

 Wattle Range COUNCIL	POLICY 1.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

1. STATEMENT

This Code sets out the commitment of Wattle Range Council to provide public access to Council and Council Committee meetings and associated documents and outlines the policies, procedures and practices contained within the *Local Government Act 1999*, to restrict public access.

The Code includes:

- information on the relevant provisions of the *Local Government Act 1999*;
- Council's policy on public access and participation;
- the process that will be adopted where public access to a meeting or a document is restricted;
- grievance procedures to be followed if a member of the public believes that the Council has unreasonably restricted public access on a particular matter.

2. DEFINITIONS

Clear Days means the time between the giving of the notice and the day of the meeting, but excluding both the day on which the notice was given and the day of the meeting, e.g. notice is given on a Thursday for a following Monday meeting, the clear days are Friday, Saturday and Sunday.

3. PRINCIPLES

3.1 Scope

This Code sets out the policy of Council for access to meetings and documents and includes information relating to:

- access to the agenda for meetings;
- public access to meetings;
- the process to exclude the public from meetings;
- matters for which the Council, or a Council Committee, can order that the public be excluded;
- how the Council will approach the use of the confidentiality provisions in the Act;
- public access to documents, including minutes;
- review of confidentiality orders;
- accountability and reporting to the community, and the availability of the code; and
- grievances about the use of the code by Council.

Wattle Range Council supports the principle that the procedures to be observed at a meeting of Council or a Council Committee should contribute to open, transparent and informed decision-making and encourage appropriate community participation in the affairs of the Council.

3.2 Public Access to the Agenda for Meetings

3.2.1 Written Notice

At least three clear days before the Council or Council Committee meeting (unless it is a special meeting) the Chief Executive Officer (CEO) must give written notice of the meeting to all Council/Committee members setting out the date, time and place of the meeting. The notice must contain or be accompanied by the agenda for the meeting.

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY 1.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

3.2.2 Public Display of Notices

The notice of meeting and agenda will be placed on public display at each office of the Council that is open to the public for the general administration of Council business within its area at the following addresses:

- Millicent Office – ‘Civic Centre’ George Street, Millicent
- Beachport Office – Millicent-Beachport Road, Beachport
- Penola Office – 27 Arthur Street, Penola

The notice of meeting and agenda will also be placed on Council's website www.wattlerange.sa.gov.au.

3.2.3 Content of Notices

Items listed on the agenda will be described accurately and in reasonable detail.

3.2.4 Period of Public Display of Notices

The notice and agenda will be kept on public display and continue to be published on the website until the completion of the relevant Council or Council Committee meeting.

3.2.5 Copies of Documents for Members of the Public in Attendance

Copies of the agenda documents and non-confidential reports that are to be considered at the meeting will be made available to members of the public in attendance. A reasonable number of copies will also be available for public inspection as soon as practicable after they are supplied to the Members of Council.

3.2.6 Copies of Documents for Members of the Public

Members of the public may obtain a copy of the agenda and any particular reports for a fee to cover the costs of photocopying, in accordance with a Council's schedule of fees and charges.

3.2.7 Documents Relating to Matters to be Considered in Confidence

Where the CEO of the Council (after consultation with the principal member of the Council, or in the case of a Committee - the presiding member) believes that a document or report on a particular matter should be considered in confidence with the public to be excluded, the basis under which the order could be made in accordance with section 90(3) of the Act will be specified. [see sections 83(5) (Council) and 87(10) (Committee) of the Act.]

3.3 Public Access to Meetings

Council and Council Committee meetings are open to the public and attendance is encouraged, except where the Council (or the Council Committee) believes it is necessary in the broader community interest to exclude the public from the discussion (and, if necessary, decision) of a particular matter.

The public will only be excluded when considered proper and necessary i.e. the need for confidentiality outweighs the principle of open decision-making.

Council encourages public attendance at meetings of the Council and Committees through public notification of meetings by notice on Council's Website and in Principal Council Offices.

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY 1.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

In accordance with section 90 of the Act, it is not unlawful for Members of Council, Committee members and staff to participate in **informal gatherings** or discussion.

Informal gatherings will not be used for the purpose of conducting the general business of the Council or to stifle debate on issues that may subsequently be dealt with by the Council at a formal meeting. However informal gatherings may be used to discuss issues that involve strategy or policy or other matters of Council administration and to brief Council members on issues relating to their decision-making function.

At informal gatherings elected members cannot make an actual or purported decision or issue a direction to staff. Council recognises that formal decision-making may, legally, only occur at formal meetings of the Council or otherwise pursuant to the Council's scheme of delegation. Section 90(8) of the *Local Government Act* provides a list of examples of informal gatherings, namely:

- Planning sessions associated with the development of policies or strategies
- Briefing or training sessions
- Workshops
- Social gatherings to encourage informal communication between members or between members and staff.

Informal gatherings may also involve:

- Exchanging draft information on proposals that are being worked on by staff or ideas that need to be investigated.
- Providing a forum for discussion on proposed staff initiatives and discuss options for engaging the community in determining Council's strategic corporate direction.
- Assisting Elected Members & executive staff in team building.
- Helping develop trust and understanding between those who attend workshops.
- Receiving briefings including information from community organisations, businesses, Council programs, the Local Government Association (South Australia) and State Government Departments.

Both the CEO and the Elected Members are responsible for ensuring informal gatherings and discussions are conducted in accordance with *the Local Government Act*.

3.4 Process to Exclude the Public from a Meeting

The practice of the Wattle Range Council is as follows:

For the convenience of the public present at a meeting, where it is resolved to consider a matter in confidence, this matter may be deferred until all other business has been dealt with rather than ask the public to leave the room and wait for however long it takes until the matter is concluded and then allow the public to return to the meeting room with the possibility of the same process being repeated for a subsequent matter.

Before a meeting orders that the public be excluded to enable the receipt, discussion and consideration of a particular matter, the meeting must, in public, formally determine if this is necessary and appropriate, and then pass a resolution to exclude the public while dealing with that particular matter. If this occurs then the public must leave the room. This means that all members of the public (including staff), unless exempted by being named in the resolution as

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY I.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

entitled to remain, are required to leave the room. For the operation of section 90(2) a member of the public does not include a member of Council.

Once Council, or a Council Committee has made the order, it is an offence for a person, who knowing that an order is in force, enters or remains in a room in which such a meeting is being held. It is lawful for an employee of Council or a member of the police to use reasonable force to remove the person from the room if he or she fails to leave on request.

Once discussion on that particular matter is concluded, the public are then permitted to re-enter the meeting. If there is a further matter that needs to be considered in confidence it is necessary to again undertake the formal determination process and to resolve to exclude the public as above.

Please note that the Council, or the Council Committee, can by inclusion within the resolution permit a particular person or persons to remain in the meeting. An example would be allowing a ratepayer who is suffering personal hardship to remain in the meeting when their circumstances concerning the payment of rates is being discussed.

3.5 Matters from Which the Public Can Be Excluded

In accordance with the requirements of section 90(3) of the Act, Council, or a Council Committee, may order that the public be excluded in the following circumstances:

- (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
- (b) information the disclosure of which—
 - (i) could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Council; and
 - (ii) would, on balance, be contrary to the public interest;
- (c) information the disclosure of which would reveal a trade secret;
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which—
 - (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
 - (ii) would, on balance, be contrary to the public interest;
- (e) matters affecting the security of the Council, members or employees of the Council, or Council property, or the safety of any person;
- (f) information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial;
- (g) matters that must be considered in confidence in order to ensure that the Council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;
- (h) legal advice;

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY I.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

- (i) information relating to actual litigation, or litigation that the Council or Council Committee believes on reasonable grounds will take place, involving the Council or an employee of the Council;
- (j) information the disclosure of which—
 - (i) would divulge information provided on a confidential basis by or to a Minister of the Crown, or another public authority or official (not being an employee of the Council, or a person engaged by the Council); and
 - (ii) would, on balance, be contrary to the public interest;
- (k) tenders for the supply of goods, the provision of services or the carrying out of works;
- (l) information relating to a proposed amendment to a Development Plan under the *Development Act 1993* before a Plan Amendment Report relating to the amendment is released for public consultation under that Act; or
- (m) information relating to a proposed amendment to a Development Plan under the *Development Act 1993* before a Development Plan Amendment proposal relating to the amendment is released for public consultation under that Act;
- (n) information relevant to the review of a determination of a Council under the *Freedom of Information Act 1991*.

The Act provides for a definition of “personal affairs”, being a person’s financial affairs, criminal records, marital or other personal relationships, personal qualities, attributes or health status, or that person’s employment records, employment performance or suitability for a particular position, or other personnel matters relating to the person, but does not include the personal affairs of a body corporate.

In considering whether an order should be made under section 90(2), it is irrelevant that discussion of a matter in public may:

- cause embarrassment to the Council or Committee concerned, or to members or employees of the Council; or cause a loss of confidence in the Council or Committee. [s.90(4)]

If a decision to exclude the public is taken, the Council or the Council Committee is required to make a note in the minutes of the making of the order and the grounds on which it was made. Sufficient detail of the grounds on which the order was made will be included in the minutes.

3.6 Public Access to Minutes

Minutes of a meeting of Council or a Council Committee will be publicly available, including on the internet, within 5 clear days after the meeting.

3.7 Use of the Confidentiality Provisions

Any consideration of the use of the confidentiality provisions to exclude the public from the discussion of a particular matter at a meeting will require the identification of one or more of the grounds listed within section 90(3) of the Act and the factual reasons for the relevance and application of the ground(s) in the circumstances. These are listed in paragraph 7 of this Code.

The policy approach of the Wattle Range Council is that:

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY I.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

1. The principle of open and accountable government is strongly supported;
2. Information of the grounds on which an order to exclude the public is made will be conveyed to the public at the time of them being ordered to leave the meeting – the public will not be excluded until after a confidentiality motion has been debated and passed and sufficient reasons for the need to exclude the public given;
3. Once discussion of the matter is concluded, the meeting will then consider if it is necessary to make an order that a document associated with this agenda item (including minutes) remain confidential. In determining this, the meeting will have regard to the provisions of section 91 and in particular section 91(8) which details when a Council must not order that a document remain confidential;
4. If the meeting determines that it is proper and necessary to keep a document confidential, then a resolution for an order to this effect is required to be resolved by the meeting in accordance with section 91(7) of the Act;
5. The Council will not consider a number of agenda items “in confidence” together i.e. one block. It will determine each item separately and consider the exemptions relevant to each item.
6. Once discussion of the matter is concluded and the public have returned, the decision of the meeting in relation to this matter will be made publicly known unless the Council has resolved to order that some information remain confidential. Details relating to any order to keep information or a document confidential in accordance with section 91(7) are also to be made known. When making an order the meeting must specify the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order must be reviewed. If the section 91(7) order is to apply for a period exceeding 12 months, then this order must be reviewed every 12 months from the date it was made. This along with the making of the order pursuant to section 90(2) and the grounds pursuant to section 90(3) on which it was made are also to be recorded in the minutes.
7. In all cases the objective is that the information be made publicly available at the earliest possible opportunity and that the community is informed of any Council order and the associated implications; and
8. Where a person provides information to the Council and requests that it be kept confidential, Council is not able to even consider this request unless the matter is one that falls within section 90(3). If this is the case, Council will then be in a position to consider the request on its merits.

3.8 Public Access to Documents

Various documents can be available for inspection and purchase (for a fee) by the public. Council may also make a document available in electronic form and place it on the Internet for public access.

The Council or the Council Committee will only order that a document associated with a discussion from which the public are excluded is to remain confidential if it is considered proper and necessary in the broader community interest.

The Council or the Council Committee can only resolve to keep minutes and/or documents confidential under section 91(7) if they were considered in confidence pursuant to sections 90(2) and 90(3).

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY I.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

In accordance with section 91(8) the Council or the Council Committee must not make an order to prevent:

- the disclosure of the remuneration or conditions of service of an employee of the Council after the remuneration or conditions have been set or determined; or
- the disclosure of the identity of a successful tenderer for the supply of goods or the provision of services (including the carrying out of works), or of any reasons adopted by the Council as to why a successful tenderer has been selected; or
- the disclosure of the amount or amounts payable by the Council under a contract for the supply of goods or the provision of services (including the carrying out of works) to, or for the benefit of, the Council after the contract has been entered into by all parties to the contract; or
- the disclosure of the identity of land that has been acquired or disposed of by the Council, or of any reasons adopted by the Council as to why land has been acquired or disposed of by the Council.

Where keeping a document confidential is considered proper and necessary, a resolution to this effect is required which shall include:

- the grounds for confidentiality; and
- the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order must be reviewed – if the order has a duration of more than 12 months, the order must be reviewed at least once in every year;
- (if applicable) whether the power to revoke the order will be delegated to an employee of the Council. [s.91(9)]

Requests to access Council and Council Committee documents can be made under the *Freedom of Information Act 1991*. Inquiries in relation to the process for seeking access to documents held by Council should be directed to Council's accredited Freedom of Information Officer on (08) 8733 0900.

3.9 Example Confidentiality Provisions

The Wattle Range Council will record in the minutes of any Council and Council Committee meetings the making of an order in accordance with sections 90(2) and (3) and section 91(7) as follows:

Cr.... moved that Council:-

1. Under the provisions of the Section 90(2) and (3) [sub-number] of the *Local Government Act 1999* an order be made that the public with the exception of [insert Council officers names and job titles] be excluded from attendance at the meeting in order to consider in confidence [insert item number and topic];
2. Council is satisfied that the principle that meetings of Council should be conducted in a place open to the public has been outweighed in relation to this matter because [insert reasoning].

Cr.... seconded.

CARRIED

Mayor <name> advised members of the gallery that Council has resolved that this matter is to

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY I.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

be considered in confidence pursuant to section 90 of the Local Government Act 1999 because the matter relates to [insert reasoning to which the matter refers to].

Cr <name> moved that Council:-

1. Pursuant to Section 91(7) and (9) of the *Local Government Act 1999* Council orders that all reports and associated documents relating to discussion of Item [insert item number and topic] having been dealt with on a confidential basis under Section 90(3)[sub-number] of the Act, should be kept confidential and not available for public inspection on the grounds that it [insert reasoning] until [insert date]; and
2. Council delegates to the Chief Executive Officer, pursuant to Section 91(9)(c) of the *Local Government Act 1999*, the power, at his discretion, to revoke the order made by Council under Section 91(7) and (9) of the Act at part (1) of this resolution at any time prior to the expiration of the period of the order specified therein.

Cr<name>seconded.

CARRIED

A Template for Making Section 90(2) and 91(7) Orders under the Local Government Act 1999 is annexed at Appendix 2

3.10 Review of Confidentiality Orders

A confidentiality order made under section 91(7) of the Act must specify the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order must be reviewed. In any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year.

An order will lapse if the time or event specified has been reached or carried out. There is no need for the Council to resolve for the confidential order to be lifted. Once the order has lapsed, the minutes and/or documents automatically become public.

A review of the reports or documents that were considered under the provision of sections 90(3) and 91(7) of the Act will be conducted every 3 months to ensure that items are released in accordance with the resolution of Council, when the confidential provision no longer applies.

Orders that exceed 12 months must be reviewed annually and the Council must assess whether the grounds for non-disclosure are still relevant and, if so, provide the relevant grounds and reasons for the minutes and/or documents remaining confidential. The conduct of the annual review can be delegated to the Chief Executive office and sub-delegated to an employee of the Council if appropriate. If there are any items that require a fresh confidentiality order because the original order is about to expire, then the reviewer will prepare a report to Council making recommendations with respect to each item to be retained in confidence. Each item must then be addressed separately and assessed against section 90(3) and section 91(7) of the Act. While a Council may delegate the power to undertake an annual review, the Council cannot delegate the power to apply sections 90(3) and 91(7) of the Act.

A Council may resolve to exclude the public from a meeting to discuss and undertake consideration of the recommendations arising from the annual review in confidence, subject to the application of the relevant ground under section 90(3) of the Act. Section 90(3) of the Act must be applied separately to each item and not in one block.

If there is no longer any need for the confidentiality order then the Council or Council Committee may delegate to an employee of the Council the power to revoke an order made in accordance with section 91(7) of the Act. The Council or Council Committee may also include

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY 1.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

in the resolution whether any delegation is given to an employee to revoke the order and if relevant, any conditions associated with the delegation.

3.11 Accountability and Reporting to the Community

A report on the use of sections 90(2) and 91(7) by the Council and Council Committees must be included in the annual report of a Council as required by Schedule 4 of the Act. This supports commitment to the principle of accountability to the community. The reporting should include the following information, separately identified for both Council and Council Committees:

1. Number of occasions each of the provisions of sections 90(2) and 90(3) were utilised;
2. Number of occasions each of the provisions of sections 90(2) and 90(3) and section 91(7) were utilised, expressed as a percentage of total agenda items considered;
3. An indication of any particular issues that contributed to the use of confidentiality provisions on more than one occasion e.g. a proposal to acquire a parcel of land was considered on 3 separate occasions;
4. Number of occasions that information originally declared confidential has subsequently been made publicly available; and
5. Number of occasions that information declared confidential has not been made publicly available and the reason for this in each case.

3.12 Grievance

Council has established procedures for the review of decisions under section 270 of the Act for:

- Council, and its committees;
- employees of the Council; and
- other persons acting on behalf of the Council.

Should a person be aggrieved about public access to either a meeting or a document then they can lodge an application for review of that decision under the procedures established by Council. The Procedures are available from the Principle Offices of Council and on Council's Website www.wattlerange.sa.gov.au

4. REVIEW

This Code of Practice will be reviewed within 12 months after the conclusion of each periodic election or before if required.

In addition, Section 92(5) of the *Local Government Act 1999* requires any future amendment or alteration to the Code, or a substitution of a new Code, will be subject to the specifications of Council's Community Engagement Policy (Public Consultation Policy).

5. AVAILABILITY

This Policy is available for inspection without charge at the following location during ordinary business hours:

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

 Wattle Range COUNCIL	POLICY 1.2	Version:	6
	Public Access to Council and Committee Meetings and Associated Documents Code of Practice	Date Adopted:	8 November 2016
		Next Review Due:	Within 1 year after general election

- Principal Office, “Civic Centre”, George Street, Millicent
- Council Website: www.wattlerange.sa.gov.au.

A copy of the Policy may be purchased from the Principal Council Office upon payment of a prescribed fee in accordance with Council’s Schedule of Fees and Charges.

6. REFERENCES & FURTHER READING

Relevant Legislation:	<ul style="list-style-type: none"> • <i>Local Government Act 1999</i> • <i>Local Government (Procedures at Meetings) Regulations 2013</i> • <i>Freedom of Information Act 1991</i>
Relevant Policies / Procedures / Guidelines	<p>This Policy should be read in conjunction with:-</p> <p>Appendix 1 – Matters for which Council, or a Committee, can order that the public be excluded.</p> <p>Appendix 2 – Template for Making Section 90(2) and 91(7) Orders Under the Local Government Act 1999</p> <ul style="list-style-type: none"> • Policy 1.1 – Code of Conduct for Council Members • Policy 1.5 - Community Engagement • Policy 1.12 - Discretionary Procedures – Procedures at Meetings Code of Practice • Policy 1.47 - Informal Gatherings

7. ADOPTION & AMENDMENT HISTORY

The table below sets out the adoption, review and amendment history of the policy.

Version No:	Issue Date:	Authorised by:	Description of Change:	Minutes Reference:
1	12/12/2006	Council	Adopted	Folio 3789; Item 18.1.1
2	14/12/2010	Council	Reviewed	Folio 4496; Item 16.1.7
3	08/05/2012	Council	Amended	Folio 4574; Item 11.1.2
4	11/12/2012	Council	Reviewed	Folio 4847; Item 11.1.9
5	08/04/2014	Council	Amended	Folio 5284; Item 12.2.9
6	08/11/2016	Council	Amended	Folio 6936; Item 13.2.3

File Ref:	Classification:	Department:	Position Responsible:	Review Frequency:
GF 9.63.1/4	Public	Corporate Services	Director Corporate Services	4 Yearly
Printed copies of this document are uncontrolled, refer to Council's Intranet to verify this is the current version.				

Appendix 1

Matters for which Council, or a Committee, can order that the Public be excluded.

Council, or a Committee may order that the public be excluded in the following circumstances:

- a. information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
- b. information the disclosure of which-
 - (i) could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Council; and
 - (ii) would, on balance, be contrary to the public interest;
- c. information the disclosure of which would reveal a trade secret;
- d. commercial information of a confidential nature (not being a trade secret) the disclosure of which-
 - (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
 - (ii) would, on balance, be contrary to the public interest.
- e. matters affecting the security of the council, members or employees of the council, or council property, or the safety of any person;
- f. information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial;
- g. matters that must be considered in confidence in order to ensure that the council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;
- h. legal advice;
- i. information relating to actual litigation, or litigation that the council or Council Committee believes on reasonable grounds will take place, involving the council or an employee of the council;
- j. information the disclosure of which-
 - (i) would divulge information provided on a confidential basis by or to a Minister of the crown, or another public authority or official (not being an employee of the council, or a person engaged by the council); and
 - (ii) would, on balance, be contrary to the public interest;
- k. tenders for supply of goods, the provision of services or the carrying out of works;
- l. information relating to a proposed amendment to a Development Plan under the *Development Act 1993* before a Plan Amendment Report relating to the amendment is released for public consultation under that Act;
- m. information relevant to the review of a determination of a council under the *Freedom of Information Act 1991*.

The Act provides for a definition of “personal affairs” being a person’s financial affairs, criminal records, marital or other personal relationships, personal qualities, attributes or health status, or that person’s employment records, employment performance or suitability for a particular position, or other personnel matters relating to the person.

[Section 90, *Local Government Act 1999*]

Commentary

The underlying principle of the *Local Government Act 1999* is to provide for transparency and accountability by local government in its business and everyday operations, and this is achieved by the public having, as a matter of right, access to:

- council and committee meetings; and
- the minutes and documents discussed at those meetings.

Section 90(1) reinforces the principle of public meetings, by creating a presumption which can only be overturned by the council justifying that the matter it wishes to consider “in confidence” complies with at least one of the 13 grounds set out in Sub-Section 90(3).

The Exceptions

Sections 90 and 91 demonstrate that the Parliament does recognise that there are circumstances where discussion and/or disclosure to the public for one reason or another is not warranted. The 13 grounds listed at sub-section 90(3) are exhaustive. When the council considers one or more of the grounds are applicable it must satisfy the necessary criteria before it is permitted to exclude the public. The council’s reasoning must be able to withstand scrutiny because the exclusion of the public goes to the very principle of transparency and accountability. With the ever increasing powers of review the Ombudsman has, a council must exercise this privilege carefully, otherwise its decisions and processes could be subject to challenge.

The exceptions are similar to a number of elements or considerations under the *Freedom of Information Act*. Although it should be noted that decisions made under Sections 90 and 91 are separate from decisions made under the *FOI Act* and in different circumstances.

Of the exceptions particular note should be made of sub-sections 90(3)(b), (d) and (j) which require the council to meet two separate criteria before excluding the public.

When the council is looking at applying one of these three grounds it will be necessary for the Council to satisfy both elements of each ground. The first part in each sub-paragraph is fairly straight forward and should be relatively easy for the council to identify whether the facts of the matter satisfy the particular ground specified. For example a council should readily be able to identify if the facts of the matter:

“90(3)(b)(i) could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Council,”

It is the second part of these three exceptions which is going to require more consideration of the matter at hand. It is the ‘public interest’ test and this will be familiar to councils in the context of requests made under the *Freedom of Information Act*. It will require a council to apply the facts of the matter and determine whether or not disclosure would be contrary to the public interest.

So what is this “public interest” test that councils need to consider when determining whether or not to exclude the public under Sub-sections 90(3)(b),(d) and (j)

The Act does not contain a definition of ‘public interest’, however direction can be taken from the many legal decisions that have considered the concept of ‘public interest’. The public interest is:

- in the public interest as opposed to, of interest to the public;
- of concern or benefit to the public, not merely of individual interest; is a concept, which will have different considerations in each matter.

The public interest test requires a council (or committee) to identify what the public interest is for the matter. This requires the council to weigh up the factors for and against disclosure and to determine, on balance, whether the exclusion of the public from the discussion or denial of

access to the documents is contrary to the public interest. This is not always an easy task but is a necessary and important one all the same.

There is no restriction on the number of factors the council can consider when determining whether disclosure would be contrary to the public interest. The factors referred to will depend on the type of information contained in the documents, the context of their creation and any other circumstances of relevance to making a decision.

The Council must appropriately record the reasons why the ground is being relied upon for holding the meeting *"in confidence"* without disclosing the confidential nature of the matter itself. It is not enough for the council just to identify the ground(s). It must demonstrate that it has considered the matter in the context of the relevant exemption and considered it necessary to close the meeting to the public in order to discuss the matter *"in confidence"*. In short, the legislation requires the council to form an opinion on these matters. The courts have said that such opinions can only be ascertained from the wording of the resolution(s).

Practical Application

For example, Council has commissioned a report from an external consultant who has reviewed the Council's green waste operations. One of the recommendations made to Council is to outsource the collection of green waste because it is not efficient for the Council to do it "in-house". The consultant's report is to be tabled for discussion at the council meeting. The council wants to discuss the report and any decision it makes *"in confidence"*. It discusses whether the ground under subsection 90(b) could be applied. The council's minute of meeting record is as follows:

"It was moved at council's meeting on 28 July that the report of Mr Brown of I.AM.GREEN Pty Ltd be discussed *"in confidence"* in relation to Section 90(3)(b) of the Act for the following reasons:

- it may confer a commercial advantage to tenderers by discussing and disclosing what it costs the council to operate the service currently. This in turn would leave it open to tenders to pitch their bid at just below that cost rather than a realistic cost;
- it is in the public interest to have the meeting closed to the public because this could put the council at a competitive disadvantage because subsequently it may not achieve the tenderers best price for the services required."

Council, or a Committee **cannot** make an order that the public be excluded from a meeting only on the basis that discussion of a matter in public may:

- cause embarrassment to Council or the Committee concerned, or to members or employees of Council: or
- cause a loss of confidence in Council or the Committee.

If a decision to exclude the public is taken, Council or the Committee is required to make a note in the minutes of the making of the order and the grounds on which it was made. Minutes of a meeting of Council must be publicly available within five days after the meeting.

Appendix 2

TEMPLATE FOR MAKING SECTION 90(2) ORDERS **UNDER THE LOCAL GOVERNMENT ACT 1999** **(i.e. excluding the public from part of a meeting)**

Item xx.x – Report Title (Report Reference #)

1. Pursuant to Sections 90(2) and 90(3) **(INSERT i.e. (a),(b),(c))** of the Local Government Act 1999, the Council orders that the public be excluded from attendance at that part of this meeting relating to **Item xx.x**, excepting the following persons: *(remove or add positions below, as appropriate)*

- **Chief Executive Officer**
- **The minute taker**
- **Manager...**
- **Team Leader...**
- **INSERT title of any other Council officers or names of other persons permitted to remain**

to enable the Council to consider **Item xx.x** in confidence on the basis the Council considers it necessary and appropriate to act in a meeting closed to the public (excepting those persons listed above) in order to receive, discuss or consider in confidence the following information or matter relating to **Item xx.x**:

(insert relevant grounds and fill out details from the below table, then delete the remainder)

NOTE: In determining whether the public should be excluded from a part of a meeting, it is irrelevant that discussion of a matter in public may:

- *cause embarrassment to the Council or to members or employees of the Council; or*
- *cause a loss of confidence in the Council; or*
- *involve discussion of a matter that is controversial within the Council area; or*
- *make the Council susceptible to adverse criticism.*

(a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

Specifically, the present matter relates to information pertaining to the personal affairs of **[a person]** *[or, if appropriate, NAME OF PERSON]*.

[also add the following if using this subsection —

The disclosure of this information would be unreasonable because **[INSERT]** *(e.g. the information is sensitive/confidential to [person] and is not a matter of public knowledge)*

(b) information the disclosure of which—
(i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting,

- or proposing to conduct, business, or to prejudice the commercial position of the council; and
- (ii) would, on balance, be contrary to the public interest.

Specifically, the present matter relates to **[TYPE OF INFORMATION]** (e.g. detailed costings and financial statements in relation to the proposed renovation of the XX Plaza).

The disclosure of this information could reasonably be expected to be commercially advantageous to **[PARTY]** because **[REASONS]** (e.g. that party is currently in commercial negotiations with the Council related to this matter, and that party could adjust their bargaining position based on the positions of the Council disclosed in the information)

[AND/OR]

The disclosure of this information could reasonably be expected to prejudice the commercial position of the Council because **[REASONS]** (e.g. the Council is currently inviting tenders in relation to this matter, and the disclosure of this information would likely influence any proposals submitted, to the commercial detriment of the Council)

[also add the following if using this subsection —

The Council has considered the public interest in relation to whether to make this order. The prevailing public interest in these circumstances is **[INSERT]** (e.g. the Council's ability to obtain best value for money). The Council considers that, on balance, disclosure would be contrary to the public interest. **[SUMMARISE REASONS OF COUNCIL]** (e.g. To discuss the matter publicly would seriously compromise the Council's ability to achieve optimum value for money for its residents, as the Council's business stance in relation to the matter would inappropriately become known to other involved parties.)

- (c) information the disclosure of which would reveal a trade secret.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]** (Note: do not include the nature of the trade secret.)

- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which—

- (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
- (ii) would, on balance, be contrary to the public interest.

Specifically, the present matter relates to **[TYPE OF INFORMATION]** (e.g. a report from XX Consultants relating to a proposed development)

The disclosure of this information could reasonably be expected to prejudice the commercial position of the person who supplied the information [or, if appropriate, **[NAME OF PARTY]** because **[REASONS]** (e.g. the information details confidential financial and business forecasts about that party which could reasonably be expected to prejudice the party's ability to conduct business with other parties)

[AND/OR]

The disclosure of this information could reasonably be expected to confer a commercial advantage on a third party because **[REASONS]** (e.g. the information contains financial estimates of the party supplying the

information regarding future work to be undertaken for third parties, and disclosure of those estimated costs would likely then be taken into account by those third parties in their dealings with the party supplying the information)

[also add the following if using this subsection —

The Council has considered the public interest in relation to whether to make this order. The prevailing public interest in these circumstances is [INSERT] (e.g. the Council's ability to conduct its present business with XX Consultants, for the benefit of residents). The Council considers that, on balance, disclosure would be contrary to the public interest. [SUMMARISE REASONS OF COUNCIL] (e.g. the potential commercial detriment that the disclosure of this information could cause to XX Consultants may diminish the ability of XX Consultants to conduct its present business with the Council, and is contrary to the Council's adherence to fair commercial conduct.)

(e) matters affecting the security of the council, members or employees of the council, or council property, or the safety of any person.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]**

(f) information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]**

(g) matters that must be considered in confidence in order to ensure that the council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]**

(h) legal advice.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]** (e.g. legal advice provided by XX Lawyers) (Note: do not include the content or nature of the legal advice.)

(i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]** (Note: do not include the nature of any legally sensitive information)

(j) information the disclosure of which—

- (i) would divulge information provided on a confidential basis by or to a Minister of the Crown, or another public authority or official (not being an employee of the council, or a person engaged by the council); and
- (ii) would, on balance, be contrary to the public interest.

Specifically, the present matter relates to **[TYPE OF INFORMATION AND MINISTER/PUBLIC AUTHORITY WHICH COMMUNICATED IT]**

(e.g. correspondence between the Council and the Department of Planning, Transport and Infrastructure regarding a proposed highway)

This information was communicated to the Council on a confidential basis.

[also add the following if using this subsection —

The Council has considered the public interest in relation to whether to make this order. The prevailing public interest in these circumstances is **[INSERT]** *(e.g. the delivery by the State Government, in partnership with the Council, of a major public works project)*. The Council considers that, on balance, disclosure would be contrary to the public interest. **[SUMMARISE REASONS OF COUNCIL]** *(e.g. Full particulars of the project will be made available in due course if the project proceeds beyond its present, early stage. However, the release of this information at this early stage may compromise the delivery of a proposed significant roadwork project, which is intended to benefit the residents of the Council and the public in general.)*

(k) tenders for the supply of goods, the provision of services or the carrying out of works.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]**

(m) information relating to a proposed amendment to a Development Plan under the Development Act 1993 before a Plan Amendment Report relating to the amendment is released for public consultation under that Act.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]**

(n) information relevant to the review of a determination of a council under the Freedom of Information Act 1991.

Specifically, the present matter relates to **[DESCRIBE INFORMATION]**

2. Accordingly, on this basis, the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or matter confidential.

**TEMPLATE FOR MAKING SECTION 91(7) ORDERS
UNDER THE LOCAL GOVERNMENT ACT 1999**
(i.e. order made at the end of a confidential session
to keep minutes/other documents confidential)

Item xx.x – Report Title (Report Reference #)

1. Pursuant to Section 91(7) of the Local Government Act 1999, the Councils orders that the following document(s) (or part) shall be kept confidential, being document(s) (or part) relating to a matter dealt with by the Council on a confidential basis under Sections 90(2) and 90(3)(INSERT i.e (a),(b),(c)) of the Act:

- [INSERT DOCUMENTS, e.g:]
- The minutes of item no. xx.x of [date]
- The written report item no. xx.x of [date]

on the grounds that the document(s) (or part) is:

[INSERT SAME GROUNDS AND DETAILS FROM THE EARLIER s 90(2) ORDER TO EXCLUDE PUBLIC].

NOTE: The Council cannot make a resolution to keep documents confidential if the purpose of the resolution is to prevent:

- *The disclosure of the remuneration or conditions of service of an employee of the council after the remuneration or conditions have been set or determined; or*
- *The disclosure of the identity of a successful tenderer for the supply of goods or the provision of services (including the carrying out of works), or of any reasons adopted by the council as to why a successful tenderer has been selected; or*
- *The disclosure of the amount or amounts payable by the council under a contract for the supply of goods or the provision of services (including the carrying out of works) to, or for the benefit of, the council after the contract has been entered into by all parties to the contract; or*
- *The disclosure of the identity of land that has been acquired or disposed of by the council, or of any reasons adopted by the council as to why land has been acquired or disposed of by the council.*

(Also — complete details from the below table then delete the table)

If a 'Fixed-term' order—	This order shall operate for a period of [##] months [AND IF PERIOD LONGER THAN 12 MONTHS, ADD:] ...and will be reviewed at least annually in accordance with the Act.
If a 'Trigger' order—	This order shall operate until [INSERT TRIGGER CIRCUMSTANCES] (which might be an event or be until further order of the Council) and will be reviewed at least annually in accordance with the Act.

<p><i>If combination 'Fixed-term + Trigger' order—</i></p>	<p>This order shall operate for a period of [##] months or until [INSERT TRIGGER CIRCUMSTANCES], whichever is sooner</p> <p>[AND IF PERIOD LONGER THAN 12 MONTHS, ADD:] ...and will be reviewed at least annually in accordance with the Act.</p>
<p><i>If a 'Periodic review' order—</i></p>	<p>This order shall be reviewed after [INSERT, BUT LESS THAN 12 MONTHS] (e.g. 6 months) or at some earlier time.</p>

If the Chief Executive Officer of other officer is to be delegated the power to revoke the order, add the following:

2. Pursuant to Section 91(9)(c) of the Act, the Council delegates to the Chief Executive Officer [or INSERT other officer title] the power to revoke this order [subject to INSERT ANY CONDITIONS], and must advise the Council of the revocation of this order as soon as possible after such revocation has occurred.

A note regarding minutes:

If officers use this template in any recommendation for a Section 90(2) order, and the council adopts the same reasoning set out in the officers' recommendation, then publishing the appropriately detailed resolution in the minutes will satisfy the requirement in Section 90(7) that a note must be made in the minutes of the making of the order and specifying—

- the grounds on which the order was made; and
- the basis on which the information or matter to which the order relates falls within the ambit of each ground on which the order was made; and
- if relevant, the reasons that receipt, consideration or discussion of the information or matter in a meeting open to the public would be contrary to the public interest.

However, it is important to remember that the minutes must record what the Council actually determined. Accordingly, if the Council, when it is determining to exclude the public, departs from the reasoning which is set out in the recommendation, then the minutes will have to reflect the actual determination of the council and not simply be a copy of the recommendation.