

**CITY OF MARION
GENERAL COUNCIL MEETING
22 JULY 2014**

Originating Officer: Kate McKenzie, Manager Governance
Director: Kathy Jarrett
Subject: Ombudsman Full Investigation – Conflict of Interest
Report Reference: GC220714R06

REPORT OBJECTIVES:

To inform the Council of the Ombudsman's final report regarding former Councillor David Speirs and whether he breached the conflict of interest provisions of the *Local Government Act* and the *Council Members Code of Conduct*.

EXECUTIVE SUMMARY:

The role of the Ombudsman is to independently investigate complaints about government and local government agencies. The powers of the Ombudsman are outlined in various acts including the *Ombudsman Act 1972* and the *Local Government Act 1999*.

In March 2014, the Ombudsman received a complaint about then Councillor Speirs and a potential conflict of interest regarding the adoption of a master plan for Hallett Cove Foreshore and his candidacy for the Liberal Party in the seat of Bright.

The Ombudsman has concluded his investigation into this matter and determined that former Councillor Speirs breached the provisions of section 74(1) and (4) of the *Local Government Act* and Clauses 3.13 of the *Code of Conduct*. Given that Council Speirs is no longer a member of the Council, the Ombudsman made no recommendations for further action.

RECOMMENDATIONS (3)

DUE DATES

That:

July 2014

1. Council note the report.

2. That Council note the Local Government Association motion carried at the April 2014 Ordinary General Meeting requesting "that the Ordinary General Meeting ask the LGA to lobby the State Government to amend the Local Government (Elections) Act 1999 to require any Mayor or Council Member is who is standing for State or Federal elections, to take leave from Council from the date the writs are issued until completion of the election."

July 2014

3. That the confidentiality order pertaining to the Report "Ombudsman Provision Report, GC270514F01" with the minutes arising from the report be revoked.

July 2014

BACKGROUND

David Speirs was elected as a Council Member for the Coastal Ward in 2010. In August 2013, he declared on his ordinary return that he was running as the Liberal candidate for the seat of Bright in the 2014 state election. The seat of Bright is partly located in the City of Marion.

As part of his state election campaign, former Councillor Speirs committed to 'revitalising Hallett Cove foreshore' and he publically announced that 'a state Liberal Government (would) partner with the City of Marion to deliver a \$3.5 million upgrade (to the Hallett Cove foreshore)'. He also publicly pledged \$1.7 million on behalf of the Liberal party toward the Hallett Cove foreshore upgrade.

At its meeting of 11 March 2014, Council considered a report regarding the endorsement of a final master plan for Hallett Cove foreshore. Former Councillor Speirs seconded the motion relating to this matter but left the room before the matter was voted on.

ANALYSIS:

The Ombudsman has investigated specifically, "whether Councillor Speirs was in breach of the conflict of interest provision of the *Local Government Act* and whether he had an interest within the meaning of section 73(1)". That is, he would receive a benefit or suffer a detriment of the type described in section 73(1).

The Ombudsman found that former Councillor Speirs had an 'interest in the matter' within the meaning of section 73(1). Section 73(1) requires a council member to suffer or to have a reasonable expectation of suffering a detriment or benefit if the matter were decided in a particular manner.

In the view of the Ombudsman, it was reasonable to expect that the decision to endorse and proceed with the master plan would benefit former Councillor Speirs' campaign, as he had promised to pledge funds to the foreshore development and the decision to not proceed with the master plan could have lost him votes.

The Ombudsman determined that former Councillor Speirs breached the provisions of section 74(1) and (4) of the *Local Government Act* and Clauses 3.13 of the Code of Conduct.

Given that Council Speirs is no longer a member of the Council, the Ombudsman made no recommendations for further action.

The Ombudsman also made no comment or recommendation regarding Council systems or processes for managing conflict of interests. On this basis, it is possible to assume Council's processes surrounding conflict of interest are reasonable.

A copy of the Ombudsman Final Report is attached in **Appendix 1**.

Legal / Legislative

The role of the Ombudsman is to independently investigate complaints about government and local government agencies. The powers of the Ombudsman are outlined in various acts including the *Ombudsman Act 1972* and the *Local Government Act 1999*.

The Ombudsman may conduct investigations to determine whether a government agency's process was reasonable and fair, and that a decision is not unreasonable or unlawful. If a problem is detected, the Ombudsman may make recommendations to correct the problem.

Pursuant to part 3 of the Council Member Code of Conduct, a report from the Ombudsman that finds a Council member has breached section 3 (misconduct), must be provided to a public meeting of the Council. The Council must pass resolutions that give effect to any recommendations received from the Ombudsman, within two ordinary meetings following the receipt of these recommendations.

Throughout the duration of this matter, various legal advice has been obtained to ensure due process has been followed and to ensure that Council had been appropriately advised. To date, approximately \$8,000 has been spent on this matter.

LGA Motion

The Ombudsman's investigation is an opportunity to reform the rules for Elected Members seeking higher office. At the April 2014 Ordinary General Meeting of the Local Government Association, the meeting determined:

"that the Ordinary General Meeting ask the LGA to lobby the State Government to amend the *Local Government (Elections) Act 1999* to require any Mayor or Council Member who is standing for State or Federal elections, to take leave from Council from the date the writs are issued until completion of the election."

This will overcome any perception of a conflict of interest for an Elected Member who is standing as a candidate at a State or Federal election. No status update has been received regarding the progress of this motion.

Confidential Order

At its meeting of 27 May 2014, Council ordered that the Report '*Ombudsman Provisional Report, GC270514F01*' together with the relevant minutes be kept confidential until December 2014 after which time the order was to be reviewed.

The confidential report '*Ombudsman Provisional Report GC270514F01*') directly relates to the Final Ombudsman Report. As the final report is a public report, it is recommended that the confidentiality order associated with the provisional report and minutes be revoked.

CONCLUSION:

The Ombudsman's investigation has found former Cr Speirs breached the relevant provisions of the *Local Government Act* and the Code of Conduct but recommends no further action be taken as he is no longer a member of Council. The decision coincides with a resolution to reform the *Local Government (Elections) Act* to remove any perception of a conflict of interest.

Enquiries: Ms Sarah Wishart
Telephone: (08) 8226 8699
Ombudsman reference: 2014/02552



Mayor Felicity-ann Lewis
City of Marion
PO Box 21
OAKLANDS PARK SA 5046

Dear Mayor Lewis

Investigation of complaint about former Councillor David Speirs

I refer to my provisional report dated 26 May 2014.

I have now concluded my investigation; and the purpose of this letter is to provide you with my final views about the complaint. They are set out in the enclosed report. I have sent a copy to Cr Speirs.

I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.

As you may be aware, the Ombudsman Act imposes certain obligations¹ on my office and others, including complainants, officers and members of the council, to keep information about my investigation confidential. However, if I consider that disclosure of that information is in the public interest, then I may authorise or require its disclosure.

In my opinion, there is a public interest in disclosure of my final reports under the Ombudsman Act. Therefore, I authorise disclosure of this report by the parties as they see fit. I advise that I may publish my report on the Ombudsman SA and AustLII websites.

Yours sincerely



Megan Philpot
ACTING SA OMBUDSMAN

4 July 2014

Encl

Cc **Mr Mark Searle**
Chief Executive Officer
City of Marion
PO Box 21
OAKLANDS PARK SA 5046

¹ *Ombudsman Act 1972*, section 26.

Report - City of Marion
Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Council member	Councillor David Speirs ¹
Council	City of Marion
Ombudsman reference	2014/02552
Date complaint received	14 March 2014
Issue	Whether Cr Speirs breached the conflict of interest provisions of the <i>Local Government Act 1999</i> and clause 3.13 of Part 3 of the Council Member Code of Conduct

Jurisdiction

I received a complaint alleging a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (the **Code of Conduct**).² An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.³

I consider that the complaint about Cr Speirs falls within this definition; and I am also satisfied that in relation to the complaint, Cr Speirs was 'engaged in the work of ... [the] agency' within the meaning of section 3 of the Ombudsman Act.

A complaint about the same matter was also made by the Chief Executive Officer (CEO) of the City of Marion (the **council**) having regard to Part 3 of the Code of Conduct which states that 'Alleged breaches of this Part made to a Council ... may be referred to the Ombudsman for investigation...'

I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- assessing the information provided by the CEO

¹ Although Mr Speirs is no longer a member of the council I will refer to him in this report as Cr Speirs given that he was a council member at the time of the council meeting on 11 March 2014.

² The Code of Conduct was gazetted on 29 August 2013.

³ Section 263A(4) Local Government Act; section 3, Ombudsman Act.

- seeking a response from Cr Speirs
- seeking a response from the council
- listening to an audio recording of the council's consideration of item Ref No GC110314R04
- considering the conflict of interest provisions of the Local Government Act
- considering the Code of Conduct
- providing the council and Cr Speirs with my provisional report for comment
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.⁴ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...⁵

Response to my provisional report

In response to my provisional report the council advised me, by letter dated 3 June 2014, that the council has considered my provisional report at a meeting on 27 May 2014 and that it supported my provisional views.

Cr Speirs did not provide a response to my provisional report.

Background

1. Cr Speirs was elected as a council member to the Coastal Ward of the council in November 2010.
1. The development of the Hallett Cove Foreshore Final Master Plan (the master plan) originated in 2006 as a part of the Marion South Plan.
2. On 22 September 2009, the council adopted a Long Term Financial Plan (the financial plan). It has since been adopted by the council annually. The financial plan includes an allocation for the master plan.
3. At its meeting on 26 June 2012, the council considered and noted a report on the Hallett Cove Coastal Management Study. This management study was the result of a grant received from the Coastal Protection Board. The purpose of the study was to guide the council in its future planning and management of the foreshore at Hallett Cove beach. Following this, the council received funding from the former Department of Planning and Local Government to develop the master plan.⁶

⁴ 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.

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

⁶ Letter from the CEO to the Ombudsman dated 14 April 2014.

4. On 26 June 2013 council members attended a forum which was held to give them an overview of the master plan and the final draft concepts.
5. In August 2013 a community engagement process was held in relation to the master plan.
6. In his August 2013 ordinary return, Cr Speirs declared that he was running as the Liberal candidate for the seat of Bright in the 2014 state election.⁷ The council area is within the seat of Bright.
7. The master plan was finalised in November 2013.
8. The council lodged a funding application for the master plan with the Department of Planning, Transport and Infrastructure for the amount of \$1.7m. In mid-February 2014 the council was advised that the funding application had not been successful.
9. On 17 February 2014, Cr Speirs officially commenced his campaign for the state election.
10. As part of his campaign, Cr Speirs committed to 'revitalising Hallett Cove's foreshore'.⁸ He publicly announced that 'a state Liberal Government [would] partner with the City of Marion to deliver a \$3.5 million upgrade [to the Hallett Cove foreshore]'.⁹ He also publicly pledged \$1.7 million on behalf of the Liberal Party towards the Hallett Cove foreshore upgrade.¹⁰
11. At the council meeting on 11 March 2014 the council considered a motion about the master plan. Cr Connor moved the motion and Cr Speirs seconded the motion. The minutes record the following:

Hallett Cove Foreshore Final Master Plan
Ref No: GC110314R04

Moved Councillor Connor, Seconded Councillor Speirs that Council:

1. Endorse the Hallett Cove Foreshore Master Plan
2. Endorse further investigation as to how commemorative elements of the master plan may be delivered by the 2015 ANZAC Centenary
3. Request a further report regarding prioritisation, staging and funding opportunities for the delivery of the master plan be brought to Council

7.51pm Councillor Speirs left the meeting

7.52pm Councillor Habib left the meeting

Lost

Councillor Bouwens called for a division

Those For: Councillors Bouwens, Allen and Connor

⁷ Sections 64 to 67 and Schedule 3 to the Local Government Act require council members to disclose their private interests, such as the name of any political party of which the council member is a member, in primary and ordinary returns. This information is maintained on a Register of Interests by the CEO of the council.

⁸ <http://davidspeirs.com.au/an-opportunity-to-serve/>, accessed on 17 March 2014.

⁹ <http://davidspeirs.com.au/transforming-hallett-coves-foreshore/> as at 17 March 2014.

¹⁰ <http://www.adelaidenow.com.au/news/south-australia-state-election-2014/liberal-candidate-and-marion-councillor-david-speirs-failed-to-declare-a-conflict-of-interest/story-fnl3k6uz-1226853072781> as at 17 March 2014.

Those Against: Councillors Pfeiffer, Campbell, Hutchinson, Hull, Verrall, Veliskou and Appleby

The motion was
Lost

12. My office has listened to an audio recording of the consideration of this item at the 11 March 2014 council meeting. During the debate about the motion Cr Connor told the elected members that the Liberal Party had pledged to a partnering commitment of \$1.7 million for the project should they win the upcoming state election. This information had not been included in the documentation provided to the council members.
13. Cr Speirs did not vote in relation to the item. He left the meeting at 7.51pm, when the matter of the pledge was raised by Cr Connor, and returned to the meeting at 7.58pm, when the matter had concluded.
14. Cr Speirs did not declare a conflict of interest and no conflict of interest is disclosed in the minutes.
15. The CEO advised my investigation that 'during the course of the Council meeting, and after the matter of the pledge had been raised, Cr Speirs sought advice during the meeting by the way of text message to staff as to whether he should leave the meeting and was advised to do so.'¹¹
16. The state election was held on 15 March 2014 and Cr Speirs won the seat of Bright.
17. Cr Speirs resigned from his position as a council member on 21 March 2014.
18. As some questions were raised at the council meeting as to whether Cr Speirs had a conflict of interest, the CEO sought legal advice. He was advised to refer the matter to this office under Part 3 of the Code of Conduct. He did so on 21 March 2014.

Legislation

19. Section 63 of the Local Government Act provides for a code of conduct and that council members must comply with it.
20. Section 73(1) defines the circumstances in which an elected member has 'an interest in a matter' as follows:

73—Conflict of interest

- (1) A member of a council has an interest in a matter before the council if—
 - (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
 - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,

(not being a benefit or detriment that would be enjoyed or suffered in common with

¹¹ Letter from the CEO to the Ombudsman dated 14 April 2014.

all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

21. Section 74(1) provides:

A member of a council who has an interest in a matter before the council must disclose the interest to the council.

22. Section 74(2) provides:

A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.

23. Section 74(4) provides:

A member of a council who has an interest in a matter before the council must not:

- (a) propose or second a motion relating to the matter; or
- (b) take part in discussion by the council relating to that matter; or
- (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
- (d) vote in relation to that matter.

24. Clause 3.13 of Part 3 of the Code of Conduct provides:

Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.

Whether Cr Speirs breached the conflict of interest provisions of the *Local Government Act 1999* at the council meeting on 11 March 2014

25. To decide whether Cr Speirs was in breach of the conflict of interest provisions of the Local Government Act, I must first be satisfied that he had an 'interest in a matter' in relation to the council decision on 11 March 2014, within the meaning of section 73(1). That is, I must be satisfied that he would receive a benefit or suffer a detriment, or would have a reasonable expectation of receiving a benefit or suffering a detriment of the type described in section 73(1). Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the area, or some other substantial class of persons.
26. In the case of *Petrovski v Dolling*,¹² the SA District Court emphasised that the legislation is confined to the type of interest referred to in section 73 and 'not to conflicts of interest at large'.¹³ The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
27. Further, the court said that the question of whether a council's resolution gives rise to a section 73(1) interest, must be determined by a consideration of the actual terms of the resolution.¹⁴ In addition, the test is that the council member 'would' receive a benefit or suffer a detriment or 'would have a reasonable expectation' of receiving a

¹² *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

¹³ *Ibid*, [41].

¹⁴ *Ibid*, [34].

benefit or suffering a detriment. Speculation about the consequences of the matter being decided in a particular manner is not sufficient.

28. The resolution proposed that the council endorse the master plan, and requested that a further report regarding prioritisation, staging and funding opportunities for the delivery of the master plan be prepared. In effect, the purpose of the motion was to continue with the progression of the master plan. Without the motion being passed it is reasonable to conclude that the master plan was not going to proceed, at least not at this time or in this form.

29. Cr Speirs denies that he had an interest in the matter. He has submitted as follows:

As I initially saw this as an administrative motion, it didn't even cross my mind for one second that it would be construed as a conflict, so I seconded the motion, but I did not participate in any debate.¹⁵

30. Given that Cr Speirs had publicly included the master plan proposal as a part of his campaign, I consider that he ought to have turned his mind to the fact that his voting in relation to the master plan could have been a conflict of interest under the Local Government Act, or could have been perceived as a conflict of interest. The fact that he saw it as an 'administrative motion' that 'would be whole-heartedly endorsed by the council'¹⁶ is not, in my view, a relevant consideration.

31. Further, Cr Speirs advised my investigation that 'all election candidates make promises to work with other tiers of government if elected', further stating that:

In the 2014 election candidates from all political parties pledged funds for City of Marion-based projects which would all require the council to receive funding and deliver the projects. Many of these election promises were not part of the council's strategic priorities and had no commitment of additional funding from the council... As above, my actions were no different to other candidates who make funding pledges in the lead-up to elections. The foreshore masterplan was an uncontroversial project, with seemingly broad community and elected member support, being delivered as a part of an ongoing reserve and park upgrade which Marion has been undertaking for several years. In many ways this project was business-as-usual and the council had spoken to political candidates about contributing money to deliver a more ambitious project than council finances would allow. The fact that the masterplan had not yet been endorsed should not stop council seeking funding from other bodies, including state election candidates - in fact it is the very thing a proactive, strategic council should be doing.¹⁷

32. The CEO also advised my investigation that 'during State and Federal elections, many candidates make pledges for various community projects.'¹⁸

33. I am satisfied that Cr Speirs had an 'interest in the matter' within the meaning of section 73(1). Section 73(1) requires a council member to suffer or to have a reasonable expectation of suffering a detriment or benefit if the matter were decided in a particular manner. As a part of his state election campaign Cr Speirs had publicly stated that the development of the Hallett Cove foreshore was a priority for him, and that he pledged \$1.7m towards it on behalf of the Liberal Party if they were elected into government. In my view, it is reasonable to expect that the decision to endorse and proceed with the master plan would benefit Cr Speirs' campaign, as he had promised to pledge funds to the foreshore development and the decision to not proceed with the master plan could have lost him votes.

¹⁵ Letter from Cr Speirs to the Ombudsman dated 14 April 2014.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Letter from the CEO to the Ombudsman dated 14 April 2014.

34. As such, in these circumstances, my view is that Cr Speirs had an 'interest in a matter' in relation to the decision within the meaning of section 73(1) of the Local Government Act and breached clause 3.13 of the Code of Conduct. Further, by failing to declare this interest, seconding a motion in relation to the matter, and apparently remaining in the room during some of the debate about the matter, Cr Speirs was in breach of section 74(1) and (4) of the Local Government Act, and acted in a manner that was contrary to law within the meaning of section 25(1) of the Ombudsman Act.

Opinion

In light of the above, I consider that Cr Speirs breached the provisions of sections 74(1) and (4) of the Local Government Act and clause 3.13 of the Code of Conduct. In this way, Cr Speirs acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Final comment

Given that Cr Speirs is no longer a member of the council, I do not make any recommendation for the council to take any action against Cr Speirs.

I recommend that the council confirm to me in writing by 15 August 2014 that this report has been provided to a public meeting of the council.



Megan Philpot
ACTING SA OMBUDSMAN

4 July 2014