



**ATTACHMENT
ITEM 21.3
10 APRIL 2013**



Enquiries: Mr Richard Bingham
Telephone: (08) 8226 8699
Ombudsman reference: 2013/00755
Agency reference:

Mr Andrew Boardman
Chief Executive Officer
Kangaroo Island Council
PO Box 121
KINGSCOTE SA 5223

Dear Mr Boardman

Your correspondence about the Kangaroo Island Council

I refer to my letter dated 29 January 2013.

I have heard nothing further from the council, and thus I will now close my file.

However, I received further representations from Cr Graham Walkom about several issues relevant to the matter, and with his agreement I will record the outcome of my discussions with him.

First, I confirmed that for the reasons outlined in my letter of 29 January 2012 I do not consider that there is any public interest in investigating this matter further.

Second, Cr Walkom put to me that I should not investigate the matter because I discussed my original investigation with the Local Government Governance Panel (the LGGP) investigator. He stated that :

That the Ombudsman agrees to investigate and determine if the LGGP investigation was sound, bearing in mind the LGGP investigation was to independently assess the Ombudsman's findings, clearly and obviously indicates there is significant conflict for the Ombudsman to undertake this due to his original investigation and adverse findings against the same councillor who has complained about unreasonable and wrong process.

In my view Cr Walkom's comment misunderstands the fact that I have no jurisdiction to investigate the LGGP.¹ As I stated in my letter of 29 January 2012, the LGGP is not an 'agency' within the meaning of the Ombudsman Act, and therefore it is not within my jurisdiction. I have declined to express any view on how it conducted its investigation.

Be that as it may, in addition to the matters outlined in my letter of 29 January 2013, Cr Walkom's stated perception is another reason why I do not consider it appropriate to investigate the matters which the council requested I should.

¹ The LGGP is an administrative body established by the Local Government Association of South Australia, which itself is currently not an 'agency to which the Act applies' within the meaning of the *Ombudsman Act 1972*. Note that this position will change when the amendments made to the Ombudsman Act by Item 48 of Schedule 3 to the *Independent Commissioner Against Corruption Act 2012* commence operation.

Third, I noted during the course of my conversation with Cr Walkom that he and/or Cr Liu have an entitlement to raise with me any new complaint arising from the facts of this matter. If either of them does so, I will consider it in accordance with my usual assessment processes.

Finally, we discussed the question of whether the council breached its code of conduct procedure² in failing to provide an opportunity for Crs Walkom and Liu to make submissions in relation to its findings before the council considered the report. Cr Walkom stated that I have ignored the fact that:

... the Council has a clearly established practice and precedent in writing to all councillors where a breach of code finding has been made and to provide the opportunity for them to present any further aspects to council in accordance with council's adopted Procedures.

In my letter of 29 January 2012, I noted that the LGGP report was provided to all councillors in the papers for the meeting held on 16 January 2013; and I expressed the view that in all the circumstances of the matter, it was reasonable to expect that the two councillors could have exercised their entitlement to make a submission to the council after the receipt of those papers.

I noted also that the procedure requires amendment to deal with the 'verbal or oral submissions' issue; and that there is no reason why the procedure could not permit a councillor against whom an investigative finding has been made to be given a separate and earlier opportunity to provide written submissions, which the council could consider in conjunction with the report of the investigator.

In the circumstances of this matter, it seems to me that - whilst it is ultimately for the council to decide - in order to assist the parties to move on, it may be helpful to provide Crs Walkom and Liu with an opportunity to present to the council on all aspects of relevant events.

I have sent copies of this letter to Crs Walkom and Liu.

Yours sincerely



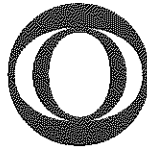
Richard Bingham
SA OMBUDSMAN

20 February 2013

Cc Cr Graham Walkom
PO Box 591
AMERICAN RIVER SA 5221

Cr Ken Liu
7 Giles St
KINGSCOTE SA 5223

² Procedure - Code of Conduct for Elected Members Reference 18.8.1.3.1,



OmbudsmanSA

Kangaroo Island Council
CONFIDENTIAL

Enquiries: Mr Richard Bingham
Telephone: (08) 8226 8699
Ombudsman reference: 2013/00755
Agency reference:

Mr Andrew Boardman
Chief Executive Officer
Kangaroo Island Council
PO Box 121
KINGSCOTE SA 5223

Dear Mr Boardman

Your correspondence about the Kangaroo Island Council

I refer to your letter dated 21 January 2013, and my acknowledgement of the same date.

At its meeting held on 16 January 2013, the council passed a resolution¹ requesting that I conduct an independent review of the process adopted by the council to deal with possible breaches of the code of conduct, by Crs Graham Walkom and Ken Liu. These possible breaches were identified in the report of my full investigation into various matters,² which was considered at the special council meeting held on 17 October 2012 (which I attended).

The council's resolution followed from its consideration of concerns expressed by the two councillors, which I broadly summarise as follows:

- the council should not have appointed the Local Government Governance Panel (the LGGP) to conduct the investigation because the panel had previously demonstrated bias against the councillors; inconsistent decisions on similar matters; and lack of clarity in the procedures which it would follow
- the LGGP investigation was not conducted in accordance with the rules of natural justice. The councillors have given several examples of alleged shortcomings, including an alleged threat of a further complaint if Cr Liu failed to cooperate with the LGGP investigation; the identity and interests of the investigator; distribution by the mayor of legal advice; the conduct of an interview without notice of questions to be asked; the suggestion that not all elected members and relevant witnesses were spoken to; and other matters
- the council breached its code of conduct procedure (the procedure)³ in dealing with the report of the LGGP, notably in failing to provide an opportunity for the councillors to make submissions in relation to its findings before the council considered it.⁴

I have decided to treat the council's request as a complaint for the purposes of the *Ombudsman Act 1972*.

In considering this matter, I have:

- assessed the information provided by you

¹ Resolution 21.2.1, moved by Cr Davis and seconded by Cr Clements.

² Ombudsman SA reference 2011/07898

³ Procedure - Code of Conduct for Elected Members Reference 18.8.1.3.1,

⁴ As required by section 4.7 of the procedures.

- considered additional supplementary comments from Crs Walkom and Liu, in both cases dated 22 January 2013
- considered the requirements of the procedure
- prepared this letter to you.

My assessment of the complaint

The first issue is whether the council should not have appointed the LGGP to conduct the investigation. Under sections 3.0 and 4.0 of the procedure, it is normally a matter for the mayor to make the decision as to how a complaint alleging a breach of the code of conduct is to be handled. In this case, at the meeting held on 17 October 2012, the council passed a resolution instructing 'the Presiding Member to forward the Code of Conduct assessment from the Ombudsman to the Local Government Governance Panel for full investigation.'⁵

It appears from the materials provided to me that after the LGGP had been appointed, and before the LGGP investigation commenced, the two councillors both expressed various concerns about the appointment. However, whilst I acknowledge that the two councillors object to the content of the resolution, I can see no administrative error in it.⁶

The second issue is whether the LGGP investigation was conducted in accordance with the rules of natural justice. The LGGP is not an 'agency' within the meaning of the Ombudsman Act, and therefore it is not within my jurisdiction. I will not express any view on how it conducted its investigation.

However, I note that the mayor's action in distributing the legal advice provided to her on 12 November 2012 was criticised by the councillors. This action is within my jurisdiction, but I see no prima facie evidence of administrative error, and thus no reason for further investigation by my office. In my view it was not inappropriate for the council as a whole to be informed of the legal advice provided to the mayor.

The third issue is whether the council breached the procedure in dealing with the report of the LGGP, notably in failing to provide an opportunity for the two councillors to make submissions in relation to its findings before the council considered the report. I note that, as section 4.6 of the procedure makes clear, the two councillors had an 'interest' in the matter, and therefore under section 74 of the Local Government Act were precluded from participating in the council's consideration of it.

Section 4.7 of the procedure provides that:

Before the council meeting, a copy of the final report will be provided to the Member who is the subject of the complaint. Notwithstanding his/her prescribed interest in the matter, the Member will be provided with an opportunity to make submissions to the Council (either verbally or orally) (sic) in relation to it. The council will have regard to the member's submissions (if any) in finalising the complaint.

In this case, as I have noted above, the council instructed the mayor as to how to commence the investigation, but I see no reason as to why this provision is not applicable in the circumstances of this matter.

The LGGP report was provided to all councillors in the papers for the meeting held on 16 January 2013. I consider that in all the circumstances of the matter, it was reasonable to expect that the two councillors could have exercised their entitlement to make a submission to the council after the receipt of those papers.

⁵ Resolution 3.5.2, moved Cr Willson, seconded Cr Denholm.

⁶ I note that its content is arguably a matter of policy, and thus beyond my jurisdiction.

The procedure is confusing in referring to 'verbal or oral' submissions, which as a matter of practicality could not have been made to the 16 January 2013 council meeting which considered the report, owing to the operation of section 74 of the Local Government Act. Nonetheless it appears to me that the procedure's intention is to permit the making of written submissions, and the councillors were 'provided with an opportunity' to do so when they received a copy of the report in the meeting papers. I therefore can see no administrative error in the process adopted by the council to deal with the report.

I note also that in fact the council was provided with a copy of an email from Cr Liu dated 30 November 2012 (i.e. written before the LGGP report was received) to assist its deliberations at the 16 January 2013 meeting.

That said, as a matter of practice for the future, the procedure requires amendment to deal with the 'verbal or oral submissions' issue. There is no reason why the procedure could not permit a councillor against whom an investigative finding has been made to be given a separate and earlier opportunity to provide written submissions, which the council could consider in conjunction with the report of the investigator.

Outcome of my assessment

In light of my assessment above and on the basis of the evidence available, it appears that the council has not acted in a way that is unlawful, unreasonable or wrong within the meaning of the Ombudsman Act. Accordingly, I do not consider that further investigation of this matter by my office is necessary or justifiable.

In assessing the council's request for me to review these issues, I am conscious of the long history of this matter, which is apparent from my earlier report. Further, I do not consider it to be in the public interest for the council's attention to be drawn away from the issues which it must confront in dealing with the matters which face it in the course of its ordinary business.

I intend to end my investigation, unless you are able to identify an error in my assessment of your complaint. If you think you are able to identify such an error, I ask you to contact my office by 15 February 2013 with your reasoning. If you do not contact my office within that time, I will close the file.

I have sent copies of this letter to Crs Walkom and Liu, and I note that my invitation to identify an error in my assessment extends to them too.

Yours sincerely



Richard Bingham
SA OMBUDSMAN

29 January 2013

Cc Cr Graham Walkom
PO Box 591
AMERICAN RIVER SA 5221

Cr Ken Liu
7 Giles St
KINGSCOTE SA 5223