

**INQUIRY INTO PERFORMANCE OF THE NSW  
ENVIRONMENT PROTECTION AUTHORITY**

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Partially Confidential

**Submission by Beverley Trevenen to the Legislative Council  
General Purpose Standing Committee No.5  
Performance of the New South Wales Environment Protection Authority Inquiry.**

This submission questions the number of community complainants in documents of record regarding the investigation of an alleged offensive odour incident at North Head Sanctuary, Manly in February 2010. The goodwill displayed by all the odour complainants, in giving their time to EPA officers investigating the incident, is a valuable asset for the protection of the environment.

Six people attending a North Head Sanctuary Foundation meeting (NHSF) at the Gatehouse, North Head Sanctuary, Manly, reported to the EPA an offensive odour they encountered on 24 February 2010, they believed the odour emanated from the North Head Wastewater Treatment Plant (NHWWTP). A resident, not at the NHSF meeting who was approximately 1.5 km from the NHWWTP, reported the odour encountered 24 February 2010 directly to the NHWWTP.

The Department of Environment, Climate Change and Water (DECCW) commenced an investigation into the odour incident 25 February 2010. EPA investigators interviewed complainants and were provided with sworn affidavits by the odour complainants. Eleven months later the complainants were disappointed to receive advice in DOC10/57265 dated 25 January 2011 from the Director General, DECCW,

advising “...that the evidence does not establish the cause of the odour that is the subject of your complaint.”

“...the evidence does not establish beyond reasonable doubt that there has been a breach of the relevant provisions of the legislation administered by DECCW”.

A response for the six complainants who had attended the NHSF meeting was forwarded to the Director General, DECCW, February 2011 requesting a review of the decision. When no response was received from DECCW a complaint was forwarded to the NSW Ombudsman in April 2011 regarding EPA's investigation into the odour they encountered 24 February 2010.

After preliminary inquiries the NSW Ombudsman decided to formally investigate the complaint. Extracts below from the Ombudsman Report pages 7 and 9 respectively, details the number of complaints and sworn affidavits received by EPA regarding the odour incident of 24 February 2010.

**“The complaints**

*On 25 February 2010 the EPA received six complaints via its environment line about an alleged odour incident on 24 February 2010 between 6 and 9pm. The odour incident was believed to have emanated from the NHWWTP, which was operated by the Sydney Water as part of the licensed Northern Suburbs Sewage Treatment System (Environmental Protection Licence EPL378) due to its proximity and there being no other obvious source of odour. All six complainants were in a meeting of the North Head Sanctuary Foundation (NHSF) at the Gatehouse at the former School of Artillery at North Head (approximately 500m west of the NHWWTP). A further complaint was received directly by the NHWWTP from a resident approximately 1.5 km away from the NHWWTP”.*

*“The investigation included some of the following key inquiries and actions:*

- obtaining seven sworn affidavits from witnesses and two witness statements from two witnesses not present at the meeting at NHSF;...”*

On reading the Ombudsman Report I was puzzled and concerned that there was no reference in EPA information to the Report either as a number, or by location, regarding the complaint made by the resident approximately 1.5 km from NHWWTP. The Ombudsman Report records statements by EPA officers regarding complaint numbers as '5' and '5 to 6 complaints' [page 14] and 'a group of people in an otherwise unpopulated area'. [page 15]. My perception was that the resident's complaint of the odour encountered at his home on 24 February 2010, along with information provided by the six people who attended the NHSF meeting would have been vitally important to EPA's scientific investigation of the odour origin.

My concern led me to submit to the Office of Environment and Heritage a Government Information Public Access (GIPA 417) application on 12 May 2014 as follows:  
*"I am making this access application under the Government Information (Public Access) Act 2009 all documents of all interviews conducted by EPA with the complainants after they had reported an odour at North Head on 24 February 2010, in addition all documents and information which were then considered in order to make the statements below that are recorded in the 'NSW Ombudsman: Results of investigation into the EPA, August 2013'.*  
*'In an email to the Deputy Director-General and Manager Litigation on 30 June 2010, the Director-General described the discussion with Sydney Water's Managing Director as follows:*

*North Head investigation - Kerry's perspective is...*

*'...they have only had 16 odour complaints this year and the 5 that have come in are all from a group of people who were at the same meeting (and discussed it)....*

*From submission by :*

*'The information I had available to me at that time was that this was an odour incident, reported as 5 to 6 complaints from people in the same meeting that there were not corresponding complaints from surrounding residents, ... (page 14)*

*From an email to the Chief Investigator the Manager Litigation stated: 'I think it is important to keep the incident in perspective. It is an odour incident, not a toxic gas incident but odours. Also, it is unlike a lot of past odour cases we've prosecuted. Those past matters involved residential areas and residents being impacted night after night or something similar. With this matter it involves a group of people in an otherwise unpopulated area being impacted once. (page 15)'*

As a consequence of GIPA417, documents were released on 18 June 2014 that included notes and sworn affidavits 'Form 40 (version 1) UCPR 35.1' provided by the six odour complainants who had attended the NHSF meeting at the North Head Sanctuary. Clearly, my request for "... all documents of all interviews conducted by EPA with the complainants after they had reported an odour at North Head on 24 February 2010..." had not been addressed by the documents released, I exchanged emails with the GIPA officer specifically for documentation relating to the resident's complaint – text of the emails follows:

I emailed 26 June 2014 to the GIPA officer:

*"The NSW Ombudsman Investigation of August 2013 states:*

*page 7 That EPA received six complaints via its environmental line and a further complaint was received by the NHWWTP from a resident 1.5km away from the NHWWTP.*

*There were 19 people at the NHSF meeting - EPA investigators contacted 13 attendees and six provided sworn affidavits.*

*page 9 – "The investigation included - Obtaining seven sworn affidavits from witnesses. There are six affidavits in the documents I have received, are you able to provide me with the seventh affidavit?"*

On 27 June 2014 the GIPA officer responded:

*"Thank you for your inquiry.*

*After receiving your email, I made further inquiries with the search area and have ascertained the following information:*

*Page 7 of the Ombudsman's investigation report is correct; however, page 9 is not accurate. Only six of the seven statements were sworn, I understand the seventh statement is only a draft and unsigned. It is also likely that the draft statement would be legally privileged as it was created for use in legal proceedings."*

I emailed on 30 June 2014 the GIPA officer:

*"The NSW Ombudsman investigation of August 2013 report agrees with what you have written below [above] that only 6 attendees at the NHSF provided sworn affidavits.*

*Page 9 - The investigation included - obtaining seven sworn affidavits from witnesses - refers to the total sworn affidavits from witnesses.*

*Was a resident 1.5 km from NHWWTP the provider of the seventh sworn affidavit?"*

The GIPA officer responded on 30 June 2014:

*"I have not been provided with a copy of the un-sworn statement, but I understand from my conversations with Legal Services Division that the 7<sup>th</sup> person interviewed was a resident.*

On 30 June 2014 I sent a lengthy email, hoping to receive some documentation that acknowledged the resident's complaint:

*"Thanks for your response.*

*I am not seeking an un-sworn affidavit or information concerning the person who made the un-sworn affidavit regarding the odour incident 24 February 2013[should be 2010].*

*Rightly or wrongly, I consider the NSW Ombudsman: Results of Investigation into the EPA, August 2013, in references to affidavits includes only sworn affidavits.*

*My access application requested "All documents of all interviews conducted by EPA with the complainants after they had reported an odour at North Head on 24 February 2010, in addition all documents and information which were then considered in order to make the statements below that are recorded in the 'NSW Ombudsman: Results of Investigation into the EPA, August 2013'.*

*It is recorded in the NSW Ombudsman [Investigation]: Results of Investigation into the EPA, August 2013 that an odour complaint was made 24 February 2013 [should be 2010] to NHWWTP by a resident 1.5 km from the plant - this is supported in GIPA417 documents released page 10 that on 24 February at approximately 6.45pm Sydney Water received one complaint via telephone from a nearby resident of odours from the STP. This complaint was notified to the DECCW officer ( ) on 25 February 2010.*

*Would you advise me if I need to make another access application regarding the following question?*

*Is there a sworn affidavit or documentation available from interviews conducted by EPA officers with the resident complainant located approximately 1.5km from NHWWTP who was not attending the NHSF meeting?"*

On 4 July 2014 the GIPA officer responded:

*"I regret the delay in responding.*

*Please find my Notice of Further Decision attached".*

The Notice of Further Decision for GIPA417 – EPA157 stated access refused.

Extracts from the further decision:

*"Notice of Decision made 18 June 2014*

*A total of 83 pages were released to you, in part on 18 June 2014; however, as indicated by you, these pages did not adequately respond to your application.*

*A number of email exchanges on 26, 27 and 30 June 2014 established that further records may exist that have not been provided in response to your application. In particular you requested a response to the following:*

*‘Is there a sworn affidavit or documentation available from interviews conducted by EPA officers with the resident complainant located approximately 1.5km from NHWWTP who was not attending the NHSF meeting?’*

*“Relevant searches for information*

*After receiving your query as to whether additional records exist, further searches were made and this has resulted in an additional three pages being located.”*

*“Further decision*

*My decision is to **refuse** you access to the information contained in these records, as it contains information which is considered to be subject to legal professional privilege.*

*Legal Professional Privilege*

*The three identified pages consist of information obtained from a resident who made a complaint about the odour at North Head on 24 February 2010. The pages were created for preparing for, or use, in legal proceedings that were reasonably anticipated at the time.*

*As the information has been identified as legally privileged, there is a conclusive presumption of an overriding public interest against disclosure and access to these records is refused.”*

What, were the affidavits provided to EPA by the six people who attended the NHSF meeting, released in response to GIPA417 on June 2014, prepared for if not for, or use, in legal proceedings that were reasonably anticipated at the time? The affidavits all have the same Court Details, Title of Proceedings and Filing Details. Three affidavits were sworn 22 July 2010, two were sworn 23 September 2010 and one was sworn 15 October 2010 by the six people who attended the NHSF meeting.

After the GIPA officer’s notice to deny access, I expressed my concerns to the resident complainant regarding process and record that acknowledged six complainants. He indicated to me that he had not received a request to allow the release of his documents and he provided me with copies of his communications with EPA regarding the odour encountered 24 February 2010, a three page sworn affidavit ‘Form 40(version 1) UCPR 35.1’ dated September 2010 one month before the investigation was terminated, EPA’s letter DOC10/57265 of 25 January 2011 and his response to that letter dated 10 February 2011.

The resident’s complaint process:

- He complained about sewage odours encountered 24 February 2010 to NHWWTP.
- A NHWWTP officer reported the resident’s odour complaint to EPA 25 February 2010.
- EPA investigators conducted interviews with the resident.
- EPA investigators obtained a sworn Affidavit from him dated September 2010.
- The resident received a letter dated 25 January 2011 DOC10/57265 from the Director General, EPA, identical to the letters received by the six odour complainants “...that the evidence does not establish the cause of the odour that is the subject of your complaint.”  
“...the evidence does not establish beyond reasonable doubt that there has been a breach of the relevant provisions of the legislation administered by DECCW”
- The resident promptly responded to the Director General, DECCW, on 10 February 2011 vigorously reiterating his claims regarding the origin of the odour encountered 24 February, 2010, extracts from the resident’s letter:

*“It has been a long time since DECCW contacted me to begin the investigation of odours emanating from North Head STP, and a long time since I provided a Statutory Declaration, following the interviews conducted by your staff.*

*I cannot determine whether there has been a breach of the relevant provisions of the legislation...I can say categorically that the odours we experienced on that day are the same odours that we have experienced at other times and definitely come from the North Head STP.*

*You are in charge of our environment and we will appreciate your diligence, despite the political fallout."*

Extracts below from two versions of an EPA document, in which EPA acknowledges six complaints regarding the odour encountered 24 February 2010 at North Head, Manly.

*"Internal Working Document*

*1 of 4*

**ISSUE**

**REVIEW OF EPA INVESTIGATION AT NORTH HEAD  
STP BY THE NSW OMBUDSMAN**

**ELECTORATE(S)**

**Manly**

**KEY POINTS**

- *On 26 February 2010, the Environment Protection Authority (EPA) received six complaints odours allegedly emitted from the North Head Sewage Treatment Plant (STP) operated by Sydney Water Corporation. [page 1]*

**SUGGESTED RESPONSE**

- *The EPA responded immediately to six complaints it received from the Manly community on 25 February 2010 about odours that were allegedly emitted from the North Head Sewage Treatment Plant operated by Sydney Water.[page 2]*

*Date created 4 September 2013*

*Factual Content Endorsed by:"*

There is an amended version of the "REVIEW OF EPA INVESTIGATION AT NORTH HEAD STP BY THE NSW OMBUDSMAN

**KEY POINTS**

- *Following receipt of complaints regarding odours from North Head Sewage Treatment Plant operated by Sydney Water Corporation, the EPA undertook, a detailed investigation, which was formally completed with the decision not to prosecute Sydney Water.*

**SUGGESTED RESPONSE**

- *The EPA responded immediately to six complaints it received from the Manly community on 25 February 2010 about odours that were allegedly emitted from the North Head Sewage Treatment Plant operated by Sydney Water.*

*Date Created: 4 September 2013*

*Date Amended: 10 September 2013*

*Factual Content Endorsed by:"*

EPA responded with identical letters to seven complainants regarding the odour incident of 24 February 2010.

EPA had at least five records (apart from any involvement in EPA's scientific investigations) regarding the complaint by the resident.

Clearly, the odour of 24 February 2010 reached residential area contrary to EPA's Manager Litigation statement.

Is there discrimination between complaints direct to EPA versus complaints direct to NHHWTP?

Did restricting the odour incident to six complainants at one location change the status of EPA's odour investigation?

## 6. Objectives of the Authority

(1) The objectives of the Authority are:

- Promoting community involvement in decisions about environmental matters,

Is the complaint by the resident 1.5 km from NHWWTP covered by the above objective for inclusion in record?