

Southern Mallee District Council

Minutes of the Confidential Council Meeting held in the Performing Arts Centre at the Lameroo Regional Community School situated at Bews Terrace, Lameroo on Wednesday 12 June 2013

The Mayor Cr Gordon Hancock opened the meeting at 3.34 pm and welcomed those in attendance

1 Attendance

Councillors Gordon Hancock [Mayor], Jeff Nickolls [Deputy Mayor], Allan Dunsford, Barry Lukins, Neville Pfeiffer, Robert Sexton, Bruce Summerton, Brian Toogood and Alf Walker

Staff in Attendance

Tony Renshaw [Chief Executive Officer]
Sheryn Bennier [Manager Executive Services and Minute Secretary]
Shona Hyde [Customer Service Officer]

2 Apologies

Nil

3 Minutes

Cr Sexton moved Cr Lukins seconded that the minutes of the following meeting be taken as read and confirmed and the Council shall adopt all recommendations contained within the minutes ;

3.1 Confidential Council Meeting held Wednesday 8 May 2013 at 3.04 pm to 4.04 pm

Carried 1 / 0613

4 Ombudsman SA Preliminary Investigation

4.1 Letter and Report dated 27 May 2013

Cr Lukins moved Cr Nickolls seconded that the Council receive the letter and the accompanying report dated the 27 May 2013

Carried 2 / 0613

RECEIVED	
26 JUL 2013	
Record N ^o	NG000013396
File N ^o	9.2413
GDS 20/ve	5

Released
Jan 2018

4 Ombudsman SA Preliminary Investigation

4.2 Email dated 28 May 2013

Cr Sexton moved Cr Toogood seconded that the Council receive the email dated the 28 May 2013

Carried 3 / 0613

4.3 The Council's Submission

Cr Nickolls moved Cr Toogood seconded that the Council noted that the submissions to the Ombudsman were prepared on a confidential basis and accordingly the submissions should remain on a confidential basis and not be released into the public domain

Carried 4 / 0613

5 Other Business

Nil

6 Closure

There being no further confidential business the Mayor Cr Hancock closed the confidential meeting, and as set in the Local Government Act Section 91 [7], having considered this agenda item in confidence under Section 90 and Section 90 [3] [g], the Council orders that the item and the minutes relating to the matter be retained on a confidential basis for a period of 12 months from the date of this meeting and on this basis the public shall be invited to re-join the meeting at 3.50 pm



OmbudsmanSA

Enquiries: Mr Richard Bingham
Telephone: (08) 8226 8699
Ombudsman reference: 2013/00226
Agency reference:

CONFIDENTIAL
Mr Tony Renshaw
Chief Executive Officer
Southern Mallee District Council
PO Box 49
PINNAROO SA 5304

RECEIVED	
28 MAY 2013	
Record No	190VRE201386
File No	10.46/1
GDS 20/Version	5

Dear Mr Renshaw

Preliminary investigation of complaint by Ms Marilyn Smith

Thank you for your letter dated 3 May 2013.

The purpose of this letter is to inform you of my provisional views about this complaint. They are set out in the enclosed report. I have sent a copy to the complainant.

I emphasise that the views I have expressed in my report are tentative only, and are subject to my receipt and consideration of submissions from the parties. I will be taking into account these submissions before finalising my views. If you wish to comment on my provisional views, please provide your comments to me in writing by 14 June 2013. If you have no comments to make, please let my office know either by letter, email or telephone. If you do not contact my office by 14 June 2013 I will assume that you have no further comment to make.

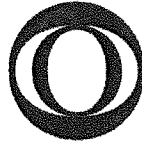
Please note that the report contains information that was obtained in the course of an investigation that is subject to the confidentiality provision in section 22 of the *Ombudsman Act 1972*. The Act also provides that an Ombudsman investigation is to be conducted in private. You should not disclose the information contained in this letter and report except where necessary for the purposes of my investigation. If you wish 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

27 May 2013

Encl



OmbudsmanSA

Provisional Report

Preliminary investigation - *Ombudsman Act 1972*

Complainant	Ms Marilyn Smith
Agency	Southern Mallee District Council
Ombudsman reference	2013/00226
Agency reference	
Date complaint received	2 January 2013
Issues	<ol style="list-style-type: none">1. Whether the council unreasonably refused to conduct an audit of the Parilla Seasonal Workers Accommodation Facility.2. Whether the Chief Executive Officer dealt properly with a gift.

Jurisdiction

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

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- discussing the matter with the Auditor General
- seeking a response from Southern Mallee District Council (the council)
- clarifying the response with the council
- seeking more particulars from the complainant
- considering sections 41, 110, 126 and 130A of the *Local Government Act 1999*
- considering the report of an Operational Review prepared by Mr David Hope from Skilmar Systems Pty Ltd, December 2011 (the Hope report)
- considering the council's Code of Conduct for Council Employees¹ and its Gifts, Benefits and Hospitality policy²
- preparing this report.

¹ <http://www.southernmallee.sa.gov.au/webdata/resources/files/Code%20of%20Conduct%20for%20Council%20Employees.pdf>, as at 24 May 2013. This code was adopted on 13 March 2013, but the earlier version adopted on 8 December 2010 and reviewed on 14 December 2011 contains a similar obligation.

² <http://www.southernmallee.sa.gov.au/webdata/resources/files/Gifts,%20Benefits%20&%20Hospitality%20Policy.pdf>, as at 24 May 2013.

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.³ 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 ...⁴

Background

1. The complainant complained about two issues arising from meetings of the council. The first concerns the decision made at its meeting held on 14 November 2012 not to conduct an audit of the Parilla Seasonal Workers Accommodation Facility (the facility); and the second concerns the acceptance by the Chief Executive Officer (the CEO) of a gift, and his subsequent actions at the council meeting held on 12 December 2012.
2. The facility provides accommodation for seasonal workers who are employed by farmers in the Parilla region. It is managed by the Parilla Sports Grounds & Town Committee (the committee). The committee is established under section 41 of the Local Government Act and is subsidiary to the council.
3. In late 2011 the then council CEO engaged Mr David Hope, a consultant, to undertake an independent review of the operation of the facility and to establish the financial arrangements for its future operation. I understand that the engagement followed from representations made by the complainant alleging shortcomings particularly in the financial management of the facility. The engagement it was reported to the council meeting held on 9 November 2011.⁵
4. I have been provided with a copy of Mr Hope's report completed in December 2011,⁶ and I note that the complainant states that she met for one and a quarter hours with Mr Hope in the course of his work.
5. The Hope report concluded that 'there is no suggestion, nor is there any evidence, of impropriety in the operation of the facility'.⁷ However, it found that the council had made a number of governance and financial errors. In particular, over a period of 11 years, the committee had disposed of the surplus funds that belonged to the council. Mr Hope concluded that

...there is a clear perception, held by both Council and the PSGTC [i.e. the committee], that the PSGTC has the unfettered right to dispose of the surplus funds of the facility as it sees fit. This perception has arisen from the predecessor of the PSGTC, the Parilla Sportsground and Town and Parilla Institute Committee having such a power under the previous Local Government Act as a controlling authority, not as a committee of council, which it exercised over a few hundred dollars a year. Under the current Local Government Act council cannot delegate such a power to the PSGTC which is a Section 41 committee of council. This perception must be rectified.

³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

⁵ Agenda for the Ordinary Council Meeting held 9 November 2011, Chief Executive Officer's report, Part 5.

⁶ Operational Review of the facility prepared by Mr David Hope, Principal Consultant, Skilmar Systems Pty Ltd, December 2011.

⁷ *Ibid* p5.

6. The Hope report also concluded that the council failed to enter budgeted amounts for the facility into its budgets; and that the council failed to subject the committee to an annual budget for the 2009/10, 2010/11 and 2011/12 years. It made 15 recommendations principally directed towards the council's oversight and financial management of its section 41 committees.
7. Whilst the Hope report found no evidence of impropriety in the operation of the facility, the complainant alleges theft and financial mismanagement occurred in the past. She documented these allegations at my request, in letter to me dated 28 January 2013. These allegations included:
 - that in a letter dated 9 March 2011 the council had provided misleading answers to 57 questions which the Geranium Ratepayers Association had asked about the facility and its finances
 - that the mayor had reported to the October 2010 council meeting some money had been stolen from the facility, but that it had not been reported to police because the person allegedly responsible had left town
 - that she had put some specific allegations to Mr Hope about petty cash withdrawals which were not used for authorised purposes
 - the facility funds had been used to pay expenses incurred by sporting clubs that are not council section 41 committees, and that the mayor denied having written letters which are recorded in the relevant minutes
 - at the September 2011 council meeting, the council's Manager, Corporate Services did not properly explain the reasons why an internal transfer was necessary, to the Parilla Sports Ground and Town Committee account.
8. After considering the findings made in the Hope report, the council voted at its meeting on 14 November 2012⁸ not to appoint Mr Hope to undertake a further financial audit of the committee. The relevant motion proposed that an amount of up to \$10 000 should be allocated for this purpose, but it was defeated 3 for - 5 against after a division was called.

Whether the council unreasonably refused to conduct an audit of the Parilla Seasonal Workers Accommodation Facility

9. The complainant alleges that the council unreasonably refused to conduct a financial audit of the facility. I note that the decision was made following receipt of the Hope report; that the Hope report made no recommendation that an audit should be conducted; and that it appears to me that the elected members were fully informed about the issue before making their decision.
10. In my view, the Hope report is a comprehensive and instructive document. It concluded that 'while there was no suggestion or evidence of impropriety in regard to the operation of the facility there were a number of significant failures of governance'. These arose from the council's failure to properly manage the finances of the committee as a section 41 committee of the council.
11. It is now a matter for the council's audit committee to oversee the response to the recommendations made in the Hope report, under section 126(4) of the Local Government Act. Should the audit committee be unsatisfied with the council's actions, it could commission an investigation under section 130A of the Act, perhaps in conjunction with the council's independent auditor.

⁸ Minutes of the Ordinary Council Meeting held Wednesday 14 November 2012, Item 13.1.

12. Against this background, I have considered whether there is any administrative error in the council's decision to refuse to conduct a further audit. I have concluded that there is not, for the following reasons:
- whilst the Hope report states that it did not deal in detail with many specific issues regarding the facility,⁹ it is nonetheless in my view a comprehensive assessment of the major concerns about the committee's operations
 - the Hope report concludes that there have been significant failures of governance. To that extent, the specific concerns raised by the complaint have been acknowledged
 - the council advises me that all transactions for the facility have been processed by council staff, through its general ledger. This process is subject to the council's audit committee and its external audit. Any further investigation would thus need to extend beyond these controls
 - the specific concerns relate to matters which are now some time in the past. This is likely to increase the difficulty in conducting any further investigation. Further, given the findings of the Hope report I consider that there is likely to be difficulty in retrieving evidence and identifying documentation relevant to any such investigation
 - the council's decision was made by its elected members in a public meeting. It seems clear that they were aware of the background to the issue,¹⁰ and I have no evidence that they did not make their decision in the interests of the communities which they represent.

Opinion

In light of the above, my provisional 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.

My provisional view is that having regard to the circumstances of the case, continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

Whether the CEO dealt properly with a gift

13. The second issue raised by the complaint is that the CEO received a 20 kg bag of potatoes from Mondello Farms. The minutes for the council meeting held on 12 December 2012 record that the CEO shared the potatoes amongst council members and staff.¹¹ The complainant queried whether the CEO contravened the Local Government Act by accepting and sharing this gift.
14. Section 110 of the Act requires the council to have in place a code of conduct governing the behaviour of its employees (including the CEO). The Act does not otherwise specifically prohibit the acceptance of gifts by a council employee. The council's Code of Conduct for Council Employees¹² requires employees to comply with the council's Gifts, Benefits and Hospitality policy.¹³ This provides as follows:

⁹ Executive summary, p5.

¹⁰ I note that it appears that proper notice of motion was given. See the council agenda paper for its meeting held on 14 November 2012, at:

http://www.southernmallee.sa.gov.au/webdata/resources/files/agenda%20nov%20public_20121109130712.pdf, as at 27 May 2013.

¹¹ Minutes of the Ordinary Council Meeting held Wednesday 12 December 2012, Item 6.7.

¹² <http://www.southernmallee.sa.gov.au/webdata/resources/files/Code%20of%20Conduct%20for%20Council%20Employees.pdf>, as at 24 May 2013.

¹³ <http://www.southernmallee.sa.gov.au/webdata/resources/files/Gifts,%20Benefits%20&%20Hospitality%20Policy.pdf>, as at 24 May 2013.

3.2 Acceptance of Benefits

3.2.1 An employee must not accept any benefit from any individual or entity if there may be a real or potential risk of compromise or conflict of interest.

3.2.2 All benefits (irrelevant of its value) must be declared and may be accepted only when approved by the Council. The Council approving the benefit will determine if it should be retained by the Council, the employee, or distributed in some other manner. The approval should be documented and saved in the relevant file.

3.2.3 Where approval cannot be gained, the Chief Executive Officer has the responsibility to politely refuse the gift. If refusal has the potential to damage Council's relationship with the person, company or organisation making the offer, then the gift may be accepted but must be reported immediately to the Council. Council will make a decision as to whether the gift that has been accepted will become Council property or whether arrangements should be made to donate it to a charitable institution in the name of the person, company or organisation that provided the gift.

3.2.4 Under no circumstances are Council members or employees to accept or receive cash, suppliers' goods or services at no cost or non-commercial discounts.

3.2.5 Benefits are not to be accepted under any circumstance by an employee who is aware that the benefit is being offered by a supplier who is in the process of tendering for the supply of goods and services to the Council.

3.2.6 Hospitality associated with networking may be accepted by an employee where there can be no real or perceived conflict of interest. The employee should ensure that the venue is appropriate and should suggest an alternative venue if it is thought that the venue could cause embarrassment to the Council.

3.2.7 Council members in a similar position should report the matter to Council.

15. In my view, the CEO's actions in reporting the gift at the council meeting complied with these obligations, and I see no need to investigate this issue further. In particular, I consider that having the action noted in the minutes of a council meeting is sufficient compliance with the requirement that the council should approve acceptance of the benefit.

Opinion

In light of the above, my provisional 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.

My provisional view is that having regard to the circumstances of the case, continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.


Richard Bingham
SA OMBUDSMAN

27 May 2013