



**Kangaroo Island Council**  
**CONFIDENTIAL**

**ATTACHMENT**  
**ITEM 21.1**  
**16 January 2013**  
**L2013/55 - 9.4.16**

Enquiries: Mr Richard Bingham  
Telephone: (08) 8226 8699  
Ombudsman reference: 2012/06301  
Agency reference:

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

Dear Mr Boardman

Own initiative investigation of matter raised by the Kangaroo Island Council (the council)

Thank you for your letter of 18 December 2012.

I have heard nothing further from any councillor, and thus I have 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

A handwritten signature in black ink, appearing to read "Richard Bingham".

Richard Bingham  
SA OMBUDSMAN

19 December 2012

Encl

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





## Report

### Preliminary investigation - *Ombudsman Act 1972*

Complainant	Ombudsman own initiative complaint under section 13(2) of the Ombudsman Act
Agency	Kangaroo Island Council
Ombudsman reference	2012/06301
Agency reference	L2012/2757
Date complaint received	14 August 2012
Issues	Whether there was a breach of confidentiality by an elected member or by a member of the council staff, regarding a council agenda item discussed in confidence

#### Jurisdiction

This matter was referred to my office by the council's Chief Executive Officer (the CEO) as a result of the following motion passed at a special council meeting held on 25 July 2012:

##### 3.3.1

Moved Cr Clements Seconded Cr Denholm

That the Ombudsman be requested to investigate further 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.

Moved Cr Boxall Seconded Cr Walkom

That the motion lay on the table.

LOST 2 For4 Against

The motion was put

CARRIED. 4 For 2 Against

The matter is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*, and in response to the council's request I advised the CEO on 31 August 2012 that I had decided to conduct an own initiative complaint under section 13(2) of the Ombudsman Act.

## Investigation

My investigation has involved:

- assessing the information provided by the CEO
- seeking statutory declarations from those present at the confidential council meeting held on 11 July 2012
- seeking information from Hon David Ridgway MLC and Hon Anne Bressington MLC
- considering sections 62 and 63 of the *Local Government Act 1999*, the council's Code of Conduct for Elected Members (the code of conduct);<sup>1</sup> and the council's Employee Code of Conduct (the employee code of conduct).<sup>2</sup>
- preparing a provisional report and sending it to the council and Hon David Ridgway MLC 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.<sup>3</sup> 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 ...<sup>4</sup>

## Responses to provisional report

On 26 November 2012 I sent a provisional report to the council and to the Hon David Ridgway MLC inviting comment by 14 December 2012.

On 18 December 2012, the CEO advised me that the council had considered the matter 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

I have received no further comment from any councillor, nor from Hon David Ridgway MLC.

<sup>1</sup> Policy - Code of Conduct for Elected Members  
[http://www.kangarooisland.sa.gov.au/webdata/resources/files/Code\\_of\\_Conduct\\_Elected\\_Members\\_-\\_adopted\\_20100920.pdf](http://www.kangarooisland.sa.gov.au/webdata/resources/files/Code_of_Conduct_Elected_Members_-_adopted_20100920.pdf), at 26 November 2012.

<sup>2</sup> Employee Code of Conduct  
<http://www.kangarooisland.sa.gov.au/webdata/resources/files/Employee%20Code%20of%20Conduct%20November%202011.pdf>, at 26 November 2012.

<sup>3</sup> 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.

<sup>4</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.



I have therefore finalised this report in accordance with the views expressed in my provisional report.

## 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. The CEO has advised that:
  - the developer in question approached the council some time ago via an organisation called the China Australia Entrepreneurs Association,<sup>5</sup> of which he is president
  - as leader of a delegation, the developer visited Kangaroo Island on several occasions, and met with council representatives.
  - the developer expressed interest in establishing a relationship between the council and Mt Putuo (an island in China) and the possibility of establishing a Buddhist retreat on Kangaroo Island
  - council members were kept advised about the approach during the course of informal gatherings.
3. Once it became clear that the matter may progress, the CEO sought consultancy advice, and arranged a meeting on 8 June 2012 in Adelaide to explain to the developer the requirements for undertaking development in the State and on Kangaroo Island in particular. Present were:
  - the mayor and relevant council staff
  - the council's consultant
  - 2 representatives from Planning SA
  - the general manager of the Kangaroo Island Futures Authority - by phone.
4. Following this meeting, the CEO prepared a report for the council meeting to be held on 11 July 2012. This report resulted in resolution 21.6.1 outlined above. The letter foreshadowed in the resolution was presented to the developer on 13 July 2012 when he visited, in the presence of the mayor and the consultant.
5. The CEO has advised me that, in accordance with Chinese custom, gifts have received from the developer. These include two books, a green jade dragon, a plate and two watches, all of which have been received and placed in the gift register. He has advised also that the developer has also 'talked to the mayor about hosting her and [the CEO] or a delegation to Mt Putuo'. The CEO has advised that these offers have been

<sup>5</sup> (<http://www.caeai.org.au>), as at 26 November 2012.

declined, and that at no time has any offer been formally made to the council or to the mayor.

6. In question time in the Legislative Council on 19 July 2012, the Hon David Ridgway MLC asked a question without notice of the Minister for Tourism, the Hon Gail Gago MLC, on the matter of potential development by a Chinese developer on Kangaroo Island. The question suggested 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'. After the Minister's response, the Hon Ann Bressington MLC asked a supplementary question about the matter.
7. On the morning of 20 July 2012, both members appeared on 5AA radio where they again raised the issue. Mr Ridgway then released a media statement later that day.<sup>6</sup>
8. 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 Ridgway confirmed that the source of the information came from within the council and had been 'so far, remarkably accurate'.<sup>7</sup>
9. The council responded to the questions in Parliament through the mayor, who conducted interviews in which she stated that no offer of a trip had been made. She also called a special meeting of the council, to be held on 25 July 2012 to consider the situation which had arisen.
10. 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.

11. The CEO has advised that the developer's proposals were only ever raised in either informal gatherings at the early stages of the developer's approach, or in the council meeting of 11 July 2012. Whilst others were present at the meeting in Adelaide held on 8 June 2012, I am advised that no offer of a trip was made at this meeting.
12. According to the minutes of the council meeting held on 11 July 2012, the following persons were present:
  - Mayor Jayne Bates
  - Cr Joy Willson
  - Cr Peter Denholm
  - Cr Malcolm Boxall
  - Cr Peter Clements
  - Cr Graham Walkom

<sup>6</sup> 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.

<sup>7</sup> The Islander, 2 August 2012, p1.



- Cr Ken Liu
  - the CEO
  - Mr Steven Watson, Asset Services General Manager
  - Ms Jennifer Trethewey, Personal Assistant.
13. By letter to the CEO dated 31 August 2012 I requested these persons to prepare a statutory declaration covering the following matters:
- whether the deponent was present for the discussion in confidence for Agenda Item 21.6
  - whether the deponent was aware that matters discussed at that time were the subject of a confidentiality order made under section 90 of the *Local Government Act 1999*
  - an outline of the deponent's recollection of the discussion of the agenda item
  - whether the deponent has revealed the content of the discussion to any other person/s since the meeting
  - if so, the name of the person/s to whom the deponent revealed the content, and for what purpose the content was revealed
  - whether the deponent has any other knowledge that they consider is relevant to this investigation.
14. I have received statutory declarations from all these persons, except for Mr Watson. On 27 September 2012, the CEO advised me that Mr Watson had been on personal leave, and had not returned his statutory declaration. I understand that Mr Watson no longer works for the council.
15. I note that in his statutory declaration, Cr Ken Liu indicated that he left the room for the discussion of Agenda Item 21.6. The minutes confirm that he was excused at 4.22pm, and I accept that he was not present for the discussion of the item, which appears to have commenced at 4.28pm.

**Whether there was a breach of confidentiality by an elected member or by a member of the council staff, regarding a council agenda item discussed in confidence**

16. In another investigation<sup>8</sup> 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.
17. 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.

<sup>8</sup> 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.

18. 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.
19. Council staff members are under a similar confidentiality obligation by virtue of the operation of the council's employee code of conduct.<sup>9</sup>
20. The statutory declarations which I have received do not enable me to determine whether an elected or staff member has breached their confidentiality obligations. With the 4 exceptions noted below, in each case the statutory declaration states (with respect to the relevant period between the council meeting on 11 July 2012 and the questions in Parliament on 19 July 2012), that the deponent did not discuss the matter with anyone.
21. First, the mayor has stated that she discussed the contents of the meeting with the CEO, the deputy mayor<sup>10</sup> 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.
22. The second exception is that the CEO stated in his statutory declaration that at the relevant time he had discussed the contents of the meeting with the mayor, the deputy mayor and the council's consultant.
23. Third, Cr Walkom stated that he was contacted by an ABC producer whilst the matter was still in confidence, and before it had been discussed in public by the parliamentarians and the mayor. He stated:

I confirmed that the matter had been discussed in confidence by council, and that the matter included a sister island relationship with the Chinese Isle of Mount Putuo. I was asked about a trip to this island but I advised I was not the person for these details as I had not been a part of the negotiations. I declined any further discussion and referred them to the mayor.
24. Fourth, as noted above, I have not received a statutory declaration from Mr Watson, whom I understand is no longer employed by the council.
25. By letter dated 12 September 2012, Mr Ridgway has advised me that he does not have any information to provide to me that is relevant to my investigation. By letter dated 4 September 2012, Ms Bressington has advised me that prior to Mr Ridgway's question on 19 July 2012 she was unaware of the proposed 'Sister Island Relationship Request' considered by the council at its 11 July 2012 meeting.
26. In these circumstances, I am not able to be satisfied to the requisite degree from the evidence currently available that a breach has been committed by an individual.

<sup>9</sup> Employee Code of Conduct, *section 14 Access to and use of information*, p6

<sup>10</sup> Cr Peter Clements.



27. In all the circumstances, I do not consider that further investigation is warranted. In particular I note that the public record has been corrected by the mayor's statements, and that 4 months has now elapsed since the matter first came to light.

### 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