

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	The City of Onkaparinga
Ombudsman reference	2012/06102
Date complaint received	8 August 2012
Issues	Whether the council failed to notify the Environment Protection Authority about an incident at the Sellicks Beach community waste water managing scheme (the Sellicks Beach CWMS) in accordance with section 83 of the <i>Environment Protection Act 1993</i> .

Jurisdiction

The original complaints attracted the protections of the *Whistleblowers Protection Act 1993*.

In order to protect the identity of the complainants, I commenced an 'own initiative' investigation under section 13(2) of the *Ombudsman Act 1972*.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- clarifying the response with the council
- seeking more particulars from the complainant
- considering the *Environment Protection Act 1993*
- meeting with council officers on several occasions
- considering information obtained in my previous investigation into the council's treatment of a complainant in its dealings with her over the Oceanview Waste Water Treatment Plant (the **Oceanview WWTP**)¹
- preparing a provisional report and sending it to the council and the complainants for comment
- considering the council's response
- considering the response from the complainant
- meeting with the complainant to take oral submissions
- preparing this (final) report.

¹ Ombudsman investigation, reference 2013/04335.

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

Responses to my provisional report

In response to my provisional report, one complainant provided me with detailed submissions about the council's management of the waste water treatment facilities, both the Sellicks Beach community waste water managing scheme (**the Sellicks Beach CWMS**) and the Oceanview waste water treatment plant (**the Oceanview WWTP**). The complainant's concerns were amongst others that:

- both the Sellicks Beach CWMS and the Oceanview WWTP are not operating in compliance with the relevant conditions set by the Environment Protection Authority (**the EPA**) and the Department for Health and Aging (**the DHA**)
- the council has demonstrated a culture of secrecy and provided misleading information to the community about the Sellicks Beach CWMS and the Oceanview WWTP
- this culture has resulted in a loss of community confidence in the council
- the council provided incorrect information to the Oceanview community corporation about its responsibilities in relation to the Oceanview WWTP
- the disclosure to the EPA about the incident at the Sellicks Beach CWMS was manipulated to give the impression that it was a recent incident.

I note that many of the complainant's concerns related to the Oceanview WWTP. These issues are not the subject of this investigation, and are therefore not considered in this report.

The council responded by letter dated 15 August 2013 and wrote *inter alia*:

I note the finding of your investigation; that council acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*. The EPA, in their ongoing negotiations with council, have written to council to advise that they consider council's responses to this incident to be reasonable and practical in the circumstances and although they have noted that the notification should have occurred earlier they are not pursuing the matter of notification any further.

...

Council have more recently provided an updated FAQ to the local residents and we are in the process of implementing a dedicated web page to assist with timely information distribution to the community.

...

Council undertakes to remedy this error in the manner described in your report.

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.

While I have limited the scope of this investigation to the issue outlined above, in recognition of what I consider to be the complainant's legitimate concerns, I will provide a copy of this report to the Chief Executives of the Environment Protection Authority and the Department for Health and Aging. I will ask those agencies to ensure that they take the necessary action to ensure that the approval conditions for the operation of the Sellicks Beach CWMS and the Oceanview WWTP respectively are enforced appropriately.

I have maintained the views expressed in my provisional report in this (my final) report.

Background

1. Over the past 10 months my office has been approached by several parties with concerns over the council's management of the Sellicks Beach CWMS.
2. The CWMS was acquired by the council in 2005. The CWMS receives wastewater from domestic homes where a Septic Tank Effluent Disposal plant treats then discharges wastewater into a sub-surface drip irrigation system beneath a council owned reserve, known as a disposal path.
3. In May 2011 an incident occurred whereby the sub-surface drip irrigation system was damaged. According to one account, in early May 2011, a council vehicle became bogged while mowing the disposal path and damaged the irrigation system. As I understand it, this account was not confirmed by the council's Field Operations Centre officers when an independent contractor found no evidence of damage to the irrigation system that could be attributed to the council vehicle. In any event, the result was pooling water and odours emanating from the CWMS's disposal path (**the incident**).
4. The community's concern stemmed from this incident and the lack of information coming from the council. This in turn led to complaints being brought to my office in August 2012 about the council's management of the CWMS.
5. In a letter to the council dated 23 August 2012, I wrote:

I have received an anonymous complaint about the City of Onkaparinga (**the council**).

The complaint alleges that the council is inadequately managing the waste water treatment plant that services properties in Sellicks Beach, and raises concerns about the management of pollution coming from the treatment plant. It is my understanding that the treatment plant referred to in the complaint is the Sellicks Beach Waste Water Treatment Plant (**the WWTP**) that treats effluent from the Prodec and the Ocean View (previously Bluewater) housing developments.

...

To assist me in my investigation, please provide my office with a report addressing the concerns about the management of the WWTP and the alleged pollution by Friday 14 September 2012. Please include the following information:

- the history and background of the Prodec estate STED scheme
- the history and background of the Ocean View estate wastewater system
- the history of the WWTP, including ownership and operation
- any reports or documentation relating to the WWTP and any safety / pollution issues
- any other relevant documentation or information.

In addition, the complaint alleges that the council has conducted an inquiry into the way it has managed the pollution coming from the plant that resulted in a report which found 'unlawful practices.' If such a report exists please provide this to me.

6. On 2 October 2012, I met with Mr Mark Dowd, Chief Executive of the council (**the CE**) and the council's Director of People and Governance, to discuss the incident at the CWMS. During this meeting, the CE indicated that he expected to receive a full report on the matter by the end of October 2012, and I agreed to defer my investigation pending that report.
7. On 23 November 2012, having not received the report from the council, I requested a copy by 7 December 2012.
8. On 7 December 2012 the council provided me with a copy the 'Sellicks Beach Wastewater Treatment' report undertaken by the council's Manager Governance (**the governance report**). The council also provided my office with a response to my notice of preliminary investigation, outlining its views on the recommendations in the governance report.
9. In an email to the CE dated 17 December 2012, I wrote:

I have noted the recommendations outlined in the report, but what I wanted to speak to you about is what if anything has been communicated to residents of the area about the report, its findings, and the council's intentions with regard to those findings.

In considering whether to continue my preliminary investigation, or to defer it pending the council's foreshadowed action, an important consideration for me is the level of public confidence in the council's actions. In my view, this will depend largely on what is communicated to the residents about the matter.

I would appreciate it if you could let me know what the council intends in this respect.
10. By way of response, the CE informed me that:

Nothing has been proposed to be communicated about the report to the community as a result of the governance report. We could certainly work with our media team to draft a press release if you believe it appropriate.
11. In a letter to the CE dated 20 December 2012, I wrote:

I have noted the contents of the Governance Report dated 31 October 2012, and your intention to respond to the recommendations contained within it. I note that you propose to provide me with an interim report on progress within 3 months.
12. The progress of my investigation has occurred over a relatively long period of time. I have done this in order to give the council a reasonable amount of time to deal with the governance report's recommendations before reaching any conclusions in my investigation.
13. I did, however express my view to the council that based on the complaints to my office, there is obviously public interest/scepticism about how the issues with the CWMS are being managed. I noted that in my view, the council would be well advised to deal with the community's concerns openly.
12. On 5 April 2013, the council provided me with a copy of a progress report on the implementation of remedial actions following the governance report (**the progress report**).
13. On 9 April 2013, the council provided me with a copy of the FAQ sheet it provided to residents regarding the incident at the CWMS.

14. The governance report made 17 recommendations to improve the council's administrative processes in dealing with issues like those raised by the incident at the CWMS.
15. Of the 17 recommendations, the council has implemented 14, either as described by the governance report or in an alternate way. In my view, this is a positive step.
16. It appears that while the council has had some issues with respect to managing the CWMS in the past, it is now working more effectively and actively addressing the concerns.
17. In light of this, I have decided to focus my investigation on the council's obligations under the *Environment Protection Act 1993* in relation to the incident at the CWMS.
18. In my view, the information provided in the governance report is comprehensive, and sufficient for the purposes of my investigation.

Relevant legislation and guidelines

19. Section 83 of the Environment Protection Act imposes an obligation on the council to notify the Environment Protection Authority (**the EPA**) if serious or material environmental harm from pollution is caused or threatened in the course of an activity undertaken by a person:

83—Notification where serious or material environmental harm caused or threatened

- (1) If serious or material environmental harm from pollution is caused or threatened in the course of an activity undertaken by a person, the person must, as soon as reasonably practicable after becoming aware of the harm or threatened harm, notify the Authority of the harm or threatened harm, its nature, the circumstances in which it occurred and the action taken to deal with it.
Penalty:
If the offender is a body corporate—\$250 000.
If the offender is a natural person—\$150 000.
- (2) For the purposes of subsection (1)—
 - (a) a person is not required to notify the Authority of harm or threatened harm if the person has reason to believe that the harm or threatened harm has already come to the notice of the Authority or any officer engaged in the administration or enforcement of this Act; but
 - (b) a person is required to notify the Authority of harm or threatened harm despite the fact that to do so might incriminate the person or make the person liable to a penalty.
- (3) Any notification given by a person in compliance with this section is not admissible in evidence against the person in proceedings for an offence or for the imposition of a penalty (other than proceedings in respect of the making of a false or misleading statement).

20. Section 3 of the Act includes the following definitions:

the Authority means the Environment Protection Authority established under Division 1 of Part 3;

pollutant means—

- (a) any solid, liquid or gas (or combination thereof) including waste, smoke, dust, fumes and odour; or
- (b) noise; or
- (c) heat; or

- (d) anything declared by regulation (after consultation under section 5A) or by an environment protection policy to be a pollutant, but does not include anything declared by regulation or by an environment protection policy not to be a pollutant;

pollute means—

- (a) discharge, emit, deposit or disturb pollutants; or
 (b) cause or fail to prevent the discharge, emission, depositing, disturbance or escape of pollutants, and ***pollution*** has a corresponding meaning;

21. Section 5 of the Act states:

5—Environmental harm

- (1) For the purposes of this Act, environmental harm is any harm, or potential harm, to the environment (of whatever degree or duration) and includes—
- (a) an environmental nuisance; and
 (b) anything declared by regulation (after consultation under section 5A) or by an environment protection policy to be environmental harm.
- (2) For the purposes of this Act, potential harm includes risk of harm and future harm.
- (3) For the purposes of this Act, the following provisions are to be applied in determining whether environmental harm is material environmental harm or serious environmental harm:
- (a) environmental harm is to be treated as material environmental harm if—
- (i) it consists of an environmental nuisance of a high impact or on a wide scale; or
 (ii) it involves actual or potential harm to the health or safety of human beings that is not trivial, or other actual or potential environmental harm (not being merely an environmental nuisance) that is not trivial; or
 (iii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$5 000;
- (b) environmental harm is to be treated as serious environmental harm if—
- (i) it involves actual or potential harm to the health or safety of human beings that is of a high impact or on a wide scale, or other actual or potential environmental harm (not being merely an environmental nuisance) that is of a high impact or on a wide scale; or
 (ii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$50 000.
- (4) For the purposes of subsection (3), loss includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent or mitigate the environmental harm and to make good resulting environmental damage.
- (5) For the purposes of this Act, environmental harm is caused by pollution—
- (a) whether the harm is a direct or indirect result of the pollution; and
 (b) whether the harm results from the pollution alone or from the combined effects of the pollution and other factors.

22. Further, according to the EPA's website:

Reporting requirements

In accordance with Section 83 of the EP Act, in the event of an incident that has caused or threatened material or serious environmental harm a licensee must, as soon as reasonably practicable after becoming aware of the harm or threatened harm and in any event within 24 hours, notify the EPA of the incident.

Failure to notify the EPA of such an occurrence is an offence and penalties apply.

Environmental incident notifications must be made using the Licensee EPA hotline: 1800 100 833.

The initial notification must include the following details:

- location of the incident
- time and date of the incident
- nature of the incident
- name of the licensee
- name and telephone number of an appropriate contact person.

An officer of the EPA will return your call to gather further information and where necessary, arrange attendance at the incident.

Following the initial notification, the EPA may also require a written report detailing:

- the circumstances leading to the incident
- actions undertaken to remedy the situation in the short term
- longer term actions that will be taken to prevent a recurrence of the incident.

When requested, this report should be submitted to the EPA within five working days of the incident occurring using the general fax number: (08) 8124 4674. Reports should be made to the attention of the Manager, Emergency Response Team.

Timeline for reporting the incident

23. According to the governance report, the incident was first brought to the council's attention on 9 May 2011, by email from Trility Pty Ltd (**Trility**), the contractors engaged to manage the CWMS.
24. As I understand it, the council, rather than Trility, held the EPA licence for the CWMS and was therefore responsible for notifying the EPA of the incident under section 83 of the Environment Protection Act.
25. According to the evidence contained in the governance report, since 9 May 2011, the incident (or at least the damage to the sub-surface drip irrigation system) was discussed by the council's staff on:
 - 9 August 2011
 - 10 August 2011
 - 21 August 2011
 - 26 August 2011
 - 23 November 2011
 - 23 November 2011
 - 12 December 2011
 - 2 March 2012
 - 5 March 2012
 - 11 April 2012
 - 19 April 2012

26. Further, it appears that on 22 June 2012, the council's Manager Public Safety formally requested that the Manager, Commercial Property and Open Space notify the EPA of the incident by close of business that day.
27. On 28 June, 5 July, 6 July and 19 July 2012, the Manager Public Safety again raised the issue of notifying the EPA with relevant council staff.
28. On 20 July 2012, in response to a request for independent legal advice, the council was advised that it has a statutory obligation to report the incident to the EPA, and failure to do so could amount to a criminal offence.
29. On 23 July 2012, the Manager, Commercial Property and Open Space wrote the following email to the EPA's Senior Environment Protection Officer:

I refer to our conversation of notification in accordance with our licence conditions (Licence EPA 15278) and the Environment Protection Act relating to activities at our wastewater treatment plant (Prodec WWTP) disposal path at Sellicks Beach.

The WWTP is currently operating in accordance with the EPA licence with test results from our managing contractor, TRILITY showing that the discharge of the treated effluent leaving the plant is within the approved parameters. This notification is in relation to the disposal path only.

The WWTP is currently supported by a subsurface irrigation system located on the adjacent reserve at Allotment 1003 Maritime Avenue, Sellicks Beach (the Council Reserve). In April 2012, the Council Reserve was further supported with an additional disposal path via a subsurface irrigation system at the nearby Bluewater (Ocean View) estate on Sellicks Beach Road, Sellicks Beach (Bluewater Reserve).

It was a condition of the Bluewater development application, that the community title development receive treated wastewater back onto its reserves as a consequence of the treatment process that would take place within the Prodec WWTP, in effect the Bluewater development would 'take back' the same volume of treated effluent as was delivered to the Prodec WWTP for processing. Whilst the Bluewater development was approved some years ago it did not commence the taking of treated wastewater for subsurface irrigation until this year.

The consequence of this was that the Council Reserve took the whole disposal path of all the treated wastewater detrimentally affecting it and in turn waterlogging the soil. As you are aware, the Council has been actively assisting the Bluewater Community Corporation to understand its development approval obligations. No enforcement action was taken against the Bluewater Community Corporation for its non compliance with its development approval conditions during the period of non compliance as a way of supporting them in rectification of the issues.

In June 2012, the Bluewater Community Corporation commenced taking the majority of treated wastewater emanating from the Prodec WWTP. The plant currently produces approximately 45,000 litres of treated wastewater per day over 12 cycles. Of these cycles 9-10 of them are transferred to the Bluewater disposal path, with the residual treated wastewater being deposited onto the Council reserve.

The Council reserve has become waterlogged and has experienced difficulties in continuing to receive the treated wastewater sub-surfacely and as a consequence water now pools on the surface of the reserve.

To agitate this problem further, the Council's maintenance vehicles became bogged in the waterlogged soil when attempting to mow the reserve causing pipe breakages to the subsurface irrigation system. The breakages in the subsurface irrigation system pipes were/are fixed as they became apparent on visual inspection.

To further agitate the issues at the reserve, it has been discovered that an SA Water meter on the reserve (shown on attached map) ruptured after the meter and has been contributing a significant amount of potable water onto the reserve for a period of up to 18 months. This was discovered and fixed on 23 May 2012.

The Council reserve has been fully fenced with security fencing to restrict public access and any potential for interaction of persons with the pooled treated wastewater.

The pooled treated wastewater, together with the overland stormwater flows and the SA Water leak have, together, been entering into the development's stormwater collection system. This system comprises two stormwater detention and sedimentation ponds which then flow into a natural floodplain system.

The Council has been undertaking testing of the water at several points along the flowpath. Traces of E.coli and enterococci have been found above the acceptable limits in these water samples. As such, we have been actively working with the Department of Health to address and remediate the issues of the test results.

This week, tanks will be installed at the Prodec WWTP to capture the 2-3 pumping cycles that have been (to date) diverted to the Council reserve so that no treated wastewater will be deposited into the Council Reserve subsurface irrigation system. This tank will then be pumped out via waste trucks and carted to our Willunga WWTP at a significant cost.

In addition, we are in the process of designing and costing a further subsurface irrigation system to be installed on the adjacent reserve on the opposite side of the plant to the existing Council reserve (see land outlined in red on attached plan). We envisage that this reserve will be 'on line' within the next two months.

We then intend on sharing the disposal of treated wastewater between the Bluewater development and the Proposed Council Reserve (outlined in red) and allow the existing Council reserve (outlined in yellow) to dry out to assess its ongoing future viability, subject to Department of Health approvals.

... I hope that this covers a summary of our discussion today and if you have any questions please do not hesitate to contact me on 8384 0646.

30. I note that the disclosure to the EPA does not indicate that the council first became aware of the issue as early as May 2011. In the complainant's view, the council's disclosure to the EPA was misleading in this respect. While I have not made a finding on this point, I will provide the EPA with a copy of this report for its consideration.
31. By email to the council dated 24 July 2012, the Senior Environment Protection Officer wrote:

Thankyou for providing the notification and background information. The EPA is satisfied that the Council is currently taking all reasonable and practical measures to ensure wastewater from the Prodec wastewater treatment plant will be disposed of sustainably and in accordance with the Environment Protection (Water Quality) Policy. As discussed yesterday, the EPA would like to visit the treatment plant, overflow area and irrigation sites. The purpose of the visit would be to view operational processes and obtain up to date information on treatment (and irrigation) and provide any technical/regulatory assistance to Council (if required). Could you please let me know if you (and/or a colleague) will be available on Thursday 9 August at 10 am.

Whether the council failed to notify the Environment Protection Authority about an incident at the Sellicks Beach community waste water managing scheme (the Sellicks Beach CWMS) in accordance with section 83 of the *Environment Protection Act 1993*.

32. In my view, it is reasonable to conclude that the incident at the CWMS caused or threatened serious or material environmental harm from pollution, within the meaning of the Environment Protection Act.
33. I base this view on the evidence contained in the governance report, including the facts of the incident, the legal advice obtained by the council and that the EPA appears to have accepted the council's email dated 23 July 2013 as notice of an incident under section 83 of the Environment Protection Act.

34. It appears that there were some 15 months between the council first becoming aware of the incident at the CWMS and its disclosure to the EPA under section 83 of the Environment Protection Act.
35. In my view, the fact that the EPA accepted the measures proposed by the council to rectify the problem does not absolve the council of its obligation under section 83 to notify the EPA 'as soon as reasonably practicable'.
36. I consider that the council failed to notify the EPA about the incident at the Sellicks Beach community waste water managing scheme in accordance with section 83 of the *Environment Protection Act 1993*.

Opinion

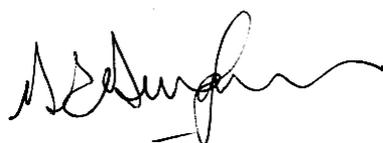
37. In light of the above, my view is that the council acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Recommendation

38. I am satisfied that the council has taken steps to address the concerns raised in the governance report, as evidenced by the progress report provided to my office on 7 December 2013. Despite this, the council's management of the waste water facilities at Sellicks Beach has resulted, at least to some extent, in a loss of public confidence in the council.
39. In light of this, and to remedy the error outlined above, I recommend under section 25(2) of the Ombudsman Act that the council consider:
 1. reminding relevant staff of the council's obligations under the Environmental Protection Act
 2. regularly updating the community on the state of the Sellicks Beach CWMS. (This could involve publishing on its website the measures taken by the council to address the concerns raised in the governance report, similar to the progress report provided to my office)
 3. providing my office with a detailed update on the management of the Sellicks Beach CWMS within four months of the date of my final report.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 30 January 2014 on what steps have been taken to give effect to my recommendations above; and, if no such steps have been taken, the reason(s) for the inaction.



Richard Bingham
SA OMBUDSMAN

30 September 2013