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Ombudsman reference: 2012/06480
Agency reference:

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

COPY

Dear Mayor Bates

Preliminary investigation of complaint by Councillor Graham Walkom

Thank you for your email of 29 November 2012.

I have now finalised my investigation on the basis of the views expressed in my provisional report. I enclose a copy of my final report for your information.

Yours sincerely

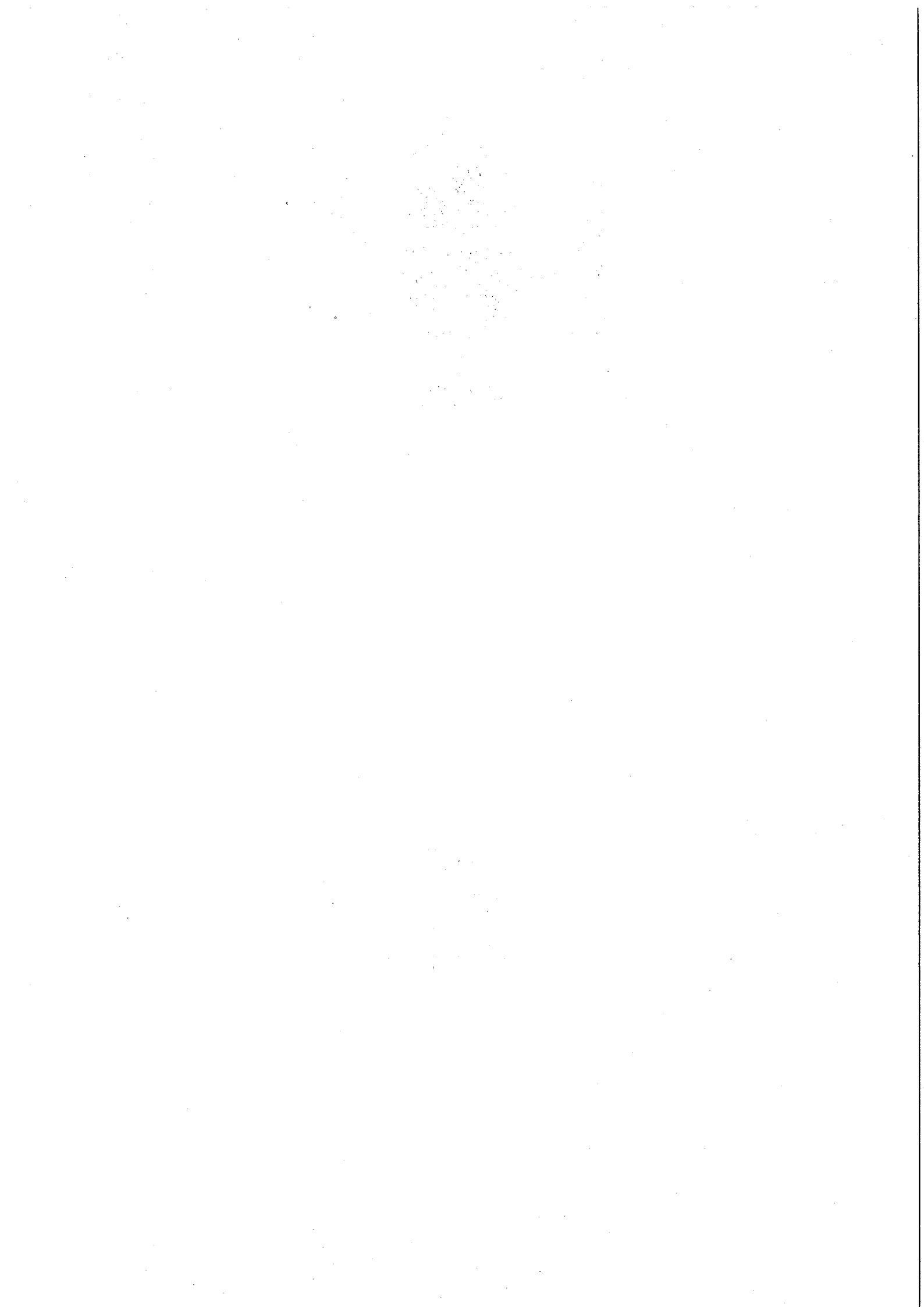


Richard Bingham
SA OMBUDSMAN

19 December 2012

Encl

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



Report
Preliminary investigation - *Ombudsman Act 1972*

Complainant	Cr Graham Walkom
Agency	Kangaroo Island Council
Ombudsman reference	2012/06480
Agency reference	L2012/2623
Date complaint received	20 August 2012
Issues	Whether the mayor breached confidentiality regarding a council agenda item discussed in confidence.

Jurisdiction

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

The original complaint was made to the deputy mayor of the council on 29 July 2012. On 20 August 2012, it was forwarded to me by the Chief Executive Officer (the CEO) of the council. At the same time, the CEO referred the complaint to the Anti-Corruption Branch of the South Australia Police.

On 31 August 2012, the CEO advised me that the ACB had informed him that there was insufficient evidence of any criminal offence alleged, and this is not a matter which the Anti-Corruption Branch would investigate.

On 31 August 2012 I advised the complainant that I had given consideration to his complaint. I noted in particular that the council had requested me to investigate:

... breaches of confidence within council with respect to council's meetings with Chinese developers and in particular State Opposition members airing of misinformation, its utilisation of this information for political purposes and its apparent intent to bring disrepute on Councillors and their community of Kangaroo Island.¹

I advised the complainant that I had decided to conduct an 'own initiative' preliminary investigation of this matter under section 18(1) of the *Ombudsman Act 1972*.

I advised the complainant that because my 'own initiative' investigation necessarily overlapped with the substance of his complaint, I did not intend at that time to commence a separate investigation of his complaint.

I have now investigated the other matter, and I consider that it is appropriate to prepare this report on this complaint.

¹ Motion 3.3.1 passed at the special council meeting held on 25 July 2012.

Investigation

My investigation has involved:

- assessing information provided by the complainant
- assessing information provided by the CEO in the related matter
- considering a statutory declaration prepared by the mayor in the related matter
- considering sections 62 and 63 of the *Local Government Act 1999* (the Act); the council's Code of Conduct for Elected Members (the code of conduct);² and the council's media policy³
- preparing a provisional report and sending it to the council and Cr Walkom for comment
- considering the responses received
- 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.⁴ 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 ...⁵

Responses to my provisional report

On 29 November 2012, the mayor advised me by email that she had no further comment to make on my provisional report.

On 18 December 2012, the CEO advised me that the council had considered my provisional report on the related investigation in confidence at its meeting held on 12 December 2012, and the following resolution was passed:

21.2.2
Moved Cr Boxall Seconded Cr Davis

That the Ombudsman Report be received for information and that Elected Members are encouraged to comment directly to the Ombudsman by 14 December 2012.

CARRIED

On 19 December, I discussed both investigations with Cr Walkom. He confirmed that he has no further comment to make.

² Policy - Code of Conduct for Elected Members
http://www.kangarooisland.sa.gov.au/webdata/resources/files/Code_of_Conduct_Elected_Members_-_adopted_20100920.pdf, at 26 November 2012.

³ http://www.kangarooisland.sa.gov.au/webdata/resources/files/20100920_Media_Policy_-_adopted.pdf, as at 26 November 2012.

⁴ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

⁵ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Background

1. At the council meeting held on 11 July 2012, the council considered an item in confidence, entitled Agenda Item 21.6 'Sister island relationship request'. As a result of that consideration, council resolution 21.6.1 was passed. This resolution was in the following terms:

IN CONFIDENCE Resolution of Council 11 July 2012

21.6.1

Moved Cr Willson Seconded Cr Clements

That Council write to Mr Raymond Wang, President of the China Australia Entrepreneurs Association confirming that they are happy to support the process of establishing a relationship between Mount Putuo and Kangaroo Island to promote greater tourism and other economic and cultural exchange for the benefit of both regions.

CARRIED.

2. In question time in the Legislative Council on 19 July 2012, Hon David Ridgway MLC asked a question without notice of the Minister for Tourism, Hon Gail Gago MLC on the matter of potential development by a Chinese developer on Kangaroo Island. After the Minister's response, the Hon Ann Bressington MLC asked a supplementary question about the matter.
3. Mr Ridgway's question was as follows:

KANGAROO ISLAND TOURISM

The Hon. D.W. RIDGWAY (Leader of the Opposition) (14:59): I seek leave to make a brief explanation before asking the Minister for Tourism a question about tourism developments on Kangaroo Island.

Leave granted.

The Hon. D.W. RIDGWAY: I have been advised that Chinese business people have expressed an interest in building a tourism resort and a Buddhist retreat on Kangaroo Island. In fact, they have had discussions with members of the government. I am also advised that this Chinese group has also offered to take the entire elected Kangaroo island Council on a trip to China to view its overseas operations. My questions to the minister are:

1. Have you, as tourism minister, or have any other ministers had discussions with Chinese Interests in relation to the tourism development and the Buddhist retreat on Kangaroo Island?
 - 2, Do you think it is appropriate for a developer of this nature to offer to take the entire local council on an overseas trip?
4. On the morning of 20 July 2012, both Members of Parliament appeared on 5AA radio where they again raised the issue. Mr Ridgway then released a media statement later that day.⁶
 5. The CEO has advised me that the local press on Kangaroo Island made contact with Mr Ridgway's office. The newspaper subsequently reported that a spokesman for Mr

⁶ The media release is no longer on the Hon David Ridgway's website, but formed part of a report to the council for its special meeting on 25 July 2012. A copy of this report has been provided to me by the council.

Ridgway confirmed that the source of the information came from within the council and had been 'so far, remarkably accurate'.⁷

6. The question of how Mr Ridgway came to be aware of the matter is the subject of the related investigation which I have conducted. However, the council considered it appropriate to respond to the questions raised in Parliament, and did so through the mayor, who conducted radio interviews in which she sought to clarify the situation. She also called a special meeting of the council, which was held on 25 July 2012, to discuss the matter.
7. The CEO produced a report to the council for the special meeting on 25 July 2012, and at that meeting the council resolved as follows:

Item 3.3

Moved Cr Davis Seconded Cr Denholm

1. That Council approve the letter, as drafted, to go to each member of the Legislative Council and the House of Assembly

and

2. That Council approve the letter, as drafted, to go to Hon DW Ridgway MP (copied to Hon Ann Bressington MP) addressing Council concerns over the statements he has made over this matter.

CARRIED.

8. This complaint alleges that in commenting on the matters raised in Parliament, the mayor disclosed information that remained in confidence. It states:

This disregard of council's order and indifference to council's code of conduct generally appears to be a breach of the following regulations:

1. Section 62(2) of the Local Government Act
2. the fiduciary duty to council (to act with fidelity and trust to council)
3. the following provisions of council's Code of Conduct
 - a) 2.1.1 - understand and give proper consideration to legal requirements
 - b) 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
 - c) 2.6.5 - ensure that information given in relation to the council or council decisions is accurate and is not a misuse of information
 - d) 2.6.6 - respect and maintain confidentiality.

Whether the mayor breached confidentiality regarding a council agenda item discussed in confidence.

9. In another investigation⁸ I have outlined in some detail the legislative and code of conduct obligations attaching to elected members of the council, and I will not repeat them here. In summary, the Local Government Act does not include any express obligation requiring councillors to keep documents confidential, even where an agenda item has been dealt with in confidence and an order made under section 91(7) of the Act that documents must be confidential.

⁷ The Islander, 2 August 2012, p1.

⁸ The report of this investigation is available at <http://www.ombudsman.sa.gov.au/Kangaroo%20Island%20Council%20-%20October%202012%20-%20Confidentiality%20and%20informal%20gatherings.pdf>, as at 23 November 2012.

10. However, there are confidentiality obligations applying to elected members of the council arising through section 63 of the Local Government Act under the code of conduct. These obligations appear under the heading '2.6 Information obtained by a member in the course of his or her duties is respected and used in a careful and prudent manner'. They include:

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.

11. In addition, by virtue of their common law fiduciary obligations, I consider that council members are under a duty to keep council information confidential when they know or should reasonably know of the information's confidential status. This clearly applies to information which has been discussed by a council in confidence under section 90 of the Act, and also information which is the subject of a council confidentiality order under section 91(7) of the Act.
12. In a statutory declaration provided to my office for the purposes of the related investigation, the mayor has stated that she discussed the contents of the meeting with the CEO, the deputy mayor⁹ and the council's consultant. She also stated that she met with Mr Michael Pengilly MP on 13 July 2012 to discuss a range of council issues not related to the China proposal. She continued:

On leaving the meeting, he asked what I had on for the day. I said I was meeting with a Chinese delegation who were interested in tourism, food and wine. He commented on their custom of offering gifts, trips etc. I said that I was aware of this and was careful to refuse anything that was inappropriate (or some such words....my recollection). I did not detail the substance or continue with the discussion.

13. The mayor also stated in her statutory declaration:

On July 20th I was rung by an Adelaide radio station and asked to comment on a question raised by The Hon David Ridgeway (sic) in Parliament in relation to the entire KI Council being offered a trip to China by a Chinese developer who was looking to build a Buddhist temple on KI. The station emailed me the content of his question, and I did two interviews that day, one on 891 and one on ABC Regional radio I was dismayed that this information provided the (sic) Mr Ridgeway was incorrect and misleading. I was aware of the confidentiality of the issue but also of my job to support and defend the Council and its reputation and more importantly the reputation of the Island community, who are in great need of investment to support our unsustainable economy. This type of allegation was extremely damaging especially in regard to the opportunity for future investors to deal with the Council who would be seen as tarnished. I was in a difficult position, with the need to provide clear and concise answers, not to be misleading, while respecting the confidentiality of the situation I found myself in. I did not name the organisation, but attempted to keep my comments general. A question directly in relation to the Buddhist temple, the subject of Mr. Ridgeway's question was put to me on the radio and I answered as appropriately as I could under the circumstances.

14. In her statutory declaration, the mayor also advised my related investigation that she had provided a statement to 'The Islander', as a result of a request for comment. The statement was printed on 26 July 2012 and was an excerpt from the letter sent to all members of Parliament, as agreed at the special council meeting held on 25 July 2012. It was as follows:

⁹ Cr Peter Clements.

There has never been such an offer, nor would it be accepted if there were. To clarify, we meet with many parties interested in investing in the Island including overseas investors. Of recent times, we have had interest from various Chinese investors, who are keen to both develop on the Island and promote the Island's food and wine in China. This includes interest from a Chinese Island to establish a relationship with us to promote tourism and cultural exchanges for the benefit of both and we have discussed the opportunity of deputations between the two Islands. During these discussions, I have, in the position of Mayor been offered a trip to China, but have respectfully declined at the moment. I am however keen to promote any opportunity to benefit our tourism, food and wine industries, and would certainly hope a deputation could be arranged in the future.

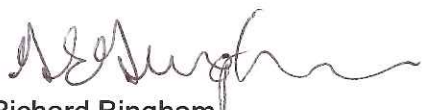
In respect to a major development on the Island by Chinese developers, we treat all enquiries with similar advice. Any application to develop on the Island must meet the strict requirements of our development plan, and hold true to our Community's vision of maintaining the principles of the KI brand while ensuring a high level of environmental integrity. The KI development plan does not allow for large development in coastal area.

15. In relation to the allegation that the mayor may have breached confidence, there are two issues which require consideration. First, it may be alleged that the mayor's discussion with Mr Pengilly may have led to the questions being asked in Parliament. On the evidence available I am not able to be satisfied to the requisite degree that this is the case.
16. Secondly, the complaint alleges that the mayor's subsequent radio interviews (i.e. after the questions were asked in Parliament) disclosed matters that were still in confidence due to the confidentiality order made at the council meeting held on 11 July 2012.
17. However, it appears to me that the substance of the council's dealings with the Chinese developer were disclosed by the explanation made by Mr Ridgway (which I have quoted above) before asking his question. The mayor's subsequent comments did no more than clarify the situation. I note that the mayor has a duty under section 58(1)(c) of the Local Government Act to act as the principal spokesperson of the council, and this is confirmed by the council's media policy.¹⁰
18. In this case, a serious question was asked concerning whether 'the entire council' had been offered an overseas trip. I consider that it was in the public interest for the mayor to clarify the matter, in keeping with her responsibilities as the principal spokesperson for the council. Her statements in my view did no more than clarify matters that had already made their way into the public domain.

Opinion

In light of the above, my final view is 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.

I consider that further investigation is unjustified or unwarranted within the terms of section 17(2)(d) of the Ombudsman Act.



Richard Bingham
SA OMBUDSMAN

19 December 2012

¹⁰ See first dot point under the heading '[policy guidelines]', http://www.kangarooisland.sa.gov.au/webdata/resources/files/20100920_Media_Policy_-_adopted.pdf, as at 19 December 2012.