

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Ms Belinda Spooner
Council	District Council of Peterborough
Ombudsman reference	2016/02992
Date complaint received	8 April 2016
Issues	<ol style="list-style-type: none">1. Whether the council's decision to enforce By-law No. 4 was unreasonable for the purposes of section 25(1)(b) of the Ombudsman Act2. Whether the council acted in a manner that was improperly discriminatory for the purposes of section 25(1)(b) of the Ombudsman Act3. Whether the council conducted an internal review in accordance with its Internal Review of a Council Decision Policy

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
- seeking more particulars from the council
- considering the District Council of Peterborough's Internal Review of a Council Decision Policy (**the Policy**)
- 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 responded as follows:

The Council is pleased with your findings that the Council did not act unreasonably or in a manner that was improperly discriminatory.

In relation to the internal review, the Council accepts it can improve on its procedures. The Council has had very little experience in handling Section 270 applications. Indeed, it has received zero applications in the last four and a half years. The Council will certainly use your investigation of this matter as a learning experience. In accordance with your foreshadowed recommendations, the Council undertakes to review its policy...

Finally, the Council seeks to clarify one aspect of its submission to you which you state you find '*concerning*' at paragraph 45 of your Provisional Report. The Council did not intend to suggest or imply in its submission that it had '*pre-judged the outcome of the review*' as you have suggested. Rather, the Council was merely speculating in hindsight as to what new evidence it could have suggested to Ms Spooner that she provide. The Council wishes to assure you that it did not mean to imply it had predetermined Ms Spooner's application.³

The complainant responded with detailed submissions elaborating on various factual issues and including the following:

- noting that she rang the former Chief Executive Officer in around April of May of this year and asked him if, during his time in office, he had a problem with the garden being planted, to which he responded 'no, I think it was great' and 'could not believe they were asking me to remove it for no valid reason'
- in relation to the garden being a fire hazard, the complainant says that there are many things in Peterborough that are fire hazards and the green plants in the garden bed area would not burn easily.
- the Fire Chief Mr Phil White did not consider the complainant's garden to be a fire hazard
- the garden was kept watered every day using a biocycle system, similar to the council's set up for watering a lawn area at the back of the council
- the council have been highly unreasonable and shown prejudice against the complainant
- the complainant considers that Peterborough is 'crying out for tree and growth' and that 'the council seem to be going to great lengths to make it a heavily sprayed barren town, that needs repetitive spraying and mowing ...'
- the complainant believes that she was the only person to be required to remove a garden pursuant to an enforcement of By-law No. 4. According to the complainant, the council has provided no examples of other people being treated the same as her, rather the council has only been able to produce evidence (by way of letters to residents released under Freedom of Information) of 'slightly similar' instances

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.

³ Letter dated 30 August 2016.

- the only reasons the complainant had ever received for the council's actions in enforcing the By-law were that the council could not get a slasher in to the garden area, and that someone could injure themselves on the stones
- the complainant believes that the council only decided to take action in relation to the garden as retribution for her making complaints to the council about weed spraying and the mess created by 'Free Campers' in the Peterborough area
- the complainant considers that of all the trees planted across the back of hers and neighbouring properties, the complainant's garden was the only one required to be removed
- the complainant offered examples of her neighbours who had planted trees in a similar area and had not been asked to remove them.

Having considered the responses of the council and the complainant, my view remains as set out in my provisional report.

Background

1. In 2007 and 2008 Ms Belinda Spooner (**the complainant**) asked the council whether it would lease or sell to the complainant a small portion of council land adjoining her land located at [redacted], Peterborough (**the land**). The land is owned by the council and is an open area bordered by a road reserve. On 21 January 2008 the council resolved not to sell or lease the land as requested. The complainant was notified of this decision by letter dated 22 January 2008.
2. On 12 March 2008 the complainant wrote to Mr Frank Endermann, Development Officer, submitting a request that the council sell or leases a portion of the land for the purposes of erecting a shed. This request was responded to by the then Chief Executive Officer of the council by reference to the council's previous decision not to sell or lease the council land. Notwithstanding the council's decisions, the complainant placed items including a trailer, scrap materials, stones, garden structures and garden beds on the land.
3. On 7 September 2015 the council wrote to the complainant notifying her that her use of and encroachment into the land constituted a breach of the council's By-law No. 4. The letter advised that the reinstatement of the council land was required to be completed by 28 September 2015.
4. On 25 September 2015 the complainant lodged a request for an internal review of the council's decision to enforce By-law No. 4:

Under section 270 of the Local Government Act 1999, I would like council to review the decision to remove my garden on council land to the rear of my property at [redacted]. I feel it is unfair for you to order this when it has been there for 6 years, and is no different from any other plantings on council land in Peterborough.
5. On 28 September 2015 the council wrote to the complainant advising that her request for an internal review would be put to the Elected Members at the council meeting on 19 October 2015.
6. On 19 October 2015 the council determined at its meeting that the Elected Membership would deal with the internal review application. The complainant was advised of this by letter dated 22 October 2015.
7. On 6 November 2015 the council received a letter from the complainant in which she made submissions regarding the environmental benefits of the garden on the land in

terms of reducing 'greenhouse footprints'.

8. On 16 November 2015 the council determined to uphold the original decision. Item 2 in the Chief Executive Officer's report of the 16 November 2015 council meeting (**the report**) stated as follows:

B SPOONER - Section 270 review

B Spooner has requested a Section 270 review in relation to the removal of a garden she has placed on Council property.

The following is a list of correspondence between Council and B Spooner:

1. Letter from I & B Spooner - received 4th December 2007
2. Letter from Council in response to the Spooner letter received on 4th December 2007
3. Letter from Council 22 January 2008
4. Copy of the minutes from the Ordinary Council meeting held on the 21st January 2008
5. Letter from I & B Spooner 12th March 2008
6. Letter from Council 19th March 2008
7. Letter from Council to I & B Spooner 7th September 2015
8. Letter from I & B Spooner 25th September 2015 requesting a Section 270 review
9. Letter from Council 28th September 2015 acknowledging receipt
10. Letter from Council 22nd October 2015
11. Copy of the minutes from the Ordinary Council meeting held on 19th October 2015
12. Copy of By-law No. 4 - Local Government Land
13. Copy of the Fire & Emergency Services Act 2005 Section 105G
14. Letter from B Spooner for consideration.
(Attachment 1)

I & B Spooner have at no stage requested permission to use Council property for their own garden [sic].

The garden has apparently been there for approx. 5 years.

Under the Fire & Emergency Services Act 2005 Section 105G [sic] Council has a responsibility to ensure its properties are kept in order to minimise the possibility of fire impacting on the community.

It should also be noted that this garden has the potential to fuel a fire which could damage the property of I & B Spooner leaving Council at risk of liability.

Recommendation: Councillors to make recommendation.

9. On 18 November 2015 the complainant wrote to the council and applied for a second internal review in the following terms:

I would like to ask for a review of the decision to remove my Garden [sic] from Council land at the rear of my property

10. On 19 November 2015 the complainant wrote to Mr Peter McGuinness, Chief Executive Officer of the council as follows:

I feel I am being discriminated against with this issue and that the deciding vote by Ruth Whittle was both unfair and totally contradictive to her decision when she visited me in person to view the garden and told me she could not see why it should be removed and that she was with me, and then had the deciding vote at the November council meeting and voted that it be removed.

I have been in contact with the Ombudsman and am therefore requesting an internal review under section 270 of the local Gov. Act. 1999 [sic]

11. On 19 November 2015 Mr McGuinness wrote to the complainant advising her as follows:

Further to your request for a Section 270 review of a Council decision on the removal of the garden located on Council land, Council did review this request at its Ordinary Council Meeting on Monday 16th November 2015, and the following decision was made.

15.2 B Spooner - Section 270 Review

Council's decision to enforce By-Law 4 remains in place and that B Spooner remove the garden located on Council land known as the 'flood plain'.

CARRIED 139/11/15

12. On 7 December 2015 the complainant lodged a Freedom of Information (FOI) application seeking a list of property owners who had, in the last 5 years, been requested by the council to remove plants and other materials from council land.
13. On 10 December 2015 Mr McGuinness wrote to the complainant as follows:
- Thank you for your letter dated 19th November 2015 in which you request a Section 270 Review as per the Local Government Act 1999.
- On the 25th September 2015 you requested a Section 270 Review of a decision taken by Council. This request was discussed at the Ordinary Council Meeting of the 16th November 2015 ...
- You have now requested a second Section 270 Review of a Council Decision. After discussion with Council's legal firm and the Ombudsman, I must now inform you that your request has been denied. You are only entitled to one review.
- However, if you feel that there is new and relevant information or evidence which was not part of the original review, I invite you to write to me stating the nature of this information. Should this be the case, I will put it to the Councillors in a request for another Review.
14. On 22 December 2015 the complainant wrote to the council and asserted that she had the following new evidence to support her position:
- the Metropolitan Fire Service Chief, Mr Phil White did not consider the garden to be a fire danger
 - Mr Dan van Holst Pellekaan MP did not consider the garden to be a fire danger
 - based on the evidence obtained through her FOI application, the complainant did not believe that there have been any other residents in Peterborough who have been required to remove their garden beds.
15. On 1 February 2016 the council wrote to the complainant requesting documentary evidence that could support the claims made in her letter dated 22 December 2015. This was followed up with an email to the complainant dated 9 February 2016.
16. On 15 February 2016 the complainant wrote to the council advising that she could not obtain the documentary evidence requested, and asking for the evidence to be provided to the elected members for the ordinary meeting in March 2016. The council responded to the complainant on the same day confirming that the information needed to be provided by 2 March 2016.
17. On 21 March 2016 the council considered the second application for an internal review at its meeting. The decision was upheld. The Chief Executive Officer's report for the council meeting on 21 March 2016 stated as follows:

INTRODUCTION:

B Spooner has grown a garden on Council land without permission. She has been asked to remove it under By-Law No.4.

BACKGROUND:

1. Motion 122/10/15
- 15.4 B SPOONER

Cr K Miller moved Cr L Clapp seconded that Councillors undertake the review of a decision for B Spooner to remove plants from Council land. All information relevant to be given to Councillors at next Ordinary Council Meeting.

2. Motion 139/11/15

15.2 B Spooner - Section 270 Review

Cr G Mercer moved Cr F Hardbottle seconded that Council's decision to enforce By-Law 4 remains in place and that B Spooner remove the garden located on Council land known as the 'flood plain'.

B Spooner then requested a second Section 270 review on the 18th & 19th November 2015 (refer attachments) of the Council decision made at the Ordinary Council meeting 16th November 2015 (refer motion 139/11/15). On the 10th December 2015 I replied to B Spooner (refer attached letter) and denied her request unless she could produce new / additional information / evidence that would warrant a new review.

REPORT:

On the 22nd December 2015 B Spooner wrote to Council listing 4 points that she considered to be new evidence that would allow a second Section 270 review of the Council decision (refer motion 139/11/15).

The four points are as follows:

1. The MFS chief Phil White does not consider it a fire danger.
2. Dan Van Holst Pellekaan does not consider it a fire danger.
3. I asked for the last 5 years of anyone in Peterborough who has had the same request made to them, Council could not find one.
4. It is now with the Ombudsman.

In response to the evidence we have received:

1. A letter initialled by Phil White - I think

This letter has been typed on B Spooner's computer, dated by B Spooner, it is not on MFS letter head, Phil White has not used his correct title, even he knows that his correct title is Station Officer not Chief of MFS so I suspect this letter was written by B Spooner.

2. No letter received from Dan Van Holst Pellekaan.

To date I have received no correspondence from the Member of Stuart Dan Van Holst Pellekaan.

3. A copy of a letter sent from Council in response to a freedom of information request. A letter was received on the 6th November 2015 for a request for information under the Freedom of Information Act (copy attached). A response to this request was made on the 7th December 2015 (copy attached). Also attached are copies of letters sent to various residences for breaches of Council's by-laws.

4. A letter from the Ombudsman
A copy of a letter received from the Ombudsman.

As Councillors have elected themselves as the "Reviewing Officers" a decision now needs to be made as to whether or not the above information constitutes new information/evidence.

If it is decided that the above is new evidence then a second Section 270 review will need to be held.

If the above does not constitute new evidence then Councils [sic] original decision will stand.

RECOMMENDATION:

Councillors recommend that the evidence presented is sufficient for a Section 270 review of the Council decision made at the Ordinary Council meeting 16th November 2015.

Or

Councillors recommend that the evidence presented is not sufficient for a Section 270 review of the Council decision made at the Ordinary Council meeting 16th November 2015.

ATTACHMENTS:

Two letters from B Spooner requesting a second review 18th & 19th November 2015
 Councils letter advising Council decision 19th November 2015
 Councils letter advising outcome of her request for a review 10th December 2015.
 Letter from B Spooner re additional evidence 22nd December 2015.
 Letter from B Spooner requesting Freedom of Information.
 Council letter responding to Freedom of Information request 7th December 2015.
 Copies of various letters re breaches of Council By-Laws.
 Letter initialled by Phil White

The Minutes from the council meeting dated 21 March 2016 provided as follows:

15.9 BELINDA SPOONER

Cr F Hardbottle moved Cr M Burford seconded that Councillors recommend that the evidence presented is not sufficient for a Section 270 review of the Council decision made at the Ordinary Council meeting 16th November 2015. **CARRIED 32/03/16**

18. The complainant complained to Ombudsman SA directly on 8 April 2016. She is dissatisfied with the decision and feels that the council has not treated her fairly and impartially throughout.

Legislation

19. Section 270 of the Local Government Act provides:

270—Procedures for review of decisions and requests for services

- (a1) A council must develop and maintain policies, practices and procedures for dealing with—
- (a) any reasonable request for the provision of a service by the council or for the improvement of a service provided by the council; and
 - (b) complaints about the actions of the council, employees of the council, or other persons acting on behalf of the council.
- (a2) The policies, practices and procedures required under subsection (a1) must be directed towards—
- (a) dealing with the relevant requests or complaints in a timely, effective and fair way; and
 - (b) using information gained from the council's community to improve its services and operations.

...

20. By-law No. 4 relevantly provides that a person must not without permission of the council on any local government land:

2.15 Encroachment

erect or place any fencing, posts or other structures or any other items or substances such as to encroach onto the land

[...]

3.6.1 Interference with Land

3.6.1 interfere with Local Government Land such as levelling, flattening sand hills, planting grass, lawn or other vegetation, paving the land or otherwise using the land in a manner contrary to the purpose for which the land was designated to be used.

21. By-law No. 4 also relevantly provides:

5. Removal of Encroachment or Interference

Any person who encroaches onto or interferes with Local Government Land contrary to this by-law must, at the request in writing of an Authorised Person, cease the encroachment or interference and remove the source of the encroachment or interference, and reinstate the land to the same standard as the state of land prior to the encroachment or interference.

Whether the council's decision to enforce By-law No. 4 was unreasonable for the purposes of section 25(1)(b) of the Ombudsman Act

22. By letter dated 14 April 2016, the Deputy Ombudsman put to the council that, on the basis of the evidence provided by the council at the time there was concern that the council had enforced By-law No. 4 in an unreasonable manner without taking into account the particular impact that the decision would have on the complainant. The Deputy Ombudsman noted that:

This is particularly relevant given that her home is proximate to the garden bed area, and is highly likely to be affected by the dust nuisance and eyesore created by the removal of plantings. I am also concerned that the council has not considered other options to address the slashing access issue and has resorted to enforcement of the By-Law without considering a more cooperative approach.

23. The council provided submissions in response:

On 7 September 2015, the Council wrote to Mrs Spooner by letter from the Development & Regulatory Services Officer Mr Lawrence Heath, notifying her that her use of and encroachment onto the Council Land constituted a breach of the Council's By-law No 4.

At this time, the Council did not enforce the By-law as it could have done in a number of ways. The Council could have, under By-law No 4 and the Local Government Act 1999 (the Act) issued Mrs Spooner with an expiation notice, commenced a prosecution or removed her goods, reinstated the Council Land and recovered its costs from Mrs Spooner, or it could have used a combination of those enforcement mechanisms. The Council took the conciliatory and informal approach of writing to Mrs Spooner and giving her the opportunity to remove all items belonging to her from the Council Land and reinstating it to the same standard as existed prior to her use and encroachment. ... Council has ... acted very reasonably by providing Mrs Spooner with the opportunity to rectify the breach of the By-law thereby obviating the need for the Council to take enforcement action.

Whilst ... Council did at its meeting of 16 November resolve “*Council’s decision to enforce By-law No 4 remains in place.....*”, it was the characterisation of Mrs Spooner’s use and encroachment of the Council Land as a breach of the By-law that was upheld by the Council, rather than the formal enforcement of the By-law which; as I explained above, could have consisted of one or more of the enforcement mechanisms available to the Council under the By-law and the Act.⁴

24. On the basis of the council’s submissions above, I accept that it was open to the council to enforce By-law No. 4. I consider therefore that the council’s actions were not unreasonable in all of the circumstances.
25. That said, I simply comment that the council is not irrevocably bound by its decision to enforce By-law No. 4 in the circumstances. As a matter of common sense, I consider that there is little value in arbitrary By-law enforcement both in terms of public relations with ratepayers and the environmental and beautification benefits which gardens such as the complainants’ can bring to an otherwise unused parcel of land.

Conclusion

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

Whether the council acted in a manner that was improperly discriminatory for the purposes of section 25(1)(b) of the Ombudsman Act

26. The complainant believes that the council has unfairly discriminated against her:

The garden was planted in 2008, the councils [sic] By-Law No 4 was enforced in 2015 to get people to clean up these areas, we moved our large trailer and vehicle like other people, but my garden was the only one that was asked to be removed.⁵

27. The council responded as follows:

Mrs Spooner lodged a Freedom of Information Application on 7 December 2015 seeking a list of property owners who had, in the last 5 years, been requested by the Council to remove plants and the like from Council land. I replied to Mrs Spooner’s request that whilst “the list” she had requested, was not a document that existed in the Council’s possession (or indeed at all as far as the Council was aware), I was able to advise her that there were a number of letters sent to property owners in relation to unauthorised encroachments consisting of plants and the like. I further advised Mrs Spooner that a further 10 letters had been issued to property owners in relation to other encroachments onto Council land during the last 5 years.⁶

28. I have had the opportunity to view the letters sent to other residents of the Peterborough area who have also been asked to remove material from council land. On this basis, I am inclined to accept the council’s submission that the complainant was one of a number of residents who were subject to the council’s enforcement of By-law No 4 in similar circumstances. I do not therefore consider that there is evidence before me which establishes that the complainant was treated in a manner that was unfair or discriminatory.

⁴ Response from council, dated 27 May 2016

⁵ Letter dated 4 April 2016.

⁶ Letter dated 27 May 2016.

Conclusion

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

Whether the council conducted an internal review in accordance with its Internal Review of a Council Decision Policy

29. I have considered whether the council adhered to the District Council of Peterborough's Internal Review of a Council Decision Policy (**the Policy**)⁷ in conducting the internal review.

Appointment of an Internal Review Contact Officer

30. The introduction to the Policy states that:

The aim of this policy and procedure, which is available on Council's website, is to ensure a fair, consistent and structured process for any party dissatisfied with a decision which has been made by Council or its agents.

The policy and procedure applies to all Council staff who may be involved in receiving an application for review of a Council decision.⁸

31. I consider therefore that the council, and in particular Mr McGuinness, was bound by the Policy in his dealings with the complainant. The Policy relevantly provides:

5.3 Internal Review Contact Officer

An Internal Review Contact Officer (IRCO) appointed by the Chief Executive Officer is the initial point of contact for applicants.

The role of the Internal Review Contact Officer is to:

- explain the procedure to the applicant and explore any alternative options to resolve the matter, such as alternative dispute resolution prior to an application for review.
- acknowledge the receipt of the application
- maintain a register of all applications for review received and the outcomes of the applications
- outline the timeframes involved and the action to be taken in the first instance
- undertake a preliminary investigation to determine what actions have already been taken to try to resolve the matter
- keep the applicant informed of progress
- ensure adequate records are maintained
- report to Council at prescribed intervals on all applications lodged for review

All applications are to be referred to the IRCO immediately, including meeting with the applicant or transferring a telephone call when contact is first made.

5.4 Acknowledging an application for review

The IRCO is responsible for:

- a) working in conjunction with the appropriately delegated officer to determine how the review will be handled
- b) advising the applicant of the process to be undertaken and the time of the next contact

⁷ District Council of Peterborough's Internal Review of a Council Decision Policy, available at: <http://www.peterborough.sa.gov.au/webdata/resources/files/Internal%20Review%20of%20a%20Council%20Decision%20Policy.pdf> (accessed 15 July 2016).

⁸ District Council of Peterborough's Internal Review of a Council Decision Policy, available at: <http://www.peterborough.sa.gov.au/webdata/resources/files/Internal%20Review%20of%20a%20Council%20Decision%20Policy.pdf> (accessed 15 July 2016), page 3.

c) ensuring the application is properly lodged and assigned.

Applications for a review of a decision must be responded to within [10] business days, acknowledging receipt and advising of the expected timeframe for dealing with the matter. Council will use its best endeavours to ensure that a review of the original decision will be completed within [21] business days. However if the decision is to be reviewed by Council, a committee, or an external panel there may be delays caused by meeting cycle timelines. In more complex cases, a review may take longer. The applicant will be regularly informed of progress, either by email, letter or telephone.⁹

32. By email dated 11 January 2016, my Legal Officer sought particulars from Mr McGuinness in terms of the name and title of the person responsible for undertaking the internal review and the Internal Review Contact Officer. Mr McGuinness responded as follows:

All Councillors were responsible for undertaking the internal review.

In my time as CEO, this is the first time a Section 270 Internal Review of Council Decision has been conducted.¹⁰

33. I consider that Mr McGuinness's response in the first instance was generally unhelpful owing to the lack of detail provided. As a result, the Deputy Ombudsman reverted to Mr McGuinness by letter dated 14 April 2016 and sought a further response with respect to this and other questions. Mr McGuinness's second response by letter dated 27 May 2016 answered the question more satisfactorily:

In relation to who was responsible for undertaking the internal review lodged by Mrs Spooner on 25 September 2015 (the First Application), as I previously advised although perhaps not clearly enough, the Council decided at its meeting of 19 October 2015 that the Council itself ie [sic] the elected membership would deal with the First Application.

As you have identified the Policy provides an Internal Review Contact Officer (IRCO) appointed by the Chief Executive Officer is the initial point of contact for applicants. I, as Chief Executive Officer, did not appoint an IRCO but effectively acted in this capacity in relation to the First Application. Indeed, as you will note from the previous documents provided to you, Mrs Spooner contacted me on a number of occasions and I responded to her communications. This included providing her with an update as to who would undertake the review of the First Application, the relevant Council meeting dates and ensuring that the information she provided to me was presented to the Council...

34. I am not satisfied that the complainant was ever made aware that the CEO did not appoint an IRCO, or that the CEO was purporting to act in the capacity of an IRCO. I consider that there is insufficient evidence to establish that the CEO has fully discharged his obligations as the IRCO, in particular with respect to advising the applicant of the process to be undertaken and the time of the next contact.

Making the complainant aware of the Policy

35. The correspondence provided by the council does not indicate that the council informed the complainant of the process and procedure to be followed (for example, by directing the complainant to the Policy), and it is concerning that the council did not direct the complainant to the services of my Office in circumstances where the council has made a finding which is adverse to the complainant.

⁹ District Council of Peterborough's Internal Review of a Council Decision Policy, available at: <http://www.peterborough.sa.gov.au/webdata/resources/files/Internal%20Review%20of%20a%20Council%20Decision%20Policy.pdf> (accessed 15 July 2016), page 6.

¹⁰ Letter dated 27 January 2016.

Preparation of a report

36. Clause 6.1 of the Policy provides *inter alia* that:

Council is also responsible for determining who will undertake the investigation **and the preparation of a report** for Council consideration. (This may be the CEO, his/her delegate, or an expert party from outside the organisation.)

37. In submissions to my Office, Mr McGuinness stated that:

A report was prepared for the Council in relation to the First Application. The report is that contained under Item 2 of the Chief Executive Officer's report for the Council Ordinary Meeting to be held on Monday 16 November 2015. No other report was prepared.¹¹

38. An extract of that report is included above. I accept that the Policy does not prescribe the substance and form of the report required. As such I cannot make an assessment of whether or not the council was compliant with the requirements of the Policy in this regard. However, I consider that the report as it stands is of limited use in that it refers to matters of fire safety which confuses the true reason behind the decision.

Giving reasons

39. Clause 6.5 of the Policy provides as follows:

6.5 Giving Reasons

While there is no statutory requirement to give reasons for a decision, Council will provide reasons for the decision of the reviewer where practicable.

Council will always give reasons to explain the outcome where:

- A decision is not in accordance with published policy;
- A decision is likely to detrimentally affect rights or interests of individuals (or organisations) in a material way ...

40. The report does not clearly enunciate the reason behind council's decision, which is the enforcement of council By-law No 4. I consider that, in the circumstances, it was entirely practicable for the council to provide proper reasons for its decision.

41. It is not unreasonable, on the basis of the comments in the council's report, that the complainant formed the view that the reason for the council's decision was based at least in part on concerns about fire hazard. For example, the report raises the council's obligations under the *Fire and Emergency Services Act 2005* (SA) and notes that 'this garden has the potential to fuel a fire which could damage the property of I & B Spooner leaving Council at risk of liability.' If these considerations were not part of the decision making process of council then it is, in my view, misleading to include them in the report without further information or context.

42. The council made the following submissions:

...I consider Mrs Spooner was notified about the reasons for the Council's decision in relation to the First Application insofar as she was notified of the Council's resolution which was worded by reference to the decision to enforce By-law No 4 remaining in place. Accordingly the letter from Mr Heath which prompted Mrs Spooner's First Application and the matters Mr Heath set out in that letter were upheld by the Council.¹²

43. I note that the council has told my investigation in no uncertain terms that the reason behind the decision to require the complainant to remove the garden was a simple enforcement of By-law No. 4. Yet the report provided to council as part of the internal

¹¹ Letter dated 27 May 2016.

¹² Letter dated 27 May 2016.

review did not make this clear, and rather the councillors would have to infer the reasons by reference to the attached documents, specifically the letter from council to the complainant dated 7 September 2016 and the copy of By-law No 4 provided.

44. I have viewed the council's correspondence with the complainant. It is clear that references to the enforcement of By-law No. 4 are made throughout. However, I have no reason to doubt that the lack of clarity in the public council documents contributed to the complainant's belief that evidence she obtained relating to fire safety would be relevant to the council's review of the decision. The complainant purported to obtain evidence from Mr Phil White of the Metropolitan Fire Service as she believed it would be relevant to the council's considerations.¹³ I consider that the complainant attempted to provide evidence which would be relevant based on the reasons behind the decision as she perceived them to be.
45. I consider that by failing to engage with the complainant in a suitably straightforward manner in its communications about reasons, and by conversing with her with a minimal level of detail and explanation, the council effectively failed to give sufficient reasons.

Did the council appropriately facilitate the complainant's participation in the internal review process?

46. I understand that the council was bound by its Policy to assist the complainant as much as possible to understand the internal review process and place her in a position where she was able to participate in the process meaningfully. Relevantly, clause 5.2 of the Policy provides as follows:

5.2 Assisting with the application for review

It is essential that no one is excluded from lodging an application for review because of any difficulties they may have representing themselves. All staff are expected to offer assistance where appropriate and provide it on request, including assistance in documenting the reasons for the review in writing when circumstances warrant. If necessary arrange access to interpreters, aids or advocates to ensure that an applicant is treated equitably.¹⁴

47. It is not apparent that the complainant was made aware of what kind of evidence she would need to provide to support her argument. The complainant directly asked Mr McGuinness what evidence she should provide:

... if you can please explain about the evidence wanted in regards to myself being the only person in the last 5 years being asked to remove a garden/garden bed off council land...¹⁵

48. It is not clear that Mr McGuinness offered the complainant any guidance in this regard. Relevantly, the council responded that:

The purported letter from Phil White was not accepted by the Council as constituting "new evidence" as claimed by Mrs Spooner as it did not address the primary issue which was that Mrs Spooner was in breach of By-law No 4. Mrs Spooner's use of and encroachment onto the Council Land did not constitute a breach of the By-law because of the potential fire risk. The breach of the By-law was the unauthorised use of Council Land.

...
Whilst, I accept that Mrs Spooner may not have been advised of what new evidence she might have needed to provide in relation to her Second Application, the nature of this

¹³ Letter dated 22 February 2016.

¹⁴ District Council of Peterborough Internal Review of a Council Decision Policy, available at: <http://www.peterborough.sa.gov.au/webdata/resources/files/Internal%20Review%20of%20a%20Council%20Decision%20Policy.pdf> (accessed 8 July 2016).

¹⁵ Email dated 11 February 2016.

matter which is a use and encroachment of Council Land without permission is not one that lends itself to new evidence.¹⁶

49. I find the council's response to be concerning, as it does not indicate that the council conducted the internal review in a manner that promoted effective and meaningful complainant participation. My impression from the wording of the response is that the council appears to have prejudged the outcome of the review, in that it is implied that there is no evidence that the complainant could have obtained that would have been capable of changing the council's view. In this way, I consider that the council has acted in a manner which is inconsistent with the spirit of the Policy, in particular Clause 5.2. I note that the council has indicated that it does not agree with my view in this regard.
50. While there is evidence of the council writing to the complainant at various stages throughout the handling of this matter, I am not satisfied that the complainant was ever entirely aware of the process and procedure the council was following. I do not have evidence that the council directed the complainant to a copy of the Policy or ever made reference to it in their dealings with her. In my view, complainants ought to be made aware at the outset of the processes and procedures that the council intends to follow in dealing with the complaint.
51. I consider that the manner in which the council conducted the internal review was procedurally flawed and not in accordance with the Policy because:
- the council failed to prepare the report in a manner which provided sufficient reasons for the decision
 - the council failed to assist the complainant to effectively participate in the review by clearly explaining the process and procedure and by communicating with an effective degree of detail.
52. In doing so, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act. I also consider that the council failed to give reasons for the purposes of section 25(1)(e) of the Ombudsman Act

Conclusion

In light of the above, I consider that the council failed to give reasons for the decision within the meaning of section 25(1)(e) of the Ombudsman Act and acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act by failing to conduct the internal review in accordance with the Policy.

In light of the above, I consider that in enforcing By-law No. 4 with respect to the land, the council did not act in a manner that was unreasonable within the meaning of sections 25(1)(b) of the Ombudsman Act.

My view is that in enforcing By-law No. 4 with respect to the land, the council did not act in a manner that was improperly discriminatory within the meaning of section 25(1)(b) of the Ombudsman Act.

My view is that the manner in which the council conducted the internal review was procedurally flawed and not in accordance with the Policy because:

- the council failed to prepare the report in a manner which provided sufficient reasons for the decision
- the council failed to assist the complainant to effectively participate in the review by clearly explaining the process and procedure and by communicating with an effective degree of detail.

¹⁶ Letter dated 27 May 2016.

In doing so, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act. I also consider that the council failed to give reasons for the purposes of section 25(1)(e) of the Ombudsman Act

Recommendations

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

- (1) the council review the Policy to clearly describe the substance and form of the report required by clause 6.1
- (2) the council prepare a letter to the complainant which clearly describes the process and procedure of the internal review, and explains the reasons behind the council's decision in clear and unambiguous language. The letter should also contain an apology from the council for failing to assist the complainant to effectively participate in the review by clearly explaining the process and procedure and by communicating with an effective degree of detail.

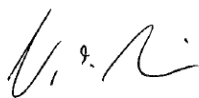
I note that the council has provided me with a copy of a draft letter for the purposes of complying with recommendation 2. I will provide the council with feedback on that letter in due course.

Final comment

In accordance with section 25(4) of the Ombudsman Act the department (or council) should report to the Ombudsman by **25 November 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

21 September 2016