

## Report

### Preliminary investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	City of Marion (the council)
Ombudsman reference	2013/09337
Date complaint received	26 September 2013
Issues	Whether Councillor David Speirs breached the conflict of interest provisions of the <i>Local Government Act 1999</i> at the council meeting on 13 August 2013.

#### Jurisdiction

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

After I received an anonymous complaint on 26 September 2013, I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

The meeting at which it is alleged that Councillor David Speirs breached the conflict of interest provisions of the Local Government Act occurred prior to the regulated code made under section 63 of the Local Government Act.<sup>1</sup>

Under the definition of 'administrative act' in section 3 of the Ombudsman Act, my jurisdiction extends to investigating 'an act relating to a matter of administration on the part of a person engaged in the work of ... an agency'. This provides the jurisdictional basis for me to investigate whether an elected member of a council breached the conflict of interest obligations pursuant to the provisions of the Local Government Act.

#### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Speirs
- considering sections 73 and 74 of the Local Government Act
- considering the District Court of SA decision of *Petrovski v Dolling* [2013] SADC 27
- providing Cr Speirs and the council with my provisional report for comment
- meeting with council officers
- preparing this report.

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<sup>1</sup> The new code of conduct commenced operation on 1 September 2013.

## Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>2</sup> It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved  
...<sup>3</sup>

## Response to my provisional report

The council and Cr Speirs advised me that they would not be providing a response to my provisional report.

## Background

1. The council manages a Youth Advisory Committee (YAC). One of the aims of the YAC is to enable young people to contribute to council decision making.
2. It was alleged that Councillor Bruce Hull made negative comments about YAC members at a public event, the Oaklands Wetland consultation, on 16 May 2013 (**the incident**). The comments were overheard by YAC members, who then contacted Cr Speirs to express their concerns about the incident.
3. Cr Speirs has told my investigation that he has 'a long association with the YAC, often attending their meetings and providing them with a conduit into the elected council.'<sup>4</sup> Further, he says that he 'supported these young people and their parents as they worked through the issues' and that his support included 'raising the matter with council's administration and supporting the young people and their parents to take the issue to the media, a decision they made on their own terms.'<sup>5</sup>
4. On 19 June 2013 the Guardian Messenger published an article about the incident, titled "'Boring" Insult Hurts.'
5. At the council meeting on 25 June 2013 the council considered a matter titled 'How We Work Together - Matter for Council Consideration' in confidence. Several motions were carried, including the following:

That Council request a personal explanation from Councillor Hull regarding alleged public comments made by him at the Oaklands Wetland consultation on Thursday 16 May 2013 re: YAC to be made in writing marked confidential to Elected Members within 7 days and reserves its right to conduct further investigation as advised.

That an investigation be undertaken by an external independent investigator as to how the matter was escalated to the media.<sup>6</sup>

<sup>2</sup> 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.

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

<sup>4</sup> Letter of response to the allegation from Cr Speirs to the Ombudsman, 4 November 2013.

<sup>5</sup> Ibid.

<sup>6</sup> City of Marion Minutes of the General Council Meeting, 25 June 2013, How We Work Together, Reference Number GC250613FO2.

6. Cr Speirs did not attend the 25 June 2013 council meeting.
7. On 13 August 2013 the council again considered the matter titled 'How We Work Together - Matter for Council Consideration' in confidence. At this meeting Cr Hull provided a personal explanation about the incident. In his personal explanation Cr Hull implied that someone had encouraged the YAC members to go to the media about the incident. The minutes include the following:
  - a. Cr Hull expressed his concern in relation to the YAC incident, querying how this ended up in the media and the person who encouraged the YAC to go to the media has more to answer for.

As Cr Speir has a relationship with the YAC members, it is reasonable to assume that Cr Hull was implying that Cr Speir had encouraged the YAC members to go to the media.

8. At the 13 August 2013 council meeting, Cr Speirs provided a personal explanation about his involvement in the incident. The minutes record the following:

Councillor Speirs provided a personal explanation in relation to his knowledge and engagement with the YAC matter stemming from the Oaklands Wetland consultation held on Thursday 16 May 2013.

- a. Cr Speirs advised following the event he received a complaint from the YAC via text message that night which he forwarded to the CEO for advice. He then referred the YAC members to the elected member profile page of the City of Marion website to see if they could identify the member making the comments from profile photos.
  - b. Cr Speirs did provide the YAC members with support through the process as he felt that it was appropriate to do so as the Council liaison. He made contact with the parents who in the course of discussions mentioned going to television media about the matter. Cr Speirs discouraged this.
  - c. Cr Speirs advised they also mentioned going to The Messenger which he neither encouraged or discouraged them to do. However, he did provide them with support once they had decided to do this.
  - d. Cr Speirs apologised to Cr Hull if his involvement or management of the matter added to his feelings of frustration.
  - e. Cr Speirs advised that from discussions with YAC he does not believe there is lasting damage to Council's relationship with YAC and that an apology from Councillor Hull would be a significant step forward in repairing the relationship.
9. After noting Cr Hull's and Cr Speir's explanations, the council resolved that the investigation into how the incident was escalated to the media was no longer required. Cr Speirs voted in favour of the motion.
  10. At the council meeting on 27 August 2013 the council carried a rescission motion to rescind council's 25 June 2013 resolution to investigate how the incident was escalated to the media. Cr Speirs declared a conflict of interest 'due to matters raised in the item relating to personal affairs.'<sup>7</sup>

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<sup>7</sup> City of Marion Minutes of the General Council Meeting, 27 August 2013, Rescission of Council Resolution: How We Work Together, Reference Number GC270813FO4.

## Relevant law

11. Section 73(1) of the Local Government Act defines the circumstances in which an elected member has 'an interest in a matter' as follows:

### 73—Conflict of interest

- (1) A member of a council has an interest in a matter before the council if—
- (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
  - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,
- (not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

12. Section 74(1) provides:

A member of a council who has an interest in a matter before the council must disclose the interest to the council.

13. Section 74(2) provides:

A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.

14. Section 74(4) provides:

A member of a council who has an interest in a matter before the council must not:

- (a) propose or second a motion relating to the matter; or
- (b) take part in discussion by the council relating to that matter; or
- (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
- (d) vote in relation to that matter.

## Whether Cr Speirs breached the conflict of interest provisions of the *Local Government Act 1999* at the council meeting on 13 August 2013

15. The complainant has alleged that Cr Speirs had a conflict of interest in participating in the voting at the 13 August 2013 council meeting decision about not continuing with the investigation into how the incident was escalated to the media (**the matter**). The complainant says that 'it is possible such an investigation may have implicated Cr Speirs in the breach of confidence to the media' and that this was 'supported by his declaration'.
16. I must first be satisfied that Cr Speirs had an 'interest in a matter' in relation to the decision within the meaning of section 73(1). That is, I must be satisfied that by participating in the council's voting as he did, Cr Speirs would receive a benefit or

suffer a detriment or would have a reasonable expectation of receiving a benefit or suffering a detriment of the type described in section 73. Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the area, or some other substantial class of persons.

17. In the recent case of *Petrovski v Dolling*,<sup>8</sup> the District Court emphasised that the legislation is confined to the type of interest referred to in section 73 and 'not to conflicts of interest at large'.<sup>9</sup> The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
18. Further, the court said that the question of whether a council's resolution gives rise to a section 73 interest, must be determined by a consideration of the actual terms of the resolution.<sup>10</sup> In addition, the test is that the elected member 'would' receive a benefit or suffer a detriment or 'would have a reasonable expectation' of receiving a benefit or suffering a detriment. Speculation about the consequences of the matter being decided in a particular manner is not sufficient.
19. I do not consider that Cr Speir's comments at the 13 August 2013 council meeting suggest that he may have provided information about the incident to the media, or encouraged the YAC members to go to the media. Whilst it is possible that Cr Speir may have encouraged the YAC members to go to the media I do not consider that it is necessary or justifiable for me to investigate this issue further. I do not have any evidence to suggest that Cr Speirs would be implicated in any way if the investigation was to have occurred. To conclude this would be no more than speculation. As such, I do not have any evidence to suggest that Cr Speirs could suffer a non-pecuniary detriment if the investigation was to have occurred.
20. Further, I note that the anonymous complainant alleges that:
 

He [Cr Speirs] provided a decisive qualitative influence on other members during the meeting as well as providing a decisive vote, which was to not continue with an investigation of the breach of confidentiality.

I disagree. The motion at the 13 August 2013 council meeting was carried by six votes for the motion, including Cr Speirs' vote, and four votes against the motion. Had Cr Speirs not voted, the motion still would have been carried by the council.
21. I acknowledge that Cr Speirs has admitted that he felt that he was 'probably too close to the issue'<sup>11</sup> and, as such, he absented himself from voting in relation to the matter at the 27 August 2013 council meeting. Cr Speirs has told my investigation that, on reflection, he thinks that perhaps he did have a conflict of interest due to the 'supportive relationship... involving individuals who are then impacted by a vote before council.' I disagree. In my view, given that there is no evidence that Cr Speirs would be implicated if an investigation of who went to the media was conducted, I could only speculate that a non-pecuniary benefit or detriment for Cr Speirs may arise from the consideration of the matter; and hence Cr Speirs was under no requirement to declare an interest as defined in section 73(1).
22. My final view is there was no identifiable pecuniary or non-pecuniary benefit or detriment (and no reasonable expectation of such a benefit or detriment) arising from the matter; and hence Cr Speirs was under no requirement to declare an interest as defined in section 73(1).

<sup>8</sup> *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

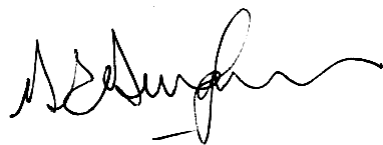
<sup>9</sup> *Ibid*, [41].

<sup>10</sup> *Ibid*, [34].

<sup>11</sup> Letter of response to the allegation from Cr Speirs to the Ombudsman, 4 November 2013.

## Opinion

In light of my conclusions outlined above, my final view is that Cr Speirs did not breach section 74(1) of the Local Government Act.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long, sweeping flourish extending to the right.

Richard Bingham  
**SA OMBUDSMAN**

13 December 2013