

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mr John Turner
Council	Kangaroo Island Council
Ombudsman reference	2015/04218
Date complaint received	3 June 2015
Issues	<ol style="list-style-type: none">1. Whether the complaint against the council officers was investigated in accordance with the Code of Conduct for Council Employees2. Whether the complaint against the Chief Executive Officer was investigated in accordance with the Code of Conduct for Council Employees3. Whether it was lawful for the council to make orders under section 90(2) of the Local Government Act

Jurisdiction

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

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- considering the *Local Government Act 1999* and the council's Code of Conduct for Council Employees (**code of conduct**) and Code of Practice: Access to Council and Committee Meetings and Documents (**code of practice**)
- providing the council 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

In response to my provisional report the council replied by letter dated 5 April 2016. The council advised me how it has already implemented recommendation 1 of the audit by including in its 'Code of Practice: Access to Council Committee Meetings and Documents' the double test since August 2012, and that all matters brought into confidence since 2012 have been minuted and verbalised at meetings in accordance with the Act.

In response to the proposed recommendation 3 of the audit set out in my provisional report the council report to me that the CEO and presiding member will confer prior to each meeting in matters where a confidential meeting is required. The council explains that it is 'most mindful of its obligations to be as open as practically possible to the public' which has reduced the use of confidentiality provisions.

The complainant replied by letter dated 10 April 2016. The complainant disagreed with my views that the responsible officer's conclusions did not amount to an administrative error that was unreasonable, unlawful or wrong pursuant to the Ombudsman Act. I have read the complainant's submissions in this regard but it does not alter my view that the preliminary investigation by council was conducted in an appropriate manner consistent with the code of conduct.

Background

1. On 1 February 2015 a council officer was at the American River boat ramp looking at a partially submerged boat when he was approached by a person who enquired as to whether the owner of the boat was going to be prosecuted for creating an obstruction.
2. On 4 February 2015 the same person attended at the council office wanting to complain about the matter and asked to speak to Mr A, the council's [redacted] Manager. As Mr A was in the office at that time he met with the person. When asked if the person wanted to make a formal complaint about the incident he declined to do so.
3. On 13 February 2015 the complainant lodged a complaint with the council's Mayor alleging bullying and harassment by two council officers and that the officers' actions were ill informed and unreasonable. The complaint provided the following information:
 - The complainant and his brother were restoring a boat and as part of the process, he had cause to place the boat at the southern ramp of the American River boat ramp. The complainant considered this ramp to be rarely used. Due to unforeseen circumstances the boat was left at the location for about two weeks, much longer than the complainant had intended.
 - On 4 February 2015 the complainant was approached by a council officer Mr B (referred to as [redacted] in the complaint) enquiring why the boat had been moored for so long and also that a complaint had been received. The

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.

complainant told the officer that his brother was arriving the next day and that he expected to have the boat moved by 8 February 2015.

- On 6 February 2015 council officers Mr B and Mr A approached the complainant and informed him that a number of complaints had been received and that he should remove the boat immediately. One complaint related to another person's launching of a boat which almost collided with the complainant's boat.
 - The complainant considered that his boat, given its unseaworthy condition, could not be safely launched. He contacted the council CEO who decided to allow the complainant to continue to work on the boat in its current location until it was safe to move. The boat was removed on the high tide on 7 February 2015.
4. On 13 February 2015 the council's Chief Executive Officer (CEO) informed the complainant that his complaint would be investigated under the council's code of conduct. A copy of the code was provided to the complainant.
 5. In an email dated 20 February 2015, the council's Executive Officer, [redacted] informed the CEO that he as the Responsible Officer, had assessed the complaint and formed a view it had no substance.
 6. On 28 February 2015 the CEO informed the complainant there was no substance to his complaint. A copy of the Responsible Officer's assessment report was provided to the complainant.
 7. On 10 March 2015 the complainant lodged a complaint with the Mayor complaining that the CEO did not adequately investigate his complaint. In particular the investigation did not address some of the complainant's specific concerns in relation to the use of false information and the bullying approach of the officers.
 8. On 26 March 2015 the matter of this code of conduct complaint against an employee was tabled at a council meeting. The minutes of that meeting record:

3.1 Code of Conduct 2015/03

Moved Cr J Willson Seconded Cr P Denholm

1. 9:25am That Council approves under the provisions of Section 90 (2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting, in order to consider, in confidence, a matter on the grounds of Section 90 (3) -

a) Information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);

This matter relates to an employee code of conduct and as such represents private interest that should not be divulged in the public realm until the process is complete.

CARRIED.

Minute: SC1:2015

9. On 10 April 2015 the complainant made a follow up enquiry as to the status of the Mayor's investigation of his complaint.
10. On 13 April 2015 the Mayor informed the complainant he found no fault in the actions taken by the CEO.
11. On 14 April 2015 the matter of this code of conduct complaint against an employee was tabled at a council meeting. The minutes of that meeting record:

18.3 Code of Conduct 2015/03

Moved Cr J Willson Seconded Cr G Connell

1. That Council approves under the provisions of Section 90 (2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting with the exception of the PA, in order to consider, in confidence, a matter on the grounds of Section 90 (3) -

b) Information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);

This matter relates to an employee code of conduct and as such represents private interest that should not be divulged in the public realm until the process is complete.

CARRIED.

Minute: C120:2015

Relevant law

12. Part 3.1 of the code of conduct provides that:

- a complaint made by a non-employee about a council employee must be in writing to the CEO
- the CEO will conduct a preliminary assessment to determine the potential severity of the complaint
- the CEO will advise the employee the subject of the complaint that it is being assessed
- a Responsible Officer be appointed to conduct a preliminary investigation to determine if the complaint has substance or is trivial, frivolous or vexatious
- the Responsible Officer after conducting the preliminary investigation must advise the CEO of their view of the complaint
- if the complaint is viewed as having no substance the Responsible Officer must inform the complainant verbally and in writing of the decision.

13. Clause 3.1.3 of the code of conduct provides that:

- a complaint about the CEO must be made in writing to the mayor
- the mayor will advise the council of the complaint but the name of the complainant and the details of the complaint not be disclosed until the investigation has concluded
- the council must appoint an 'Independent Investigator' who should first conduct a preliminary investigation to determine if the complaint has substance or is trivial, frivolous or vexatious
- if the complaint is considered not to have substance the Independent Investigator must advise the mayor
- the mayor can then dismiss the complaint against the CEO and inform the council at the next available meeting
- the mayor must advise the CEO and the complainant of the decision in writing.

14. Section 90 of the Local Government Act provides in part, that:

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) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);

(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;

...

(9) In this section—

personal affairs of a person includes—

(a) that person's—

- (i) financial affairs;
- (ii) criminal records;
- (iii) marital or other personal relationships;
- (iv) personal qualities, attributes or health status;

(b) that person's employment records, employment performance or suitability for a particular position, or other personnel matters relating to the person, but does not include the personal affairs of a body corporate.

Whether the complaint against the council officers was investigated in accordance with the code of conduct

15. In relation to the complaint against the two officers, I infer from the Responsible Officer's assessment report that it was in the form of a preliminary investigation of the complaint under Part 3.1 of the code of conduct.
16. The code of conduct does not prescribe how a preliminary investigation should be conducted. The assessment report selected the salient allegations made by the complainant to the Mayor and provided commentary based on evidence obtained from other sources.
17. Following is the record of the assessment report³:
 - JT: We chose a time to launch on 25th January when the launching area was vacant (6:15 am), and when there was a high tide, intending to move it to a mooring on the following low tide when the current was slack.
 - RO: Confirmed by the Harbour Master [redacted].
 - JT: We paid our launch fee.
 - RO: Confirmed by Council GI.
 - JT: We launched on the Southern ramp that is very rarely used due to interactions of winds and currents. In fact I believe I have only ever seen this ramp used once since the facility was constructed.
 - RO: Not found. Harbour Master states that, 'although the southern ramp is not used as much as the northern, larger ramp, it is used frequently - particularly by smaller boats during times of a northerly / north-easterly wind and during high-use days.'
 - JT: I advise that we had previously enlisted help to move it later in the same day and had received permission from the Harbormaster (sic), [redacted], to moor it in the river. We took all steps we felt were necessary but the weather forecast we had relied on turned out to be wrong and it became impossible to safely move it.
 - RO: Confirmed in part by the Harbour Master - who went on to add that he had 'advised Mr Turner to 1] move his vessel to the sand flats immediately south of the southern boat ramp to allow clear passage or 2] to inform Council of the situation and make other arrangements - otherwise he (John) may be liable for a \$1,200.00 fine for the obstruction of Marine and Emergency vessels. He went on to say that

³ In the report the initials 'JT' refer to the complainant and the initials 'RO' refer to the Responsible Officer

- he noted Mr Turner "was not taking up and caulking the clinker built cutter correctly, but I decided to keep quiet on that one so not to embarrass John".
- JT: Furthermore the weather remained bad for the following week with strong south easterlies and quite high seas, so we had no other option than to leave it secured to the southern ramp. I attended each day to ensure it was not in danger of breaking free, when it could create a hazard for other boat users and possibly block all ramps.
- RO: Weather conditions Confirmed by the Harbour Master.
- JT: Obviously I acknowledge our boat should not have occupied the ramp for almost two weeks. It was certainly not our intention. On a subsequent suggestion from CEO Andy Broadman (sic) I paid a fee for each day we occupied the ramp.
- RO: Confirmed by A Boardman.
- JT: On Wednesday 4th February a Council officer named [redacted] (surname unknown) contacted me as I had been unable to move my boat. He explained he had received a complaint from a 'serial complainer' (his words) about the boat occupying a ramp
- RO: Confirmed in part. [redacted] stated that he did inform Mr Turner of the complaint, but cannot recall using the words 'serial complainer'. Council [redacted] also received a face-2-face complaint at the Dauncey Street Office from the same American River resident/boater on the same day. The complaints were forwarded to the Executive Officer and placed on-Record.
- JT: He [redacted] appeared understanding and I told him my brother was arriving on the evening of Thursday 5th February and we expected to be able to remove the boat by the end of the coming weekend i.e., Sunday 8th February. He appeared to accept this.
- RO: Mr B recalls that he agreed that Mr Turner could wait until help arrived to move the boat before the weekend.
- JT: On 6th February, the morning after my brother arrived, he and I commenced work at 6:15 am, caulking the boat in an endeavour (sic) to get it to float and be in a safe condition to move. Mr B attended during that day and told us we must move the boat immediately as his phone had been running hot with complaints about the boat occupying the rarely used ramp.
- RO: Confirmed. Other complaints had been received.
- JT: This surprised us, as very few boats had been launched during the previous week of inclement weather - on most days none. In fact on the day of the incident only 8 boat operators used the ramp and none were inconvenienced by the presence of our boat on the southern ramp, whether they were launching or retrieving.
- RO: Confirmed by the Harbour Master, who went on to add that 'regardless of it being a quiet week, the weekends are always pretty busy at this time of year'.
- JT: I believe Mr B invented or grossly exaggerated complaints.
- RO: Possibly exaggerated, but confirmed that they were not invented.
- JT: Mr B threatened to call in a crane and lift it from the water, a step that would have destroyed the boat....,
- RO: Mr B Confirmed that he told Mr Turner that Council would have the vessel removed from the boat ramp at Mr Turner's cost.
- JT: Mr B contacted his line manager, Mr A who arrived some time later.
- RO: Confirmed.
- JT: Mr A was likewise unmoved by the dilemma we were in..... He was disinterested in our explanation that continuing bad weather prevented us from doing so.....
- RO: Confirmed. Mr A stated to the RO that he was not concerned about why the vessel hadn't been removed at that point, more that it was still blocking the boat ramp after 13 days and that the weekend was upon them.
- JT: Mr A told us a person had come into his office complaining that he had almost backed his boat into ours.
- RO: The 3rd party complaint provided at the 'office' is Confirmed and documented by Mr A, Customer Service Staff and the Executive Officer.
- JT: To keep one alleged complainant happy he (Mr A) was bullying another ratepayer.
- RO: Irrelevant and uncalled for. An independent witness to the event stated categorically that the Council workers were firm and fair in their manner and tone and saw no evidence of bullying from the part "those blokes were just doing their job and John and his brother didn't like it'.
- JT: In believing this person Mr A displayed extraordinary gullibility. In using it as a reason we must move our boat he displayed total ineptitude.

- RO: Irrelevant and uncalled for. Mr A states that he mentioned the complaint to Mr Turner in the hope that Mr Turner would understand that his vessel had been an impediment to other ramp users
- JT: At one stage he (Mr A) demonstrated his ignorance by telling us the boat should not have been launched in an unseaworthy condition, completely overlooking the fact that for it to become seaworthy it must be allowed to take up and that can only happen when it is launched.
- RO: Irrelevant and uncalled for. The Harbour Master observed that the method used by Mr Turner to 'take up' the vessel was incorrect and was the principal reason that it had sunk.
- JT: Harassment we suffered under Mr B and Mr A made our difficult task even more difficult.
- RO: Challenged. An independent witness to the event stated categorically that he saw no evidence of harassment from the Council workers - more that Mr Turner and his brother were harassing the Council workers.
- JT: On an allied matter, it was the KI Council that closed off the earthen ramp adjacent the wharf that was traditionally used by boat owners to tend their vessels.
- RO: Incorrect and challenged. The earthen ramp was closed off by Transport SA at the time Council opened the new, extended concrete ramps and pontoon jetties.
- JT: Please explain where wooden boat owners can safely attend to their boats.
- RO: The Kingscote slipway and other suitable areas away from the boat ramps. The Harbour Master can advise in this matter.

FINDINGS:

The RO found no evidence, anecdotal or otherwise, to show that either Mr B or Mr A had behaved in a bullying and/or harassing manner toward Mr John Turner and/or his brother [Harry?].

The RO was provided with evidence, both anecdotal and/or documented, showing that the situation Mr Turner found himself in with his boat was treated sympathetically and supportively by Council. Further, it was found that Mr Turner did not follow the instructions of the Harbour Master and that he had caused some minor inconvenience to other boat ramp users.

The RO also found that there are a series of allegations, accusations and assumptions provided by Mr Turner and directed at either Council, in general, or Mr C and Mr A, that are ill-informed at best.

As such; it is found that the complaint has no substance.

18. In considering the assessment report I make the following findings:

- the frequency of use of the southern ramp is not relevant to any consideration that the officers bullied or harassed the complainant
- the advice given by the Harbour Master to the complainant is relevant in terms of where the boat was actually positioned and observed by the officers thereby prompting their action
- the report made to the officer by the person at the boat ramp is relevant to any assessment that the boat may be an obstruction
- a second report made to other council officers at a later time, albeit by the same person as before, is relevant to the officers considering whether it was necessary that the boat to be relocated as a matter of some urgency. I do not consider it critical that the report was not a formal complaint to the council, as it was information made known to the council.
- informing the complainant that the council could have the boat relocated at his cost is relevant in terms of the authority vested in the council. Of course this authority should only be exercised after the complainant was given a reasonable opportunity to comply with the direction.
- the evidence given by an independent third party commenting favourably on the council officers' manner is relevant and is at odds with the complainant's view.

I also acknowledge that some of the statements made by the complainant were supported by the evidence. I note in particular, the Responsible Officer expressed a view that one officer may have exaggerated the existence of complaints but nevertheless, complaints had been received. However, I note that this exchange between the officer and the complainant would have occurred in the context of an on-site discussion.

19. I note that the Responsible Officer did not inform the complainant verbally or in writing, of the outcome of the preliminary investigation as required by the code of conduct. The CEO did, however, advise the complainant in writing and provided him with a copy of the assessment report. I do not consider that this non-compliance with the code of conduct is, in the circumstances, significant.
20. My final view is that the preliminary investigation was conducted in an appropriate manner consistent with the code of conduct.

Conclusion

In light of the above, I consider that the council in conducting the investigation of the complaint against the council officers did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the complaint against the Chief Executive Officer was investigated in accordance with the code of conduct

21. Under the code of conduct the council was required to appoint an Independent Investigator to conduct a preliminary investigation of the complaint. The independent investigator is also required to advise the Mayor of the outcome of the assessment. I do not consider the code of conduct envisages the Mayor as an Independent Investigator.
22. Accordingly my final view is that the council in appointing the Mayor as an Independent Investigator acted contrary to the code of conduct and in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.
23. I now turn my mind as to whether the conducting of the preliminary investigation by the Mayor compromised the integrity of the process. I note at this time that first, it is in effect a policy requirement and secondly, the complainant has not raised this point in his complaint to me.
24. The mayor has stated that in considering the complaint he:
 - reviewed all of the documents from council staff and the complainant
 - interviewed the CEO to establish an accurate record of the process
 - interviewed the Responsible Officer who conducted the preliminary investigation.
25. The complainant went to some length to critique the Responsible Officer's assessment report as adopted by the CEO. In my view some of the statements made by the complainant are subjective and reflect a perspective that cannot be proved or may relate to others, but not to the two officers concerned. They include for example:
 - the comments made by and about the Harbour Master
 - comments attributed to Mr B by the complainant
 - the competence of other ramp users when launching their boats
 - the veracity of statements purportedly made by others in the vicinity

- the leniency extended by the CEO to the complainant does not, on its face, prove error on the part of the council officers.
26. The complainant was critical of the CEO not providing details of the complaints received by the council. I have commented earlier in the report about the finding of exaggerated comments by an officer. In light of this it would have been open to the CEO to provide some detail of those complaints. It would not, however, be appropriate for the CEO to disclose the source of the complaints.
27. On balance and having regard to the particular circumstances of this matter, my final view is that the council's failure to comply with the code of conduct has not resulted in a finding that is not supported by the evidence. In my view there is no evidence to support an allegation that the CEO did not handle the complaint appropriately.

Conclusion

In light of the above, my view is that in the Mayor assuming the role of Independent Investigator, the council did not comply with the code of conduct and consequently, acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

I have decided not to make a recommendation under section 25(2) of the Ombudsman Act in view of my finding that the non-compliance with the code of conduct did not affect the reasonableness of the investigation outcome.

In light of the above, my view is that the council in finding that the complaint against the CEO was not substantiated did not act in a manner that was unreasonable, unlawful or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether it was lawful for the council to make orders under section 90 of the Local Government Act

28. Section 90(1) of the Local Government Act provides that council meetings be open to the public. This is endorsed by the council's code of practice in which it advocates the 'principle of open and accountable government'.
29. Following receipt of the complaint against the CEO the matter was tabled at a council meeting on 26 March 2015. The council made an order under section 90(2) of the Local Government Act that the public be excluded and the matter be considered in confidence. The council purportedly relied on section 90(3)(a) of the Act as the matter contained information concerning the personal affairs of a person.
30. The council's resolution states that the reason for invoking section 90(3)(a) is because the matter relates to a 'private interest'. Section 90(3)(a) refers to 'personal affairs' and section 90(9) of the Local Government Act provides a definition of that term. It is unclear to me what the term 'private interest' means although the council may have been referring to personal affairs and in this matter it would have been the name of the complainant.
31. Clause 3.1.3 of the code of conduct requires that the Mayor inform the council of a complaint against the CEO, but that the name of the complainant and the details of the complaint not be disclosed until the investigation has concluded. I consider this can be done without the council relying on section 90. The Mayor, by simply making a statement to the effect that a complaint has been received against the CEO that will be managed under the provisions of the code of conduct, would satisfy the requirements of the code. Furthermore, a statement to such effect in a public forum would provide an appropriate level of transparency.

32. For this reason my view is that it was wrong for the council to move into confidence at the meeting.
33. On 14 April 2015 the matter of the outcome of the investigation was discussed at the council meeting. On that occasion the council resolved that it should consider the matter in confidence and made an order relying on section 90(3)(b)⁴ of the Local Government Act.
34. If a complaint against the CEO is dismissed the Mayor must inform the council at the next available meeting. I make the observation that the council could not rely on section 90(3)(b) in any event as the information must first, convey an expectation of a commercial advantage on a person and secondly, disclosure of that information would not be in the public interest. I suspect, however, the council sought to rely on section 90(3)(a). If I am right about that, I refer to my earlier view that by removing the name of the complainant the council could have dealt with the matter in a public meeting.
35. In my view it was wrong for the council to move into confidence at the meeting.
36. I am disappointed by this as these incidents followed the publication of the outcomes from an audit⁵ conducted by my predecessor in 2012 (**the audit**), which addressed the usage of section 90 confidentiality orders within the local government sector.

Conclusion

In light of the above, I consider that on 26 March 2015, in making the order under section 90 of the Local Government Act the council acted in a manner that was wrong under section 25(1)(g) of the Ombudsman Act.

In light of the above, I consider that on 14 April 2015, in making the order under section 90 of the Local Government Act the council acted in a manner that was wrong under section 25(1)(g) of the Ombudsman Act.

Recommendation/s

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council report to me on how it has implemented recommendation 3 of the audit being what the system of pre-meeting consultation between the CEO and the presiding member is for all recommendations made in relation to confidential meetings and how it has been implemented.

⁴ Minutes obtained from the council's website.

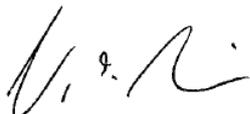
⁵ In the Public Eye - An audit of the use of meeting confidentiality provisions of the Local Government Act 1999 in South Australian councils - November 2012.

Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **1 July 2016** on what steps have been taken to give effect to the recommendations above; including:

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

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



Wayne Lines
SA OMBUDSMAN

2 May 2016