

Attachment 11.2

Action following Code of Conduct breach

30 page

governance	
complain	

To the City of Onkaparinga

Mayor Lorraine Rosenberg,
Chief Executive Officer Jeff Tate
Councillor Arthur Ferguson
Councillor Sharon Nash

Without Prejudice

Dear Lorraine, Jeff, Arthur and Sharon

This correspondence is in relation to the council's reaction to my actions on behalf of the rate payers of this municipality who voted me in the position of councillor and the affect this has had on my reputation and my personal health.

I informed the council that I had advised the media about the salary increase that the council had awarded to our CEO in February 2009 which was to be back dated to July 2008. At the time I relied on section 91(8) of the Local Government Act which prohibits a motion to prevent the disclosure of remuneration on change of conditions of service of an employee of council after the remuneration or condition has been set aside or determined. The matter had been determined by the council.

Mayor Rosenberg insisted that this motion of the salary increase to the CEO of council remain confidential until the end of 2009. This was in breach of section 91 (8) of the Local Government Act 1999.

Please find enclosed * a letter of advise to the Minister of Health, Hon John Hill from the Minister for State and Local Government Relations Hon Gail Gago.

I also enclose * a copy of an email sent on the 17th of January 2009 to Jeff Tate, CEO of the Onkaparinga council requesting that the taped council meeting, which was convened on the 16th of June 2009, be sealed.

The response from Mr Tate to my request was surprising. He informed me that the tape of the meeting on the 16th of June 2009 had run out at the end of the normal meeting. Mr Tate also explained that there was no tape available for the confidential meeting.

Mr Tate is the CEO therefore the responsible person for all the workings of council machinery. If the tape did run out it is therefore the responsibility of the CEO to change the tape. He admits that he did not do this because he claims there was no tape available to record the confidential meeting.

I therefore enquired how and why there were minutes of this meeting if there was no tape.

Mr Tate is remunerated for his position with rate payer's money. Yet at a time when we need clarification on issues that have been raised at the council meeting, whether they be confidential or not, he has been shown to be wanting. Not only has he let down the council but he has let down the rate payers themselves.

The area that concerned me in particular was the confidential meeting concerning the CEO's remuneration and the remark made by councillors Nash and Ferguson.

I was personally hurt by the remarks of my fellow councillors who, like myself, have been elected to their positions by the rate payers of this council and who expect their representatives to act in their best interest.

Councillor Ferguson remarked stating "that councilor Apap did the lowest act that he has ever seen in his 20 years as councilor" and that "I should be ashamed of myself for leaking the salary increase to the press and to the public."

Councillor Ferguson then went on to praise the council CEO saying that he deserved the salary increase.

Councillor Nash stated that "I disgraced myself, the council and all councilors by making public the confidential motion of the council in February 2009 by giving the CEO salary increase."

Both councilors had missed the point that we are responsible for public money and act within the Local Government Act which incorporates a Code of Practice.

There was a motion proposed and passed in ^{MAY} August 2009's meeting for Mayor Rosenberg to investigate if councilor Apap had breached the Local Government Act or breached the Code of Practice.

In September 2009 Mayor Rosenberg made a statement that the council lawyer has said that I was not in breach of the Act or the Code of Practice. Hence no charges were laid upon me.

The Hon Minister for State/Local Government Relations states that "As section 91 (8) of the act prevents a council making such an order any purported such order would be ultra vires and therefore invalid and not binding.

It is quite clear that I have done no wrong by informing the rate payers of our municipality about the salary increase this council gave to the CEO. I claim that it was my duty as an elected member of this council to advise the ratepayers of this salary increase.

Therefore I ask

1. that the CEO publicly apologise to me for not doing his job to make sure that all council meetings are taped and kept on tape until such time that minutes are written,
2. that Mayor Rosenberg publicly apologise to council for trying to suppress council minutes to the public/ratepayer of our municipality which is in breach of section 91 (8) of the Local Government Act,
3. that councillor Ferguson publicly apologise to me for saying that "I had done the lowest act and that I should be ashamed of myself for giving the public/ratepayers the salary increase of the CEO,"
4. that councilor Nash publicly apologise to me for calling me a disgrace and that I disgraced myself, the council and all councillors.

Yours sincerely,

Cr George Apap JP
PO Box 1408
Aldinga Beach 5173

Hon Gail Gago MLC



09LG0729

Government
of South Australia

RECEIVED
11 SEP 2009

BY:

Hon John Hill MP
Member for Kaurana
99 Dyson Road
CHRISTIES BEACH SA 5165

Minister for State/Local
Government Relations
Minister for
the Status of Women
Minister for Consumer Affairs
Minister for
Government Enterprises
Minister Assisting the
Minister for Transport,
Infrastructure and Energy
Level 12
Terrace Towers
178 North Terrace
Adelaide SA 5000
GPO Box 464
Adelaide SA 5001
DX 336
Tel (08) 8303 2926
Fax (08) 8303 2533
minister.gago@saugov.sa.gov.au

John
Dear Mr Hill

Thank you for your letter concerning the ability of the City of Onkaparinga to use section 91(8) of the *Local Government Act 1999* (the Act) to keep a decision made in confidence to increase the Chief Executive Officer's salary package confidential until December 2009. I apologise for the delay in this response.

I provide the following answers to your questions:

"Can a local government authority keep confidential a decision in relation to an employee's remuneration for a specified period of time?"

Section 91(8)(a) of the Act states that a Council may not make an order to keep confidential the Minutes concerning that item if the matter relates to *"the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined."*

Further, section 105 of the Act requires that a record (the Register of Salaries) be kept in which details of each position held by an employee of the Council (including the Chief Executive Officer) are entered, as well as the salary, allowances and benefits payable as part of a remuneration package.

"Can a local government authority decision to maintain confidentiality in relation to an employee's remuneration, bind an individual councillor?"

As section 91(8) of the Act prevents a Council making such an order, any purported such order would be *ultra vires* and therefore invalid and not binding.

"What authority does a local government authority have to discipline or censure a councillor who provides such information to the community?"

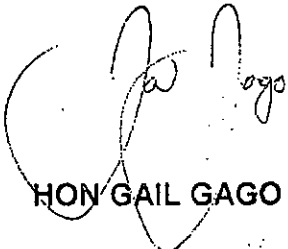
Every Council is required to have a Code of Conduct for Elected Members, setting out the standard of conduct required of its Elected Members. A complaint could be brought under the Code that an Elected Member had not complied with the Code as a Council resolution to keep information confidential had not been followed. However, where the original confidentiality order was *ultra vires*, an investigation would find no basis for censuring the Member.

In addition, section 94(1) of the Act allows for the Ombudsman to, on receipt of a complaint, carry out an investigation if it appears that a Council may have unreasonably prevented access to documents under Part 4 of the Act.

I have instructed the Office for State/Local Government Relations to discuss this matter further with the City of Onkaparinga.

I thank you for drawing this matter to my attention.

Yours sincerely



HON GAIL GAGO MLC

719 12009

Your Ref:

Our Ref:

27 January 2010

Cr George Apap
PO Box 1408
ALDINGA BEACH SA 5173

Dear Cr Apap

Thank you for your letter received on 21 December 2009. That letter was also addressed to Cr Sharon Nash, Cr Artie Ferguson and Jeff Tate CEO and is in relation to the CEO's remuneration public notification process, comments made by Crs Nash and Ferguson, and your request for a tape recording of Council's 16 June 2009 meeting.

I am responding to you on behalf of Cr Sharon Nash, Cr Artie Ferguson and Jeff Tate, CEO.

The facts of the matter are as follows:

At it's meeting held on 17 February 2009, Council considered (in confidence) the recommendations of the CEO Review Panel in relation to the CEO's remuneration. A number of media enquiries were made on this subject, these commenced on 23 February 2009.

At the elected member gathering held at the Christies Beach Surf Life Saving Club on 25 May 2009, you indicated that you had provided information to members of the public in relation to the CEO's remuneration. Subsequently the issue of an alleged breach of confidence arose.

On 16 June 2009 Council considered (in confidence) this alleged breach of confidentiality and called for a report to be presented to Council. On 17 June 2009 an email was received from yourself to the CEO requesting that the tape recording from the 16 June 2009 be made available to you. The CEO responded by email on 19 June 2009 advising that the tape had run out during 'other business' and offered to make an appointment for you to listen to the tape. Please note that there is no legal requirement to tape record Council meetings. The tape recording was discontinued last year because of the direct typing and display of the minutes on the screen for viewing by all elected members prior to voting. Debate is not included in the minutes.

Following legal advice, I reported (in confidence) at the 1 September 2009 Council meeting that it could not be clearly established whether there had been a breach of confidentiality or of the Code of Conduct (in relation to matters other than the decision about the CEO's remuneration review), and that I considered the matter closed.

In summary, regarding your direct requests:

- there is no legal requirement to tape record Council meetings
- I did not try to suppress Council minutes
- Crs Nash and Ferguson expressed their personal views (in confidence) and their actions did not breach the Elected Member Code of Conduct.

As such it is my view that there are no apologies required.

Yours sincerely

Lorraine Rosenberg
Mayor



ombudsman
south australia

Attachment 3

Enquiries: Richard Bingham

Telephone: 8226 8699

Ombudsman reference: 81218A01

Agency reference:

PERSONAL AND CONFIDENTIAL

Mr Jeff Tate
Chief Executive Officer
City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168

Dear Mr Tate

Complaint by Councillor George Apap

I refer to our telephone discussion on 16 February 2010.

I have received a complaint from Councillor Apap against your Council's actions relating to the discussion and resolution of your salary in 2009.

There are three elements to this complaint.

First, Councillor Apap states that the details of your remuneration package were agreed at a meeting of the Council's CEO Review Panel on 8 January 2009. He states that on the same date, the Mayor moved to invoke sections 90(3)(a) and 91(7) and (9) of the *Local Government Act 1993* to exclude the public from that meeting, and to deny public access to the report prepared for consideration at that meeting.

He further states that on 10 February 2009, the minutes of the Review Panel meeting were suppressed until 31 December 2009, and that on 17 February 2009 the Council endorsed the Review Panel's decisions on both the details of your remuneration, and the suppression of the report and minutes until 31 December 2009.

Councillor Apap alleges that in so doing, the Council breached section 91(8)(a) of the *Local Government Act 1993* by making an order under section 90(7) of that Act preventing 'the disclosure of the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined'.

Secondly, Councillor Apap states that he admitted at an elected member gathering at the Christie's Beach Surf Life Saving Club on 25 May 2009 that he had provided information about your remuneration to the members of the public.

He states that following his admission, at a meeting held on 16 June 2009 the Council considered and sought a report on this alleged breach of confidentiality. He states that during the course of this meeting, Councillors Ferguson and Nash made unwarranted comments about him.

PO Box 3651, Rundle Mall SA 5000

Telephone (08) 8226 8699 Toll Free 1800 182 150 Facsimile (08) 8226 8602

Email ombudsman@ombudsman.sa.gov.au website www.ombudsman.sa.gov.au

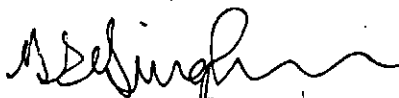
Councillor Apap seeks an apology from the two Councillors for their comments. I note that the City of Onkaparinga Code of Conduct includes a number of provisions which could be perceived as relevant to this issue¹.

Thirdly, Councillor Apap has stated that he requested you to retain the tape of the meeting held on 16 June 2009. He was advised that the tape ran out at the end of the normal Council meeting, and that no replacement tape was available at the time. He alleges that this was a breach of your obligations as Chief Executive Officer.

I would be grateful if you would provide me with a report on the three elements of the complaint made by Councillor Apap, by 11 March 2010. As discussed, I understand that your Council acknowledges that there may have been some non-compliance with section 91(8), but that it has put in place measures to prevent any repetition. I would appreciate receiving details of any such measures.

Please note that Councillor Apap has provided to me a copy of the Mayor's letter to him dated 27 January 2010.

Yours sincerely



Richard Bingham
SA OMBUDSMAN

16 February 2010

¹ City of Onkaparinga, *Code of Conduct - Elected Members*:

Paragraph 4.1 '...encourage positive working relationships between Individual Elected Members.... respect each other and the right to be heard'

Paragraph 6.1 '... Elected Members...need to treat each other with respect, courtesy and sensitivity and should, at all times, act reasonably, justly and in a non-discriminatory manner.'

Your Ref:

Our Ref: 1559190

15 March 2010

Ombudsman South Australia
Mr Richard Bingham
PO Box 3651
RUNDLE MALL SA 5000

Dear Mr Bingham

Complaint by Councillor Apap

I am writing in response to your letter dated 16 February 2010 to address the elements of Cr Apap's complaint.

I have addressed each of the three complaints in turn.

1. In relation to the complaint regarding the breach of Section 91(8)(a) of the *Local Government Act 1993*.

The CEO performance review has two components. The first is a review of the actual performance of the CEO against certain criteria contained in the contract of employment. The second component is a remuneration review.

The Council's practice had been to consider both components together and to invoke the confidentiality clause in relation to considering the report and also in relation to confidentiality of the minutes of the meeting.

Our administrative practice had been to update the salaries register at the time any new remuneration arrangements are put in place. As a result even though there has been a confidentiality order in place covering both the performance review and remuneration review it has always been the case that the latter component is overridden by entering details in the salaries register.

Both practices were followed in this particular instance. The new salary arrangements were not implemented for some weeks and thus the salaries register was not updated until that time.

We now recognise that both practices were against the provisions of the Local Government Act. We have changed our practices so that the remuneration details are excluded from any confidentiality order that might apply in relation to the performance review. In addition the salaries register is updated within 28 days as required by Section 105 (2) of the Local Government Act, separate to when the new salary arrangements are implemented.

2. Regarding Cr Apap's statement at the Council meeting held on 16 June 2009. This discussion took place in confidence under the Act and as the matter being discussed had some relationship with my performance review I and other staff were not in attendance. As a result I am unable to comment on what discussion took place. However, Cr Apap is aware of the elected member code of conduct and would have been able to make a complaint under it if he felt there had been a breach.

I was present at the elected member workshop on 25 May 2009 when Cr Apap indicated he had provided information to another party or parties. What was not clear was whether other aspects of the performance review that had legitimately been the subject of a confidentiality order were shown to the other party or parties. This point is relevant as it was a component of legal advice sought by Mayor Rosenberg as to whether Cr Apap had breached the code of conduct or the legislation.

3. The City of Onkaparinga did previously have an **administrative** practice to tape Council meetings. This was purely to assist with preparation of the minutes of meetings. Once the minutes of the meeting were confirmed the tapes were cleared ready for use at the next Council meeting.

Several years ago we introduced direct typing of minutes at Council Meetings and projection onto a large screen in the council chamber that is visible to elected members and the public gallery. The previous practice of taping the meetings continued even though it was not required. At times the tapes would run out but it was never considered to be an issue because of the direct typing of minutes. This happened at the council meeting of 16 June 2009 and as I indicated above no staff were present when the matter referred to by Cr Apap was discussed.

I reviewed the practice of taping of meetings in September 2009 and directed staff to discontinue the practice as it was no longer required.

I stress there is no legal or policy obligation on me as Chief Executive Officer to tape meetings or ensure a tape is always in the machine.

There is an exchange of emails on this matter between myself and Cr Apap which is enclosed for your information.

Please feel free to contact me if you require any further information or to clarify any points.

Yours sincerely

Jeff Tate
Chief Executive Officer



ombudsman
south australia

Attachment 5

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Enquiries: Richard Bingham

Telephone: (08) 8226 8699

Ombudsman reference: 2010/00205

Agency reference:

PERSONAL AND CONFIDENTIAL

Mr Jeff Tate
Chief Executive Officer
City of Onkaparinga
PO Box 1
NOARLUNGA CANTRE SA 5168

Dear Mr Tate

Preliminary investigation of complaint by Cr George Apap

Thank you for your letter dated 15 March 2010

I have now conducted an investigation, and the purpose of this letter is to inform you of my provisional views. They are set out in the enclosed report. I have sent a copy to the complainant.

If you wish to comment on my provisional views, please provide your comments to me in writing, within 14 days of the date of this letter. In particular, if you have any additional information that you wish me to consider, please provide it with submissions showing how the new information may change my provisional views.

If you have no comments to make, please let me know either by letter, email or telephone. If you do not contact my office within 14 days of the date of this letter I will assume that you have no further comment to make.

Please note that the report contains information that was obtained in the course of an Ombudsman investigation that is subject to the confidentiality provision in section 22 of the *Ombudsman Act 1972*. You should not disclose the information contained in this letter and report except for the purposes of the investigation.

Should you need to discuss this letter or my provisional views with any other person to prepare your comments, it is essential that they understand that the views expressed are only provisional, and that they should also comply with the confidentiality requirement.

Yours sincerely

Richard Bingham
SA OMBUDSMAN

29 March 2010



ombudsman
south australia

Enquiries: Richard Bingham

Telephone: (08) 8226 8699

Ombudsman reference: 2010/00205

Agency reference:

Provisional Views Report

Date complaint received 2 February 2010

Agency City of Onkaparinga ('the Council')

Complainant Mr George Apap

Allegations

1. The Council breached the *Local Government Act 1993* in dealing with the CEO's 2009 remuneration review
2. Two councillors made unwarranted comments about the complainant
3. The CEO breached his obligations in not recording, or retaining the tape of, the Council meeting of 16 June 2009

tape

Aspects of allegations within jurisdiction

The complaint is fully within the jurisdiction of the Ombudsman.

Investigation

My investigation has comprised:

- assessing the information provided by the complainant
- seeking a response from the Council
- clarifying the response
- consideration of the relevant provisions of the *Local Government Act 1993* ('the Act')
- preparing this provisional views report

Provisional Views

Background

1. The complainant is an elected member of the Council, and his complaint raises three issues. First, he states that the details of the remuneration package to be paid to the Council's Chief Executive Officer ('the CEO') were agreed at a meeting of the

Council's CEO Review Panel on 8 January 2009. He states that on the same date, the Mayor moved to invoke sections 90(3)(a) and 91(7) and (9) of Act to exclude the public from that meeting, and to deny public access to the report prepared for consideration at that meeting.

2. The complainant further states that on 10 February 2009, the minutes of the Review Panel meeting were suppressed until 31 December 2009, and that on 17 February 2009 the Council endorsed the Review Panel's decisions on both the details of the remuneration, and the suppression of the report and minutes until 31 December 2009.
3. The complainant alleges that in so doing, the Council breached section 91(8)(a) of the Act by purportedly making an order under section 90(7) of that Act preventing 'the disclosure of the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined'.
4. Secondly, the complainant states that he admitted at an elected member gathering at the Christie's Beach Surf Life Saving Club on 25 May 2009 that he had provided information about the remuneration package to members of the public.
5. He states that following his admission, at a meeting held on 16 June 2009 the Council considered and sought a report on this alleged breach of confidentiality. He states that during the course of this meeting, Councillors Ferguson and Nash made unwarranted comments about him. The complainant seeks an apology from the two Councillors for their comments.
6. Thirdly, the complainant has stated that he requested the CEO to retain the tape of the meeting held on 16 June 2009. He was advised that the tape ran out at the end of the normal Council meeting, and that no replacement tape was available at the time. He alleges that this was a breach of the CEO's obligations.
7. After the complainant raised his concerns about the matter, the Council sought legal advice. The Mayor wrote to the complainant on 27 January 2010 advising him as follows:

'Following legal advice, I reported (in confidence) at the 1 September 2009 Council meeting that it could not be clearly established whether there had been a breach of confidentiality or of the Code of Conduct (in relation to matters other than the decision about the CEO's remuneration review), and that I considered the matter closed.

In summary, regarding your direct requests:

- *there is no legal requirement to tape record Council meetings*
- *I did not try to suppress Council minutes*
- *Crs Nash and Ferguson expressed their personal views (in confidence) and their actions did not breach the Elected Member Code of Conduct*

As such it is my view that there are no apologies required.'

Whether the Council breached the Local Government Act 1993 in dealing with the CEO's 2009 remuneration review

8. Section 91(8)(a) of the Act provides that a council must not make a confidentiality order 'to prevent the disclosure of the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined'.
9. In relation to this complaint, the Council has advised that the CEO performance review has two components. The first is a review of the actual performance of the CEO against certain criteria contained in the contract of employment. The second component is a remuneration review. The Council's practice has been to consider both components together, and to seek to invoke the relevant confidentiality provisions of Act both in relation to the report prepared for the Council meeting, and the minutes of that meeting.
10. The Council also has an obligation under section 105 of the Act to maintain a Register of Salaries, which records (amongst other things) details of the CEO's remuneration. Section 105(2) requires that a record must be made in the Register within 28 days after a change in remuneration occurs. The Council has advised that its administrative practice has been to update the Register at any time new remuneration arrangements are put in place. It has advised that even though there has purportedly been a confidentiality order in place covering both the performance and remuneration reviews, that order has been overridden (insofar as it relates to remuneration) by entering the details in the Register.
11. However, quite apart from the fact that a confidentiality order cannot be made lawfully in the circumstances defined in section 91(8)(a), in my view the perceived overriding was a matter of practicality rather than legality. As a matter of law, a lawful confidentiality order remains in effect notwithstanding that some information to which it applies may have been made public in some other way.
12. The Council has also advised that in this case, the new remuneration arrangements were not implemented for some weeks, and thus the Register was not updated until that time. I understand that this period exceeded the 28 days required by section 105(2). It follows that the Council believed that the confidentiality order remained in place throughout that period.
13. The Council has advised me that:
'We now recognise that both practices were against the provisions of the Local Government Act. We have changed our practices so that the remuneration details are excluded from any confidentiality order that might apply in relation to the performance review. In addition the salaries register is updated within 28 days as required by Section 105(2) of the Local Government Act, separate to when the new salary arrangements are implemented.'
14. My provisional view is that the previous Council practices breached sections 91(8)(a) and 105(2) of the Act, and hence were unlawful within the meaning of section 25(1)(a) of the Ombudsman Act 1972. However, in light of the Council's recognition of this fact

and the remedial action which it has taken, I see no need to make any formal finding or recommendation in relation to this issue.

Whether Councillors Ferguson and Nash made unwarranted comments about the complainant.

15. The complainant states that, following his admission that he had publicly disclosed details of the CEO's remuneration package, at a meeting held on 16 June 2009 the Council considered and sought a report on this alleged breach of confidentiality. He states that during the course of this meeting, Councillors Ferguson and Nash made unwarranted comments about him. The complaint alleges that Councillor Ferguson remarked that:

'I did the lowest act that he has ever seen in his 20 years as councillor and

'That I should be ashamed of myself for letting the salary increase to the press and to the public.'

It alleges that Councillor Nash stated that:

'I disgraced myself, the council and all councillors by making public the confidential motion of council in February giving the C.E.O. salary increase.'

16. The Council has advised me that the discussions at the Council meeting held on 16 June 2009 took place in confidence under the Act and, as the matter had some relationship with the CEO's performance review, the CEO and other staff were not in attendance. Further, for the reason set out below there is no other record of what occurred. However, I note that the Mayor's letter to the complainant dated 27 January 2010 acknowledges that Crs Ferguson and Nash 'expressed their personal views (in confidence)' and does not dispute the version of events outlined in the complaint.
17. That letter also indicates that it could not be clearly established whether there had been a breach of the Code of Conduct, and I assume that this is because of the difficulty in obtaining evidence of what occurred at the 16 June 2009 meeting. However, I am not bound by the rules of evidence (see section 18(3) and (6) of the *Ombudsman Act 1972*), and the complainant's version of events has not been disputed. I find that the comments which he alleges were made by Crs Ferguson and Nash, or comments similar to them, were actually made.
18. The City of Onkaparinga Code of Conduct¹ includes a number of provisions which are relevant to this issue. Paragraph 4.1 states that Councillors should
*'...encourage positive working relationships between Individual Elected Members... respect each other and the right to be heard'*²
Paragraph 5.1 states that:
*'... Elected Members...need to treat each other with respect, courtesy and sensitivity and should, at all times, act reasonably, justly and in a non-discriminatory manner.'*³
Paragraph 5.4 states that:

¹ City of Onkaparinga - Code of Conduct for Elected Members 2008 - <http://www.onkaparingacity.com/web/binaries?img=10103&stypen=html>

² Ibid p7, first dot point

³ Ibid p8

It is the responsibility of Elected Members to resolve interpersonal disputes with fellow members.... In the event that Elected Members cannot resolve disputes effectively the following process may be followed:

- *The Elected Member notifies the Mayor to discuss the dispute and paths forward*
- *The Mayor, or nominated delegate, initiates a discussion between the differing parties and seeks to resolve differences through dialogue. The Mayor's role, or nominated delegate is to act as a facilitator with the responsibility for resolution lying with Elected Members.*

If attempts to resolve disputes through this process are not successful a professional mediator agreed to by the parties in dispute may be appointed by the Chief Executive Officer at the request of the Mayor, or delegate....⁴

The Code also sets out a procedure for dealing with formal complaints of alleged breaches⁵. It specifies that a formal complaint must be lodged within three months of the date of the alleged breach, but the Mayor has a discretion to decide whether the complaint should be pursued.

19. I have no evidence that the informal dispute resolution procedure set out in paragraph 5.4 of the Code has been initiated. I understand also that the complainant has not made a formal complaint of a breach of the Code of Conduct by Crs Ferguson and Nash.
20. In my provisional view, in the circumstances the comments made by Crs Ferguson and Nash amount to a prima facie breach of the Code of Conduct, paragraphs 4.1 and 5.1. Whilst Crs Ferguson and Nash may not have understood it at the time, the complainant's actions were consistent with the Council's legal obligation to disclose the details of the CEO's remuneration, and in my provisional view their comments were unwarranted.
21. In my provisional view, the complainant should initiate the informal dispute resolution procedure set out in Paragraph 5.4 of the Code of Conduct. In the event that no resolution is achieved, a formal complaint could be lodged, and I would expect that the Mayor should consider whether the complaint ought to be pursued notwithstanding the elapse of more than three months since the alleged breach.

Whether the CEO breached his obligations in not recording, or retaining the tape of, the Council meeting of 16 June 2009.

22. The complainant states that he requested the CEO to retain the tape of the Council meeting held on 16 June 2009. This request was made on 17 June 2009 by email. The CEO responded by email on 19 June 2009 advising that:
'the tape of the Council Meeting of 16 June 2009 ran out during Other Business of the meeting and was not replaced. Hence the confidential part of the meeting was not recorded on the tape.'
The CEO went on to explain that meetings were recorded to assist in the preparation of minutes, and the tapes were erased once minutes of the meeting concerned had

⁴ Ibid p11

⁵ Ibid, Section 6, pp 12-15.

been approved by Council. He offered to provide access to the tape recording so the complainant could check its content.

23. On 20 January 2010 the complainant sought clarification of the position in light of the CEO's advice to the Council at its meeting on 19 January 2010 that no tapes were made of Council meetings. There followed an email exchange between him and the CEO, in which the CEO explained what had occurred.
24. In my understanding, the taping of council meetings is a traditional practice which in the past was fairly widely adopted in local government as a matter of administrative convenience. However, the Council has advised me that several years ago it adopted the practice of direct typing of minutes at Council meetings, and projection of those minutes onto a large screen in the council chamber that is visible to elected members and the public gallery. The taping of meetings continued for some time (up to and including 16 June 2009), but was discontinued in September 2009.
25. In my view, there was and is no legal obligation to tape meetings, and the Council's actions have been adequately explained to the complainant by the CEO. In my provisional view, there is no administrative error in the way in which this issue was handled by the Council.


Richard Bingham
SA OMBUDSMAN

29 March 2010

CONFIDENTIAL

Attachment 6

Your Ref:

Our Ref:

06 April 2010

Ombudsman South Australia
Mr Richard Bingham
PO Box 3651 Rundle Mall
ADELAIDE SA 5000

Dear Mr Bingham

Preliminary investigation of complaint by Cr George Apap

Thank you for the opportunity to respond to your letter of 29 March 2010 and provisional views report.

I have one minor change to suggest and one query.

The minor change I am suggesting relates to the first part of the report where allegation three refers to a breach of 'obligations' in not recording etc the council meeting of 16 June 2009. This could potentially be construed as alleging a breach of Section 91 (1) of the Local Government Act which requires the CEO to ensure that minutes are kept of the proceedings of council and committee meetings. Making it clear that 'recording' refers to 'tape recording' would remove that potential confusion.

My query relates to process once your investigation has been finalised.

Obviously other elected members of the council have an interest in this matter given that it relates to some of them individually and all of them in terms of compliance with legislation and their involvement in activities under the elected member code of conduct. Members of the public have an interest also as there has been an article in The Advertiser quoting a member of a community group commenting on council processes and treatment of Cr Apap. My query is whether your report will remain confidential after your investigation is concluded. If it does then I think some consideration needs to be given to reporting your findings to elected members and to the general public.

Yours sincerely

Jeff Tate
Chief Executive Officer

Attachment 7

Cr Apap
P.O. Box 1408
Aldinga Beach
S.A. 5173

Elected Men person	Corresp. No.
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Mayor Rosenberg
City of Onkaparinga.

7th May 2010

Dear Mayor,

In response to your summary as outlined by you in your letter of 27th January 2010

1. *There is no legal requirement to tape record Council meetings.*

- I agree, however there is a legal requirement to take and keep minutes of Council meetings. (See Part 4 of the Local Government Act.) If the meeting was being recorded by tape recorder, and no written minutes were being taken, then Council was in breach of the Local Government Act as soon as the tape ran out, simply because no one was taking the minutes at all. The Act requires minutes to be taken of Council meetings at all times.

2 You Mayor state *"I did not try to suppress Council minutes."*

- You were the chair of CEO Review Panel. On the 7th April 2009 there was a meeting of the CEO Review Panel. The meeting was deemed Confidential until 31st December 2009.
- That meeting was 49 days after Council had passed the CEO's new salary package.
- **Once passed on the 17th February 2009** the package could not be suppressed as confidential.
- There is not a clause that permits any confidentiality at all once Council had passed the package.
- There is an allowance of 28 days for it to be entered into the Council salary register.
- There is not any clause that allows or requires the details of salary packages to be held in confidence during the 28 days allowed for them to be entered into the salary register.
- I made you personally aware, that Council was in breach of the Act by Council continuing to suppress the details of the CEO's new salary package.
- The CEO Review Panel met on the 7th April 2009, a meeting at which the detail were suppressed by invoking the confidentiality clauses in the Local Government Act, once again until 31st December 2009. Another 7 days passed before the CEO salary package was made public by Council by entering the details in the salary register.

THAT WAS 56 DAYS AFTER COUNCIL PASSED THE CEO NEW SALARY PACKAGE. It had been subject to Confidentiality clauses for all of that time. And the clauses could have remained in effect until December 31st 2009.

Yes I was the Councillor that put the CEO salary package into the public domain at the time that council was still suppressing that information ILEGALLY.

- MINISTER GAGO sought legal advice and addressed it to me via Hon John Hill. It stated that **Council was in breach of the Local Government Act**. Council by neglecting to make the CEO's new salary package public after it had been passed by Council on the 17th February was Ultra Vires illegal and therefor unenforceable.
- **Custom and Practice are only arguable if a law is not clear and explicit. You cannot argue Custom and Practice prevailed in this case.**
- Cr Nash and Cr Ferguson expressed their personal views of me. **They were defamatory** let there be no doubt about that. My lawyer believes that there is in excess of 90% chance of me winning a deformation action against these Councillors.
- There are a number of paragraphs of Council Code of Conduct that were breached by Cr Nash and Cr Ferguson, apart from their support of the breach of the Local Government Act outlined above.
- You Mayor suggest that they did not breach the Elected Member Code of Conduct. Go to Paragraph 4.1, 5.1, and 5.4 was not invoked.
- And let us not forget Mayor that you as mayor should lead Council in these matters. Rather than that, you swore to deal with the culprit that made the CEO's new salary package public, when you found out who it was.
- The matter is still active via the OMBUDSMAN. Neither he nor I consider the matter to be closed. I had a personal meeting with him this week, he would prefer that we all met as per clause 5.4 of the code to see if we can overcome our differences. I am willing.
- However I should tell you now, I do consider an apology by you and Councillors Nash and Ferguson appropriate, and I expect the apologies to be public.

Sincerely Cr Apap.





ombudsman
south australia

Council complain	Corresp. No.
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Enquiries: Richard Bingham

Telephone: (08) 8226 8699

Ombudsman reference: 2010/00205

Agency reference:

Mr Jeff Tate
Chief Executive Officer
City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168

Dear Mr Tate

Complaint by Cr George Apap

I refer to your letter of 6 April 2010.

I have now completed my investigation, and I enclose a copy of my final report. I have also sent a copy to Cr Apap.

Because the Council is a party to the complaint, in my view it is proper for it to be advised of the result of my investigation. For this purpose I authorise you to publish my report by tabling it at the next available Council meeting. I note that it is a matter for the Council to consider whether it wishes to deal with the report on a confidential basis under Part 3 of the *Local Government Act 1999*.

As we discussed, in relation to the comments made by the two councillors, I understand that Cr Apap will initiate the dispute resolution process under the Council's Code of Conduct for Elected Members 2008.

Yours sincerely

Richard Bingham
SA OMBUDSMAN

14 May 2010



ombudsman
south australia

Enquiries: Richard Bingham

Telephone: (08) 8226 8699

Ombudsman reference: 2010/00205

Agency reference:

FINAL REPORT

Date complaint received	2 February 2010
Agency	City of Onkaparinga ('the Council')
Complainant	Cr George Apap
Allegations	<ol style="list-style-type: none">1. The Council breached the <i>Local Government Act 1993</i> in dealing with the CEO's 2009 remuneration review2. Two councillors made unwarranted comments about the complainant3. The CEO breached his obligations in not recording, or retaining the tape of, the Council meeting of 16 June 2009

ASPECTS OF ALLEGATIONS WITHIN JURISDICTION

The complaint is fully within the jurisdiction of the Ombudsman.

INVESTIGATION

My investigation has been conducted as a preliminary investigation under section 18(1) of the *Ombudsman Act 1972*. During the course of my inquiries I determined not to proceed with a full investigation.

My investigation has comprised:

- assessing the information provided by the complainant
- seeking a response from the Council
- clarifying the response
- considering the relevant provisions of the *Local Government Act 1993* ('the Act')
- preparing a provisional views report and providing it to the parties for comment
- considering the parties' responses
- meeting with the complainant to discuss his response to my provisional views
- meeting with Crs Nash and Ferguson to discuss their response to my provisional views
- preparing this final report

FINAL VIEWS

Background

1. The complainant is an elected member of the Council, and his complaint raises three issues. First, he states that the details of the remuneration package to be paid to the Council's Chief Executive Officer ('the CEO') were agreed at a meeting of the Council's CEO Review Panel on 8 January 2009. He states that on the same date, the Mayor moved to invoke sections 90(3)(a) and 91(7) and (9) of Act to exclude the public from that meeting, and to deny public access to the report prepared for consideration at that meeting.
2. The complainant further states that on 10 February 2009, the minutes of the Review Panel meeting were suppressed until 31 December 2009, and that on 17 February 2009 the Council endorsed the Review Panel's decisions on both the details of the remuneration, and the suppression of the report and minutes until 31 December 2009.
3. The complainant alleges that in so doing, the Council breached section 91(8)(a) of the Act by purportedly making an order under section 90(7) of that Act preventing 'the disclosure of the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined'.
4. Secondly, the complainant states that he admitted at an elected member gathering at the Christie's Beach Surf Life Saving Club on 25 May 2009 that he had provided information about the remuneration package to members of the public.
5. He states that following his admission, at a meeting held on 16 June 2009 the Council considered and sought a report on this alleged breach of confidentiality. He states that during the course of this meeting, Councillors Ferguson and Nash made unwarranted comments about him. The complainant seeks an apology from the two Councillors for their comments.
6. Thirdly, the complainant has stated that he requested the CEO to retain the tape of the meeting held on 16 June 2009. He was advised that the tape ran out at the end of the normal Council meeting, and that no replacement tape was available at the time. He alleges that this was a breach of the CEO's obligations.
7. After the complainant raised his concerns about the matter, the Council sought legal advice. The Mayor wrote to the complainant on 27 January 2010 advising him as follows:
'Following legal advice, I reported (in confidence) at the 1 September 2009 Council meeting that it could not be clearly established whether there had been a breach of confidentiality or of the Code of Conduct (in relation to matters other than the decision about the CEO's remuneration review), and that I considered the matter closed.

In summary, regarding your direct requests:

- *there is no legal requirement to tape record Council meetings*
- *I did not try to suppress Council minutes*

- *Crs Nash and Ferguson expressed their personal views (in confidence) and their actions did not breach the Elected Member Code of Conduct*

As such it is my view that there are no apologies required.'

Whether the Council breached the *Local Government Act 1993* in dealing with the CEO's 2009 remuneration review

8. Section 91(8)(a) of the Act provides that a council must not make a confidentiality order 'to prevent the disclosure of the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined'.
9. In relation to this complaint, the Council has advised that the CEO performance review has two components. The first is a review of the actual performance of the CEO against certain criteria contained in the contract of employment. The second component is a remuneration review. The Council's practice has been to consider both components together, and to seek to invoke the relevant confidentiality provisions of the Act both in relation to the report prepared for the Council meeting, and the minutes of that meeting.
10. The Council also has an obligation under section 105 of the Act to maintain a Register of Salaries, which records (amongst other things) details of the CEO's remuneration. Section 105(2) requires that a record must be made in the Register within 28 days after a change in remuneration occurs. The Council has advised that its administrative practice has been to update the Register at any time new remuneration arrangements are put in place. It has advised that even though there has purportedly been a confidentiality order in place covering both the performance and remuneration reviews, that order has been overridden (insofar as it relates to remuneration) by entering the details in the Register.
11. As a matter of law, a lawful confidentiality order remains in effect notwithstanding that some information to which it applies may have been made public in some other way, and thus I have difficulty understanding how a confidentiality order could be 'overridden' as the Council suggests. In any event, this is not a significant point as the fact remains that a confidentiality order cannot be made lawfully in the circumstances defined in section 91(8)(a).
12. The Council has also advised that in this case, the new remuneration arrangements were not implemented for some weeks, and thus the Register was not updated until that time. I understand that this period exceeded the 28 days required by section 105(2). It follows that the Council believed that the confidentiality order remained in place throughout that period.
13. The Council has advised me that:
'We now recognise that both practices were against the provisions of the Local Government Act. We have changed our practices so that the remuneration details are excluded from any confidentiality order that might apply in relation to the performance review. In addition the salaries register is updated within 28 days as

required by Section 105(2) of the Local Government Act, separate to when the new salary arrangements are implemented.'

14. The complainant takes the view that the effect of these provisions was known, or should have been known, to the Council at the time.
15. My view is that the previous Council practices breached sections 91(8)(a) and 105(2) of the Act, and hence were unlawful within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*. However, in light of the Council's recognition of this fact and the remedial action which it has taken, I see no need to make any recommendation in relation to this issue.

Whether Councillors Ferguson and Nash made unwarranted comments about the complainant.

16. The complainant states that, following his admission that he had publicly disclosed details of the CEO's remuneration package, at a meeting held on 16 June 2009 the Council considered and sought a report on this alleged breach of confidentiality. He states that during the course of this meeting, Councillors Ferguson and Nash made unwarranted comments about him. The complaint alleges that Councillor Ferguson remarked that:

'I did the lowest act that he has ever seen in his 20 years as councillor'

and

'That I should be ashamed of myself for letting the salary increase to the press and to the public.'

It alleges that Councillor Nash stated that:

'I disgraced myself, the council and all councillors by making public the confidential motion of council in February giving the C.E.O. salary increase.'

17. The Council has advised me that the discussions at the Council meeting held on 16 June 2009 took place in confidence under the Act and, as the matter had some relationship with the CEO's performance review, the CEO and other staff were not in attendance. Further, for the reason set out below there is no other record of what occurred. However, I note that the Mayor's letter to the complainant dated 27 January 2010 acknowledges that Crs Ferguson and Nash 'expressed their personal views (in confidence)' and does not dispute the version of events outlined in the complaint.
18. I met with the 2 councillors on 14 May 2010. At that meeting, Cr Ferguson agreed that he made a comment as alleged. Whilst she does not agree that she used the words alleged against her, Cr Nash accepts that she expressed disappointment that a 'team member' had acted in this way.
19. The Mayor's letter of 27 January 2010 also indicates that it could not be clearly established whether there had been a breach of the Code of Conduct, and I assume that this may be because of the difficulty in obtaining evidence of what occurred at the 16 June 2009 meeting. However, I am not bound by the rules of evidence (see section 18(3) and (6) of the *Ombudsman Act 1972*), and whilst Cr Nash disputes the words used, the general outline of the complainant's version of events has not been disputed.

I find that the comments which he alleges were made by Crs Ferguson and Nash, or comments expressing disappointment about his behaviour, were actually made.

20. The City of Onkaparinga Code of Conduct¹ includes a number of provisions which are relevant to this issue. Paragraph 4.1 states that Councillors should
*'...encourage positive working relationships between Individual Elected Members.... respect each other and the right to be heard'*²

Paragraph 5.1 states that:

*'... Elected Members...need to treat ... each other with respect, courtesy and sensitivity and should, at all times, act reasonably, justly and in a non-discriminatory manner.'*³

Paragraph 5.4 states that:

'It is the responsibility of Elected Members to resolve interpersonal disputes with fellow members.... In the event that Elected Members cannot resolve disputes effectively the following process may be followed:

- *The Elected Member notifies the Mayor to discuss the dispute and paths forward*
- *The Mayor, or nominated delegate, initiates a discussion between the differing parties and seeks to resolve differences through dialogue. The Mayor's role, or nominated delegate is to act as a facilitator with the responsibility for resolution lying with Elected Members.*

*If attempts to resolve disputes through this process are not successful a professional mediator agreed to by the parties in dispute may be appointed by the Chief Executive Officer at the request of the Mayor, or delegate....'*⁴

The Code also sets out a procedure for dealing with formal complaints of alleged breaches⁵. It specifies that a formal complaint must be lodged within three months of the date of the alleged breach, but the Mayor has a discretion to decide whether the complaint should be pursued.

21. I have no evidence that the informal dispute resolution procedure set out in paragraph 5.4 of the Code has been initiated. I understand also that the complainant has not made a formal complaint of a breach of the Code of Conduct by Crs Ferguson and Nash.
22. In my view, in the circumstances the comments made by Crs Ferguson and Nash may amount to a prima facie breach of the Code of Conduct, paragraphs 4.1 and 5.1. Whilst Crs Ferguson and Nash did not understand it at the time, the complainant's actions were consistent with the Council's legal obligation to disclose the details of the CEO's remuneration.
23. In my view, the complainant should initiate the informal dispute resolution procedure set out in Paragraph 5.4 of the Code of Conduct. In the event that no resolution is achieved, a formal complaint could be lodged. I would expect that the Mayor should consider whether the complaint ought to be pursued notwithstanding the elapse of

¹ City of Onkaparinga - Code of Conduct for Elected Members 2008 - <http://www.onkaparingacity.com/web/binaries?img=10103&stypen=html>

² Ibid p7, first dot point

³ Ibid p8

⁴ Ibid p11

⁵ Ibid, Section 6, pp 12-15.

more than three months since the alleged breach, and that in the circumstances it would be appropriate for her to appoint a delegate to deal with the matter.

Whether the CEO breached his obligations in not recording, or retaining the tape of, the Council meeting of 16 June 2009.

24. The complainant states that he requested the CEO to retain the tape of the Council meeting held on 16 June 2009. This request was made on 17 June 2009 by email. The CEO responded by email on 19 June 2009 advising that:
'the tape of the Council Meeting of 16 June 2009 ran out during Other Business of the meeting and was not replaced. Hence the confidential part of the meeting was not recorded on the tape.'
The CEO went on to explain that meetings were recorded to assist in the preparation of minutes, and the tapes were erased once minutes of the meeting concerned had been approved by Council. He offered to provide access to the tape recording so the complainant could check its content.
25. On 20 January 2010 the complainant sought clarification of the position in light of the CEO's advice to the Council at its meeting on 19 January 2010 that no tapes were made of Council meetings. There followed an email exchange between him and the CEO, in which the CEO explained what had occurred.
26. In my understanding, the taping of council meetings is a traditional practice which in the past was fairly widely adopted in local government as a matter of administrative convenience. However, the Council has advised me that several years ago it adopted the practice of direct typing of minutes at Council meetings, and projection of those minutes onto a large screen in the council chamber that is visible to elected members and the public gallery. The taping of meetings continued for some time (up to and including 16 June 2009), but was discontinued in September 2009.
27. In my view, there was and is no legal obligation to tape meetings, and the Council's actions have been adequately explained to the complainant by the CEO. In my view, there is no administrative error in the way in which this issue was addressed.

Opinion

28. In relation to the allegation that the Council breached the *Local Government Act 1993* in dealing with the CEO's 2009 remuneration review, my view is that the previous Council practices breached sections 91(8)(a) and 105(2) of the Act, and hence were unlawful within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*. However, in light of the Council's recognition of this fact and the remedial action which it has taken, I do not make any recommendation in relation to this issue.
29. In relation to the allegation that two councillors made unwarranted comments about the complainant, my view is that the complainant should initiate the informal dispute resolution procedure set out in Paragraph 5.4 of the Code of Conduct. In the event that no resolution is achieved, a formal complaint could be lodged. I would expect that the Mayor should consider whether the complaint ought to be pursued notwithstanding

the elapse of more than three months since the alleged breach, and that in the circumstances it would be appropriate for her to appoint a delegate to deal with it.

30. In relation to the allegation that the CEO breached his obligations in not recording, or retaining a tape of, the Council meeting of 16 June 2009, I find that there was no legal obligation to tape the meeting, and the Council's actions have been adequately explained to the complainant by the CEO. I find that there is no administrative error in the way in which this issue was handled by the Council.



Richard Bingham
SA OMBUDSMAN

14 May 2010



ombudsman
south australia

Enquiries: Richard Bingham
Telephone: (08) 8226 8699
Ombudsman reference: 2010/00205
Agency reference:

PERSONAL AND CONFIDENTIAL

Mr Jeff Tate
Chief Executive Officer
City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168

Dear ~~Mr~~ Tate

Complaint by Cr Apap

Thank you for sending me a copy of Cr Apap's letter to the Mayor, dated 14 May 2010, and for your email of 18 May 2010.

I have noted the clarification in relation to paragraph 19 of my Final Report. It was my understanding that the Mayor's letter of 27 January 2010 addressed the question of whether there had been a breach of the Code of Conduct by any Councillor, not simply Cr Apap, and my report reflects that understanding.

However, the clarification doesn't affect my views about the determination of Cr Apap's complaint. In any event, I have completed my investigation, and I think it unlikely that I have power to revisit the matter even if I wanted to.

Yours sincerely

Richard Bingham
SA OMBUDSMAN

20 May 2010