

C/- GPO Box 2693  
ADELAIDE SA 5001

(Please mark all correspondence as Private & Confidential)

T: 08 8224 2082

F: 08 8232 6336

E: [governancepanel@lga](mailto:governancepanel@lga)

**ATTACHMENT  
ITEM 21.6  
16 January 2013  
L2013/70 - 9.1.3**

Our Reference: 93781 (95727) / MS : CS

**CONFIDENTIAL**

**CONFIDENTIAL**

11 December 2012

Mayor Jayne Bates  
Kangaroo Island Council  
PO Box 121  
KINGSCOTE SA 5223

Dear Mayor Bates

**93781 - Kangaroo Island Council - Alleged breach of the Code of Conduct -  
Council -v- Cr Walkom and Cr Liu**

Panel Member, Mr Stephen Hains has undertaken the investigation of the above alleged breach of the Kangaroo Island Council Member Council Code of Conduct. The report on the investigation of the matter is attached.

This report concludes the investigation of the complaint by the Local Government Governance Panel. If you require further clarification in relation to this matter please contact Chris Umapathysivam, Director - Excellence & Reform on 8224 2033 or email [chris.u@lga.sa.gov.au](mailto:chris.u@lga.sa.gov.au).

Yours sincerely



Marjorie Schulze, OAM  
Chairperson



**Local Government Association  
of South Australia**



---

# LOCAL GOVERNMENT GOVERNANCE PANEL

C/- GPO Box 2683  
ADELAIDE SA 5001

(please mark all correspondence as Private & Confidential)

T: 08 8224 2082  
F: 08 8232 6336  
E: [governancePanel@lga.sa.gov.au](mailto:governancePanel@lga.sa.gov.au)

---

Our Reference: 93781 (95724) / MS : CS

## CONFIDENTIAL FINAL REPORT

*"Without Prejudice - this report is for the use of Local Government Governance Panel, Kangaroo Island Council and its legal advisers only"*

### Report on the investigation of a Code of Conduct Complaint 93781 - Kangaroo Island Council - (Council -v- Cr Walkom and Cr Liu)

We write to report on the investigation undertaken into a complaint involving an alleged breach of the Kangaroo Island Council Code of Conduct for Council Members (the "complaint") following the referral of this matter to the Local Government Governance Panel (the "Panel").

#### The Complaint

The complaint referred to the Panel is that brought by Kangaroo Island Council (the "complainant") against Cr Walkom and Cr Liu (the "respondent") as outlined in the referral letter of 22 October 2012.

We are advised that in October 2011, the Kangaroo Island Council (by formal resolution) requested the Ombudsman investigate certain behaviours and events in regard to informal gatherings and breaches of confidences within Council. The Ombudsman subsequently conducted a full investigation over many months and Council considered his final report on 17 October 2012.

Within the summary of opinions provided, the Ombudsman foreshadowed that Crs Walkom and Liu may have breached sections of the Kangaroo Island Council Code of Conduct for Council Members 2.1.1, 2.6.1, 2.6.5, and 2.6.6.

The Council resolution of that meeting was:

*That Council instruct the Presiding Member to forward the Code of Conduct assessment from the Ombudsman to the Local Government Governance Panel for full investigation.*

#### Ombudsman's Report

The Ombudsman found (in relation to the matter that is the subject of this reference) as follows:

*"Publication of information about the OHS incident reports:*

*I consider that the publication of a letter dealing with matters subject to a confidentiality order to "The Islander" and on the KIPolis website by Crs Liu and Walkom may have breached*

.../2



Local Government Association  
of South Australia

This Panel has been established by the Local Government Association of South Australia for the use of Councils. It is funded by Councils and the Local Government Research and Development Scheme. All members of the Panel are independent to the workings of the LGA, however, administrative support is provided by the LGA.

section 62(2) of the Local Government Act, their fiduciary duty to the council and the following provisions of the code of conduct:

- 2.1.1 – understand and give proper consideration to legal requirements;
- 2.6.1 – ensure that information obtained as a result of their role is not to be used for any purpose other than council business;
- 2.6.5 – ensure that information given in relation to the council or council decisions is accurate and is not a misuse of information;
- 2.6.6 – respect and maintain confidentiality.”

## The Investigation

The Panel has investigated this complaint by reviewing the Ombudsman's report and interviewing the Ombudsman on his findings; by reviewing the documentary evidence of the alleged breach and the Council policies and procedures governing Code of Conduct and by visiting the Council office and interviewing Mayor Bates and Crs Liu and Walkom (who attended the interview with Dr Gabriel Bittar as an “observer”)<sup>1</sup>.

In reviewing a Code of Conduct issue, the Panel recognises that alleged breaches are a question of both fact and degree. Accordingly, it seeks to answer questions such as:

- Has a breach of the Code of Conduct occurred?
- Was this breach intentional?
- Are there any mitigating circumstances?
- Did the breach have the potential to seriously compromise the position of the Council or another party with whom the Council has an obligatory relationship?
- Did harm actually occur?
- Is the breach acknowledged with regret?
- Is there evidence of previous breaches of a similar nature?
- What is an appropriate response by the Council?

## Background / Context

This issue is based on the conduct of an independent investigation by Council into an Occupational Health and Safety (OH&S) matter that involved Cr Walkom and the publication of information about this investigation by Crs Liu and Walkom in “The Islander” and on the KIPolis website in October 2011.

The Panel has confirmed the following facts as noted by the Ombudsman in his report (footnote 24), *“the relevant agenda items were dealt with in confidence at the cCouncil meetings held on 7 January 2011 (special), 9 February 2011, 8 March 2011 (special) and 29 March 2011 (special). They were made the subject of confidentiality orders under section 90 of the Local Government Act, which remain in effect today.”*

.../3

---

<sup>1</sup> Crs Liu and Walkom have challenged the Panel on its basis for interviewing Mayor Bates. The Panel, however, felt that it was appropriate to obtain contextual information about the allegation from the Principal Officer of Council. The CEO was not available for interview as he was overseas at the time of the investigation. The councillors also wanted the Panel to interview Michael Pengilly, MP and the previous Cr Chirgwin, but, while this may have been relevant to the Councillors dispute with the Mayor, it was not seen to be central to this investigation.

While the matter that has triggered this investigation was the publication of a letter in October 2011, the Mayor indicated at interview that she believed information that was the subject of confidential discussions in the Council was being actively leaked outside the Council in the early months of 2011, although no evidence was available to support a suggestion that the source of such leaks may have been these two councillors, and such an allegation is not the focus of this investigation.

The Ombudsman also noted that a letter sent to the editor of "The Islander" and to the KIPolis website, which contained an accusation against the behaviour of the Mayor, also revealed to the public that an external investigation had been undertaken. This was, at that time, the subject of in-confidence communication within the Council and as such, should have been kept confidential.<sup>2</sup>

The Council's grounds for making confidential its consideration of the matter that was being investigated, and the subsequent investigation of that allegation, were soundly based on the relevant provisions of the Local Government Act 1999. In particular, it would be quite inappropriate for an allegation of this nature to be the subject of public discussion before the allegation has been proven and could do serious damage to the reputations of the parties involved.

In these circumstances, it is important that Council was able to discuss this matter in confidence and to believe that all members would respect that confidentiality. It is noted, however, that the letter in question did not publicly canvass the issues at the core of the confidential item, but only the fact that the investigation was taking place and its associated cost.

The Ombudsman has summarised his view on this matter (paragraph 81) as that:

*"the publication of the letter by Crs Liu and Walkom may have breached section 62(2) of the Local Government Act, their fiduciary duty to the Council and the following provisions of the code of conduct:*

- *2.1.4 – behave in a way that maintains and enhances the image of council and does not reflect adversely on Council*
- *2.5.1 – conduct relationships with courtesy, respect and mutual trust*
- *2.5.2 – seek to establish mature and constructive working relationships*
- *2.6.3 – recognise that in their relationship with the media, unless otherwise empowered by the council, the member is putting forward personal views and not those of the Council*
- *2.6.4 – ensure that personal comments are clearly identified*
- *2.6.5 – ensure that information is given in relation to the Council or Council decisions is accurate and is not a misuse of information*
- *2.6.6 – respect and maintain confidentiality"*

## Findings

In interview, the councillors indicated that the letter was the result of months of frustration in obtaining information about the process by other means. They also noted that, by the time of their

.../4

---

<sup>2</sup> The Panel notes that Council revised its Code of Conduct in mid 2011, some time after the meetings referred to above, although the only change of substance was in the introduction of a subordinate Procedure document regarding the processes for handling complaints and the options open to council where an allegation had been demonstrated. Various details of this new Code were disputed by the councillors in question, notably in relation to the issue of a right of appeal beyond a council determination.



**Local Government Association**  
of South Australia

published letter, the fact that Council was investigating the matter was common knowledge within the community and that it had in fact been referred to in an article that quoted the Mayor in "The Islander" some months earlier.<sup>3</sup> Finally, they also noted that their letter did not overtly breach the subject of Council's confidentiality, but simply referred to the costs of the investigation.

Neither of the councillors believes that they breached confidentiality or the Code of Conduct and both indicated that there is nothing that they did that they would not do again.<sup>4</sup>

A number of issues arise from these responses. Firstly, as the councillors had previously been actively seeking information from Council about the costs of the investigation and associated legal expenses, it seems clear to the Panel that they had a clear intention to relay such information to the community (a conclusion that was not denied by the councillors). Secondly, a focus on the cost of the investigation seems somewhat disingenuous on the part of Cr Walkom, since he was a key focus of the complaint that was being investigated. Thirdly, individual councillors should not disclose any matter that remains confidential, even by referring obliquely to an "investigation", and claiming wide community knowledge of the issue is not of itself a licence to breach Council confidentiality.

The Panel therefore finds that there was a breach of the confidentiality of a Council decision by the intentional publication of information relating to that decision.

There is always a tension between the role of a councillor to represent his constituents and to promote the free flow of information about council affairs; and the obligation that councillors have as a member of the corporate body of council to abide by the rules of conduct and his responsibilities to the decisions of Council. Recognising and adhering to these rules and responsibilities is, however, not negotiable, and are a cornerstone around which the other roles of an elected member must revolve.

The investigation into the allegation at the core of this issue appears to have been circumvented by the departure from Council's employment of the CEO, and Council resolved to take no further action. There is therefore no evidence to connect the CEO's departure or any direct damage to Council's position with the inappropriate release of public information about the investigation. This was possibly fortuitous, as there was the possibility of more serious damage occurring.

The Panel notes the evidence that the investigation was to some extent public knowledge, and that the published letter did not publish any details or argument about the substance of the confidential issue. It nonetheless considers that the breach of confidentiality in this context was a potentially serious breach of the Council's Code of Conduct and the fiduciary responsibilities of the councillors.

.../5

---

<sup>3</sup> An article in "The Islander" of 7 April 2011 reported that "several allegations of breaches of the Code of Conduct are being investigated by the Kangaroo Island Council" and quoted the Mayor as saying that the council "had engaged outside assistance to investigate the claims and had also sought legal advice on how best to proceed." This article did not, however, refer to the specific nature of the complaint, as did the publication in KIPolis.

<sup>4</sup> Cr Walkom also believes that the Mayor has an outstanding conflict of interest in this matter, which the Panel does not consider is demonstrated, and is not considered relevant to this investigation.

## General Observations

As so often, where the Panel investigates Code of Conduct matters, the underlying issue is some breakdown in relationships within the Council. In this case, there has been a clear split between the two councillors who are the subject of this report, both of whom were elected at the last election, and the rest of the Council, especially the Mayor. The cause of the split does not appear to be based on any particular issue of significance, but is rather based on differences in style, with both Crs Liu and Walkom giving the impression to the Investigator in interview that they adopt a highly procedural, legalistic and somewhat confrontational style to their role on Council. This has only been reinforced by references of the type that brought on this report, as they clearly feel they are something of a persecuted minority defending the real interests of the community.

Differences of opinion on Councils is a key element of sound decision making, so that established positions and traditional approaches to issues are closely questioned and reconsidered. It is also important that members actively seek to serve the community interest as they perceive it to be, and to ensure that Council decisions and processes are as transparent as possible. But individual elected members have an overriding responsibility to the corporate body, and to abide by and respect the processes of Council.

In considering any potential action in this matter, the Panel believes that it is most important that Council moves towards a more consensual and less confrontational style of governance and bears in mind the effluxion of time on this issue, and that what might have been serious damage to Council's position in this matter appears to have been averted.

## Recommendations

It is a matter for Council to consider what action, if any, it wishes to take however the Panel recommends that Council:

- notes this report at a formal meeting of Council;
- notes that having investigated the alleged breach of the Code of Conduct for Elected Council Members, the Local Government Governance Panel finds that a breach of the Code has occurred;
- notes the obligations, joint and several, of all Elected Members to behave at all times in a manner prescribed by the Code of Conduct (whether or not they individually agree with its provisions); and takes steps to ensure that all Elected Members (current and future) understand these obligations; and
- seeks the services of a mediator to work with elected members on creating a more positive team environment within the Council forum.

While some relationships on the Council have clearly deteriorated and may not be capable of recovery, the Panel remains convinced that the motivation of all councillors is for the long-term betterment of the community, and that progress is still possible. Expenditure on a mediator and on the professional development of Members in the area of interpersonal relationships may also be a better investment in the future quality of decision making on the Council than on-going expenditure on legal advice and external investigations.

.../6



This report concludes the investigation of the complaint by the Local Government Governance Panel. If you require further clarification in relation to this matter please contact Chris Umapathysivam, Director - Excellence & Reform on 8224 2033, email [chris.u@lga.sa.gov.au](mailto:chris.u@lga.sa.gov.au).

Yours sincerely



Marjorie Schulze OAM  
Chairperson



Stephen Hains  
Investigating Panel Member

11 December 2012