet block?

24. Despite reminders, I received no response to these questions. I have therefore formed my final views on the basis of the information and understandings available to me.

25. The council advised that Mr McEvoy 'has some considerable expertise in the field; providing cost analyses and literature on costing for the construction industry. His expertise was most notably utilised to provide an analysis of the Building the Education Revolution (BER) funded structures in schools'. I note also that other complainants about the same issue made specific reference to Mr McEvoy as 'the nation's most respected construction costs surveyor', and I understand that he was engaged by the council because he had been identified by the other complainants as a suitable person to review the costs.

26. The council also advised me that:

    > When a decision was taken to have the project costs reviewed some days later, Mr McEvoy was one of those approached. The hourly fee for service from Mr McEvoy was favourably comparable and given that the complainant held his advice in high esteem, Mr McEvoy was subsequently made an offer of engagement.
    >
    > Mr McEvoy's report, despite its apparent brevity, was the result of some 10.8 hours of analysis of site plans, construction materials, labour costs, etc.

27. In my view, the council's decision to engage Mr McEvoy was reasonable in the circumstances, which involved seeking to allay the concerns of a group of ratepayers.

[10] Item 10.3

He appears appropriately qualified, and the rate of remuneration is consistent with my understanding of current costs. On the face of his report, I have no reason to doubt his conclusions. I note that whilst the report is brief, the council was, in effect, paying for his expertise and opinion.

Opinion

In light of the above, I consider that in engaging Mr McEvoy the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the council breached the caretaker conventions

28. For the November 2010 periodic local government elections, the council was in 'caretaker mode' between 21 September 2010 and 19 November 2010. Under the caretaker policy, the council states that it will avoid actions and decisions which could be perceived as intended to influence voters or otherwise have a significant impact on or unnecessarily bind the incoming council. In particular, it provides that the council must, during an election period, avoid making:
    - decisions which are prohibited by section 91A of the Local Government (Elections) Act
    - other significant decisions as defined within the procedure supporting the caretaker policy.

29. Section 91A of the Local Government (Elections) Act prohibits a council from making designated decisions whilst in caretaker mode. A 'designated decision' is defined as follows:

> ***designated decision*** means a decision–
>
> (a) relating to the employment or remuneration of a chief executive officer, other than a decision to appoint an acting chief executive officer; or
>
> (b) to terminate the appointment of a chief executive officer; or
>
> (c) to enter into a contract, arrangement or understanding (other than a prescribed contract) the total value of which exceeds whichever is the greater of $100 000 or 1% of the council's revenue from rates in the preceding financial year; or
>
> (d) allowing the use of council resources for the advantage of a particular candidate or group of candidates (other than a decision that allows the equal use of council resources by all candidates for election),
>
> other than a decision of a kind excluded from this definition by regulation;

30. The procedure supporting the caretaker policy provides that the council will also treat 'any major policy decisions which will significantly affect the council area or our communities or will inappropriately bind the incoming council' as prohibited during the election period. It notes that:

> In the context of this procedure, a 'major policy' decision includes any decision:
> - to dispose of Council land
> - to approve community grants
> - to approve sponsorship applications
>
> that is not a 'designated decision'.

31. The complainant alleges that the council breached the caretaker policy in two respects: firstly by appointing Mr McEvoy to undertake the review of the Willunga Golf Club toilet procurement, and secondly by publishing its Annual Review. Both these events occurred during the election period.

32. The decision to undertake a review of the Willunga Golf Course toilet procurement was made on 19 October 2010 i.e. within the election period. It involved entering into an agreement for the provision of a service from Mr McEvoy. In my view the council staff needed to consider:
    - whether the likely cost of the agreement would exceed the value of 1 per cent of the previous year's rates revenue (which I understand to be approximately $800,000). In the event, the advice cost $1,950
    - whether the decision allowed the use of council resources 'for the advantage of a particular candidate or group of candidates (other than a decision that allows the equal use of council resources by all candidates for election)'
    - whether the decision amounted to a 'major policy decision' as defined under the procedure.

33. I note that the decision was made in response to a complaint sent to elected members alleging possible corruption, and that the complaint suggested in effect that Mr McEvoy should review the procurement. It appears to me that under section 5(5) of the *Whistleblowers Protection Act 1993*, the council was under an obligation to refer the allegation to the Anti-Corruption Branch, and I am advised that this occurred. It is not apparent to me that it was necessary for a separate review to be undertaken, but in the circumstances I accept that it was not unreasonable for it to be initiated. I note that the CEO has stated in his letter to the complainant dated 6 April 2011 that:

> There were no discussions between any member of staff with any elected members prior to the decision to refer the matter to Mr McEvoy.

34. In these circumstances, in my view the decision to initiate the review did not constitute a designated decision under the Local Government (Elections) Act, nor a 'major policy decision' under the caretaker policy. It was plainly under the relevant monetary limit, and I do not believe that the undertaking of an independent review of a council decision could be said to advantage a particular candidate, or group of candidates. It may be that the **result** of a review would assist or harm the electoral chances of an individual candidate, but in my view that feature cannot be said to arise from the decision to conduct a review.

35. The second possible breach arises because in the edition of the council's magazine dated 6 October 2010 (i.e. in the election period), the community was advised that the regular mayor's message was not included because the council was in caretaker mode. However, in a 2009 - 2010 Annual Review lift out section in the same magazine, the mayor and the CEO wrote prominent articles praising the council's performance over the past year.

36. The complainant considers these articles were 'a blatant breach of the caretaker requirements'. He stated to the council that:

> … they were biased, misleading and totally lacked objectivity. For example, the claim of responsible and prudent strategy applied to financial management belies the facts. It is difficult to comprehend how as Mayor and CEO you both could be so unaware of the total inappropriateness of your actions.

37. I note that under section 131 of the Local Government Act the council had a legal obligation to prepare an Annual Report, and under section 131(7) the council was empowered to 'provide to the electors for its area an abridged or summary version of its annual report'.

38. At the time the Annual Review (as distinct from the Annual Report) was distributed, the mayor was the principal member of a council in caretaker mode, and an electoral candidate. In its letter to the complainant dated 6 April 2011, the council explained its position as follows:

> The council had a responsibility to ensure that 'designated decisions' were not made whilst in caretaker mode. Whilst the definition of a 'designated decision' has been detailed in an earlier response, the relevant consideration for council with respect to this question was ensuring that it did not:
>
> > *allow the use of council resources for the advantage of a particular candidate or group of candidates (other than a decision that allows the equal use of council resources by all candidates for election).*
>
> As the Mayor's message may be both forward and backward looking over time, it was possible that some of the content could be construed as 'electoral material' from a candidate. The publication could, therefore, be perceived to give an advantage to a particular candidate; that being the Mayor. Consequently, council chose to take a conservative stand point and disallow the inclusion of a mayor's message in that issue.
>
> The 2009/2010 Annual Review lift out was a document that *retrospectively* looked at the achievements of council in the preceding year. The document is based upon the information provided in the Annual Report. The Annual Report is a document required by Section 131(1) of the *Local Government Act 1999*, as follows:
>
> > *A council must, on or before 30 November in each year, prepare and adopt an annual report relating to the operations of the council for the financial year ending on the preceding 30 June.*
>
> The Annual Review had been included in the magazine for a numbers (sic) of years and given that it both reflected the content of the Annual Report and its focus was purely retrospective (on decisions that had already been made), a decision was made that there could be no reasonable perception that it tried to influence the outcome of an election.

39. The council has advised me that the Annual Review was written so as to:
- 'purposefully utilise inclusive language'
- contain matters of fact, not opinion
- inform, not influence its community
- contain matter that was entirely retrospective, not prospective
- not give credit to individual elected members.

40. The council has further stated that the CEO's and Mayor's messages in the Annual Review are an exact copy of their messages as printed in the Annual Report, and that 'they present the information required by law relating to the council's performance (i.e. its achievements against its Annual Business Plan and Strategic Management Plans) in a manner that is relevant and easily understood by the community'. It has advised me that the messages were written for the Annual Report during the time it was compiled prior to the election period, and 'were not specifically prepared for the Annual Review and hence not a use of council resources during the caretaker period and/or intended to constitute electoral material'.

41. However, in my revised provisional report, I expressed the view that the decision to publish the Annual Review arguably constituted a designated decision under the Local

Government (Elections) Act, in that it allowed the use of council resources for the advantage of a particular candidate or group of candidates. I stated also that it therefore appeared to me that the council had infringed section 91A of the Local Government (Elections) Act.

42. My revised provisional report noted also my view that there is a clear policy intent on the part of the legislature that during the election period a council should not undertake activity which may be **perceived** as favouring one candidate over another. I stated that I could see no imperative for the outgoing council to publicise its achievements during the election period, and that I considered it likely that this would be perceived as favouring incumbent candidates. I stated my view that it should be a matter for individual candidates to put such information before the community.

43. I acknowledged also that the standard which I outlined would require a council to exercise judgement about what was reasonable in the circumstances, as well as whether it was in strict compliance with the law. I remain of the view that this is appropriate, and in accordance with the community's reasonable expectations of their local government.

44. In its response to my revised provisional report, the council questioned whether the decision to publish the Annual Review constituted a 'designated decision' under section 91A of the Local Government (Elections) Act, in that the use of resources by the council to prepare the Annual Review occurred outside the election period; and that no advantage accrued to a candidate from the Annual Review; because the material which it contained was not 'electoral material' within the meaning of that Act.

45. The council also stated its view that 'consideration of the *Briginshaw* principle has not sufficiently moderated (my) consideration of 'reasonable satisfaction' in this matter'; particularly in relation to 'the allegations of fact (that an advantage was provided) on the balance of probabilities (giving full weight to the seriousness of the matter and the gravity of the consequences following such a finding)'.

46. I have considered the council's comments. However, in my view, the fact that resources were expended by the council in preparing the Annual Review prior to the election period is immaterial, and the question of whether the Annual Review contained 'electoral material' is irrelevant. Section 91A(d) of the Local Government (Elections) Act precludes the use of council resources to advantage one candidate over another. It does not specify that this applies only in relation to the preparation of 'electoral material' during the election period.

47. In this case, the council action complained of is the distribution of the Annual Review, not its preparation, and the council has not disputed that this distribution occurred during the election period.

48. Further, having regard to the nature and content of the Annual Review, and the timing of its distribution during the election period, I remain of the view that the effect of the use of the council's resources was to advantage an individual candidate, namely the mayor. I note in particular that in my assessment the mayor's message is not, as the council claims, simply 'a document that *retrospectively* looked at the achievements of council in the preceding year'. For example, a significant part of the mayor's message is devoted to outlining 'two key strategies that further develop the priorities of the Community Plan 2028', namely the Energy Futures Strategy 2010-14 and the Native Vegetation Strategy 2010-14, both of which were approved by the council in the 2009-10 year. In any event, and even if I am wrong in my assessment of the nature of the document, section 91A(d) is not limited in this way. It does not distinguish between

retrospective or prospective council actions, and is simply focussed on whether the council has provided an unfair advantage to a candidate.

Opinion

In light of the above, I consider that the engagement of Mr McEvoy did not breach the council's caretaker obligations, and the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

However, I consider that in publishing its Annual Review during the election period the council acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council review its practice and avoid publication of similar material in future election periods.

Whether the CEO breached a duty which he owed to the council

49. The complainant alleges that:
    - the CEO's report to the 2 November 2010 meeting of the council misleadingly claimed Mr McEvoy had reviewed the costs of the Willunga toilet block, when no costs were provided to him
    - the CEO failed to provide to council a report provided to him by a structural designer who resides in the council area, which indicated that the toilet could be constructed for a cheaper cost
    - over a period of two years, the CEO failed to respond adequately to requests for documentation about the project, which were made by a named councillor.

50. In response to the first allegation, the CEO responded to the complainant as follows:

> Mr McEvoy was employed by council to review the cost of the construction of the Willunga toilet, among other buildings. His specific expertise relates to costs of materials and labour for the construction industry. The objective of the review was to determine whether construction costs for public toilet structures at that time was significantly less expensive than the works commissioned by the City of Onkaparinga.
>
> Mr McEvoy, when asked, specifically advised the Manager of Property & Recreation Services not to send him the details of the actual costings for the Willunga Golf Course public toilet. Mr McEvoy, requested only a gross sum of the costs of the construction; which were provided to him by telephone.
>
> Mr McEvoy has a duty to maintain a level of independence when making assessments. Thereby, the relevant information for his purposes relates to the design of the building and any site specific issues (such as the distance to services).

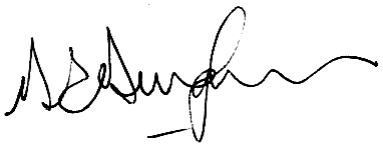
51. In my view, this is a reasonable response. I do not consider that in the circumstances it was misleading for the CEO's report to the 2 November 2010 meeting to state that Mr McEvoy had reviewed 'the costing of public toilet blocks'. This phrase was, in fact, the wording of the motion passed by the council at its 19 October 2010 meeting, at which Mr McEvoy's appointment was noted. Further, in my view the report provides a fair and reasonable summary of what occurred.

52. In relation to the second allegation, I have considered the document provided by the complainant[11] as a report from the structural designer. It makes no reference to any site specific issues and consequent connection costs, which in my understanding were a significant issue in the construction of the facility. Consequently I am unable to assign significant weight to the document, and I do not consider that it was incumbent on the CEO to provide it to the council.

53. The third allegation concerns inadequate responses to Cr George Apap's requests to the CEO. I have been provided with copies of documents which Cr Apap sent to the CEO seeking information on 16 December 2008, 14 April 2009 (in response to which a document entitled 'cost breakdown' was provided, but no costs were evident in that document) and 22 April 2009. Under section 16 of the Ombudsman Act I am not able to consider complaints made more than 12 months after the complainant first had notice of the issue. These matters are well outside that time limit, and the CEO is no longer employed by the council. I see no public interest in investigating this issue further.

Opinion

In light of the above, I consider that further investigation of the complaint that the CEO breached a duty which he owed to the council is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.



Richard Bingham
SA OMBUDSMAN

16 April 2012

[11] Attachment 6 to his original complaint to the Electoral Commissioner