

Protocol – Ombudsman Enquiry Procedure



(To be read in conjunction with Complaints Handling Policy and Complaints Handling Procedure)

1. Purpose

The purpose of this protocol is to ensure that Councils and Council staff are aware of the procedures applied by the SA Ombudsman's Office in dealing with complaints it receives relating to Councils. It is also intended to facilitate the prompt and proper response by Councils to enquiries or investigations arising from these complaints, to ensure the proper documentation and record-keeping in a Council's records management system and appropriate internal communication through the levels of management.

2. Approval and Change History

Procedure ID	Version	Approval Date	Approval by	Change
Not Applicable	1	22/03/2016	Council	New Procedure

3. Scope

This Procedure applies to Council Members and Council employees responsible for dealing with complaints relating to Council.

4. Definitions

Council refers to the City of Playford Council

Council Employee includes a person employed directly by the Council in a full time, part time or casual capacity (whether that position is permanent or contractual) and persons providing services to, or on behalf of, the Council even though they may be employed by another party.

Principal Member – is the Mayor of the City of Playford

The Ombudsman - safeguards the community in its dealings with Australian Government agencies. The **Ombudsman's** office handles complaints, conducts investigations, performs audits and inspections, encourages good administration, and carries out specialist oversight tasks.

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Before using a printed copy, verify that it is the current version.*

5. Procedure

5.1 Background

- 5.1.1 Under the *Ombudsman Act 1972* the Ombudsman may investigate matters raised by complainants or referred from other sources. Complaints can be made to the office via:
- Personal visit
 - Letter
 - Email contact via the SA Ombudsman's website
<http://www.ombudsman.sa.gov.au/index.php?page=contactus>
 - Telephone.
- 5.1.2 In many cases, an Assessment Officer from the Ombudsman's office undertakes preliminary enquiries to seek further information from the complainant and/or the Council to determine whether there are grounds to commence a full investigation. A preliminary enquiry may include an enquiry by telephone or email to any officer in the Council. These preliminary enquiries are usually directed to the officer directly involved in the matter about which the complaint is made.
- 5.1.3 If, in the first instance, the Assessment Officer considers there is sufficient information and the complaint warrants a full investigation, this may commence without any further preliminary enquiries.
- 5.1.4 If a complainant has not complained first to the Council, it is Ombudsman policy to refer the matter back to the Council in the first instance, to enable the Council to address the complaint. However, depending on the circumstances, this may not be appropriate (for example, a complaint made under the *Whistleblowers Protection Act 1993*).
- 5.1.5 The Ombudsman will always consider whether there are any underlying systemic issues in complaints which warrant investigation and this can lead to the widening of an investigation beyond the particular issue raised by a complainant. There are also issues that arise independently of complaints and investigations of these issues may be conducted on the Ombudsman's own initiative (s.13 (2) of the *Ombudsman Act*).
- 5.1.6 A copy of the investigation framework for Ombudsman's investigations is attached - see **Attachment A**.

5.2 Protocols

- 5.2.1 Subject to the requirements of the *Ombudsman Act*, the Ombudsman can determine the procedure for an investigation. The procedure may therefore vary from case to case. The Ombudsman may also, at any time, decide to attempt to deal with the complaint through conciliation.

Preliminary Enquiries

- 5.2.2 The Ombudsman has no obligation to inform a Council that a preliminary inquiry is being carried out. The Assessment Officer will determine to which Council officer (or officers) they will direct preliminary enquiries.
- 5.2.3 The relevant Council officer should respond to these enquiries promptly, accurately, fully and respectfully, cooperating fully with the Assessment Officer and report the matter to the CEO through their manager.

- 5.2.4 Where a Council officer is unable to respond to the query, or is unsure of the complete answer, the matter should be promptly referred to their manager.
- 5.2.5 All details of the enquiry should be recorded in a file note, including:
- Name and contact details of the Assessment Officer
 - Name and address of the complainant (where known)
 - Information provided to the Assessment Officer
 - Cross references to any other relevant information or Council records
 - Agreed actions and/or outcomes.

[A pro-forma for the suggested file note is at Attachment B]

This is an essential record in the event that the matter progresses to full investigation.

- 5.2.6 The file note should be incorporated into the Council's records management system and a copy provided to your Manager, Senior Manager and General Manager for their information. The CEO should also be informed of the enquiry.
- 5.2.7 Follow up information may be requested by the Assessment Officer by email or phone call. The appropriate Council employee should respond to these requests promptly, fully, accurately and respectfully. A copy of the follow up email and the response should be incorporated into the Council's records management system and a copy provided to the appropriate Manager, Senior Manager and General Manager for their information.

File notes should also be made of the contents of any telephone conversations with the Assessment Officer. The CEO should be informed of the enquiry.

- 5.2.8 All correspondence from the Ombudsman is to be responded to in writing, signed by the CEO.
- 5.2.9 Preliminary inquiries provide an opportunity to clarify the issues and to resolve the matter in the initial stages. A Council should therefore endeavour to provide all relevant materials and information to assist in avoiding escalation to a full investigation.
- 5.2.10 The CEO should use judgement as to whether the preliminary enquiry is likely to identify issues that should be reported to the Council, however Councils position is that reports will not be provided to Council where they are not founded or substantiated.

Full Investigations

- 5.2.11 If a full investigation proceeds, the following procedure sets out a typical example of a process that might be followed. Some of these steps are mandated by legislation, while others are the result of the Ombudsman's policy, which may change from time to time.
- 5.2.12 The Ombudsman must, by law, inform the principal member that an investigation will be commenced. This will usually be done by a letter to the Mayor with a copy to CEO. Sometimes the Ombudsman will direct the Mayor and CEO not to disclose the fact, nature or scope of the investigation to the full Council, if he or she judges that confidentiality is required.

- 5.2.13 The Ombudsman may take the following measures to prevent the disclosure of information to others, and to protect the confidentiality of documentary information:
- The Ombudsman may assert an implied power from section 18(2) and section 18(6)) to require secrecy.
 - The Ombudsman may make an order pursuant to section 16A of the *Royal Commissions Act 1917*
 - The Ombudsman may invoke section 22
 - The Ombudsman may consider section 18(6), which provides that, subject to the Act, the procedure to be adopted in relation to an investigation will be as determined by the Ombudsman.
- 5.2.14 Where the Ombudsman does not make a direction under section 18(6) that the nature of the investigation must be kept confidential, the Mayor should consider whether to inform the full Council. However, before doing so, the Mayor should take the precaution of obtaining the Ombudsman's agreement to that course of action. The information about the Ombudsman's investigation should be provided at an ordinary Council meeting. Depending on the circumstances of the particular investigation, it may be appropriate to provide the information in confidence.
- 5.2.15 Sections 90(3)(a), 90(3)(g) and 90(3)(j) concerning respectively 'personal affairs', 'duty of confidence' and 'disclosure of information provided by a public official' may provide a basis for a Council going into confidence.
- 5.2.16 The letter will usually contain information about the nature of the matter under investigation and will generally include the name of complainant and the nature of complaint (if the investigation is a result of a complaint).
- 5.2.17 The investigation must be conducted in private and may involve multiple requests for further information, by letter, email or telephone. It may also involve interviewing Council Employees, Council Members and members of the public. A person may be interviewed more than once and should provide all relevant information known to the person.
- 5.2.18 Where a complaint involves Council Employees or a Council Member and potentially provides grounds for disciplinary action, the Ombudsman must, by law, advise the Mayor/Chairperson of any evidence of breach of duty or misconduct. As a matter of policy, the Ombudsman will advise in writing. This will enable appropriate internal investigations to proceed as appropriate (note that investigations of an industrial nature do not fall within the Ombudsman's jurisdiction). As a general rule, advice on these matters will be copied to the Council CEO, but this may depend on the nature of the allegations and the identities of the parties involved.
- 5.2.19 Under the rules of procedural fairness, the Ombudsman will allow the staff member or Council Member concerned an opportunity to comment on the allegations, before advising the Mayor.
- 5.2.20 A Council Member who engages legal or other professional advisors, to assist them in responding to a complaint under this policy may have costs up to \$2,500 met by Council. Further costs may be met by resolution of Council.
- 5.2.21 A Council Employee may have access to legal or other professional advisors, to assist them in responding to a complaint under this policy at the discretion of the Chief Executive Officer.

- 5.2.22 Before finalising a report affecting the Council, the Ombudsman must give the Mayor a reasonable opportunity to comment on the subject matter of the report. This provides an opportunity to correct any errors of fact or to provide further information which may mitigate the issues dealt with in the report. For example, if the Council or CEO has taken steps to reform particular procedures or to establish new policies, this should be stated in response to the draft report.
- 5.2.23 It is important for Councils to acknowledge any failings in the administrative system and to learn the lessons inherent in any findings of poor administration. If failings are identified, Council should move to address them immediately rather than waiting for the Ombudsman's final recommendations.
- 5.2.24 The Ombudsman can investigate any 'administrative act' (s.3 of the *Ombudsman Act*) which gives him or her a broad jurisdiction for enquiries. While the Ombudsman cannot investigate policy decisions, he or she can 'look behind' the policy and investigate the administrative decisions that led to the policy.
- 5.2.25 Section 25 of the *Ombudsman Act* sets out the general findings that an investigation can reach. These include findings that an administrative act appears to have been contrary to law, unreasonable, unjust, oppressive, improperly discriminatory or wrong. It is important to note that the Ombudsman can find that an administrative act was in accordance with law, but was nevertheless unreasonable or unjust, etc in its outcome.
- 5.2.26 In general, materials produced by Ombudsman SA should be kept confidential whilst an investigation is underway. When an investigation is completed, the investigation report can be made publicly available. During an investigation Ombudsman SA will seek to ensure that the contents of any letters or reports relating to the investigation are kept confidential.
- 5.2.27 It is an offence to obstruct, hinder or resist the Ombudsman in the exercise of his or her powers (s.24 of the *Ombudsman Act*)

6. Supporting Documentation

- Ombudsman Act 1972
- Independent Commissioner Against Corruption Act 2012
- Complaints Handling Policy
- Complaints Handling Procedure
- Internal Review of Council Decision Procedure
- Whistleblower Policy
- Attachment A – The Ombudsman of SA – Investigations
- Attachment B – Pro Forma File Note

The Ombudsman of South Australia - Investigations

The Ombudsman of South Australia is established by section 6 off the *Ombudsman Act 1972 (the OA)*. Note that unless otherwise indicated, all of the sections referred to in this document are references to the OA. This document does not discuss every section of the OA, only those that concern investigations.

The OA sets out the things that the Ombudsman *must* or *may* do and provides the framework for how the Ombudsman conducts his or her investigations. This document sets out the statutory framework first, and then how it is implemented in an actual investigation.

Preliminary points

- Section 3 empowers the Ombudsman to investigate the *administrative acts of agencies* as defined by the OA. Generally speaking, most South Australian State Government Departments and agencies can be investigated by the Ombudsman. So can local councils. The Ombudsman cannot investigate the South Australian Police; they are investigated by the Police Complaints Authority (phone number 8226 8677). Ministers are not agencies within the meaning of the OA and therefore he or she may not investigate Ministers or Ministers' offices.
- Section 3 provides that **administrative act** means—
 - (a) *an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency; or*
 - (b) *an act done in the performance of functions conferred under a contract for services with the Crown or an agency to which this Act applies,*
but does not include—
 - (c) *an act done in the discharge of a judicial authority; or*
 - (d) *an act done by a person in the capacity of legal adviser to the Crown; or*
 - (e) *an act of a class declared by the regulations not to be an administrative act for the purposes of this definition. (As at 4 August 2008, there are no regulations.)*
- Section 3 also provides that:
act includes—
 - (a) *an omission;*
 - (b) *a decision, proposal or recommendation (including a recommendation made to a Minister of the Crown),*
and the circumstances surrounding an act.
- Section 28 provides that any disputes about whether the Ombudsman has jurisdiction to investigate are decided by the Supreme Court.
- Section 9 empowers the Ombudsman to *delegate* his or her powers to any person. Officers who contact agencies seeking information have been delegated the power to do so under section 9.

- Section 24(a) makes it an offence to, without lawful excuse, obstruct, hinder or resist the Ombudsman or delegate in the exercise or performance of powers or functions under the OA. (Penalty \$2,000.00.)
- Section 24(b) makes it an offence to, without lawful excuse, fail or refuse to comply with any lawful requirement of the Ombudsman or delegate under the OA. (Penalty \$2,000.00.)
- Section 24(c) makes it an offence to, wilfully make any statement that is false or untrue in a material particular to the Ombudsman or delegate under the OA. (Penalty \$2,000.00.)
- The Ombudsman is an impartial investigator; not an advocate for complainants.
- The Ombudsman does not give legal advice, either to agencies or complainants.
- Section 17(3) provides that the Ombudsman must inform the complainant if the Ombudsman decides not to investigate or not to continue an investigation and give reasons for the decision.
- Section 17A provides that any time in an investigation, the Ombudsman may decide to attempt to deal with the complaint by way of conciliation.
- Sometimes, people complain about many issues and some of those issues are more serious than others. When this happens the Ombudsman may not investigate all of the issues, but will decide which are most appropriate and investigate those only.

Royal Commission Act 1917

- Section 19 provides that for the purposes of an investigation, the Ombudsman has the powers of a Royal Commission.
- The Ombudsman may use the powers of a Royal Commission to obtain documents under subpoena and oral evidence under oath or affirmation. If a person gives false evidence under oath or affirmation, he or she commits an offence and could be liable to prosecution.

Procedure on investigation

- Section 18(6) provides that subject to the OA, the procedure to be adopted in the investigation will be as determined by the Ombudsman.
- Section 18(1) provides that the Ombudsman may make a *preliminary investigation* of an administrative act to decide whether a *full investigation* is necessary.
- Section 18(1a) provides that if the Ombudsman proceeds to a *full investigation*, he or she must inform the *principal officer* of the agency. The identity of the *principal officer* is determined by reference to section 3. In the case of a government department, it is the *CEO*. In the case of a local council, it is the principal member of the council that is the Mayor or Chairperson.
- Section 18(3) provides that the Ombudsman is not required to hold a hearing but may do so. He or she may obtain evidence from such persons and in such manner as the Ombudsman sees fit and may determine whether any person to whom the investigation relates may have legal or other representation.

- Section 18(2) provides that every Ombudsman investigation is to be conducted in *private*.
- Section 22 provides that it is an offence (penalty \$2,000.00) for information obtained by or on behalf of the Ombudsman in the course of or for the purposes of an investigation to be disclosed *except for the purpose of the investigation and of any report or recommendation to be made under the OA or for the purposes of any proceedings under the Royal Commissions Act 1917*.
- Section 27(1) provides that the Ombudsman must inform the complainant of the result of an investigation.
- Section 27(2) provides that if a complaint is investigated, *and* the Ombudsman makes a recommendation, *and* the Ombudsman is of the opinion that reasonable steps have not been taken to implement the recommendation within a reasonable time, the Ombudsman must inform the complainant of that opinion and may make other comments *that appear appropriate in the circumstances*.
- Section 26 provides that the Ombudsman may have a report of an investigation published, in such manner as he/she thinks fit, if the Ombudsman considers it to be in the public interest or in the interests of the agency.
- Section 18(4) provides that before making a report *affecting* an agency, the Ombudsman must allow the principal officer a reasonable opportunity to comment on the subject matter of the report.
- Section 18(5) provides that the Ombudsman must report, to the principal officer of the agency, *any evidence of breach of duty or misconduct on the part of a member, officer or employee of the agency*.
- Section 19A provides that the Ombudsman may issue a notice requiring an agency to refrain from taking action in relation to a particular *administrative act*.

Recommendations

- Section 25(1) provides that if the Ombudsman investigates, and is of the opinion that the *administrative act* to which the investigation relates amounts to *maladministration*, the Ombudsman may make one or more of the *recommendations* listed in section 25(2).
- *Maladministration* is the shorthand used by the Ombudsman to describe the range of conduct that he or she investigates.
- Section 25(1) does not use the word *maladministration* but instead lists the type of defects in *administrative acts* that activate the recommendation making power in section 25(2). Section 25(1) identifies the defects as follows:
 - (a) *appears to have been made contrary to law; or*
 - (b) *was unreasonable, unjust, oppressive or improperly discriminatory; or*
 - (c) *was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or*

- (d) *was done in the exercise of a power or discretion and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations; or*
 - (e) *was done in the exercise of a power or discretion and the reasons for the act were not but should have been given; or*
 - (f) *was based wholly or in part on a mistake of law or fact; or*
 - (g) *was wrong.*
- Section 25(2) provides that: *In the case of an investigation to which this section applies in which the Ombudsman is of the opinion—*
 - (a) *that the subject matter of the investigation should be referred back to the appropriate agency for further consideration; or*
 - (b) *that action can be, and should be, taken to rectify, or mitigate or alter the effects of, the administrative act to which the investigation related; or*
 - (c) *that the practice in accordance with which the administrative act was done should be varied; or*
 - (d) *that any law in accordance with which or on the basis of which the action was taken should be amended or repealed; or*
 - (e) *that the reason for any administrative act should be given; or*
 - (f) *that any other steps should be taken,*

the Ombudsman must report that opinion and the reasons for it to the principal officer of the relevant agency and may make such recommendations as the Ombudsman thinks fit.
 - Section 25(3) provides that where the Ombudsman makes a recommendation under section 25(2), the Ombudsman must provide a copy of *any report or recommendation under subsection (2) to the responsible Minister and in the case of a report or recommendation relating to the sheriff, to the Courts Administration Authority.*
 - The Ombudsman may ask the agency to report back on implementation of the recommendations (section 25(4)). If the agency does not implement them within a reasonable time, the Ombudsman may report the matter to the Premier and to both Houses of Parliament with a request that the report be tabled (sections 25(5) and (6)).

[SA Ombudsman - 4 November 2008]

CITY OF PLAYFORD

FILE NOTE – Enquiry from Ombudsman’s Office



FROM: Author

DATE OF ENQUIRY: Date

**NAME OF
COMPLAINANT:**

**ISSUE UNDER
INVESTIGATION:**

**ASSESSMENT
OFFICER:**

**COUNCIL FILE
REFERENCE:**

[Insert text here:

- Details of enquiry
- Name and address of the complainant (where known)
- Name and contact details of the Assessment Officer
- Information provided to the Assessment Officer
- Cross references to any other relevant information or Council records
- Agreed actions and/or outcomes.]

Noted:

	<i>Initial</i>	<i>Date</i>
Manager		
Senior Manager		
General Manager		
CEO		