



Report

Full investigation - *Ombudsman Act 1972*

Ombudsman 'own initiative' investigation, section 13(2) Ombudsman Act 1972

Council member	Cr Cassandra Chambers
Council	District Council of Peterborough
Ombudsman reference	2022/06206

Issues	<ol style="list-style-type: none">1. Whether Cr Chambers failed to declare and properly manage a material conflict of interest in relation to Agenda Item 20.1 during the council meeting on 19 August 20192. Whether Cr Chambers failed to declare and properly manage a material conflict of interest in relation to a motion to approve a list of projects and contractors during a Special Meeting of the council on 2 March 20203. Whether Cr Chambers' actions amount to misconduct in public administration
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Jurisdiction

On 2 December 2022 I determined to carry out this investigation of my own initiative pursuant to section 263A(3) of the *Local Government Act 1999*.¹

Investigation

My investigation has involved:

- assessing information provided in the course of a separate investigation involving the council (reference 2022/03918)

¹ In doing so, I have applied the relevant provisions of the Local Government Act, in accordance with the transitional provisions in the *Statutes Amendment (Local Government Review) Act 2021, Pt 2, s147*

- seeking a response from Cr Chambers
- providing the Principal Member of the council, the reporter and Cr Chambers 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.² 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 ...³

Procedural fairness

I provided a copy of my provisional report to the Principal Member, the Current Chief Executive Officer and Cr Chambers. I received a response from Cr Chambers advising she had no submissions to make.

I therefore provide my final report in substantially the same terms as the provisional report. In particular I have not altered the findings, nor recommendations.

Background

1. Cr Chambers is an elected member of the council and was the Deputy Mayor during the period in question.
2. I determined to conduct this investigation after being provided with information in the course of a separate investigation regarding the council, involving the council's procurement and management of contracts in relation to projects funded by the Drought Communities Program in 2019.
3. The information relevant to this investigation involved two instances where Cr Chambers remained in council meetings and participated in votes to engage Chambers Building Services among other contractors, to undertake work on projects.
4. The council's Register of Members' Interests indicates that Cr Chambers submitted an ordinary return on 20 August 2019 declaring that she was an employee of Chambers Building Services and her father is an officer-holder in the company.

Meeting of the council on 19 August 2019

5. During a meeting of the council on 19 August 2019 the former Chief Executive Officer (**the former CEO**) submitted a report regarding a variation to the projects that would be undertaken with the Drought Communities funding. One of the recommendations

² 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.

³ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

concerned the number of toilet blocks to be purchased with the funds and the contractors to be engaged by the council, including Chambers Building Services.

6. A quote by Chambers Building Services to undertake work on four pre-made toilet blocks was attached to the former CEO's report. The Minutes of the meeting indicate Cr Chambers seconded the motion for Agenda Item 20.1 to be confidential and the recommendations were carried including the following:

That Council authorises the Chief Executive Officer to purchase 4 toilet blocks with male female and disabled to be placed at Victoria Park, Rotary Park, Tennis Club, and Yongala Sports Complex and to contract 4K Construction, Chambers Building Services, John Schofield to build the verandahs and lay the pavers.

7. The council's resolutions also included that it authorise the Mayor and Deputy Mayor to finalise plans, choose colours and 'make any other decisions necessary for the toilet blocks.'
8. Although the motion passed by the council referred to engaging three contractors to undertake the work, the only quote attached was from Chambers Building Services and it was the only contractor engaged for the work.
9. Records provided by Chambers Building Services to my separate investigation indicate that Cr Chambers was one of the employees who worked on the toilet blocks at Victoria Park, Rotary Park and the Tennis Club through February, March and May 2020.
10. During the meeting the council also approved the former CEO's recommendation to authorise him to obtain plans for the Main Street toilet block and 'for the same to be constructed by 4K Construction, Chambers Building Services, John Schofield.'

Special Meeting of the council on 2 March 2020

11. During a Special Meeting of the council on 2 March 2020 the elected members considered a confidential report from the former CEO. The report contained a revised list of some 58 projects recommended for Round 2 Drought Communities funding, previously considered by the council in January 2020. Alongside each project in the list is the name of the contractor or supplier nominated for it. The projects where Chambers Building Services was the proposed contractor included: painting the Rotunda, replacing decking at the Senior Citizens Hall, upgrading the office kitchen and reception desk at the Town Hall and involvement in upgrading the toilet at West Park.
12. The Minutes of the meeting record that: 'Cr C Chambers moved Cr R Hotchin seconded that Council approve the projects as submitted and attached' and the motion was carried.

Meeting of the council on 18 October 2021

13. During a council meeting on 18 October 2021 a councillor asked a Question Without Notice about why the veranda on the Yongala toilet block veranda had not been erected by Chambers Building Services in accordance with the council's motion.
14. The audio recording of the meeting indicates Cr Chambers and Cr Hotchin volunteered responses to the question indicating the veranda was not part of the council's agreement with Chambers Building Services. Cr Chambers stated: 'No. They changed that. That got changed. That was removed. For the new septic tank. The funding for that got removed so the new septic tank...'

15. I note that no evidence of a formal variation to the agreement between Chambers Building Services and the council has been provided to my separate investigation. However, the council has provided information indicating that the connection of the Yongala toilet block to the septic system was funded under Round 2 of the Drought Program. This contradicts the suggestion that the council had made a firm arrangement to offset the veranda in Round 1 against the septic system funded in Round 2.
16. The information provided by Cr Chambers suggesting that the council had formally agreed to remove the veranda from its contract with Chambers Building Services was incorrect and potentially misleading. However, as the council was not considering a motion and there was no outcome which would result in a loss or benefit to a relevant party, I do not consider this situation comes within the conflict of interest provisions of the Local Government Act.

Cr Chambers' account

17. Cr Chambers says that there are three building services in the community and 'all work together and support each other.' She says that the Drought Community projects were shared amongst all businesses.
18. Cr Chambers says '(a)ll hands in the Chamber were raised in agreeance of the projects. It was just my name that was recorded. There was no division, there was no recording of anyone against the motion.' She also says that '(w)hile the resolution was for the Mayor and Deputy Mayor ... to be involved with the pre-made toilet blocks. No decisions were brought forward as the blocks Shape, Design and colouring was pre-set by the manufacture.'
19. Cr Chambers also says she works as a carpenter in her father's company and she was not involved in researching or providing the quotes to the council. She says although the former CEO was in regular contact with her employer about the projects and alterations to it, she was not involved in these discussions.
20. Cr Chambers indicates she acted on the advice of the former CEO in relation to conflicts of interest. She says:

I had many conversations with the then CEO Mr Peter McGuinness about conflict of interest, and the times you have indicated are no exception. I would be repeatedly told. That we are just voting in the projects you all agreed on. That sourcing and nominating business to those projects were operational and up to him. That bundling all the projects together was best because every councillor has an interest in one project or another. We have always been directed to the CEO when issues and concerns rise and this is what I did.

Relevant law/policies

21. Section 4(1) of the Ombudsman Act provides me with jurisdiction in relation to misconduct, as follows:
 - (1) Misconduct in public administration means an intentional and serious contravention of a code of conduct by a public officer while acting in their capacity as a public officer that constitutes a ground for disciplinary action against the officer
22. Sections 73 and 74 of the Local Government Act concern material conflicts of interest and relevantly provide:

73— Material conflicts of interest

- (1) Subject to this section, for the purposes of this Subdivision, a member of a council has a material conflict of interest in a matter to be discussed at a meeting of the council if any of the following persons would gain a benefit, or suffer a loss, (whether directly or indirectly and whether of a personal or pecuniary nature) depending on the outcome of the consideration of the matter at the meeting:
 - (a) the member;
 - (b) a relative of the member;
 - [...]
 - (g) the employer or an employee of the member;
 - [...]
- (2) A member of a council will not be taken to have a material conflict of interest in a matter to be discussed at a meeting of the council— (a) if the relevant benefit or loss would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the council area; or (b) on account of an interest under subsection (1) of a relative of the member, other than the member's spouse or domestic partner, if the member does not know, and could not reasonably be expected to know, of the interest.
[...]

74—Dealing with material conflicts of interest

- (1) If a member of a council has a material conflict of interest in a matter to be discussed at a meeting of the council, the member must—
 - (a) inform the meeting of the member's material conflict of interest in the matter; and
 - (b) leave the meeting room (including any area set aside for the public) such that the member cannot view or hear any discussion or voting at the meeting, and stay out of the meeting room while the matter is being discussed and voted on.

Maximum penalty:

- (a) if the member votes on the matter with an intention to gain a benefit, or avoid a loss, for the member or another person—\$15 000 or 4 years imprisonment; or
- (b) in any other case—\$5 000.
- [...]
- (5) If a member of a council discloses a material conflict of interest in a matter to be discussed at a meeting of the council, the following details must be recorded in the minutes of the meeting and on a website determined by the chief executive officer:
 - (a) the member's name;
 - (b) the nature of the interest, as described by the member;

- (c) if the member took part in the meeting, or was in the chamber during the meeting, under an approval under subsection (3), the fact that the member took part in the meeting, or was in the chamber during the meeting (as the case requires)
- (6) This section does not apply to a matter of ordinary business of the council of a kind prescribed by regulation for the purposes of this section.

23. Section 63 of the Local Government Act provides:

63—Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils
- (2) Council members must observe the code of conduct

24. Clause 3.13 of the Code of Conduct for Council Members provides:

- 3.13 Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.

Whether Cr Chambers failed to declare and properly manage a material conflict of interest in relation to Agenda Item 20.1 during the council meeting on 19 August 2019

- 25. Agenda Item 20.1 required the council to consider the recommendations in the former CEO's report. Two of these recommendations, which were approved by the council, in part involved the engagement of three contractors to perform the work, including verandas, around the four pre-made toilet blocks and to construct the Main Street toilet block.
- 26. I acknowledge Cr Chambers' explanation that the Drought Community Program projects were shared amongst the three contractors in the community, who worked cooperatively on the projects. I also acknowledge her account that she had spoken to the former CEO who had bundled the projects together for the councillors to vote on and advised her that nominating the contractors to the projects was an operational decision for him.
- 27. Nevertheless, the wording of the recommendations in relation to Agenda Item 20.1 are clear. They authorised the former CEO to engage the three contractors, including Chambers Building Services, to undertake the building work. The only quote for the work on the four pre-made toilet blocks, attached to the former CEO's report, was from Chambers Building Services. Therefore, even if the work was intended to be shared between the three contractors, it remains the case that Chambers Building Services, as one of the three, would have gained a benefit by the council's consideration and vote to engage all three contractors.
- 28. I therefore consider that Cr Chambers had a material conflict of interest as defined in section 73 of the Local Government Act as the following people and entities would have gained a benefit by the council's consideration of Agenda Item 20.1: Chambers Building Services as her employer; her father as principal of the business; and indirectly herself, as she worked on the toilet blocks as an employee of Chambers Building Services.

29. Section 74 of the Local Government Act requires a member who has a material conflict of interest to advise the meeting of the interest and leave the meeting room during the discussion and vote. There is no record Cr Chambers advised the meeting of her conflict of interest, nor left the room.

Opinion

In light of the above, I consider that Cr Chambers' actions in failing to declare a material conflict of interest and remaining in the meeting room for the discussion and vote on Agenda Item 20.1, breached section 74 of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members.⁴

Whether Cr Chambers failed to declare and properly manage a material conflict of interest in relation to a motion to approve a list of projects and contractors during a Special Meeting of the council on 2 March 2020

30. The Special Meeting on 2 March 2020 involved the council considering the former CEO's revised list of projects for Round 2 Drought Communities Program funding. It indicates Chambers Building Services was the sole contractor proposed for four of these projects. The Minutes record the council voted to 'approve the projects as submitted and attached.'
31. I accept Cr Chambers' explanation that all councillors voted to approve the projects and her name was arbitrarily recorded as moving the motion. I have also considered her description of her conversations with the former CEO about conflicts of interest. This includes her account that he informed her that the role of the councillors was to vote to approve the projects and he determined the contractors for the projects.
32. While Cr Chambers may have sought advice from the former CEO, the responsibility for determining whether she had a conflict of interest rests with her. In my view while the councillors were voting to approve the projects, it was reasonably apparent from the list they approved, who the nominated contractors or suppliers were for each project.
33. In my view Cr Chambers had a material conflict of interest as defined in section 73 of the Local Government Act. This is because Chambers Building Services as her employer and her father as an officer-holder in the business, would have gained a benefit through the council's consideration and vote on the recommendation to approve the list of projects, which included it as the proposed contractor for a number of projects.
34. Section 74 of the Local Government Act requires a member who has a material conflict of interest to advise the meeting of the interest and leave the meeting room during the discussion and vote. There is no record Cr Chambers advised the meeting of her conflict of interest, nor left the room.

Opinion

In light of the above, I consider that Cr Chambers' actions in failing to declare a material conflict of interest and remaining in the meeting room for the discussion and vote to approve

⁴ For the sake of clarity, under the transitional provisions in the *Statutes Amendment (Local Government Review) Act 2021, Pt 2*, s147, the applicable provisions are those contained in Chapter 5 Part 4 of the Local Government Act, prior to the commencement of the 17/11/2022 amendments.

the list of projects during the Special Meeting on 2 March 2020, breached section 74 of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members.

Whether Cr Chambers' actions as outlined amount to misconduct

35. Section 4(1) of the Ombudsman Act provides me with jurisdiction in relation to misconduct in public administration, which is defined as an 'intentional and serious contravention of a code of conduct.' My view is that Cr Chambers breached the conflict of interest provisions of the Local Government Act, and thereby clause 3.13 of the Code of Conduct for Council Members.
36. However, in my opinion Cr Chambers' actions do not constitute misconduct as defined in the Ombudsman Act. This is because, on her evidence, she spoke to the former CEO about her concerns and apparently believed that she was voting to approve the projects, rather than the contractors. I therefore believe the intentional aspect required by section 4(1) of the Ombudsman Act has not been satisfied.

Summary and Recommendation

In light of the above, my final view is that:

- Cr Chambers breached section 74 of the Local Government Act by failing to declare and deal with a material conflict of interest at council meetings on 19 August 2019 and 2 March 2020
- Cr Chambers' conduct was contrary to section 63(2) Local Government Act, which required her to observe the code of conduct.

I have considered the appropriate remedy for Cr Chamber's contravention of the conflict of interest provisions of the Local Government Act. I understand from my Officer's conversations with the current Chief Executive Officer, that he intended to implement an ongoing training program for elected members after the recent council elections, including training on conflicts of interest. In light of this, I do not believe it is necessary to recommend that Cr Chambers undertake specific training in this area. Instead, I believe the appropriate remedy would be for Cr Chambers to apologise for contravening the conflict of interest provisions of the Local Government Act on the two occasions identified. I therefore make the following recommendation under section 25(2) of the Ombudsman Act and section 263B(1)(b) Local Government Act:

- that the council require Cr Chambers to make a public apology at a meeting of the council.

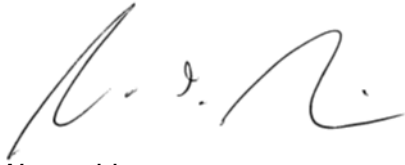
As I have found Cr Chambers' actions contravened clause 3.13 of the Code of Conduct for Council Members, Part 3 of that Code requires the council to provide my report to a public meeting of the council within two ordinary meetings of the receipt of the report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **31 July 2023** on what steps have been taken to give effect to my recommendation and the requirement 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.

I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines
SA OMBUDSMAN

18 April 2023