

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

Complainant	Mr John Harry
Council member	Councillor Chad Buchanan
Council	City of Salisbury
Ombudsman reference	2014/07042
Date complaint received	29 August 2014
Issue	Whether Cr Chad Buchanan breached the conflict of interest provisions of the <i>Local Government Act 1999</i> and clause 3.13 of Part 3 of the Code of Conduct for Council Members at the council meeting on 25 August 2014

Jurisdiction

The council's Chief Executive Officer, Mr John Harry, (**the CEO**) received a complaint made in confidence to him by email on 26 August 2014 alleging breaches of Part 2 and Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).¹

In accordance with his obligations as CEO under the Code of Conduct the CEO forwarded the allegations to my Office.

The complaint alleged that Cr Buchanan had breached clauses 2.3, 2.9 and 2.10 of Part 2 of the Code of Conduct and 3.13 of Part 3 of the Code of Conduct.

I am investigating the alleged breach of Part 3 of the Code of Conduct. I do not have jurisdiction to consider the alleged breaches of Part 2.

The complaint alleges a breach of Part 3 of the Code of Conduct. An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.²

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

¹ The Code of Conduct was gazetted on 29 August 2013.

² Section 263A(4) Local Government Act; section 3, Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the council and the complainant
- seeking further information from the council
- seeking a response from Cr Buchanan
- considering the Local Government Act
- considering the Code of Conduct
- meeting with Cr Buchanan
- providing the council and Cr Buchanan 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.³ 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 ...⁴

Response to my provisional report

Cr Buchanan provided a response to my provisional report which, in summary, included:

- he no longer remains in the vicinity of the chamber after he has declared a conflict of interest in a matter, however he notes that other council members do sit just outside the chamber
- he accepts that he did attempt to record the discussions
- he was advised that the audio system was not working and attempted to record the meeting in order to be able to show me that other council members had conflicts of interest in the matter, and that they were using the process to destroy his 'reputation and standing in the community' as they were lodging numerous Code of Conduct complaints against him to coincide with the 'council election media cycle'
- at no time was he 'ever attempting to show deliberate disregard' to his obligations
- he now understands that, by being in close vicinity to the chamber, he did not comply with the Local Government Act, but he did not deliberately disregard the Local Government Act or act dishonestly.

I have amended my report in response to Cr Buchanan's submission as I consider appropriate.

The council responded by letter dated 3 August 2015 advising that it had no comment to make in response to my provisional report.

³ 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.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Background

1. Cr Buchanan is an elected member of the City of Salisbury (**the council**).
2. At its meeting on 28 April 2014 the council considered two code of conduct complaints concerning the conduct of Cr Buchanan at a council meeting on 28 January 2014. The council resolved to refer the complaints to the Local Government Governance Panel (LGGP) for investigation.
3. At items GB2 and GB3 of its council meeting on 25 August 2014, the council considered the final reports of the LGGP.
4. Cr Buchanan declared a conflict of interest in items GB2 and GB3 of the 25 August 2014 council meeting, due to being a party to the complaints, and left the meeting.
5. The minutes of the 25 August 2014 council meeting record the following:

GB2 Local Government Governance Panel - Report on the Investigation of Code of Conduct Complaints 05/2014 and 06/2014

Cr Buchanan declared a conflict of interest due to being a party to the complaint being considered and left the meeting at 11:02 pm.

In accordance with section 10(2) of the Code of Practice for Meeting Procedures, the presiding member provided a five minute break to all present. The meeting was suspended at 11:06 pm.

The meeting reconvened at 11:16 pm.

Cr Pilkington entered the meeting at 11:17 pm.

Cr G Caruso entered the meeting at 11:18 pm.

Cr Proleta entered the meeting at 11:18 pm.

Cr Zahra sought leave of the meeting to speak for a second time. Leave was granted.

Cr Pilkington moved:

- 2612** 1. That the Local Government Governance Panel - Report on the Investigation of Code of Conduct Complaint 05/2014 and 06/2014 not be considered in confidence.
- Cr G Caruso seconded **CARRIED**

- 2613** 1. That the Local Government Governance Panel - Report on the Investigation of Code of Conduct Complaint 05/2014 and 06/2014 be received.
- Cr Pilkington moved Cr Vermeer seconded **CARRIED**

Cr Buchanan returned to the meeting at 11:48 pm.

GB3 Code of Conduct Complaint 05/2014 and 06/2014 - Investigation Findings

Cr Buchanan declared an interest due to being a party to the complaint and left the meeting at 11:48 pm.

Cr Vermeer called a point of order in relation to the use of a recording device at the meeting.

The CEO provided advice in relation to the point of order.

The Deputy Mayor ruled the point of order to be valid and advised that the Manager Governance had provided advice to Cr Buchanan reminding him of his obligations.

Cr Pilkington moved:

1. Information be received.
2. Councillor Buchanan apologise to Mayor Aldridge and Cr Isemonger for his behaviour at the Council Meeting on 28th January 2014. The apology be made at the next Council meeting as a Personal Explanation in accordance with the Local Government Procedures at Meeting Regulations 15(3) and 8(4g). The apology to be recorded in writing and recorded in full in the minutes of the meeting.

Cr G Caruso seconded

*With leave of the meeting and consent of the seconder Cr Pilkington **VARIED** the **MOTION** as follows:*

Cr L Caruso left the meeting at 12:25 am (26/08/2104).

Cr Coates noted that Cr Buchanan left the meeting at 12:26 am (26/08/2104) and did not return.

Cr L Caruso returned to the meeting at 12:27 am (26/08/2104).

2613

1. Information be received.
2. Councillor Buchanan apologise to Mayor Aldridge and Manager Governance for his behaviour at the Council Meeting on 28th January 2014. The apology be made at the next Council meeting as a Personal Explanation in accordance with the Local Government Procedures at Meeting Regulations 15(3) and 8(4g). The apology to be recorded in writing and recorded in full in the minutes of the meeting.

Cr Caruso seconded

**CARRIED
UNANIMOUSLY**

6. As recorded in the minutes, shortly after Cr Buchanan had left the meeting the Deputy Mayor provided a break in proceedings. This was to allow the council's Manager Governance to retrieve additional information in relation to the confidential status of documents related to the complaints. During this break Cr Buchanan re-entered the council chamber and it is alleged that he discussed the matter before the council with several council members.
7. It is alleged that when Cr Buchanan spoke to other council members during the break he bullied them and acted in a threatening manner in an attempt to influence their voting. As such, the complaint alleged that Cr Buchanan breached clauses 2.3, 2.9 and 2.10 of Part 2 of the Code of Conduct. I do not have jurisdiction to consider alleged breaches of Part 2.
8. The CEO and the Governance Manager advised Cr Buchanan that it was not appropriate for him to discuss the item with other council members given that he had declared a conflict of interest in the item. Cr Buchanan left the chamber, and the council's consideration of item GB2 resumed.
9. The council debated the issue of considering the LGGP report in confidence, with varying views expressed as to whether the matter should initially be considered confidentially. The council resolved that the matter not be considered in confidence.
10. The complaint alleges that once Cr Buchanan left the chamber 'he sat directly outside the door and pushed a recording device through the slats in the door.'

11. After the council had considered item GB2 it then moved on to consider item GB3. It was raised that Cr Buchanan also had a conflict of interest in this item and, as such, he should be invited to re-enter the chamber to declare the conflict. It is alleged that at this point Cr Buchanan put his head through the door and advised that he had a conflict of interest in relation to this item also.

12. The complaint states as follows:

... Following the decision re confidentiality without being asked Cr Buchanan put his head through the door and yelled to forward his conflict on to the next matter. At this point the manager of governance was asked to ask Cr Buchanan to move away from the door. ...

13. My investigation requested information from the council. The council provided a response by letter dated 7 October 2014, including the following summary of events:

... Following the declaration of the outcome of the vote on the motion for consideration of the item in confidence, a member asked if Cr Buchanan should be invited back to the meeting. At that time Cr Buchanan opened the door to the Council Chamber and suggested his declaration of conflict of interest should be repeated for the remaining Code of Conduct items.

Cr Buchanan's contribution to the meeting at that point was cause for concern for a number of Elected Members, with Cr Pilkington formally noting it was inappropriate for Cr Buchanan to be in the vicinity of the Chamber having declared a conflict. Cr Pilkington also noted that he had observed what appeared to be a mobile phone inserted in the door grill of the closed Council Chamber door and commented that it was his assumption that the meeting was being recorded by Cr Buchanan.

The Manager Governance spoke with Cr Buchanan as requested by the CEO and reminded him of his obligations. Cr Buchanan observed that it was possible to hear the discussion from a range of places on the first floor of the Council Building. The Manager Governance observed a mobile phone inserted into the grill in the Gallery entrance door of the Council Chamber and removed the phone, handing it to Cr Buchanan. At the suggestion of the Manager Governance, Cr Buchanan moved to the Ground Floor of the Building. The Manager Governance returned to the Council Chamber.

Council then discussed and resolved to receive the *Local Government Governance Panel - Report on the Investigation of Code of Conduct Complaint 05/2014 and 06/2014*. Cr Buchanan was invited to return to the Council Chamber prior to moving on to the next item of business (GB3)

At the commencement of consideration of GB3 Cr Buchanan declared a conflict of interest due to being a party to the complaint and left the meeting at 11.48pm.⁵ As reflected in the Council Minutes Cr Vermeer called a point of order at this point in relation to the use of a recording device in the Council meeting by Cr Buchanan. The CEO provided advice in relation to the allegation. The Deputy Mayor ruled that the point of order was validly called and advised that the Manager Governance had spoken to Cr Buchanan regarding his obligations in relation to a matter he had declared a conflict of interest for. On that basis the Deputy Mayor took no further action in relation to the point of order. The Council meeting proceeded and a final decision was made in relation to the action to be taken in response to the finding of the LGGP that Cr Buchanan had breached Part 2 of the Code of Conduct for Council members. ...

14. Cr Buchanan provided a response to my investigation by email on 5 January 2015. He has alleged that several council members were timing multiple complaints against him to be lodged prior to the local government elections that were 'vexatious' and 'an

⁵ Cr Buchanan did not return to the meeting after that point in proceedings. Council's security officer entered the Chamber at 12:26am (26/08/14) and collected Cr Buchanan's belongings. Deputy Mayor Coates (who was presiding over the meeting) noted that Cr Buchanan had left the meeting and this was recorded in the minutes.

example of the way that Councillors across South Australia are making multiple vexatious complaints about their opponents for political gain.’ Cr Buchanan also states:

... Furthermore it was stated to me in May or June, 2014 that if I did not get “breached on at least two of the seven complaints lodged against me (to trigger the provision of sending it to the Ombudsman) this month, more will be lodged next month”. Sure enough that came true when Cr Pilkington declared a conflict of interest when another code of conduct was lodged due to my supposedly “being in contact with the community members who lodged the code of conduct.” This conflict of interest didn’t seem to bother Cr Pilkington at a later stage when dealing with the findings of alleged code of conduct against me, by not only remaining present during discussions, but also moving and advocating the maximum penalty against me. This, is why amongst other reasons, I tried to record the meeting so that I could, if necessary, prove what was actually occurring. I will go into my other reasons for trying to record the meeting when answering that questions.

...

I confirm that I declared a conflict of interest about item G.B.3 as the report was considering action against me. With the benefit of hindsight, I now realise that I did not declare my conflict of interest correctly, as I should have re-entered the Chamber, declared the interest, and not merely declared an interest by opening the door to the chamber and stating that I had a conflict of interest on the same ground as the previous item.’

...

I was seated at the table and chairs in the foyer immediately outside of the Council Chamber door. I and a number of elected members have regularly sat there after declaring a conflict of interest.

Please note that deliberations in the Chamber can be heard anywhere on the same floor where the chamber is located. Councillors would have to sit in the kitchen or downstairs near customer service if an elected member was to avoid hearing anything from the Chamber. Again, with the benefit of hindsight, I will ensure that I do this next time I have a conflict of interest and I did move after Council’s Manager of Governance came out and advised me to do so after I called out my conflict of interest from where I was located outside of the door when Council was considering item G.B.3.

...

During the course of the meeting, there were faults with the audio system. This can be confirmed by an email from the CEO. Given the trial by majority that was taking place, because I wasn’t given an opportunity to respond to the LGA Panel’s recommendation and on what Council was considering, not to mention the rhetoric that was coming from some of the councillors, I attempted to record the meeting. I did this for no other purpose than to give you a record of what was happening to me and what I believed were a number of conflicts of interest by other councillors (the same councillors who lodged the complaints were now deciding on what action to take). Not to mention the defamatory comments, Council assuming the role of judge, jury and executioner and having absolutely no regard to me for any resemblance of natural justice. At no stage was even I able to comment to the Council about the allegations made against me, the findings or the recommendations against me. I just had to put my fate in the hands of the same people that concocted half of the complaints, who had canvassed with each other the timing and number of complaints and had even on occasion declared a conflict in having been in discussions and advising community members to lodge complaints against me.

...

Relevant law

15. Clause 3.13 of Part 3 of the Code of Conduct provides:

Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.

16. Section 73(1) defines the circumstances in which a council 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).

17. Section 74(1) of the Local Government Act imposes an obligation on a council member who has an interest in a matter to disclose the interest to the council. Sections 74(2) and 74(3) prescribe procedural requirements to be followed by elected members who have an interest for the purposes of the section:

74–Members to disclose interests

- (1) A member of a council who has an interest in a matter before the council must disclose the interest to the council.
- (2) A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.
- (3) A disclosure made under subsection (1) must be recorded in the minutes of the council (including details of the relevant interest).
- (4) 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 Buchanan breached the conflict of interest provisions of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct for Council Members at the council meeting on 25 August 2014

18. It is alleged that Cr Buchanan was ‘in, or in the close vicinity of’ the chamber while the discussion in relation to the motion was taking place, in contravention of section 74(4)(c) of the Local Government Act.
19. Cr Buchanan has admitted that:
- he was in the close vicinity of the chamber while the discussions were taking part
 - that he was listening through the door and ‘called out’ that he had a conflict of interest in relation to item GB3, and

- that he attempted to record the discussion on his mobile phone.
20. In his response to the allegations, Cr Buchanan made the point that in remaining in the foyer immediately outside of the council chamber he had been following regular council practice. Nonetheless, ultimate responsibility for his actions rests with Cr Buchanan, and in my view his presence in the foyer amounted to being 'in the close vicinity' of the council chamber, as prohibited by section 74(4)(c).
 21. Cr Buchanan also provided reasons as to why he considered that it was necessary to attempt to record the discussions.
 22. In my view, Cr Buchanan's actions show a disregard of his obligations in regards to conflicts of interest and the conflict of interest provisions of the Local Government Act.

Conclusion

In light of the above, my final view is that Cr Buchanan breached the conflict of interest provisions of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct. In this way, Cr Buchanan acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Recommendations

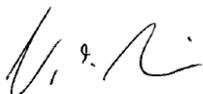
To remedy this error, I recommend under section 25(2) of the Ombudsman Act and section 263B of the Local Government Act, that the council:

1. reprimand Cr Buchanan (including by means of a public statement)
2. require Cr Buchanan to attend conflict of interest training
3. require Cr Buchanan to issue a public apology.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 27 November 2015 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.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as those above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the District Court.



Wayne Lines
SA OMBUDSMAN

7 October 2015