

CONFIDENTIAL MINUTES

OF THE ORDINARY MEETING HELD ON WEDNESDAY 13<sup>TH</sup> OCTOBER 2010

101006

QUESTIONS ON NOTICE

Councillor Blacksell submitted a total of 13 Questions on Notice for the October Council Meeting. Questions 5 to 11 have been listed above. Questions 1 to 4 and 12 and 13 relate to a matter being dealt with in confidence pursuant to Section 90(2) and 90(3) (a) "information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead)" of the Local Government Act 1999, therefore I recommend that questions 1 to 4 and 12 and 13 be dealt with in confidence pursuant to Section 90(2) and 90 (3) (a).

**INTO CONFIDENCE.**

Moved Cr. Ramke/Seconded Cr. Dunsford that:-

a) pursuant to Section 90(2) of the Local Government Act, 1999, an order be made that the public, except the Chief Executive Officer and Minute Secretary, be excluded from attendance at the meeting for Council to discuss this matter in confidence.

b) That the Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the item at the meeting on the following grounds; Section 90 (3) (a) of the Act, information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

c) The Council is satisfied that on this basis the principle that the meeting be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

**CARRIED.**

Councillor Pfeiffer asked leave of the meeting to have five minutes to read the documentation that had just been distributed to Elected Members which included the Mayor's response to questions 1 to 4 and questions 12 and 13. Leave of the meeting was granted.

**Question 1 - What was the process for the investigation of the Code of Conduct complaint lodged against the Chief Executive Officer?**

**Mayor's Response.**

22<sup>nd</sup> August 2010.

Received a Code of Conduct complaint against the Chief Executive Officer from Councillor Blacksell. As previously advised I went to the Code of Conduct for Council Employees. Section 5, 5<sup>th</sup> dot point states "if a question of compliance with the Code by the Chief Executive Officer is raised the matter is to be referred to the Council Mayor for determination. The Mayor may refer the matter to the whole Council or a Committee of Council however in all cases, the principals of fairness, equity and natural justice will apply, and the matter will be handled confidentially."

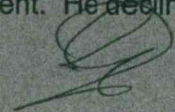
I advise I have taken the first option and this process has been followed.

Presented the complaint to the Chief Executive Officer for reply. The Chief Executive Officer asked for more details.

Contacted Councillor Blacksell and he complied with this request.

Contacted the Chief Executive Officer for his written reply.

I asked an Elected Member who was named within the complaint to comment. He declined.





**QUESTIONS ON NOTICE CONTINUED**

**Question 1 - What was the process for the investigation of the Code of Conduct complaint lodged against the Chief Executive Officer? – Continued.**

**Mayor's Response – Continued.**

Having all the relevant information on file, I contacted Rob Wallace from the LGA of SA for advice. He declined to handle the case himself, his advice was to get an independent mediator. For example a former Chief Executive Officer or Mayor. After a great deal of thought and advice from two former Chief Executive Officers, who both declined, a common name was put forward to me. On the 6<sup>th</sup> September, I contacted Mr Bill Paterson who accepted to mediate this complaint. He was forwarded in confidence the file by email, also a hard copy by post.

**Question 2 - Which of the parties were interviewed or asked to submit details in this process?**

**Mayor's Response.**

Councillor Blacksell, Chief Executive Officer Rod Ralph and Councillor Toogood.

**Question 3 - If any parties (sic) submitted details what form or medium were they submitted in?**

**Mayor's Response.**

All details submitted to me were in the form of hard copy and are in the file.

**Question 4 - What was the final finding?**

**Mayor's Response.**

A letter has been received from Mr Bill Paterson, finding the Code of Conduct has not been broken. However he offered to act as mediator. This offer was not taken up by Councillor Blacksell. (Each Elected Member present received a copy of the letter received from Mr Bill Paterson.)

I consider this the end of the matter.

**Background Information provided by Councillor Blacksell in regard to Questions 12 and 13.**

"In correspondence dated 19 August 2010, advice from Norman Waterhouse Senior Associate Amanda Green stated and I quote:

*"You advised that the CEO has objected to the HRM specialist nominated by Council. The reasons for this were because the person nominated has never carried out a Local Government CEO remuneration/performance review".*

It was not brought to the CEO Performance Review Committee's attention the concerns of the Chief Executive Officer in relation to the appointed HRM specialist's lack of previous performance review experience. The Officer had in fact agreed to the Consultants appointment with the words to the effect that we employed him, he didn't employ us and if we were comfortable with the appointment then we should get on with the process. This led to the withdrawal of the motion moved by Cr Pfeiffer and seconded by Cr Ramke whereby legal advice was to be sought on clauses 9.1 and 9.2 of the Officers employment contract. Council then proceeded to engage the services of Janet Binder Consulting Pty Ltd, in good faith on the basis of agreement from the officer.

Clause 8.6 of the Officers contract states:


*"The Council shall be entitled to terminate this Agreement and the Officers employment without further liability at any time and with immediate effect for any of the following reasons:*

Clause 8.6.1 states:

*"Misconduct or neglect of duty"*

Clause 8.6.7 states:

*"Pursuant to clause 9, should the officer choose not to undertake or cooperate fully with the performance review process, the Council is entitled to terminate this agreement pursuant to clause 8.6.1"*





**QUESTIONS ON NOTICE CONTINUED**

**Background Information provided by Councillor Blacksell in regard to Questions 12 and 13 – Continued.**

Taking into account the background information and the stated clauses provided above I ask Council to consider the following question;”

**Question 12 - Does Council believe Amanda Green was given all the relevant facts to advise Council appropriately on Councils appointed Consultants status as there are errors of fact stated in her return advice or details were omitted from the brief she received?**

**Mayor's Response.**

Mayor Gum tabled the legal advice received from Norman Waterhouse Lawyers in regard to Question 12. (Attached as Appendix A.)

**Question 13 - Does Council believe it should seek further advice from an appropriate Industrial Relations/Employment lawyer as to whether the Officer has breached his employment contract as Amanda Green was advised there had been a stated objection by the Officer to the appointment of Janet Binder Consulting Pty Ltd?**

**Mayor's Response.**

Mayor Gum tabled the legal advice received from Norman Waterhouse Lawyers in regard to Question 13. (Attached as Appendix A.)

Each Elected Member present received a copy of the email advice sent to Amanda Green of Norman Waterhouse Lawyers by the Chief Executive Officer, Rod Ralph in regard to question 12. (Attached as Appendix B.)

Moved Cr. Toogood/Seconded Cr. Nickolls that under the provisions of the Section 91(7) of the Local Government Act, 1999 having considered this agenda item in confidence under Section 90 (2) and (3)(a) of Act the Council orders that the item and the minutes relating to the matter be retained in confidence until the December 2010 Council meeting that this order be reviewed every 12 months.

**CARRIED.**





# Norman Waterhouse LAWYERS

**CONFIDENTIAL**

By Email: <RodneyR@southernmallee.sa.gov.au>  
Ref: 272367/ASKD01548138

5 October 2010

Mayor G Gum  
Southern Mallee District  
PO Box 49  
PINNAROO SA 5304

Attention: Mr R Ralph

Dear Mayor Gum

**CEO Performance Review – Questions on Notice**

We are instructed by Mr Ralph that the Council seeks responses to two questions taken on notice relating to the Chief Executive Officer's performance review. This follows the provision of advice by Amanda Green of this Firm. We address each of these questions below.

1. **Does Council believe Amanda Green was given all the relevant facts to advise Council appropriately on Council's appointed Consultant's status as there are errors of fact stated in her return advice or details omitted from the brief she received?**

Ms Green was engaged to advise the Council as to the proper interpretation of Clause 9.1 of the CEO's contract. In particular, the Council sought clarification as to whether, as part of the review process, it could dictate the Human Resource Management Specialist who is involved or whether it should allow the CEO to have input.

It is my view that Ms Green was provided with all the relevant facts for the purposes of providing the advice sought. The issue raised by Cr Blacksell concerns the lack of clarity in the Council's instructions as to whom the CEO raised his objection regarding the appointment of Janet Binder Consulting Pty Ltd. It was not clear whether this sentiment was shared with the Mayor or the Committee.

Regardless, this does not, in my view, change Ms Green's advice.

The Council retains the discretion to determine which Human Resource Management Specialist will be appointed. Whilst it makes sense and is reflective of industry practice to give the CEO input into this process, it is not absolutely necessary under the CEO's contract of employment. Therefore, Cr Blacksell should be advised that Ms Green was given all the relevant information for the purposes of interpreting Clause 9.1 of the CEO's contract.





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As an aside, I note that Ms Green was provided with only Page 6 of the CEO's contract, which sets out Clause 9 and part of Clause 10. However, nothing in the initial advice sought by the Council turns on this fact.

2. **Does Council believe it should seek further advice from an appropriate Industrial Relations/Employment lawyer as to whether the Officer has breached his employment contract as Amanda Green was advised there had been a stated objection by the Officer to the appointment of Janet Binder Consulting Pty Ltd?**

In my view, seeking additional advice regarding the possible breach by the CEO of his contract is unnecessary given the scope of the initial advice. This is because it is clear from Ms Green's advice that the objection raised by the CEO was reasonable and would not constitute a fundamental breach of his contract that could lead to the termination of his contract.

Cr Blacksell makes reference to Clause 8.6.7 of the contract as the proposed mechanism of termination, which provides that the Council may terminate the employment relationship if the CEO does not undertake or co-operate fully with the performance review process.

From my instructions, it is clear that the CEO is prepared to undertake the process. The CEO's reasonable objection would not, in my view, constitute a failure to co-operate. Rather, he has simply raised the issue of the consultant's appointment for discussion. On our instructions, there is no suggestion, at this time, that the CEO is seeking to hinder the process. Any attempt by the Council to argue otherwise and claim breach of contract would fail.

Therefore, Cr Blacksell should be advised that it would be unnecessary to seek this additional advice as the initial advice notes the reasonableness of the CEO's objection. However, should the Council prefer to pursue this issue, I would be happy to provide advice if any other facts to which I have referred have altered in any way.

Please contact me should you wish to discuss this matter further.

Yours faithfully  
Norman Waterhouse



Sathish Dasan  
Partner

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e-mail: [sdasan@normans.com.au](mailto:sdasan@normans.com.au)



## APPENDIX B

**Sheryn Bennier**

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**From:** Rodney Ralph  
**Sent:** Tuesday, 28 September 2010 6:00 PM  
**To:** AGreen@normans.com.au  
**Cc:** Sheryn Bennier; bjtoogood@bigpond.com  
**Subject:** Question on notice  
**Attachments:** Question on notice.docx

Dear Amanda

Council has received a total of 13 questions on notice for its October Council Meeting from Cr Corey Blacksell and these two questions were forwarded to Council separately from the earlier 11 questions received.

After discussion with Mayor George Gum and Cr Brian Toogood, I have been authorized to engage Norman Waterhouse Lawyers and to seek your assistance to formulating a response to the two questions asked by Cr Corey Blacksell.

To assist with the background to this matter, it is the case that I was sceptical of the Committee appointing Janet Binder as it had not gone through a process of considering and selecting other HR consultants other than Janet Binder. It was the case however that certain Elected Members were anxious for the speedy appointment of Janet Binder and so I relented eventually so as to not be obstructive in the process of Council appointing its preferred consultant to undertake the CEO appraisal review. It needs to be pointed out that from a governance perspective, it was out of character for Cr Corey Blacksell to be pushing support for one consultant and not widening the field before making the recommendation before the Committee.

It was not until the conclusion of that meeting for where Janet Binder was duly engaged by the Committee that I then became aware of an earlier email advice received on my I phone from Janet Binder. This response was as a result of a earlier query where I had asked her to verify that she was currently or had previously undertaken a number of CEO annual appraisals as was claimed to have been the case and to which was emphasised in the presence of Elected Members in attendance at this CEO's Performance Appraisal Review Committee meeting. Her email response confirmed that she had not and was not currently undertaking any CEO annual appraisals and so Elected Members had been misled by the statement claimed at the Committee meeting. At this point of time of refrain from naming the particular Elected Member who claimed Janet Binder was currently working with about 6 Councils in respect of doing appraisals for their CEOs.

As a result of this advice coming to my notice, I phoned Cr Brian Toogood and informed him of Janet Binder's advice to me.

I then understand discussions took place between Cr Brian Toogood and Mayor George Gum and the services of Norman Waterhouse Lawyers were sought.

Other than the correction to the background advice initially provided to you, it is the case I agreed to Council engaging Janet Binder, but it was not under the situation as set out by Cr Corey Blacksell.

Whilst I have a view to the personal views within the main body of this question on notice, I do not intend making comment at this point of time.

I would ask however that you now provide advice to Council so as to allow Mayor George Gum the ability to provide a response to these two questions.

Should you require any further clarification, I will endeavour to do my best to assist you in that matter.

I would appreciate your early response to this request.

Rod Ralph  
Chief Executive Officer



### Question on notice

In correspondence dated 19 August 2010, advice from Norman Waterhouse Senior Associate Amanda Green stated and I quote:

*"You advised that the CEO has objected to the HRM specialist nominated by Council. The reasons for this were because the person nominated has never carried out a Local Government CEO remuneration/performance review".*

It was not brought to the CEO Performance Review Committee's attention the concerns of the Chief Executive Officer in relation to the appointed HRM specialist's lack of previous performance review experience. The Officer had in fact agreed to the Consultants appointment with the words to the effect that we employed him, he didn't employ us and if we were comfortable with the appointment then we should get on with the process. This led to the withdrawal of the motion moved by Cr Pfeiffer and seconded by Cr Ramke whereby legal advice was to be sought on clauses 9.1 and 9.2 of the Officers employment contract. Council then proceeded to engage the services of Janet Binder Consulting Pty Ltd, in good faith on the basis of agreement from the officer.

Clause 8.6 of the Officers contract states:

*"The Council shall be entitled to terminate this Agreement and the Officers employment without further liability at any time and with immediate effect for any of the following reasons:*

Clause 8.6.1 states:

*"Misconduct or neglect of duty"*

Clause 8.6.7 states:

*"Pursuant to clause 9, should the officer choose not to undertake or cooperate fully with the performance review process, the Council is entitled to terminate this agreement pursuant to clause 8.6.1"*

Taking into account the background information and the stated clauses provided above I ask Council to consider the following question; does Council believe Amanda Green was given all the relevant facts to advise Council appropriately on Councils appointed Consultants status as there are errors of fact stated in her return advice or details were omitted from the brief she received, and secondly does Council believe it should seek further advice from an appropriate Industrial Relations/Employment lawyer as to whether the Officer has breached his employment contract as Amanda Green was advised there had been a stated objection by the Officer to the appointment of Janet Binder Consulting Pty Ltd.

