

Report - Mid Murray Council
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Brenton Schmitt
Council	Mid Murray Council
Ombudsman reference	2015/00357
Date complaint received	15 January 2015
Issues	Whether the council breached section 91 of the <i>Local Government Act 1999</i> by publishing confidential information in the agenda papers for the 20 January 2015 council meeting

Jurisdiction

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

The complaint to my Office also included an allegation about the council's Chief Executive Officer, Mr Russell Peate (**the CEO**), breaching confidentiality by telling council employees at general staff meetings information about the Morgan Riverside Caravan Park Lease that he should have kept in confidence. In my view, this allegation constitutes a complaint under the Code of Conduct for Council Employees. Under this scheme such complaints are to be investigated by the council.

I advised the complainant by letter dated 23 January 2015 that my investigation is confined to the issue of whether the council breached section 91 of the *Local Government Act 1999*.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- meeting with the complainant
- seeking a response from the council
- considering the Local Government Act
- seeking further information from the council
- preparing a provisional report.
- providing the council, the CEO and the complainant 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.¹ 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 ...²

Response to my provisional report

The CEO responded to my provisional report by letter dated 19 May 2015 and in a telephone conversation with my investigating officer on 26 May 2015. His response included, in summary, the following:

- he was not advised that I would be considering whether he breached confidentiality by telling council employees at general staff meetings information about the Morgan Riverside Caravan Park lease, and is disappointed that he was not able to provide a response to this allegation. He included council meeting documents to show that the information he disclosed to employees was public information. I remain of the view that if the complainant wishes to pursue this allegation he should make a complaint to the council pursuant to the Code of Conduct for Council Employees
- the CEO requested that I determine whether the relevant council meeting items relating to the Morgan Riverside Caravan Park lease should remain confidential or not. I remain of the view that this is unnecessary for the purposes of this investigation
- it was not his intention to release the confidential minutes in the report. The report was prepared by a staff member and he did not check it properly and, as such, he did not realise that the minutes had been wrongly included. It was an honest mistake. His intent was that the report contained only the headings of the minutes and not the minutes themselves.
- he accepts responsibility for the error and acknowledges that he should have taken more care to ensure that the minutes were not wrongly included in the report and released to the public prior to any decision being made by the council as to their confidentiality or otherwise.
- he acknowledges that, as the CEO, he does not have the power to release the confidential minutes, and his intention was for the council to consider and review the confidential items.
- he disagrees with my view in the provisional report that he released the confidential minutes in order to make the information public in an attempt to protect himself against the allegation that he had told staff members confidential information. He disputes this and says that the information he told council employees was not confidential and was discussed with staff as it was relevant to performance management issues
- he denies the views expressed in my provisional report that he does not properly understand the confidentiality provisions of the Local Government Act
- he recognises that under section 91(9)(c) of the Local Government Act it is necessary for the delegation to be cited by the council or committee for every order where such a review is to take place

¹ 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.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- measures have been put in place to ensure that such errors do not occur in the future, including the hiring of a governance officer.

I have considered the CEO's comments and have amended my report as I consider appropriate in response.

The complainant did not provide a response to my provisional report.

Background

1. The complainant is the lessee of the Morgan Riverside Caravan Park (**the caravan park**).
2. On 5 February 2013 the complainant wrote to the council to seek to extend the lease of the caravan park.
3. At the council meeting on 8 April 2013 the council considered the complainant's request for a lease extension and resolved to:
 - commence negotiations with the complainant, and
 - obtain an independent valuation to assist in ascertaining the market rent.
4. The council engaged Opteon Property Group (South Australia) Pty Ltd to undertake the independent valuation.
5. At the council meeting on 14 April 2014 the council received the Morgan Caravan Park Rent Review Report (**the report**). The council resolved to adopt the annual rent recommended in the report.
6. The complainant has disputed the proposed caravan park rent and is utilising the Office of the Small Business Commissioner to facilitate resolution with the council of issues with the caravan park lease and the valuation determination.
7. The complainant was elected as a member of the council in the 2014 local government elections.
8. The council has considered the matter of the caravan park lease at a number of council meetings. I have determined that the following council meeting items are relevant to this investigation:
 - item 6.4.3 of the 14 April 2014 council meeting
 - item 6.5.26 of the 10 June 2014 council meeting
 - item 6.5.22 of the 13 October 2014 council meeting
 - item 7.5.21 of the 25 November 2014 council meeting
 - item 7.5.14 of the 20 January 2015 council meeting.

14 April 2014 council meeting

9. The minutes of the 14 April 2014 council meeting record:³

CONFIDENTIAL ITEM - MORGAN CARAVAN PARK - RENT REVIEW REPORT

Confidential item pursuant to Section 90 -

³ Mid Murray Council, 14 April 2014 Council Meeting Minutes, page 15584. Accessed at <http://www.mid-murray.sa.gov.au/webdata/resources/files/20140414.pdf> on 2 March 2015.

90(3)(b) and (h) -

- (b) information the disclosure of which -
 - (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
 - (ii) would, on balance, be contrary to the public interest.
- (h) legal advice.

10-12 A M

15584/1 Cr Hall moved that

- (1) Under the provision of Section 90(2) and (3)(b) and (h) of the Local Government Act 1999 an order be made that with the exception of Mr Russell Peate, Mr Robin Bourne, Mr Geoff Parsons, Mr Greg Hill, Mr Shane Thompson and Mrs Rose Sloper, all other persons present and the public be excluded from attendance at the meeting in order to receive a report and consider matters under Section 90(3)(b) and (h).
- (2) The Mid Murray Council is satisfied that it is reasonably foreseeable that the public disclosure or discussion of the information at the meeting could cause significant damage to the interest of Council, because of the public disclosure or discussion relating to the subject could reasonably be expected to present an unreasonable disclosure of information concerning the personal affairs of any person.
- (3) Accordingly, on this basis, the principle that meetings of Mid Murray Council should be conducted in a place open to the public has been outweighed by the need to keep the discussion confidential.

Seconded Cr Howie.

CARRIED.

10-35 A M

15584/2 Cr Milsom moved that pursuant to Section 91(7) of the Local Government Act 1999, the Council orders that Confidential Minutes Pages 940 - 942 of the meeting held on 14 April 2014, the Corporate & Financial Services Report Item 6.4.3 (Morgan Caravan park - Rent Review Report) and attachments and all discussions relating to the matter which was considered in confidence pursuant to Section 90(2) and (3)(b) and (h) remain confidential until the matter of the Rent Review has been resolved.

Seconded Cr Raison.

CARRIED.

10. The minutes and report for this item remain confidential.⁴

10 June 2014 council meeting

11. At the 10 June 2014 council meeting the council reviewed the confidential order for Resolution No 940/1 of the 14 April 2014 council meeting. The council resolved that the matter remain confidential 'until the matter of the Rent Review has been resolved.'

12. The minutes and report for this item remain confidential.⁵

⁴ as at 2 March 2015.

⁵ as at 2 March 2015.

13 October 2014 council meeting

13. The minutes of the 13 October 2014 council meeting record:⁶

CONFIDENTIAL ITEM - MORGAN CARAVAN PARK LEASE

Confidential item pursuant to Section 90 -

90(3)(b) and (h) -

(b) information the disclosure of which -

(i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and

(ii) would, on balance, be contrary to the public interest.

(h) legal advice.

11-54 A M

16297/1 Cr Meyers moved that

- (1) Under the provision of Section 90(2) and (3)(b) (i) & (ii) & (h) of the Local Government Act 1999 an order be made that with the exception of Mr Russell Peate, Mr Robin Bourne, Mr Kelvin Goldstone, Mr Greg Hill, Mr Shane Thompson and Mrs Rose Sloper, all other persons present and the public be excluded from attendance at the meeting in order to receive a report and consider matters under Section 90(3)(b) (i) & (ii) & (h).
- (2) The Mid Murray Council is satisfied that it is reasonably foreseeable that the public disclosure or discussion of the information at the meeting could cause significant damage to the interest of Council, because of the public disclosure or discussion relating to the subject could reasonably be expected to present an unreasonable disclosure of information concerning the personal affairs of any person.
- (3) Accordingly, on this basis, the principle that meetings of Mid Murray Council should be conducted in a place open to the public has been outweighed by the need to keep the discussion confidential.

Seconded Cr Hall.

CARRIED.

12-11 P M

16297/2 Cr Taylor moved that pursuant to Section 91(7) of the Local Government Act 1999, the Council orders that Confidential Minutes Pages 1036 - 1038 of the meeting held on 13 October 2014, Chief Executive Officer's Item 6.5.22 (Morgan Caravan Park Lease) and attachments and all discussions relating to the matter which was considered in confidence pursuant to Section 90(2) and (3)(b) and (h) remain confidential until the market rental has been agreed or determined for the parties.

Seconded Cr Howie.

CARRIED.

14. The minutes and report for this item remain confidential.⁷

⁶ Mid Murray Council, 13 October 2014 Council Meeting Minutes, page 15584. Accessed at <http://www.mid-murray.sa.gov.au/webdata/resources/files/20141013-1.pdf> on 2 March 2015.

⁷ as at 2 March 2015.

25 November 2014 council meeting

15. The minutes of the 25 November 2014 council meeting record:⁸

CONFIDENTIAL ITEM - MORGAN CARAVAN PARK LEASE

Confidential item pursuant to Section 90 -

90(3)(b) and (h) -

(b) information the disclosure of which -

(i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and

(ii) would, on balance, be contrary to the public interest.

(h) legal advice.

11-32 A M

16414/1 Cr Raison moved that

- (1) Under the provision of Section 90(2) and (3)(b) (i) & (ii) & (h) of the Local Government Act 1999 an order be made that with the exception of Mr Russell Peate, Mrs Robyn Dunstall, Mr Kelvin Goldstone, Mr Greg Hill, Mr Shane Thompson and Mrs Rose Sloper, all other persons present and the public be excluded from attendance at the meeting in order to receive a report and consider matters under Section 90(3)(b) (i) & (ii) & (h).
- (2) The Mid Murray Council is satisfied that it is reasonably foreseeable that the public disclosure or discussion of the information at the meeting could cause significant damage to the interest of Council, because of the public disclosure or discussion relating to the subject could reasonably be expected to present an unreasonable disclosure of information concerning the personal affairs of any person.
- (3) Accordingly, on this basis, the principle that meetings of Mid Murray Council should be conducted in a place open to the public has been outweighed by the need to keep the discussion confidential.

Seconded Cr Taylor.

CARRIED.

11-32 A M

Cr Schmitt declared an interest under Section 74 of the Local Government Act in the Morgan Riverside Caravan Park Lease item as he is one of the Lessees of the Morgan Caravan Park and vacated his chair and left the Chamber and did not vote or take part in any discussions in relation to the matter.

11-48 A M

Cr Myers moved that pursuant to Section 91(7) of the Local Government Act 1999, the Council orders that Confidential Minutes Pages 1039 - 1042 of the meeting held on 25 November 2014, Chief Executive Officer's Item 7.5.20 (Morgan Riverside Caravan Park Lease) and attachments and all discussions relating to the matter which was considered in confidence pursuant to Section 90(2) and (3)(b)(i) & (ii) and (h) remain confidential until the market rental has been agreed or determined for the parties.

Seconded Cr Raison.

CARRIED.

⁸ Mid Murray Council, 25 November 2014 Council Meeting Minutes, page 15584. Accessed at <http://www.mid-murray.sa.gov.au/webdata/resources/files/20141125.pdf> on 2 March 2015.

16. The minutes and report for this item remain confidential.⁹

20 January 2015 council meeting

17. At the council meeting on 20 January 2015 the council considered item 7.14 titled 'Morgan Caravan Park Lease - Release of Documents.'
18. The purpose of the item was to consider the release of the confidential documents held under section 91 of the Local Government Act in relation to the following resolutions:
- Resolution 940/1 of the 14 April 2014 council meeting
 - Resolution 1036/1 of the 13 October 2014 council meeting
 - Resolution 1039/1 of the 25 November 2014 council meeting.
19. The agenda papers for the 20 January 2015 council meeting included a report from the CEO (**the CEO's Report**) recommending release of the confidential documents relating to the above resolutions.
20. The agenda documents for the 20 January 2015 council meeting, including the CEO's Report, were distributed to council members on 14 January 2015, and were published on the council's website on 15 January 2015.
21. The CEO's Report included the following:¹⁰

7.5.14 Morgan Caravan Park Lease - Release of Documents

Report Purpose

To seek Council endorsement for the release of the following document held under Section 91 of the Local Government Act 1999.

Background

The Local Government Act 1999 Chapter 6, Part 4 (Minutes of council and committee meetings and release of documents) Section 91 Clause (9) (a) and (c) state -

- (a) the council or council committee must specify the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order must be reviewed, and, in any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year

and

- (b) the council or council committee may delegate to any employee of the council the power to revoke an order.

Council has delegated authority to the Chief Executive Officer to release documents as he believes appropriate, with a follow up report to Council following the release of documents.

Recommendation

Moved _____ Seconded _____
that the release of the following item be endorsed with exception of the Market Rent Valuation report prepared by Andrew Nobes from Opteon (SA) Pty Ltd referred to in the Corporate and Financial Services Report Item 6.4.3

⁹ as at 2 March 2015.

¹⁰ Mid Murray Council, 20 January 2015 Council Meeting Agenda, page 15584. Accessed at <http://www.mid-murray.sa.gov.au/webdata/resources/files/20150120%20Council%20Agenda.pdf> on 3 March 2015.

(Morgan Caravan Park - Rent Review Report) and all correspondence with Opteon (SA) Pty Ltd which is to remain confidential until the matter of the Rent Review has been resolved -

...

22. The CEO's report in the agenda papers included the minutes for the following council decisions, which were made in confidence pursuant to section 90 of the Local Government Act:
 - Resolution No 940/1 of the 14 April 2014 council meeting
 - Resolution No 1036/1 of the 13 October 2014 council meeting
 - Resolution No 1039/1 of the 25 November 2014 council meeting.
23. As such, the CEO's Report released the confidential minutes in the publicly available agenda before a resolution had been made to either release the information or retain it in confidence pursuant to section 90 of the Local Government Act.
24. The council considered the CEO's Report and resolved that the items remain confidential until the market rental has been agreed or determined for the parties. The minutes record the resolutions as follows:¹¹

Morgan Riverside Caravan Park Lease

The Chief Executive Officer has advised that the Case Manager from the Small Business Commissioner has advised that he does not have any objection to an experienced and qualified valuer being appointed to provide an independent valuation for the Morgan Caravan park and the Chief Executive Officer has indicated a preference for two out of three valuers provided to be appointed.

The Chief Executive Officer advised members that both parties would share the cost and be bound by the independent valuation. The valuation would take between 25 - 30 days to be completed and the recommended market rental payable would be reported to Council when received.

CONFIDENTIAL ITEM - MORGAN CARAVAN PARK LEASE

Confidential item pursuant to Section 90 -

90(3)(a) - information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead)

10-26 A M
16572/2 Cr Meyers moved that

- (1) Under the provision of Section 90(2) and (3)(a) of the Local Government Act 1999 an order be made that with the exception of Mr Russell Peate, Mrs Robyn Dunstall, Mr Geoff Parsons, Mr Greg Hill, Mr Shane Thompson and Mrs Rose Sloper, all other persons present and the public be excluded from attendance at the meeting in order to receive a report and to consider matters under Section 90(3)(a).
- (2) The Mid Murray Council is satisfied that it is reasonably foreseeable that the public disclosure or discussion of the information at the meeting could cause significant damage to the interest of Council, because of the public disclosure or discussion relating to the subject could reasonably be expected to present an unreasonable disclosure of information concerning the personal affairs of any person.

¹¹ Mid Murray Council, 20 January 2015 Council Meeting Minutes, page 15584. Accessed at <http://www.mid-murray.sa.gov.au/webdata/resources/files/20150120.pdf> on 3 March 2015.

- (3) Accordingly, on this basis, the principle that meetings of Mid Murray Council should be conducted in a place open to the public has been outweighed by the need to keep the discussion confidential.

Seconded Cr Raison.

CARRIED.

10-47 A M

16573/1 Cr Meyers moved that pursuant to Section 91(7) of the Local Government Act 1999, the Council orders that Confidential Minutes Pages 1053 - 1054 of the meeting held on 20 January 2015, and all discussions relating to the Chief Executive Officer's address to Council Employees relating to the Morgan Caravan Park Lease which was considered in confidence pursuant to Section 90(2) and (3)(a) remain confidential until the market rental has been agreed or determined for the parties.

Seconded Cr Taylor.

CARRIED.

Morgan Riverside Caravan Park Lease

16573/2 Cr Meyers moved that

- (1) The report on the Morgan Riverside Caravan Park lease and letter sent to the Small Business Commissioner dated 8 January 2015 be received.
- (2) Council await a response from the Small Business Commissioner.

Seconded Cr Wilkinson.

CARRIED.

Morgan Caravan Park Lease - Release of Documents

16573/3 Cr Taylor moved that the release of the following Confidential item not be endorsed and that the matter remain confidential pursuant to Section 90 (2) and (3) (b) and (h) of the Local Government Act until the matter of the rent review has been resolved

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Review of Confidential Order for item:
Morgan Caravan Park - Rent Review Report
Res No 940/1, Pages 940 to 942 - 14 April 2014

Seconded Cr Wilkinson.

CARRIED.

16574/1 Cr Meyers moved that the release of the following Confidential item not be endorsed and that the matter remain confidential pursuant to Section 90 (2) and (3) (b) and (h) of the Local Government Act until the matter of the rent review has been resolved

-

Review of Confidential Order for item:
Morgan Caravan Park Lease
Res No 036/1, Pages 1036 to 1038 - 13 October 2014

Seconded Cr Kuhn.

CARRIED.

16574/2 Cr Taylor moved that the release of the following Confidential item not be endorsed and that the matter remain confidential pursuant to Section 90 (2) and(3) (b) and (h) of the Local Government Act until the matter of the rent review has been resolved

Review of Confidential Order for item:
Morgan Riverside Caravan Park Lease
Res No 1039/1, Pages 1039 to 1042 - 25 November 2014

Seconded Cr Hall.

CARRIED.

25. I note that the CEO's Report on the council's website no longer includes the confidential minutes.

Relevant law

26. Section 90 of the Local Government Act provides:

90—Meetings to be held in public except in special circumstances

- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):
 - (a) ...
 - (b) information the disclosure of which—
 - (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
 - (ii) would, on balance, be contrary to the public interest;
 - ...
 - (h) legal advice;
 - ...
- (4) In considering whether an order should be made under subsection (2), it is irrelevant that discussion of a matter in public may—
 - (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
 - (b) cause a loss of confidence in the council or council committee.
- (5) A person who, knowing that an order is in force under subsection (2), enters or remains in a room in which a meeting of the council or council committee is being held is guilty of an offence and liable to a penalty not exceeding \$500 and if such a person fails to leave the room on request it is lawful for an employee of the council or

a member of the police force to use reasonable force to remove him or her from the room.

...

27. Section 91 of the Local Government Act provides:

91—Minutes and release of documents

- (1) The chief executive officer must ensure that minutes are kept of the proceedings at every meeting of the council or a council committee.
 - (2) If the chief executive officer is excluded from a meeting pursuant to Part 3, the person presiding at the meeting must ensure that minutes are kept.
 - (3) Each member of the council must, within five days after a meeting of the council or a council committee, be supplied with a copy of all minutes of the proceedings of the meeting kept under this section.
 - (4) A copy of the minutes of a meeting of the council must be placed on public display in the principal office of the council within five days after the meeting and kept on display for a period of one month.
 - (5) A person is entitled to inspect, without payment of a fee, at the principal office of the council—
 - (a) minutes kept under this section; and
 - (b) reports to the council or a council committee received at a meeting of the council or committee; and
 - (c) recommendations presented to the council in writing and adopted by resolution of the council; and
 - (d) budgetary or other financial statements adopted by the council.
 - (6) A person is entitled, on payment of a fee fixed by the council, to a copy of any documents available for inspection under subsection (5).
 - (7) However, subsections (4), (5) and (6) do not apply to a document or part of a document if—
 - (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3; and
 - (b) the council or council committee orders that the document or part be kept confidential.
- ...
- (9) If an order is made under subsection (7)—
 - (a) the council or council committee must specify the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order must be reviewed, and, in any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year; and
 - (b) the council or council committee must ensure that a note is made in the minutes recording the making of the order, the grounds on which it was made, and the decision of the council or council committee under paragraph (a); and

- (c) the council or council committee may delegate to an employee of the council the power to revoke the order.

...

Whether the council breached section 91 of the *Local Government Act 1999* by publishing confidential decisions

28. Section 90 and section 91 of the Local Government Act provide a council with the ability to prevent public access to council meetings and council documents.
29. It is alleged that the council has breached section 91 of the Local Government Act by releasing minutes for items that were considered confidential pursuant to sections 90(2) and (3)(b) and (h) of the Act in the CEO's Report for the 20 January 2015 council meeting.
30. The CEO's Report includes the minutes of the decisions made in confidence pursuant to section 90(2) and (3)(b) and (h) by the council for the following items:
- Resolution 940/1 of the 14 April 2014 council meeting
 - Resolution 1036/1 of the 13 October 2014 council meeting
 - Resolution 1039/1 of the 25 November 2014 council meeting
31. Pursuant to section 91(7) the council had ordered that the minutes of the above resolutions remain confidential until the market rental has been agreed or determined for the parties.
32. It is unnecessary for me to determine whether the items should remain confidential or not. The question is whether the confidential minutes should have been published in the CEO's Report.
33. Mayor Burgess provided me with a response to the allegation by letter dated 17 February 2015, including:

The Chief Executive Officer prepared a report for consideration by Council as to whether the confidential items in the previous Council resolutions and agenda papers could be released to the public. I am informed that the Chief Executive Officer considered that there were no provisions under Section 90 of the Local Government Act 1999 for this to occur. In particular, Section 90(4) of the Local Government Act 1999 states the following:

- (4) In considering whether an order should be made under subsection (2), it is irrelevant that discussion of a matter in public may—
- (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
 - (b) cause a loss of confidence in the council or council committee.

The Chief Executive Officer has advised that notwithstanding this potential to both Council and Cr Schmitt, the matter should be released and available to the public. Further, it is noted that in the Report prepared by the Ombudsman SA in November 2012, Part 9 - Reviewing Confidentiality Orders states inter alia:-

"Section 91(7) document orders which operate for a 12 month period have been problematic in this regard. There is some misunderstanding in councils about the statutory requirement to review a document order before that order expires. If the council intends to maintain confidentiality, it must review the original order before expiry and then make a valid new order for a further period of time." (Page 57)

Accordingly, as this matter was initially considered by Council on 14 April 2014, a review of the document/s, order/s are required before the order/s expire.

...

Legal advice was not obtained in relation to the Agenda papers for the 20 January 2015 Council meeting relating to Sections 90 and 91 of the Local Government Act 1999, as the Chief Executive Officer considered that there were no provisions under Section 90 for the matter to remain confidential.

Notwithstanding this the Mid Murray Council determined the following:-

[for the matters to remain confidential]...

34. I agree that it is appropriate for the council to review the confidentiality of documents and order/s at the appropriate time. I note section 91(1)(9)(a) of the Local Government Act which provides that the council must stipulate the circumstances in which the order will cease to apply and that, in any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year.
35. However, it is clearly the role of the council to make a decision as to when the order will cease to apply, not the CEO. The CEO did not have the power to release the confidential minutes.
36. I note the following paragraph in the 20 January 2015 council meeting minutes:

Council has delegated authority to the Chief Executive Officer to release documents as he believes appropriate, with a follow up report to Council following the release of documents.
37. The council advised my investigation that, following questions from my Office about this investigation, it obtained legal advice in relation to the CEO's delegated authority to release confidential information.¹² The legal advice includes:
 - Sections 90(2) and section 91(7) of the Local Government Act 1999 oblige the Council to separately resolve to hold part of a meeting in confidence and to keep relevant documents confidential for each and every matter which it considers that confidentiality is required pursuant to section 90(3) of the Act;
 - this requirement is reflected in section 91(9)(c) of the Act which states that the Council may delegate to an employee of the Council the power to revoke **the order**;
 - the Council cannot therefore resolve to delegate to the CEO a general power to review all confidentiality orders made under section 91(7) of the Act. The resolution to delegate this power can only be made in respect of a specific section 91(7) order;
 - if the Council's administration wishes to ensure that confidentiality orders can be revoked by the CEO on particular terms or in certain circumstances to increase efficiency and consistency and reduce the number of Orders which must be reviewed under the Act, then template recommendations for use in respect of certain classes of documents which providing for the delegation to the CEO to allow the orders to be revoked on relatively consistent grounds can be devised. What must occur however is that a specific delegation to the CEO must be made in respect of each individual order.
38. I agree with this view.
39. Section 91(9)(c) of the Local Government Act provides a power to revoke the order. In other words, it is necessary for the delegation to be cited by the council or committee

¹² Email from council to Ombudsman SA Investigating Officer, 7 April 2015.

for every order where such a review is to take place. It is not a general power of delegation which can be used on a discretionary basis by the CEO.

40. The Audit on the use of meeting confidentiality provisions of the Local Government Act conducted by my Office in 2012 found that there was confusion around the powers available to council CEOs with respect to section 91(9)(c):

Here the Act provides a power of delegation for the CEO to revoke a document order early, before the original timeframe or event has been reached. It is not always understood that this authority must be issued on each separate occasion, Neither is it clearly understood that only the council itself has the power to remake a section 91(7) document order.¹³

41. It is the role of the council, not the CEO, to determine whether the information remained confidential or not. As it turned out, the council determined that the items should remain confidential. However, the CEO had already included the confidential minutes in the publicly released agenda papers.
42. The minutes of the 14 April 2014, 13 October 2014 and 25 November 2014 council meetings do not provide delegated authority to the CEO to release the confidential minutes of the relevant items.
43. As such, my final view is that, by publishing confidential minutes in the CEO's Report, the council breached section 91(7) of the Local Government Act.
44. The CEO, in response to my provisional report, advised that he is fully aware of his obligations under the confidentiality provisions of the Local Government Act and it was not his intention to release the confidential minutes to the public prior to any decision of the council.
45. The complainant has alleged that the CEO deliberately included the confidential minutes in the CEO's Report to make the information public in an attempt to protect himself against the allegation that he had told staff members confidential information at general staff meetings. There is no evidence to support this.
46. I note that the council had determined on a number of occasions, including at the 10 June 2014 council meeting, that items relating to the caravan park lease should remain confidential until the market rental had been agreed or determined for the parties. The CEO had also recommended the same on numerous occasions. As such, I accept the CEO's position that he knows that he did not have the power to make a decision to release the confidential minutes and that the minutes were mistakenly included in the CEO's Report.
47. I do not consider there is any evidence for me to determine that the CEO's actions in including the confidential minutes in the agenda report were mischievous.
48. Nonetheless, I find that the CEO breached clause 2.11 of the Code of Conduct for Council Employees, which provides the following responsibility of an employee of a council:

Not to release or divulge information that the Council or Chief Executive Officer of the Council has ordered to be kept confidential, or that the Council employee should reasonably know is information that is confidential, including information that is considered by the Council or the Chief Executive Officer in confidence, subject to the *Ombudsman Act 1972* and the *Independent Commissioner Against Corruption Act 2012*.

¹³ Ombudsman SA, 'In the Public Eye - An Audit of the use of meeting confidentiality provisions of the Local Government Act 1999 in South Australian Councils', November 2012. Available at http://www.ombudsman.sa.gov.au/wp-content/uploads/councils_confidentiality_audit_2012.pdf

Conclusion

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

- a. the council acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act, and
- b. the CEO breached clause 2.11 of the Code of Conduct for Council Employees.

Recommendation

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council pass a resolution making a public apology to the complainant.

Final comments

I intend to report the CEO's misconduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

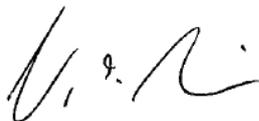
I intend to send a copy of this report to the Minister for Local Government Act as required by section 25(3) of the *Ombudsman Act 1972*.

I request that the council provide this report to a public meeting of the council, within two ordinary meetings of the council receiving the report.

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by 17 July 2015 on what steps have been taken to give effect to the recommendation above; including:

- details of the actions that have been commenced or completed
- the relevant date of the action taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

28 May 2015