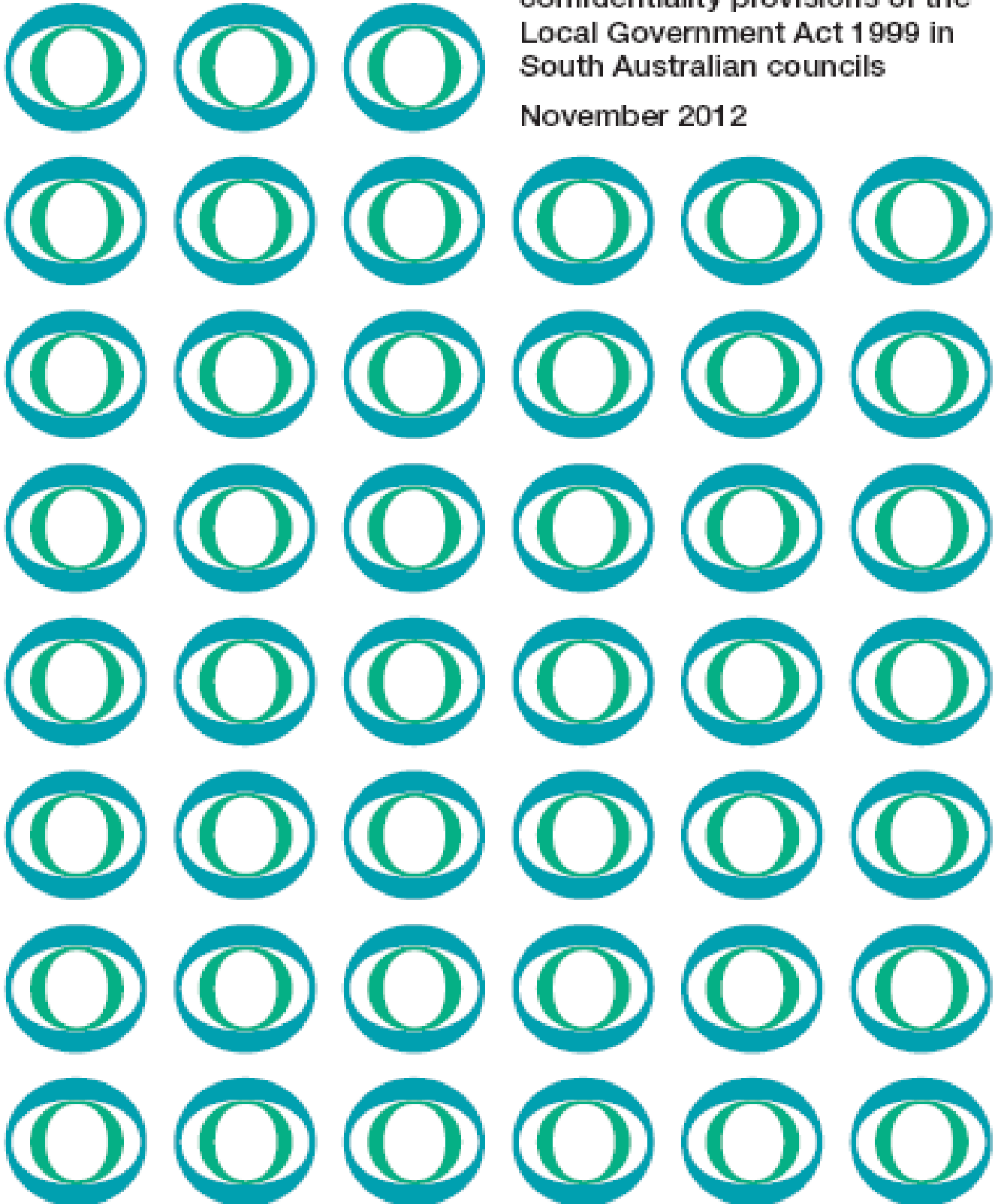


Ombudsman SA

**In The Public Eye**

An audit of the use of meeting  
confidentiality provisions of the  
Local Government Act 1999 in  
South Australian councils

November 2012



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# No secrets here

A REVIEW of whether councils are discussing too many issues in secret is unlikely to

"We as a council don't have much confidence"

Top – secret agenda at council's meeting  
Meeting bid thrown out

undisclosed property in confidence

Council considers secret land buy

A "Culture of secrecy"

They are also considering a crackdown after the Ombudsman found the public has been wrongly evicted from some meetings.

Town Hall's closed doors

Councillors met in confidence

Mayor issues media warning

The stand-out example in which councils let themselves down in this regard is when they too frequently use regulations to declare items in council meetings as confidential.

behind closed doors

Council says no more secrets

It's a matter of confidence down at the Town Hall

council's secret meetings

Open workshops call

Decisions made in secret workshops

Confidential meeting discusses creek cost blow out

close to an hour to open the doors to the public again.

Lower Council has pledged to deal with its non-compliant confidential information policy after receiving a report from the state ombudsman.



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## FOREWORD

The passage of the *Local Government Act 1999* was a watershed in the development of local government in South Australia. The Parliament emphasised open government and the principles of administrative law as part of the new legislation. It did this through rewriting the objects of the original 1934 Act and by redefining and updating the primary roles, functions and the principles to be observed by a council. The current Act's objects now speak of 'encouraging the participation of local communities in the affairs of local government' and 'ensuring the accountability of councils to the community'. The principles to be observed by a council include 'providing open, responsive and accountable government' and 'achieving and maintaining standards of good public administration'.

We have come to expect these attributes in a modern and open system of government at all levels in Australia. Writing about council meetings and the law in South Australia in 1980 K.H. Gifford QC, made the following observation:

Unfortunately many councils throughout Australia rely upon their legal right to exclude members of the public whether there is any practical need for that exclusion or not. Very few Australian councils practice the committee system in the true sense of the word, but almost all adopt the device of 'going into committee' so that their discussions will not be open to the public. By some, this device has been so widely practised that almost all decisions appear to be arrived at in committee instead of open council. Such a practice can hardly be calculated to arouse ratepayer interest, and it must do much to harm the council's relations with the local press. A council is not, after all, a secret society.<sup>1</sup>

Many of the changes to the Local Government Act in 1999, and the amendments since made, are intended to bring local government more into the 'sunshine' of public participation, openness and accountability. This is an ongoing process with different approaches taken in different council communities; and I do not believe that local councils in South Australia are operating as 'secret societies'.

However, I have had cause in recent times to find that some councils are not adhering to the spirit and the letter of the meeting confidentiality provisions in the Act. In an extensive report on the City of Charles Sturt in 2011, I found several breaches of the Act concerning the basis of resolutions for moving council meetings into confidence. I also found evidence of invalid orders made to keep documents confidential. Other complaints made to my office about use of the confidentiality provisions by councils have revealed breaches of the legislation. Moreover, fairly or otherwise, the issue has become something of a favourite topic for local media reporting on council proceedings and decision making. There are perceptions in some quarters that councils are improperly making important and sensitive decisions at meetings behind closed doors.

For these reasons, and because the Local Government Act provides for the confidentiality provisions to be used in only a narrow range of circumstances, I decided to conduct an audit of their use in a selected range of councils across the sector in South Australia.

The report which follows outlines my findings and makes certain recommendations for change. It has not found deliberate and widespread abuse of the legislative provisions. However, it does reveal common substandard practices and a lack of understanding about public interest considerations, which can and should be remedied.

---

<sup>1</sup> K.H. Gifford QC *Council Meetings - Law and Procedure in South Australia*, Second Edition, The Law Book Company, Sydney, 1980, p17.

I take this opportunity to thank the twelve councils who cooperated with my office in the conduct of this audit. They have provided extensive documentation and valuable professional input into the gathering of evidence for my report. I acknowledge their good faith and openness. Their willingness to contribute ideas and learn from mistakes has complemented my intention to provide a resource and encouragement to the local government sector for the improvement of governance and accountability standards.

Richard Bingham  
**SA OMBUDSMAN**



## PUBLICATION OF THIS REPORT

Under section 26 of the *Ombudsman Act 1972*, I consider it appropriate and in the public interest to release this report to the Parliament of South Australia and to members of the public. Accordingly I will forward this report to the President of the Legislative Council and to the Speaker of the House of Assembly and councils, in addition to a general release on the Ombudsman SA website.

I am releasing the report for the following reasons:

- members of the community have an expectation that councils will act fairly and reasonably in making decisions that affect them. They also expect that councils will conduct their business in an open and accountable fashion in accordance with the law
- to provide a resource for councils to use in further developing and refining meeting confidentiality procedures in compliance with state legislation and consistent with the public interest.

I encourage all councils to consider and act on the contents of this report.

### A perspective on governance standards and the law

The focus of this audit is an investigation into the standards maintained by local councils with regard to their obligations under the meeting confidentiality provisions of the *Local Government Act 1999* (**the Act**).

Whilst my report finds deficiencies in the use of these provisions, I have also reflected on the obligations imposed across the broader sweep of the Act.

In many respects local government is required to adhere to and maintain higher standards of accountability and transparency than that expected of other spheres of government. On the matter of confidentiality, for example, local government is required to conduct its business in public, with a closely defined range of 'special circumstances' available to consider sensitive matters behind closed doors.

By contrast, other levels of government have available the cabinet process which protects the workings of government from immediate public scrutiny. The difference is a matter of law and convention.

In the same vein, the complexity of local government law means that councils must spend time and resources on compliance. In my view there is a point of diminishing returns with regulation. Too many detailed rules can inhibit rather than assist movement towards administrative improvement. This is the desired outcome of all the work done in recent times to support good governance.

Any future comprehensive review of the workings of the Local Government Act might consider how the sum of the parts operate to make the system work more freely as an enabling instrument.

The recommendations contained in my report seek to clarify those sections of the confidentiality provisions in the Local Government Act which are not currently working efficiently. I suggest that this should be achieved without adding to the regulatory burden already required by the legislation.

## EXECUTIVE SUMMARY AND AUDIT OPINION

### Background

This audit set out to identify how closely councils comply with a fundamental requirement of the Local Government Act for their meetings to be held in public, except in special circumstances.

I have reviewed extensive documentation from the 12 councils involved in the audit; held discussions with each council; and reflected on recent investigation findings on local government confidentiality matters handled by my office.

Whilst the audit was necessarily confined to a representative group of 12 from the total number of 68 councils in South Australia, I am confident the practices and approaches revealed in the course of my investigation are broadly representative of practices across the local government sector.<sup>2</sup>

The confidentiality provisions of the Act in South Australia operate differently from many other jurisdictions around Australia. New South Wales, Queensland, Western Australia and Tasmania all have local government legislation which limits confidentiality in various ways not required in South Australia or in Victoria. For example, the New South Wales legislation stipulates that a meeting is not to remain closed for longer than necessary to preserve confidentiality. Queensland legislation restricts decision making to procedural resolutions only when a meeting is closed. In some respects the provisions in the South Australian legislation are more flexible and discretionary than is the case in other states.<sup>3</sup>

In making recommendations for change in meeting procedures and in the legislation here in South Australia, my intention is to acknowledge and reinforce existing discretions allowed under the Act. It is also to provide guidance to councils in the exercise of their powers to consider matters in confidence. As such, the propositions outlined below are designed to assist councils to use the confidentiality provisions with confidence, and in step with the requirements of the legislation.

### Audit opinion

The evidence from this audit indicates that councils commonly use the confidentiality provisions of the Local Government Act without fully considering or explaining the reasons for excluding members of the public from council meetings. This also results in too many meeting and document confidentiality orders being issued.

Some councils incorrectly believe that they are required to close meetings when they consider certain topics. It also appears that the special circumstances intended in the Act are being misinterpreted by some as a shield to protect their council from 'pressure from the public' when debating sensitive topics.

Other councils are misunderstanding or misinterpreting specific provisions in the Act when making an order to close a meeting to the public. They are consequently making orders which would be unlikely to withstand legal challenge.

---

<sup>2</sup> Throughout this report orders made under sections 90(2) and 90 (3) of the Local Government Act are referred to as 'meeting orders'. Orders made under section 91(7) of the Act are referred to as 'document orders'.

<sup>3</sup> See Appendix C for an overview of other Australian state legislative provisions.

There is apparently little understanding of the ‘public interest balancing test’ which should be applied in some circumstances under section 90(3). This means there must be public interest reasons announced for closing a meeting to the public, which must clearly outweigh the general requirement for meetings to be held in public. This requirement needs to be better understood and applied across the local government sector.

Although there is a general awareness of the legislative provisions requiring review of meeting orders and the prompt release of documentation held in confidence when orders expire, these practices are inconsistently applied and poorly monitored.

The most positive aspects of councils’ current approach to open government is the promotion of public attendance at council meetings and the practice of improved community engagement strategies, particularly on issues which require extensive public consultation. This provides a foundation upon which to build a more transparent and confident approach to considering more matters in open council.

On the basis of the findings outlined below, this report makes certain recommendations under section 25(2)(b) of the Ombudsman Act to rectify or mitigate the effect of the deficiencies in councils’ use of the confidentiality provisions of the Local Government Act.

## Summary of audit findings and recommendations

I list below a summary of my findings and recommendations under the headings which I adopted for the conduct of the audit.

### Section 92 code of practice for access to council meetings and associated documents

#### Finding

1

Under section 92 of the Local Government Act councils must prepare and adopt a code of practice to govern public access to meetings, documents and minutes of council and committee meetings.

A significant number of councils across South Australia have failed to review their code of practice within the 12 month timeframe allowed after council elections are held. Reviews should have been completed by November 2011.

Whilst adequate reviews were completed by many councils, few apparently took the opportunity to educate their new council on the requirements for public access to meetings and documents. For example, all council codes of practice examined for this audit lacked an appropriate reference to the ‘double test’ required for some paragraphs of section 90(3) of the Act.

### **Recommendation 1**

That all councils update their section 92 code of practice by May 2013 to ensure all procedures comply with the Local Government Act. In particular, the 'double test' requirements of paragraphs (a),(b),(d) and (j) of section 90(3) should be cited and explained. An accurate reference should also be made to the requirement to cite reasons for the use of a particular paragraph to make a valid section 90(2) meeting order.

## **Public participation at council meetings**

### **Finding**

2

All councils reported significant efforts made to encourage public participation at council and committee meetings. Creative efforts involved rotating meeting venues, using local media to promote discussion and opening council meetings to Question and Answer dialogues between elected members and the community. A majority of the 12 audited councils are actively looking for new ways to engage their local communities.

### **Recommendation 2**

That all councils continue to encourage public attendance and participation at council and committee meetings. Further, that the Local Government Association of SA continue to support best practice in community engagement through the Governance Officers Network and other related initiatives.

## **Moving meetings into confidence using section 90(2) 'meeting orders'**

### **Finding**

3

The percentage of section 90(2) confidential meeting orders is calculated against the total number of agenda items considered by council in the two year period 2009-2011. A majority of councils involved in the audit reported between 5% and 10%, or higher, of orders which closed meetings to the public.

Council responses to the Audit Questionnaire show little evidence of elected members debating or deciding against council administration recommendations for section 90(2) meeting orders.

Contrary to law, councils generally are providing insufficient details of their reasons for excluding the public under sections 90(2) and 90(3) of the Local Government Act. The current law, requiring a note to be made explaining the grounds for the meeting order, is either misunderstood or misinterpreted by most councils.

### **Recommendation 3**

That all councils aim to deal with 3% or less of their agenda items in confidence.

Further, that all councils consider implementing a system of pre-meeting consultation between the CEO and the presiding member for all recommendations made to close a council or committee meeting to the public.

Consideration should be given to amending the Local Government Act to clarify that an explanation of reasons must be recorded in the minutes for the making of a section 90(2) meeting order.

## The merits of section 90(2) meeting orders closing meetings to the public

### Finding

4

For 45 of the 80 agenda items examined for this audit, I consider that there were no valid grounds for the council to exclude members of the public from meetings under sections 90(2) and 90(3) of the Local Government Act.

‘Commercial interest’ considerations and regard for the ‘personal affairs’ of a person were the most frequently stated reasons for holding meetings behind closed doors. Few meeting orders examined showed an understanding of the requirement of the Act for meetings to be held in public unless there were clear ‘special circumstances’ to justify exclusion of the public.

There was little indication of councils discriminating between background or contextual information which should be in the public domain, and those specific issues which merited discussion in confidence.

I formed the view that councils are sometimes moving into confidence over matters of local sensitivity or controversy in an attempt to debate issues without pressure from the public. Such intent is contrary to the democratic objects of the Act.

### Recommendation 4

Consideration should be given to amending the Local Government Act to specify that controversy or sensitivity over a matter in the community is an irrelevant ground for the making of a section 90(2) meeting order.

## Making orders to keep documents confidential using section 91(7) ‘document orders’

### Finding

5

A significant number of councils reported practices where section 91(7) confidential document orders were considered quite distinctly from section 90(2) confidential meeting orders. In these councils there were examples of matters discussed in confidence for which no order over meeting documents had been made. I consider this good practice when dealing with items which require confidentiality for discussion, but for which there is no reason to withhold any documentation from the public. I support differentiating the two confidentiality powers.

The audited councils used a variety of approaches to deciding the expiry of document orders; from short timelines to open-ended event triggers. Some event-related document orders were vague and therefore easily misunderstood or open to interpretation as indefinite orders.

It is good practice to frame document orders which require defined event triggers for release, with the fall back option of a delegated power for the CEO to release documents to a shorter timeline.

Process mistakes were commonplace in the making of document orders with some examples of decisions being made *ultra vires*.

### Recommendation 5

That all councils, in collaboration with the Local Government Association of SA, review their section 92 codes of practice to identify uncomplicated procedures and good practice examples for the making of section 91(7) document orders.

## Reviewing the duration of document orders - section 91(9)

### Finding

6

Section 91(9) stipulates the process for reviewing section 91(7) confidential document orders. A significant number of councils reported establishment and maintenance of a Confidential Items Register to assist monitoring and release of material covered by a section 91(7) document order. However, local variations on the model register proposed by the Local Government Association of SA have led to some poor practices where minutes and documents are continuing to be held after the orders have expired.

Section 91(7) document orders which operate for a 12 month period have been problematic in this regard. There is some misunderstanding in councils about the statutory requirement to review a document order before that order expires. If the council intends to maintain confidentiality, it must review the original order before expiry and then make a valid new order for a further period of time.

There is also some confusion around the powers available to council CEOs with respect to section 91(9)(c). Here the Act provides a power of delegation for the CEO to revoke a document order early, before the original timeframe or event has been reached. It is not always understood that this authority must be issued on each separate occasion. Neither is it clearly understood that only the council itself has the power to remake a section 91(7) document order.

### Recommendation 6

That all councils establish or update their Confidential Items Register with reference to the Model Register prepared by the Local Government Association of SA.

Consideration should be given to amending the Local Government Act to clarify the process of reviewing section 91(7) confidential document orders, including specifying the requirement for the full council or committee to remake an order before an expiry event or date has been reached.

## Public access to release of previously confidential documents

### Finding

7

The Local Government Act has specific requirements for councils to provide the public with access to certain documents. These include the minutes of meetings after a confidential meeting order has expired. Six of the 12 councils involved in the audit were not making confidential documents available to the public on the internet after these were released. By requiring members of the public to apply for access to the documents, these councils were effectively maintaining a form of confidentiality.

Some other councils have been releasing documents onto their websites as required. However, due to the type of postings made on the website, the released reports have been difficult to find amongst long lists of agendas and minutes. Two councils from the audit group have developed a best practice approach to release of confidential information which actively assists the public to locate documents.

### Recommendation 7

That all councils post their Confidential Items Register on their website. The register should show which documents are currently retained in confidence and which

documents have been released, as well as the dates of the meetings where the orders have been made. A quick link should be provided from the register to the released documents.

Consideration should be given to amending the Local Government Act to clarify the requirement for all documents to which a section 91(7) order has ceased to apply, including agenda reports, to be made available on the internet pursuant to section 91(9) and section 132.

## Annual reporting standards

### Finding

80

The Local Government Act and the *Local Government (General) Regulations 1999* spell out the requirements for annual reporting on the use of the meeting confidentiality provisions. Most councils are currently falling short of the requirements. Based on the incidence of underreporting, there is a case for clarification and upgrading of the regulations to underpin improved annual reporting standards.

### Recommendation 8

That all councils adopt a legally compliant, best practice approach to annual reporting standards on the use of meeting confidentiality provisions.

Consideration should be given to amending the Local Government (General) Regulations to specify a requirement for the date and subject of all meeting orders made under section 90(2) and the details of document orders made, expired and remade under section 91(7) in the financial year, to be reported.

## Use of informal gatherings

### Finding

9

There is concern in the community and amongst some elected members that informal gatherings are being used by some councils to make decisions or to effectively obtain a decision on a matter outside a formally constituted meeting. Such action would be a contravention of section 90(8) of the Act. I found no direct evidence of such contraventions during the conduct of this audit with regard to informal gatherings.

However, I did find an instance where an informal discussion had been used during a closed meeting to consider a matter of business to be decided by the council. This created a risk of a breach of the legislation.

I consider that appropriately run informal gatherings can provide a useful opportunity for elected members to be informed about matters, including the background to issues coming before the council.

There is potential for greater clarity in the legislation on the permitted boundaries for use of informal gatherings. A clarification may be desirable to separate and legitimise process decisions from outcome decisions which are likely to become formal resolutions of a council.

Councils would benefit from the use and publication of a clear internal policy statement on the conduct of informal gatherings and discussions.

**Recommendation 9**

That all councils adopt a legally compliant, best practice approach to use of informal gatherings and release this as a public document.

Consideration should be given to amending the Local Government Act to clarify the provisions of the Act with respect to what constitutes a 'decision' on matters of council business during an informal gathering.

**Minute taking standards****Finding****10**

There is room for improvement in the recording of the proceedings of council meetings, particularly in relation to noting reasons for a confidential meeting order made under section 90(2).

There are instances where documents which relate to a council decision are not being cited or copied in the minutes. Similar problems are occurring with some PowerPoint and verbal presentations to councils where record taking is inadequate and incomplete.

**Recommendation 10**

That all councils review their minute taking practices with a view to ensuring a true and accurate record is being kept of proceedings, including for meetings held in confidence.

Consideration should be given to amending the Local Government (Procedures at Meetings) Regulations to specify that the minutes of a council or key committee meeting must include a record of any document tabled at the meeting and/or any verbal briefing given to the meeting on a matter of council business.



## PART 1

---

# THE AUDIT CONTEXT AND METHODOLOGY

## 1.1 Audit context and Ombudsman jurisdiction

1. Part 3 and Part 4 of Chapter 6 of the Local Government Act provide a local government council with the ability to prevent public access to council meetings and associated documentation.
2. Parts 3 and 4 are underpinned by democratic objectives, and reflect a council's role and function to provide its community with open, responsive and accountable government.<sup>4</sup> Parts 3 and 4 should not be invoked lightly by a council.
3. In various complaint and other investigations under the Ombudsman Act my office has noted the often inconsistent and possible unlawful invoking by councils of Part 3 and Part 4.
4. Because of the confidential nature of council proceedings under Part 3 and Part 4, it is difficult for the public to understand and scrutinise their council's actions under these parts, and raise their concerns with their council, the Office for State/Local Government Relations or my office.
5. For these reasons, I considered it was in the public interest to conduct an audit of councils' practices and procedures concerning Part 3 and Part 4. Section 14A of the Ombudsman Act provides as follows:
  - (1) If the Ombudsman considers it to be in the public interest to do so, the Ombudsman may conduct a review of the administrative practices and procedures of an agency to which this Act applies.
  - (2) The provisions of this Act apply in relation to a review under subsection (1) as if it were an investigation of an administrative act under this Act, subject to such modifications as may be necessary, or as may be prescribed.

## 1.2 Terms of Reference

6. I determined the subject of the audit to be:
  1. the practices and procedures of councils with respect to public access to council and committee meetings (section 90 of the Act and associated provisions)
  2. the practices and procedures of councils with respect to public access to council and committee minutes and documents (section 91 of the Act and associated provisions)
  3. the practices and procedures of councils with respect to councils' codes of practice for the purposes of the operation of Parts 3 and 4 of Chapter 6 of the Act (section 92 of the Act and associated provisions)
  4. the standard of reporting in councils' Annual Reports with respect to access to meetings and documents (section 131 of the Act and associated provisions)
  5. any other matters relevant to the operation of Parts 3 and 4 of Chapter 6 of the Act.

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<sup>4</sup> The *Local Government Act 1999*, see section 8, 'Principles to be observed by a council', specifically section 8(b).

### 1.3 Audit methodology

7. The aim of this audit was to establish what best practice is, identify councils' possible misunderstandings of Part 3 and Part 4, and make recommendations for improvement. 12 councils were selected to participate directly in the audit using criteria outlined below.
8. I advised all 68 councils in South Australia of the audit and sent each of them an Audit Survey Questionnaire. The purpose was two-fold. As well as informing local government generally, my intention was to encourage all councils to review their practices, regardless of participation in the audit.
9. Some councils outside the formal audit chose to do this. I acknowledge their efforts and commitment to the objective of council best practice in managing the confidentiality provisions of the Act.
10. The audit itself was conducted in two stages. The first stage was a desk audit where the 12 selected councils were asked to provide background information and complete the questionnaire on their use of the confidentiality provisions. A copy of the Audit Survey Questionnaire is attached at Appendix A.
11. As part of this process I requested relevant information from each council for the years 2009-2010 and 2010-2011, including:
  - the number of occasions on which each council has invoked section 90(2) of the Act and ordered that the public be excluded from a council meeting
  - the reasons for the order on each occasion, including the application of section 90(3)
  - the note of the order made in the council minutes under section 90(7)
  - the number of occasions on which each council has invoked section 91(7) of the Act and made an order that a document or part of a document be kept confidential
  - the recording of the duration of the order, or the circumstances in which the order will cease to apply, or the period after which the order must be reviewed - section 91(9)(a)
  - the annual review of relevant orders - section 91(9)(a)
  - the note made in the minutes recording the order - section 91(9)(b)
  - delegations of power to a council employee to revoke an order - section 91(9)(c)
  - compliance by councils with their code of practice - Part 5, Chapter 6 - section 92.
12. Following preliminary analysis of responses from all 12 councils, the second stage involved a visit to each council by me and an Investigating Officer from my audit team. The purpose of the visit was to discuss questions arising from the Audit Survey responses and to invite commentary on use of the confidentiality provisions. Written questions based on survey responses were sent to each council in advance of these discussions.
13. At the completion of the council visits, individual reports were prepared and sent to each council's Chief Executive Officer (CEO). The reports were in the form of preliminary findings and included an invitation for each council to reply with its response to the commentary.
14. I reported to each council on the issues relevant to it. I also indicated my intention to circulate a general report on the audit regarding current practice standards and system issues for the information of all councils and the public.

15. As I did not consider it necessary to identify particular council practices or responses, I have chosen to make them anonymous through reference to councils as A through to L.<sup>5</sup>

#### 1.4 Selection of 12 councils<sup>6</sup>

16. The selection of councils for audit was made with regard to each of the 12 state government regions and what was considered to be a good spread of population densities, geographic locations and council size.
17. In 2006, the South Australian government decided to introduce 12 administrative regions for uniform use in planning and reporting across all state government departments and agencies.
18. There are four regions in the Adelaide metropolitan area; three regions in the greater Adelaide area; and five country regions.
19. The Australian Classification of Local Governments (**ACLG**) was introduced in 1994 as a method of classifying local governing bodies in receipt of general financial assistance grants from the Commonwealth. The system uses a variety of urban, urban fringe, provincial city and rural codes to classify councils. In South Australia the Local Government Grants Commission uses the system to allocate grants across four council groupings based on region and size.
20. Through a process of cross referencing councils with ACLG groupings and state government regions the following selections were made for the audit:

##### Adelaide Metropolitan area

- Eastern Adelaide
- Northern Adelaide
- Southern Adelaide
- Western Adelaide

##### Council

City of Burnside  
City of Playford  
City of Onkaparinga  
City of West Torrens

##### Greater Adelaide area

- Adelaide Hills
- Barossa, Light and Lower North
- Fleurieu and Kangaroo Island

##### Council

District Council of Mount Barker  
Light Regional Council  
Alexandrina Council

##### Country regions

- Eyre and Western
- Far North
- Limestone Coast
- Murray and Mallee
- Yorke and Mid North

##### Council

District Council of Ceduna  
District Council of Coober Pedy  
District Council of Grant  
Rural City of Murray Bridge  
District Council of Barunga West

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<sup>5</sup> Whilst the letter designations for each council are consistent throughout this report the audited councils do not correspond to an alphabetical order of listing.

<sup>6</sup> Appendix B profiles each of the 12 participating councils.

## PART 2

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# THE LEGISLATIVE CONTEXT

## 2.1 The *Local Government Act 1999* - Chapter 6

21. A commitment to compliance with the Local Government Act is essential to accountable administration and sound governance. It is important that councils are sensitive to the public's demand for the open and transparent exercise of municipal power. As such, attention to both the letter and the spirit of the Act is a means of strengthening and improving relations with the community. This builds public confidence in local government.
22. It is doubtful that there is any clearly established right under common law for members of the public to attend council meetings.<sup>7</sup> However, section 90 of the Act requires that meetings 'must be conducted in a place open to the public'. The notion of accessibility is directly supported by the principles to be observed by a council, specifically under section 8(a) of the Act where the requirement for 'open, responsive and accountable government' is stated.
23. The Act also stipulates requirements for public notice of council meetings and committees, access to documents and reports to the council and committees. In addition, there is a requirement that ordinary meetings of a municipal council cannot be held, unless decided otherwise by a unanimous resolution of the council, before 5pm. A checklist of legal requirements regarding public access and confidentiality requirements is included in this report at Appendix D. The sections which follow detail the requirements of Parts 3, 4 and 5 of Chapter 6 of the Act with which this audit is primarily concerned.

### Part 3 - Public access to council and committee meetings

#### 90—Meetings to be held in public except in special circumstances

- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):
  - (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—

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<sup>7</sup> M. Goode and D. Williams, *Council Meetings in South Australia*, Federation Press 1992. p.34.

- (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 the supply of goods, the provision of services or the carrying out of works;
  - (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*.
- (4) In considering whether an order should be made under subsection (2), it is irrelevant that discussion of a matter in public may—
- (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
  - (b) cause a loss of confidence in the council or council committee.
- (5) A person who, knowing that an order is in force under subsection (2), enters or remains in a room in which a meeting of the council or council committee is being held is guilty of an offence and liable to a penalty not exceeding \$500 and if such a person fails to leave the room on request it is lawful for an employee of the council or a member of the police force to use reasonable force to remove him or her from the room.
- (6) Subsection (5) does not apply to—
- (a) a member of the council or the council committee; or
  - (b) any other person permitted to be in the room by the council or the council committee.
- (7) If an order is made under subsection (2), a note must be made in the minutes of the making of the order and of the grounds on which it was made.

- (7a) A council committee meeting will be taken to be conducted in a place open to the public for the purposes of this section even if 1 or more committee members participate in the meeting by telephone or other electronic means in accordance with any procedures prescribed by the regulations or determined by the council under section 89 (provided that members of the public can hear the discussion between all committee members and subject to the qualification that a council may direct a committee not to use telephone or other electronic means for the purposes of its meetings).
- (8) The duty to hold a meeting of a council or council committee at a place open to the public does not in itself make unlawful informal gatherings or discussion involving—
- (a) members of the council or council committee; or
  - (b) members of the council or council committee and staff,
- provided that a matter which would ordinarily form part of the agenda for a formal meeting of a council or council committee is not dealt with in such a way as to obtain, or effectively obtain, a decision on the matter outside a formally constituted meeting of the council or council committee.

**Examples—**

The following are examples of informal gatherings or discussions that might be held under subsection (8):

- (a) planning sessions associated with the development of policies or strategies;
  - (b) briefing or training sessions;
  - (c) workshops;
  - (d) social gatherings to encourage informal communication between members or between members and staff.
- (9) In this section—
- personal affairs*** of a person includes—
- (a) that person's—
    - (i) financial affairs;
    - (ii) criminal records;
    - (iii) marital or other personal relationships;
    - (iv) personal qualities, attributes or health status;
  - (b) 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.

## **Part 4 - Minutes of council and committee meetings and release of documents**

### **91—Minutes and release of documents**

- (1) The chief executive officer must ensure that minutes are kept of the proceedings at every meeting of the council or a council committee.
- (2) If the chief executive officer is excluded from a meeting pursuant to Part 3, the person presiding at the meeting must ensure that minutes are kept.
- (3) Each member of the council must, within five days after a meeting of the council or a council committee, be supplied with a copy of all minutes of the proceedings of the meeting kept under this section.



- (4) A copy of the minutes of a meeting of the council must be placed on public display in the principal office of the council within five days after the meeting and kept on display for a period of one month.
- (5) A person is entitled to inspect, without payment of a fee, at the principal office of the council—
  - (a) minutes kept under this section; and
  - (b) reports to the council or a council committee received at a meeting of the council or committee; and
  - (c) recommendations presented to the council in writing and adopted by resolution of the council; and
  - (d) budgetary or other financial statements adopted by the council.
- (6) A person is entitled, on payment of a fee fixed by the council, to a copy of any documents available for inspection under subsection (5).
- (7) However, subsections (4), (5) and (6) do not apply to a document or part of a document if—
  - (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3; and
  - (b) the council or council committee orders that the document or part be kept confidential.
- (8) A council must not make an order under subsection (7)—
  - (a) 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
  - (b) to prevent 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
  - (ba) to prevent 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
  - (c) to prevent 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.
- (9) If an order is made under subsection (7)—
  - (a) the council or council committee 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, and, in any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year; and
  - (b) the council or council committee must ensure that a note is made in the minutes recording the making of the order, the grounds on which it was made, and the decision of the council or council committee under paragraph (a); and
  - (c) the council or council committee may delegate to an employee of the council the power to revoke the order.
- (10) No action for defamation lies against the council in respect of—
  - (a) the accurate publication under this section of any information, statement or document (in whatever form); or

- (b) the accurate publication under this section of a transcript, recording or other record of a meeting of a council or a council committee.
- (11) A document purporting to be minutes of proceedings at a meeting of a council, or a council committee, or to be a copy of or extract from such minutes, and to be signed by the chief executive officer, will be accepted as proof, in the absence of proof to the contrary, of the matters contained in the document.

## Part 5 - Code of practice

### 92—Access to meetings and documents—code of practice

- (1) A council must prepare and adopt a code of practice relating to the principles, policies, procedures and practices that the council will apply for the purposes of the operation of Parts 3 and 4.
- (2) A council must, within 12 months after the conclusion of each periodic election, review the operation of its code of practice under this section.
- (3) A council may at any time alter its code of practice, or substitute a new code of practice.
- (4) A code of practice must include any mandatory provision prescribed by the regulations.
- (5) Before a council adopts, alters or substitutes a code of practice under this section it must—
  - (a) make copies of the proposed code, alterations or substitute code (as the case may be) available for inspection or purchase at the council's principal office; and
  - (b) follow the relevant steps set out in its public consultation policy.
- (6) A person is entitled to inspect (without charge) the code of practice of a council at the principal office of the council during ordinary office hours.
- (7) A person is entitled, on payment of a fee fixed by the council, to a copy of the code of practice.

## 2.2 The Local Government Association Model Code of Practice

- 24. As part of the Local Government Association of SA (LGA) Better Governance Program, a Model Code of Practice for Access to Meetings and Associated Documents has been produced and distributed to councils. The Model Code incorporates four elements, namely:
  - Part A: Guidelines for Developing an Access to Meetings and Documents Code of Practice
  - Part B: Model Code of Practice for Access to Council and Committee Meetings and Associated Documents
  - Part C: Model Confidentiality Orders
  - Part D: Model Confidential Items Register.
- 25. The Model Code was updated from the original in December 2011. It is a comprehensive document which provides practical assistance to councils in discharging their responsibilities under Chapter 6 of the Act. I note the objectives outlined by the LGA are to assist councils to:<sup>8</sup>
  - 1. Meet the provisions of section 92 of the *Local Government Act* 1999 (*"the Act"*) in the preparation and adoption of a Code of practice relating to the

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<sup>8</sup> Local Government Association of South Australia, *Model Code of Practice for Access to Council and Committee Meetings and Associated Documents*, p.3.

principles, policies and procedures that a Council must apply for the operation of Parts 3 and 4 of the Act for the purposes of public access to meetings, documents and minutes of Council and Committee meetings.

2. Inform and educate the community about public access to Council and Committee meetings, minutes of Council and Committee meetings and other Council documents.
3. Clearly outline to the community for what purpose and on what basis a Council may apply the provisions of the Act to restrict public access to meetings and/or documents.
4. Prepare and provide information on Council's Code of practice to the community.
5. Summarise the legal position relating to public access to Council and Committee meetings and documents.

## PART 3

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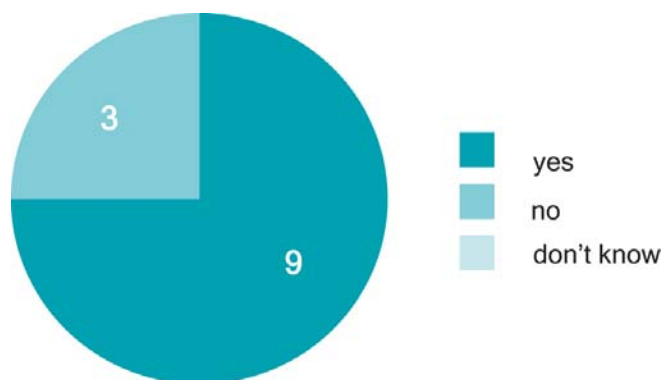
# STATISTICAL DATA

### 3.1 Key facts and figures

26. The following is a summary of the facts and figures emerging from council responses to key questions in the Audit Survey. The questions or issues examined are recorded alongside the figure or table depicting percentage responses from councils. Subheadings indicate a selection of general topic areas where statistical information is available.

### 3.2 Code of practice - section 92

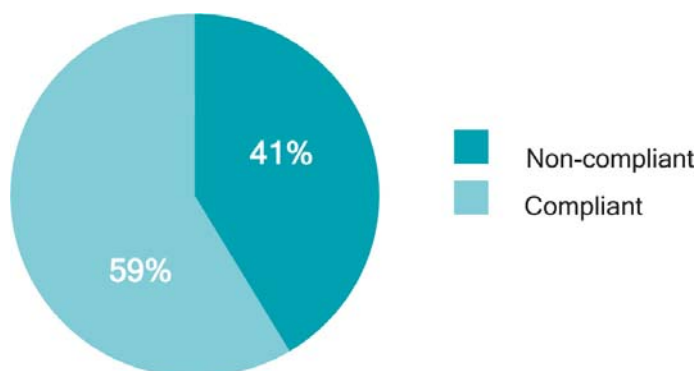
27. Section 92 of the Act requires that a council 'must prepare and adopt a code of practice relating to the principles, policies, procedures and practices that the council will apply for the purposes of the operation of Parts 3 and 4'. There is a further requirement that councils 'must, within 12 months after the conclusion of each periodic election, review the operation of its code of practice'.
28. Figure 1 shows that three of the 12 audited councils had not completed the mandatory review of their *Code of Practice for Access to Meetings and Documents* within the 12 month period following council elections in November 2010. As such, these councils were in breach of the Act, although all three have either now completed the review and endorsed their code, or are close to doing so.



**Figure 1:** Has your council reviewed the operation of its code of practice since the local government elections in November 2010?

29. To provide context for the responses of the 12 councils involved in the audit I decided to review all 68 councils' compliance with section 92. Section 132 of the Act requires that a council must make all codes of practice adopted by the council 'available for inspection on the internet within a reasonable time after they are available at the principal office of the council'.
30. My review of compliance with section 92 across the whole local government sector revealed a high incidence of failure to review codes of practice within the timeframe required by the Act. In order to gauge reviews in progress, I decided to take two snapshots of compliance on the basis of council website postings of their current code of practice. In December 2011, one month beyond the stipulated timeline for completion of the review, I found that a majority of 35 of the 68 councils (51.5%) were non-compliant. A total of 33 councils (48.5%) had completed their code of practice review as per the Act.

31. Figure 2 shows the gradual improvement in those numbers with the second snapshot taken in July 2012. At this point in time 28 councils (41%) remained non-compliant, with the number of compliant councils increasing to 40 (59%). It should be noted that July 2012 is eight months beyond the 12 months allocated for the review task under the Act. Given the currency of discussion across the local government sector around use of the confidentiality provisions, this finding is concerning.



**Figure 2:** Numbers of councils which have reviewed the operation of their code of practice since the local government elections in November 2010.

### 3.3 Moving meetings into confidence

32. Councils were asked to supply the number of agenda items for which they had invoked section 92(2) of the Act and ordered that the public be excluded from a meeting in each of the two years of 2009-2010 and 2010-2011.<sup>9</sup>

Council	No. of meetings held in confidence 2009-2010	No. of agenda items 2009-2010	Percentage of agenda items considered in confidence 2009-2010 (%)	No. of meetings held in confidence 2010 - 2011	No. of agenda items 2010-2011	Percentage of agenda items considered in confidence 2010-2011 (%)
A	14	179	8	14	197	7
B	30	371	8	55	298	18
C	33	245	13	23	273	8
D	7	209	3	3	208	1
E	22	330	7	7	283	2
F	30	338	9	9	329	3
G	59	136	43	44	112	39
H	68	830	8	77	871	9
I	8	130	6	8	125	6
J	7	335	2	10	369	3
K	73	704	10	85	688	12
L	27	219	12	12	265	5
<b>TOTAL</b>	<b>378</b>	<b>4026</b>	<b>9%</b>	<b>347</b>	<b>4018</b>	<b>9%</b>

**Table 1:** Numbers and percentages of council meetings held in confidence compared with total numbers of business items considered.

33. Table 1 shows the totals of meetings held in confidence by the full council compared with the total number of business items considered in each year. Percentages are also shown. The Audit Survey also requested a breakdown of

<sup>9</sup> The percentage of agenda items considered in confidence is calculated from total numbers of business agenda items considered by the full council during ordinary and special meetings. Committee meetings were excluded.

the numbers of business agenda items considered in confidence by the committees during the relevant period. These are not shown in the table.<sup>10</sup>

34. Councils also supplied data on each section 90(2) order made in the relevant period. Details included the date of the order, the item number, whether the meeting was ordinary, special or committee, and the grounds on which every decision was made.
35. Table 2 shows a total of 875 reasons for confidentiality cited by subsection. This number is greater than the 725 orders made by the 12 councils in the two year period because councils frequently cite more than one subsection for making confidentiality orders.<sup>11</sup>
36. It is interesting to note that commercial advantage, followed by personal affairs and tender decisions are the most frequently cited reasons for councils to use the confidentiality provisions.

Council	(a) personal affairs	(b) commercial advantage	(c) trade secret	(d) commercial information	(e) security	(f) maintenance of law	(g) duty of confidence	(h) legal advice	(i) litigation	(j) public authority confidential basis	(k) tenders	(m) Development Act	(n) Freedom of Information Act	TOTAL
A	12	10		4		1		1	2					28
B	34	30	1	8			9	8	6	1	2	2		97
C	7	6		8	1			6	3	3	18			55
D				3			4	5		2				17
E	12	12		6	1		1	2			4	1		39
F	9	10		7	1			5	4		10	1		47
G	48	26		10				28	27		1			141
H	37	23		19				33		6	44	34		196
I		5		1	10	1				4				21
J	8	9					2				4			23
K	13	63	1	15	11		6	2	7	4	43			164
L	15	7		1	2	1	6	6	3		5	1		47
<b>TOTAL:</b>	<b>195</b>	<b>201</b>	<b>2</b>	<b>84</b>	<b>26</b>	<b>3</b>	<b>28</b>	<b>96</b>	<b>52</b>	<b>19</b>	<b>132</b>	<b>39</b>		<b>875</b>

**Table 2: Audited councils section 90(2) orders by subsection for 2009-2011**

<sup>10</sup> Section 41 of the Act provides authority for councils to 'establish committees... to assist the council in the performance of its functions'. Committees may also use the confidentiality provisions of sections 90 and 91. Some councils have numerous committees; one involved in this audit has 14. Consequently, the number of committee business agenda items can sometimes exceed the number of matters considered by the full council.

<sup>11</sup> For example a council will often cite section 90(3) (b) and (h) if they have legal advice about a 'commercial in confidence' matter. In this table all paragraphs cited have been counted individually.

### 3.4 The merits of orders closing meetings to the public

37. The Act provides for the exercise of discretion by councils in the making of confidentiality orders. My audit examined a total of 80 agenda items considered in confidence across the 12 councils.<sup>12</sup>
38. The material I reviewed consisted of the confidential minutes from each meeting, along with the relevant agenda papers and the attached reports and associated documents considered by the council.
39. In summary, I found that 45 of the 80 confidential items should have been considered in a public meeting. Another 31 agenda items were 'at the margin', where I noted that there was a reasonable case to be made for considering at least some of the information in confidence. The alternative, used only occasionally, was for councils to consider a matter in confidence under a section 90(2) meeting order and then to release the information immediately without making a document order under section 91(7).
40. On just four occasions, from the 80 matters I reviewed, did I agree that there were valid grounds for considering the matter in confidence. A related issue is the high incidence of orders made incorrectly and therefore invalidly, by councils not explaining reasons for making the order under section 90(2). I discuss the implications below.



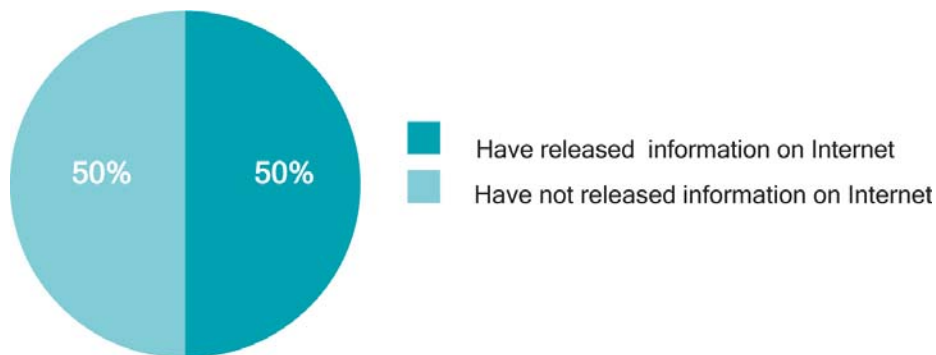
**Figure 3: Merits of orders made to exclude members of the public from council meetings.**

### 3.5 Public access to released documents

41. Figure 4 shows the level of compliance by audited councils with the requirement to make available on the internet all minutes, documents and reports to council which have been released from confidentiality.
42. Six of the 12 councils have been releasing documents on the internet on the expiry of section 91(7) document orders. Of these, only two councils had in place a best practice approach which provides a dedicated site for released confidential items and easy links to council meeting documentation.

<sup>12</sup> Note: I selected agenda items for examination on the basis of their particular relevance to my audit. Figure 3 does not represent the result of a purely random selection.





**Figure 4:** Website access to documents which have been released by councils following expiry of a confidentiality order made under section 91(7).

### 3.6 Consultation when considering section 90(2) meeting orders

43. Question 21 of the Audit Survey asked councils to indicate who was consulted in the preparation of advice to issue a section 90(2) meeting order.
44. Under section 99(1)(c) the CEO is responsible for:
 

[providing] advice and reports to the council on the exercise and performance of its powers and functions under this or any other Act.
45. Given the statutory responsibility of the CEO to provide advice to the council on the exercise of its powers under the Act, it is arguable that the CEO is under no obligation to consult the elected members or other staff in providing advice on use of the confidentiality provisions.
46. That said, I have indicated my view to all councils involved in the audit that consultation with the mayor or committee chair on matters of confidentiality is highly desirable before the meeting agenda papers are finalised.
47. Table 4 shows the responses from the 12 council CEO's on the question of consultation. All but one CEO indicated a willingness to take advice from legal practitioners as necessary. Just two indicated that they consulted with the mayor or deputy mayor as a matter of course. Most others expressed a willingness to consult with the presiding member if there was a level of uncertainty about the recommendation to council.
48. As indicated in the table, most councils are familiar with the availability of legal advice on matters of confidentiality. Depending on the issue involved, it may be wise to do this for certain complicated and sensitive matters. However, councils retain the responsibility for using the confidentiality provisions. In my view, making these decisions should not be wholly a consequence of legal opinion.

Council	As CEO I always make the decision myself	I consult Mayor or Deputy Mayor as a matter of course	I consult Mayor or Deputy Mayor if unsure	I consult committee chair as matter of course	I consult committee chair if unsure	I take advice from staff as appropriate	I take advice from a lawyer if necessary
A			X		X	X	X
B						X	X
C			X		X	X	X
D		X		X			
E			X			X	X
F						X	X
G	X		X			X	X
H			X		X	X	X
I			X				X
J			X				
K	X					X	X
L		X		X		X	X

**Table 4:** Who do you consult when considering whether to indicate to the council or committee that a confidential order may be made?

## PART 4

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# SECTION 92 CODE OF PRACTICE

#### 4.1 Section 92 code of practice for access to meetings and associated documents

49. Section 92 of the Act requires that councils 'must prepare and adopt a code of practice relating to the principles, policies, procedures and practices that the council will apply for the purposes of the operation of Parts 3 and 4'. There is a further requirement that councils 'must, within 12 months after the conclusion of each periodic election, review the operation of its code of practice'.
50. Three of the 12 audited councils had not completed the mandatory review of their *Code of Practice for Access to Meetings and Documents* within the 12 month period following council elections in November 2010. As such, these councils were in breach of the Act, although all three have either now completed the review and endorsed their code, or have almost done so.
51. Whilst not the most significant issue in terms of legislative compliance, the mandatory review does provide an indication of the level of attention councils give to the provisions of Part 3 and Part 4 of Chapter 6 of the Act. As at 10 July 2012, my office confirmed that 28 of the 68 councils in South Australia do not have an up to date code of practice in place and posted on their website. This represents 41% of all councils in breach of the Act more than six months after the expiry of the timeframe allowed under the legislation.
52. Outside of the statutory requirements, the failure of many councils to review their code of practice is a concern in the broader context of the sound functioning and administrative decision making of local government. Incoming councillors, especially those new to local government, rely on the experience and legislative knowledge of their re-elected peers and the council administration for guidance on important matters of meeting procedure.
53. The mandatory review is also an opportunity for a new council to fully acquaint itself with the intent and requirements of Parts 3 and 4. In this case the intention of the provision is clear. It is for every new council following the periodic election cycle to review and remake policy on meeting procedure. Not to do so is a flaw in good administrative practice. Failure to properly review section 92 codes may be a cause of the deficient practices of many councils in their observance of the confidentiality provisions.
54. On a more positive note, I welcome the generally extensive efforts many councils have made in attempting to solicit public comment on their draft codes of practice. Although I did encounter one instance of a council omitting to consult externally, as mandated by the Act, most councils made considerable efforts in this regard. I acknowledge that these consultations have not often been rewarded with a high volume of responses from members of the public. However, some did receive feedback which was useful for the council to consider before finalising the document.
55. Some councils used the review as an opportunity to consult with the LGA and to reconsider the Association's updated model code of practice in the preparation of their own documents.<sup>13</sup> A few went further and provided information to me about organising training for elected members on the draft code and the issues associated with the confidentiality provisions.

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<sup>13</sup> Local Government Association of South Australia, *Model Code of Practice*, op cit.

56. Three councils reported that the review had prompted a significant rewrite of their original code to include, in one case, a detailed update aiming to provide clarity on matters over which confidentiality orders on documents must not be made. These are positive developments, although not yet widespread practices across the local government sector.
57. My review of council submissions to the audit also picked up a number of errors and omissions in codes of practice which are entirely avoidable and potentially problematic if not corrected. One was an occasional tendency to paraphrase the information and matters listed in subsection (3) for the purposes of section 90(2). The paraphrasing in one instance led to omission of one of the tests required to make a valid 'personal affairs' order under section 90(3)(a). As a result, all orders made using the incorrect wording from the code were rendered invalid. In several other instances, an outdated version of the Act was used to outline Part 3 provisions which have since been amended. I emphasise here the importance of maintaining a vigilant eye on amendments to the Act as a fundamental governance responsibility of all councils.<sup>14</sup>
58. In my responses to all 12 councils in the audit, I also drew attention to an important issue which should be clearly stated in all council codes of practice. With regard to section 90(2) orders and citation of the grounds upon which an order is made pursuant to sections 90(3) and 90(7), I have proposed inclusion of a reference to the multiple tests which must be satisfied for an order to be valid under some paragraphs.
59. For example, under section 90(3)(a), the words 'unreasonable disclosure of' are an additional test to 'information concerning the personal affairs of any person (living or dead)'. Both tests must be satisfied to comply with the Act. In this case the council must be convinced that the matter involves both 'personal affairs' and 'unreasonable disclosure'. (The term 'personal affairs' is separately defined in section 90(9) of the Act.) It is not enough to cite disclosure of 'personal affairs' as grounds to exclude the public, as this suggests that the council has not properly turned its mind to the legislative requirements of paragraph (a), namely evidence that the disclosure would also be 'unreasonable'.
60. The same 'double test' applies to all grounds in section 90, which cite a 'public interest' criterion. They are 90(3)(b) - 'commercial advantage', 90(3)(d), - 'commercial information of a confidential nature' and 90(3)(j), - 'information provided on a confidential basis'. I provide further commentary on the public interest test below.

**Finding****1**

Under section 92 of the Local Government Act councils must prepare and adopt a code of practice to govern public access to meetings, documents and minutes of council and committee meetings.

A significant number of councils across South Australia have failed to review their section 92 code of practice within the 12 months timeframe allowed after council elections are held. Reviews should have been completed by November, 2011.

Whilst adequate reviews were completed by many councils, few apparently took the opportunity to educate their new council on the requirements for public access

<sup>14</sup> South Australian Legislation at <http://www.legislation.sa.gov.au/index.aspx> has all Acts of the SA Parliament and the relevant subordinate Regulations available electronically. The listings include the current version and dated historical and older versions, back to the *Local Government Act 1934*.

to meetings and documents. For example, all council codes of practice examined for this audit lacked an appropriate reference to the 'double test' required for some paragraphs of section 90(3) of the Act.

**Recommendation 1**

That all councils update their section 92 code of practice by May 2013 to ensure all procedures comply with the Local Government Act. In particular, the 'double test' requirements of paragraphs (a),(b),(d) and (j) of section 90(3) should be cited and explained. An accurate reference should also be made to the requirement to cite reasons for the use of a particular paragraph to make a valid section 90(2) meeting order.

## PART 5

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# PUBLIC PARTICIPATION AT COUNCIL MEETINGS

## 5.1 Public participation at council meetings

61. Chapter 6 of the Act covers all general aspects of council meetings. As well as the explicit references to public access to meetings and documents in Part 3 and Part 4, the chapter also makes reference to giving public notice of council and committee meetings and to procedure at meetings. The *Local Government (Procedures at Meetings) Regulations 2000* prescribe these procedures in considerable detail, under the clear auspices of the Guiding Principles.

62. Guiding Principle (b) states:

procedures should encourage appropriate community participation in the affairs of the council;

I consider that one of the fundamental means of enabling community participation is to encourage attendance at ordinary meetings of the council and of its committees. It is reasonable to assume that local government as a whole would enjoy more favourable publicity if confidential meetings were kept to an absolute minimum. It is also true that the open and transparent display of a council at work in the interests of its community is a strongly supported feature of our democracy.

63. As part of the Audit Questionnaire the 12 councils were asked to provide details of their methods for encouraging public attendance at meetings. All councils reported significant efforts made to encourage public participation. Methods varied according to local custom and history, but invariably involved each council posting meeting dates and times on the website and at council offices, as required under section 84 of the Act. Use of community notice boards, mail outs to community groups and even local Post Office and local press advertisements were means also employed, particularly, but not exclusively, in councils outside the Adelaide metropolitan area.
64. Four councils in country South Australia reported making a deliberate effort to hold meetings in towns other than the principal office location. Some of these made regular decisions to meet in a small number of townships within their borders. The objective was either to counter historical community rivalries reflecting pre-amalgamation borders, or simply to ensure the council was seen to be representative of all communities. One country council holds 'township meetings' in 10 different communities as part of a scheduled tour across its region each year. The council reports these meetings, a mix of council business and socialising, are an important and successful mechanism for engaging with local communities. Both the mayor and the CEO attend and they answer questions and make commitments which are considered 'on the record' by the council.
65. Another country council reported a boost in public attendance when it opened up two council committees to members of the public as participants. A public works and an administration and finance committee now actively promote public participation with an invitation for attendees to vote on recommendations. These are framed by the council's committee members in consultation with the non council participants. The outcomes of the community votes are then put to the full council as part of its consideration of resolutions referred by the committees.
66. Four councils across metropolitan and country South Australia reported on their successful use of Question and Answer sessions with members of the public attending full council meetings. Methods vary, from a proforma requirement to



submit questions on notice the day before meetings, to a well established practice in one council of providing residents with the opportunity to ask questions on any council related topic at the beginning of every meeting.

67. That council also provides for a further Question and Answer session at the end of the meeting on any topic related to the meeting agenda. Notwithstanding a level of discomfort for elected members when some controversial issues are raised, the approach to public access is impressive and shows substantial community engagement with the council. I commend these councils for maintaining this level of openness with their local communities.
68. Two councils raised the opposite issue: dealing with an unruly gallery. Both indicated that they were looking for ways to better manage disruptive people attending council meetings. I note the Procedures at Meetings regulations<sup>15</sup> provide a modest penalty for members of the public who 'behave in a disorderly manner' or 'cause an interruption'. In a practical sense the provision probably does not deter those determined to interrupt proceedings. This usually happens when a matter of controversy in the community is scheduled to be discussed and/or a key decision made. Development approvals, sale of assets, major capital works and environmental issues often feature in disputes between councils and sections of the community.
69. Whilst I agree these situations can be taxing on elected members, I do not consider there has been a practical or persuasive case made to strengthen penalties for interruption of council meetings. Instead, I suggest use of methods which seek to engage the local community in dialogue, at an early stage, to take some of the heat out of confrontations over difficult issues. In my view this is preferable to the use of frequent meeting adjournments or the call out of police to clear the gallery.
70. For most councils, attendance in the public gallery will always be patchy and motivated by interest in the burning issues of the day. Notwithstanding the views expressed to me about full galleries being a thing of the past, and complaints about modern day apathy to council proceedings, I suspect that people retain an interest in local issues which they feel directly affect them. I cite as evidence a number of recent, well publicised protests held to engage council meetings over controversial issues. Many would regard this pressure as a desirable accountability mechanism in an open democratic society.
71. I am impressed that many councils which participated in the audit are now seeking to diversify the ways in which they communicate with the public. Some other noteworthy examples reported are successful efforts by one council to attract a steady and growing number of attendees to community meetings, as well as promoting a significant 'issue' focus in general and committee meetings.
72. Increasingly councils are looking to develop sophisticated approaches to community engagement through mechanisms such as e-panel community groups, leadership forums and community/neighbourhood development networks. The use of social media to inform, consult and engage local residents and businesses is also an interesting innovation. A few councils are either investigating, or have established, website links to audio recordings of council meetings in addition to the traditional record of minutes. Initiatives such as these hold considerable potential for further developing council profiles and for generating positive, open connections with the community.

<sup>15</sup> *Local Government (Procedures at Meetings) Regulations 2000*, Regulation 30.

2

**Finding**

All councils reported significant efforts made to encourage public participation at council and committee meetings. Creative efforts involved rotating meeting venues, using local media to promote discussion and opening council meetings to Question and Answer dialogues between elected members and the community. A majority of the 12 audited councils are actively looking for new ways to engage their local communities.

**Recommendation 2**

That all councils continue to encourage public attendance and participation at council and committee meetings. Further, that the Local Government Association of SA continue to support best practice in community engagement through the Governance Officers Network and other related initiatives.

## PART 6

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# MOVING MEETINGS INTO CONFIDENCE

## 6.1 Moving meetings into confidence using section 90(2) 'meeting orders'

73. In the two years from 2009 to 2011, the 12 councils involved in the audit moved into confidence on 725 occasions in full council meetings. Table 1 shows the incidence of section 90(2) meeting orders across all audited councils and the percentage of agenda items considered in confidence for the relevant period. The percentage has been calculated against reports of 8044 business agenda items considered over the two year period by these councils.
74. Breaking the figures down further for the 12 audited councils, four councils averaged over 10% for the relevant period, six councils returned figures between 5% and 10% of the total and just two of the audit group had an average rate below 3%. I would like to see councils keep confidential meetings well below 5% of agenda items - more appropriately something in the 2%-3% range.
75. In my discussions with councils, most readily agreed that they had overused the confidentiality provisions and were able to identify problems with their own processes for making section 90(2) meeting orders. Some indicated that they had given insufficient consideration to the particulars of matters, instead having a blanket 'confidential business' approach to issues which council had previously considered in confidence. This meant certain issues would automatically attract a recommendation proposing an in camera discussion to the council. Frequently cited examples included CEO performance reviews, staff discipline issues, alleged elected member code of conduct breaches, land purchases, proposals to increase fees, sale of council assets and tenders.
76. Interestingly, when looking across a range of councils and examining the details of the various section 90(2) meeting orders made, there is no consistency in what might be designated an 'automatic' issue for confidentiality. All of the examples cited above are handled differently council by council. Whilst many councils consider CEO performance reviews and salary matters in confidence, not all do. Similarly, allegations of elected member code of conduct breaches and tender proposals are handled in very different ways across local government in South Australia. There is much that councils can learn from each other in this respect. However, the overriding point is that each item of business should be considered on its merits, not as an issue which should automatically be deemed confidential. The Act is clear: section 90 allows for orders to be made only in special circumstances, and those circumstances must be explained.
77. The question of who decides on a recommendation for council to resolve to hear a matter in confidence is also interesting. Question 18 of the Audit Survey (see Table 4) asked councils to indicate who the CEO's consulted when 'considering whether to indicate to the council or a committee that a confidential order may be made'. The choices canvassed a range of council office bearers, staff and lawyers. Only two councils indicated that the CEO consulted with the mayor 'as a matter of course', although another seven councils indicated that they consulted the mayor 'if unsure' about a recommendation. Ten councils indicated they consult with lawyers 'if necessary'. Only two council CEO's indicated that they always made the decision to recommend hearing a matter in confidence themselves. However, in my conversations with councils most conceded that the involvement of the presiding member was desirable in making that decision. Most also agreed that their current approach to internal consultation could be improved upon.

78. Whilst section 90(2) of the Act clearly spells out the basis upon which an order to exclude the public may be made, it does not prescribe the procedure for moving the meeting into confidence. Despite the fact that a code of practice is required, and there are clear guidelines and a model code of practice available from the LGA, there is still some confusion in councils about the correct process to exclude the public from a meeting.<sup>16</sup> The following case study illustrates the point:

**Case study 1: Procedural resolution to move council into confidence**

Following difficulties with elected members accidentally disclosing confidential information when making the decision to move into confidence, one council introduced a new process for moving into confidence in 2009.

As standard practice the administration prepares papers marked 'confidential' for a particular item with a recommendation for closure of the meeting. When the meeting convenes and the item is introduced the council then resolves to move into confidence as an initial procedural step. At the time the procedural resolution is carried the public are required to leave the chamber. The council then discusses, in confidence, another set of resolutions citing the reasons for confidentiality.

If carried, the council then discusses the item of business in camera. It then (usually) makes a section 91(7) order to keep reports, associated documents and minutes confidential with a requirement that the confidentiality order may be lifted after a fixed period of time - or 'when the matter is concluded'.

The council does not post released minutes and previously confidential documents on its website when the confidentiality order is lifted or has expired. At present, the council requires members of the public to make a direct request for release of the information from the council office.

The council has indicated that it intends to review its procedures for moving into confidence and for making released confidential documents available on its website.

79. The intent of the Act is to allow discussion of the reasons for exclusion to be made clear to members of the public before their exclusion. On this basis, whilst I understand the circumstances which led to the change in procedure, I consider that the practice which is followed in this example, namely passing a 'procedural decision' for 'council to move a motion to go into confidence', is not in itself sufficient to exclude members of the public. In my view the Act requires that councils openly consider the full resolution proposing an 'In Confidence' matter which includes a clear, valid citation of the grounds on which the proposed order is to be made.
80. Another confusion about the discretionary powers of section 90(2) became apparent during the course of the audit. In one instance a council was given advice by the CEO which asserted that a particular item of business was required to be discussed in confidence under section 90(3)(k). The matter related to a tender for the supply of goods. I advised the council that section 90(2) grants discretion, rather than imposing an obligation, to discuss the matters listed in section 90(3) in confidence. This reflects the intent of section 90 that all matters will be dealt with in public except in special circumstances.

<sup>16</sup> Local Government Association of South Australia, *Model Code of Practice*, op cit.

81. This mistake illustrates that care must be taken by council administrations to provide the correct advice to the council on the nature of its power and obligations under section 90(2). It also underlines my earlier point that the elected members must also be familiar with the Act and with their obligation to maintain public access to council meetings.
82. On the matter of citing reasons for making an order under section 90(2), the Act requires that 'the grounds on which [the order] was made' will be included in the minutes. This is an area where councils are interpreting the legislation in different ways, often incorrectly. None of the 12 audited councils regularly explained reasoning consistent with their obligation under section 90(7), although there were attempts to articulate grounds in some instances. Sometimes these were documented in the confidential report to the council, rather than in the minutes, as is required by the legislation.
83. Several councils stated that their usual practice was to discuss reasons only after the meeting had excluded members of the public. As with the case study outlined above, there were fears expressed about elected members inadvertently disclosing confidential information if reasons were too widely canvassed in public. I believe this is an area where the legislation could usefully be clarified to provide explicit guidance to councils.
84. In my view councils must, after identifying the relevant paragraph of section 90(3) of the Act, then articulate the reasoning behind the order. Details of the reasons for relying on the particular paragraphs in section 90(3) must be provided in order to allow the public to better understand the council's decision for moving into confidence. This is part of good administrative decision-making.<sup>17</sup> Further, articulating reasons would also help both the administrative staff and councillors to think more carefully about why the public should be excluded from the meeting. In the latter case, this may also help add an appropriate measure of caution to weighing up recommendations for secrecy.
85. I note that the LGA also states in its 'Meeting Procedures Handbook for Council Members':
- The Council may by resolution, exclude the public from the meeting in order to receive, discuss or consider in confidence only those specific matters or information the details of which are set out in S90(3). Each item must be considered on its merits. Even though the subject matter is within the provisions of S90(3) it does not automatically flow that the Council will resolve to close the meeting to the public. Separate consideration must be given to each matter in accordance with the requirements of S90 for the purpose of determining if the public will be excluded whilst that matter is considered.
- The resolution to exclude the public must contain reference to the relevant clause(s) of S90(3) and also include details of the reasons why the Council is satisfied that the principle that the meeting should be conducted in a place open to the public has been outweighed in relation to the matter.<sup>18</sup>
86. The LGA's Model Code of Practice acknowledges this in slightly different language where it advises councils that 'sufficient detail of the grounds on which the order was made will be included in the minutes'. One shorthand way to ensure this is done is to consider and address the important word: **'because [insert reasons]'**. In every instance it then becomes necessary to give a brief explanation of why a particular paragraph is being used to make the order.

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<sup>17</sup> See: Administrative Review Council, Best Practice Guide 4, Decision Making: Reasons, August 2007.

<sup>18</sup> Local Government Association of South Australia, *Meeting Procedures Handbook for Council Members*, Reprint 2, 2010, p11.

87. Two other issues came to light in my examination of council practices in moving meetings into confidence. The first relates to the issue briefly touched on above, namely the question of who decides on a recommendation for council to hear a matter in confidence. As the legislation states, the decision to move into confidence is one for the elected council members alone. However, as is the case in most organisations with both an administrative and an elected arm, the council's senior staff, almost always the CEO, makes the decision to recommend that council use the provisions of section 90(2).

88. Question 13. in the Audit Questionnaire asked councils:

Have there been occasions in the relevant period when council has considered moving into confidence under section 90(2), but decided not to do so?

The response was overwhelmingly 'No', with nine of the 12 councils indicating that this had not happened in the relevant period. Whilst three councils did record occasions where they had decided against a recommendation to move into confidence, the instances were rare and sometimes accidental. For example, one council reported that a matter 'got away' from the elected members during the public discussion to move the section 90(2) meeting order. As supposedly confidential details had been revealed inadvertently, the council decided to simply continue the discussion without making the order and requiring the public to leave. The council said that, on reflection, the matter need not have been designated as confidential. They concluded that the public discussion had provided a useful learning for the preparation of future confidentiality recommendations.

89. Another council indicated that its elected members had always been willing to accept the advice from the administration to move into confidence. However, the council reported a small number of occasions where it had, during open debate, proposed moving into confidence for an item without a recommendation to do so. On each occasion the administration had 'dissuaded them of the need or legality of doing so'. It appears that instances of council elected members debating recommendations to make a section 90(2) meeting order are not common. I acknowledge, however, that debates on the merits of moving into confidentiality do occur from time to time.

90. Second, there are many instances which came to light during the audit of matters which were considered in confidence which, arguably, need not have come to the council for a decision. These are, of course, judgement calls about what business a council chooses to conduct during formal meetings. Examples I noted included a code of conduct investigation which was reported in detail to the council - but which could have been dealt with by providing a less detailed public report summarising the process of investigation the council had instigated. Another case involved a performance report on council employees other than the CEO, who is recognised for the purposes of the Act as the only direct council employee.

91. The most frequent example of business which senior administrators believe need not be taken to council involves low value tenders. A number of council CEOs reported that they had no option other than to take a tender approval to council (seeking a section 90(2) meeting order) because they did not have the delegated authority to approve tenders of any significant value. These are matters which should properly be resolved as part of every council's business planning and governance review process.

### **Finding**

3

The percentage of section 90(2) meeting orders is calculated against the total number of agenda items considered by council in the two year period 2009-2011. A majority of councils involved in the audit reported between 5% and 10%, or higher, of orders which closed meetings to the public.

Council responses to the Audit Questionnaire show little evidence of elected members debating or deciding against council administration recommendations for section 90(2) meeting orders.

Contrary to law, councils generally are providing insufficient details of their reasons for excluding the public under sections 90(2) and 90(3) of the Local Government Act. The current law, requiring a note to be made explaining the grounds for the meeting order, is either misunderstood or misinterpreted by most councils.

### **Recommendation 3**

That all councils aim to deal with 3% or less of their agenda items in confidence.

Further, that all councils consider implementing a system of pre-meeting consultation between the CEO and the presiding member for all recommendations made to close a council or committee meeting to the public.

Consideration should be given to amending the Local Government Act to clarify that an explanation of reasons must be recorded in the minutes for the making of a section 90(2) meeting order.



## PART 7

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# THE MERITS OF ORDERS CLOSING MEETINGS TO THE PUBLIC

## 7.1 The merits of section 90(2) meeting orders, closing meetings to the public

92. My audit examined a total of 80 agenda items considered in confidence across the 12 councils. The material I reviewed consisted of the confidential minutes from each meeting, along with the relevant agenda papers and the attached reports and associated documents considered by the council. As noted above, my examination of documentation of agenda items was augmented by follow-up written questions put to all councils on each of the selected items and a discussion with senior council staff and the mayor at interview.
93. As shown in Figure 3, I found that for 45 of the 80 agenda items examined there were no valid grounds for the council to exclude members of the public.<sup>19</sup> On many other occasions I made the judgement that the order to invoke section 90(2) had been too broad and that many of the details of the discussion could have been held in public. The effect of this would be to limit the in camera deliberations to only those items which were properly the subject of a valid confidentiality order.
94. A recurring example of this is the issue of CEO performance reviews conducted regularly by councils. I advised councils that I could see no good reason to exclude the public from discussions and, consequently, from access to documentation, which covered, *inter alia*, the key performance indicators established for the CEO position and the criteria for assessing performance. I made the observation on a number of occasions that I can find no compelling reason for considering the matter of CEO performance reviews exclusively in confidence.
95. I understand in some councils there is an accepted view of human resource management practice that CEO performance reviews are managed confidentially. However, in my discussions with various councils I found there is no consistent approach to CEO reviews, or an accepted principle of human resource management which relates specifically to confidentiality. Indeed, there seems to be a wide range of practices in this area.
96. Having made this point, I consider councils should retain the discretion to use the provision citing 'unreasonable disclosure of information concerning the personal affairs of any person' - if the agenda item is likely to involve a detailed appraisal that includes a discussion of the CEO's personality and/or qualities. Whilst it is certainly not mandatory for councils to hold these discussions in camera, I understand why many councils choose to do so and I offer no criticism for this.
97. In some of the items I reviewed the in camera discussion apparently involved both procedural matters and issues concerning personal affairs. Where there are sensitive matters discussed which fit the Act's criteria for 'personal affairs', such as a discussion of staff dynamics and an individual's leadership qualities, it may be that the best course of action is to consider the issue in two parts. A discussion of procedure, approach and criteria to be used in a performance appraisal may be considered in public. The actual appraisal, where performance is detailed and assessed, might reasonably be held in camera,

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<sup>19</sup> All documentation from identified confidential items was carefully examined. I acknowledge that my review, whilst thorough and considered, may not have taken account of all the facts of each case as these were considered by councils at the time decisions to exclude members of the public were made. As such, it is important to note that the judgement of merit in each of the cases I examined is not a conclusive and definitive finding of either error or correctness.

although it is also appropriate that the outcome should be made public. As I interpret it, this is the intention of section 90(9)(b) of the Act.

98. An interesting and appropriate alternative is the practice employed by one council. The council held the CEO performance review discussion in camera under a section 90(2) meeting order made in reliance on section 90(3)(a), but did not to resolve to keep either the minutes or the associated documents and reports secret using a section 91(7) document order. In this way the discussion was held confidentially but the meeting outcomes were made immediately available to the public. I consider that this approach could have a wider application than is currently the case across South Australian councils.
99. Section 90(3)(b) makes reference to disclosure of information which '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 council; and would, on balance, be contrary to the public interest.' The paragraph is the most commonly used criterion from the list of 13 paragraphs prescribed for the purposes of section 90(2).
100. As with section 90(3)(a), two tests apply for orders made under section 90(3)(b). They depend on the council being satisfied that at least one of the commercial interest tests is relevant, and that disclosure would, on balance, be contrary to the public interest. During the audit I found that many councils repeatedly failed to satisfy the two tests required. Moreover, in some instances councils failed to specify which of the two (or both) tests in section 90(3)(b)(i) applied to any of the matters considered. Often there was no record that there had been active consideration of the public interest test. In two cases I found that section 90(3)(b)(ii) was omitted entirely from the resolution to move a meeting into confidence. As canvassed above, there is a requirement for councils to explain, in public session, why a matter is deemed to meet the criteria for exclusion under section 90(3)(b).
101. If a council relies on section 90(3)(b) to exclude the public it should, as a minimum, describe how and why:
  - the information could reasonably be expected to confer a commercial advantage; or
  - disclosure of the information would prejudice the commercial position of the council; and
  - disclosure of the information would, on balance, be contrary to the public interest.
102. The expectation of the commercial advantage or the harm to the council's commercial position must be based on reason, and not be inconsequential.<sup>20</sup>
103. The following case study is an example of a section 90(2) meeting order made in reliance on section 90(3)(b), which I had cause to question on technical grounds and also on my reading of the merits of the case for confidentiality:

#### **Case study 2: Merits of considering a commercial interest matter**

In 2008-2009 discussions were conducted by council A with a neighbouring council B regarding the desirability of jointly establishing a regional recreation and sport centre. Council A considered a public report prepared by a project consultancy company which had canvassed the advantages of various sites proposed for the facility. A 2006 location assessment had focused on 10

<sup>20</sup> See *Iplex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54.

identified sites which had been augmented by the addition of 4 additional sites in 2008. The information about the proposed centre had been in the public domain since at least 2008.

Council A moved in camera relying on section 90(3)(b) to exclude the public. The minutes record no identification of the commercial interest involved in the matter. No reason was given for relying on this particular paragraph of section 90(3). The item was to consider an update report on discussions with council B and a proposal to jointly fund company Z for an amount up to \$20,000 to provide probity and consultancy services for the investigation of a privately developed and operated regional sport and recreation centre.

Council A noted in the confidential minutes of the meeting that 'it was considered important for us to ensure that we deal with all issues in a very open and transparent manner'.

The resolution carried at the meeting endorsed the preparation by company Z, in consultation with a joint council working party, of an 'Expression of Interest' invitation for the development and operation of the recreation and sport centre. It was agreed that the joint working party would prepare and issue a press release providing the community with an update on progress/commitments to date.

Council A made a further order that the report and minute remain confidential for a period of 12 months. The section 91(7) order to suppress the council report was incorrectly referenced to section 90(3) of the Act.

Council A has advised me that it will now ensure a more rigorous check of the grounds on which an order is made pursuant to section 90(2) and that appropriate description and reasoning behind each decision will be recorded.

104. As noted, a council should show how disclosure of the information being considered would, on balance, be contrary to the public interest. There are identical requirements to this provision in the *Freedom of Information Act 1991*, where the District Court of South Australia has described the need to balance competing public interest factors in favour of and against disclosure. The court said:

This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure ..., but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.<sup>21</sup>

105. I consider this view is applicable to all provisions in section 90(3) which contain a public interest balancing obligation. I note also that the LGA adopts a similar view in its 'Meeting Procedures Handbook for Council Members':

Some of the specific clauses in S90(3) also require the Council to consider whether disclosure of information of that kind would, in this particular case, be contrary to the public interest. The public interest consideration requires a Council or committee to decide what the public interest is for the matter. The Council or committee must consider the factors for and against disclosure and determine, on balance, whether the exclusion of the public from the discussion or denial of access to documents is contrary to the public interest. The Council must also appropriately record the reasons for excluding the public and holding the meeting 'in confidence' S90(7).<sup>22</sup>

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<sup>21</sup> See *Iplex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54.

<sup>22</sup> Local Government Association of South Australia, *Meeting Procedures Handbook*, op cit, 2010, p11.

106. I note that in the minutes of many of the meetings I reviewed, councils did not provide details of the reasons for excluding the public, and simply recited one of the provisions of section 90(3)(b) as the grounds. In the case of paragraphs (a),(b),(d) and (j) it is mandatory for councils to show reasoning for two tests; in the latter three instances the public interest balancing test is required. Unfortunately, the meaning of the words: 'would, on balance, be contrary to the public interest', is not universally understood. Neither is there a general understanding that the Act states the default position in favour of public disclosure. I address this concept further in Part 13 below.
107. A related concern arises from my examination of other sets of confidential minutes which relied on section 90(2) meeting orders. These orders were made, without adequate reasoning, to discuss matters behind closed doors which were clearly controversial in the community. Some involved the sale of assets and use of community land, and one was a financial dealing with a private company which involved a council subsidy. There were also instances where the calling or approval of tenders generated a doubtful rationale for secrecy, and lengthy orders were made to suppress minutes, reports and associated documents.
108. On several occasions in my individual reports to councils I advised that simply marking documents as 'confidential' is not sufficient in and of itself to show that the documents were communicated confidentially. Nor have I been satisfied that documents should be subject to a section 90(2) meeting order under the Act simply because a request has been made to a council by a third party that the matter should be treated as confidential.
109. I also warned that document orders made for long periods of time under section 91(7)<sup>23</sup> were generally undesirable and could lead to the conclusion that the council is attempting to avoid embarrassment, rather than seeking to disclose information at the earliest possible opportunity. One council has prepared a confidentiality guideline for the administration (itself a good initiative), which notes that 'on its own' embarrassment or loss of confidence in the council are not valid reasons to keep an item confidential. The advice goes on to say that: 'however there may be justification for an item to be held in confidence if it meets other criteria'.
110. This wording leaves the impression that the council administration might look for other criteria to provide the rationale for an order which may, at least in part, be about avoiding embarrassment or loss of confidence. Another council stated openly that it has sometimes used the confidentiality provisions because the elected members 'want to debate a matter without pressure from the public'. Both of these examples are clearly contrary to the intent of section 90(4) of the Act. It reads as follows:
  - (4) In considering whether an order should be made under subsection (2), it is irrelevant that discussion of a matter in public may—
    - (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
    - (b) cause a loss of confidence in the council or council committee.

<sup>23</sup> Whilst some councils used time- lapse orders of 3 or six months, most used a 'standard' 12 month document order for minutes, reports and associated documents. I reviewed many orders in excess of 12 months - some 2 years, 5 years, 10 years and even 20 years.

111. I have considered such disclosures about the effects of public pressure and weighed up issues arising from the use of section 90(2) meeting orders without the recording of lawful reasons. I am inclined to the view that the legislation could usefully provide more explicit guidance in ruling out matters of controversy and sensitivity (as an undeclared rationale) for councils making confidentiality orders. This is a matter which could be explored further in any broader review of the provisions of Parts 3 and 4 of Chapter 6. I note here that claims have also been made during the course of the audit, and in the public domain, about the use of informal gatherings by some councils to avoid public scrutiny of decision making. I address the issue of informal gatherings in Part 12 below.

#### **Finding**

4

For 45 of the 80 agenda items examined for this audit, I consider that there were no valid grounds for the council to exclude members of the public under sections 90(2) and 90(3) of the Local Government Act.

‘Commercial interest’ considerations and regard for the ‘personal affairs’ of a person were the most frequently stated reasons for holding meetings behind closed doors. Few meeting orders examined showed an understanding of the requirement of the Act for meetings to be held in public unless there were clear ‘special circumstances’ to justify exclusion of the public.

There was little indication of councils discriminating between background or contextual information which should be in the public domain, and those specific issues which merited discussion in confidence.

I formed the view that councils are sometimes moving into confidence over matters of local sensitivity or controversy in an attempt to debate issues without pressure from the public. Such intent is contrary to the democratic objects of the Act.

#### **Recommendation 4**

Consideration should be given to amending the Local Government Act to specify that controversy or sensitivity over a matter in the community is an irrelevant ground for the making of a section 90(2) meeting order.

## PART 8

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# MAKING ORDERS TO KEEP DOCUMENTS CONFIDENTIAL

## 8.1 Making orders to keep documents confidential using section 91(7) 'document orders'

112. Section 91(7) of the Act is the complementary provision enabling appropriate suppression of minutes, reports and associated documents pursuant to a valid section 90(2) meeting order. The Act does not permit the provision to be used in isolation from a meeting order. This effectively means a council must first pass a valid order to exclude the public from a meeting before a confidential document may be considered, or a record made as a minute of the meeting. It is not possible to canvass the content of a confidential document in a public meeting without also releasing that document.<sup>24</sup>
113. As noted above, I did come across occasions in some councils where document orders were considered quite distinctly from meeting orders. In these councils there were a small number of examples of matters discussed in confidence for which no order over meeting documents had been made. This, in itself, is a good practice when dealing with some items which require confidentiality for discussion, but for which there is no reason to withhold any documentation from the public.<sup>25</sup> I am strongly supportive of an approach to differentiating the two confidentiality powers in Parts 3 and 4 of Chapter 6. I consider that such a practice is evidence that the council is more carefully considering its responsibilities with respect to public disclosure.
114. Another grouping of resolutions I encountered were section 91(7) document orders which employed a short timeline before release, e.g: 'to be kept confidential for 3 weeks until 8 October 2010' or, 'for a period of 3 months from the date of this meeting'. Others used an event trigger with similar short-term intent such as 'until nominees have been notified' or, 'until all the licence documentation has been completed'. These orders were clearly seeking to maintain confidentiality over documentation for a minimum amount of time before release to the public.
115. In my reports to councils, I noted that use of a fixed timeframe for section 91(7) document orders provides some risk that events may overtake the order and render it redundant before the formal expiry date. Contract negotiations and settlement of legal disputes are just two examples of issues which commonly attract a time-linked release. Having reviewed many of the differing variations to section 91(7) document orders made by councils in the relevant period, I have recommended as best practice the approach which links release of documents with an event. Common examples are resolutions with conditions such as: 'until settlement occurs for the sale of the property' or, 'until the document has been signed'.
116. Where the council believes that a timeframe is appropriate for a document order, or wishes to ensure early release if events turn out differently from the anticipated outcome, I have suggested adding the words: 'or such lesser period as may be determined by the Chief Executive Officer', to the order. I acknowledge that many councils have stated, in response to this audit, their intention to grant such discretion to the CEO. I have encouraged councils to do this more often when using section 91(7), and to link the expiry date to an event wherever possible. These are useful methods for ensuring the earliest possible

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<sup>24</sup> This issue was raised by one council during the audit as 'a flaw in the law'. Whilst I understand the concern expressed, I can see no alternative to disclosure if a document has been included in the report to council for a business item on the agenda. Another approach, which is permissible, is the out-of-session circulation of a confidential memo to elected members providing information which is not formally part of a business agenda. As with all other council documents, such a document would still be subject to the provisions of the FOI Act.

<sup>25</sup> Effectively, this means that the decision and documentation are made available to the public when the minutes are released, i.e. according to section 91(3), within five days after that meeting of council.



public release date. They also provide a ready reference point for monitoring release triggers and stimulating the timely posting of released information on the council's website.

117. In my review of the use of section 91(7) document orders I noticed that some councils have required particular documents to be held in confidence for long periods of time. One council has recently issued a draft guide which allocates a timeline for each of the 13 paragraphs of section 90(3), some of which recommend 10 year orders. The notion of fixed timelines for release of items under a particular category runs contrary to the requirement for each matter to be considered on its merits and for the minimum possible time for an order to remain in place. I found two councils which had made section 91(7) document orders for periods as long as 20 years. Whilst these items are subject to annual review under section 91(9)(a), in my view orders which are designed to remain in place for a significant period of years are generally undesirable. This is particularly so when the order reaches well beyond one or more terms of the elected council.
118. It is good practice to avoid making section 91(7) document orders which are *de facto* indefinite orders. It is also wise to avoid triggers which are vague or open to dispute such as: 'when there is no legal or commercial need for continued confidentiality'. Others I came across tied release dates to events such as 'until negotiations with company X are concluded or construction of a recreation facility has commenced' or, 'until Families SA advise that the nominee is no longer under guardianship'. In the latter example the issue becomes one of the council effectively divesting itself of the responsibility to decide that a matter should now be made public. For the reasons noted here, I consider it is preferable to avoid using terminology which is liable to misinterpretation or misunderstanding - or which leads to an order remaining in place indefinitely.
119. From the material I reviewed, a number of process mistakes were common in making section 91(7) document orders. Some of these were trivial, such as omitting to minute the particulars of the order, or incorrectly referring to section 91(9) of the Act. Others had greater import, such as one council moving in camera under section 90(2) and then discussing a number of confidential items together, making a series of section 91(7) document orders as one resolution. I advised the council that all proposed confidential agenda items should be considered separately, as is required by the Act.
120. This process mistake does not, however, impact on one good practice common to many councils. This is about considering confidential items as the last session of business on the agenda to avoid asking members of the public to leave and then return to the chamber. The problem described only arises if multiple confidential items are considered together under a single section 90(2) meeting order - or which purport to use one order to suppress documents and minutes.
121. The following case study is an example of an invalid confidentiality order which sought to retrospectively alter incomplete section 91(7) document orders:

**Case study 3: Making orders to keep documents confidential**

One council currently has in place a six-monthly review system for monitoring section 91(7) document orders. The council's Register of Confidential Minutes tracks both 'confidentiality ends' and 'release' dates as separate entries. This has apparently led to some confusion around what remains held in confidence.

As part of one regular review the council discovered anomalies in the making of a number of past document orders. To remedy this, the council resolved, in camera, to retrospectively amend seven document orders dating from March 2011 back to March 2008. The resolution sought to extend the orders to the 'report and associated documents' as well as to the 'minutes'. This was to take effect for each of the separate resolutions made on the seven dates cited in the minutes. The intent was to remedy the error in framing the original resolutions which omitted a reference to documents other than the minutes.

The section 90(2) meeting order used to consider this review item in camera cited the provisions of all 13 paragraphs of section 90(3) as a catch-all to ensure all elements were covered. The motion carried by council stated grounds for the order as follows:

'the council is satisfied that it is reasonably foreseeable that the public disclosure or discussion of the information at the meeting could cause significant damage to the interests of the council, because of the public disclosure or discussion relating to confidential items previously discussed by council'.

I advised the council that the order is *ultra vires* and is of no effect. This is so because any items not covered by a valid document order are already, by definition, public documents. As such, they cannot be retrospectively suppressed. I further advised the council that the documents and reports referred to in the invalid order should not be held in confidence.

The council has since informed me that it has released the documents covered by the *ultra vires* order and indicated that it understands the need to 'get the process right'. As part of a wider ranging review of confidentiality procedures the council has stated its intention to schedule quarterly reviews of all items held in confidence.

### Finding

5

A significant number of councils reported practices where section 91(7) confidential document orders were considered quite distinctly from section 90(2) confidential meeting orders. In these councils there were examples of matters discussed in confidence for which no order over meeting documents had been made. I consider this good practice when dealing with items which require confidentiality for discussion, but for which there is no reason to withhold any documentation from the public. I support differentiating the two confidentiality powers.

The audited councils used a variety of approaches to deciding the expiry of document orders; from short timelines to open-ended event triggers. Some event-related document orders were vague and therefore easily misunderstood or open to interpretation as indefinite orders.

It is good practice to frame document orders which require defined event triggers for release, with the fall back option of a delegated power for the CEO to release documents to a shorter timeline.

Process mistakes were commonplace in the making of document orders with some examples of decisions being made *ultra vires*.

### Recommendation 5

That all councils, in collaboration with the Local Government Association of SA, review their section 92 codes of practice to identify uncomplicated procedures and good practice examples for the making of section 91(7) document orders.

## PART 9

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# REVIEWING CONFIDENTIALITY ORDERS

## 9.1 Reviewing the duration of section 91(7) document orders - section 91(9)

122. Section 91(9) of the Act establishes the parameters for both the duration and review of orders which cover minutes and documents held in confidence. Paragraph (a) reads:

The council or council committee 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, and, in any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year;

123. As part of the Model Code of Practice for Access to Council Meetings and Associated Documents the LGA recommends that a Confidential Items Register be created to 'provide assistance with the review of confidentiality orders'. Part D of the model code gives the example of a Model Confidential Items Register. The model register suggests that the title of the documents discussed, a description of the documents, and the nature of the confidentiality be included on the register, as well as any relevant dates and recommendations regarding the confidentiality or release of the documents.<sup>26</sup>

124. Under the heading: 'Annual Review of Confidential Items: Some Tips and Traps' Wallmans Lawyers have provided some detailed, plain English advice to councils on the process and requirements for review of section 91(7) document orders, including the desirability of maintaining a confidential items register. The advice, with which I agree, states:

It is best practice to record all orders (whether they exceed 12 months or more) in a confidential items register. This will assist orders that are less than 12 months to be tracked and diarised, either for release or if unable to be released publicly, to be subject to a further order to keep the documents in confidence.<sup>27</sup>

125. Along with their responses to the Audit Questionnaire councils were asked to provide copies of their confidential items register (or equivalent) for the relevant period. Nine of the 12 councils indicated that they had established registers and forwarded them to me as part of their audit documentation. Amongst the registers I reviewed, there were often detailed notes made of the legislative provisions used to keep documents confidential, along with a description of the documents held and scheduled release dates.
126. However, it would appear that many councils have not followed the LGA model register closely and have instead designed their own proforma. As a result, there are many anomalies, such as vague or missing entries about the nature of the original document order and no record of review dates. In my view the LGA model register provides a comprehensive basis for following documents from the original meeting date to release, and is therefore a much easier process to follow.
127. The wide variety or absence of confidential items registers used by councils is symptomatic of what I believe is some ongoing confusion around the review and release provisions of the Act. As noted above, one council currently has in place a six-monthly review system for monitoring document orders. The council's Register of Confidential Minutes tracks both 'confidentiality ends' and 'release' dates as separate entries. This has apparently led to some confusion around what remains held in confidence. This was a common problem raised

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<sup>26</sup> Local Government Association of South Australia, *Model Code of Practice*, op. cit., December 2011. page 58.

<sup>27</sup> Wallmans Advice: Annual Review of Confidential Items: *Some Tips and Traps*. October 2009.

by many council governance managers who found the statutory process difficult to understand. Poor systems at the council administrative level compounded the problem.

128. The following case study illustrates the difficulty which often arises when review of document orders is not handled as a priority by the council.

**Case study 4: Reviewing section 91(7) document orders**

In reviewing the Confidential Items Register of audited councils I noticed several instances where minutes and the associated documentation have remained in confidence for some time after the expiry date of a section 91(7) document order.

In the case of one council, I noticed that two items considered in October 2010 and ordered confidential for a period of 12 months were not reviewed until January 2012. Both items remained suppressed during that period.

After a scheduled review council released the items from confidence. Whilst it may have been an oversight, the effect is that the documents were unlawfully withheld from public inspection for a period of approximately 3 months.

I advised the council that the order to release the items in January 2012 was unnecessary. Due to the expiry of the original 12 month timeframe, the orders had already lapsed and the documents were already, by definition, public documents.

Confidential Items Registers are useful tools in reviewing document orders. Councils must take care in ensuring that the registers are correctly maintained, regularly checked and scheduled reviews held on time.

129. Whilst the invalid ongoing suppression of minutes and documents was a common problem encountered in the audit, there were other issues which came to light stemming from misunderstandings about the statutory requirements for reviewing orders. The wording in section 91(9) stating that: 'any order that operates for a period exceeding 12 months must be reviewed at least once in every year', seems to have generated some confusion around what is required at the end of the 12 month period.
130. Two issues are noteworthy here. The first is the practice I encountered of councils reviewing section 91(7) document orders which had lapsed automatically at the end of the 12 month period. As outlined above, some councils have not understood that the order will lapse if the time or event specified has been reached or carried out. In this circumstance the council cannot decide that the confidential order will be either lifted or extended. If there has been no valid new order put in place and the original order has lapsed, the minutes and any documents, including the agenda reports, automatically become public and must be released on the council's website.
131. Second, it is not universally understood that the order review must happen before the expiry of the 12 month timeframe. In the case of an event trigger the purpose of the review is simply to determine whether the event has happened. If so, the minutes and documents automatically become public at that moment, as noted above. However, if the council administration wishes to review an order which has been made for a period of time, say 12 months, it must conduct the review within that timeframe. It must then either release the information on the scheduled release date, or make a case to the council for a further section 91(7) document order to keep the documents in confidence.

132. On my reading of the evidence I suspect that some of the confusion I found around the process of reviewing confidentiality orders stems from the wording of the legislation itself. There are apparently different understandings of what 'reviewed' means in the context of section 91(9)(a). The first use of the word clearly encourages a critical assessment or re-examination of the order on a regular basis. The second use becomes a requirement that an existing order be reviewed after a 12 month period has elapsed when confidentiality is set to continue beyond that time. It is desirable that this difference is clearly understood to ensure the Act is being followed.
133. This is particularly important when the review leads to a decision to seek an extension to a section 91(7) document order which is about to expire. In such cases the matter must be brought back to the full council or committee meeting to be examined again according to the requirements of sections 90(2) and/or 91(7). This means the order must be reassessed against the relevant ground used to make the original determination and a new order made. I am not convinced that this is currently the standard practice across the councils involved in the audit. However, the intention of the Act is quite clear: anything beyond 12 months duration must be formally reassessed. It follows that the Act works to discourage the making of orders of more than 12 months duration and, by implication, the practice of extending the timeframe on the original resolution.
134. A related issue is the mistake I came across in at least one circumstance where the council believed the administration had the authority under the Act to 'review' orders with the intention of extending them. The council did not understand that only the council itself has that power under the Act and that it must itself remake section 91(7) document orders by valid resolution if it wishes to extend them. Again, it is possible that the legislation is being misunderstood when section 91(9)(c) is read in the context of the review provisions. It states:

the council or council committee may delegate to an employee of the council the power to revoke the order.

It should be noted that section 91(9)(c) provides a power to revoke the order. In other words, it is necessary for the delegation to be cited by the council or committee for every order where such a review is to take place. It is not a general power of delegation which can be used on a discretionary basis by the CEO.

135. I draw attention here to the operative words in the paragraph: 'power to revoke'. I believe there is a misunderstanding in some quarters which interprets the power to revoke as power to also extend or remake an order. Ironically, this is the paragraph in the Act which both anticipates and enables the CEO to take the initiative in releasing minutes and documents. Here I am referring to discretionary early release, before the stipulated timeline or event, if this has been written into the original resolution. In this way the Act works to facilitate and encourage early release, but in turn, provides the intended obstacle of remaking the order from scratch if confidentiality is to be maintained.
136. Care must be taken to avoid conflict of interest when the delegated power of revocation is exercised according to the Act. In the course of the audit I came across examples in three councils of CEOs exercising authority over the revocation of document orders which concerned their own annual performance review. In one instance the CEO issued an order for the suppression of minutes and documents to be extended, which is, as explained above, *ultra vires*. In another example the council employed a section 91(7) document order for

suppression of the CEO's performance review using the enabling words 'for a period to be determined by the Chief Executive Officer'. I cautioned the council that the order had created a conflict of interest situation for the CEO and was undesirable.

### Finding

6

Section 91(9) stipulates the process for reviewing section 91(7) confidential document orders. A significant number of councils reported establishment and maintenance of a Confidential Items Register to assist monitoring and release of material covered by a section 91(7) document order. However, local variations on the model register proposed by the Local Government Association of SA have led to some poor practices where minutes and documents are continuing to be held after the orders have expired.

Section 91(7) document orders which operate for a 12 month period have been problematic in this regard. There is some misunderstanding in councils about the statutory requirement to review a document order before that order expires. If the council intends to maintain confidentiality, it must review the original order before expiry and then make a valid new order for a further period of time.

There is also some confusion around the powers available to council CEOs with respect to section 91(9)(c). Here the Act provides a power of delegation for the CEO to revoke a document order early, before the original timeframe or event has been reached. It is not always understood that this authority must be issued on each separate occasion. Neither is it clearly understood that only the council itself has the power to remake a section 91(7) document order.

### Recommendation 6

That all councils establish or update their Confidential Items Register with reference to the Model Register prepared by the Local Government Association of SA.

Consideration should be given to amending the Local Government Act to clarify the process of reviewing section 91(7) confidential document orders, including specifying the requirement for the full council or committee to remake an order before an expiry event or date has been reached.

## PART 10

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# PUBLIC ACCESS TO RELEASED DOCUMENTS



## 10.1 Public access to released documents

137. Section 132 of the Act outlines the legislative requirements for councils to provide the public with access to documents. In many respects this section is a companion provision for section 91(7) document orders which allow for suppression of documents for a period of time. Schedule 5 of the Act is also relevant. I interpret it to be read in conjunction with section 132. It deals with the types of meeting papers which must be released. Section 132(a) and (b) read as follows:

A council must make the following documents available for inspection on the Internet within a reasonable time after they are available at the principal office of the council:

- (a) agendas for meetings of the council or council committees;
- (b) minutes of meetings of the council or council committees;

138. Of the 12 councils involved in the audit only six provided internet access to minutes, documents and reports to council which had been released from confidentiality. The other six councils were unaware that they were required to do so. Their responses to the audit question, asking how a member of the public can gain access to the information previously covered by a document order, were as follows:

- By request to council. If we are aware of a specific public interest in a matter (e.g. tender) we will provide a copy of reports etc to interested party
- [Through] inspection of minutes at the council office, and the issue might be covered in the Council Page in the local newspaper
- Information is gained upon request
- Upon enquiry. If an FOI is lodged and the document is available it is released without need for an FOI
- While [previously] confidential documents have been made available to the community by request, council has not made the released documents available on its website
- In writing to the CEO. A request has never been lodged.

139. I noted that in each case the council's code of practice stated that minutes of council and committee meetings 'will be publicly available, including on the internet, within five days after the meeting'. The codes also stated that the council 'may also make a document available in electronic form and place it on the internet for public access'. I advised councils that, in my view, this discretion in the council codes is not consistent with section 132(3)(a) of the Act. I understand that the provision requires display of agenda (including reports) and minutes of meetings of the council and council committees on the internet 'within a reasonable time after they are available at the principal office of council'.

140. In the audit survey responses cited above, the six councils reported that members of the public could gain access to information previously covered by a section 91(7) document order by requesting the information, either in person at the front counter, or in writing to the CEO. It was also apparent that there was no notification to the community that the documents had been made available. In a practical sense this meant the public could only access the released

documentation after an extensive effort to confirm that it existed. I advised councils that this is not a satisfactory practice. The arrangement effectively maintains a form of confidentiality, as public access is restricted by an application process and an assumption of prior knowledge. I requested that the six councils implement a system for identification and release of confidential items on their websites as soon as possible.

141. The remaining six councils have all established various approaches to public release of information on their websites. However, in four of these councils there does not seem to be a comprehensive or systematic approach to public release of confidential items. The websites in most instances are not particularly user friendly. Users experience some difficulty in finding reports from released confidential items amongst long sets of agendas and minutes. I also noted the occasional omission or deletion of information from some items which should have been part of released sets of documents. As with other accountability requirements, it is important that councils provide the public with ready access to all released meeting documents previously covered by a section 91(7) document order.
142. On the positive side of the ledger there were some excellent examples of councils maximising public access to all documents covered by section 91(7) document orders, including minutes and agenda reports. This may be done in any one of a number of ways. The following case study highlights two best practice examples.

#### **Case study 5. Public access to released documents**

Two metropolitan councils offer best practice examples for making documents available for public inspection online. Both councils have dedicated pages for released confidential items and there are clear links to the pages beneath links to the body of council meeting documentation.

The councils arrange the released documents in registers of confidential reports. This makes clear all the documents that have been subject to confidentiality orders and allows the public to quickly establish which documents are currently retained in confidence and which documents have been released. The registers contain detailed information about the date of the meeting, subject of the item, grounds of confidence and the current status of the item.

Once the items are available for public inspection the registers are updated with quick links to the documents. For those councils which currently lack adequate online release practices, I have recommended they consider adopting the approach of these two councils.

143. On a related disclosure issue, many of the confidential minutes I reviewed often recorded only the resolutions carried under sections 90(2) and 91(7) without further information being provided. Minutes should be kept in such a form as to be intelligible to those who were not at the meeting. If the meeting considered a document, that document must be specifically identified in the minutes or it must be incorporated into them. Whilst necessarily a brief summary, council minutes should record accurately what takes place at the meeting, not just the resolutions which are carried or lost. I address this issue in part 15 below.

**Finding**

7

The Local Government Act has specific requirements for councils to provide the public with access to certain documents. These include the minutes of meetings after a confidential meeting order has expired. Six of the 12 councils involved in the audit were not making confidential documents available to the public on the internet after these were released. By requiring members of the public to apply for access to the documents, these councils were effectively maintaining a form of confidentiality.

Some other councils have been releasing documents on to their websites as required. However, due to the type of postings made on the website, the released reports have been difficult to find amongst long lists of agendas and minutes. Two councils from the audit group have developed a best practice approach to release of confidential information which actively assists the public to locate documents.

**Recommendation 7**

That all councils post their Confidential Items Register on their website. The register should show which documents are currently retained in confidence and which documents have been released, as well as the dates of the meetings where the orders have been made. A quick link should be provided from the register to the released documents.

Consideration should be given to amending the Local Government Act to clarify the requirement for all documents to which a section 91(7) order has ceased to apply, including agenda reports, to be made available on the internet pursuant to section 91(9) and section 132.

## PART 11

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# ANNUAL REPORTING STANDARDS

## 11.1 Annual reporting standards

144. Schedule 4 of the Act requires that a report on the use of sections 90(2) and 91(7) by a council and council committee must be included in the annual report of the council. The requirement is about both transparency and accountability to the community.

145. The Local Government (General) Regulations state:

### **22A—Schedule 4—Annual reports**

- (1) For the purposes of clause 1(ga) of Schedule 4 of the Act—
  - (a) in the case of a report on the use of section 90(2) of the Act, the following information is required:
    - (i) the total number of orders made under that subsection in the financial year;
    - (ii) in relation to each paragraph ((a) to (n)) of section 90(3) of the Act—the number of times in the financial year that an order made under section 90(2) was made on the basis that the information or matter fell within the ambit of the paragraph; and
  - (b) in the case of a report on the use of section 91(7) of the Act, the following information is required:
    - (i) the total number of orders made under that subsection in the financial year;
    - (ii) the number of orders made under that subsection that expired, ceased to apply or were revoked during the financial year;
    - (iii) the number of orders made under that subsection that remained operative at the end of the financial year (but not including orders made before the commencement of this paragraph).
- (2) Pursuant to clause 1(i) of Schedule 4 of the Act, the report required under section 270(8) of the Act is prescribed.

146. From my review of the 24 Annual Reports submitted for 2009-2010 and 2010-2011, it is apparent that councils approached the 'Confidential Items' issue in very different ways. Sometimes there were variations within individual councils from year to year. Many councils had prepared a simple table or listing stating the number of items that were considered in confidence and which provisions were invoked under section 90(3) of the Act. There were a number of examples of the reports failing to show the total number of confidentiality orders made by subsection, or those which had expired or remained active. This is not satisfactory or consistent with the regulatory requirements.

147. As a best practice initiative, I have suggested including the date and subject description of each matter considered, the reasons for the order, and, as per the regulations, a list of all documents released from section 91(7) document orders in that year.

148. In their responses to my reports, most councils acknowledged the requirements of the legislation and agreed that there is benefit in providing a more comprehensive information summary for publication. Two councils suggested that the annual reporting on use of the confidentiality provisions was a low order priority, in one case because of a belief that 'no-one ever reads them'. I disagree with the proposition that the content of annual reports can be

downgraded because of a perception that they are not widely read. The provisions of the Act are not discretionary and must be complied with. It is also apparent that many people are now accessing council documents on line, including annual report material.

149. I have welcomed the general willingness by councils to consider improvements to their annual report as an exercise in greater transparency for the public. One country council is taking a comprehensive approach to reporting using the following information in a simple, easy to access table. Whilst the dates and subject lines have been modified for the case study, it should be noted that this table complies with, and exceeds, the requirements of the Act and the current Regulations. Importantly, it contains a reference to the date and subject of the agenda item.

**Case study 6. Annual reporting model standard**

Date	Subject	Reasons	Held In Confidence
20/8/2010	Rural CWMS	90 (3) (k) tenders for supply of goods or provision of services	No
2/10/2010	CEO Employment Contract (Probation Review)	90 (3) (a) disclosure of personal affairs 90 (3) (b) commercial advantage to another person	Yes
30/11/2010	Coastal Produce Unloading Facility	90 (3) (d) disclosure of commercial information of a confidential nature	No
18/2/2011	Australia Day Awards - Young Citizen of the Year	90 (3) (a) disclosure of personal affairs	No
8/4/2011	CEO Performance Review	90 (3) (a) disclosure of personal affairs	Yes
2/5/2011	CEO Performance Assessment	90 (3) (a) disclosure of personal affairs	Yes
20/6/2011	Purchase of Township Caravan Park	90 (3) (b) commercial advantage to another person	Yes

### Finding

The Local Government Act and the *Local Government (General) Regulations 1999* spell out the requirements for annual reporting on the use of the meeting confidentiality provisions. Most councils are currently falling short of the requirements. Based on the incidence of underreporting, there is a case for clarification and upgrading of the regulations to underpin improved annual reporting standards.

### Recommendation 8

That all councils adopt a legally compliant, best practice approach to annual reporting standards on the use of meeting confidentiality provisions.

Consideration should be given to amending the Local Government (General) Regulations to specify a requirement for the date and subject of all meeting orders made under section 90(2) and the details of document orders made, expired and remade under section 91(7) in the financial year, to be reported.

## PART 12

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# USE OF INFORMAL GATHERINGS

## 12.1 Use of informal gatherings

150. During the course of the audit some councils raised concerns that 'other councils' were using informal gatherings improperly. The nub of the allegation was that the cover of closed informal gatherings was being used to decide council business in contravention of the Act. The other implication was that informal gatherings were being held to make decisions rather than employing the Act's confidentiality provisions, which have accountability and disclosure requirements attached to them.
151. The concern has some history. In recent times I have conducted formal investigations into similar complaints. The topic is also one which receives regular coverage in the media, particularly the local press. As part of my audit discussions with councils I raised the question of their approaches to the use of informal gatherings and/or discussions under section 90(8) of the Act. As outlined below, some interesting information came to light, particularly in relation to informal discussions. However, I had no corroborated evidence presented to me during this audit that councils were conducting informal gatherings in breach of the legislation.
152. Section 90 of the Act provides that council meetings are to be held in public except in special circumstances. Subsection 90(8) states:
- (8) The duty to hold a meeting of a council or council committee at a place open to the public does not in itself make unlawful informal gatherings or discussion involving -
- (a) members of the council or council committee; or
- (b) members of the council or council committee and staff,
- provided that a matter which would ordinarily form part of the agenda for a formal meeting of a council or council committee is not dealt with in such a way as to obtain, or effectively obtain, a decision on the matter outside a formally constituted meeting of the council or council committee.

### Examples -

The following are examples of informal gatherings or discussions that might be held under subsection (8):

- (a) planning sessions associated with the development of policies or strategies;
- (b) briefing or training sessions;
- (c) workshops;
- (d) social gatherings to encourage informal communication between members or between members and staff.
153. Section 90(8) of the Act was added in 1999 when the majority of the *Local Government Act 1934* was repealed. At that time the LGA issued supporting material in the form of a Discussion Paper which canvassed the key issues in a constructive and informative manner. In relation to the benefits and purpose of section 90(8) it said:
- During the course of a council or committee meeting, information is shared, reports and recommendations are debated and discussed, and decisions, where appropriate, are taken. However, time constraints and meeting regulations



prescribing the rules of debate can restrict the ability of members to speak on motions or ask questions on a continued basis to fully explore and understand the various views of members. At times the exploration of issues can be restrained and members may not feel that an issue has been sufficiently canvassed for optimal decision making.

The *Local Government Act 1934* has been problematic in that it does not explicitly provide for the conduct of information dissemination sessions to support the desire of members to become fully informed on matters put before them whether for immediate decision or at a later date.

Accordingly, councils that conducted or attempted to conduct informal gatherings or briefing sessions have, at times, been the subject of negative media attention. On occasions councils have felt the need to seek legal advice when they may have wanted to gather to discuss important strategic issues, conduct briefings and/or training sessions and the like. Other councils chose not to gather informally for fear that they may be in breach of the Act.

The new Local Government Act 1999 [Section 90(8)] specifically recognises the need to have informal gatherings to support Elected Members in their decision-making role and this approach is welcomed.<sup>28</sup>

154. Clearly, the intent of section 90(8) of the Act is to permit the holding of informal gatherings by a council. The proviso is that they are not dealing with items that would ordinarily form part of the agenda for a formal council meeting in such a way as to obtain, or effectively obtain, a decision on the matter. The primary purpose of these gatherings is to provide a practical opportunity for elected members to be informed about matters, including the background to issues coming before the council. In my view, appropriately run informal gatherings can assist elected members to exercise their responsibilities under the Local Government Act.
155. The common concern raised about closed informal gatherings conducted by councils is that they go beyond the intended information sharing; i.e. that the discussions held are *de facto* decision making meetings. I have seen informal gathering agendas set out in the form of a 'to do' list and outcomes from the meetings noted in the form of an 'action list'. I consider these sorts of lists to be undesirable to the proper conduct of an informal gathering. It should not be the intention of such a meeting to attribute actions to be achieved to particular individuals, or to the council or committee.
156. The conduct of informal gatherings varies considerably across local government. There were numerous comments on the value of these gatherings as a mechanism for discussion and understanding. In one instance the comment was made that informal gatherings are useful 'to take the heat out of decision making' and also to 'provide staff with some broad directions to report back to council on for a decision'. Some councils frequently precede their formal meetings with a workshop or briefing meeting. Others hold occasional day-long closed planning sessions. Others again have workshops or briefing sessions which are open to the public and promoted as such. One council involved in the audit includes a tally of the numbers of 'closed' and 'open' informal gatherings in its annual report.
157. I am also aware that, from time to time, elected councillors have raised questions about the integrity of the informal meeting process used by their own councils. During a recent investigation I reviewed evidence of an informal

<sup>28</sup> Local Government Association of South Australia, *Informal Council Gatherings and Discussions*, Discussion Paper, December 1999, pages 1&2.

(social) gathering held by newly elected councillors to canvass amongst themselves their preferred candidate for a council office bearing position. Whilst there was no certainty that a quorum of councillors had been present at the time a 'straw vote' was held, I was concerned that there was a potential for the gathering to be in breach of section 90(8) of the Act.

158. In another example, revealed as part of the audit, one council initiated an informal discussion, under regulation 21 of the Local Government (Procedures at Meetings) Regulations, whilst the meeting was being conducted behind closed doors. The informal discussion lasted for approximately 15 minutes. The minutes did not record the content of the discussion. The council explained that the informal discussion enabled 'a more open discussion' of a proposal before the council'. Regulation 21 permits informal discussion if it is considered that 'the conduct of the meeting would benefit from' the suspension of formal procedures.
159. In this instance I was concerned that an informal discussion on a proposal which was before council for a decision was potentially contrary to section 90(8) of the Act. I questioned how suspension of the meeting enabled an 'open discussion' any more than the exclusion of the public by the making of a section 90(2) meeting order had already provided. I noted that one possible effect of an informal discussion during an in camera session is the permanent suppression of information. There would not be a record made of proceedings that may otherwise be publicly released with the expiry of confidentiality.
160. On another level, a common risk encountered by many councils during informal gatherings is the building of consensus. I note the advice on this prepared by the Queensland government for its local government sector:<sup>29</sup>

Building consensus, even in an informal manner, can effectively result in the 'rubber stamping' of decisions during subsequent council meetings.

Councillors are required to attend meetings with an open mind and without having predetermined the outcome under consideration. As such, avoiding situations where debate and discussion result in consensus building is imperative.

161. Beyond the issue of building consensus I think it also fair to say that there is sometimes confusion within councils about whether a decision has been made. Where items on an informal gathering action list subsequently appear on the agenda for the next council meeting, apparently for the purposes of 'ratification', there is an increased risk that the gathering is in breach of section 90(8). However, where a process decision has been made to, for example, bring in outside expertise to clarify or explain a matter, the situation becomes less clear cut.
162. The central question here revolves around the interpretation of what constitutes a 'decision' under the statute. Whilst the Act describes 'a matter which would ordinarily form part of the agenda for a formal meeting of a council or council committee', it does not define what constitutes 'a decision on the matter'. I am inclined to the view that 'a decision' here refers to an outcome decision which should ordinarily be expressed, or will ultimately be framed, as a formal resolution of the council. However, this is not clarified in the Act. There is potential for more to be done to assist elected members to find the limits of the law, and to give confidence to members of the public that their council is acting lawfully and with integrity.

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<sup>29</sup> *Guidelines for the conduct of informal briefing sessions by local governments*, Department of Local Government Sport and Recreation, Queensland Government, December 2008.

163. I note that the advice from the LGA in its supporting material when section 90(8) of the Act came into effect is helpful:

How should an informal gathering or discussion be undertaken?

Some of the principles that could underpin the use of the provision on informal gatherings and discussions by Council might include:

- the structure of the session should be free and open and facilitated by the most appropriate person depending on what is to be discussed rather than “chaired”;
- when arranged, such gatherings should be conducted on an “informal” basis;
- no formal agenda should be prepared, however, a program, discussion document or statement of what is to be addressed needs to be provided to assist Members and staff to determine if they wish to participate;
- as informal gatherings are not meetings it is inappropriate to keep minutes, however, the desirability to keep notes ought to be dictated by the nature of the gathering eg. it would be appropriate to keep a record of key priorities explored during a strategic planning session for incorporation in a document to be formally considered at a subsequent Council meeting;
- preparation for attendance should be kept to a minimum e.g. reading a discussion paper that will be formally presented at a briefing session.

Council should be mindful that participation in an informal gathering is not bound by legislative provisions relevant to Council or committee meetings, for example, public notice of the meeting and public access are not required.<sup>30</sup>

164. As noted, it is important that elected members understand the boundaries of the legislation with regard to informal gatherings. They must refrain from debate, consensus building or canvassing possible outcomes to a matter during these sessions if the effect is to make a decision. It is also important that the council CEO play a leadership role on these occasions. Notwithstanding individual preferences on ‘chairing’ and ‘facilitation’, I endorse the following practical advice provided by the Queensland government on the role of the CEO.<sup>31</sup>

As briefing sessions are informal and non-compulsory it would not be anticipated that the mayor or other elected representative would chair the sessions. It would be more appropriate for the CEO or other senior council officer to chair any informal meetings, briefings, training or workshops.

It is a responsibility of council’s CEO to advise councillors when they approach ‘consensus building’ or ‘persuasive discussion’. The CEO also has a key role in establishing the purpose, intent and outcomes sought prior to the start of the meeting. This can be done by issuing a clear statement identifying the aims of the briefing session or workshop such as:

- ‘Council is seeking to canvas opinions on [ ] issue’
- ‘Council is seeking feedback with regard to [ ] issue’
- ‘Council is seeking to identify if any further clarification council may require with regard to [ ] agenda item’.

<sup>30</sup> See LGA Discussion Paper, page 3.

<sup>31</sup> *Guidelines for the conduct of informal briefing sessions by local governments*, op cit.

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**Finding**

There is concern in the community and amongst some elected members that informal gatherings are being used by some councils to make decisions or to effectively obtain a decision on a matter outside a formally constituted meeting. Such action would be a contravention of section 90(8) of the Act. I found no direct evidence of such contraventions during the conduct of this audit with regard to informal gatherings.

However, I did find an instance where an informal discussion had been used during a closed meeting to consider a matter of business to be decided by the council. This created a risk of a breach of the legislation.

I consider that appropriately run informal gatherings can provide a useful opportunity for elected members to be informed about matters, including the background to issues coming before the council.

There is potential for greater clarity in the legislation on the permitted boundaries for use of informal gatherings. A clarification may be desirable to separate and legitimise process decisions from outcome decisions which are likely to become formal resolutions of a council.

Councils would benefit from the use and publication of a clear internal policy statement on the conduct of informal gatherings and discussions.

**Recommendation 9**

That all councils adopt a legally compliant, best practice approach to use of informal gatherings and release this as a public document.

Consideration should be given to amending the Local Government Act to clarify the provisions of the Act with respect to what constitutes a 'decision' on matters of council business during an informal gathering.

## PART 13

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## PUBLIC INTEREST MATTERS

### 13.1 Public interest considered

165. In my discussions with councils during the course of this audit it was often openly stated, by elected members and senior council administrators alike, that they find the public interest a vague concept. The main observation was that there is no legislative definition available to guide decision makers in considering confidentiality orders. At issue are the requirements for paragraphs covering the personal affairs, commercial interests and confidential information tests of section 90(3) of the Act. Specifically, to make a valid order it must be demonstrated that disclosure of information:

would, on balance, be contrary to the public interest.

166. There is good reason that the public interest is not defined in legislation.<sup>32</sup> Similar to the concept of 'reasonableness', legislators have deliberately left room for the public interest to be interpreted according to the unique circumstances of each case and also to stand the test of time. In so doing they have recognised that the public interest will always be an evolving concept. The challenge for local government is to ensure that the application of the Act keeps pace with the requirements of accountability and participation, and, more broadly, with changing public expectations of openness and matters for public debate.<sup>33</sup>
167. There is no single and immutable public interest. Identifying the public interest is about choosing which action will do the most good - or cause the least harm.<sup>34</sup> However, balancing interests can be complex and usually involves decision makers making subjective judgements against certain criteria. In a general statement of principle the High Court of Australia has said:<sup>35</sup>

...the expression 'in the public interest, when used in a statute, classically imparts a discretionary value judgement to be made by reference to undefined factual matters, confined in so far as the subject matter and the scope and purpose of the statutory enactments may enable.

168. In *DPP v Smith*,<sup>36</sup> the Supreme Court of Victoria gave a useful definition of the public interest. In the process the court also stressed the necessity of distinguishing between 'what is in the public interest' and 'what is of interest to know'. Considering the multi-faceted nature of the public interest, the court explained that:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.

There are... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest *per se* is not a facet of the public interest.

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<sup>32</sup> Lord Hailsham's classic dictum is that 'the categories of public interest are not closed'. For a discussion of the concept of public interest at general law see M. Carter and A. Bouris, *Freedom of Information - Balancing the Public Interest*, University College London. Second Edition, May 2006 at 2.1-2.15

<sup>33</sup> D. Murphy, 'Commercial Confidentiality, Freedom of Information and the Public Interest' paper presented to the Australian Institute of Administrative Law, May 1996. p14.

<sup>34</sup> See NSW Ombudsman, *Public Interest*, Public Sector Agencies fact sheet No 16.

<sup>35</sup> *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; <http://www.austlii.edu.au/au/cases/cth/HCA/1989/61.html>

<sup>36</sup> *Director of Public Prosecutions v Smith* [1991] 1 VR 63, at [75].

169. The public interest has long been considered as the core of modern democratic theories of government. In Australia the concept finds recent public policy expression in freedom of information (FOI) legislation first introduced by the Commonwealth in 1982. The supporters of FOI argued that the accountability of government would be improved by providing access to information held by government. Introducing the South Australian FOI Bill in December 1990, the Hon GJ Crafter noted that freedom of information is allied with the fundamental principles of a democratic society and is based on three major premises:<sup>37</sup>
1. The individual has a right to know what information is contained in Government records about him or herself.
  2. A Government that is open to public scrutiny is more accountable to the people who elect it.
  3. Where people are informed about Government policies, they are more likely to become involved in policy making and in Government itself.
170. In practical terms FOI legislation provides a public right of access to government information, subject to defined exceptions. Based on principles of transparent and accountable government this approach includes the concept of open meetings and the notion that governments hold information in trust for the community. In local government these ideas are central to the objects of the Local Government Act and to the principles to be observed by a council under section 8. Whilst FOI legislation and the Local Government Act are clearly statutes with different purposes, they share the same democratic underpinnings.
171. A report delivered by a Senate committee on freedom of information legislation is helpful in understanding the 'balancing act' which must be considered in deciding what is 'contrary' to the public interest. The report supported a 'properly framed public interest test' by which any number of relevant interests may be weighed, one against another. It stated that, in the process of balancing competing interests, the scales should be tipped in favour of openness because 'disclosure of information is so important to the representative democracy in which we live'.<sup>38</sup>
172. In the context of the use of the confidentiality provisions of the Local Government Act this conceptual approach has an important implication. Where a council considers that a meeting should be held in confidence it must give attention to, and be satisfied that, the benefit to the public from secrecy will outweigh the other public interests of openness. This is commonly known as the public interest balancing test. I consider how this works at 13.3 below.

## 13.2 Council perspectives on the public interest

173. As part of the Audit Questionnaire, I asked each of the 12 councils to provide their interpretation of the phrase: '*would, on balance be contrary to the public interest*'. The responses quoted below reflect the different understandings of the concept. Whilst most had a general understanding of the Act's requirement for openness and disclosure of information, some associated their own interests with the public interest, while others took a more paternalistic approach:
- a balance of ensuring that council keeps its community advised...without jeopardising the need for confidentiality on specific matters such as commercial advantage

<sup>37</sup> *Hansard*, House of Assembly, 11 December 1990, 2592 [Second reading speech].

<sup>38</sup> Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Victorian *Freedom of Information Bill 1978*, note 5.

- at times there is a need to keep information in confidence until information can be tested for accuracy
  - essentially it means that it would not be in the public's (or council's) interest to disclose information which could/would compromise the decision making process of the council
  - the CEO must also consider if information was provided to council on the basis that it remain confidential, in which case the public interest test may relate to another organisation's business and obligations
  - I consider whether the document could cause serious concern to the individual/group/company should information contained in that document be made available to the public. I also consider carefully the need to ensure if the public would benefit from being made aware of the information.
  - will the matter before the council, and the subject of the discussion or decision by the council impose or provide a detriment or benefit to a third party who is not an immediate party to that discussion?
174. Many councils were inclined towards closed meetings when the matter involved third party commercial or business interests. As shown in Table 2, section 90(3)(b) was the most frequently cited reason for confidentiality for the period of time examined by my audit. Section 90(3)(d) was also a commonly cited ground for section 90(2) meeting orders. Both paragraphs contain a mandatory public interest balancing test. However, because of the lack of reasoning articulated in most of the resolutions I reviewed, it is difficult to judge the merits of councils' reasons for confidentiality on the first 'limb' of these commercial grounds tests.

### 13.3 Weighing the public interest

175. In a general sense the public interest is served where openness and access to information would further the understanding of and participation in the debate of issues of the day. Facilitating the accountability and transparency of councils for decisions taken by them, including the spending of public money, are also important elements of maintaining a public interest outlook on council governance.<sup>39</sup>
176. When considering the use of those paragraphs in section 90(3) of the Act which require a public interest test to be applied, the onus is on the council to identify, and then assess, the relevant factors. The test requires an assessment on why disclosure of the information or documents would, on balance, be contrary to the public interest.

The reference to 'on balance' indicates the need to weigh up competing public interests before making a decision. It is critical that factors both for and against disclosure are assessed. The factors must include an explanation of the specific harm that may occur as a result of disclosure remembering that factors may be weighed differently in different circumstances.<sup>40</sup>

177. In Appendix F, I have suggested principles and some example components of a 'public interest balancing test' for councils. The test should be applied when the first 'limb' of a section 90(3) paragraph has been satisfied by a council in resolving to make a section 90(2) meeting order to close a meeting to the public. It is important to remember that in weighing the competing factors against each other and making a judgement as to where the balance lies in the circumstances of the particular case, the Act has a default position in favour of public disclosure.

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<sup>39</sup> Information Commissioners Office (UK) Freedom of Information Act Awareness Guidance No 5, Version 2, p.2.

<sup>40</sup> *FOI and the Public Interest Guideline*, op. cit.



178. In practice, this means that councils must approach each item of business to be considered on the premise that the matter should be heard in public. It is therefore necessary for council decision makers to understand that the factors considered in favour of conducting a meeting in confidence must be weighed against the status quo position of openness. This is a public interest factor in favour of disclosure.
179. In considering the public interest test it is also useful to remember that some matters will not be relevant. For instance, if the matter is complex or the information supporting a proposal is incomplete (and therefore potentially misleading) these factors should not, in themselves, be used to justify excluding the public from a meeting. Section 90(4) of the Act specifies that a matter should be considered in public if the only likely harm would be embarrassment or a loss of confidence in the council. I believe that provision should also apply where the only real issue is controversy in the community.
180. It may also be necessary to disregard previous requests or decisions in favour of confidentiality on a particular matter, or on a similar issue. For example, the fact that the public interest may not have been served by an open meeting in the past does not mean that it would not do so now. Circumstances change and fresh public debate often drives that change. These are relevant factors for considering where the public interest lies at any point in time.<sup>41</sup>
181. At the heart of the public interest test is the requirement that councils should consciously consider many factors favouring openness which might otherwise be ignored.<sup>42</sup> It is therefore not appropriate to 'find' a reason to close a meeting under section 90(2) of the Act. The reason or reasons favouring secrecy must be weighed against the range of reasons to hold the meeting in public. The council needs not only to identify the public interest factors for and against disclosure, but must also weigh the factors up as part of a careful decision making process.

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<sup>41</sup> See D. Murphy, op. cit. pp.4-5 for a considered view on the right of the public to information to assist debate

<sup>42</sup> See Office of the Information Commissioner (Qld) in Decision No. 93002 - *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993 S0015) at paragraph 48.

## PART 14

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# CONSIDERING TENDERS

## 14.1 Considering tenders

182. Table 2 in Part 3 shows the reasons councils recorded for confidential meetings cited by paragraph of section 90(3). Of the 875 reasons given for the period 2009-2011, 132 or 15% of the total were for items concerning tender decisions under section 90(3)(k). Four of the 12 councils involved in the audit cited section 90(3)(k) as their most common reason to exclude members of the public from meetings. Given the frequency of the use of section 90(3)(k), I took some interest in the approaches of councils in considering tenders, and to the merits of these confidentiality orders examined as part of the audit process.
183. Section 49 of the Act requires councils to have in place policies on contracts and tenders which includes contracting out of services, competitive tendering, the use of local goods and services and the sale or disposal of land and other assets. As part of the audit I asked a question about reference to section 49 policies in the context of councils considering tenders in confidence. I was concerned to discover that three of the 12 councils were not compliant with the requirement to develop and maintain a tender policy and to publish this on the council website.
184. Despite this, from my general discussions with councils on their use of section 49 policies (and related procedures), it quickly became apparent that there is a wide range of tendering practices across local government in South Australia. As noted above, many councils delegate authority for the administration to consider and decide on tenders up to a certain value, while others reserve the right for the full council to decide even low value tenders. Some councils form tender committees under section 41 with the delegated authority to consider and decide tenders. These committees can, and do, use section 90(3)(k) to authorise hearing matters in confidence as deemed appropriate.
185. Section 91(8) has two subclauses related particularly to the tender process:
- A council must not make an order under subsection (7)-
- (b) to prevent 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
  - (ba) to prevent the disclosure of the amounts 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;
186. Clearly the intent of the Act is to ensure that the public has a right to know what the council has agreed to pay for a particular good or service and who is to supply or provide that good or service.<sup>43</sup> Beyond these requirements, councils have discretion under the Act to determine the extent to which confidentiality applies to the tender decision making process, if at all. Some councils include advice to suppliers (at either the approach to market or invitation to tender stage) which signals the council's intention to make a decision in a public

<sup>43</sup> I note that one council made the following submission on section 91(8)(b): 'In our major procurement exercises for large scale projects, the successful tenderer may be identified through an assessment process and presented to council for approval. At this point, we are required to ensure the release of the identity of the person/company identified as the successful tenderer from the tender assessment process. However, in these instances the negotiations are often ongoing. The disclosure of the successful tenderer's identity and rationale may sometimes prejudice our negotiation position. It would be more appropriate, in our view, to seek disclosure at the award of contract.'

meeting of the council and advises that all relevant documentation will be made available to the public.

187. In these instances there is often a council policy which states that open and effective competition is the central operating principle which determines the best outcome. I note the LGA's Draft Model Procurement Policy<sup>44</sup> clearly articulates the procurement principles for all purchasing activities, including a reference to 'transparency of decisions made'. I interpret this to mean transparency of all decisions made, not just to outcome decisions related to successful bidders and amounts of money. As discussed above, the exception is enabling appropriate confidentiality for sensitive commercial information, including respect for intellectual property.
188. As a general proposition I accept that tender documents which reveal detailed information about, for example, a company's current pricing strategy or about otherwise unavailable product information should be held in confidence, at least insofar as any published tender specifications and council policies stipulate. It is also reasonable to decide that detailed discussions exploring particular elements of a project or tender appraisal process might be considered in confidence by the council's project evaluation panel before a recommendation is put to the council for decision.
189. However, it is a separate matter to consider summary reports containing, *inter alia*, background information, eligibility and appraisal criteria and overall project or tender evaluations as confidential material if the information is not, in fact, commercially sensitive. Moreover, councils should be aware that tender documents may become available to third parties through an FOI application. In the case of litigation 'commercial in confidence' documents will not be protected simply because of their relationship to the tender process.<sup>45</sup>
190. It may be that disclosure of tenderers, or more particularly, amounts bid by each company, is considered confidential information. However, some councils overcome that obstacle simply by ascribing a non-identifying letter to each bid so that other relevant details may be discussed publicly without referring to names and amounts together. As noted, others take the view that open tenders are matters which require the maximum possible transparency and prefer to redact little, if any, information.
191. In my view there can be neither public nor council benefit in suppressing knowledge of how a council is providing its ratepayers with value for money in a tender process. As suggested, a redacted report or 'blind bidder' approach can be used if names and amounts are a sensitive issue. My preference is for councils to consider these decisions in public with appropriately modified or redacted reports which can also be made public promptly when the decisions are made and the contract is awarded.
192. I make no specific recommendation in this report on council policy changes to the consideration of tenders. I believe the practice of separating out supporting documents and criteria for assessment from 'commercial in confidence' material provided in tender submissions is a matter for councils to work through in-house. However, I point out here the need for all councils to comply with section 49 of the Act with respect to establishing and maintaining up-to-date policies on contracts and tenders.

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<sup>44</sup> LGA circular 39.5. In consultation with Local Government Corporate Services, the LGA has produced a draft model procurement policy: *Council as a Buyer: Model Policy for the Acquisition of Goods and Services*. The document suggests that, pursuant to the inclusion of the new subsection 49(a1), councils would be wise to 'have a scalable set of procedures so that larger-value purchases are undertaken with more rigour'.

<sup>45</sup> *ACCC v Baxter Healthcare Pty Ltd* [2003] FCA 994.

## PART 15

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# MINUTE TAKING STANDARDS

## 15.1 Minute taking standards

193. The function of minutes is to provide a true and accurate record of what actually occurred at a council meeting. Whilst necessarily brief and succinct, they are nonetheless the formal record of the business conducted. The minutes provide the legal basis for most actions taken by councils; they also provide information to the community and are frequently referred to by residents.<sup>46</sup>
194. The Local Government Act imposes obligations concerning the keeping of minutes for all council and key committee meetings. Sections 86 and 91 address procedure at meetings and requirements for minutes and release of documents in general terms. The Local Government (Procedures at Meetings) Regulations are the specific instrument which governs the prescribed procedures for meetings. They include, at regulation 9(4), a list of eleven requirements (a)-(k), which must be observed in recording the proceedings of any council meeting. There are also some minor additional rules listed in the body of the regulations.
195. During the course of this audit I have had occasion to look at many sets of council minutes from the relevant period and all 12 councils involved. I make the observation that the emphasis of most meeting minutes is on the mandatory recording of resolutions (which at times are lengthy), rather than on factual reporting of issues or a summary of discussion points. As detailed in Part 4, I have particular concerns with the general lack of detail provided in confidential minutes when explaining the use of section 90(2) meeting orders.
196. Notwithstanding this concern, I am reluctant to provide general advice to councils on the need for more detail to be recorded in council minutes. However, I agree with the conclusion drawn by Messrs Goode and Williams where they note that:<sup>47</sup>

Minutes should be capable of standing alone and so be framed as to be self-explanatory. It is also useful to provide a heading for each item and a two or three line summary or abstract of each item. However, the summary should describe the item and not explain it.

197. With regard to confidential proceedings two points are relevant here. First, a number of councils have commented to me that (their) use of the confidentiality provisions could be better explained and publicised to the community. I think this is an important point. Perceptions are powerful and if people believe the confidentiality provisions are being used inappropriately, a loss of confidence in the council may result. Preparation and prompt website release of appropriately informative minutes (and reports) from confidential meetings is an important communication tool with the community.
198. Second, there is a discrete issue with regard to the tabling of documents in confidential meetings. The concern I have is that sometimes documents which are part of the material considered by council in making a decision are not referred to in the minutes. As such, people wishing to understand a particular council decision, or the basis upon which it was made, may have difficulty following the logic and authority of the decision. I found records of meetings where a document has been considered by the council but no reference note or copy made of the material for the minutes.

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<sup>46</sup> LGA *Meeting Procedures Handbook*. op. cit. p39 & 42.

<sup>47</sup> *Council Meetings in South Australia*, op.cit. p199.

199. K.H. Gifford addressed this topic and the importance of the keeping of effective minutes in advice which reinforces that of Goode and Williams. He wrote:<sup>48</sup>

The minutes must be kept in such a form as to be intelligible to those who were not at the meeting. If the meeting considered a document, that document must be specifically identified in the minutes or it must be incorporated in them.

The preparation of minutes should always be undertaken with care. They are the repository of the council opinions and decisions; and, if they prove to be insufficient or inaccurate, councillors 'cannot reasonably complain of inferences different from those which they allege to be right'.

200. During the audit I also came across instances where PowerPoint presentations and verbal reports were given to a council but no record kept of the content. In each case a section 90(2) meeting order was made in reliance on section 90(3)(b), and the item deemed to be 'commercial in confidence'. No report was tabled for the council or for the public record. In the minutes for each discussion a simple one sentence outcome is noted along the lines of: 'Mayor and councillors were briefed on issues in relation to [XYZ development]'. Effectively the full weight of the legislative provisions designed to protect sensitive, non-public information was being used here to suppress all information on the item of business discussed.
201. At issue is the omission of information related to the content of the presentation. Presumably there was information of a sufficiently sensitive nature to prompt the section 90(2) meeting order in the first place. In my view a succinct summary or dot point notation should be made of the session content in the minutes. This should properly enable some understanding of what was presented and discussed at a later time when the order is lifted. This also provides a record for the council to rely on at a future time to revisit or inform an issue which has previously been explored and considered in some depth.
202. As referred to in 5.1 above, there is at least one council in South Australia currently using audio recordings as an ancillary record of meeting proceedings. These are being posted on the council website to enable public access to a verbatim record of proceedings.<sup>49</sup> I am aware that several other councils are investigating the potential of this method as part of their commitment to transparency and openness. I am also advised that one council is investigating the possibility of webcam recordings of meetings, presumably for both real time broadcast and post meeting access for members of the public.
203. I strongly support these innovations and the creative thinking that goes into encouraging greater public access to council proceedings and decision making. However, as a minimum, I consider that all councils should ensure that all information covered by a section 91(7) document order should be made available to the public when the order expires. The test should be that information is disclosed as if the public were present in the gallery and had access to all relevant documentation. In plain terms, there should be no disadvantage to an understanding of a decision through inadequate or incomplete release of confidential information, including the minutes of a meeting.

<sup>48</sup> *Council Meetings - Law and Procedure in South Australia*, op.cit. p105.

<sup>49</sup> The council has advised me that the recordings are made and posted for public meetings only. No audio record is made for meetings held in confidence.

10

**Finding**

There is room for improvement in the recording of the proceedings of council meetings, particularly in relation to noting reasons for a confidential meeting order made under section 90(2).

There are instances where documents which relate to a council decision are not being cited or copied in the minutes. Similar problems are occurring with some PowerPoint and verbal presentations to councils where record taking is inadequate and incomplete.

**Recommendation 10**

That all councils review their minute taking practices with a view to ensuring a true and accurate record is being kept of proceedings, including for meetings held in confidence.

Consideration should be given to amending the Local Government (Procedures at Meetings) Regulations to specify that the minutes of a council or key committee meeting must include a record of any document tabled at the meeting and/or any verbal briefing given to the meeting on a matter of council business.



## PART 16

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## COUNCIL RESPONSES TO THE AUDIT

## 16.1 Progress towards change

204. An important part of the audit process has been the dialogue between individual councils and my office arising from both face to face discussions and the audit reports sent to council CEOs. Each council received a detailed appraisal which covered the following aspects of use of Parts 3 and 4 of Chapter 6 of the Local Government Act:
- the code of practice - section 92
  - public participation at council meetings
  - moving meetings into confidence - section 90(2)
  - the merits of orders closing meetings to the public
  - making orders to keep documents confidential - section 91(7)
  - reviewing confidentiality orders - section 91(9)
  - public access to released documents
  - public interest considerations
  - annual reporting standards
  - suggested system improvements
  - other matters, including use of informal gatherings.
205. All 12 councils have responded to my written reports in a spirit of constructive engagement. Most have indicated their intention to make changes to current practices regarding use of the confidentiality provisions. Some councils have provided further explanation of reasons for actions taken or disagreed with particular findings on the merits of a section 90(2) meeting order or a section 91(7) document order. However, overwhelmingly, I conclude that there is broad agreement that practices and approaches to use of the confidentiality provisions must change.
206. Many of the comments I received in response letters from councils are noteworthy. Some of these, in random order are as follows:
- council agrees that further steps should be taken to explain reasons why council is considering matters in confidence; now implemented
  - council will be commencing project in near future to explore ways of releasing confidential items on our website
  - a draft management guideline has been completed to assist staff in assessing whether a report should be treated as confidential (copy enclosed)
  - a Confidential Item Register for 2012/2013 is now available on our website
  - a management guideline will be prepared to assist Elected Members and staff in understanding of limitations re information briefings
  - council intends to undertake review of its procedures and internal practices over coming weeks, taking into consideration the Ombudsman's comments
  - council agrees with general lack of understanding re application of public interest test
  - council will be more consistent in providing reasons and sufficient detail for confidential orders
  - council now has a more open approach to reporting on tenders to council
  - the suggestion to include a Confidential Minute register with released confidential items will be implemented
  - council confirms that it has not used informal gatherings to make decisions
  - council members now more aware of difference between formal council meetings and informal sessions and workshops
  - council acknowledges that improved wordings in the motions re going into confidence and closing meetings to the public would help clarify its reasons

- council will be setting up an area on website for public access to released documents
  - council endeavours to link expiry date of confidential orders made under section 91 to events but acknowledges it is not always possible : a monthly review by the CEO is deemed sufficient for quick document release
  - delegation to review confidential orders related to CEO's performance and contract are now made to the Deputy CEO
  - council accepts that details contained within confidential orders should be expanded
  - a formalised preamble and background statement for consideration by elected members of whether to discuss a matter in confidential session is in the process of discussion by council. It would resolve the 'multiple test' issue to comply with the provisions of section 90
  - CEO believed it might not have been best for matter involving senior manager of Council to be reported to Council at meeting; memorandum to elected members should have sufficed
  - council has taken steps to amend the review process to better inform public of items on confidential register
  - council intends to create suitable webpage to direct readers.
207. A further indication of council views on suggestions for improvements is attached to this report at Appendix E. In response to questions on improved approaches to open government, possible legislative or regulatory changes and public access to council meetings, councils have put forward a range of views on what should be done to improve use of the confidentiality provisions.
208. Two further important issues were raised by councils in response to my audit findings. First, I have received a number of approaches from councils requesting examples of model confidentiality orders which can be used as templates when considering use of section 90(2) and section 91(7). I have advised councils that the Local Government Association of SA has produced an extensive guideline as part of its Better Governance Program which includes model section 90(2) meeting orders made under section 90(3) paragraphs (a) to (n), and also model section 91(7) document orders. Importantly these incorporate an explanation of reasons for use of the provision.
209. Second, representations were made to me about the need for councils to retain the power to use the confidentiality provisions. The following is a good example:

There are occasions, because of the nature of council's business, that the council will need to discuss matters in private away from the public eye in order to protect the public interest. Local government should not lose the right to do so.

I agree with this statement. No finding or recommendation made in this audit report is designed to remove the right of councils to exercise legitimate and due discretion to consider matters in confidence.

## 16.2 Monitoring progress

210. Having considered the audit evidence and the responses received from councils involved I have made a series of findings and recommendations for action. As outlined above, councils participating in the audit have given me clear indications of changes which they intend to make to their procedures and systems.

- 211. To encourage the recommendations from this report to be successfully implemented across all councils, I intend to monitor council confidentiality practices on an ongoing basis.
- 212. A significant number of recommendations involve possible changes to local government legislation. I intend to liaise with the Minister for State/Local Government Relations on these matters as appropriate.



## LOCAL GOVERNMENT CONFIDENTIALITY AUDIT

### AUDIT SURVEY QUESTIONNAIRE

As part of its administrative improvement role Ombudsman SA is undertaking an operational audit of a sample group of councils on matters associated with public access to council meetings and documents.

Section 14A (1) of the *Ombudsman Act 1972* provides as follows:

If the Ombudsman considers it to be in the public interest to do so, the Ombudsman may conduct a review of the administrative practices and procedures of an agency to which this Act applies.

Section 93A of the *Local Government Act 1999* (**the Act**) also provides for the Ombudsman to conduct an audit in relation to local government councils' practices and procedures under Part 3 and Part 4 of Chapter 6 of the Act, if it is in the public interest to do so.

Part 3 and Part 4 of Chapter 6 of the Act provide a local government council with the ability to prevent public access to council meetings and associated documentation.

Part 3 and Part 4 are underpinned by the democratic objectives of the Act, and reflect a council's role and function to provide its community with open, responsive and accountable government (section 8(a)). Therefore Part 3 and Part 4 should not be invoked lightly by a council.

The aim of the audit is to establish best practice, identify any possible misunderstandings of Part 3 and Part 4, and make recommendations for improvement.

The sample group consists of one council from each of the 12 state administrative regions.

This document commences the audit process. It will be followed by an on-site interview with the council Mayor and Chief Executive Officer at the discretion of the Ombudsman. Further documentation relevant to Part 3 and Part 4 of Chapter 6 may also be required at this stage.

Council name.....

**Part A: Council meeting details**

*(Please tick the relevant multiple choice boxes, add comments and additional material)*

1. How many times did your council meet in the two financial years 2009-2011 (**the relevant period**)?

Ordinary meetings

2009-2010

2010-2011

Special meetings

2009-2010

2010-2011

2. Please list below the names of all council committees and the number of times each committee met in the relevant period *(do not include the DAP)*.

	Committee	2009-10	2010-11
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			

3. How many (business) agenda items did council consider in the relevant period?

Ordinary meetings

2009-2010

2010-2011

Special meetings

2009-2010

2010-2011

Committee meetings

2009-2010

2010-2011

**Part B:**            **Code of practice**  
**(Chapter 6, Part 5, section 92)**

4.       Does your council have a code of practice as per section 92 of the Act?

- ☐ Yes
- ☐ No
- ☐ Don't know

5.       Has your council reviewed the operation of its code of practice since the local government elections in November 2010?

- ☐ Yes
- ☐ No
- ☐ Don't know

6.       What is the month and year of the last review of council's code of practice?

month/year

7.       Has preparation of your council's code of practice and subsequent practice involved reference to the Local Government Association of South Australia's **(LGA)** *Model Code of practice for Access to Council and Committee Meetings and Associated Documents (Incorporating Guidelines, Model Code of practice and Model Confidentiality Orders)*?

*(tick whichever applicable)*

- ☐ Yes
- ☐ Yes, and we have sought further advice from the LGA
- ☐ No
- ☐ We have used other sources of advice

8.       Has your council's code of practice been prepared in accordance with the relevant steps set out in your public consultation policy?

- ☐ Yes
- ☐ No
- ☐ Don't know

**Part C: Public access to council and committee meetings  
(Chapter 6, Part 5, section 90)**

9. Does your council encourage public attendance at council and committee meetings?

- ☐ Yes  
☐ No  
☐ We leave it to the public  
☐ Comment (*please outline below*)

--

10. (*If you answered yes to Q9*) How does your council encourage public attendance at meetings?

--

11. Please list, in the boxes below, the number of agenda items for which your council has invoked section 90(2) of the Act and ordered that the public be excluded from a meeting in the relevant period.

Ordinary meetings

<input type="text"/>	2009-2010
<input type="text"/>	2010-2011

Special meetings

<input type="text"/>	2009-2010
<input type="text"/>	2010-2011

Committee meetings

<input type="text"/>	2009-2010
<input type="text"/>	2010-2011



12. In the table marked as Appendix A, please provide the details of each section 90(2) order made in the relevant period, including the date of the order, the item number, whether the meeting was ordinary, special or committee, and the grounds on which each decision was made.

- ☐ Completed
- ☐ Not completed
- ☐ Details not available

13. Have there been occasions in the relevant period when council has considered moving into confidence under section 90(2), but decided not to do so?

- ☐ Yes, and the circumstances are outlined in the box below
- ☐ Yes, but we have no record of the discussion
- ☐ No

**Part D: Orders to keep documents confidential  
(Chapter 6, Part 5, section 91)**

14. Please list, in the boxes below, the number of occasions on which your council has invoked section 91(7) of the Act and ordered that a document or part of a document be kept confidential in the relevant period.

**Note:** 'documents' include:

- (a) minutes of meetings, and
- (b) reports to the council or a council committee received at a meeting of the council or committee; and
- (c) recommendations presented to the council in writing and adopted by resolution of the council; and
- (d) budgetary or other financial statements adopted by the council.

Ordinary meetings

<input type="text"/>	2009-2010
----------------------	-----------

<input type="text"/>	2010-2011
----------------------	-----------

Special meetings

<input type="text"/>	2009-2010
----------------------	-----------

<input type="text"/>	2010-2011
----------------------	-----------

Committee meetings

<input type="text"/>	2009-2010
----------------------	-----------

<input type="text"/>	2010-2011
----------------------	-----------

15. On each occasion section 91(7) was invoked, was a record made of the duration of the order, the circumstances in which the order will cease to apply, or the period after which the order must be reviewed.

- ☐ Yes, the evidence is in the minutes attached
- ☐ No

16. On each occasion section 91(7) was invoked, with the order of confidentiality being for a period exceeding 12 months, was an annual review of the order conducted (for the period up to June 30, 2011)?

- ☐ Yes, the evidence of the review of each order is in the minutes attached
- ☐ No

17. On each occasion that an order made over a document, or part of a document, under section 91(7) ceased, was the information previously covered by the order made available to the public?

- ☐ Yes
- ☐ No

18. *(If you answered yes to Q17)* Please describe how a member of the public can gain access to the information previously covered by the confidentiality order.

**Part E: Associated matters**

19. Section 90(3)(b)(ii) refers to disclosure of information which ***“would, on balance, be contrary to the public interest”***. Please describe below, in your own words, what you consider this notion means in practice.

20. Please briefly describe your process for indicating on a document or report provided to members of council under section 83(4) (or on a separate notice) that a matter is proposed for consideration in confidence. As part of this, please outline how you satisfy yourself that the need for confidentiality outweighs the principle of open decision making.

21. Who do you consult when considering whether to indicate to the council or a committee that a confidential order may be made? *(please tick all boxes that apply)*

- ☐ As CEO, I always make the decision myself
- ☐ I consult the Mayor or Deputy Mayor as a matter of course
- ☐ I consult the Mayor or Deputy Mayor if I am unsure
- ☐ I consult the Committee chair as a matter of course
- ☐ I consult the Committee chair if I am unsure
- ☐ I take advice from staff as appropriate
- ☐ I take advice from a lawyer if necessary

22. Can you describe any circumstances in the relevant period in which council has not agreed to keep information provided to it by a person or organisation confidential?

- ☐ Yes
- ☐ No

*If yes please provide details*

23. In the relevant period, has the council received and processed any complaints or requests for section 270 internal reviews of decisions on matters involving public access to a meeting or a document?

- ☐ Yes, related to access to meetings there were.....complaints or reviews  
☐ Yes, related to access to documents there were.....complaints or reviews  
☐ No complaint or section 270 review request has been made

24. Does each of the council's annual reports for the relevant period include a report on the use of sections 90(2) and 91(7) by the council and its committees?

2009-2010

s.90(2)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
s.91(7)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Combined

2010-2011

s.90(2)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
s.91(7)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Combined

25. Does council currently provide training in meeting procedures, specifically covering confidentiality matters, to council members and senior executives?

- ☐ Yes  
☐ No

*If yes please give some details about the training provided for members and/or staff*

**Part F: Suggestions for improvements to the system and practices of councils with regard to matters of confidentiality.**

- 26.** What actions do you believe your council can take to improve its approach to open, responsive and accountable government?

- 27.** What legislative or regulatory changes could be considered to ensure best practice in managing public access to council meetings and documents?

- 28.** What actions do you believe would help raise awareness of the importance of public access to council meetings and documents across the local government sector in South Australia?

- 29.** If you have anything else you would like to tell us about your thoughts on confidentiality and public access issues, please provide them below.

**Documents required for the relevant period** (*please check box for inclusion or not*).

- ☐ Council's code(s) of practice for access to meetings and documents applicable during the relevant period
- ☐ Council's minutes for items of business considered in confidence under section 90(2) of the Act in the relevant period
- ☐ Council committee minutes for items of business considered in confidence under section 90(2) of the Act in the relevant period
- ☐ If there are any additional to the above, council's minutes and committee minutes for items of business for which the council or a committee made an order under section 91(7) of the Act that a document or part of a document be kept confidential in the relevant period
- ☐ Delegations (and sub-delegations) to staff to revoke orders under section 91(9)(c) of the Act in the relevant period
- ☐ Minutes for review of documents subject to orders of confidentiality under section 91(7) of the Act in the relevant period
- ☐ Extracts from council's two Annual Reports for 2009-2011 regarding reporting on the use of sections 90(2) and 91(7) of the Act
- ☐ Council's confidential items register or equivalent applicable during the relative period.

Please attach any other documents you believe are useful to understanding confidentiality approaches and practices in your council.

CEO (*for sign-off*)

Name.....

Signature.....

Date.....

***THANK YOU FOR TAKING THE TIME TO RESPOND TO THIS SURVEY***

***Please return to Kym Davey, Investigating Officer, Ombudsman SA, 5<sup>th</sup> floor, East Wing, 50 Grenfell Street, Adelaide SA 5000 - by cob Wednesday 30 November 2011***

## Appendix A (see question 12)

Please provide the details of each section 90(2) order made in the relevant period (2009-2011), including the date of the order, the item number, whether the meeting was ordinary, special or committee, and the grounds on which each decision was made. *(Attach further pages as necessary)*

[illegible]



## PROFILE OF AUDIT COUNCILS

### Alexandrina Council

#### Council Statistics

Population	23,868
Number of Employees	179
Total Operating Revenue	\$32,617,000
Number of Electors	18,469
Distance from Adelaide GPO	88km
Number of Rateable Properties	17,795
State Electorate	Finniss
Federal Electorate	Mayo

#### Chief Executive Officer

Peter Dinning

#### Mayor

B K (Kym) McHugh

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### District Council of Barunga West

#### Council Statistics

Population	2,860
Number of Employees	21
Total Operating Revenue	\$4,530,700
Number of Electors	1973
Distance from Adelaide GPO	171km
Number of Rateable Properties	2,641
State Electorate	Frome, Goyder
Federal Electorate	Grey

#### Chief Executive Officer

Nigel Hand

#### Mayor

Dean Dolling

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### City of Burnside

#### Council Statistics

Population	44,500
Number of Employees	156 FTE
Total Operating Revenue	\$36,000,000
Number of Electors	32,005
Distance from Adelaide GPO	7km
Number of Rateable Properties	20,449
State Electorate	Bragg, Morialta, Hartley, Norwood, Unley
Federal Electorate	Sturt, Adelaide

#### Chief Executive Officer

Paul Deb

#### Mayor

David Parkin

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## District Council of Ceduna

### Council Statistics

Population	3,574
Number of Employees	46
Total Operating Revenue	\$8,342,149
Number of Electors	2,568
Distance from Adelaide GPO	772km
Number of Rateable Properties	2,295
State Electorate	Flinders
Federal Electorate	Grey

### Chief Executive Officer

Craig Wilson (Acting)

### Mayor

Allan Suter

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## District Council of Coober Pedy

### Council Statistics

Population	3,500 approx
Number of Employees	72
Total Operating Revenue	\$13,196,000
Number of Electors	1,194
Distance from Adelaide GPO	843km
Number of Rateable Properties	1,956
State Electorate	Giles
Federal Electorate	Grey

### Chief Executive Officer

Phillip Cameron

### Mayor

Steve Baines

---

## District Council of Grant

### Council Statistics

Population	8,270
Number of Employees	92 (Includes casuals)
Total Operating Revenue	\$12,738,000 (10/11)
Number of Electors	5,672
Distance from Adelaide GPO	450km
Number of Rateable Properties	5,335
State Electorate	Mount Gambier
Federal Electorate	Barker

### Chief Executive Officer

Trevor Smart

### Mayor

Richard Sage

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## Light Regional Council

### Council Statistics

Population	13,984
Number of Employees	80
Total Operating Revenue	\$15,265,000
Number of Electors	9,509
Distance from Adelaide GPO	76km
Number of Rateable Properties	7,422
State Electorate	Light, Schubert
Federal Electorate	Wakefield

### Chief Executive Officer

Brian Carr

### Mayor

Bill O'Brien

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## District Council of Mount Barker

### Council Statistics

Population	29,149
Number of Employees	138
Total Operating Revenue	\$29,926,289
Number of Electors	22,617
Distance from Adelaide GPO	33km
Number of Rateable Properties	13,696
State Electorate	Heysen, Kavel
Federal Electorate	Mayo

### Chief Executive Officer

Andrew Stuart

### Mayor

Ann Ferguson

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## Rural City of Murray Bridge

### Council Statistics

Population	19,420
Number of Employees	133 Council 114 Lerwin Nursing Home
Total Operating Revenue	\$22,693,000
Number of Electors	15,281
Distance from Adelaide GPO	75km
Number of Rateable Properties	10,822
State Electorate	Hammond
Federal Electorate	Barker

### Chief Executive Officer

Peter Bond

### Mayor

Allan Arbon OAM

---

## City of Onkaparinga

### Council Statistics

Population	162,925
Number of Employees	613
Total Operating Revenue	\$121,424,629
Number of Electors	110,269
Distance from Adelaide GPO	31km
Number of Rateable Properties	74,213
State Electorate	Bright, Kaurana, Mawson, Fisher, Heysen, Reymell, Davenport, Mitchell
Federal Electorate	Boothby, Kingston, Mayo

### Chief Executive Officer

Mark Dowd

### Mayor

Lorraine Rosenberg

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## City of Playford

### Council Statistics

Population	79,850
Number of Employees	428
Total Operating Revenue	\$89,369,160
Number of Electors	48,000
Distance from Adelaide GPO	31km
Number of Rateable Properties	35,888
State Electorate	Napier, Taylor, Light, Kavel, Elizabeth
Federal Electorate	Wakefield, Bonython

### Chief Executive Officer

Tim Jackson

### Mayor

Glenn Docherty

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## City of West Torrens

### Council Statistics

Population	56,169
Number of Employees	300
Total Operating Revenue	\$54,804,269
Number of Electors	38,726
Distance from Adelaide GPO	4km
Number of Rateable Properties	29,047
State Electorate	Morphett, Colton, West Torrens
Federal Electorate	Adelaide, Hindmarsh

### Chief Executive Officer

Terry Buss

### Mayor

John Trainer

## Overview of Interstate legislation

### New South Wales

The *Local Government Act 1993* (NSW) stipulates in Chapter 4 that meetings conducted by council and its committees are to be held in public. Section 9 mandates that council must give notice to the public of the meetings and make copies of the meeting agenda available for viewing by the public. If the meeting will be closed to the public, the agenda must expressly indicate this.

Section 10A provides that a meeting can be closed as required if it is anticipated that the council will be receiving information or discussing the following type of matters (section 10A(2)):

- (a) personnel matters concerning particular individuals (other than councillors);
- (b) the personal hardship of a resident;
- (c) information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct business);
- (d) commercial information of confidential nature that would, if disclosed:
  - (i) prejudice the commercial position of the person who supplied it, or
  - (ii) confer a commercial advantage on a competitor of the council, or
  - (iii) reveal a trade secret;
- (e) information that would, if disclosed, prejudice the maintenance of the law;
- (f) matters affecting security of the council, councillors, council staff or council property;
- (g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege;
- (h) information concerning the nature and location of a place or an item of Aboriginal significance on community land.

Section 10A(3) stipulates that a council or a council committee may close to the public so much of its meeting as comprises a motion to close another part of the meeting to the public. The Act confers a right on the public to make representations in relation to the matters to be discussed at a closed meeting, before it is closed (section 10A(4)).

Section 10B(1)(a) states that a meeting is not to remain closed for longer than is necessary to preserve confidentiality. Furthermore, if the matters discussed at the meeting concern personnel, personal hardship or a trade secret, the meeting is not to remain closed unless the council is satisfied that discussion of these matters in the open, on balance, would be contrary to the public interest (section 10B(1)(b)).

The legislation is silent as to whether the public interest test needs to be satisfied when information relating to the matters listed in section 10B(1)(b) is received but not discussed at the council meeting. Section 10B(2) states that a meeting is not to be closed if the council is discussing material subject to legal professional privilege; unless the legal advice received concerns substantial issues which are clearly identified and fully discussed (it is insufficient under this provision to close a meeting on the basis of receiving general legal advice).

Under section 10B(4), in order to lawfully apply the public interest test required by section 10B, the council must not close the meeting on the basis that a person may misinterpret the discussion or that the discussion may cause embarrassment to the council or loss of confidence in the council.

Section 10D mandates that the grounds for closing the meeting must be stated in the minutes of the meeting. These grounds must specify the relevant provision of section 10A(2), the matter to be discussed in confidence and the reasons why the meeting is being closed to the public, including why public discussion would be, on balance, contrary to public interest. Section 11 also mandates that the council must give the public reasonable access to information received and discussed at the meeting, unless the meeting was closed or the council has resolved to treat the information as confidential.

Part 7 of the *Meetings Practice Note* (n16 - August 2009), made available by the Department of Premier and Cabinet (NSW), Division of Local Government, suggests that closing part of the council meeting is discretionary and the council is not obliged to exercise this discretion even if the matters discussed at this meeting fall within the section 10A(2) list. The *Practice Note* stipulates that all resolutions and recommendations made during a closed meeting need to be made available to the public after the meeting ended, these can be reported in a way to protect the confidential information.

The *Government Information (Public Access) Act 2009* (NSW) also legislates for maintenance of open, accountable government for the purpose of ensuring transparency and maintenance of responsible and representative governance. Local governments are subject to this legislation (section 4). Section 5 contains the presumption in favour of disclosure of government information unless such disclosure is contrary to public interest. It is worth noting that 'government information' is defined under this Act as 'information contained in a record held by an agency' (section 4). Section 13 states that to satisfy the public interest test against disclosure, the agency must consider that the public interest against disclosure outweighs the public interest in favour of disclosure. Section 14(1) states that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1 of the Act. Section 14(2) strictly limits the other considerations to be taken into account when determining the public interest test, providing a table of permissible considerations. Interestingly this Act, specifically section 16, expressly states that the agency must, as much as is reasonable, advise and assist persons seeking to gain access to government information.

Section 664 of the *Local Government Act 1993* provides that a person must not disclose any information obtained in connection with the administration or execution of the *Local Government Act* unless in certain circumstances provided by the Act. The same section expressly states that a person must not disclose information which concerns matters discussed during a closed meeting, unless certain conditions have been met. The maximum sanction of 50 penalty units is imposed on a person who is in breach of the subsection (1), (1A), (2) and (3) of section 664.

## Victoria

The *Local Government Act 1989* (Vic) directs that any meeting of the council or a special committee must be open to the public unless the following section 89(2) factors apply to the discussions contained within the closed part of the meeting:

- (a) personnel matters;
- (b) the personal hardship of any resident or ratepayer;
- (c) industrial matters;
- (d) contractual matters;
- (e) proposed developments;
- (f) legal advice;
- (g) matters affecting security of council property;
- (h) any other matter which the council or special committee considers would prejudice the council or any person;

- (i) resolution to close the meeting to members of the public.

If the council or the special committee resolves to close part of the meeting, the reason for this closure needs to be recorded in the minutes of the meeting (section 89(3)). Section 11(f) of the *Local Government (General) Regulations 2004* (Vic) states that the council is required to make the agendas and minutes of council meetings held in the previous 12 months available for public inspection except if the minutes relate to parts of meetings which have been closed to members of the public under section 89. It is unclear whether the reasons recorded under section 89(3) are subject to the rule or exception established in section 11(f) and therefore whether the reasons must be made publically available.

Interestingly section 92 specifies that proceedings of a council are not invalidated in the case of any failure to comply with section 89.

Section 77 of the *Local Government Act* specifically provides for maintenance of confidential information. Subsection (2) states that information is confidential information if:

- (a) the information was provided at a closed meeting
- (b) the information was designated as confidential pursuant to list of factors under section 89(2)
- (c) the information was designated as confidential by the Chief Executive Officer pursuant to the grounds in section 89(2).

In all of the above circumstances, the information cannot be maintained as confidential if the council has resolved to release the information. Based on this provision, the legislative intention appears such that when the council determines to close part of the meeting or designate information as confidential pursuant to section 89(2), the details of the matters contained within the closed meeting or the confidential documents are maintained in confidence indefinitely (except when section 77(2)(c) applies, as per above, confidentiality ceases after 50 days).

No express penalty provisions have been imposed for unauthorised release of confidential information.

## Queensland

Section 17 of the *Local Government (Operations) Regulation 2010* (Qld) directs that a meeting is open to the public unless a resolution is passed that the meeting is closed under section 72.

A local government or a committee may resolve to close the meeting to the public if 'its councillors or members consider it necessary' to close the meeting in order to discuss any of the following factors (section 72):

- (j) the appointment, dismissal or discipline of employees;
- (k) industrial matters affecting employees;
- (l) the local government's budget;
- (m) rating concessions;
- (n) contracts proposed to be made by it;
- (o) starting or defending legal proceedings involving it;
- (p) any action to be taken by the local government under the Sustainable Planning Act, including deciding applications made to it under the Act;
- (q) other business for which a public discussion would be likely to prejudice the interests of the local government or someone else, or enable a person to gain financial advantage.

The Regulations also provide, under section 72(2), that a local government or a committee cannot resolve to keep a meeting closed to the public if any person is to take part in the meeting by teleconferencing.

A resolution to close the meeting must state the nature of the matters to be considered during the closed part of the meeting pursuant to section 72(3). Section 72(4) states that the local government or a committee must not pass any resolutions (other than procedural ones) in a closed meeting.

The Regulations do not expressly contain provisions relating to confidential documents.

The *Local Government Act 2009* (Qld) at section 171 states that a person who is or has been a councillor must not knowingly release confidential information. Nor must they use confidential information to gain a financial advantage or harm the local government. If this provision is breached a maximum penalty of 100 units or 2 years of imprisonment is imposed. Section 200(8) stipulates that a person who is or has been a local government employee must not release confidential information. If this provision is breached a maximum penalty of 500 units or 5 years imprisonment for an employee of a corporate entity; or a maximum of 100 points penalty for any other local government employee.

### Western Australia

The *Local Government Act 1995* (WA), in section 5.23, states that the council and committee meetings are to be open to the public except when the meeting or part of the meeting deals with the following matters in subsection (2):

- (a) a matter affecting an employee or employees;
- (b) the personal affairs of any person;
- (c) a contract entered into, or which may be entered into, by the local government and which relates to a matter to be discussed at the meeting;
- (d) legal advice obtained, or which may be obtained, by the local government and which relates to a matter to be discussed at the meeting;
- (e) a matter that if disclosed, would reveal - (i) trade secret; (ii) information that has a commercial value to a person; or (iii) information about the business, professional, commercial or financial affairs of a person;
- (f) a matter that if disclosed, could be reasonably expected to - (i) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law; or (ii) endanger the security of the local government's property; or (iii) prejudice the maintenance or enforcement of a lawful measure for protecting public safety;
- (g) information which is the subject of a direction given under section 23(1a) of the *Parliamentary Commissioner Act 1971* (WA); and
- (h) such other matters as may be prescribed.

A decision to close a meeting, as well as the reason for the decision, must be recorded in the minutes of the meeting (section 5.23(3)).

Section 5.94 provides that a person can inspect certain local government information, including confirmed minutes of meetings, notice papers, agenda and reports. Section 5.95(2) excludes a person's right to inspect information of confirmed minutes and notice papers and agendas if the information relates to any debt owed to the local government by a person other than themselves. Section 5.95(3) also stipulates that a person cannot inspect the minutes, notice papers or agendas of a closed meeting, unless the information sought is a record of the decisions made at a meeting or has been prescribed as being available to the public despite section 5.95(3) (section 5.95(4)). Section 5.95(6) excludes a person's right to inspect confidential information throughout the period of time that the information has been prescribed as confidential information, unless the council has resolved that the confidential information is to be available for inspection (section 5.95(7)).



No express penalty provisions have been imposed for unauthorised release of confidential information, apart from release of information relating to complaints made during the campaign period.

## Tasmania

The *Local Government (Meeting Procedures) Regulations 2005* (Tas), specifically section 15, stipulates that the council by absolute majority or a council committee by simple majority may close a meeting or part of a meeting to the public only for one or more of the following reasons as specified in subsection (2):

- (a) personnel matters, including complaints against an employee of the council;
- (b) industrial matters relating to a person;
- (c) contracts for the supply and purchase of goods or services
- (d) the security of property of the council;
- (e) proposals for the council to acquire land or an interest in the land or for the disposal of land;
- (f) information provided to the council on the condition it is kept confidential;
- (g) trade secrets of private bodies;
- (h) matters relating to actual or possible litigation take by or involving the council or an employee of the council;
- (i) application by councillors for leave of absence;
- (j) the personal affairs of any person.

Section 15(3) states that the meeting should not be closed if the council or a committee is acting as a planning authority under the *Land Use Planning and Approvals Act 1993* (Tas) or if considering whether or not to grant a permit under that Act, or when considering proposals for the council to deal with public land under section 178 of the Act. However section 15(4) allows for such matters to be discussed in a closed meeting if the council or a committee is considering these matters in relation to an actual or possible legal action taken by or involving the council.

Grounds for the closure of a meeting are to be recorded in the minutes (section 15(5)). The minutes of the open meeting may only record the fact that a matter was discussed at a closed meeting and may not record the details of the outcome of the closed meeting unless the council determines otherwise (section 34(1)).

Section 9 provides for public access to documents. However subsection 3 states that, subject to the *Right to Information Act 2009* (Tas), the General Manager of the council must withhold documents from the public if he/she is of the opinion that these documents relate to any matter under section 15(2) (as outlined above). Subsection 6 provides that the General Manager (subject to the *Right to Information Act 2009*) may authorise release of such documents to the public if:

- (a) the council or a council committee has authorised its release to the public under section 15(9); or
- (b) the council or a council committee has discussed, at a meeting that was not closed to the public under section 15, the matter to which the associated report or document relates and has, after considering privacy and confidentiality issues, authorised its release to the public.

Section 338A of the *Local Government Act 1993* (Tas) contains a penalty provision, which imposes a fine (not exceeding 50 penalty units) on a councillor, a member or an employee for disclosing information that is confidential.

## Checklist of legal requirements regarding council meetings and confidentiality

Under Chapter 6 of the *Local Government Act 1999* councils must comply with certain requirements regarding meeting procedures and access to relevant information. Compliance requirements for both meetings, public access to meetings and access to documents are here summarised. Annual reporting and relevant sundry provisions are included.

### 1.1 Prior to each meeting

#### Notice of council and committee (other than non-regulatory) meetings to members

Was each member given at least three clear days notice of the meeting? (s.83(1), s.87(4))

If the meeting was a special meeting, was each member given at least four hours notice of the meeting? (s.83(2), 87(7))

Does the notice of the meeting comply with the following? (s.83(3), 87(8))

- Is it in writing?
- Does it set out the date, time and place of the meeting?
- *For council meetings*, is it signed by the chief executive officer?
- Does it contain or is it accompanied by the agenda for the meeting?

When the notice of the meeting was given to each member, and if practicable, was each member given a copy of all documents or reports that are/were to be considered at the meeting? (s.83(4), s.87(9)(b)). If not, why not?

The chief executive officer may indicate that a document or report provided to members contains information that may, if the members so determine, be considered in confidence under section 90(2). If this applies to the meeting, is the basis upon which such an order could be made specified? (s.83(5), s.87(10))

#### Notice of council and committee (other than non-regulatory) meetings to the public

In the case of an *ordinary council meeting*, was the public notified of the time and place of the meeting at least three clear days before the date of the meeting? (s.84(2)(a))

In the case of a *special council meeting* or a *committee meeting*, was the public notified of the time and place of the meeting as soon as practicable after the time that notice of the meeting was given to members? (s.84(2)(b), s.88(2))

Other than publicly displaying the meeting notice and agenda at the principal office of the council, have you considered it appropriate to notify the public of the time and place of the meeting in any other manner? (s.84(1) & (2a), 88(2) & (2a))

Was the notice and agenda for the meeting kept on public display until the completion of the meeting? (s.84(4), s.88(4))

Other than documents relating to matters dealt with by the meeting in confidence under section 90(2), or to which the chief executive officer had indicated could be dealt with in confidence, were reasonable numbers of copies

of all documents and reports that were supplied to members made available to the public as soon as practicable after they were supplied to the members? (ss.84(5)(a), 84(5)(b), 84(6), 88(5) and 88(6))

## 1.2 During the meeting

### Meetings to be held in public except in special circumstances

Did the members order that the public be excluded from the meeting only to the extent that the members considered it necessary and appropriate in order to receive, discuss or consider in confidence *information* or *matter* of the types prescribed by section 90(3)(a)-(n)? (s.90(2))

Were notes (which include the grounds on which each order was made) made in the relevant minutes of each order made to exclude the public? (s.90(7) and regulations 9(4)(h) and 25(1)(d) of the LG (Procedures of at Meetings) Regulations)

*Note:* informal meetings *are* allowed pursuant to section 90(8), however this does not permit a matter to be discussed 'in such a way as to obtain, or effectively obtain, a decision on the matter outside a formally constituted meeting of the council or council committee'.

### Minutes and documents

Were minutes kept of the proceedings of the meeting? (s.91(1) & (2))

Was each member supplied with copies of all minutes of the proceedings of the meeting within five days after the meeting? (s.91(3))

Other than parts of the minutes relating to matters dealt with on a confidential basis under section 90(2), and which are subject to orders that they be kept confidential, were copies of the minutes of the meeting placed on public display within five days after the meeting, and kept on display for at least one month? (s.91(4) & (7))

Other than documents or parts of documents relating to matters dealt with on a confidential basis under section 90(2), and which are subject to orders that they be kept confidential, is a person entitled to inspect, or upon payment of a fee, to obtain a copy of, the following documents? (s.91(5), (6) & (7))

- minutes of the proceedings of the minutes?
- all reports received by the members?
- recommendations presented to the members in writing and adopted by resolution of the members?
- budgetary or other financial statements adopted by the members?

Did the members make any order that a document or part of a document be kept confidential for any of the following purposes? (s.91(8))

- 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
- to prevent 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 members as to why a successful tenderer has been selected
- to prevent 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
- to prevent the disclosure of the identity of land that has been acquired or disposed of by the council, or of any reasons adopted by the members as to why land has been acquired or disposed of by the council

For each order made by the members that a document or part of a document be kept confidential:

- did the members 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? (s.91(9)(a))
- was a note made in the minutes recording:
  - the making of the order;
  - the grounds on which it was made; and
  - the decision about the duration of the order or the circumstances in which the order will cease to apply, or the period after which the order must be reviewed? (s.91(9)(b))
- did the members delegate to an employee of the council the power to revoke the order? (s.91(9) and regulations 9(4)(i) and 25(1)(e) of the LG(Procedures at Meetings) Regulations)

## **2. Checklist for the end of the financial year**

### **Council meetings**

Was there at least one ordinary meeting in each month? (s.81(2))

Were all meetings held after 5pm? If not, and if you are a municipal council, did your council unanimously resolve to hold meetings before 5pm on each occasion? (s.81(6))

### **Notice of council and committee (other than non-regulatory) meetings to members**

Has the council kept a record of all notices of meetings given to members? (s.83(8))

### **Notice of council and committee (other than non-regulatory) meetings to the public**

Other than publicly displaying meeting notices and agendas at the principal office of the council, did you notify the public of the times and places of meetings in any other manner? (s.84(1) & (2a), 88(2) & (2a)) If not, why would this not be appropriate?

### **Meetings to be held in public except in special circumstances**

Other than as allowed by the LG Act, were all council and committee meetings held in places open to the public? (s.90(1))

## **Minutes and documents**

Other than documents or parts of documents relating to matters dealt with on a confidential basis under section 90(2), and which are subject to orders that they be kept confidential, is a person entitled to inspect, or upon payment of a fee, to obtain a copy of the following documents? (s.91(5), (6) & (7))

- minutes of the proceedings of the minutes of all meetings?
- all reports received by the members?
- recommendations presented to the members in writing and adopted by resolution of the members?
- budgetary or other financial statements adopted by the members?

For each order made by the council or committee that a document or part of a document be kept confidential for a period exceeding 12 months, did the council or committee review the order at least once this year? (s.91(9)(a))

## **Code of practice**

Has the council adopted a code of practice relating to the principles, policies, procedures and practices that it and its committees will apply for the purposes of sections 90 and 91? (s.92(1))

Did the council review its code of practice within 12 months after the conclusion of the last periodic election? (s.92(2))

Has the council at any time altered its code of practice, or substituted a new code of practice? (s.92(3))

Before adopting, altering or substituting its code of practice, did the council:

- make copies of the proposed code, alterations or substitute code available for inspection or purchase at its principal office?
- follow the relevant steps set out in its public consultation policy? (s.92(5))

Is the council's code of practice available for inspection or, for a fee, purchase from the council's principal office?

Is the council's code of practice available for inspection on the internet? (s.132(3)(c))

## **Annual reporting of confidential matters**

Does your council's most recent annual report include a report on the use of sections 90(2) and 91(7) by the council and its committees (containing the information required by the regulations)? (s.131(2) and Schedule 4(1)(ga))

Are copies of your council's annual reports on the website? (s.132(3)(i))

## Part F: Suggestions for improvements to the system and practices of councils with regard to matters of confidentiality.

### 1. What actions do you believe your council can take to improve its approach to open, responsive and accountable government?

#### Council A

- The Council could consider providing the community clearer reasoning as to why documents have been marked as confidential.
- The Council is currently considering changes to procedures whereby all confidential matters release from the Confidential Register will be available on Council website.

#### Council B

- Continuous review of policy regarding governance and development of decision makers.

#### Council C

- The conduct of this audit has made it apparent that when seeking to retrospectively understand the underlying rationale to exclude the public from meetings or keep documents in confidence that the documentation of such decisions does not confer that understanding. A practical improvement to the adequate recording of these decisions is necessary.

#### Council D

- Encourage attendance of electors at Council meetings. Encourage attendance of electors at community consultation meetings. Encourage locals to stand for election to Council.
- Continue to seek community representation on Council committees or events when applicable, giving them an insight or introduction into the mechanisms of local government.
- Council can continue to encourage members of the community to attend the Council meetings. In the local newspaper the Mayor provides a monthly update of what has been happening in Council.
- Council continues to provide a maximum of 30 minutes (5 minutes each person) for members of the community to address Council at its Ordinary Meetings, to air grievances or ask questions on any matter. Unfortunately public attendances at Council meetings are poor, unless a matter of some controversy or very real interest is on the agenda.

#### Council E

- We currently attempt to minimise our use of confidentiality provisions and also view our organisation as being open and accessible. Communication methods are continually assessed to provide information etc. (Currently we use website, Facebook, quarterly newsletters, print media etc)

#### Council F

- Council has made improvements - tender reports are no longer confidential. The tender reports provide information on the assessment of the tender panel and no longer attach confidential information. In the future staff should clarify with people providing information for a council report if they believe it should be confidential and why. Any copyright issues should also be clarified. The confidential minute register should be updated straight after the meeting.

#### Council G

- Follow provisions of the *Local Government Act 1999*, review and release documents as often as possible.

- Publicise the fact that information has been released.

#### Council H

- Council is always endeavouring to improve means of communicating with the Community. Council conducts Annual Township Plan meetings as part of community inclusion in Council decision making.

#### Council I

- Being aware of the need to be open and accountable and to carefully assess the agenda items for council meetings to see if that item does need to be heard in confidence.

#### Council J

- Notice of Council and Committee Meetings to be placed in Council's newsletter and Council's Messenger Press Columns monthly.

#### Council K

- Making available a copy of the confidential items removed from confidence more readily available e.g. on community noticeboard and Council's website.

#### Council L

- Refinement of six monthly Confidential Register review process, in particular reporting of matters held in confidence.
- Continued questioning of need or requirement to have matters discussed in open forum as opposed to confidential session.
- Provision of pre-amble where reasoning is contemplated prior to considering suggested Section 90 recommendation.
- Review information and order status shown in Confidential Register.

## 2. What legislative or regulatory changes could be considered to ensure best practice in managing public access to council meetings and documents?

#### Council A

- Changes to the Local Government legislation to better inform residents of Council Meetings, with minimum requirements including advertising in the local paper, and on the Councils website.

#### Council B

- Concern has been raised by individuals that they may be named in a document identifying their involvement.

#### Council C

- Section 91(8)(b) provides that when a successful tenderer has been identified a council may not make an order to prevent the disclosure of that tenderer or the reasons why they have been selected.
- In our major procurement exercises for large scale projects, the successful tenderer may be identified through an assessment process and presented to Council for approval. At this point, we are required to ensure the release of the identity of the person/company identified as the successful tenderer from the tender assessment process. However, in these instances the negotiations are often ongoing. The disclosure of the successful tenderer's identity and rationale may sometimes prejudice our negotiation position. It would be more appropriate, in council's view, to seek disclosure at the award of contract.

#### Council D

- Council has not encountered any issues that would indicate to it that legislative or regulatory change is necessary.

Council E

- We consider legislation to be reasonably sound in that it provides for a flexible approach to be possibly transacted in confidence.

Council F

- The current legislation is sufficient.

Council G

- The links between the Freedom of Information Act and confidentiality provisions in the Local Government Act and Development Act need to be examined. Council officers are often caught between the intent and provisions of the FOI Act and Local Government Acts.
- Rapidly evolving information technology has made maintenance of confidentiality more difficult and increased community expectations around what can be accessed. The legislation needs to better cater for this.
- There needs to be stronger mechanism for dealing with disruptive people in the public gallery.

Council H

- N/A

Council I

N/A

Council J

- Public access to Council and Committee meetings does result in potential OHSW risks to staff and Elected Members i.e. aggressive/abusive outbursts by members of the gallery.
- Stronger provisions around the behaviour of members of the public during meetings could be of benefit.

Council K

- A specific definition of 'public interest'

Council L

- Consider legislative and regulatory requirements are clearly enunciated in the Statutes. Perhaps the further development of model guidelines (with a more comprehensive list of example uses) in association with the Code of Conduct for Access to Council and Committee Meetings and Associations would add value in this management activity. This might include some form of 'Public Interest' test by way of examples (if possible).

**3. What actions do you believe would help raise awareness of the importance of public access to council meetings and documents across the local government sector in South Australia?**

Council A

- Advertising for each ordinary Council meeting should be in the local newspaper in the Council area.
- The Council could consider placing Council meeting on the rates notices and on variable message signs advising rate payers of Council meeting times and dates.
- The Local Government Association could play a role in advertising meeting times for Council on its website.

Council B

- High profile in our media choices, i.e. internet, newsletter, electronic notice board.



#### Council C

- In our view, the community expects that they are entitled to be present at any meeting of their elected Council. Hence, it is our view that there is not a need to raise awareness of public access to meetings - as it is already an expectation of the community.
- What is missing, in our view, is an understanding of the circumstances in which it is reasonable to exclude members of the public.

#### Council D

- Regular conduct of education campaign carried out to bring to the attention of electors that (a) they have a right to attend meetings; and (b) that they have a right of access to documents if necessary. Campaign to be carried out with the support of the State Government, LGASA and all Councils.

#### Council E

- Locally we could publish reasons on why we utilise in confidence provisions. We do need to address perception versus fact.

#### Council F

N/A

#### Council G

- More promotion by LGA of the importance of regulatory processes.
- Improve the awareness and understanding by the community that some Council processes have to be confidential as Council is often still a business working in a commercial environment.

#### Council H

- The Council encourages the public to attend meetings by:
  - Information available on Council's website
  - Township Plan Meetings
  - Community Advisory Committees
  - Council is pro-active with the Media

#### Council I

- Utilisation of council's newsletter, which is distributed to all ratepayers advising of the accessibility of access to council meetings. Also utilisation of council's website which we are looking to upgrade.

#### Council J

- The importance of public access to council meetings and documents is well understood across the Local Government sector in general.

#### Council K

- Providing for items placed in confidence to "expire" and automatically be removed from confidence, unless Council formally decides to continue a further period of confidence.

#### Council L

- Continuous refresher training on the various Codes of Practice applicable to the sector, the 'continued' promotion of the access and accountability issues; without overloading the 'local politics' element which might cause turn-off.

By following the steps set out in the flowchart, a decision maker can reach a decision about whether a meeting open to the public would, on balance, be contrary to the public interest.

### 1. *The public interest test favours openness*

It is the Parliament's intention under the *Local Government Act 1999* [the Act] that all council meetings should be held in public unless closure can be justified under 'special circumstances'. Under sections 90(3)(b),(d) & (j) it is mandatory to identify why an open meeting would, on balance, be contrary to the public interest.

The threshold for the public interest test is not neutral. If factors are evenly balanced, access to information must be allowed. The public interest will usually be served by the public having access to meetings and, where relevant, to documents from meetings.

### 2. *The decision maker must identify public interest factors*

The council is the decision maker. The decision maker is responsible for:

- identifying factors that are irrelevant to the public interest; and
- deciding which public interest factors apply to the agenda item and evaluating the importance of those public interest factors.

A ratepayer or a third party is **not** required to identify public interest considerations because the obligation is on the decision maker. However, they may choose to do so or they may provide information or submissions that raise issues for a decision maker to consider in applying the public interest test.

### 3. *Factors which are irrelevant to the public interest balancing test*

There are certain factors which should be disregarded when deciding on confidentiality:

- **Embarrassment or loss of confidence in the council:** Matters should not be discussed in confidence merely to veil the disclosure of incompetence or impropriety on the part of the council.
- **Controversy or public pressure:** Contentious issues should be decided through public discussion and openness rather than attempting to control debate with secrecy.
- **Disclosure of confusing or misleading information:** It is not the council's role to determine whether the public would understand or interpret the information to be released. Any lack of clarity can be overcome by explanation or further release of information.
- **Information may be misused:** Disclosure of information should not be refused on the ground that it may lead to mischievous conduct by some people. A council cannot guess end use of information.
- **High office of person involved:** The standing or seniority of the person or persons involved in the matter should not serve as deterrence to openness. Instead, it might tip the scales towards disclosure.

### 4. *Suggested steps in balancing the public interest factors*

A decision maker should undertake particular steps when conducting the balancing test:

1. identify and disregard irrelevant factors
2. identify relevant public interest factors 'for' disclosure
3. identify relevant public interest factors 'against' disclosure
4. compare the importance of the factors for and against disclosure taking into account the harm that could reasonably be expected to flow from disclosure
5. make a decision about whether closure of a meeting or release of documents would be contrary to the public interest
6. allow access to the information unless disclosing the information would be harmful to the public interest.

<sup>50</sup> The public interest balancing test outlined here is partly derived from the Office of the Information Commissioner, (Queensland). See [http://www.oic.qld.gov.au/information\\_and\\_resources/guidelines-rti/public\\_interest\\_balancing\\_test](http://www.oic.qld.gov.au/information_and_resources/guidelines-rti/public_interest_balancing_test) as at 28 August 2012 and from *FOI and the Public Interest Guideline*, State Records of South Australia, July 2011.

## Balancing the public interest

