



OmbudsmanSA

# FINAL REPORT

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KANGAROO ISLAND COUNCIL

October 2012

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## Final Report

### Full investigation - *Ombudsman Act 1972*

Agency	Kangaroo Island Council
Date complaint received	31 October 2011
Issues	<ol style="list-style-type: none"><li>1. The council breached section 90(8) of the <i>Local Government Act 1999</i> in relation to informal gatherings</li><li>2. There was a breach of section 90(8) of the <i>Local Government Act 1999</i> in relation to the nomination of the deputy mayor</li><li>3. There have been breaches of confidentiality by elected members, contrary to the Code of Conduct for Elected Members</li></ol>

#### Jurisdiction

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

During the course of my investigation I investigated a number of allegations concerning Cr Rosalie Chirgwin. Cr Chirgwin resigned from her position as elected member on 11 July 2012.<sup>1</sup>

In the circumstances of these allegations I do not consider that there is any public interest in publishing a report on them. I have, however, referred to Cr Chirgwin's involvement in this report where it is necessary to understand the context of the issues which are the subject of my investigation.

In particular, I have decided not to continue to investigate an allegation that Cr Chirgwin refused to return documents distributed to her in a confidential envelope for use at a council meeting. The documents related to the Stokes Bay Road tender.

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<sup>1</sup> For ease of explanation I shall refer to Rosalie Chirgwin as Cr Rosalie Chirgwin despite her resignation as a councillor on 11 July 2012.

## Investigation

My investigation has involved:

- assessing the information provided by Ms Jayne Bates (**the mayor**), the council's Chief Executive Officer Mr Andrew Boardman (**the CEO**) and elected members of the council
- interviewing under oath the mayor, deputy mayor Peter Clements (**the deputy mayor**); Councillors Ken Liu, Rosalie Chirgwin, Graham Walkom and Bec Davis; and the CEO
- considering sections 62, 63 and 90(8) of the *Local Government Act 1999* (**the Act**); the Council Members Guide 2010 (**the LGA guide**) produced by the Local Government Association (**the LGA**); the LGA Discussion Paper (Dec 1999) 'Informal Council Gatherings and Discussions' (**LGA Discussion Paper**); the council's Code of Conduct for Elected Members (**the code of conduct**) and the council's media policy
- preparing a provisional report
- providing three relevant councillors with my provisional report for comment, and considering their responses
- interviewing Mr Peter Warner under oath
- providing three relevant councillors, the mayor and Mr Michael Pengilly MP with my revised provisional report for comment, and considering these 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.<sup>2</sup> 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  
 ...<sup>3</sup>

## Responses to my revised provisional report

My revised provisional report was sent to the mayor, Crs Liu, Walkom, the former councillor Chirgwin and Mr Michael Pengilly MP for comments on 24 August 2012. The mayor informed me that she provided the report in confidence to the council on 31 August 2012 where it was resolved that each councillor will respond individually and directly to me if they wished.

Consequently, I received a response from Mr Pengilly (letter dated 31 August 2012), Cr Denholm (email dated 3 September 2012), the mayor (email dated 10 September 2012) and Cr Walkom (email dated 25 September 2012).

Mr Pengilly replied that this was a matter for council to deal with, and not himself. He enclosed a copy of the two statutory declarations, which, it has been alleged, prove that the council instructed Mr Warner to investigate him. I am not persuaded that the statutory declarations demonstrate this, but rather that it was explained by Mr Warner there were three OH&S incident reports and that they concerned Cr Walkom and Mr Pengilly.

<sup>2</sup> 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.

<sup>3</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Cr Denholm's response concerns the second allegation in relation to the nomination for the deputy mayor. It confirms the views expressed in my provisional report, that five council members were present at Cr Liu's house and participated in the discussion in relation to who would be interested in nominating for the position of deputy mayor. However, section 85 of the Act sets out how a quorum is calculated. Under the formula set out there, in the case of a council consisting of 9 elected members plus the mayor the quorum is six. Therefore, my final views have not changed in this regard.

Cr Walkom commented that firstly, Mr Warner's instructions were 'substantially amended' by the council a week after the formal resolution was passed by council. It is alleged by Cr Walkom that this amendment could only have been done by council resolution. It appears that Mr Warner was requested by Norman Waterhouse (the lawyers acting on behalf of the council) to investigate some additional matters.<sup>4</sup> It is not clear whether Norman Waterhouse was acting directly on instructions from the council, and in any event, this is not relevant to whether breaches of confidentiality by elected members occurred. Accordingly I have not investigated this issue further.

Second, Cr Walkom argues that an independent investigation by Mr Warner should have involved interviewing Mr Pengilly. I disagree with this assertion as Mr Warner gave his reasons for not interviewing Mr Pengilly, as stated in paragraph 60. In my view, this is not unreasonable in the circumstances.

Cr Walkom and the mayor's remaining comments do not change the opinion expressed in my revised provisional report.<sup>5</sup>

## Background

1. On 17 October 2011 the CEO wrote to me asking me to initiate an investigation. The letter was not received by my office until 3 November 2011. The letter summarised events at the council which took place following the November 2010 elections when five new council members were elected. Some of these events had previously come to the attention of my office. The letter contained attachments and concluded by asking for my assistance in investigating:
  - allegations that the council was unlawfully holding informal gatherings
  - breaches of confidentiality by councillors.
2. In my reply dated 22 November 2011 I determined that upon my initial assessment:
  - there was insufficient evidence to support the first allegation in relation to informal gatherings held by council; and
  - I would conduct a preliminary investigation into the second allegation, being the breaches of confidentiality.

I invited the CEO or any elected members of the council that had any evidence that indicated any gathering had been conducted in such a way as to obtain, or effectively obtain, a decision on a matter outside a formally constituted meeting of the council<sup>6</sup> to contact me.

3. On 16 December 2011 I received a reply from the CEO supported by explanations and attachments from himself, the mayor, the deputy mayor and Crs Joy Wilson, Graeme Connell, Malcolm Boxall, Bec Davis, Ken Liu and Peter Denholm. These documents provided examples of when each thought that informal gatherings had been held

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<sup>4</sup> The additional matters involved the conduct of confidential enquiries to ascertain whether council's responses to Mr Michael Pengilly MP regarding the CEO complaints had been appropriate; and the interviewing of all elected members regarding issues raised in the incident reports.

<sup>5</sup> Part of Cr Walkom's and the mayor's response deal with a separate allegation made by Cr Walkom against the mayor, which does not form part of this investigation.

<sup>6</sup> See Local Government Act 1999, section 90(8)

inappropriately; or that confidentiality of the council had been breached by various council members, the mayor and/or the CEO. Two remaining councillors, Crs Graeme Walkom and Rosalie Chirgwin provided separate submissions on the same issues.

4. After reading this information I wrote to the mayor, the CEO and Crs Chirgwin, Liu and Walkom on 7 February 2012. In that letter I proposed to meet with each of them on 8 March 2012 with my Investigating Officer to interview them under oath. I expressed the tentative view that I was conducting a preliminary investigation on the issue of alleged confidentiality breaches and, unless shown evidence to the contrary was satisfied that the council had explained the dates on which, and the reasons why it had conducted informal gatherings. I also attached a schedule containing the allegations about confidentiality breaches specific to each person against whom the allegations were made.
5. On 8 and 9 March 2012 I visited Kangaroo Island (**the island**) for the purpose of conducting the interviews. It is necessary to understand the background to this complaint, and I recount the relevant events below.

### ***Post November 2010 Elections***

6. Due to the retirement of five elected members, the November 2010 council elections saw five new councillors join the elected member body, including Crs Chirgwin, Liu and Walkom. A four day training program was provided prior to the first council meeting to assist their understanding of their new role and responsibilities. This included a workshop on 26 November 2010 by Wallmans Lawyers covering topics including meeting procedure, conflict of interest, confidentiality, the code of conduct, and administrative law.
7. The first meeting of the new council took place in December 2010. Questions on notice, mainly from new councillors increased almost immediately. There were over 30 for the January 2011 meeting, and over 60 for the February 2011 meeting. In part because of the demands caused by providing answers to these questions, a second training day was held on 21 February 2011 in an effort to improve elected members' understanding of their role and responsibilities.
8. In May 2011 the council released its then CEO Ms Carmel Noon from her contract and acting CEO Mr John Coombe was appointed, until the current CEO Mr Andrew Boardman was appointed in August 2011.
9. At its meeting on 17 August 2011, the council reviewed and adopted the code of conduct. A division was called with a majority of elected members voting in favour. Crs Chirgwin, Liu and Walkom, whom I note have still not signed the code of conduct, voted against the adoption.
10. A resident of the island, Dr Gabriel Bittar owns and operates a community website called 'Klpolis' which provides a forum for residents to post concerns and comments. Some councillors utilise this form of social media to inform members of the public about their concerns regarding council issues, including questions on notice.

### **Whether the council breached section 90(8) of the *Local Government Act 1999* in relation to informal gatherings**

11. Section 90 of the Act provides that council meetings are to be held in public except in special circumstances. Subsection 8 states:

(8) The duty to hold a meeting of a council or council committee at a place open to the public does not in itself make unlawful informal gatherings or discussion involving -

- (a) members of the council or council committee; or
- (b) members of the council or council committee and staff,

provided that a matter which would ordinarily form part of the agenda for a formal meeting of a council or council committee is not dealt with in such a way as to obtain, or effectively obtain, a decision on the matter outside a formally constituted meeting of the council or council committee.

Examples -

The following are examples of informal gatherings or discussions that might be held under subsection (8):

- (a) planning sessions associated with the development of policies or strategies;
- (b) briefing or training sessions;
- (c) workshops;
- (d) social gatherings to encourage informal communication between members or between members and staff.

12. Section 90(8) of the Act was added in 1999 when the majority of the *Local Government Act 1934* was repealed. The LGA issued supporting material at the time the current Act came into effect. In relation to this provision, it states the benefits and purpose of section 90(8), with which I agree:

During the course of a Council or committee meeting, information is shared, reports and recommendations are debated and discussed, and decisions, where appropriate, are taken. However, time constraints and meeting regulations prescribing the rules of debate can restrict the ability of members to speak on motions or ask questions on a continued basis to fully explore and understand the various views of members. At times the exploration of issues can be restrained and members may not feel that an issue has been sufficiently canvassed for optimal decision making.

The Local Government Act 1934 has been problematic in that it does not explicitly provide for the conduct of information dissemination sessions to support the desire of members to become fully informed on matters put before them whether for immediate decision or at a later date.

Accordingly, Councils that conducted or attempted to conduct informal gatherings or briefing sessions have, at times, been the subject of negative media attention. On occasions Councils have felt the need to seek legal advice when they may have wanted to gather to discuss important strategic issues, conduct briefings and/or training sessions and the like. Other Councils chose not to gather informally for fear that they may be in breach of the Act.

The new Local Government Act 1999 [Section 90(8)] specifically recognises the need to have informal gatherings to support Elected Members in their decision-making role and this approach is welcomed.<sup>7</sup>

13. The allegation about informal gatherings conducted by the council is that they went beyond the intended information sharing; and that agendas were set in the form of a 'to do' list and decisions were canvassed and/or effectively made. Further, the informal gatherings were closed to the public, and I note that section 90(1) of the Act states:

<sup>7</sup> See LGA Discussion Paper, page 1.

(1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public

This provision does not apply to informal gatherings, as they are not council or committee meetings.

14. It is apparent to me that over the first half of 2011, a number of councillors became concerned about the way in which the council held informal gatherings, particularly because the public were not entitled to be present at those gatherings. This concern culminated in Cr Chirgwin moving 5 motions at the council meeting held on 17 August 2011,<sup>8</sup> the apparent purpose of which was to change the way in which the gatherings were conducted. One motion relating to public notice of the issues to be discussed was carried, and one was ruled ultra vires. The remaining 3 motions were each lost on the casting vote of the mayor.
15. The allegations raised with my office related to a number of informal gatherings, particularly those held in the lead-up to Cr Chirgwin's motions at the 17 August 2011 council meeting. The allegations focussed in particular on 3 items considered by the council at an informal gathering held on 28 July 2011. In support of the allegations I received a copy of a document entitled 'Council Informal Gathering - 28 July 2011. Commenced at 9am' (**the action list**). It is clear from this document that a quorum of the council was present at the gathering, and in the action list is a table, part of which I have reproduced below.

'Item No'	'Action'	'Person Responsible'	'Actioned'
1	'Paradise Girt By Sea' 'Take views of council to KIFA' 'KIFA Board - one position to come from person permanently living on KI 'Have KI declared remote and hence tax advantage'	Mayor	Blank
2	'Overview of the Community Cabinet visit'	Blank	Blank
3	'Road infrastructure discussions update' 'Agreement to handing back "ring route" and Seal Bay Road 'include Arranmore Road in agreement if possible'	Mayor & GMAS (CEO)	Blank

16. It is alleged that decisions were made about the first and third items being:
- to endorse the council's support for the Kangaroo Island Futures Authority as proposed (item 1)
  - to endorse the mayor's preferred option for how a \$2 million per year grant for 4 years from the state government was best used (item 3).
17. It is further alleged that a decision was made about an item that did not appear on the action list. This allegation was that a decision was made to give a block of council's residential land in Kingscote to the state government for an emergency housing development, which was required to be built by 30 June 2012 (**the land transfer**).
18. I checked the agendas and minutes for those council meetings following the informal gathering of 28 July 2012. There are a number of references to the Paradise Girt By

<sup>8</sup> Minutes of the council meeting held on 17 August 2011, Item 15.1 Informal Council Meetings.

Sea initiative,<sup>9</sup> and to the road infrastructure funding issue.<sup>10</sup> I could identify no reference to agenda items dealing with the land transfer.

19. I note that in the agenda for the 12 October 2011 meeting the above items were raised by Cr Liu in a question on notice, which was answered as follows:

Question 8

*I was informed that at the meeting of 28 July where I was absent due to personal commitments, Council endorsed the support for the Kangaroo Island Future Authority (KIFA) announced by the State Government and that a formal report with recommendations to effect the decision would be included in the agenda of the August meeting of Council.*

If this was correct, what was the reason for the delay in submitting this report to Council for a resolution?

Answer 8

There was no Council meeting on 28th July, only an informal gathering and no endorsement can occur in this forum. Any support for the work of the Authority will be brought to Council as and when necessary. As we have no idea how KIFA will function other than the broad terms of reference within the Paradise Girt by Sea document we have nothing to work with to formulate any kind of endorsement. We would hope that the Authority will meet this month and indicate to Council and the Community how it intends to work through the recommendations contained within the report.

Question 9

*At the 28th July Informal Gathering, I understand that it was decided to offer a parcel of Council land near Kingscote Oval to SA Government for emergency housing development.*

Would the CEO confirm whether it was correct in what I heard about the proposal which was agreed at this Informal Gathering? If so, when will this commitment be referred to Council for a formal endorsement?

Answer 9

Councillors were informed of the various discussions between the Mayor, CEO, ACEO and Ministers during the cabinet visit. The opportunity to assist in the provision of emergency housing was discussed. The informal gathering was also informed that discussions with the Department would continue and a report brought before Council as and when appropriate.

Question 10

*At the 28 July Informal Gathering, I also understand that the Elected Members were given a briefing on the options and conditions relating to the \$2M per year road funding from the State Government.*

When will a full report (*if it is not ready, an interim report at least*) on the \$2M Road Funds be placed in the agenda so that the public will be informed of the current status of the road funding, when and which roads are programmed for upgrading?

Answer 10

The discussions at the informal gathering on the 28th July elaborated on the major issues uncovered during the process of discussing the various options that the \$2M funding present- at the point it was still unclear as to the best way to progress this and discussions with DTEI, the Minister, the Grants Commission and our Consulting Engineers were in progress.

A full report is before Council for consideration on 12th October.

20. I note in passing that the above extract is typical of the current council agendas which run to between 60 and 80 pages, and which contain many questions on notice clarifying events such as informal gatherings, legislative provisions, email correspondence, etc.

<sup>9</sup> See for example, minutes of the council meeting held on 17 August 2011, Item 10.5 Member for Finniss; minutes of the council meeting held on 21 September 2011, Item 3.0 Deputation.

<sup>10</sup> See for example, minutes of the council meeting held on 17 August 2011, Item 9.1.3 Road Funding and Impacts on Long Term Financial Plan; minutes of the council meeting held on 12 October 2011, Item 14.6 DTEI Road Funding - Program & Implications, minutes of the council meeting held on 9 November 2011, Item 17.0 MP Conlon MP, Minister for Transport - KI Roads Funding; minutes of the council meeting held on 14 December 2011, Item 9.1.6 Update of infrastructure Funding DTEI Infrastructure Program.

In that sense the agenda appears to be a tool utilised by some councillors to get information 'on the record'.

21. In addition to the 28 July 2011 Action List, I was provided with other similar examples by councillors where informal gatherings were organised and held (sometimes occupying a whole day) with documents prepared in a similar way to a formal council meeting.<sup>11</sup>
22. In response to the expressed concerns about how informal gatherings were operating within the council, and to Cr Chirgwin's motions at the 17 August 2011 council meeting, the mayor sent an email to all councillors on 11 September 2011:

As we have agreed the Council meetings are to be run following strict meeting procedure and therefore does not allow the freedom to use these meeting as information sessions. It is inherent [sic] on Councillors to be fully informed before the meeting, on the business before them at a formal Council meeting.

No decisions are made at workshops or informal gatherings, and if a decision is required, it will be placed on a Council agenda with a report from our staff.....and Council will be well informed to allow for a considered decision.

....

At a recent LGS Forum I attended, the importance of workshops was discussed at length. While all Councils Australia wide [sic] use workshops to discuss issues, the strong recommendation was that council's [sic] should use them more. The criticism of Council's [sic] who don't regularly meet in an informal sense is that the EM's are not as informed as they should be to make decisions, and many opportunities for EM's to achieve their personal objectives are lost. To my knowledge, no other Council opens workshops/ informal gatherings to the public.

23. I note the mayor uses the terms 'workshop' and 'informal gatherings' interchangeably in this email, which is consistent with the description on the council's webpage. I see no error in this description, as section 90(8) of the Act describes a workshop as an example of an informal gathering.
24. In the interviews I conducted on the island I put the allegations to the mayor. She disputes that decisions were actually made in relation to those items listed above, and suggested that the confusion has arisen due to the way items were incorrectly described on the action list, which for informal gatherings was titled 'Items to be discussed'.
25. I have concluded that in relation to the items dealing with the Paradise Girt by Sea issue and the road funding issue, no final decision was reached or effectively reached at the informal gathering held on 28 July 2011; and the matters were properly considered at subsequent open council meetings. I base this conclusion on the nature of the issues as they are explained in the answers to Cr Liu's questions on notice, and on the record of decisions taken on the relevant agenda items at the council meetings.
26. I have also concluded that no decision was made in respect of the land transfer at the informal gathering held on 28 July 2011. There has been no subsequent council decision on the matter, and I understand that whilst there are some continuing intermittent discussions with the state government, the proposed transfer is not proceeding at the current time.<sup>12</sup> I have formed the view that the outcome of the informal gathering discussion on 28 July 2011 was at best an indication of a

<sup>11</sup> I have been provided with documentation relating to other informal gatherings held on 4 February 2011, 11 August 2011, and 16 September 2011.

<sup>12</sup> Telephone conversation with the CEO, 22 May 2012.

preparedness on the part of the council to discuss the issue further, not a commitment to proceed. This would have required a subsequent council decision.

27. Both the mayor and the CEO informed me that since the concerns about the conduct of informal gatherings were first expressed by some councillors, there have been changes made to the way they are held. These changes include:
- no agenda or 'to do' list with actioned items and decisions about which staff is responsible is produced
  - the mayor no longer 'chairs' the gathering but rather acts as a participant in the discussion
  - members of the public are informed of the topics for discussion and the date of the informal gathering by way of 'notification' which is published on the council's website and in the window of the Kingscote council chambers.
28. As noted above, section 90(8) of the Act permits the holding of informal gatherings provided that they are not dealing with items that would ordinarily form part of the agenda for a formal council meeting in such a way as to obtain or effectively obtain a decision on the matter. I consider that informal gatherings can provide an appropriate opportunity for elected members to be informed about matters including the background to issues coming before the council. In my view, informal gatherings can assist elected members to exercise their responsibilities under the Local Government Act appropriately.
29. In this case, it is fair to say that from the interviews I conducted there was confusion as to when it was that a decision was effectively or actually made. In some cases, items on the action list subsequently appeared on the agenda for the next council meeting, apparently for the purposes of 'ratification'. In my view this practice runs the risk of breaching section 90(8). However, simply because something is discussed at an informal gathering does not mean it is in effect a decision.
30. I note that the advice from the LGA in its supporting material when section 90(8) of the Act came into effect is helpful:

How should an informal gathering or discussion be undertaken?

Some of the principles that could underpin the use of the provision on informal gatherings and discussions by Council might include:

- the structure of the session should be free and open and facilitated by the most appropriate person depending on what is to be discussed rather than "chaired";
- when arranged, such gatherings should be conducted on an "informal" basis;
- no formal agenda should be prepared, however, a program, discussion document or statement of what is to be addressed needs to be provided to assist Members and staff to determine if they wish to participate;
- as informal gatherings are not meetings it is inappropriate to keep minutes, however, the desirability to keep notes ought to be dictated by the nature of the gathering eg. it would be appropriate to keep a record of key priorities explored during a strategic planning session for incorporation in a document to be formally considered at a subsequent Council meeting;
- preparation for attendance should be kept to a minimum e.g. reading a discussion paper that will be formally presented at a briefing session.

Council should be mindful that participation in an informal gathering is not bound by legislative provisions relevant to Council or committee meetings, for example, public notice of the meeting and public access are not required.<sup>13</sup>

31. I acknowledge that the changes that the council has made to the way it coordinates informal gatherings reflect this advice, and I consider that there is no public interest in

<sup>13</sup> See LGA Discussion Paper, page 3.

any further investigation of specific issues that were discussed at informal gatherings. My investigation has not revealed any evidence that decisions are effectively being made or canvassed at these meetings as they are now organised. I also note that the council has at every opportunity explained its position in relation to councillor enquiries.

## Opinion

In light of the above, my final view is that the informal gatherings held by the council were not unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

However, I would comment that council clarify the position in respect of formal and informal meetings, either in its 'Code of Practice - Access to Council Meetings and Documents' policy or another place.

Further, my final view is that, in view of the changes made by the council to the way in which these informal gatherings are held, further investigation is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

## Whether there was a breach of section 90(8) of the *Local Government Act 1999* in relation to the nomination of the deputy mayor

32. Another allegation about informal gatherings was made about a specific informal gathering that occurred in December 2010 at which the five new councillors (Cr Clements, Liu, Walkom, Chirgwin and Denholm) met to determine which one among them would seek to become deputy mayor, as this position was up for nomination. I therefore took evidence under oath from Crs Chirgwin, Liu, Walkom and the deputy mayor in respect of this allegation.
33. Soon after the council elections in November 2010 a 'get-to-know-you' celebration was held for the five new councillors (Crs Liu, Denholm, Clements, Chirgwin and Walkom) at Cr Liu's house. The new councillors discussed amongst themselves who would be the best person to nominate for the position of deputy mayor. Cr Clements stated that he was interested and asked for the support of the other councillors. After a discussion about the merits of this choice (given that Cr Liu had the highest number of votes in the council elections), it was determined that Cr Clements would nominate for the position of deputy mayor, a position that he later won at a formal council meeting, and holds today.
34. It was alleged that this meeting may have been held in breach of section 90(8) of the Act, because the councillors were at a social meeting effectively deciding something that would form part of an agenda item of a formal council meeting.
35. It is fair to say that in the course of my interviews Crs Chirgwin, Liu and Walkom were surprised that this social gathering could be classed as an informal gathering under section 90(8) of the Act. The gathering was held prior to the first council meeting, and councillors had not at this stage received the training from Wallmans Lawyers. In that sense they did not appreciate the requirements of the Act. The deputy mayor himself brought this information to my attention after he became aware that this was a possible contravention of the Act.
36. Section 90(8) is only contravened if there is a quorum present. The council has nine councillors. Section 85 of the Act defines a quorum:

(1) The prescribed number of members of a council constitutes a quorum of the council and no business can be transacted at a meeting unless a quorum is present.

The *prescribed number* of members of a council is a number ascertained by dividing the total number of members of the council for the time being in office by 2, ignoring any fraction resulting from the division, and adding one.

37. This means that six councillors would need to be present. I was informed that Cr Chirgwin had not arrived when this discussion took place, and there was also differing recollections as to whether Cr Denholm was present during this discussion. Given Cr Chirgwin's absence, at most there could only have been four and therefore no quorum.
38. In my view, the councillors' action in determining at an informal gathering that they would support Cr Clements in his nomination for the position of deputy mayor was not prudent. However, due to the lack of a quorum it does not constitute a breach of section 90(8) of the Act.

### Opinion

In light of the above, my final view is that the informal gathering held at Cr Liu's house where new councillors nominated Cr Clements for the position of deputy mayor was not conducted in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

### Whether breaches of confidentiality by elected members occurred contrary to the Code of Conduct for Elected Members

39. In considering this issue I start from the proposition that elected members must primarily conduct their business in public. The LGA guide explains their broad responsibility as follows:

In tandem with their role as community representatives, Council Members are the Council's representatives to the electors. As such they will be expected to communicate to individuals and groups in the community about Council policies, decisions and long term plans, or to raise new ideas and proposed changes to gauge community responses. Council Members need to listen to and be interested in the wider community (not just the people in the ward who elected them) and be responsive to residents' and ratepayers' issues including those from different cultural and socio-economic backgrounds. To assist in finding out what these views and aspirations are, it is helpful for Council Members to become involved in local activities and to consult regularly with various community interests.<sup>14</sup>

40. This position is reflected in the various statutory provisions applying to elected members. First, section 59(1)(b) of the Local Government Act sets out the role of council members as elected representatives of their community:

The role of a member of a council is -

- (1) (a) as a member of the governing body of the council -
- (i) to participate in the deliberations and civic activities of the council;
  - (ii) to keep the council's objectives and policies under review to ensure that they are appropriate and effective;
  - (iii) to keep the council's resource allocation, expenditure and activities, and the efficiency and effectiveness of its service delivery, under review;
  - (iv) to ensure, as far as is practicable, that the principles set out in section 8 are observed;
- (b) as a person elected to the council - to represent the interests of residents and ratepayers, to provide community leadership and guidance, and to facilitate communication between the community and the council.

<sup>14</sup> See LGA guide, page 23

41. Section 60 of the Act and regulation 6 of the *Local Government (General) Regulations 1999* together provide that a member of a council must, at or before the first council meeting, make a declaration before a Justice of the Peace or another person authorised to take declarations under the *Oaths Act 1936* to 'undertake to discharge [their] duties conscientiously and to the best of [their] abilities'.<sup>15</sup>
42. Section 62 of the Act sets out the general duties that council members must adhere to:
- (1) A member of a council must at all times act honestly, in the performance and discharge of official functions and duties.
  - (2) A member of a council must at all times act with reasonable care and diligence in the performance and discharge of official functions and duties.
  - (3) A member or former member of a council must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.  
  
Maximum penalty: \$10 000 or imprisonment for two years.
  - (4) A member of a council must not, whether within or outside the State, make improper use of his or her position as a member of the council to gain, directly, or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.  
  
Maximum penalty: \$10 000 or imprisonment for two years.
43. Section 63 of the Act states:
- (1) A council must prepare and adopt a code of conduct **to be observed by the members of the council**. (my emphasis)
  - (2) A council must, within 12 months after each general election of the council, complete (and, as appropriate, implement) a review of its code of conduct under this section.
44. The elected members of the council approved their code of conduct in June 2011. The first principle of its code of conduct echoes that of the legislation and is as follows:
- 2.1 A member of council must act in a fair, honest and proper manner according to the law.**
- In particular Members will:
- 2.1.1 understand and give proper consideration to legal requirements
  - 2.1.2 use reasonable, just and non discriminatory behaviour in all aspects when carrying out their roles and responsibilities
  - 2.1.3 ensure actions to be undertaken will be in good faith and not for improper or ulterior motive
  - 2.1.4 behave in a way that maintains and enhances the image of Council and not reflect adversely on the Council
  - 2.1.5 be impartial in decision making and accept the responsibility that goes with the decision
  - 2.1.6 make proper use of Council resources

<sup>15</sup> *Local Government (General) Regulations 1999*, regulation 6, Schedule 1, Form 2.

2.1.7 be honest, open, transparent and fair when applying for reimbursement of expenses

45. Other obligations in the code of conduct which are relevant to a consideration of elected members' confidentiality obligations appear under the heading '2.6 Information obtained by a member in the course of his or her duties is respected and used in a careful and prudent manner'. These obligations include:
- 2.6.1 ensure that information obtained as a result of their role is not to be used for any purpose other than council business
- 2.6.5 ensure that information given in relation to the council or council decisions is accurate and is not a misuse of information
- 2.6.6 respect and maintain confidentiality.
46. As stated above, Crs Chirgwin, Liu and Walkom chose not to sign the council's code of conduct until concerns about the validity of the document including the lack of public consultation and the council not following due process were addressed. However, given the prescribed declaration under section 60, and the obligation on the council to prepare a code of conduct under section 63(1), I consider that the code of conduct applied to Crs Chirgwin, Liu and Walkom even though they did not sign it.
47. In summary, the Local Government Act does not include any express obligation requiring councillors to keep documents confidential, even where an agenda item has been dealt with in confidence and an order made under section 91(7) of the Act that documents must be confidential. I note that this is unlike equivalent legislation in Victoria<sup>16</sup> and Queensland,<sup>17</sup> for example. However, there is a confidentiality obligation applying to elected members of the council arising through section 63 of the Act under the code of conduct.
48. In addition, by virtue of their common law fiduciary obligations, I consider that council members are under a duty to keep council information confidential when they know or should reasonably know of the information's confidential status. This clearly applies to information which has been discussed by a council in confidence under section 90 of the Act, and also information which is the subject of a council confidentiality order under section 91(7) of the Act.
49. In this context, I agree with the comments in the LGA guide:
- Council members must also be aware of their fiduciary obligations. The term 'fiduciary duty' is frequently used in relation to members of the governing body of an organisation. Fiduciary duty has been defined by the high court as '*the duty to act with fidelity and trust to another.*'<sup>18</sup> What this means is that a member of a governing body must act honestly, in good faith and to the best of their ability in the interests of the organisation (in this case, the council).<sup>19</sup>
50. I also consider that a council member's release of information which they know is confidential or should reasonably know is confidential, may in certain circumstances constitute a breach of their statutory obligation under section 62(2) of the Act, which requires council members to act with 'reasonable care and diligence in the performance of their duties'.

<sup>16</sup> See section 77 *Local Government Act (Vic)*

<sup>17</sup> See section 171 *Local Government Act 2009 (Qld)*

<sup>18</sup> Baxt, R *Duties and Responsibilities of Directors and Officers*, Australian Institute of Company directors, 1998, p23.

<sup>19</sup> See LGA Guide, page 16.

51. There were many allegations put to me by the mayor, CEO and elected members about breaches of confidentiality, some of which overlap. I will therefore discuss the relevant events below, and then the allegations which pertain to each event.
52. In accordance with section 18(5) of the Ombudsman Act I must report any evidence of breach of duty or misconduct on the part of a member to the principal officer of the council.

### *Occupational Health and Safety Incident Reports*

53. In September 2010, the Member for Finnis Mr Michael Pengilly MP was invited to a council meeting by the mayor. At that meeting Mr Pengilly made a number of comments about the council.<sup>20</sup>
54. In December 2010 the then CEO Ms Carmel Noon made two incident reports to the mayor alleging bullying and harassment by Mr Pengilly and one against Cr Walkom. Given the sensitivity of the allegations it was determined at a special council meeting on 7 January 2011 that the matter be dealt with in confidence 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);

55. It appears that no documents were considered and no order made in relation to the documents under section 91(7) of the Act.
56. At a special council meeting in early January 2011 it was determined that an independent investigator should be appointed. Mr Peter Warner was subsequently appointed as investigator. I note that there is significant conjecture about exactly what the scope of Mr Warner's investigation was at this time and I have interviewed Mr Warner under oath about this. Mr Warner confirms his instructions were:

I confirm that my instructions in relation to the above matter were to undertake the following independent investigation;

From Bernadette Brennan

- Investigate the three incident reports submitted by the CEO Carmel Noon.
- Interview CEO Carmel Noon, senior council staff and the Mayor Jayne Bates.

From Norman Waterhouse Lawyers

- Conduct confidential enquiries to ascertain whether council's responses to MP Michael Pengilly regarding the CEO complaints have been appropriate.
- Interview all elected members and address issues raised in the CEO's incident reports.

I was not, at any time, instructed to investigate MP Michael Pengilly. Mr Pengilly initiated the contact with me per telephone and requested to know if he was being investigated. He was informed that he was not a part of my instructions.<sup>21</sup>

57. As intimated above, Mr Pengilly telephoned Mr Warner on 2 February 2011, during which he offered to meet with Mr Warner regarding his investigation.
58. On 4 February 2011 all elected members received an email from Mr Pengilly:

<sup>20</sup> As reported in *The Islander* newspaper on 16 and 23 September 2010.

<sup>21</sup> Letter from Mr Peter Warner to Ms Jayne Bates, 27 October 2011

I am absolutely astounded and view extremely seriously that your Council has employed an investigator to “investigate” me as a Member of Parliament. It is an extremely flawed proposition.

It is an extremely serious matter to attempt to interfere with a Member of Parliament going about their lawful business. The alleged investigation may well amount to a contempt of Parliament which in itself carries potentially very serious consequences.

59. The mayor advised my investigation that she immediately contacted Mr Warner, and then tried to contact Mr Pengilly to assure him that the council was not, and could not be, investigating him.
60. On 7 February Mr Warner sent an email to Mr Pengilly as follows:
- Thank you for suggesting Tuesday 8th February, 2011.
- On reflection, I am of the view that as the investigation is confidential and is not related to you, it is appropriate for me to report to Council before meeting with anyone external to the Council.
- May I also take this opportunity to express my concern that information confidential to the Council, namely, that I have been appointed to conduct an investigation concerning the conduct of elected members appears to have been shared with you. Of even greater concern is that you appear to have been given the misinformation that you are the subject of the investigation, which is not the case.<sup>22</sup>
61. On 8 March 2011 Mr Warner provided his report to the council in confidence at a special council meeting. At its meeting the council resolved ‘That all copies of the report be returned to Mr Warner to be kept secure by him’.
62. On 9 March 2011 Mr Pengilly made a Freedom of Information (FOI) request to the council for Mr Warner’s report, which was refused. At the council meeting on the same day the council moved the following motion:
- That the Mayor be authorised to seek legal advice on the breaches of confidence issues by elected members as a result of the internal investigation reports presented to the Special Council meeting on the 8th March 2011.
63. On 7 April 2011 Mr Pengilly’s application for internal review of the initial FOI determination was also refused.
64. On 27 September 2011 Mr Pengilly informed the mayor via email that he was in receipt of two statutory declarations indicating he was the subject of an investigation by Mr Peter Warner.
65. Under oath Cr Chirgwin admitted to my investigation that she signed one of the statutory declarations declaring that the council was investigating Mr Pengilly.<sup>23</sup> Cr Chirgwin had also informed the mayor of her declaration. I have been provided with the other statutory declaration from Mr Pengilly and confirm it was not from an elected member.
66. On 27 October 2011 a letter to the editor appeared in *The Islander* newspaper written by Crs Liu, Walkom and Chirgwin, accusing the mayor of coercing councillors to pursue Mr Pengilly for alleged comments he made at a previous council meeting. The letter contained a rider by the editor as follows:

<sup>22</sup> Email from Mr Peter Warner to Mr Michael Pengilly, 7 February 2011

<sup>23</sup> I make this statement based on witnessing Cr Chirgwin nod during our interview under oath when I asked her whether she informed Mr Pengilly of her belief that he was being investigated by the council, and conversations with other elected members confirmed this.

Letter edited for legal reasons. It contained information which remains confidential within the council and matters raised in this letter may be the subject of defamation or other legal action.

67. The letter was also published on the website Kipolis in full on the previous day, 26 October 2011. The letter included that which was missing from the excerpt in *The Islander* (in bold):

Prior to the first meeting of the new council last year, councillors **were pressured by the mayor to pursue the Member for Finniss for alleged bullying. Councillors resisted this attempted coercion but nevertheless** found themselves embroiled in a costly and futile external investigation. The consequent legal and associated costs have been used in a manipulative and misleading way implying that they are our doing!

In fact we have not supported spending on legal advice, as most matters may have been dealt with internally rather than by lawyers. We have repeatedly opposed obtaining such advice and the various costly and ongoing investigations.

68. Crs Chirgwin, Liu and Walkom's attempt to obtain access to council documents about Mr Warner's investigation was the subject of an earlier complaint to my office. I concluded that section 61 of the Local Government Act confers an entitlement for councillors to access 'any relevant council document', and this can include documents that have been treated by the council as confidential.
69. At the council meeting on 9 November 2011 the mayor made a personal statement refuting the allegation made against her, that she encouraged and coerced councillors to pursue Mr Pengilly for alleged comments he made at a previous council meeting.
70. The allegations of breach of confidence arising from the incident reports are shown in the table below:

Date	Subject	Alleged breach
January 2011	Cr Chirgwin and another person	Informed and signed a statutory declaration incorrectly informing Mr Pengilly that he was being investigated by the council
October 2011	Crs Chirgwin, Liu, Walkom	Leaking confidential information about the council's appointment of an investigator to <i>The Islander</i>
27 October 2011	Crs Chirgwin, Liu, Walkom	Making allegations against the mayor to the local press alleging that she pressured staff into pursuing Mr Pengilly for alleged bullying

*Incorrectly informing Mr Pengilly that he was being investigated*

71. I noted above that in a letter dated 27 October 2011 Mr Warner wrote to the mayor confirming instructions for his report.
72. In my view, there is a clear difference between investigating the occupational health and safety incidents (which the council was obliged to do) and investigating a Member of Parliament going about their lawful business (which, as Mr Pengilly and the mayor correctly state, the council is powerless to do). In my interviews with Crs Chirgwin, Liu

and Walkom I found no evidence of motive as to why Cr Chirgwin would sign a statutory declaration attesting to something that does not appear to be the case, other than the fact that Cr Chirgwin still believes it to be true.

73. All councillors were aware of the confidential nature of Ms Noon's allegation in December 2010, the appointment of Mr Warner in early January 2011, and the receipt of Mr Warner's report on 8 March 2011. Each of these matters was dealt with in confidence, and (with one exception) at special meetings.<sup>24</sup> All elected members were therefore aware that the issue was intended to remain in confidence. However, I note that pursuant to section 91(9) of the Act the issue is no longer confidential.<sup>25</sup>
74. As I have noted above, Cr Chirgwin has resigned from her position as an elected member. I see insufficient public interest to warrant making any findings in relation to her conduct in this regard. The other statutory declaration was made by someone who is not an elected member but was interviewed by Mr Warner. Therefore no question of breach of confidence arises.

*Providing confidential information about the council's appointment of an investigator to The Islander, and making public accusations against the mayor*

75. The letter sent to the editor of *The Islander* and to the Kipolis website, which accused the mayor of pressuring staff to make allegations of bullying by Mr Pengilly, also revealed to the public that an external investigation had been undertaken. This was, at that time, the subject of in-confidence communication within the council and as such should have been kept confidential. Given the content of the matter, I consider that it was reasonable for the council to be dealing with it in confidence under section 90 of the Act.
76. I note the council has a media policy (**the policy**). The policy states:

The Mayor is the official spokesperson on all matters of policy and decision-making enquiries, including civic occasions, community events and major Council announcements

The Chief Executive Officer is the official spokesperson on all matters concerning Council's operations including staff, administrative, election and industrial matters. Additionally, the Chief Executive Officer may act as the Council spokesperson in regard to technical or legislative matters affecting policy.

At the Chief Executive Officer's discretion, approving media releases or responding to enquiries on routine operational issues may be delegated to Managers. Furthermore, the Chief Executive Officer may delegate the authority for other officers to communicate with the media on specific issues.

Management shall provide information to the media which is freely available to any member of the public. This information shall be provided in order to improve or clarify the media's understanding of the issues.

Any staff member authorised to speak to the media will not make any personal comments on any issues.<sup>26</sup>

<sup>24</sup> The relevant agenda items were dealt with in confidence at the council meetings held on 7 January 2011 (special), 9 February 2011, 8 March 2011 (special) and 29 March 2011 (special). They were made the subject of confidentiality orders under section 90 of the Local Government Act, which remain in effect today.

<sup>25</sup> I can see no reference to where the council has specified the duration of the confidentiality order, or the circumstances in which the order will cease to apply. The original order on 7 January 2011 does not specify, nor do any council minutes in the 12 months following the order, nor does the matter seem to have been reviewed. On this basis I determine that the issue is no longer confidential pursuant to s91(9).

<sup>26</sup> I note that at the foot of the letters it refers 'Our full media release is on [www.kangaroo-island.net](http://www.kangaroo-island.net)'. I note also that the policy deals with the administrative procedure of staff speaking with the media, and is silent on whether councillors can issue their own media releases.

77. Whilst they were not overtly identified as such, I consider that the comments made to *The Islander* and the Kipolis website in the letter signed by Crs Liu, Chirgwin and Walkom were intended as personal comments. They did not reflect the views of the council, and they dealt with matters which had been the subject of in-confidence council deliberations. It follows that the publication of the letter may represent a breach of the elected members' confidentiality obligations.
78. In making this observation, I am conscious of section 59(1)(b) of the Act and the LGA guide, which both emphasize the need for communication between councillors and the general public. It is important that councillors should be able to communicate effectively with their constituents, but this entitlement and obligation does not extend to matters which are dealt with in confidence by the council. In my view any public comment by councillors needs to reflect their obligations under the Local Government Act, the code of conduct and their fiduciary duty to the council.
79. Further, the precise allegations published on Kipolis were not brought to the mayor for a response prior to publication, which means she was not given the opportunity to respond to the allegations before the media became involved. I consider that this action may have breached other obligations in the code of conduct, which require members to 'establish a working relationship with fellow members that recognises and respects the diversity of opinion and achieves the best possible outcomes for the community'.<sup>27</sup>
80. I appreciate the counter argument put by Crs Chirgwin, Liu and Walkom that it was only after raising this issue in the council forum - through questions on notice, informal gatherings and in writing - that they felt it necessary to utilise a media forum. In my view it was not appropriate to do this whilst the item remained subject to a confidentiality order, and without first providing the mayor with an opportunity to comment on the Letter to the Editor or giving her notice of its forthcoming publication.
81. My final view is that the publication of the letter by Crs Liu and Walkom may have breached section 62(2) of the Local Government Act, their fiduciary duty to the council and the following provisions of the code of conduct:
- 2.1.4 - behave in a way that maintains and enhances the image of council and does not reflect adversely on council
  - 2.5.1 - conduct relationships with courtesy, respect and mutual trust
  - 2.5.2 - seek to establish mature and constructive working relationships
  - 2.6.3 - recognise that in their relationship with the media, unless otherwise empowered by the council, the member is putting forward personal views and not those of the council
  - 2.6.4 - ensure that personal comments are clearly identified
  - 2.6.5 - ensure that information given in relation to the council or council decisions is accurate and is not a misuse of information
  - 2.6.6 - respect and maintain confidentiality.
82. I foreshadow reporting this conduct to the principal officer in accordance with my obligation under section 18(5) of the Ombudsman Act.
83. Because Cr Chirgwin is no longer an elected member I see insufficient public interest in making any findings in relation to her conduct in this regard.

*Dam on the property of Mr James Wandell*

84. Mr James Wandell is the owner of a property on the island. Mr Wandell built a dam on his property allegedly without appropriate development approvals. At the council

<sup>27</sup> Section 2.5 of the code of conduct.

meeting in January 2011, a confidential item for discussion was the tabling of a report which was to assess the legal action, if any, to be taken against Mr Wandell. This report was circulated to council members via a confidential envelope, and mention of it did not appear on the open agenda.

85. It is alleged that at the council meeting Crs Chirgwin and Walkom freely discussed having visited Mr Wandell prior to the council meeting. The question is whether this conduct amounted to a breach of their confidentiality obligations.
86. In my interviews under oath with them, both councillors admitted having visited Mr Wandell together to inspect the dam. Both informed me that they did not speak to Mr Wandell about the council's confidential discussions. Instead the purpose of the visit was to educate themselves as councillors, as is their right, on a matter prior to a decision being made at the council meeting. I accept their evidence about this.
87. I formed the view from my discussions with Crs Chirgwin and Walkom that confidentiality was not breached, because they did not divulge the council's in-confidence discussions with Mr Wandell. However, I can appreciate the perception that a visit to Mr Wandell just prior to the council determining whether to take legal action against him could be seen as an error of judgement on the part of Crs Chirgwin and Walkom.
88. On balance my final view is that no administrative error has occurred. I am not persuaded to the requisite degree that Mr Wandell was informed of the details of council's deliberations.

*Klpolis - council correspondence (not subject to a confidentiality order) being provided to the media*

89. The Klpolis website is operated by islander Dr Gabriel Bittar, and describes itself as 'A community site for informative and transparent politics on Kangaroo Island'. The website has been frequently used by Crs Chirgwin, Liu and Walkom. The councillors also utilise *The Islander* newspaper in this way.
90. It is incumbent on a councillor who receives information which has been dealt with by the council in a confidential session to treat it as such. In practical terms, this means not sharing it with anyone outside the elected member body and the CEO.
91. In addition to alleged breaches of the obligation to maintain confidentiality for this information, it is alleged that some councillors have inappropriately shared other information, which has not been the subject of a confidentiality order, but which others in the council have expected them to treat as confidential. I have been given some examples of such information. These include but are not limited to:
  - questions on notice posted by Cr Liu on 6 March 2012, 27 March 2012 and 4 May 2012. These posts include responses to the questions, and answers which are unattributed
  - questions on notice posted by Cr Walkom on 26 October 2011, 7 March 2012 and 1 May 2012. These posts include the questions only, and no answers
  - an email chain posted by Cr Chirgwin between her and a LGA investigator (November - December 2011).
92. Elected members plainly need to communicate with their constituents, as it is part of their role as elected representatives. It is appropriate to do this on occasion by using information sharing websites, or newspapers. However it has been alleged to my investigation that:

- items of a confidential nature should not be communicated to anyone outside the elected member body. This suggests a 'misuse and misunderstanding of the meaning of a confidence'
- email questions are posted on the website and the answers are not. This creates an unfair perception in the minds of readers that issues are not being dealt with by council.

93. The LGA guide states:

Council Members have the right to be heard as individuals. This is different from making official comment on behalf of the Council. Sometimes a Council Member may have different views from those of other Council Members and are free to express their views. However, in these circumstances, Council Members should make it clear that it is their personal view and not necessarily the views of the Council, and be careful not to engage in personal attacks on other Council Members, Council staff or any other person.<sup>28</sup>

94. My investigation has been advised of particular occasions when matters have been posted on KIpolis, without reference to the original author (another elected member or council staff member). This has extended to emails, and other documents such as answers to questions. In my view it is a matter of common courtesy that documents which are not intended for broader circulation should not be published without the consent of their author, or without providing their author with an opportunity to respond.
95. However the examples that have been provided to me are questions on notice and other matters that councillors have wanted to communicate with other community members. This information is available to members of the public through the council's website, as it is reproduced in the agendas and minutes of council meetings. Members of the public can also make FOI requests for council information.
96. I therefore consider that the publication of various council matters on the KIpolis website by Crs Liu and Walkom does not amount to a breach of confidentiality, because the items were not the subject of confidentiality orders. Further, in my view the Local Government Act intends to promote transparency and encourage communication by elected members to their constituents.

## Summary of Opinions

### *Informal gatherings conducted by the council*

My final view is that the informal gatherings held by the council were not unlawful, unreasonable or wrong within the meaning of section 25(1) of the *Ombudsman Act 1972*.

However, I would comment that council clarify the position in respect of formal and informal meetings, either in its 'Code of Practice - Access to Council Meetings and Documents' policy or another place.

Further, my final view is that, in view of the changes made by the council to the way in which these informal gatherings are held, further investigation is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

### *Informal gathering conducted by newly-elected members*

My final view is that the informal gathering held at Cr Liu's house where new councillors nominated Cr Clements for the position of deputy mayor was not conducted contrary to law

<sup>28</sup> LGA Guide, page 34.

within the meaning of section 25(1)(a) of the Ombudsman Act, because there was no quorum present at the relevant time.

*Publication of information about the OHS incident reports*

I consider that the publication of a letter dealing with matters subject to a confidentiality order to *The Islander* and on the KIPolis website by Crs Liu and Walkom may have breached section 62(2) of the Local Government Act, their fiduciary duty to the council and the following provisions of the code of conduct:

- 2.1.1 - understand and give proper consideration to legal requirements
- 2.6.1 - ensure that information obtained as a result of their role is not to be used for any purpose other than council business
- 2.6.5 - ensure that information given in relation to the council or council decisions is accurate and is not a misuse of information
- 2.6.6 - respect and maintain confidentiality.

I foreshadow reporting this conduct to the principal officer in accordance with my obligation under section 18(5) of the Ombudsman Act.

*The dam on Mr James Wandell's property*

My final view is that Cr Walkom did not breach confidentiality because he did not divulge the council's in confidence deliberations to Mr Wandell.

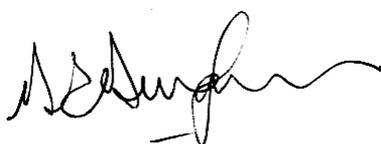
*Publication of council information on the Kipolis website*

My final view is that the publication of various matters on the Kipolis website by Crs Liu and Walkom was not unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

*Ombudsman comment*

I make the following additional comments:

1. That Crs Liu and Walkom should sign the council's Code of Conduct, in the understanding that their role as elected members under section 62 and 63 of the Act requires them to adhere to the same standard in any event.
2. The council should consider establishing its own electronic noticeboard for elected members to independently post information such as questions on notice.



Richard Bingham  
SA OMBUDSMAN

4 October 2012