

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Trent Cameron
Agency	The Barossa Council
Ombudsman reference	2013/05038
Date complaint received	17 May 2013
Issues	<ol style="list-style-type: none">1. Whether it was appropriate to make the confidentiality orders at the council meeting on 19 February 20132. Whether it was appropriate to make the confidentiality orders at the council meeting on 9 May 20133. Whether the council adequately responded to the complainant's enquiries

Jurisdiction

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

Investigation

My investigation involved:

- assessing the information provided by the complainant
- seeking a response from the council
- considering the *Local Government Act 1999*, the council's Code of Conduct for Elected Members Grievance Policy and the Code of Conduct for Elected Members and Committee Members
- 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

Responses to my provisional report

In response to my provisional report, the complainant made submissions in relation to my provisional finding that the council did not err in making confidentiality orders at the council meeting on 9 May 2013. The complainant submitted that the council, in its resolution made under section 91(7) of the Local Government Act, did not make a note of the grounds on which the decision was made.

The minutes of the meeting on 9 May 2013 do record the grounds on which the matter was moved into confidence pursuant to section 90(2) of the Local Government (being section 90(3)(a) - information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead)). The minutes then record the resolutions in relation to the release of the documents pursuant to section 91 of the Local Government Act. I note that those resolutions do not reference section 90(3)(a) specifically although resolution 6 refers to the 'names and any personal information pertaining to third parties named in the report...'

In my view, strict compliance with section 91(9) requires the grounds for making a document confidential to be noted in the minutes. That said, in these circumstances, I think it is reasonably clear that the documents were made confidential by virtue of section 90(3)(a) of the Local Government Act. Further, I note that the council has implemented changes to improve its confidentiality processes and specifically its compliance with section 91(9)(b), requiring the minutes to include 'a further statement as to why materials are being held in confidence and is directly relates [sic] to the reasons to going into confidence in the first place'. In these circumstances, I consider that continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

The complainant also submitted that it is 'unhealthy' for councils to be able to rely upon the personal affairs justification 'without qualification or some details being provided'. In my view, it is not always possible for details to be provided without releasing the very information which is the subject of the confidentiality order. I remain of the view that the council acted reasonably in the circumstances in relation to the orders made on 9 May 2013.

The complainant also submitted the following issues in relation to the 'Code of Conduct for Elected Members Grievance Policy': it is not listed on the council's website; it is dated 19 July 2011 and has a 'Next Review Date' of 1 July 2012; and there is no mention of it in the 'Code of Conduct for Council Members' policy which commenced operation on 1 September 2013.

I note the complainant's concern that it appears the Code of Conduct for Elected Members Grievance Policy had not been reviewed regularly. However, I do not consider this to be unreasonable given councils were aware for some time that a statutory code would supersede those adopted by individual councils. That code commenced on 1 September 2013. I am also nevertheless of the view that the Code of Conduct for Elected Members Grievance Policy was in operation at the relevant time.

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

The complainant also referred to clause 4.2.5(vi) of the Code of Conduct for Elected Members Grievance Policy which provides 'The report delivered to the Council is final. There is no right of appeal on the report of the Governance Panel', and submitted that this does not support the following statement in paragraph 25 of my Provisional Report:

The complainant has been informed that any inaccuracy in that report cannot be challenged by the council under the terms of the council policy.

I agree and have accordingly removed this sentence. However, I have not altered my view in relation to whether the council adequately responded to the complainant's enquiries.

The council responded in relation to my provisional finding that it erred in making confidentiality orders at the council meeting on 19 February 2013. In particular, the council

- noted it has made improvements to its confidentiality processes since February 2013
- noted that, whilst there were other relevant considerations at play, the 'driving factor' in making the decision was that legal privilege attached to the legal advice
- other factors were that
 - there was a potential investigation but that the Code of Conduct complaint had not yet been confirmed
 - the potential detriment to 'any further processes, the complainant's still undecided wishes and, importantly, the Mayor's reputation'
 - references to imposts upon third parties
- acknowledged that in hindsight the legal advice was primarily about process
- submitted that the confidentiality order could have stated it would be reviewed once the complainant confirmed his intent to proceed with a Code of Conduct matter
- stated that the council thought it best to protect all parties and processes involved in this matter.

I have considered these submissions, but have not altered my finding. I remain of the view that there was no basis, pursuant to section 90(3) of the Local Government Act, for the matter to be heard in confidence. Further, I note section 90(4) provides that in considering whether a confidentiality order should be made that the discussion of a matter in public may

...cause embarrassment to the council or council committee concerned, or to members or employees of the council...

Background

1. On 28 January 2013 a complaint was received by the council's Chief Executive Officer (CEO) making an allegation against the mayor.
2. The existence of the complaint was required to be made known to the council³ at its next formal meeting. The matter was included as an agenda item for the council meeting on 19 February 2013.
3. The council meeting held on 19 February 2013 considered an item titled '8.1.1 COMPLAINT FROM RESIDENT ABOUT CONDUCT OF A MEMBER'. The council made the following order:⁴

MOVED Cr Angas that:

- (1) Under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from the meeting, with the exception of the Chief

³ Paragraph 4.1.5 of the Code of Conduct for Elected Members Grievance Policy

⁴ Taken from the public minutes of the meeting.

Executive Officer and the Minute Secretary, in order to consider in confidence a report relating to Section 90(3)(l) of the Local Government Act 1999 relating to a Complaint from Resident about Conduct of a Member, being information the disclosure of which would involve the disclosure of legal information.

- (2) Accordingly, on this basis, the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

Seconded Cr Kies

CARRIED

4. After considering the item council resolved as follows:

MOVED Cr Kies that Council:

- (1) Confidential resolution
- (2) Confidential resolution
- (3) An order be made pursuant to the provisions of Sections 91(7) and (9) of the Local Government Act 1999, that the minutes, reports and associated documents of the Confidential Council meeting held on 19 February 2013 in relation to confidential item 8.1.1, Complaint from Resident about Conduct of a Member, other than the minutes relating to this confidentiality order, be kept confidential and not available for public inspection, except that the Chief Executive Officer or Cr de Vries may release relevant information to legal advisors, parties named in the complaint or the complainant, or independent referral body and for a period not greater than 12 months being 18 February 2014.

Seconded Cr Harris

CARRIED

5. As the complaint could not be resolved between the council and the person making the complaint, the council referred the complaint to the Local Government Governance Panel (**the panel**) for it to investigate the allegations.
6. On 30 April 2013 the panel provided the council with a copy of its findings.
7. The special council meeting⁵ on 9 May 2013 minuted the following:

2.1.1

ALLEGED BREACH OF COUNCIL MEMBERS CODE OF CONDUCT - CONSIDERATION OF LOCAL GOVERNMENT GOVERNANCE PANEL REPORT

The matter and support documents of the agenda item on balance may disclose unreasonable personal information of a health nature of a named person and details of third parties to the matter who may have provided information to the Local Government Governance Panel investigation in confidence and therefore pursuant to Section 90(3)(a) being information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead), the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

MOVED Cr Miller that:

- (1) Under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from the meeting, with the exception of the Chief Executive Officer and the Minute Secretary, in order to consider in confidence a report relating to Section 90(3)(a) of the Local Government Act 1999 relating to an Alleged Breach of Council Members Code of Conduct - Consideration of Local Government

⁵ Section 82 of the Local Government Act

Governance Panel Report, being information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

- (2) Accordingly, on this basis, the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

Seconded Cr Harris

CARRIED

RESUMPTION OF OPEN COUNCIL MEETING - 5.21PM

The open meeting of Council resumed at 5.21pm
In the matter: **2.1.1**

ALLEGED BREACH OF COUNCIL MEMBERS CODE OF CONDUCT - CONSIDERATION OF LOCAL GOVERNMENT GOVERNANCE PANEL REPORT MOVED Cr Lykke that:

- (1) Council notes the report and recommendations from the Local Government Governance Panel and the written response of Mayor Hurn.
- (2) Whilst Council notes the recommendations of the Local Government Governance Panel it deems that the matter is trivial and as no third parties named by the complainant were aggrieved no further action is required.
- (3) Council notes that this brings this matter to a conclusion and that no further investigation or actions shall be instigated by Council in relation to this complaint.
- (4) Council undertakes a review of Council's Code of Conduct for Council Members Grievance Policy to ensure any future complaints are dealt with in a timely manner.
- (5) An order be made pursuant to the provisions of Sections 91(7) and (9) of the Local Government Act 1999, that the letter of response from Mayor Hurn tabled at the Confidential Special Council meeting held on 9 May 2013 in relation to confidential item 2.1.1 Alleged Breach of Council Members Code of Conduct - Consideration of Local Government Governance Panel be kept confidential and not available for public inspection for a period not greater than 12 months being 8 May 2014 and that the Chief Executive Officer be empowered to review this order prior to 8 May 2014.
- (6) An order be made pursuant to the provisions of Sections 91(7) and (9) of the Local Government Act 1999, that the Local Government Governance Panel report be released, however the names and any personal information pertaining to third parties named in the report tabled at the Confidential Special Council meeting held on 9 May 2013 in relation to confidential item 2.1.1 Alleged Breach of Council Members Code of Conduct - Consideration of Local Government Governance Panel be kept confidential and not available for public inspection for a period not greater than 12 months being 8 May 2014 and that the Chief Executive Officer be empowered to review this order prior to 8 May 2014.

Seconded Cr Miller

CARRIED UNANIMOUSLY

8. On 13 May 2013 the council issued a media release to the effect that a complaint had been made against the mayor. The council had managed the complaint in accordance with its Code of Conduct for Elected Members Grievance Policy and referred it to the panel for investigation. The media release included the following statement:

The complainant alleged a group including ladies had overheard the word and the ladies had been offended - a claim which has since been independently investigated and found to be wholly unsubstantiated.

9. Over a number of days after the council meeting there were a number of emails exchanged between the complainant and the CEO. In essence the complainant sought clarification for the reasons for the confidentiality orders and clarification if the actual allegation made against the mayor included that the ladies had been offended by the alleged remark.
10. On 23 May 2013 at 8.01am the CEO responded by email stating 'The comment to which you refer reflects the report of the independent panel on page 4, finding second to last paragraph'. This reference should in fact, have referred to page 3 of the report.
11. In response to a further email from the complainant the CEO responded by email on 24 May 2013 as follows:

Dear Mr Cameron

The Local Government Governance Panel undertook an independent review and provided a report to Council. The Council made its determination on this report, which including the agenda report, Panel report and minutes have been released and provided in full to you. I have provided you the reference to the Council press release (sic) I can do no more than that and I have clearly articulated that to you and noted you do not concur. I have also outlined that the reference your (sic) refer in Councils press release was in relevance to the reports findings and highlighted the passage for your reference (and as also stated evidence collected by the Panel which is obviously not at my hand and thus I have nothing further to release to you other than the Panel report itself) not anything to do with the substance of the written complaint. I also respect your right to seek review via the Ombudsman and note, as I am unable to provide any further comment than this you shall seek that review and I on behalf of the Council so (sic) respond to the Ombudsman should we receive that query.

I appreciate your noting of Section 90 (4) of the Local Government Act and Council's consideration as to appropriate confidentiality orders, however it remains Councils interpretation as it is entitled legal to determine that the conditions under Section 90(3)(a) of the Act were on balance met, as the document so retained in confidence meets the test under Section 90(3)(a) and by definition Section 90(9) of the Act as it involved the health status of a party involved.

As it is your likely intention to refer the matter to the Ombudsman I shall await any correspondence and respond accordingly and as you shall be likely to avail yourself of that option I shall not respond further to any questions regarding this specific matter.

If you wish to lay complaint regarding the conduct of an outside officer please provide the necessary details including location, time and name of the officer involved (if that is in your knowledge) of the incident and I shall have that investigated; without this detail I can only comment that the general policy of Council that smoking whilst not on a break is not an acceptable practice which staff are fully aware of.

Whether it was appropriate to make the confidentiality orders at the council meeting on 19 February 2013

12. As part of my recent audit⁶ of the use of meeting confidentiality provisions of the Local Government Act in South Australian councils, I have examined the practices of 12 councils on the issue of moving meetings into confidence using section 90(2) meeting orders. On many occasions the procedure used by councils resulted in invalid motions being endorsed by councils.

⁶ In the Public Eye - An audit of the use of meeting confidentiality provisions of the Local Government Act 1999 in South Australian councils - November 2012

13. At the council meeting dated 19 February 2013 the council had before it a report informing elected members of the existence of the complaint and the legal advice to the CEO. The council has acknowledged that the reference to 'Section 90(3)(l)⁷ of the Local Government Act' as the authority for it to move into confidence was a typographical error. The council in fact relied on the provision of section 90(3)(h) of the Act, which is the correct sub-section.
14. Section 90(7) provides that where a confidentiality order is made under section 90(2), a note must be made in the minutes of the order and of the 'grounds on which it was made'. This should be interpreted with the democratic objects of section 90 in mind. In my opinion, it is insufficient for a council to justify a section 90(2) order to exclude the public from a council meeting simply by recounting the paragraphs in section 90(3) that the council considers are relevant. This approach is unhelpful for the public, and it lacks transparency.
15. The council has acknowledged⁸ that the grounds on which the confidentiality order was made are 'potentially deficient' when it used the term 'legal information' rather than 'legal advice'. I agree, but I acknowledge that the intention of the council was clear. Nevertheless, the council should have used the correct term provided in section 90(3).
16. I note that Part 4.1.5 of the Code of Conduct for Elected Members Grievance Policy⁹ states that when the council is informed of a complaint:
- ... it is to be received by the Council in confidence, subject to meeting one or more of the grounds under Section 90(3) of the Act.
- This required the council to exercise a judgement in relation to the application of section 90(3).
17. I have considered the nature of the legal advice to the CEO. I paraphrase the advice to be that council should treat the complaint as one made under the Code of Conduct¹⁰ and, if the matter could not be resolved by the council engaging with the person who brought the complaint, the council should consider referring the complaint to the panel. I appreciate that the CEO may have been sensitive about some aspects of the complaint, but I can see no basis to claim that the council should move into confidence for the reason given. In effect the salient points of the advice from the solicitors were paraphrased in the CEO's report.
18. I would proffer a view that had the matter been conducted in the public view, the manner in which the council dealt with the matter at that time, would have instilled confidence in the conduct of the council.
19. In my view, in addition to the failure of the council to strictly comply with the statutory requirements of section 90 of the Act, I can see no basis for the council to have made the order that it did.

Opinion

In light of the above, I consider that the council in making the orders on 19 February 2013, acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

⁷ Section 90(3)(l) of the Local Government Act 1999 was deleted on 22 May 2003.

⁸ Letter from the Council dated 12 June 2013.

⁹ A new Code of Conduct for Council Members was promulgated in the Government Gazette dated 22 August 2013 at 3536

¹⁰ Code of Conduct for Elected Members and Committee Members

Whether it was appropriate to make the confidentiality orders at the council meeting on 9 May 2013

20. At the special meeting on 9 May 2013, the council had before it a report prepared by the CEO summarising the management of the complaint by the council and a copy of the report from the panel. It also had before it a letter from the mayor to the CEO responding to the panel's findings. At approximately 4.34pm that day the meeting moved into confidence as there was information that related to the personal affairs¹¹ of another person. The council has explained to my investigation the nature of the information it considered warranted protection from disclosure. This included information provided to the panel by third persons in confidence.
21. I note that section 90(9) of the Act provides some definition of the term 'personal affairs', but it is not exhaustive.
22. I understand the concerns held by the council. While I would encourage councils to elaborate on its reasons for moving into confidence beyond quoting the sub-section, in this matter to have done so may have disclosed information the council was seeking to suppress.
23. When the meeting was reopened to the public at about 5.21pm the council resolved to accept the panel's report and consider the matter to be concluded. The council resolved to publish the CEO's report and a redacted version of the panel's report. Orders were made under sections 91(7) and (9) of the Act suppressing the redacted material from the report and the mayor's letter. The order of suppression is effective until 8 May 2014, although the council did empower the CEO to review the order earlier if appropriate.
24. The council meeting was in confidence for approximately 45 minutes. Following that consideration, the council made a decision, correctly in my view, to suppress some information while making other information publicly available.

Opinion

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 adequately responded to the complainant's enquiries

25. The complainant's interest in the detail of the allegation against the mayor has its origin in the reference in the council's media release that 'ladies had been offended'. The CEO has informed the complainant that this statement was taken from the panel's report.¹²
26. The CEO provided the complainant with a copy of his report to the council meeting of 9 May 2013, and a redacted version of the panel's report. The complainant's request to access a copy of the complaint against the mayor was declined, but the CEO suggested that the complainant lodge an application under the *Freedom of Information Act 1991* to access the document.

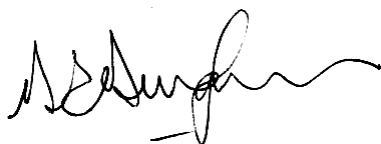
¹¹ Section 90(9) of the Local Government Act provides examples of 'personal affairs'.

¹² Emails from the CEO to the complainant dated 23 and 24 May 2013.

27. The CEO has provided my investigation with a table prepared using the council's records management system recording the number of email transactions between the council and the complainant in the period 17 May 2013 and 24 May 2013. The CEO considers that he has responded promptly and to the best of his ability to the matters raised by the complainant, and I agree with this assessment.
28. The CEO has conceded that one matter raised by the complainant relating to the rationale for the confidentiality order made on 19 February 2013 was overlooked. My investigation has been advised that in order to resolve the complainant's issues the CEO has offered to meet with the complainant.
29. In my view the council has responded appropriately to the complainant, although it would seem not to the complainant's satisfaction. In the circumstances I have formed the view that further investigation of this aspect of the complaint is unnecessary or unjustifiable.

Opinion

Having regard to the circumstances of the case, I consider that continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.



Richard Bingham
SA OMBUDSMAN

25 October 2013