

Report - City of Playford
Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	City of Playford
Ombudsman reference	2013/06992
Date complaint received	17 July 2013
Issues	<ol style="list-style-type: none">1. Whether the council followed its procurement policy and guidelines when it engaged Rockpools2. Whether the council followed due process in the recruitment of its Acting Corporate Services Manager3. Whether council members have breached the <i>State Records Act 1997</i> and/or the council's records management policy.

Jurisdiction

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

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

The complainant made the following allegations:

1. the council has failed to follow due process around the recruitment of staff, namely the recruitment of a Human Resources Consultant and a Corporate Services Manager
2. the council has engaged Rockpools without following its procurement policy
3. council members have breached the *State Records Act 1997* by failing to keep their emails on the council server
4. staff members have been given pay rises despite not meeting the required key performance indicators (KPIs)
5. the council is spending ratepayers funds setting up a subsidiary for the provision of enterprise services, the 'Enterprises Business Program', without the proper delegations
6. employees who have complained about the conduct of the council have been made redundant
7. the review process for the chief executive officer (**the CEO**) is unreasonable
8. council vehicles are improperly used by council staff
9. the council did not follow its procurement policy in the fit-out of its office extension
10. there was a conflict of interest in engaging Rockpools.

I determined not to investigate allegations 6, 7, 8, 9 and 10 as they are either industrial issues or I did not have enough evidence to warrant doing so.

I sought information and a response from the council, by letter dated 2 August 2013, in relation to allegations 1, 2, 3, 4, 5 in order to determine if these allegations warranted further investigation. I received a response and documents relating to these allegations from the council by letter dated 5 September 2013.

I considered the council's response to allegation 1 and was satisfied that it had followed due process in relation to the recruitment of the Human Resources Consultant. However, I determined that it was necessary to investigate whether the council had followed due process in the recruitment of the Acting Corporate Services Manager.

Under section 13(3) of the Ombudsman Act, I must not investigate a matter where a complainant has an alternative remedy as described in that section. I note that under part 29 of the council's Enterprise Agreement¹ (**the EA**), the parties to the agreement agreed to use the grievance and dispute resolution procedures set out in the EA. However, in my view section 13(3) does not apply in the case of an own initiative investigation.

I considered the council's responses to allegations 2 and 3 and determined that further investigation of these allegations was warranted.

I determined not to investigate allegation 4, in which the complainant alleged that staff members have been given pay rises despite not meeting the required KPIs. Under the EA council staff are entitled to a maximum 4% increase if all performance targets are achieved. The performance targets are:

- achievement of an efficiency and effectiveness gain of 1% of operating expenditure in 2012/2013;
- identification of efficiency and effectiveness gain of 2% of operating expenditure to be achieved in 2013/2013; and
- to maintain the council's customer satisfaction rating for 2012/2013.

The council advised me that no managers have yet received any salary increases in accordance with this requirement, as the performance targets have only just been achieved. I have no evidence to suggest that any of the managers have not reached the performance targets and should not be entitled to a pay rise in accordance with the EA. As such, I determined not to investigate this allegation further.

In its response the council denied that it is spending ratepayers' funds to set up a subsidiary for the provision of enterprise services, the 'Enterprises Business Program', without the proper delegation. Section 44 of the *Local Government Act 1999* provides that a council must not delegate power to establish a subsidiary. The council has advised me that it is aware of this provision. It advised me that it:

...has allocated funds in the efficiencies and effectiveness program but not in relation to establishing a subsidiary for the provision of enterprise services. For this reason no information has been provided to elected members because it is too premature at this point in time. Whilst the establishment of a Council subsidiary may be contemplated in the future to create two business units, it is certainly not the case at this point in time.

As such, I determined not to investigate allegation 5.

¹ City of Playford Enterprise Agreement 2012, File No. 03156/2012B.

I wrote to the council again by letter dated 20 September 2013 and requested further information and responses to questions in relation to allegations 1, 2 and 3. I received the council's response, along with further documents, by letter dated 10 December 2013.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- seeking more particulars from the complainant
- seeking a further response from the council
- considering the Local Government Act
- considering the State Records Act
- considering the *Fair Work Act 1994*
- considering the council's 'Procurement Policy'² (**the procurement policy**)
- considering the council's 'Guidelines to Procurement'³ (**the procurement guidelines**)
- considering the council's 'Records Management Policy'⁴ (**the records management policy**)
- considering the council's 'Recruitment and Selection Policy'⁵ (**the recruitment policy**)
- considering the council's 'Recruitment and Selection Guidelines'⁶ (**the recruitment guidelines**)
- considering the council's EA
- preparing a provisional report
- providing the council and the whistleblower with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.⁷ 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 ...⁸

² City of Playford, Procurement Policy, adopted 22 June 2009.

³ City of Playford, Guidelines to Procurement.

⁴ City of Playford, Records Management Policy, adopted April 2007.

⁵ City of Playford, Recruitment and Selection Policy, adopted August 2006.

⁶ City of Playford, Recruitment and Selection Guidelines.

⁷ 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.

⁸ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Response to my provisional report

The whistleblower did not respond to my provisional report.

The council provided a response to my provisional report by letter dated 4 March 2014.

In response to issue 1, the council submitted, in summary, that:

- the 'Enterprise Transformation Program' and the 'Corporate Services Commercialisation' are one and the same
- it disagrees with my view that it did not take steps to ensure that the extension of the phase 1 Transformation Program, at an additional cost of \$68,000, complied with the procurement policy. It says that it had already applied the provisions of section 49(2)(c) of the Local Government Act and completed an exemption form to give reasons why it had engaged Rockpools for phase 1 without undertaking a tender process. Further, there was no requirement for it to undertake this process again when the additional cost related to the same work. It submits that there is no requirement that it request an exemption to extend a program or to tender for the completion of a program that has already commenced and is in progress. I agree with the council
- it refutes the allegation that it had already started a tender process for appointing someone to do the Control Work plan, and selected a company, before deciding to engage Rockpools
- it rejects the allegation that Rockpools have been engaged to do work that could have been done by council employees. The council submits that this would have cost an additional \$830k to ratepayers to fund the program had it been resourced properly. Further, the council submits that, in my provisional report, I am suggesting that the council should take action that is not required under its policies. As all policies and guidelines were adhered to, the council submits that my commenting on the adequacy of the policies is not 'under the purview' of my office and nor does it 'fit the scope of this investigation.' I agree that it is not my role to investigate whether the council should engage an outside contractor or use its employees to undertake work. This is an allegation made by the whistleblower and I make no comment or finding in response to it
- it points out that exemptions are required prior to the signing of a contract, not prior to a letter of engagement. However, the council agrees that the 'process can be improved to ensure consideration of exemption is given before the decision is made to sign a letter of engagement, recognising that at law the signing of a letter of engagement indicates the intention to enter into a contract'
- it submits that Mr Volkoff did not have delegation to sign the contract, only the CEO was authorised to do so, and that this is what occurred. It submits that there was no correlation between Mr Volkoff signing the exemption form and the receipt of the complaint, as I implied in my provisional report. The council submits that the timing of Mr Volkoff signing the exemption form is consistent with his return to the country in early August
- the council submits that, while it does not agree with my provisional findings, because they are based in part on inaccurate information, the council 'has already demonstrated commitment to procurement training.' I acknowledge that the council also advised my office on the telephone that it has already taken steps to implement my recommendation in relation to issue 1.⁹

In response to issue 2, the council submitted, in summary, that there was no requirement to follow a recruitment process because 'the Acting Corporate Services Manager was contracted, not recruited'.

⁹ Telephone call between Ms Rosemary Munslow, Practice Manager, Business Services, City of Playford, and my Investigating Officer, 1 May 2014.

In response to issue 3, the council submitted that it accepted my findings. It advised me that it has already 'implemented a process of ensuring all Council members use their Council provided email address and arrangements are presently being made for Council members to receive training.'

The council also submitted that it 'acknowledge[s] and support[s] continuous improvement in every operation and as such will continue with [its] transformation program to provide the best outcomes for the residents of the Council.' The council also stated that it rejects any assertion that it has 'acted in any manner other than what results in the best outcome for the residents and ratepayers of the Council area.'

I took account of the council's response and have amended my report as I consider appropriate.

Issue 1 – the engagement of Rockpools

Background

1. It is alleged that the council has engaged the global executive recruitment and professional development company, Rockpools, to undertake a 'Transformation Program' without following its procurement policy and guidelines. It is intended that the council's Transformation Program 'would re-engineer processes and place Playford's Enterprise business unit in a position by June 2014 to be contestable and self sustainable [sic].'¹⁰
2. Rockpools describes its services to the council as follows:

Rockpools Asia Pacific (Rockpools) are a team of experienced practitioners in change in the public sector, particularly local government, in New Zealand, United Kingdom and Australia. Our core team are not just advisory consultants but have hands-on experience of designing and implementing change programmes in large complex organisations.¹¹

The Transformation Program - the review and diagnostic phase

3. Ms Susan Law, Director, Rockpools, met Mr Efrim Volkoff, General Manager Enterprises for the council, in November 2012. Following the meeting, Ms Law sent an email to Mr Volkoff, which included:

...I thought I would capture how we agreed Rockpools could work with you and the Enterprise team.

...

We agreed that in January Rockpools would be onsite in Playford to:

- facilitate a workshop to develop a clear narrative of the changes occurring in Enterprises and describe what the new, desired Enterprises directorate will look like in 3 years time
- review and determine the status of the different services in relation to the Efficiency and Effectiveness programme, including the review of the procurement function that is currently being done
- identify the scope of the activities needed to establish your Corporate Services as a commercial unit and develop the programme plan
- once you have agreed to the programme plan, we will provide you with a proposal on how Rockpools can support you and your team in the implementation and management of it.

¹⁰ Letter from the CEO dated 10 December 2013.

¹¹ Rockpools, Enterprise Express - Transformation Business Case, Draft v0.1 270513, page 3.

Effrim, on the assumption that I have captured our discussion accurately, I will incorporate them into a simple letter of engagement. For the work in January, I propose a price of \$45,000. ...¹²

4. On 30 November 2012 Ms Law emailed a letter of engagement for the review and diagnostic phase of the Transformation Program to Mr Volkoff. On 11 December 2012 Mr Volkoff signed the letter agreeing to the engagement of Rockpools for the services and to the proposed fee.
5. Whilst the information provided to me by the council is not clear, I do not believe that I have been provided with a tender exemption form for this expenditure, or any evidence that the council took any steps to ensure that this purchase complied with the council's procurement principles.

Implementation of the Transformation Program - Phase 1

6. On 11 March 2013, Ms Law sent Mr Volkoff a letter of engagement for the first phase of the implementation of the Transformation Program. The letter states that the first phase was to be undertaken from March 2013 to June 2013 for a fee of \$250,000. Mr Volkoff signed the letter agreeing to the engagement of Rockpools for the services and to the proposed fee.¹³
7. The council completed a 'Request for Exemption from Tender Process or Obtaining Three Quotes' form for phase 1 of the Transformation Program (**the phase 1 tender exemption form**). This exemption form relates to phase 1 of the implementation of the Transformation Program.¹⁴ The relevant parts of the form are as follows:

Request For Exemption From Tender Process or Obtaining Three Quotes.

This form is intended to be used by a procurer to provide information to the decision maker when seeking an exemption from an open public tender or obtaining three quotes. Sections 1 – 4 are to be completed by you, the procurer, Section 5 is to be authorised by the Team Manager, Risk Management and Procurement before Section 6 is completed by the approving Manager.

1. Your Details

Procurer / Person Requesting Exemption:	Effrim Volkoff
Business Unit:	Enterprises
Extension:	

2. Project Details

Project Name:	Corporate Services Commercialisation
Brief Project Description:	Development of Corporate Services into a contestable commercial unit via the review of procurement functionality, workshop facilitation and scoping reviews.
Estimated Value of Contract:	\$250,000

¹² Email from Ms Susan Law to Mr Effrim Volkoff, 'Subject - Our meeting on Friday', Monday, 26 November 2012.

¹³ Mr Volkoff's signature is undated. It is reasonable to assume that it was signed promptly given that the project had already commenced.

¹⁴ The CEO, in his letter to me dated 10 December 2013, advised that the 'Corporate Services Project' is not a term that the council has used, but the project is called the 'Transformation Program.' Also, in its response to my provisional report, the council advised that the Transformation Program and the Corporate Services Commercialisation project are 'one and the same.'

3. Proposed Procurement Method

Details of Proposed Procurement Method (i.e. Direct negotiation, 2 x quotes etc)	Direct negotiation
Name of proposed supplier(s)	Rockpools

5. Exemption Justification (Space available below to address questions)

Limited suppliers available (unable to obtain 3 quotes)

When was the market previously tested for suppliers and or prices?
 What procurement method was used when last testing the market?
 What market research have you undertaken prior to seeking this exemption?

Offers substantial savings / benefits to Council

Describe the proposed savings to Council:
 Susan Law with her team of qualified procurement professionals have extensive local council

knowledge and extensive international corporate experience to provide the service to council.

Upgrade from original supplier / Compatibility with existing equipment

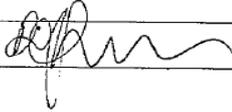
Time Critical

What unforeseen circumstances have lead to this project having a critical timeline?
 What actions can be taken in the future to prevent a similar critical timeline arising?

Comments

It was determined that Rockpools Asia Pacific could provide the services and expertise Council required within the timeframe to meet Council's efficiency and effectiveness objectives.

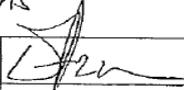
6. Risk Management & Procurement Team

Name of RMP Team Member making comments	MICHAEL KNOWLES
Comments	<i>The efficiency & effectiveness project has expressed timeframes to deliver savings across Council. Market Research by Executive have determined that this consultancy firm is best fit to re-engineer Councils Corporate Services Business Unit to achieve the objectives of the efficiency & effectiveness project that will drive savings to Council.</i>
Team Manager, Risk Management & Procurement Signature	

7. Approving Manager

Comments

As per the comments above we are looking for an exemption for Rockpools based on the industry expertise they bring with their vast experience in re-engineering local government operations

General
 Group Manager Signature 

CEO
 General Manager Signature (Only required if contract value over \$500,000 or the procurer is a Group Manager) 

8. The phase 1 tender exemption form is undated. However the CEO has advised my investigation that it was created in April 2013.¹⁵
9. On 6 June 2013 Ms Law sent Mr Volkoff a letter extending the first phase of the Transformation Programme until 31 August 2013 for an additional fee of \$68,000 plus GST.

Implementation of the Transformation Program - Phase 2

10. On 25 February 2013, Ms Law sent Mr Volkoff a letter attaching the Enterprise Transformation Program and providing a fee proposal for the implementation of the program. Rockpools offered the council two options to implement the full Transformation Program. The council could choose to pay Rockpools a fee of \$994,000, or \$730,000 plus 15% of the cash savings identified and/or achieved.
11. On 31 May 2013, Ms Law sent Mr Volkoff a letter of engagement for the second phase of the implementation of the Transformation Program. The letter stated that the total fee for the second phase was \$738,000 plus 15% of the cash savings identified and/or achieved.
12. On 13 June 2013, Mr Volkoff signed agreement to the engagement of Rockpools for phase 2 of the Transformation Project and agreed to the proposed fee.
13. The council completed an 'Exemption from Tender Process or Obtaining Three Quotes' form for phase 2 of the Transformation Program (**the phase 2 tender exemption form**). The relevant parts of the form are as follows:

2. Project Details

Project Name:	Transformation Programme for the Enterprise Business Unit – Phase 2, Market Orientation
Brief Project Description:	To develop and lead the implementation of a new corporate business model for the Enterprise Business Unit.
Estimated Value of Contract:	\$780,000 plus disbursements

3. Proposed Procurement Method

Details of Proposed Procurement Method	Direct negotiation and acceptance of the consultants proposal
Name of proposed supplier(s)	LKS Business Excellence Pty Ltd (Rockpools)

5. Exemption Justification (Space available below to address questions)

Limited suppliers available (unable to obtain 3 quotes)
When was the market previously tested for suppliers and or prices?
What procurement method was used when last testing the market?
Offers substantial savings / benefits to Council
Describe the proposed savings to Council
<input checked="" type="checkbox"/> Upgrade from original supplier / Compatibility with existing equipment <ul style="list-style-type: none"> • Rockpools conducted Phase One via an exemption process, this exemption is to further engage Rockpools to deliver Phase two based on an upgrade and/or compatibility with this existing consultancy organisation.

¹⁵ The CEO, in his letter to me dated 10 December 2013, advised that the exemption form was created in April 2013.

<input type="checkbox"/> Time Critical
What unforeseen circumstances have lead to this project having a critical timeline? What actions can be taken in the future to prevent a similar critical timeline arising?
Comments
<i>An existing exemption was approved by the Chief Executive Officer in April 2013 to conduct Phase One – the Enterprise Diagnostics Review.</i>
<i>As a result of Phase One, Rockpools have presented to the Efficiency and Effective Board their proposal to conduct Phase 2 including a programme plan and business case to deliver a new Target Operating Model for the Enterprise Business Unit.</i>

6. Risk Management & Procurement Team

Name of Procurement Team Member making comments	<i>Michael Knowles (20/08/13)</i>
Comments	
<i>This is an extension to an existing or previous exemption approval by the Chief Executive Officer to engage Rockpools to deliver Phase One of the project.</i>	
<i>To drive a competitive process for Phase Two would not be efficient and or effective based on the information/intelligence gathering exercise (Enterprise Diagnostic Review) conducted already by Rockpools in the Stage One process.</i>	
<i>Further, a contract for consultancy would be required to be formalised addressing services to be provided, agreed timeframes to deliver the services, insurances, agreed fee etc. This can be formalised once this exemption has been approved.</i>	
Team Manager, Risk Management & Procurement Signature	

14. The phase 2 tender exemption form is undated, however a memorandum from Mr Volkoff to the CEO that appeared to have been attached to it is dated 30 August 2013.

The Control Work Plan

15. It is alleged that the council may have already started a tender process for appointing someone to do its 'Control Work Plan 2012-2013' and had selected a preferred company from this process, before deciding to engage Rockpools to undertake the work. The council denies this allegation and I agree that while the council had commenced a tender process when it decided to engage Rockpools to undertake the work, it had not selected a preferred company from this process.¹⁶
16. On 18 December 2013 the council prepared a 'Request for Quote' (RFQ) for the facilitation of the completion of the Control Work Plan. The scope of this work was to 'assess where the organisation was at with the implementation of the LGA/Deloittes Internal Controls, to test the effectiveness of the controls and to receive recommendations in relation to any identified gaps.'¹⁷ The council approached four consultancy firms with the RFQ.
17. The deadline for the quotes was 24 January 2013. The CEO advised my investigation that an assessment panel reviewed the quotations and, at the completion of this assessment process, 'but before the engagement of any service provider, it was

¹⁶ See letter from the CEO responding to the provisional report, dated 4 March 2014.

¹⁷ Letter from the CEO dated 5 September 2013, page 5.

identified that the work that Rockpools was already conducting for the Council would address a number of areas outlined in the Request for Quote in services they were already engaged to provide to the Council.¹⁸ As such, the decision was made not to continue with the RFQ process.

18. Ms Law sent an email to Mr Volkoff dated 19 February 2013 including the following:

...We have looked at the LGA - Deloitte Best Practice Model for financial Internal Controls... it seems a shame to spend money for a largely redundant activity. You probably have other priorities for that investment. ...

19. On 22 February 2013 the firms were advised that the council was no longer going ahead with the tender.

Relevant legislation

20. Section 49 of the Local Government Act sets out the obligations imposed on the council in respect of contract and tender policies:

49 – Contracts and tender policies

- (a1) A council must develop and maintain procurement policies, practices and procedures directed towards–
- (a) obtaining value in the expenditure of public money; and
 - (b) providing for ethical and fair treatment of participants; and
 - (c) ensuring probity, accountability and transparency in procurement operations.
- (1) Without limiting subsection (a1), a council must prepare and adopt policies on contracts and tenders, including policies on the following:
- (a) the contracting out of services; and
 - (b) competitive tendering and the use of other measures to ensure that services are delivered cost-effectively; and
 - (c) the use of local goods and services; and
 - (d) the sale or disposal of land or other assets.
- (2) The policies must–
- (a) identify circumstances where the council will call for tenders for the supply of goods, the provision of services or the carrying out of works, or the sale or disposal of land or other assets; and
 - (b) provide a fair and transparent process for calling tenders and entering into contracts in those circumstances; and
 - (c) provide for the recording of reasons for entering into contracts other than those resulting from a tender process; and
 - (d) be consistent with any requirement prescribed by the regulations.

¹⁸ Ibid.

Relevant policies and guidelines

21. The council's procurement policy provides that all of the council's procurement activities will be conducted in accordance with six fundamental principles. The principles are:

5.1.1 Open and fair competition

Council recognises the commercial and economic benefits of open and effective competition. Council will encourage healthy competition in the markets from which it purchases.

5.1.2 Accountability and Transparency

Council values the highest ethical and professional standards in its business dealings. Council will aim to achieve integrity in its procurement activities through transparent processes. Council will respect the rights of tenderers and contractors, including the right to confidentiality and the expectation to be treated fairly at all stages of the procurement process.

5.1.3 Value for Money

Council seeks to achieve Value for Money and acquire quality goods and services or works by:

- selecting goods, services and suppliers that represent the best overall Value for Money. This may not be as a result of accepting the lowest priced confirming offer;
- ensuring that the works and/or service meet the needs of the community;
- using 'best practice' purchasing techniques;
- encouraging market competition as a consequence of its procurement activities;
- procurement through purchasing groups and cooperatives that can demonstrate high levels of integrity in line with Council's own policies and guidelines and assist the Council to achieve Value for Money; and
- taking advantage of opportunities to develop open and effective relationships with third party suppliers of goods, works or services.

5.1.4 Social, Environmental and Economic Sustainability

Council is committed to maximising the positive impact of its activities to benefit the environment, its economy and its community. In addition to our selection criteria:

- Council will support the use of environmentally responsible products, materials, processes and services where it is demonstrated that they provide best Value for Money
- Council recognises the importance of employment growth within and surrounding our city. Council will endeavour, within the law, to support our local economy by encouraging local businesses to participate in our procurement processes and giving preference to local businesses when all other commercial considerations are equal.
- Council will where possible buy Australian Made provided that the product and or services provide Value for Money.

5.1.5 Health and Safety

Council is committed to protecting human health, safety and welfare. Council will ensure that its procurement activities protect the health, safety and welfare of its Elected Members, staff, volunteers, customers, contractors and our community.

5.1.6 Governance

The Local Government Act (South Australia) 1999 is particularly relevant to the tendering process; however, various other Acts and Regulations apply to Council's diverse range of procurement activities. This Procurement Policy is intended to supplement these instruments. Any inconsistencies that may arise between the Procurement Policy and a relevant Act or Regulation shall be resolved in favour of the Act or Regulations.

22. Part 5.2.3 of the procurement policy requires the council to document its reasons for not undertaking an open tender process:

5.2.3 Methods of Procurement

The Council will select an approach to market method best suited to the particular requirement. In doing so it will have regard to, but not be obligated to adhere to, the following guidelines:

For purchases less than \$10,000 Council will make the procurement decision with regard to the Procurement Principles.

For purchases where the estimated gross value of the expenditure is greater than \$10,000 but less than \$100,000 quotations will usually be obtained.

For purchases where the estimated gross value of expenditure exceeds \$100,000, Council's usual practice will be to call for tenders for the supply of goods, the provision of services or the carrying out of works.

Council reserves the right to undertake public or selected tenders, requests for expressions of interest and requests for registration of interest whenever considered appropriate by the Council.

If the Council enters into contracts in other than those resulting from a tender process, Council will record the reasons for entering into those contracts.

23. The procurement guidelines require that a Risk Assessment Checklist be completed for purchases for values in excess of \$50,000.

The Enterprise Agreement

24. The relevant sections of the EA are as follows:

Clause 24 - Service Delivery

Council is committed during the life of this Agreement to maintaining efficient and effective operations that deliver quality and cost effective outcomes to the ratepayers of the city.

24.1 Council will continue to use a predominance of internal service providers where they continue to provide a high level of efficiency and cost effectiveness.

24.2 Council will invest in appropriate skill development, systems and equipment to ensure its workforce is competitive.

24.3 Council will determine the types and levels of services it will provide by undertaking research into the needs of the community and having regard to its capacity to pay.

- 24.4 The use of contract labour is recognised as a legitimate way of managing the ongoing challenges of a growth of a Council

Whether the council followed its procurement policy and guidelines when it engaged Rockpools

25. It is alleged that the council has engaged Rockpools without following its procurement policy and its procurement guidelines.
26. It is also alleged that Rockpools have been engaged to do work that could have been done by existing council employees. My investigation has been told that the Efficiency and Effectiveness team employs several Business Analysts and Project Managers capable of undertaking the work. In response, the CEO told my investigation:

Whilst it may be the case the Council has staff within the Council that can perform some of the tasks undertaken by Rockpools, you can see from the scope of the project that it would cause an unnecessary and unreasonable diversion of the Council's resources if Council staff were utilised for this purpose when such staff were, and continue to be, operating at full capacity.¹⁹

27. The council provided the following explanation as to why it did not undertake a selective tender process, in accordance with part 5.2.3 of its procurement policy, when it engaged Rockpools to undertake works:

Ordinarily, the value of the contract would have required the Council to adhere to either a selective public tender process in accordance with the Council's Guidelines. In giving reasons for not proceeding to a select or open tender both the Team Manager, Risk Management and Procurement and the General Manager and Chief Executive Officer were consulted. The reasons given were that the efficiency and effectiveness project had specific delivery timeframes. The ability of Rockpools to deliver the project within these timeframes would provide savings to the Council. In addition, market research undertaken by the ELT determined that Rockpools were the best fit to "reengineer" processes across the Council, including corporate services and processes to deliver the objectives of efficiency and effectiveness project that is intended to deliver savings to the Council, in an independent manner with the requisite expertise in the area.²⁰

28. By letter dated 20 September 2013, I requested further information from the council including:
- evidence of the market research
 - any further evidence of why it was considered that Rockpools was 'the best fit to re-engineer council's corporate services business unit to achieve the objectives of the efficiency and effectiveness project.'
29. The CEO provided a response by letter to me dated 10 December 2013, including the following:

2.1 Evidence of market research

Susan Law was the CEO of two large metropolitan Councils. Susan is well known across local government and has interstate, intrastate and overseas experience. The change that Playford are embarking on is a radical shift in mindset to ensure the sustainability of Playford into the future. The experience that (Susan Law) Rockpools have had in the UK and delivery models that have been achieved was identified as being similar to what Playford were considering and a number of CEO's had provided good references of the work that the team at Rockpools had undertaken. Susan as CEO of Doncaster Metro Council and Wokingham in the UK implemented Commercial models of service delivery in her time at each Council in the late 2000's.

¹⁹ Letter from the CEO to the Ombudsman dated 5 September 2013, page 6.

²⁰ Letter from the CEO to the Ombudsman dated 5 September 2013, page 5.

2.2 Any further evidence of why it was considered that Rockpools was the "the best fit"

An example of the work that Susan's team have done is illustrated in Manor Drive Business Services... It was considered that there were no other organisations to which Council was familiar with that had the experience and capability to deliver the project required. The concept of creating subsidiaries of business units within Council and transforming the organisation similar to Manor Drive is a new and unique model for local government in Australia.

30. I note clause 23.4 of the EA, under which the council may engage contract labour 'as a legitimate of managing the ongoing challenges of a growth council'. In my view it was open to the council to engage an external company to undertake the work.
31. However, it is not my role to determine whether Rockpools was the most appropriate company to undertake that work. My role is to determine whether the council followed the appropriate procedures in its engagement of Rockpools. I do not consider that it did.
32. My view is that, if the council did undertake adequate market research to determine that Rockpools was the 'best fit' for the project, it did not adequately document the market research. Further, I do not consider there is adequate evidence to show that the council gave sufficient consideration to:
- its procurement policy and guidelines, particularly the procurement principles
 - risk assessment.
33. In relation to the review and diagnostic phase of the transformation program, I consider that the council either failed to give consideration to the procurement principles; or if it did give such consideration, it failed to adequately document it. The value of the review and diagnostic phase of the transformation program was \$45,000. The procurement policy provides that for purchases where the estimated gross value of the expenditure is greater than \$10,000 but less than \$100,000 quotations will usually be obtained. Whilst the council is not required to obtain quotations in all situations, it ought to have documented why it did not obtain other quotations, **prior** to agreeing to the works. [my emphasis]
34. In relation to the implementation of the transformation program (phase 1 and phase 2), I consider that the council either failed to give consideration to the procurement policy and guidelines, and in particular the procurement principles; or if it did give such consideration it failed to adequately document it. Part 5.2.3 of the procurement policy provides that for purchases where the estimated gross value of expenditure exceeds \$100,000, the council's usual practice will be to call for tenders. I consider it would have been prudent for the council to have conducted a risk assessment and provided more substantial documentation of the reasons why the usual practice was not followed, **prior** to agreeing to the works. [my emphasis]
35. I acknowledge that the council has agreed with this position and has committed to improve its processes in response to it.
36. The Local Government Association of South Australia published the LGA Procurement Handbook in 2012. It is a guide for councils in 'best practice procurement'. The handbook 'gives guidance and support to Local Government procurement practitioners consistent with the Local Government Act, standards of probity, good governance and best commercial practice.'²¹ The handbook says:

Accountability means that Local Government practitioners who operate in the procurement space are responsible for their decisions and actions and take responsibility

²¹ Local Government Association of South Australia, Procurement Handbook, 2012, page 1.

for the resulting outcomes. Transparency means that Local Government practitioners are able to give reasons for the decisions they make.

Documentation is critical to accountability and transparency. It provides a record of procurement activities and how they have been conducted, which in turn facilitates scrutiny of these processes. Councils must ensure that there is sufficient documentation to provide an understanding of the reasons for the procurement, the process that was followed, all relevant decisions and the reasons supporting those decisions.²²

37. The phase 1 and phase 2 tender exemption forms are both undated. However, it appears that they were both completed following the acceptance of the letter of offer for the work, particularly:
- the letter of engagement for phase 1 was signed around 11 March 2013 and I understand that the work commenced at this time. The CEO has advised my investigation the phase 1 exemption form was created in April 2013
 - the letter of engagement for phase 2 was signed on 13 June 2013. It appears to me that the phase 2 exemption form was created on 30 August 2013.
38. There is no evidence that any risk assessment checklists were completed in relation to any of the phases of work undertaken by Rockpools.
39. In relation to the Control Works Plan, I consider that the council breached part 5.1.1 and part 5.1.2 of its procurement policy. The council accepted Ms Law's advice that Rockpools could undertake the work, after it had already undertaken a RFQ process. Cancelling the process after the suppliers had no doubt spent considerable time preparing the quotes does not reflect 'the highest ethical and professional standards'²³ or fair treatment of those suppliers. As far as I can determine, the council did not request Rockpools to submit any documentation or to quote for the works. I do not consider that this shows that the council 'recognises the commercial and economic benefits of open and effective competition.'²⁴

Opinion

In light of the above, I consider that the council acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that all general managers, managers and other relevant council staff, attend procurement training.

In accordance with section 25(4) of the Ombudsman Act, I request that the principal officer report to me by 31 July 2014 on the steps which have been taken to give effect to my recommendation, and if no steps have been taken, the reasons for the inaction.

²² Local Government Association of South Australia, Procurement Handbook, 2012, page 11.

²³ City of Playford, Procurement Policy, adopted 22 June 2009, part 5.1.2.

²⁴ City of Playford, Procurement Policy, adopted 22 June 2009, part 5.1.1.

Issue 2 – the recruitment of the Acting Corporate Services Manager

Background

40. The whistleblower has alleged that the council engages staff without following a proper recruitment process. The whistleblower named two positions in which this had occurred - the appointment of a Business Partner in its Human Resources area and the appointment of an acting Corporate Services Manager. By letter dated 2 August 2013, I sought information from the council about the recruitment processes undertaken for these two positions.
41. The council responded by letter dated 5 September 2013. I considered the council's response and was satisfied that it had followed the appropriate process for the appointment of the Human Resources position.
42. In relation to the appointment of the acting Corporate Services Manager, the council advised me that the Corporate Services Manager resigned and it was determined that a candidate would be selected from the applicants who had recently applied for the role of Finance Director, and would be appointed as a contractor on a short term basis. The council selected one of the candidates from the applicants for the Finance Director role (**the candidate**). The council advised me as follows:
- ...the Acting General Manager Enterprises determined in conjunction with the General Manager Enterprises (on annual leave at the time) and the Chief Executive Officer that there was an immediate need to put in place an interim measure to ensure some stability in the role of Corporate Services Manager through to the budget adoption in late July and to then manage the end of the financial year ending 30 June 2013 process. ...²⁵
43. By letter dated 20 September 2013, I sought further information from the council about the recruitment of the acting Corporate Services Manager. The council provided me with further information, including a chronology of the recruitment process followed, and additional documents relating to the appointment, by letter dated 10 December 2013.
44. I have had difficulties determining the exact chronology relating to appointment of the acting Corporate Services Manager. The information provided by the council includes the following:
- in mid June 2013 the position of Finance Director was advertised on SEEK.com through the Tardis Group recruitment agency²⁶
 - on 1 July 2013 the recruitment agency, Tardis Group, emailed the candidate's resume to the council
 - on 1, 2 and 3 July 2013 there was email communication between the Tardis Group and council staff members organising interviewing the candidate
 - the letter to me from the CEO dated 10 December 2013 states that on 2 July 2013 the Corporate Services Manager resigned
 - the internal council emails organising the interviewing of the candidate suggest that the Corporate Services Manager resigned prior to 2 July 2013
 - the letter to me from the CEO dated 10 December 2013 states that, on 2 July 2013, a decision was made to recruit a short term consultant to the position of acting Corporate Services Manager
 - the candidate was interviewed on 5 July 2013²⁷ or on 8 July 2013²⁸
 - the candidate's reference checks were done on 8 July 2013²⁹ or on 9 July 2013³⁰

²⁵ Letter from the CEO to the Ombudsman dated 5 September 2013, page 3.

²⁶ Letter from the CEO to the Ombudsman dated 5 September 2013, page 2.

²⁷ Letter from the CEO to the Ombudsman dated 10 December 2013, page 2.

²⁸ Letter from the CEO to the Ombudsman dated 5 September 2013, page 3.

²⁹ Letter from the CEO to the Ombudsman dated 5 September 2013, page 3.

³⁰ Letter from the CEO to the Ombudsman dated 10 December 2013, page 2.

- the candidate commenced in the role of Acting Corporate Services Manager on 15 July 2013.³¹

45. A Request for Exemption from Procurement Process form (**the acting Corporate Services Manager exemption form**) was completed, dated 12 August 2013. The relevant parts of the form are as follows:

2. Project Details

Project Name:	Interim Manager - Corporate Service
Brief Project Description:	Business requirement for the engagement of a suitability qualified person to temporarily fill the position of Corporate Services Manager for an interim term.
Estimated Value of Project:	\$60,000

3. Proposed Procurement Method

Details of Proposed Procurement Method (i.e. Direct negotiation, 2 x quotes etc)	Direct Negotiation
Name of proposed supplier(s)	Tardis Group Pty Ltd

4. Compliance with Enterprise Agreement

Does contract comply with clause 23.5? (See reverse for clause 23.5)	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
If not, has consultation occurred in respect to clause 23.6?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If required, has overleaf Contracting Out Performa been completed?	<input type="checkbox"/> Yes <input type="checkbox"/> No

5. Exemption Justification

<input type="checkbox"/> Limited suppliers available (unable to obtain 3 quotes) When was the market previously tested for suppliers and/or prices? What procurement method was used when last testing the market?
--

³¹ Letter from the CEO to the Ombudsman dated 5 September 2013, page 3.

What market research have you undertaken prior to seeking this exemption?
<input type="checkbox"/> Offers substantial savings / benefits to Council Describe the proposed savings to Council: What are the additional benefits to Council by using the proposed alternative procurement method?
<input type="checkbox"/> Upgrade from original supplier / Compatibility with existing equipment
<input checked="" type="checkbox"/> Time Critical What unforeseen circumstances have lead to this project having a critical timeline? What actions can be taken in the future to prevent a similar critical timeline arising?
Comments Manager Corporate Services resigned 28 th June 2013 and due to the full workload commitments of the existing management team an urgent requirement was required to temporarily fill the position to progress with E&E initiatives and provide leadership to relevant staff. The Professional Temporary Labour contract with Hudson has not been finalised and Tardis Group Pty Ltd was approached to manage the application, interview process and engaged process.

6. Procurement

Name of Procurement Team Member making comments	MICHAEL KINDEL
Comments	<i>insert comments here</i> The acquisition or placement has already been conducted & completed and whilst this exemption is after the fact expressed timeframe could be justified in this case. MK 12/8/2013
Manager, Corporate Services Signature	n/a

46. I note that Rockpools is part of the Tardis Group Pty Ltd.
47. The candidate was employed in the role of acting Corporate Services Manager on a temporary contract for \$800+GST per day on a three month contract.
48. The acting Corporate Services Manager's contract ended on 26 September 2013.

Relevant legislation

49. Section 107 of the Local Government Act requires that the CEO must ensure that selection process are based on an assessment of merit, and are fair and equitable:

107—General principles of human resource management

- (1) The chief executive officer must ensure that sound principles of human resource management are applied to employment in the administration of the council, and must take reasonable steps to ensure that those principles are known to all employees.
- (2) In particular, he chief executive officer must ensure—
 - (a) that selection processes are based on merit, and are fair and equitable; and
 - (b) that employees are given reasonable access to training and development, and are afforded equal opportunities to secure promotion and advancement; and ...

50. Section 99(1)(i) of the Local Government Act provides that the functions of the CEO include:

to give effect to the principles of human resources management prescribed by this Act and to apply proper management practices;

The Enterprise Agreement

51. The relevant sections of the EA are as follows:

CLAUSE 24 SERVICE DELIVERY

...

24.4 The use of contract labour is recognised as a legitimate way of managing the ongoing challenges of a growth Council in the delivery of services to an expanding community whilst also maintaining a committed and efficient workforce.

24.5 Management may determine from time to time to utilise external service providers where any of the following criteria is met:

- Specialised and/or highly technical tasks for which the Council does not have the necessary equipment, resources or expertise.
- Seasonal or short term work when employment or additional permanent employees cannot be justified (recognising that the relevant Awards and Agreement allow for the use of fixed term, casual and Agency employees).
- Large or labour intensive services where the Council is unable to apply the required equipment or resources without adversely affecting existing services or operations.
- For the delivery of new services where it would be more efficient and cost effective to do so, whilst maintaining legislated safety standards and comparable levels of service.

24.6 Management will only contract out other operations or services not identified in clause 24.5 above, with consultation and input from union representatives. This will be undertaken in a timely manner to ensure contracts will only be awarded when the agreement has been reached by the parties involved. ...

...

CLAUSE 31 RECRUITMENT

The City of Playford requires recruitment and selection for all staff to be carried out in accordance with Equal Opportunity Legislation and for appointments to be made on the basis of merit. All recruitment and selection processes must therefore be based on a proper assessment of merit and abilities in relation to the selection criteria of the vacant position. Appointments must not be made on the basis of nepotism or patronage. The conditions relating to Council Recruitment and Selection procedures will be in accordance with the City of Playford's Recruitment and Selection Policy and Guidelines as amended or replaced.

...

CLAUSE 33 VOLUNTEERS: RECRUITMENT / CAREER PATH DEVELOPMENT

...

33.2 Positions will be offered internally in the first instance and eligible staff, including active volunteers will be provided with a minimum of 5 days to apply.

52. I note that the EA binds the council, the relevant unions, and the council's employees employed pursuant to the South Australian Municipal Salaried Officers Award, the Local Government Employees Award and the Cafes and Restaurants (South Australia) Award, except any management role or specialist role employed on contract outside of the EA. The EA provides that the council will provide written advice to employees upon commencement of employment about whether or not the position falls within the coverage of the EA.³² It was approved by the South Australian Industrial Relations Commission pursuant to section 79 of the Fair Work Act, and prevails to the extent of any inconsistency with any contract of employment, or any award.³³
53. I note also that the EA establishes a Workforce Relations Consultative Committee, which 'is to operate as the consultative structure for negotiating, reviewing and monitoring enterprise agreements and to assist in the resolution of concerns and/or disputes arising from the operation of said agreements and other major employee related issues'.³⁴

Relevant policies and guidelines

54. The relevant sections of the council's recruitment policy are as follows:

- 1.2 All appointments will be made on the basis of careful and consistent application of the principles of merit and adherence to the guidelines
- 1.3 Appointments will be made in open competition from the widest field of applicants, attracted by internal and external advertising

2. SELECTING ON MERIT

Definition:

Merit is the extent to which an applicant has abilities, aptitude, skills, qualifications, knowledge, experience and achievement (including community service), characteristics and personal qualities relevant to the carrying out of the duties in question. This includes, where relevant, the manner in which an applicant carried out the duties or functions of any position, employment or occupation previously held or engaged in (paid or unpaid), and the extent to which an applicant has potential for development necessary to fulfil the position within reasonable time and resources.

Appointment must be based on merit assessed in relation to the selection criteria, position description interview and referee reports as a minimum. Applicants must meet all essential criteria in the position description to be eligible for appointment.

Where merit occurs between an external and internal applicant, preference will be given to the internal applicant.

55. The introduction to the recruitment guidelines states:

These guidelines form the basis for the implementation of the City of Playford's Recruitment and Selection Policy. They are designed to provide a clear and simple process for effective recruitment with maximum flexibility to meet the needs of each area, while at the same time ensuring a transparent and fair process, and clear communication of important information. ...

The City of Playford requires all staff recruitment and selection to be carried out in accordance with equal opportunity legislation and for appointments to be made on the basis of merit. All recruitment and selection processes must therefore be based on a proper assessment of merit and abilities in relation to the vacant positions selection

³² Clause 3 of the EA.

³³ Clause 6 of the EA.

³⁴ Schedule 5 of the EA.

criteria and appointments must not be made on the basis of nepotism or patronage. Controls are also in place to ensure that vacant or new positions are properly established, funded and advertised prior to the commencement of an appointment process.³⁵

Whether the council followed due process in the recruitment of its Acting Corporate Services Manager

56. In its response to my provisional report, by letter dated 4 March 2014, the council submitted that there was no requirement to follow a recruitment process because 'the Acting Corporate Services Manager was contracted, not recruited'. The council submits that it is 'commercially non-sensical' to follow a recruitment process to fill a short-term contract role'.
57. I agree with the view of the council and recognise the council's need to fill the position quickly. I consider that section 24.4 of the EA provides that the council is entitled to utilise contract labour in such a situation.
58. However, I note the lack of an adequate paper trail in relation to the recruitment of the candidate to the position of acting Corporate Services Manager. Whilst I acknowledge that the candidate was engaged through the Tardis Group, the council has an obligation to ensure transparency and accountability.

Opinion

In light of the above, I consider that, in appointing the candidate to the role of acting Corporate Services Manager, the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Issue 3 – the keeping of records on the council's server

Background

59. It is alleged that some of the council members forward emails from the email addresses that have been provided to them by the council to their personal email addresses, and that they then use their personal email addresses to correspond about council matters.
60. It is my understanding that once an email has been forwarded from a council member's council email address, the council then has no access to the email. The council's server would capture council members' emails if they were corresponding with council staff; but would not capture any other correspondence between council members, or between council members and community members.
61. The council responded to this allegation by letter dated 5 September 2013 as follows:

All elected members are provided with a Council email address and information that is exchanged to and from the email address is captured on the Council's server to ensure compliance with records management obligations under the *State Records Act 1997*. The Council recognises that any record that is created, sent, received, forwarded or transmitted by elected members in the performance in [sic] discharge of their functions and duties may be classified as an *official record* and managed in accordance with General Disposal Schedule 20. It is also recognised that many of the activities and functions performed by an elected member trigger records management obligations under the *State Records Act*.

³⁵ City of Playford, Recruitment and Selection Guidelines, page 1.

The appropriate use of emails for the purpose of sending and receiving information that is related to Council business is crucial for elected members and Council to be able to comply with legislative requirements. This is why dedicated Council email addresses have been provided to every elected member and email correspondence to and from the Council is retained in the Council's central records management system.

We note that the Complainant alleges that all elected members, except for the Mayor and Councillor Sherwood, forward emails from the Council email address to their personal email address and that they then use their personal addresses to correspond about Council matters. As a result of the receipt of these allegations the Council has undertaken its own review of email usage and it has revealed that some Council members have in place auto divert to a personal email address including Yahoo, Bigpond, Gmail and other service providers. This means that the assertion made by the Complainant may be accurate to the extent that information sent to Council email addresses is forwarded to their personal email address. However, the Council does not have any evidence to support the allegation that elected members use their personal email addresses to correspond about Council matters.

Whilst I am fulfilling my statutory obligation under Section 99 of the *Local Government Act* to ensure that records are properly kept and maintained, I am concerned that this raises the possibility of information being conveyed through private email addresses that are not captured by the Council's server. Accordingly, this response along with your correspondence will be provided to Council members in the coming week which will draw attention to the obligations of elected members to comply with the State Records Act, and adherence to the Council's Records Management Policy (**Annexure 18**), the Mayors and Councillors Support Policy (**Annexure 19**), Council Committee Member Access and Use of Council Information Policy (**Annexure 20**), in addition to the Statutory responsibility contained within Section 62(3) of the *Local Government Act* and specifically Clause 3.3 of the Mandatory Code of Conduct for Council Members.

Council administration will be working with elected members to ensure they utilise their Council provided email address for Council business to ensure compliance with the State Records Act and that they understand their obligations regarding records management.

62. The council provided a further response to this allegation by letter dated 10 December 2013, as follows:

Governance/ICT have developed a strategy to consult with Elected Members to understand their needs and identify the best approach to migrating members to using Corporate email addresses. This consultation has commenced with conversations with individual councillors. At this point in time we have three elected members who have had their laptops reconfigured to receive emails through the Playford email server. It is anticipated that we will move the remaining members over in the coming months.

63. An internal council email, dated 20 August 2013, shows that all council members, except for three, have forwarded their council emails to an external email address:

As requested, please find attached the elected member mailbox information around their emails as requested.

As you can see they all have their emails forwarded externally, except for:

The Mayor
Cr Smallwood-Smith
Cr Gooley

And this is because ICT has proactively advertised the council email platform after these elected members had issues or lost emails that ICT had to resolve for them on their personal email accounts.

Again, as per our Post Incident Report I sent through before, ICT has no ability to retrieve, log or monitor emails at these private email accounts should this requirement exist, it's a

risk that I have raised on numerous occasions before and I would strongly recommend all elected members email accounts are configured to utilise Playford mailboxes (like all other staff) and we prohibit all email forwarding outside of the Playford.sa.gov.au domain to ensure data integrity and security can be maintained.³⁶

Relevant legislation

64. Section 3 of the State Records Act defines and agency to include a municipal or district council.

65. Section 13 of the State Records Act states:

Subject to this Act, every Agency must ensure that the official records in its custody are maintained in good order and condition.

66. Section 5 provides the objects of the Act:

5—Objects of Act

(1) The objects of this Act are—

- (a) ...
- (b) to ensure that official records of enduring evidential or informational value are preserved for future reference; and
- (c) to promote the observance of best practices by agencies in their management of official records; and
- (d) to ensure that each agency is afforded prompt and efficient access to official records in the custody of State Records for which the agency is responsible; and
- (e) to ensure that members of the public have ready access to official records in the custody of State Records subject only to exceptions or restrictions that—
 - (i) would be authorised under the *Freedom of Information Act 1991* or Part 5A of the *Local Government Act 1934*; and
 - (ii) are required—
 - for protection of the right to privacy of private individuals or on other grounds that have continued relevance despite the passage of time since the records came into existence; or
 - for the preservation of the records or necessary administrative purposes.

(2) This Act must be administered and standards must be formulated and determinations and decisions made under this Act so as to give effect to the objects set out in subsection (1).

67. Section 23 provides that an agency must not dispose of official records except in accordance with a determination made by the Director of State Records with the approval of the State Records Council. A determination from the Director of State Records takes the form of either an Operational Records Disposal Schedule (RDS), a General Disposal Schedule (GDS) or a Transfer of Ownership and Custody Schedule (TOCS). GDS 20 for Local Government Records in South Australia (5th edition) (GDS 20) applies in this instance.

³⁶ Email from City of Playford, ICT Senior Business Partner to Acting Manager Corporate Services, 20 August 2013.

Relevant policies and guidelines

68. The council has implemented its records management policy to ensure that it complies with the objects of the Act.
69. The records management policy says that Australian Standard ISO 15489 defines a record as:

Information created, received, and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transactions of business. Irrespective of media or format. [sic]

70. The relevant sections of the council's records management policy are as follows:

3. LEGISLATION AND STANDARDS

The State Records Act 1997 governs the legal obligations and responsibilities of local government in relation to the management of official records. Under this Act, Council has an obligation to maintain official records in its custody in good order and condition. This applies to both hard copy records and electronic records.

An 'official record' is a record made or received by the Council in the conduct of its business. Elected members and staff, as representatives of Council, create, receive, send, or forward records as part of their everyday duties and functions.

Official records are created and exist in various formats, including:

- hard copy (i.e. paper based)
- electronic (email, fax, telephone, digital images)

Council has an obligation to provide access to records under legislation such as the Freedom of Information Act 1991, and for legal processes such as discovery and subpoenas. Other persons or bodies such as the Ombudsman, Royal Commissions, the Courts or auditors may also require access to the records.

4. OBJECTIVES OF THE RECORDS MANAGEMENT SYSTEM

The primary recordkeeping system of City of Playford is the electronic document management system (EDRMS) currently Dataworks. The EDRMS allows all corporate administration records to be captured and stored, in addition original paper-based records can be captured through digital imaging (scanning). All records should be created and maintained within DataWorks, unless creation is controlled and managed within another application such as Pathway.

...

6. OBLIGATIONS OF RECORD USERS

Council staff and Elected Members;

- Shall not intentionally damage, alter, dispose of or remove official records of the Council without authorisation to do so.
- Are required to handle council records with care and respect in a sensible manner to avoid damaging records and with a view to prolonging their life span.
- Shall ensure that council records in any format, including electronic documents and electronic messages (i.e. emails), which they personally receive or send are captured into council's record keeping system. Records must be readily accessible to meet business needs and accountability requirements.
- Add notes to documents that are captured to ensure ongoing integrity, reliability and accountability.
- Notify external stakeholders of their obligations to the City of Playford with reference to this policy.
- Be aware of the Copyright Act, drawing, plans, photographs etc are all protected by the copyright Act; therefore, copies should not be taken of these and handed out

- for public use i.e. Development/Building plans. This would also refer to advertising plans/drawings over the Web.
- Staff members of the Knowledge Services Team are required to follow authorised procedures in carrying out records management functions.

All official records including electronic records are to be captured and maintained as functioning records by preserving their structure, context and content. In order to maintain their value as evidence, Council records cannot be altered or manipulated for as long as they are retained.

Persons who breach this Policy may be subject to disciplinary action under the relevant Code of Conduct, and/or subject to criminal or civil proceedings as per the State Records Act 1997. Elected Members and staff should report breaches of this Policy to the Chief Executive Officer or their manager.

...

10. DESTRUCTION METHODS

Official records must be disposed of in accordance with the General Disposal Schedule No.20 for Local Government Authorities in South Australia. Council staff and elected member should contact the Knowledge Services Team for advice concerning the destruction of records.

Under the State Records Act illegal destruction of records could incur penalties of \$10,000 or 2 years imprisonment of the individual responsible.

71. Part 11 of the records management policy says that 'council records are not to be stored at home.'

Whether council members have breached the State Records Act and/or the council's records management policy

72. The council has confirmed that some council members have in place auto diverts to personal email addresses.
73. It has been alleged that council members refuse to use their council email addresses as they do not want their emails to be accessed by the council administration. It appears to me that this may be a systemic issue across councils.
74. It is one of the functions of the CEO under section 99 of the Local Government Act to ensure that records are properly kept and maintained. The failure of the council members to utilise their council provided email address would make it difficult for the CEO to meet this obligation.
75. The State Records Act and GDS 20 require that in order to ensure that the official records (including emails) of council members are preserved for future reference they must be maintained in the council's record management system. As such, any destruction of an email would be in breach of section 23 of the State Records Act.
76. It is difficult for the council to ensure that the official records of council members are preserved for future reference, and that the State Records Act is complied with, if the official records are not maintained in the council's record management system. It is my view that not storing official records in the council's records management system, but having them maintained individually by council members, is likely to lead to a breach of the State Records Act.

77. Furthermore, this allegation raises concerns about the council fulfilling its obligations to provide access to records under legislation and for legal processes such as discovery and subpoenas.
78. I have not sought evidence as to how the council members who have diverted their council email address to a personal email address are maintaining and destroying their email records. Suffice it to say that it is not good practice for the council members' emails to be excluded from the council's record keeping system, and that it is likely that council members have correspondence that they have not preserved in accordance with the council's records management policy or the objects of the State Records Act. I consider that it was wrong of the council to permit the forwarding of emails to private email addresses without ensuring that the necessary practise and policies are put in place to prevent breaches of the State Records Act.
79. I acknowledge that the council has commenced implementation of a process to ensure that all council members now use their council provided email addresses.

Opinion

In light of the above, I consider that the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

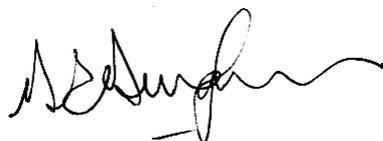
To remedy this error, I recommend under section 25(2) of the Ombudsman Act that:

- the council take steps to ensure that all council members use their council provided email addresses
- the council members undertake training in records management and their obligations under the State Records Act.

In accordance with section 25(4) of the Ombudsman Act, I request the principal officer to report to me by 31 July 2014 on the steps which have been taken to give effect to my recommendation, and if no steps have been taken, the reasons for the inaction.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 30 June 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

13 May 2014