

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Mr Kim Miller
Council	District Council of Peterborough
Ombudsman reference	2016/03155
Council reference	15.54.2
Date complaint received	13 April 2016
Issues	<ol style="list-style-type: none">1. Whether the council reasonably dealt with Mr Miller's complaint that his property was flooded2. Whether the council refused to undertake an internal review pursuant to section 270 of the <i>Local Government Act 1999</i> (SA)3. Whether the council's CEO Mr Peter McGuinness acted unreasonably in banning Mr Miller from conversing with council staff

Jurisdiction

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

Investigation

My investigation has involved:

- seeking and receiving a response from the Mayor of the council
- seeking and receiving a response from the council's CEO Mr Peter McGuinness
- seeking and considering more particulars from Mr Miller
- considering section 270 of the Local Government Act, the Ombudsman Act, the council's Complaints Policy and Complaints Procedure, the council's Internal Review of a Council Decision Policy (**Internal Review Policy**), Complaints Handling Procedure-Elected Members, Code of Conduct -Employees Policy, the Code of Conduct for Council Members and the Code of Conduct for Council Employees
- preparing the provisional report
- providing Mr McGuinness, the Mayor and Mr Miller with my provisional report for comment, and considering their responses
- meeting with Mr McGuinness with his and the councils' legal representative Mr Peter Psaltis from Norman Waterhouse
- receiving further information from Mr McGuinness and from Mr Miller
- preparing this final 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 complainant responded by letter dated 19 December 2016 and commented:

- on some factual inaccuracies, which have been amended in this final report
- that he repeatedly made requests of the CEO to assist with concerns about flooding on this property
- that the CEO is rude to him and closes down any issue Mr Miller raises or refers the matter directly to the council's lawyers which does not resolve his grievance
- that the CEO refers issues to the council's lawyers in an attempt to act 'transparently' but then will not respond to Mr Miller's telephone calls etc
- that there is ongoing animosity between Mr Miller and the CEO which is evident to ratepayers at council meetings.

The council and CEO Mr Peter McGuinness responded through the council's legal representative Mr Peter Psaltis from Norman Waterhouse by letter dated 25 January 2017. The council and CEO commented that:

- there was a complex history between Mr Miller and the council and CEO which involved the council's Works Manager visiting Mr Miller's property prior to the June 2015 correspondence
- read in that context therefore the response from the council and CEO were not 'heavy-handed'
- the letter of 9 June 2015 from Mr Miller only involved one issue (request for rectification following alleged damage to Mr Miller's property) and was not additionally a 'complaint' or second issue that required action
- the 17 June 2015 letter and the Notice of Prescribed Action (**the Notice**) from the CEO to Mr Miller were drafted by Norman Waterhouse following the CEO seeking advice as to Mr Miller's 9 June 2015 letter
- the council accepted that communication ought to have come directly from the council and not its insurer in relation to the request for a section 270 review
- the request from Mr Miller to address the flooding of his property was a request for rectification and therefore rightly referred to the council's insurer LGAMLS
- the Notice was issued to Mr Miller in his capacity as an elected member not in his private capacity and did not impede Mr Miller from acting in his role as elected member
- the CEO issued the Notice in accordance with the Code and not the Complaints Policy therefore the reference to the Complaints Policy should be removed from the report

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.

- the CEO is empowered by the Code to direct an elected member to communicate any requests to the CEO.

On 15 February 2017 my Officers met with Mr McGuinness and his and the council's legal representative at their request. At that meeting my Officers set out my concerns about the council's treatment of Mr Miller's complaints including:

- the way in which Mr Miller was treated left him no choice but to seek legal representation to be heard by the council in respect of any issue
- the context of issuing the Notice appeared disproportionate to the events prior
- the CEO's actions appear contrary to the spirit of the council's policies and procedures which encourage complainants to feel heard and respected and where apologies by the council are encouraged
- that there appeared to be a lack of impartiality in the CEO's treatment of Mr Miller's issues.

Further evidence was therefore submitted by Norman Waterhouse on 9 March 2017 as to pre-June 2015 communication between the council and Mr Miller, including the inspection of Mr Miller's property on 16 and 17 June 2015.

As a result of the responses to the provisional report, I have:

- removed references to the council's Complaints Policy and only referred to the Code of Conduct for Council Members as I accept the respondent is correct in his assertion that the Notice was sent to Mr Miller in his capacity as an elected member
- included an additional paragraph detailing the site visits which the CEO and council works manager made on 16 June 2015, prior to writing the 17 June 2015 letter and the Notice to Mr Miller

The information that site visits occurred prior to the Notice and 17 June 2015 letter and the council's evidence that the Works Manager met with Mr Miller and genuinely attempted to discover whether water was pooling in Mr Miller's property caused me to change my view as to the first allegation. I therefore consider that the council reasonably dealt with Mr Miller's flooding complaint by requesting him to provide a report to support his assertions, as the council had investigated Mr Miller's allegation and had come to a different conclusion.

My views in regard to the second and third allegations remain unchanged apart from reference to the Complaints Policy being removed and reference to the Code inserted. The issuing of the Notice was, in my view, unreasonable.

Background

1. Mr Miller is a resident of Peterborough. He is also an elected member of the council, but makes this complaint in his private capacity.
2. On 9 June 2015 Mr Miller wrote a letter addressed to Mayor Ruth Whittle (**the Mayor**), CEO Mr Peter McGuinness and all elected members. Mr Miller complained that a shed on his rural property was being flooded by storm water which had been redirected towards his property by recent council works. His letter attached four photographs of large pools of water and flooded hay shed with hay inside it. Mr Miller wrote:

A decision of the current CEO to change the landscape of a reserve in Yongala has redirected storm water from this reserve to a point opposite my gateway and directly flows across Belalie Road and onto my property and into my hay shed.

I am now fearful this water may cause a "combustion fire" with wet hay, not to mention the loss of much needed stock feed due to spoiled hay (very costly).

This hay shed was built at this location in 1995 and had never had water entering the property prior to the changes to the landscape of this reserve being done by council. Since the works were performed on the reserve, my property has been flooded twice with water up to the hay shed. This has also washed away topsoil and caused erosion to my driveway.

Currently a reasonable amount of remediation is required to reinstate my gateway and the land to the same condition prior to this flooding.

The location of the shed is the corner of Belalie Road and Park Street Yongala. I ask that councillors visually inspect the site and damage done on my side of the gate. This will highlight the damage that has been done in a short space of time. I am available on [number] if anybody would like any further information or to discuss

I request suitable works be performed within 30 days to divert this flood water.

3. On 15 June 2015 the council held its ordinary council meeting. As the letter was received by council too late to be included in its Agenda for the meeting, Mr Miller distributed his letter and was allowed to comment on it.
4. On 16 June 2015 and 17 June 2015 the council's Works Manager and CEO attended Mr Miller's property to make observations during a significant rainfall event. At the 17 June 2015 meeting Mr Miller was informed that it was the council's view that the council's works at the Yongala Reserve in 2012 had not contributed to the flooding issues Mr Miller had experienced. The CEO's solicitors stated that the CEO was aware from this meeting that Mr Miller would not accept the council's view in this regard and therefore sent Mr Miller correspondence as set out below.
5. The 17 June 2015 letter which the CEO wrote to Mr Miller on behalf of the council in relation to his flooding complaint (**the 17 June letter**) stated:

Thank you for your letter dated 9 June 2015.

We acknowledge the content of your letter and the problems you are having with water movement in or about your property.

The allegations outlined in your recent correspondence give rise to a number of complicated issues which need to be considered. First and foremost, we would require you to provide an engineering report, undertaken by a suitably qualified expert water engineer, providing an assessment of what is taking place on your land. This funding of this report would be your responsibility. It would need to consider (at a minimum):

1. The source of the water flow in or about your property, and its movement across the site generally.
2. What kind of water it is (eg stormwater, run-off etc).
3. The amount/extent of the water flow and how it makes its way down to your shed.
4. How often the increase in the water flow causes pooling and is likely to do so in the future.
5. What works are required to be undertaken in order to ease/ stop/ redirect the water flow.
6. If redirection is required, what possible attenuation measures are available and reasonable in the circumstances
7. If the water comes from an offsite source, what offsite source that is and how it reaches your property (with evidence supporting this conclusion).
8. The timing required/ proposed for any recommended works to rectify the situation.
9. The estimated costs of any recommended works.

It has also come to our attention, following an analysis of title that a survey of your property boundary would be required to be undertaken in order to understand how the boundary of your property aligns with Belalie Road (such information is not provided in the title or deposited plan). The funding and completion of any such survey would also be

your responsibility. The Council will likely require such information to assess the above referenced expert report.

We hope the above is of use. Should you pursue the above, the Council shall give the reports provided due consideration.

6. In the same envelope as the above letter came a second letter from the CEO to Mr Miller dated 17 June 2015. This letter was entitled 'Notice of Prescribed Action to be followed in the Future when seeking information or action - effective immediately'. The Notice detailed the responsibilities of the CEO in managing a safe workplace and, after defining 'bullying' stated:
 - 3.5 From what has been reported to me, clearly there is an issue that needs to be managed at this time. In order to do that effectively I find myself directing you to take the following actions in order to protect my staff and avoid possible action against the Council on foot(sic) of the issues that have made aware of in confidence by my staff.
 - 3.6 I expect you to improve your behavior toward my staff in the first instance. The Code requires a particular standard of behavior to be met. It is my belief that that standard is not being met and(sic) present and I am keen to correct that oversight. I wish to avoid messy investigations that cost the Council both time and money and damage to reputation, none of which it can afford at this time. We are already stretched and stressed without provoking further aggravations.
 - 3.7 The Code mandates the type of behavior that is acceptable. If everyone sticks to that standard, there will not be an issue.
 - 3.8 Effective today, I direct you (in accordance with the Code) to email me directly with:
 - 3.8.1 Any questions or queries you have concerning Council business that you require to be furnished to you pursuant to Section 61 of the *Local Government Act 1999 (SA) (LG Act)*;
 - 3.8.2 Any suggestions you have regarding works, activities, or plans that my staff are implementing under my delegated authority;
 - 3.8.3 Whilst I encourage debate and different views, personal attacks of my staff will not be tolerated. Snide remarks, gestures, commentary that would cause the reputation of my staff or this Council to be called into question will not be tolerated. I encourage the free flow of ideas but ask you to note that such ideas do not need to be couched in sarcastic terms.
 - 3.9 This request requires you, where possible, to put your question in writing to me as the CEO and I in turn will communicate the questions you have, to the relevant Council Staff member. Once the research has been conducted I will then relay the information you require to you in due course. This will minimize the risk of an issue occurring and puts me in the position of satisfying my WHS related obligations to my staff.
 - 3.10 Your questions or queries, like those of everyone else, will be prioritised.
 - 3.11 You shall refrain from making any accusations against any staff member unless you have tangible evidence to back your assertion.
 - 3.12 These simple rules are intended as a means to limit the possibility of
 - 3.12.1 staff alleging 'bullying, harassment or intimidation'; or
 - 3.12.2 you directing or influencing council staff with respect to the way in which employees perform their duties;

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- 3.12.3 directing a staff member for information; or
 - 3.12.4 requesting that work or actions be undertaken by Council staff.
- 3.13 In the event that these rules cannot be followed (which mirror the requirements of the Code), then I will be left with no choice but to follow the procedure and make a formal complaint under the Code. As mentioned earlier, I wish to try and avoid this type of action, but if I need to I will not hesitate to protect my staff.
- 3.14 Failing to comply with the provisions of the WHS Act can result in penalties of up to \$3,000,000 for a body corporate such as a Council. As noted earlier, while Council Members individually will not attract a penalty, their actions (or rather inactions) as a collective which can result in an unsafe working environment for those that they have an obligation to protect, i.e. the Council staff, can incur substantial penalties. I will not expose the Council to such a claim. I take my responsibilities as a CEO seriously and ask you to note the seriousness of what I am asking you to undertake in this correspondence.
- 3.15 I will have no hesitation in reporting the alleged behavior (which in my view is contrary to the Code) of you or any other Council Member for that matter to an external agency, which is currently determined by the Council's Complaint Handling Procedure and ask the external agency to review the behavior to do the following:
- 3.16 To review
- 3.16.1 his or her behavior towards the Council staff member (in accordance with the allegations made),
 - 3.16.2 his or her conduct during the investigation with respect to confidentiality; and
 - 3.16.3 his /her compliance with the Complaints Handling Procedure referenced in paragraph 3.
 - 3.16.4 the adequacy of the Council Member Training Program concerning the prevention of bullying/ harassment and learn alternate means to communicate and deal with confronting and impassioned issues to avoid transgressions in the future.

Should you have any questions concerning this request, please put your questions or queries to me and I will respond to same.

7. Mr Miller sought legal advice as a result of receiving the 17 June letter and the Notice. On 29 September 2015 Ms Tracey Visintin from Crawford Legal wrote on behalf of Mr Miller to the CEO in relation to the Notice. Crawford Legal wrote:

As best we can understand your letter, you say that Councillor Miller has engaged in conduct in the nature of bullying and harassment of Council staff. You appear to have drawn conclusions about that without first raising any allegations with Councillor Miller. In other words, you have apparently accepted the complaints of your employees without reference to Councillor Miller, let alone providing particulars of the complaints. Such an approach is unacceptable.

We are instructed to request that you provide us with particulars of the allegations against Councillor Miller that have been made by Council staff. That is, details of who has complained about Councillor Miller, when and the nature of the complaints. We ask that you do this within 7 days. Councillor Miller will then respond to any detailed allegations.

8. On 8 October 2015 Crawford Legal wrote again to the CEO asking for a resolution to the flooding complaint and stating that otherwise the council was on notice that a claim would be lodged against it in the District Court of South Australia.

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9. On 9 October 2015 the CEO replied to Crawford Legal and stated that:
 - clauses 2.12 and 2.13 of the Code of Conduct for Council Members required council members to only make any requests for information, work or actions to the CEO or the CEO's nominated delegate
 - he had determined that Mr Miller may only make such requests to him as CEO
 - he declined to provide particulars of any allegations against Mr Miller as it would be 'inappropriate'
 - he was not aware of any investigations in relation to Mr Miller such that Mr Miller would be entitled to be provided with details
 - his priority was ensuring the work health and safety of council staff
 - he informed the other members of the council about his letter to Mr Miller because it was 'appropriate that they be made so aware'
 - he had not asserted that Mr Miller had breached the Code
 - there had been allegations put to him and he therefore deemed it necessary and appropriate to direct Mr Miller not to approach staff
 - in the event that any allegation proceeded to an investigation under the Code then at that stage Mr Miller would be provided with details of the allegation
 - at this stage there were no investigations into Mr Miller's conduct
 - it was not and is not necessary for him to ask Mr Miller for his response when he was exercising his responsibility to protect the work health and safety of the council staff.
 10. On 13 October 2015 Crawford Legal wrote to the CEO and sought confirmation that Mr Miller's flooding issue would be discussed at the next council meeting on 19 October 2015.
 11. On 19 October 2015 Crawford Legal replied to the CEO. Its letter was critical of the Notice and alleged that the CEO had formed a view as to the truthfulness of Mr Miller and issued directions to him which limited his interaction with other council members and staff, which was necessary to him in his role as an elected member. This letter requested that the CEO provide either full particulars of any allegation or withdraw all allegations of bullying, harassment or wrongdoing against Mr Miller by way of a retraction letter.
 12. At the council meeting on 19 October 2015, the council received Mr Miller's correspondence and were informed by the CEO that Mr Miller's complaint was to be forwarded to the Local Government Association's Mutual Liability Scheme (**LGAMLS**) in order for it to manage the alleged civil liability issues, as per advice from lawyers Norman Waterhouse. Mr Miller's complaint was therefore forwarded to the LGAMLS on 20 October 2015.
 13. On 30 October 2015 the LGAMLS wrote to Crawford Legal on behalf of the CEO in response to letters dated 29 September 2015 and 19 October 2015. The LGAMLS stated that:
 - the council is a member of the LGAMLS therefore it was replying on behalf of the CEO
 - it considered that Mr Miller via his solicitors Crawford Legal had defamed the CEO's reputation and alleged that he distributed a copy of the Notice of Prescribed Action to elected members and council staff
 - the CEO wrote to Mr Miller as an alternative to formal complaint investigation process in good faith
 - the council would not undertake an investigation into CEO
 - the CEO disputed breaching the Code of Conduct for Council Employees

- the CEO had received reports from staff of Mr Miller's behaviour which could, if established have amounted to breaches of the Code of Conduct for Elected Members
14. On 4 November 2015 Crawford Legal replied to the LGAMLS and proposed to send a copy of all correspondence in this matter to all elected members, as a way of resolving the issue. This was agreed by the LGAMLS in correspondence dated 15 January 2016.
 15. On 2 and 15 January 2016 Crawford Legal wrote to the LGAMLS asking for a resolution to the flooding complaint.
 16. On 20 January 2016 Crawford Legal wrote to the council explaining that the LGAMLS had still not responded in relation to the flooding complaint and therefore it sought an internal review of council's failure to adequately address the flooding complaint.
 17. On 21 January 2016 the LGAMLS emailed and subsequently wrote to Crawford Legal. The email from LGAMLS advised that its request for an internal review was 'misguided' as the progress or otherwise of Mr Miller's claim did not constitute a council 'decision'. The letter from LGAMLS stated that the council rejected liability for the flooding issue at Mr Miller's property for the following reasons:
 1. The track which had gradually formed on the hill on the eastern side of Belalie Road (at some time prior to 2012) was not an access road as alleged but an unformed, ungraded track formed by ad hoc use over time. The track was on "community land" (as defined in the *Local Government Act 1999* - "the Act"), did not form a "road" for vehicular access, or "road reserve", and was not designed or maintained as such.
 2. Having been made aware of the existence of the unauthorised development of the track (by way of request to grade the track and essentially form a road), the council conducted restorative works to discourage continued unauthorised vehicular access in accordance with the community land management plan as required by the Act.
 3. The Council has not received any reports from any person indicating frequent or other use of the track, and no request to re-establish and embark on the process to formally open a road by any party. The rail authority which owns and operates the rail network in the vicinity has a purpose-built access track within the rail corridor.
 4. The Council works simply reinstated the natural level of the land and did not involve any excavation or mounding of soil as alleged.
 5. The works did not in any way redirect or otherwise alter the natural flow of surface water in the catchment. The natural flow of surface water has always followed the slope of the land down the hill in a west/south-westerly direction. The rehabilitation (including revegetation) of the land has had no impact on the rate or flow of water onto Mr Miller's property. If anything, the works have slowed and dispersed surface runoff across (sic) naturally across the parcel of land rather than as previously channelled via the unauthorised track. That is, no more or less water would flow down the sloped land than before the works but the speed and velocity of any flow would be reduced.
 6. The Council does not accept that your client's property would not have been subject to run-off from the catchment in significant rainfall events prior to the remediation works. Belalie Road has been known to experience water damage from time to time in such events in years prior to the works being undertaken.
 7. The photograph attached to the letter of claim indicates water emanating from a location some 170 metres south of the remediated track.

8. Your client's property is on the low side of the natural catchment, and the shed has been built on the lowest part of the property. Any excess runoff emanating from the higher, eastern side of Belalie Road will naturally drain to the lowest point.
9. The Council has no record of development approval of the shed and so does not have any detail as to design for drainage or surface levels. The run-off emanating from Mr Miller's property alone would accumulate approximately 150,000 litres of water in a 20mm rain fall and approximately 370,000 litres in a 50mm rainfall.

In these circumstances, the Council is not prepared to undertake any works outside its scheduled and routine works programme. Given that the shed has been built at the lowest point of the catchment, Mr Miller might consider diversion works on the property to reduce the risk of future inundation in significant rain events. Insofar as the existing shed floor is below natural ground level works to raise the floor should be considered.

In absence of any technical evidence to the contrary, any claim against the Council will be defended on the above basis.

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18. On 1 February 2016 Crawford Legal wrote to LGAMLS refusing to withdraw its application for internal review of the council's failure and/or refusal to address the complaint. It clarified that it was seeking review of the decision by council not to rectify ongoing water issues.
19. On 29 February 2016 LGAMLS wrote to Crawford Legal in relation to the request for internal review and stated that:
 - the decision that Mr Miller was seeking to be reviewed or the basis for which remained unclear
 - no decision made by LGAMLS in relation to resolving the flooding complaint is capable for review
 - only the decision by the council to submit the complaint to the LGAMLS could be reviewed under section 270 of the Local Government Act and LGAMLS considers that to be 'frivolous and/or vexatious' under section 270(4)(b) of the Local Government Act
 - if Mr Miller is dissatisfied with the decision by LGAMLS to deny the claim then he was entitled to invite LGAMLS to reconsider. To this end LGAMLS arranged for an external investigator to undertake a full assessment including site inspection and assessment. LGAMLS asked Crawford Legal to confirm availability and contact person for this to occur.
20. On 5 March 2016 Mr Miller wrote directly to the LGAMLS. The first letter stated that the reasons his flooding complaint claim was rejected were factually inaccurate, and gave reasons:
 - there were always two tracks on the reserve - the track that runs parallel with the railway fence, both tracks were shaped as roads and used by locals
 - a works request was made to the council as railway trucks were driving along edges with tandem wheels marking out another road
 - in July 2012 the works manager raised the subject of creating a formal road for heavy vehicle use
 - council works have altered the landscape with the track along the railway fence now forming a creek with the south western boundary being a low spot and open to run off onto and across Belalie Road
 - the rate of water flow into his property since the above works were performed is significant. Previously the runoff softly flooded across Belalie Road in sheet form and ran to and along Park Street

- the shed was built in 1995 and would not have been built in that location had there been water ingress of this velocity. No water ingress came from the runoff from the reserve until council works were done in 2012
- photos do show water emanating from the southwest end of remediated track which was positioned parallel to railway fence
- development approval was given by the council for the shed and the shed was purchased from and erected by Caltowie Shed Constructions
- the figures quoted in respect of runoff generated by Mr Miller's property are incorrect because they require a catchment of 7,500 square metres and he does not have a catchment area of this size in front of the shed
- the existing shed floor is not below natural ground level.

The second letter clarified that his request for internal review was of 'the council's decision to not undertake the necessary works to stop the flow of runoff water from council's reserve into my property.'

21. On 3 May 2016 the LGAMLS sent an email to Crawford Legal as follows:

Hi Tracy

On a further point, you will recall that the Scheme had previously decided to appoint an external investigator to attend your client's property and conduct an inspection. The reason for this decision was that your client had been agitating Council and demanding that the Mayor meet with him at his property. We did not consider this to be appropriate, and hence intended to appoint the investigator to meet with your client instead. It was hoped that this might placate him. We have subsequently learnt that the Mayor conceded to your client's demands, and the meeting took place. On this basis we do not propose to incur the expense of appointing an investigator to meet with your client, as this would achieve very little other than to further record detail of your client's already known (and investigated) complaint. As such there will be no attendance by the Scheme's investigator.

Kind regards

Daniel Verow

22. On 6 April 2016 Mr Miller wrote to my Office and complained of 'maladministration and Code of Conduct breaches by the CEO and Works Manager Chris Thomson, senior staff employed by the District Council of Peterborough'. Mr Miller complained:
- about the council's decision not to present Mr Miller's complaint dated 9 June 2015 to the council but instead forward it directly to its lawyers, Norman Waterhouse
 - that the council's reply to his letter of complaint, drafted by its lawyers Norman Waterhouse unreasonably requested him to undertake an engineering report and boundary survey at considerable cost before it would look into the complaint
 - that at the same time the council were corresponding with him about his flooding complaint he was sent a letter from the CEO entitled 'notice of prescribed action' on 17 June 2015 which sought to ban Mr Miller from conversing with council staff and that this was bullying and ordered him to only correspond with the council through the CEO in writing
 - that both issues, the flooding complaint and allegations of breach of the Code were passed from the council's lawyers Norman Waterhouse to the LGAMLS quite early on which has not been helpful in any resolution
 - that he had sought a section 270 review of the council's decision not to deal with his flooding complaint which the council sent to its insurers the LGAMLS to deal with instead of making its own decision.

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23. Mr Miller's letter to me included 18 further documents including his and the council's correspondence in relation to this issue including letters from Crawford Legal on behalf of Mr Miller and Norman Waterhouse and LGAMLS on behalf of the council.
24. On 12 May 2016 I wrote to Mr Miller informing him of the commencement of a preliminary investigation but that I would confine my investigation to three issues:
1. whether the council adequately dealt with his complaint about the flooding of his property
 2. the council's decision to refuse to undertake an internal review pursuant to section 270 of the Local Government Act
 3. the decision by the CEO to direct Mr Miller to only communicate through the CEO.
25. Also on 12 May 2016 I wrote to the Mayor and the CEO asking for the council's response to the allegations.
26. On 23 May 2016 the Mayor responded to my enquiries on behalf of the council. The Mayor replied that the complaints are difficult to deal with given the people involved and in the interests of impartiality forwarded it to its lawyers Norman Waterhouse, who recommended that it be forwarded to the LGAMLS. The letter concluded:

Sir, we are honest Councillors who do our utmost to deal with the complications of Local Government. We deal in black and white and do not have the skill set to sort through this now complex issue nor do we wish to cause legal ramifications should we take a wrong step - hence the involvement of parties put in place to protect the Council and Ratepayers of the District Council of Peterborough.

I trust that this is satisfactory and assure you that my interest is in finding a suitable solution for all parties involved.

27. On 25 May 2016 Mr Miller provided additional information to my investigation in relation to Mr Thomson and Mr McGuinness' handling of his flooding complaint on behalf of the council and included photographs of pooled water inside the hayshed at his property. Mr Miller stated that:
- he contacted Mr Thomson at each flooding event to inspect the site in order to understand his complaint
 - Mr Thomson declined to visit as he 'didn't have time'
 - He then called the Mayor and asked her to inspect the site, and sent her a video of the water running into his property
 - a meeting took place at which the CEO and Mr Thomson denied any previous work council had performed caused the flooding
 - the Mayor informed him that the problem would be rectified once council had finished its works and its machinery had left the area
 - there was no further contact from the council about the issue prompting Mr Miller to send his letter dated 9 June 2015
 - he has since seen Mr Thomson parked in his driveway but he drove off once Mr Miller approached
 - on 26 June 2015 the council grader spent all day grading Belalie Road in front of his gateway. The effect of the grading was to destroy washed gutters across Belalie Road which showed the path of water runoff entering his property
 - on 22 February 2016 he had a meeting with the Mayor to discuss the contents of the LGAMLS letter dated 21 January 2016 and he invited the Mayor to inspect his property
 - on 23 February 2016 the Mayor visited his property and commented to the effect of acknowledging the effect of council roadworks in causing flood damage to his property

- on 24 February 2016 Deputy Mayor Cr Frank Hardbottle (the Deputy Mayor) inspected the site and commented that the council needed to put a drain pipe under Belalie Road for water to escape to avoid flooding the property
 - the CEO and Mr Thomson have not followed council policies or procedures in relation to handling his flooding complaint.
28. On 23 June 2016 I wrote to the CEO asking for his response to the particular allegations about his conduct concerning council's handling of the flooding complaint, its decision to refer Mr Miller's request for a section 270 review to the LGAMLS and his decision to restrict Cr Miller's communication with council staff and councillors.
29. The CEO replied by letter dated 21 July 2016 and stated that:
- Mr Miller's complaint about the flooding of his property was distributed by Mr Miller to the Mayor, CEO and all councillors at the council meeting on 15 June 2015. Whilst this was not usual procedure, he was given the opportunity at that meeting to comment on his letter
 - his letter to Mr Miller dated 17 June 2015 did not require him to provide an engineering report and boundary survey at his expense and was instead in relation to alleged breaches of the Code by Mr Miller and instead wrote to Mr Miller on 20 October 2015 in relation to his flooding complaint
 - my Office had misunderstood his letter dated 17 June 2015 to Mr Miller and his letter dated 20 October 2015 to Mr Miller requesting an engineering report and boundary survey at his expense given that it 'was reasonable in the circumstances and consistent with Council's response to any ratepayer who was alleging "nuisance" on private property as the result of Council's actions, that was unfounded and/or unsupported by a technical/engineering evidence' and complied with council policies
 - in relation to Crawford Legal's request to the council for a section 270 review on 20 January 2016 the CEO submits it was not a failure to adequately address the flooding complaint by referring it to LGAMLS
 - on 1 February 2016 Crawford Legal subsequently wrote directly to the LGAMLS requesting a section 270 review of a council decision it asserted that council had made 'a decision not to carry out works.' The CEO states council never made such a decision:

In previous and various correspondence with Cr Miller, I have informed him that given the nature of the issue, combined with limited Council budget and resources, it could be anywhere up to a year before Council could address the various complexities of the problem Mr Miller was experiencing on his property. This is a large Council area with a small revenue base and limited resources. We do not have the luxury to fix every problem in our district at the "drop of a hat" it is impossible.

- the LGAMLS is not about to consider a section 270 review application pursuant to the Local Government Act and was not asked by the CEO to do so
- his letter to Mr Miller dated 17 June 2015 restricting Mr Miller's communication with council staff and councillors was consistent with clauses 2.11-2.14 of the Code and did not preclude Mr Miller from communicating with elected members nor with the LGAMLS.

Legislation

30. Section 270 of the Local Government Act provides:

Part 2 - Internal review of council actions

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.
- (1) Without limiting subsections (a1) and (a2), a council must establish procedures for the review of decisions of—
- (a) the council;
 - (b) employees of the council;
 - (c) other persons acting on behalf of the council.
- (2) The procedures must address the following matters (and may address other matters):
- (a) the manner in which an application for review may be made;
 - (b) the assignment of a suitable person to reconsider a decision under review;
 - (c) the matters that must be referred to the council itself for consideration or further consideration;
 - (ca) in the case of applications that relate to the impact that any declaration of rates or service charges may have had on ratepayers—the provision to be made to ensure that these applications can be dealt with promptly and, if appropriate, addressed through the provision of relief or concessions under this Act;
 - (d) the notification of the progress and outcome of an application for review;
 - (e) the time frames within which notifications will be made and procedures on a review will be completed.
- (3)...
- (4) A council, or a person assigned to consider the application, may refuse to consider an application for review if -
- (a) the application is made by an employee of the council and relates to an issue concerning his or her employment; or
 - (b) it appears that the application is frivolous or vexatious; or
 - (c) the applicant does not have a sufficient interest in the matter.
- (5)-(9)...

31. The council's Internal Review Policy provides:

6.6 Refusing an application for review

A council, or a person assigned to consider the application, may refuse to consider an application for review if:

- the application is made by an employee of the council and relates to an issue concerning his or her employment; or
- it appears that the application is frivolous or vexatious; or
- the applicant does not have sufficient interest in the matter.

Refusing an application for review will not be done lightly and reasons for the refusal will document the evidence on which a refusal is based

32. The council's Complaints Handling Procedure - Elected Members provides:

4.1 Alleged Breach

4.1.1 Where an alleged breach occurs the complainant should report the allegation, in writing, to the Council, addressed to the CEO. The allegation should:

- Be specific
- Provide as much supporting evidence as possible to assist an investigation
- Provide the name of the Member who has allegedly breached the Code.

Complainants can, at any time, take the alternative option of lodging the complaint with the Office of Public Integrity (OPI), which will direct the complaint in accordance with the ICAC Act.

4.1.2 The CEO will be responsible for receiving and managing the referral of a complaint to the Principal Member and will advise the Principal Member (or if it relates to the Principal Member, his/her deputy) of receipt of a complaint. The Principal Member (or deputy) will determine whether the complaint relates to:

- Behaviour which falls under Part 2 of the Code
- Misconduct which triggers action under Part 2 of the Code or
- Criminal or corrupt behaviour

Complaints relating to misconduct or criminal behaviour must be referred to the appropriate authorities immediately. (see below at clauses 6 and 7)

Council maintains jurisdiction where the complaint deals with conduct that falls into Part 2 of the Code. Part 2 deals with conduct that reflects reasonable community expectations of how Council Members should conduct themselves. Robust debate within Council which is conducted in a respectful manner is not a breach of this Part.

Having regard to the seriousness of the allegation and information provided, the Principal Member may:

- a) seek to resolve the matter internally, including through conciliation or mediation
- b) refer the complaint to the Local Government Governance Panel
- c) dismiss the allegation

4.1.3 Within three days of receipt of an allegation, the Member who is the subject of the complaint will be advised by the Principal Member of the complaint and provided with a copy of the complaint. The Member and the complainant will be advised of the manner in which the Principal Member intends to deal with the complaint.

5.1 Alleged breach of Part 2

5.1.1 Only matters which are determined to be of a minor nature will be dealt with internally and only with the agreement of the parties. The Principal Member may hold meetings with the complainant and the Council Member and may seek mediation or conciliation between the parties in an attempt to resolve the matter to the satisfaction of

all parties. This may be appropriate, for example, where the complainant is also a Council Member.

5.1.2 The Principal Member must ensure that the principles of natural justice are observed.

5.1.3 Where the matter is resolved by the Principal Member to the satisfaction of all the parties, the matter will be closed and no further action will be taken. The Principal Member will send written confirmation to all the parties confirming that the matter has been resolved and may provide a report to a public meeting of the Council if appropriate.

33. The Code of Conduct for Council Members provides:

Relationship with Council staff

2.11 Not bully or harass Council staff

2.12 Direct all requests for information from the Council administration to the Council's Chief Executive Officer or nominated delegate/s.

2.13 Direct all requests for work or actions by Council staff to the Council's Chief Executive Officer or nominated delegate/s.

2.14 Refrain from directing or influencing Council staff with respect to the way in which these employees perform these duties

Complaints

2.18 Complaints about behaviour alleged to have breached the Behavioural Code should be brought to the attention of the Principal Member or Chief Executive Officer of the Council, or nominated delegate/s.

2.19 A complaint may be investigated and resolved in any manner which that Council deems appropriate in its process for handling alleged breaches of this Part. This can include, but is not limited to: a mediator or conciliator, the Local Government Governance Panel, a regional governance panel or an independent investigator.

2.20 A complaint may be considered within this process to be trivial, vexatious or frivolous, and accordingly not investigated.

34. The Code of Conduct for Council Employees provides:

General behaviour

2.4 Act in a way that generates community trust and confidence in the Council.

2.5 Act in a reasonable, just, respectful and non-discriminatory way when dealing with all people.

Responsibilities as an employee of Council

2.7 Comply with all relevant Council policies, codes and resolutions of which they have been made aware, relevant to their particular role.

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

Relationship within Council

- 2.16 Not make any public criticism of a personal nature of fellow Council employees or Council members.
- 2.17 Take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons, as required by the *Work Health and Safety Act 2012*.

Chief Executive Officers

- 2.26 Chief Executive Officers must act in accordance with the provisions specific to their position within the *Local Government Act 1999* at all times.

Whether the council reasonably dealt with Mr Miller's complaint that his property was flooded

35. Mr Miller submitted his formal complaint in relation to the alleged flooding of his property by letter on 9 June 2015 in his personal capacity as a resident. Instead of submitting that letter to the council in accordance with its Complaints Policy he chose to distribute it to the Mayor, CEO and all elected members.
36. It appears that due to the complexities of the complaint, it was not dealt with strictly in accordance with the council's Complaints Policy. It was the CEO who directly replied to Mr Miller on 17 June 2015. The CEO's letter asked for further information from Mr Miller in relation to his complaint, including the requirement that he obtain an engineer's report and a boundary survey in order for the council to assess his complaint.
37. As seen in the chronology above, Mr Miller did not reply to this correspondence until he instructed solicitors in September 2015. Once Crawford Legal was instructed it appears the council forwarded the complaint to the LGAMLS in October 2015. Under paragraph 6.1 of the council's Complaints Policy and paragraph 4.43 of the council's Complaints Procedure it was open to the council to refer the complaint to the LGAMLS as it was considered an insurance claim.
38. I consider that Mr Miller's letter dated 9 June 2015 was more than a standard complaint as it was asking the council to remedy what he considered to be council error in inadvertently redirecting storm water towards his hay shed. In my view it was ill conceived of Mr Miller to present his complaint letter at the council meeting on 15 June 2015, when he should have followed paragraph 4.2.1 of the Complaints Policy and sent his letter of complaint to council administration.
39. Mr Miller's letter of complaint was replied to by the CEO on 17 June 2015 and required Mr Miller to further particularise his issue and obtain an engineering report and boundary survey at considerable expense to Mr Miller. The CEO drafted his response to Mr Miller on the receipt of legal advice, after visiting Mr Miller's property the day prior and that morning to observe the water following a rainfall. The council also inform me that a detailed site inspection also occurred on 21 April 2015 where a contour map was prepared by council staff. In those circumstances I do not consider the CEO's response in his letter of 17 June 2015 was unreasonable because it was preceded by a genuine attempt by the council to determine where the water was coming from.
40. The CEO's response to Mr Miller's complaint arrived in the same envelope as a second letter from the CEO accusing Mr Miller of bullying and harassment and informing him that he was not to communicate with staff or elected members. I express concern about the wisdom of the CEO dealing with both issues simultaneously, and the effect this would have had on Mr Miller's perception of the CEO's impartiality.

41. Mr Miller sought legal advice upon receipt of the letters. It is arguable that had Mr Miller received a different reply from the council and/or the CEO he may not have followed the route of obtaining legal advice.
42. The CEO forwarded Mr Miller's complaint in relation to flooding to the LGAMLS as a result of a decision by himself and/or the Mayor. The CEO stated this was because the letter from Crawford Legal threatened legal action should the Council fail to resolve the alleged flooding; that the council was a member of the LGAMLS; and that it was a discussion with the council to forward the 'letter of demand' onto the LGAMLS for it to manage the civil liability on council's behalf.³
43. In my view, Mr Miller's complaint of 9 June 2015 was not entirely related to an insurance claim for flooding, it was also a complaint to the council about a situation that he considered ought to be looked into because council works may have caused the stormwater runoff. However I am satisfied based on the additional information provided by the council that the CEO and Works Manager had attended Mr Miller's property and observed the flooding on at least the 21 April 2015, 16 and 17 June 2015.
44. I therefore consider the response by the CEO on behalf of the council in relation to Mr Miller's flooding complaint was reasonable in circumstances where it had attempted to understand where the water was coming from including the preparation of a site map on 21 April 2015 by the Works Manager and Mr Laurence Heath which was drawn from obtaining survey data of land contours.
45. I therefore consider that the council reasonably dealt with Mr Miller's complaint to the council that his property was flooded by council works which may have redirected runoff.

Opinion

In light of the above I do not consider that the council acted in a way that was unreasonable in its handling of Mr Miller's flooding complaint within the meaning of section 25(1)(b) of the Ombudsman Act.

Whether the council refused to undertake an internal review pursuant to section 270 of the Local Government Act

46. On 20 January 2016 Crawford Legal wrote to the council seeking an internal review pursuant to section 270 of the Local Government Act in relation to the council's failure to adequately address the flooding complaint. A copy of this letter was sent to the LGAMLS for their reference. The LGAMLS confirmed by email to Crawford Legal that it had forwarded the request for review to the council. The council therefore had received the request for review.
47. Crawford Legal received replies from LGAMLS in relation to internal review, and not the council, on 21 January and 29 February 2016 on LGAMLS letterhead. LGAMLS asked Crawford Legal to confirm that the request for review be withdrawn because it was 'misguided'⁴, and that it would be deemed 'frivolous and/or vexatious' if sought pursuant to section 270(4)(b) of the Local Government Act.⁵
48. Mr Miller himself wrote directly to LGAMLS on 5 March 2016 and reiterated his request for an internal review. His request was for review of the council's decision not to carry out council works on the access road so the runoff would not flood his property.

³ Letter from the CEO to the Ombudsman, 21 July 2016, page 2

⁴ Email from Daniel Verow, Manager, Claims LGAMLS to Ms Tracey Visintin, solicitor Crawford Legal, 21 January 2016

⁵ Letter from Mr Verow LGAMLS to Crawford Legal, 29 February 2016, page 1

49. The CEO responded to my enquiries as follows:

On 20 January 2016 Crawford Legal wrote directly to the Council seeking an internal review, via S270, of Council's "...failure to adequately address the complaint." It was council's response that referring the complaint as alleged to the LGAMLS was not a failure to adequately address the complaint. Crawford Legal subsequently wrote directly to LGAMLS requesting a S270 review of a Council decision in a letter dated 1st February 2016, asserting that Council had made "a decision NOT to carry out works." Council and/or Staff had made no such decision. In previous and various correspondence with Cr Miller, I have informed him that given the nature of the issue, combined with limited Council budget and resources, it could be anywhere up to a year before Council could address the various complexities of the problem Mr Miller was experiencing on his property. This is a large Council area with a small revenue base and limited resources. We do not have the luxury to fix every problem in our district at the "drop of a hat" it is impossible.⁶

50. Section 270 of the Local Government Act states that the council must have in place policies in relation to internal review. The council's Internal Review Policy sets out the process for making an application and how the council ought to deal with an application. Paragraph 6.6 'Refusing an application for review' permits applications to be refused by the council, (or a person assigned to consider the application) for three alternative reasons: an application by an employee relating to an employment issue, a frivolous or vexatious application, or insufficient interest by an applicant.⁷ The Internal Review Policy states that it would not refuse an application lightly and that reasons should always be given.

51. In my view:

- the complainant sought an internal review of two different decisions - the council's failure to deal with his complaint (as sought by Crawford Legal), and the failure to fix the access road (as sought by Mr Miller directly) and should have been clear in relation to which decision or decisions review was sought
- the council did not respond to the request for review
- there is no evidence that the council assigned LGAMLS to consider Mr Miller's request for review, in fact the CEO informed me that the LGAMLS is not able to consider a section 270 request for review and was not asked by himself or the council to consider the request⁸
- the council should have dealt with the complainant's request via its Internal Review of Council Decisions Policy including paragraphs:
 - 5.2 Assisting with the application for review (by staff),
 - 5.3 Internal Review Contact Officer,
 - 5.4 Acknowledging an application for review,
 - 6 Undertaking a Review,
 - 6.4 Providing 'Procedural Fairness',
 - 6.5 Giving Reasons,
 - 6.6 Refusing an application for review.
- the council did not respond to Mr Miller's application for review in Crawford Legal's letter of 20 January 2016 (i.e. the failure to deal with the complaint)
- it would have been more appropriate for the council rather than the LGAMLS to respond in relation to these applications, including:
 - giving its predetermined opinion as to the success or otherwise of the application
 - requesting the application be withdrawn
 - declaring it frivolous and vexatious etc as it was not entitled to consider the request

⁶ Letter from the CEO to the Ombudsman, 21 July 2016, page 2

⁷ The policy reiterates section 270(4) of the Local Government Act 1999.

⁸ Letter from the CEO to the Ombudsman, 21 July 2016, page 2

- it is contrary to the spirit of the Complaints Policy and Procedure for the CEO to inform Mr Miller that his complaint would not be dealt with in a timely fashion, and denying that decisions were made by the council and/or staff.
52. In my view it was open for Mr Miller to request an internal review as to the council's failure to deal with the flooding complaint and failure to fix the access road and reasonable that the requests be dealt with by council pursuant to its Internal Review Policy.
53. The CEO's response to me, outlined in his letter of 21 July 2016 was that he only referred Mr Miller's complaint (or 'letter of demand') to the LGAMLS in order to deal with it transparently, and that referring the complaint was not a failure to adequately address the complaint. The CEO submitted that the council never made a decision not to carry out works. I consider the CEO's response unreasonable for the following reasons:
- the council did not deal with the request for internal review when it was the council's responsibility (not LGAMLS's) to deal with Mr Miller's request pursuant to section 270 of the Local Government Act
 - the CEO and/or council did not deal with the request for internal review in accordance with its Internal Review Policy.
54. Therefore in my view the request for internal review by Mr Miller was not adequately dealt with by the CEO and/or council because the council did not respond directly to the request (despite understanding that the LGAMLS could not deal with the request), nor follow its Internal Review Policy in dealing with the request. There appeared to be a misapprehension by the LGAMLS in considering that it could respond to Mr Miller's application for internal review on behalf of the council. Consequently, I consider that the LGAMLS would benefit from reading this report.

Opinion

In light of the above, my final view is that the CEO, on behalf of the council acted in a manner that was unreasonable within the meaning of section 25(1) of the Ombudsman Act.

Recommendation 1

To remedy this error I recommend that the council review its Internal Review Policy to determine whether it adequately reflects the current process council employees adopt.

Recommendation 2

To remedy this error I recommend that the council forward a copy of this report to the LGAMLS.

Whether the council's CEO Mr Peter McGuinness acted unreasonably in banning Mr Miller from conversing with council staff

55. The CEO's letter to Mr Miller dated 17 June 2016 is titled 'Notice of Prescribed Action to be followed in the Future when seeking information or action-effective immediately'. None of the relevant council policies or procedures refer particularly to a Notice of Prescribed Action. Mr McGuinness stated that the Notice was issued in accordance with the Code of Conduct for Council Members and that the Notice was not sent to Mr Miller in his personal capacity but as an elected member.
56. The CEO has informed me that he was concerned Mr Miller may be breaching clauses 2.11-2.14 of the Code of Conduct for Elected Members and in trying to protect the health and wellbeing of the council staff he was forced to issue the Notice, which was drafted by his legal representative.

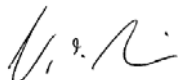
-
57. The Notice refers in paragraph one to the CEO being approached by staff regarding allegations of alleged Code of Conduct for Council Members breaches, and that the staff had been interviewed by the CEO. Allegations of breaches ought to be dealt with in accordance with clause 4.1 of the Complaints Handling Procedures-Elected Members and the CEO and Principal Member's response is dictated by clause 5.1 which states:
- minor matters can be dealt with by a meeting between the complainant and the member
 - natural justice principles must be observed
 - if the matter cannot be resolved refer to the LGA Governance Panel.
58. The council's Code of Conduct - Employees Policy requires the CEO, amongst other responsibilities to:
- act properly in accordance with the law
 - not publicly criticise the council, its members or other employees or their decisions
 - adhere to the council's policies and procedures relating to harassment, bullying, equity and diversity an occupational health and safety
 - offer relevant and impartial advice and respect the rights and responsibilities of council members and the community.
59. I therefore consider that the CEO acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act in issuing the Notice to Mr Miller for the following reasons:
- it impeded Mr Miller acting in his role as an elected member on behalf of the community by directing Mr Miller not to communicate directly with council staff
 - it did not provide Mr Miller with any information in relation to the allegation as to why he was considered to have been acting unreasonably
 - the CEO conceded in a letter to Crawford Legal that no complaints has been received by staff, nor were there current investigations into Mr Miller's conduct on foot
 - no evidence was provided to Mr Miller in relation to complaints by council staff despite being provided to my Office
 - it did not make clear the statutory basis for 'the prescribed notice' or whether it was a requirement or a request
 - the Notice was not prefaced by any contact with Mr Miller about the Notice which, in my view, was not respectful to Mr Miller and contrary to clauses 2.4 and 2.5 of the Code of Conduct for Council Employees.

Opinion

In light of the above, my final view is that the CEO acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

Recommendation 3

To remedy this error I recommend that the CEO retract in writing to Mr Miller the Notice of 17 June 2015 and that the letter of retraction be tabled at a meeting of council within two months of my final report being issued.



Wayne Lines
SA OMBUDSMAN

10 April 2017