



DISTRICT COUNCIL OF

Streaky Bay

Policy Document

OMBUDSMAN'S ENQUIRY POLICY

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Classification:
Community Relations

Strategic Plan Link:

1.3 – Ensure Council fulfills its legislated governance responsibilities and its decision-making is supported by relevant policies and codes.

References and related Policies & Procedures:

Independent Commissioner Against Corruption Act 2012

Local Government Act 1999

Ombudsman Act 1972

Ombudsman Regulations 2020

Public Interest Disclosure Act 2018

Royal Commissions Act 1917

DCSB-G-09.01 Code of Conduct for Council Members

DCSB-G-09.10 Complaints Handling Procedure under Council Members Code of Conduct

DCSB-CR-02.01 Customer Complaints Policy

DCSB-G-09.12 Elected Members Records Management Policy

DCSB-HR-12.02 Employee Code of Conduct Policy

DCSB-G-09.08 Fraud, Corruption, Misconduct and Maladministration Prevention Policy

DCSB-HR-PROC-12.08 Managing Unsatisfactory Performance Guidelines

DCSB-HR-12.00 Performance Management Framework

DCSB-IFM-13.06 Digitisation and Disposal of Temporary Source Records Policy

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1. Definitions

CEO – means the Chief Executive Officer of Council

Council – means the District Council of Streaky Bay

ICAC Act – means the *Independent Commissioner Against Corruption Act 2012*

LG Act – means the *Local Government Act 1999*

Maladministration – has the same meaning as described in section 5 of the *ICAC Act* and section 26 of the *OA*.

PID Act – means the *Public Interest Disclosure Act 2018*

The OA – means the *Ombudsman Act 1972*

2. Purpose

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

3. Background Information

- 3.1 Under the *Ombudsman Act 1972*, the Ombudsman may investigate matters raised by complainants or referred from other sources. Complaints may be made to the office via:
- personal visit;
 - letter;
 - online via the SA Ombudsman's website <https://www.ombudsman.sa.gov.au/complaints/make-a-complaint/>; or
 - telephone (08 8226 8699 or Toll Free 1800 182 150).
- 3.2 In many cases, an Assessment Officer from the Ombudsman's office undertakes preliminary enquiries to seek further information from the complainant and/or 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.
- 3.3 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.
- 3.4 If a complainant has not complained first to 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 *Public Interest Disclosure Act 2018*).

- 3.5 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 OA).
- 3.6 An outline of the investigation framework for Ombudsman's investigations is attached - see [Attachment A](#).

4. Protocols

- 4.1 Subject to the requirements of the OA, 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

- 4.2 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.
- 4.3 The relevant Council officer should respond to these enquiries promptly, accurately, fully and respectfully, co-operating fully with the Assessment Officer and report the matter to the Chief Executive Officer (CEO) through the appropriate manager.
- 4.4 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 the relevant team leader or departmental manager.
- 4.5 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; and
 - 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.

- 4.6 The file note should be incorporated into Council's records management system and a copy provided to your Manager [and Departmental Manager] for their information. The CEO should also be informed of the enquiry. It is important to note that the name of the Complainant is protected under the PID Act and should not be disclosed more widely than is **absolutely necessary** to allow the investigation to take place.
- 4.7 Follow up information may be requested by the Assessment Officer by email or phone call. The appropriate Council officer should respond to these requests promptly, fully, accurately and respectfully. A copy of the follow up email and the response should be incorporated into Council's records management system and a copy provided to the appropriate Manager [and Departmental 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.

- 4.8 All correspondence from the Ombudsman is to be responded to in writing, signed by the CEO [or relevant Departmental Manager]
- 4.9 Preliminary inquiries provide an opportunity to clarify the issues and to resolve the matter in the initial stages. Council should therefore endeavour to provide all relevant materials and information to assist in avoiding escalation to a full investigation.
- 4.10 The CEO should use judgement as to whether the preliminary enquiry is likely to identify issues that should be reported to the Elected Body.

Full Investigations

- 4.11 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.
- 4.12 The Ombudsman must, by law, inform the CEO / Mayor that an investigation will be commenced. This will usually be done by a letter to the CEO / Mayor. Sometimes the Ombudsman will direct the CEO / Mayor not to disclose the fact, nature or scope of the investigation to the full Elected Body if the Ombudsman judges such confidentiality is required.
- 4.13 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 19) to require secrecy.
 - The Ombudsman may make an order pursuant to section 16A of the *Royal Commissions Act 1917*
 - The Ombudsman may invoke section 20
 - 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.
- 4.14 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 Elected Body. 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. sections 90(3)(a), 90(3)(g) and 90(3)(j) of the LG Act 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.
- 4.15 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).
- 4.16 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

staff, Elected Members and members of the public. A person may be interviewed more than once and should provide all relevant information known to the person.

- 4.17 Where a complaint involves Council staff or an Elected Member and potentially provides grounds for disciplinary action, the Ombudsman must, by law, advise the Mayor 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 CEO, but this may depend on the nature of the allegations and the identities of the parties involved.
- 4.18 Under the rules of procedural fairness, the Ombudsman will allow the staff member or Elected Member concerned an opportunity to comment on the allegations, before advising the Mayor/CEO.
- 4.19 Before finalising a report affecting the Elected Body, 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 Elected Body or CEO has taken steps to reform particular procedures or to establish new policies, this should be stated in response to the draft report.
- 4.20 It is important for Council 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.
- 4.21 The Ombudsman can investigate any 'administrative act' (s.3 of the OA) which gives the Ombudsman a broad jurisdiction for enquiries. While the Ombudsman cannot investigate policy decisions, they can 'look behind' the policy and investigate the administrative decisions that led to the policy.
- 4.22 Section 25 of the OA sets out the general findings that an investigation may 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 may find that an administrative act was in accordance with law, but was nevertheless unreasonable or unjust, etc in its outcome.
- 4.23 In general, materials produced by Ombudsman SA should be kept confidential whilst an investigation is underway. When an investigation is completed, the investigation report may be made publicly available. During an investigation Ombudsman SA will seek to ensure the contents of any letters or reports relating to the investigation are kept confidential.
- 4.24 It is an offence to obstruct, hinder or resist the Ombudsman in the exercise of their powers (s.24 of the OA).

5. Records

- 5.1 All records shall be kept and disposed of in accordance with Council's Records Management Policy & Procedure, the current General Disposal schedule.

6. Review and Evaluation

- 6.1 This policy will be updated at least every 4 years or sooner should legislative change require review.

7. Further Information and Policy Availability

This policy will be available for inspection at the Council offices listed below during ordinary business hours and available to be downloaded, free of charge, from Council's internet site: www.streakbay.sa.gov.au

District Council of Streaky Bay
29 Alfred Tce
Streaky Bay SA 5680

Copies will be provided to interested parties upon request. Email dcstreaky@streakybay.sa.gov.au

8. Version Details

VERSION	DATE ADOPTED	MINUTE BOOK NUMBER
V2.0	16 March 2017	74/17
V2.0	17 September 2020	XXXX

Attachment A – Investigations by the Ombudsman

The Ombudsman of South Australia is established by section 6 of the **The OA**.

Note: unless otherwise indicated, all the sections referred to in this attachment are references to the OA. This attachment 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 attachment sets out the statutory framework first, and then how it is implemented in an actual investigation.

Preliminary points

- Part 3 of The OA empowers the Ombudsman to investigate the *administrative acts of agencies* as defined by The OA. In this instance, this means the Ombudsman may investigate and administrative act of Council

- 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 an agency to which this Act applies; 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 9 empowers the Ombudsman to *delegate* their powers to any person. Officers who contact agencies seeking information have been delegated the power to do so under section 9.
- 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.
- 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.)
- Section 28 provides that any disputes about whether the Ombudsman has jurisdiction to investigate are decided by the Supreme Court.
- The Ombudsman is an impartial investigator, not an advocate for complainants.
- The Ombudsman does not give legal advice, either to agencies or complainants.
- 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. In the case of the administrative arm of Council, this is the CEO. In the case of the Elected Body, the principal member is the Mayor.
- Section 18(3) provides that the Ombudsman is not required to hold a hearing but may do so. The Ombudsman 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 26(1) 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 administration of the OA or for the purposes of any proceedings under the OA or the Royal Commissions Act 1917*. Further exemptions apply where authorised by the Ombudsman or where disclosure is for the purposes of the performance of official function of an agency to which the OA applies or their statutory office holders.
- 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 (3) provides that the Ombudsman may have a report of an investigation published, in such manner as they think 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 performing a particular *administrative act* for a period to be specified in the notice.

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 defined in section 5 of the ICAC Act. It is more broadly defined in the OA Act in section 25(1)(a) to (g).
- 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*. In this case the Minister for Local Government. .
- 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)).

Attachment B – File Note

DISTRICT COUNCIL OR STREAKY BAY

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		
Group Manager		
CEO		