



OmbudsmanSA

## Recommendations Implementation Report

for

*In The Public Eye* - an audit of the use of meeting confidentiality provisions of  
the Local Government Act 1999 in South Australian councils.

April 2014

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## EXECUTIVE SUMMARY

Section 90 of the *Local Government Act 1999 (the Act)* requires that council meetings ‘must be conducted in a place open to the public’. The notion of public 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.

Section 91 provides for the circumstances whereby council meeting documents may be kept in confidence for a defined period of time. Section 92 requires councils to prepare and adopt a code of practice relating to the principles, policies, procedures and practices that the council will apply for the purposes of confidential decision-making.

Together these parts of the Act provide an explicit framework for exemptions to the rule of openness and transparency. It is important to understand the intent of the Act is to allow the occasional and necessary use of confidentiality orders. It is not to provide licence to impose or maintain secrecy unnecessarily.

In recent times I have had cause to find that some councils are not adhering to the spirit and the letter of the meeting confidentiality provisions in the Act. In a 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 examples of non-compliance with the legislation.

For these reasons, and because the 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 12 councils across the sector. My audit report was published in November 2012. I made nine recommendations for change directed to all South Australian councils.<sup>1</sup> My report did not find deliberate and widespread abuse of the legislative provisions. However, it did reveal common substandard practices and a lack of understanding about public interest considerations, which I considered should be remedied.

This report is a snapshot of how all 67<sup>2</sup> South Australian councils have responded to the recommendations made in my 2012 audit report.

This 2013 audit recommendation implementation survey revealed that:

- the number of meeting confidentiality orders made by all 67 councils for the 10 month survey period in 2013 averaged 4.6% of all business items considered. This is substantially lower than the 9% of all business items revealed in the audit of 12 councils in 2012.<sup>3</sup>

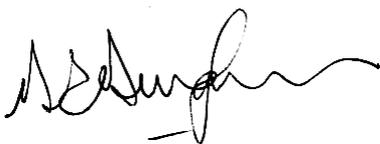
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<sup>1</sup> The audit report, titled *In The Public Eye* also made several recommendations for amendments to the Local Government Act which were directed to the state government for consideration. These recommendations are not reviewed in this document.

<sup>2</sup> There are 68 councils in South Australia. However, the Municipal Council of Roxby Downs operates under an Administrator appointed by the Minister for Minerals Resources Development. Sections 90 and 91 Of the Local Government Act do not apply to the council. Therefore, for the purposes of this audit survey, 67 councils constitute 100% of council numbers.

<sup>3</sup> My audit report in 2012 recommended a maximum 3% rate as an aspirational target for all councils. Note that this report compares percentages from the 12 audit councils with the more recent survey returns from 67 councils.

- 11 of the 12 councils involved in the original audit reported substantially lower rates of meeting confidentiality orders one year after the audit concluded.
- 46 councils reported full implementation of recommendation 1. This calls for updating the councils' section 92 code of practice, to ensure all procedures, including citing reasons for an order, comply with the Local Government Act. 21 councils have accepted and/or partially implemented the recommendation.
- 40 councils reported full implementation of recommendation 3 that calls for dealing with 3% or less of agenda items in confidence under section 90(2). 18 councils have partially implemented the recommendation; whilst 7 councils did not accept the recommendation.
- 40 councils reported full implementation of recommendation 5 that calls for a review of procedures for making section 91(7) document confidentiality orders. 25 councils have accepted and/or partially implemented the recommendation.
- 48 councils reported full implementation of recommendation 6 that calls for establishment or update of the council Confidential Items Register to monitor timely release of confidential documents. 19 councils have accepted and/or partially implemented the recommendation.
- Only 17 councils reported full implementation of recommendation 7 that calls for all councils to post their Confidential Items Register on their website. 50 councils have accepted and/or partially implemented the recommendation.
- 54 councils reported full implementation of recommendation 8 that calls for councils to adopt a legally compliant and best practice approach to annual reporting standards on the use of meeting confidentiality provisions. 13 councils have accepted and/or partially implemented the recommendation.
- 7 councils reported that 10% or more of all council business agenda items were considered in confidence. 2 councils reported 15% or more of all council business agenda items were considered in confidence.
- 9 councils reported that 10% or more of all council committee business agenda items were considered in confidence. 4 councils reported 15% or more of all council committee business agenda items were considered in confidence.



Richard Bingham  
SA OMBUDSMAN

## PART 1

### THE AUDIT PROCESS

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## 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 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 or with 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.

## 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, see section 8 'Principles to be observed by a council', specifically section 8(b).

## Audit methodology

7. The aim of the audit was to establish what best practice is, identify councils' possible misunderstandings of Part 3 and Part 4, and make recommendations for improvement. Twelve councils were selected to participate directly in the audit using criteria outlined below.
8. As part of this process I requested certain 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.
9. Following analysis of responses from all 12 councils, I reported to each council on the issues arising from their use of the confidentiality provisions. I then published, at [www.ombudsman.sa.gov.au](http://www.ombudsman.sa.gov.au), a general report on audit outcomes that addressed current practice standards and system issues for the information of all councils.

## Selection of 12 councils<sup>5</sup>

10. 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. The following councils were selected 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

<sup>5</sup> Appendix B profiles each of the 12 participating councils.

## 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

## The audit recommendation implementation survey

11. In 2013 I established a small Recommendations Implementation Team in my office. The role of the team is to document progress and completion of investigation and audit recommendation actions by agencies and councils for information sharing and reporting purposes.
12. On 3 October 2013 I wrote to all councils advising them of the follow-up to the confidentiality audit and requested completion and return of an audit survey proforma that covered each of the nine recommendations made in the original report. The survey questionnaire is included in this document as Appendix 1.
13. The survey questionnaire requested data on all council and council committee meetings for the 10 month period covering January to October 2013.<sup>6</sup>
14. In December 2013 and January 2014 I received completed questionnaire responses from all 67 councils with their indications of acceptance and compliance with each of the nine recommendations. I also asked the councils for comments where these were warranted, mainly by way of explanation for recommendations not yet implemented.

## Publication of this report

15. Under section 26(2) of the *Ombudsman Act 1972*, I consider it appropriate and in the public interest to release this report to the public:

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.
16. I intend to forward this report to the Minister for Local Government and to all councils, in addition to a general release on the Ombudsman SA and AustLII websites.

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<sup>6</sup> The 10 month review period was a considerably shorter timespan than the 24 month window I examined during the original audit. However, I consider the data from 10 months to be adequate to inform a view of current council practices.

## PART 2

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### RECOMMENDATIONS IMPLEMENTATION: SURVEY RESULTS

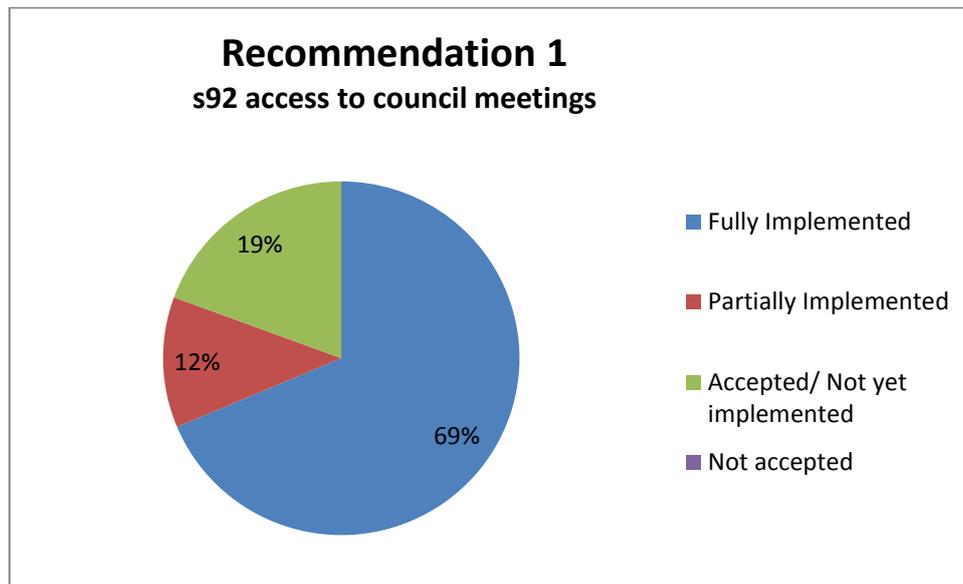
## Implementation of audit recommendations

17. The audit report, *In The Public Eye* made nine recommendations relevant to local government councils. In this section each recommendation is reported on separately, with a selection of comments from the councils and comments from me.

### 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.

18. All councils accepted the recommendation. Questionnaire returns show that 69% or 46 of the 67 councils reported full implementation of the recommendation. A further 8 councils reported partial implementation and 13 councils reported that they had yet to implement the recommendation.



### Council comments

19. The following is a selection of comments made by councils about their response to Recommendation 1:

The council complied with sections 90 and 91 of the LGA99 prior to the introduction of the revised provisions and double test in 2003 and revised practice accordingly to comply thereafter. Council's standing orders address the requirements of section 92. The council has had a section 92 Code of Practice since 2008. Access to meetings and documents were consulted upon in 2011.

Council adopted its Code of Practice - Access to Council Meetings and Documents in October 2011. The Code cites section 90(3) in full and makes clear that details, grounds and the 'application of those grounds' must be included in the resolution.

A revised Code of Practice for Access to Meetings of council and committees and council documents [has been] updated by council's governance consultants and will be workshopped by Elected Members prior to council meeting (where the code will be adopted) on 19 November 2013.

[Council's] code updated July 2012. [We] will now look at further update from LGA Model Code update [from] March 2013 with a report to go to the November 2013 council meeting.

Council's existing Code of Practice for Access to Meetings and Documents (available on council's website) currently contains the 'double test' requirements and also requires reasons for the use of a particular clause and therefore complies with the Local Government Act. Having said that, this document is scheduled for a regular review and some minor adjustments will be made taking into consideration your audit recommendations.

### Ombudsman comment

20. The reported full implementation rate of 69% is a disappointing result for Recommendation 1. I am concerned that some councils have indicated a very recent or 'in progress' review of their section 92 code of practice for access to council meetings and associated documents. It would appear that some councils have needed the stimulus of this audit to put in place a review which ensures compliance with the legislation. I note that not all these reviews have been completed to date. I strongly urge all councils do so as soon as possible.
21. I am also concerned that a small minority of councils appear not to fully understand the requirement of the 'double test' for paragraphs (a),(b),(d) and (j) of section 90(3). Where these paragraphs of the legislation are being cited as cause for confidentiality orders, each 'limb' of the test must be identified and explained. I have addressed this issue in some detail in my audit report.<sup>7</sup>
22. I re-emphasise here the requirement to cite reasons for the use of a particular paragraph to make a valid section 90(2) meeting order. My audit report details the requirements of the Act, and refers to the Local Government Association Model Code of Practice.<sup>8</sup>

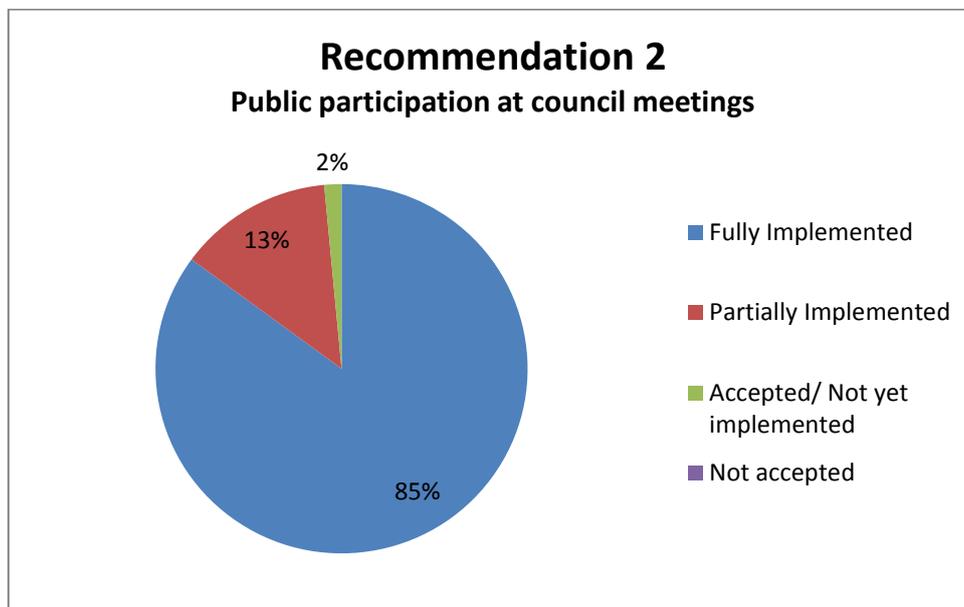
### Recommendation 2

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.

<sup>7</sup> *In the Public Eye* An audit of the use of meeting confidentiality provisions of the Local Government Act 1999 in South Australian councils, page 30 at paragraphs 58-60.

<sup>8</sup> *Ibid*, page 40 at paragraphs 82-86.

23. All councils accepted the recommendation. Questionnaire returns show that 85% or 57 of the 67 councils reported full implementation of the recommendation. A further nine councils reported partial implementation and one council reported that it had yet to implement the recommendation.



24. The second element to the question on public participation requested an indication from councils about their participation in the Local Government Governance and Policy Officers Network. The Network is supported by the Local Government Association of South Australia (LGASA) and provides a forum for governance officers and their equivalents to share information and expertise on governance and procedural matters, including use of the confidentiality provisions.
25. Council returns indicated that 27 of the 67 councils were active participants in Network meetings whilst another 25 reported that they were able to participate by correspondence. I note that only 15 of the 67 councils indicated that they had no involvement in the Network.

### Council comments

26. The following is a selection of comments made by councils about their response to Recommendation 2:

Council has a standing agenda item at its ordinary meetings for public question time.

Council has been proactive in its approach to community engagement and will soon release as part of its Integrity Framework a Public Integrity Resource guide. This guide seeks to inform residents of the options available for communicating with the council whether this is via a deputation, petition and so on. A flow on effect of the increased awareness of the available options would undoubtedly be an increase in public participation and attendance at council and/or committee meetings...Council has been investigating the use of social media, and may in future use social media platforms to alert the community about upcoming council meetings and other council events.

Council is currently in the process of developing its video conferencing capabilities which once developed will be put to council for its consideration. If implemented, the public will be capable of participating in meetings remotely.

Council has undertaken a trial series of 'Council in the Community' council meetings where we conducted our meetings in community centres and sporting clubs to improve accessibility to community members. This was supported by extensive additional advertising of the meetings and the items of interest on the agenda to be considered in order to promote local community interest....A range of council employees were among the initiators of the forming and formalisation of the Governance and Policy Officers network group. The council continues to be actively represented...

The council's General Manager, Governance and Community Affairs is the former chair of the [Local Government Governance and Policy Officers] Network and continues to attend meetings.

### Ombudsman comment

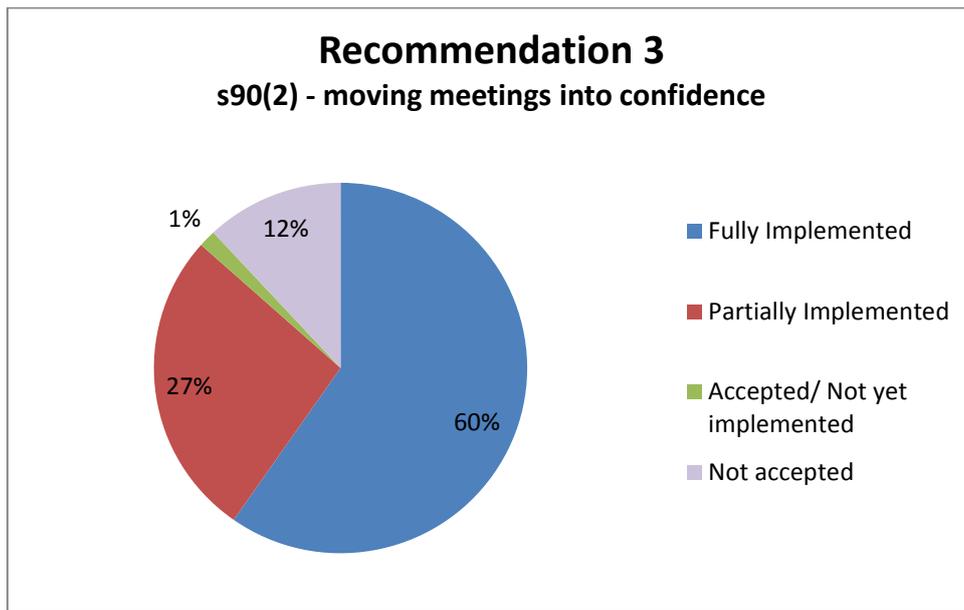
27. The reported full implementation rate of 85% is a welcome result for Recommendation 2. I am impressed that many councils, country and city alike, work hard to encourage greater public participation in council meetings. Some also demonstrate a creative approach to the broader issue of community engagement in decision-making and to the growing use of technology and social media. I am also aware of some long-standing local traditions whereby councils open their formal proceedings up once, in some cases twice, in every meeting to 'questions from the floor'. This is an aspect of local democracy which should attract more media attention.
28. Equally impressive is the level of support shown by many councils around the state to the Local Government Governance and Policy Officers Network. Supported by the LGASA, the Network has evolved from a strong spirit of collaboration amongst councils that see an opportunity to share information and resources to improve governance standards. I note the active participation in the Network of council governance officers and managers from both city and country. There is also a high level of participation by correspondence from councils outside the metropolitan area. It is apparent that governance officers are increasingly being seen by councils as an indispensable resource in managing and improving governance capabilities. This is important in an increasingly complex regulatory environment.

### 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.

29. Questionnaire returns show that 88% or 59 of the 67 councils reported acceptance of Recommendation 3. Eight councils did not accept the recommendation. 40 councils reported full implementation of the recommendation and 18 councils reported partial implementation. One council reported that it had yet to implement the recommendation.



### Council comments

30. The following is a selection of comments made by councils about their response to Recommendation 3:

Council has not for a number of years dealt with matters in confidence.

We have reduced our reliance on the use of confidentiality orders and will continue to review our processes including training of staff and Elected Members and review of policies and procedures to reduce to 3%.

Council dealt with only 2% of agenda items in confidence, although this is more by nature of the business rather than by design. It is agreed that having a target makes you more aware when making a decision whether to close a meeting to the public.

Council rarely goes into confidence. We would be meeting the suggested ratio. Whether you go into confidence or not should be based on the issue at hand rather than an artificial maximum percentage!

Formal pre-meeting consultation does not occur, however all EM's & presiding members are encouraged to contact the City Manager to discuss any item on the agenda if they have queries, prior to meeting.

### Ombudsman comment

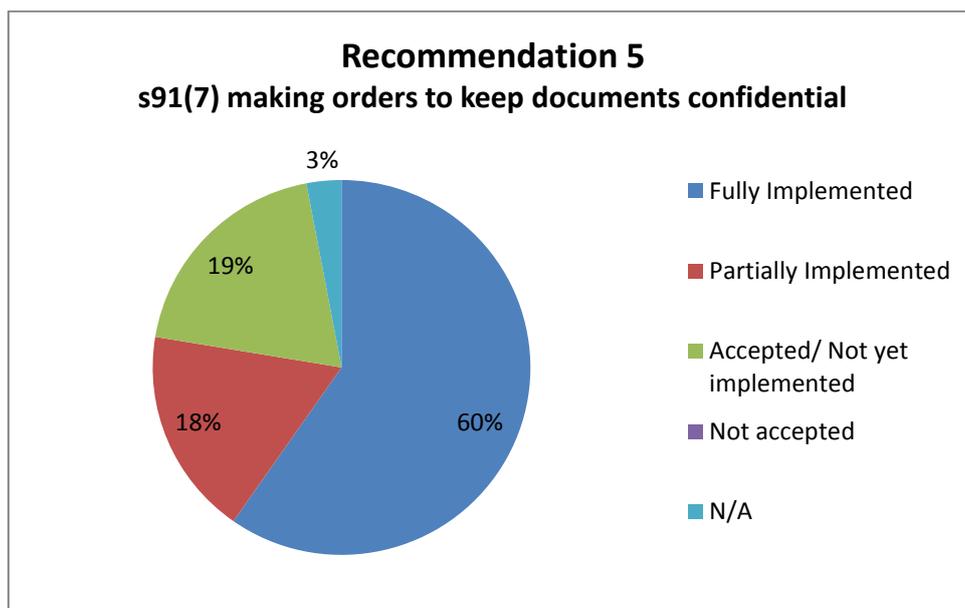
31. The reported 88% acceptance rate for Recommendation 3 is significant. The main focus is the 3% aspirational target I have proposed. In many ways this recommendation highlights the central issue of my audit, i.e. overuse of section 90(2) resolutions which allow for councils to discuss matters behind closed doors *only in exceptional circumstances* (my emphasis). As the figures in section 3 demonstrate, there is a substantially lower average percentage rate of section 90(2) orders reported by councils in this survey. The 2012 audit of 12 councils showed a rate of 9% of all business items discussed in confidence. This survey of all councils, taken just over twelve months later shows the rate has fallen to 4.6%. I welcome this result.

32. Whilst eight councils did not accept the recommendation, their reasons were always interesting. Some said there was no need because they did not, or only rarely, use the confidentiality provisions of the Act. Some felt the 3% figure cited in the recommendation represented a 'quota' rather than an aspirational target. Others made the very relevant point that the decision whether or not to use confidentiality orders should be determined by the nature of the business to be discussed - as weighed against the requirements of the Act.
33. On the issue of pre-meeting consultations with the presiding member, many councils reported that they did this as a standard practice for all agenda items. Others consulted only when confidentiality recommendations were made by the administration. Many were willing to embrace the practice. One council suggested that preparation of agenda reports and framing recommendations should be 'kept out of political influence' and for that reason rejected the recommendation.

### 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.

34. Questionnaire returns show that 97% or 65 of the 67 councils reported acceptance of recommendation 5. Two councils gave no response to the recommendation. 60% or 40 councils reported full implementation of the recommendation. Twelve councils reported partial implementation and 13 councils reported that they had yet to implement the recommendation.



## Council comments

35. The following is a selection of comments made by councils about their response to Recommendation 5:

Council's existing s92 Code of Practice already contained good practice examples of s91(7) document orders. The complexities of the legislation and regulation in a meeting procedure context necessitates guidelines/codes of practice that reflect the varying circumstances encountered in dealing with council business. Whilst council supports the concept of 'uncomplicated' meeting procedures, including for in-confidence matters, the reality is that to-date council has yet to identify such procedures that are technically comprehensive and uncomplicated.

Council will undertake a review of its Section 92 Code of Practice in the near future. Council is always willing to collaborate with the LGASA and uses their Model policies and procedures as a basis for council documents. A decision on Sec 91(7) orders is well discussed by council before any such order is made or indeed not make such an order. Council will utilise the LGA Model as its base document.

We are happy to update/improve our procedures if the LGA come up with an updated Best Practice document. We currently do not have too many issues.

Code of Practice - Meeting Procedures is currently being reviewed in line with the legislative changes due December 2013. The last review of Code of Practice - Meeting Procedures was in January 2013.

A comprehensive review of Council's Code of Practice for Access to Council meetings, Committee meetings and documents has been undertaken with the revised Code adopted by Council at its meeting held 3 June 2013. Council also adopted a revised Code of Practice for Meeting Procedures at the same meeting. More appropriate wording regarding the release process for confidential items has been incorporated including the provision for the CEO to revoke an order earlier if he determines the matter need not remain confidential.

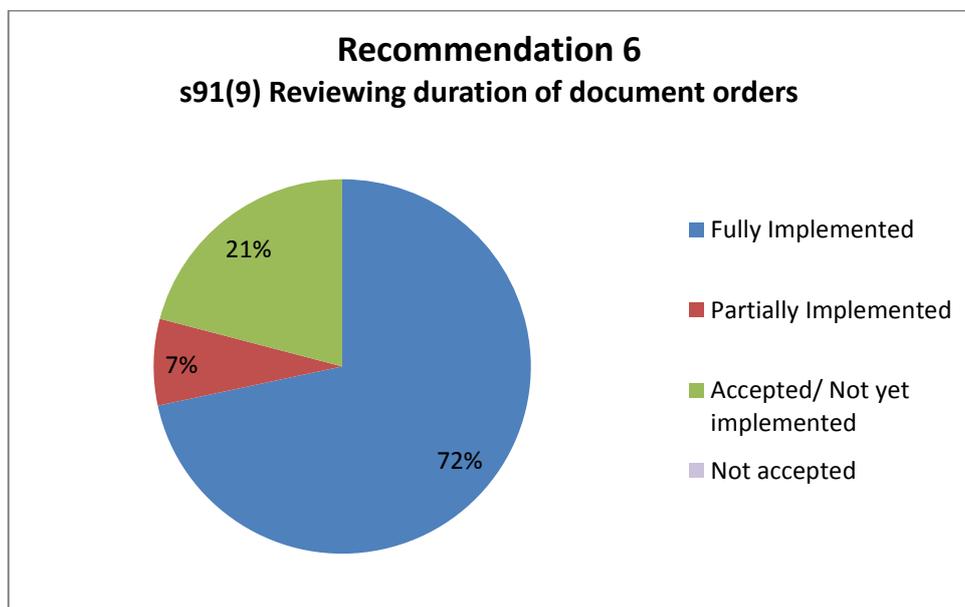
## Ombudsman comment

36. The reported acceptance rate of 97% is a welcome result for Recommendation 5. Many councils noted that they based their meeting procedures on the Local Government Association model procedures which are workshopped and reviewed regularly by council members. However, as the result for Recommendation 1 and the comments above demonstrate, some councils have yet to review their section 92 code of practice. This may mean for some that good practice approaches to the making of section 91(7) document orders is not seen as a priority. I consider that it should be a priority for all councils.
37. On the other hand, many councils commented on their 'differential' approaches to the making of meeting confidentiality orders and document confidentiality orders. Some highlighted their sensitivity to the public's right to know by stating their practice of advising the public of confidential meeting outcomes immediately - 'unless the council has resolved to order that some information remain confidential'. The practice of considering every confidential decision on its merits is a sound one. The survey figures show a significantly lower incidence (4% to 4.6%) of council document orders from meeting confidentiality orders. The figures demonstrate that councils are increasingly mindful that making a meeting confidentiality order does not, and should not, automatically lead to suppression of minutes and documents.

## 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.

38. All councils accepted the recommendation. Questionnaire returns show that 72% or 48 of the 67 councils reported full implementation of the recommendation. A further 5 councils reported partial implementation whilst 14 councils reported that they had yet to implement the recommendation.



## Council comments

39. The following is a selection of comments made by councils about their response to Recommendation 6:

Council is in the process of fully updating its confidential items register. An audit of confidential items prior to 2007 is currently being finalised. The quarterly report to Council reviewing the Register of Confidential Items includes the components listed on the LGA's Model Register detailed in the LGA's Confidentiality Guidelines.

The Council accepts the recommendation and is working through the Model Register to ensure intertwined processes and smooth transition into work practices occurs.

Council is currently implementing the register in line with the model register from the LGA of SA.

The council has not historically dealt with formal release with its confidential records when they expire. These matters are now being addressed.

Council's Confidential Register is formatted in a manner similar to that of the LGA's Model Register, and incorporated all suggested subject areas.

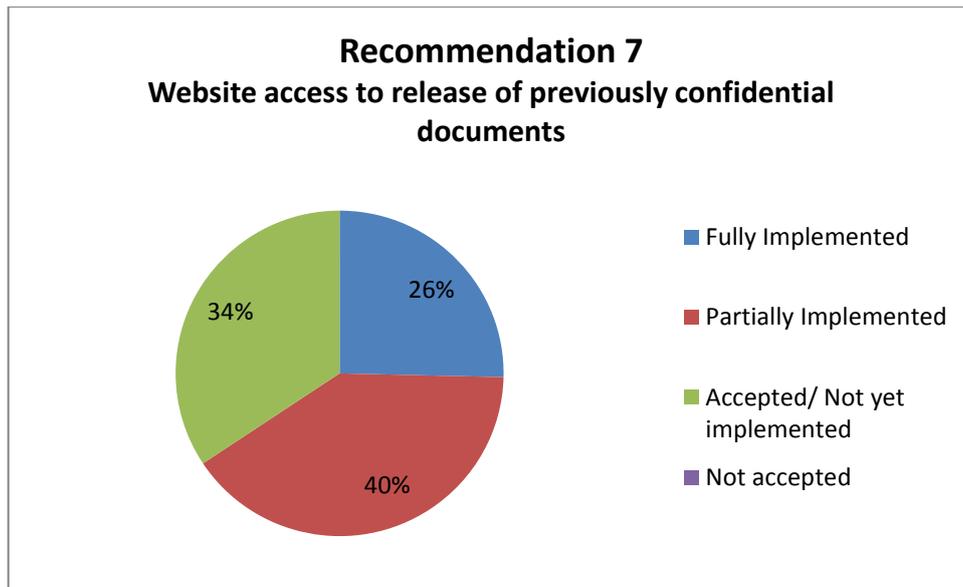
### Ombudsman comment

40. The reported acceptance rate of 100% is a welcome result for Recommendation 6. My audit noted that a significant number of councils established and maintained a Confidential Items Register to assist monitoring and release of material covered by a section 91(7) document order. However, I found many instances where minutes and documents were continuing to be held after the orders had expired. The survey returns from all councils indicates a growing awareness of the need to maintain and update registers to ensure that confidential records are monitored and released when (or before) they are due to expire. The LGASA model register is a helpful tool in this regard.
41. The timely lifting of document confidentiality orders is a matter which causes some confusion in councils. I am impressed that many councils have recently reviewed their practices and updated their Confidential Items Register process to ensure it is 'entwined' with decisions taken to release documents. There are indications that this includes a better understanding of section 91(9)(c) which provides a delegated power for an employee of the council to revoke the order. I welcome the indications that many councils are choosing to encourage discretionary early release based on a 'trigger event' - rather than sticking to a fixed timeframe that usually takes longer.

### 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.

42. All councils accepted the recommendation. Questionnaire returns show that 26% or 17 of the 67 councils reported full implementation of the recommendation. 27 councils reported partial implementation and 23 councils reported that they had yet to implement the recommendation.



### Council comments

43. The following is a selection of comments made by councils about their response to Recommendation 7:

A 'Register' has not been created on the website. However council's Agenda and Minutes Webpage clearly identify documents that have been released. Council does not have enough confidential orders to justify a register at this time.

Confidential documents that have now been released are included in original minutes on web. [We are] in process of posting Register on web with links to released documents.

Council staff have reviewed the register to ensure all items have been recorded correctly and intend to load the register on the website in January with links to released documents as they become available.

Council is currently establishing its process to post the Confidential Items Register on the website.

Council has posted the Confidential Items Registers from years 2009 - 2010 all the way through to 2013 - 2014 together with links to pages showing the released confidential minuted item.

### Ombudsman comment

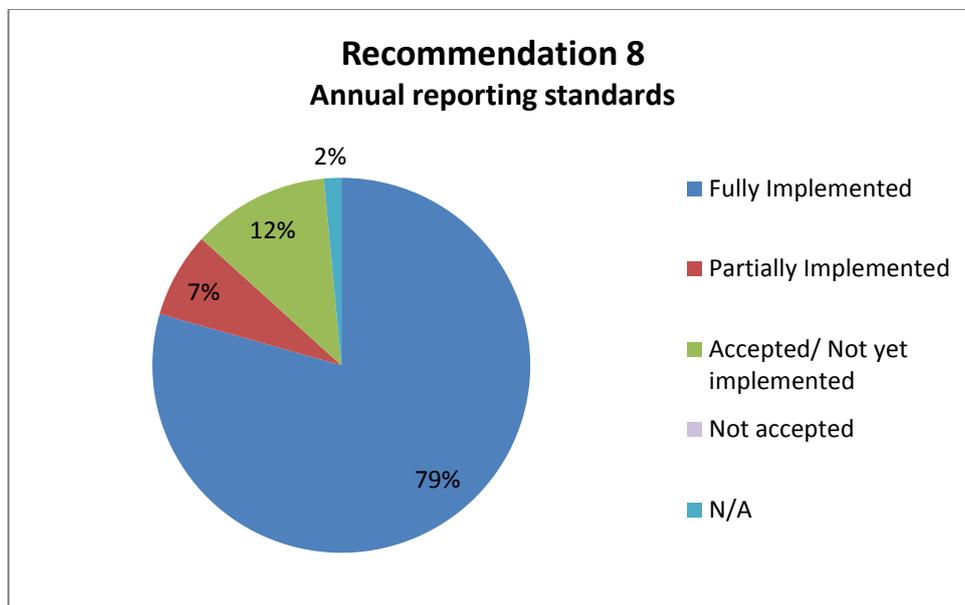
44. The reported acceptance rate of 100% is a welcome result for Recommendation 7. However, a full implementation rate of only 40% (17 councils) to date underlines how far many councils have to go to achieve an appropriate level of disclosure and transparency. It is disappointing that 60% (50 councils) have yet to implement or fully implement this recommendation. My audit found that only 6 of the 12 councils surveyed 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 make available documents which had been released from confidentiality. At that time, some councils were still requiring the public to apply for access to the documents - effectively maintaining a form of confidentiality.

45. During my audit I came across several councils that had best practice document disclosure arrangements. These councils arrange documents in registers of confidential reports on their website. This identifies 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. This saves people having to comb through long lists of agendas and minutes to find released confidential information.

### Recommendation 8

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

46. Questionnaire returns show that 98% or 66 of the 67 councils reported acceptance of recommendation 8. One council gave no response to the recommendation. 79% or 54 councils reported full implementation of the recommendation. 5 councils reported partial implementation and 8 councils reported that they had yet to implement the recommendation.



### Council comments

47. The following is a selection of comments made by councils about their response to Recommendation 8:

At this time Confidential Items listed in a simple table within council's Annual Report. Undertaking improvements to outline date and documentation of all meeting orders made under Sections 90(2) and 91(1)

Council currently prepares its Annual Report in line with the LGA's Model Annual Report.

The council accepts the recommendation and is currently working on procedures to ensure implementation of a best practice approach occurs.

Confidentiality orders - made & expired are noted within the annual report but more comprehensive details of document orders made, expired or remade are not noted. This requirement will be considered during planned review process.

Council's annual report standards are legally compliant, with most of the information recommended as 'best practice' also contained in its 2012/13 Annual Report. Council will further review its in-confidence annual report content in preparation of its 2013/14 Annual Report.

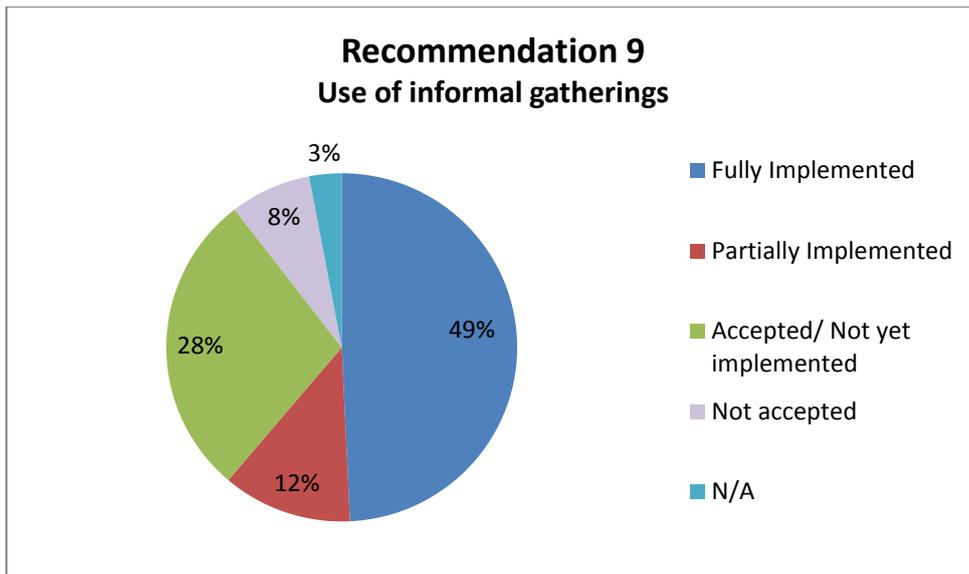
### Ombudsman comment

48. The reported full implementation rate of 79% is a pleasing result for Recommendation 8. In contrast with the much slower implementation rate for website release of confidential information, councils appear to have embraced the need for their annual reporting standards to improve beyond strict adherence to the current regulations.
49. As a best practice initiative, I have suggested including the date and subject description of each confidential 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. I welcome the general willingness by councils to make improvements to their annual report as an exercise in greater transparency for the public.

### Recommendation 9

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

50. Questionnaire returns show that 90% or 60 of the 67 councils reported acceptance of recommendation 9. 5 councils did not accept the recommendation and two councils gave no response to the recommendation. 33 councils reported full implementation of the recommendation. A further eight councils reported partial implementation and 19 councils reported that they had yet to implement the recommendation.



### Council comments

51. The following is a selection of comments made by councils about their response to Recommendation 9:

Informal workshops/forums are for information discussions. No decisions are made at these meetings. Presentations to Council are also conducted in these forums.

This has not been formally considered by council and therefore has not been adopted. Council uses the guidelines published by the LGASA and is referred to at council meetings of council when considering informal gatherings. A document on best practice approach to use of informal gatherings will be considered by council at the February 2014 Ordinary meeting.

Use of informal meetings by Council has been minimal. However, Council has not adopted a clear internal policy statement on the conduct of informal gatherings and discussions. Examples will be sought for consideration by Council for adoption.

Requirements are identified in Council's Code of Practice - Access to Council Meetings and Documents.

Council follows the advice provided by LGA but is yet to put this in written policy.

### Ombudsman comment

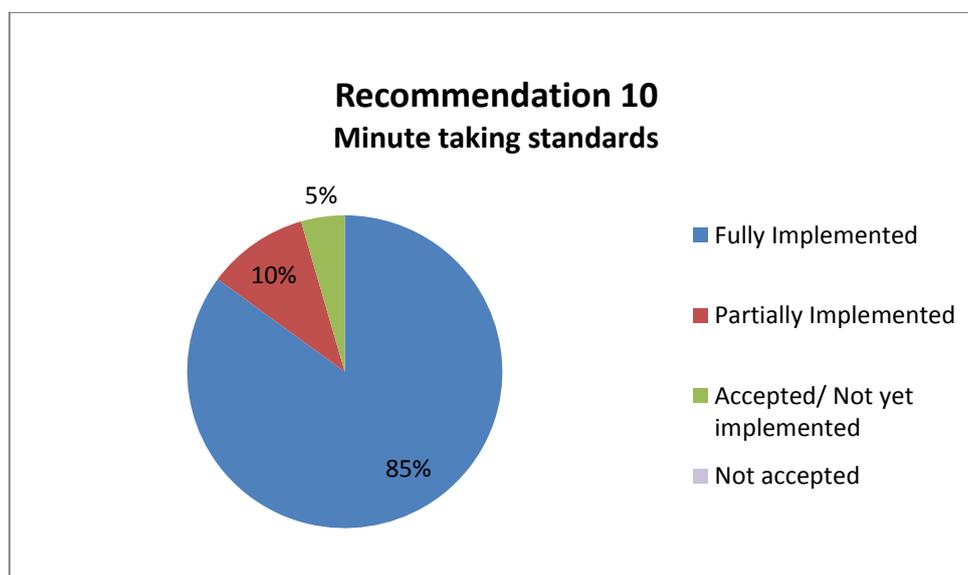
52. The reported acceptance rate of 90% is a pleasing result for Recommendation 9. I note the responses from those councils that have not accepted the recommendation. These are a group of councils that either do not conduct informal gatherings - or that insist their informal gatherings do not discuss council agenda items or make decisions. I accept these assurances. I understand that most councils use informal gatherings as is intended by the Act, i.e. for planning sessions, training workshops or for social gatherings to encourage informal communication between members and members and staff.

53. 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 maintain, a decision on the matter. In my audit report, I noted two helpful resources about finding the appropriate balance between information, discussion and decision-making.<sup>9</sup> One is the LGASA Discussion Paper<sup>10</sup> on informal gatherings which answers the question: *'How should an informal gathering or discussion be undertaken?'* The other is a guideline issued by the Queensland Government in 2008 for their local government sector.<sup>11</sup> The guideline notes that 'consensus building' and 'persuasive discussion' are beyond the boundaries for a legitimate informal gathering.

## 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.

54. All councils accepted the recommendation. Questionnaire returns show that 85% or 57 of the 67 councils reported full implementation of the recommendation. 7 councils reported partial implementation and 3 councils reported that they had yet to implement the recommendation.



<sup>9</sup> See *In the Public Eye*, page 69.

<sup>10</sup> Local Government Association of South Australia, *Informal Gatherings and Discussions*, Discussion Paper, December 1999.

<sup>11</sup> Department of Local Government Sport and Recreation, *Guidelines for the conduct of informal briefing sessions by local governments*, Queensland Government, December 2008.

## Council comments

55. The following is a selection of comments made by councils about their response to Recommendation 10:

Council is currently trialling a process where meeting minutes are taken electronically and displayed on a projection screen throughout the meeting.

[The] only point of reference here is for items discussed in confidence (without supporting report) require general description to be applied.

Council staff and deputy chairperson recently attended LGA workshop on the new/to be introduced local government (meeting procedures) regulations. The new minute taking handbook will be released shortly thereafter and will be utilised by council. It is understood that current practices at council are a true reflection of these new regulations and in keep with the LGA training. Council will continue to refine - awaiting new regulations, - awaiting new handbook.

No formal review has been undertaken at council meeting level. This has been done informally by the CEO. A written review will be done for the February 2014 Council meeting.

Council has kept a true and accurate record of proceedings prior to the implementation of Meeting Regulations in 1984 and thereafter.

## Ombudsman comment

56. The reported acceptance rate of 100% and a full implementation rate of 85% is a pleasing result for Recommendation 10. I note that answers to this question sometimes asserted that the council always kept a true and accurate record of the proceedings of all council meetings. In most cases this is not in doubt. However, in my 2012 audit, I observed that for section 90 and 91 resolutions, the record of proceedings often consisted only of the mandatory recording of (often lengthy) resolutions. What was frequently missing was the reason for the use of the particular confidentiality provision and context for the agenda item to be considered in confidence.
57. Many councils have said to me that their use of the confidentiality provisions could be better explained and publicised to the community.<sup>12</sup> In that context, the official record is essential to convey a clear understanding of what was discussed and decided at the meeting. In preparing the formal meeting record, it is also important that supporting documents, PowerPoint presentations and verbal reports considered as part of the agenda item, are referred to and/or incorporated as appropriate. People not attending the meeting should not be disadvantaged in understanding a matter discussed. Inadequate recording or incomplete release of confidential information, including the minutes of the meeting, can create confusion and misunderstanding.

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<sup>12</sup> Ombudsman conversations with councils subject to audit February and March 2012.

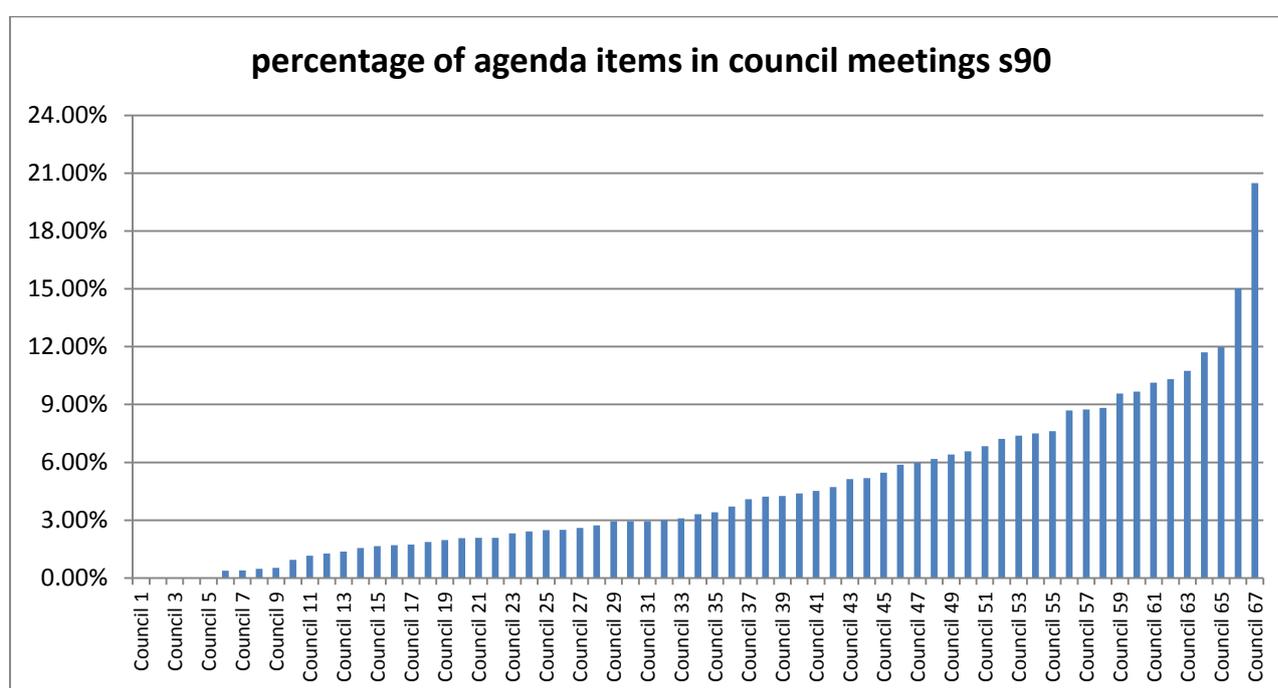
## PART 3

### COUNCIL MEETING DETAILS

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## Meeting confidentiality orders - council meetings

58. For my 2012 audit I requested the 12 participating councils to list the number of agenda items where the council had invoked section 90(2) of the Act and ordered that the public be excluded from the meeting. I asked that each council calculate this for all meetings in the 2009-2010 and 2010-2011 financial years (the relevant period).
59. This required calculations for numbers of ordinary meetings and special meetings of the council - and also for section 41 committees where councils have powers to invoke the confidentiality provisions.
60. Just 2 of the 12 participating councils (less than 17%) were at a 3% or under rate of section 90 meeting confidentiality orders in 2009-2010. In 2010-2011 the rate was significantly better at 4 of 12 councils (33%).

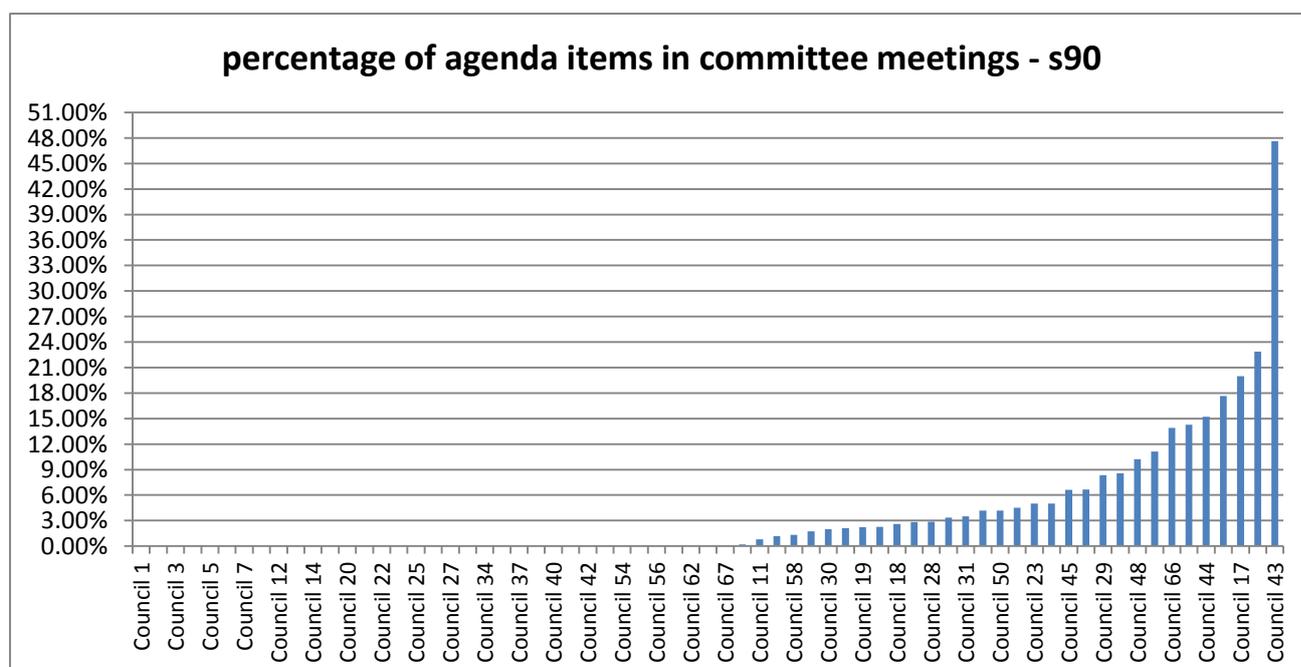


**Chart 1**

61. By contrast, Chart 1 shows a considerable improvement in the number of councils averaging 3% or less of section 90 confidentiality orders from the 2013 survey. 32 of 67 - or almost 48% of councils reported an average of 3% or less of confidentiality orders for the relevant 10 month period in the 2013 survey of all councils.
62. Another 26 councils - or 39%, reported an average of less than 9% rate of meeting confidentiality orders, whilst 9 councils from 67 (13%) reported average rates in excess of 9%. The highest number was a 20% rate where one council considered 43 business items in confidence from a total of 210 business items on the agenda of 22 meetings. I consider this to be an excessive use of the confidentiality provisions.

## Meeting confidentiality orders - committee meetings

63. Section 41 of the Act enables councils to establish committees to ‘exercise perform or discharge delegated powers, functions or duties’. Examples of committee functions cited in the Act include:
- (1) To carry out a project on behalf of the council
  - (2) To manage or administer property, facilities or activities on behalf of the council
  - (3) To oversee works on behalf of the council
64. Most councils have ‘section 41’ committees where business is considered and decisions are taken. Common examples are council finance committees, audit committees, heritage advisory committees and arts and cultural advisory committees. Many of these are simply advisory committees to the council. Others have delegated authority to make decisions. Regardless, all section 41 committees have access to the confidentiality provisions of the Act. They have the authority to close meetings to the public and to make orders that documents be kept in confidence.
65. During my audit, and again as part of the implementation survey, I examined the use of committee meeting and document confidentiality orders alongside the council’s own use of the provisions. Given that many councils conduct significant amounts of business in committee, it is important for councils to be transparent about how the confidentiality provisions are being used in this forum.
66. Chart 2 shows that 35 councils with section 41 committees did not make a meeting confidentiality order in the designated survey period in 2013. 12 councils had committees that averaged 3% or less for section 90 confidentiality orders. Another 11 councils averaged between 3% and 9% of committee business considered in confidence, while 9 councils had in excess of 9% of matters considered in confidence. One council reported that it had invoked the meeting confidentiality orders for almost half (48%) of its total section 41 committee business.



**Chart 2**

67. The council reporting the rate of 48% explained to me the reason for the high number of confidentiality orders. The council has an aged care facility which is governed by a section 41 committee where decisions are made about the running of the service. Given the nature of the service, practical matters are discussed dealing with the private circumstances and various treatments being offered to residents of the facility. In order to protect privacy, the confidentiality provisions are invoked when the personal affairs of individuals are discussed. In these unusual circumstances, I accept the need for this level of confidentiality to be maintained.
68. One notable example of the volume of council committee business conducted is one council with 14 section 41 committees. Together the 14 committees considered 1,902 business items over the 2 year period 2009-2011. This compared with 1,389 business items for the council itself over the same period of time. I note that in this case the council committees did not invoke the confidentiality provisions for a single agenda item in any of their meetings.

### Document confidentiality orders - council meetings

69. For my 2012 audit I requested the 12 participating councils to list the number of agenda items where the council had invoked section 91(7) of the Act and ordered that that a document or part of a document be kept confidential. I asked that each council calculate this for all meetings in the 2009-2010 and 2010-2011 financial years.

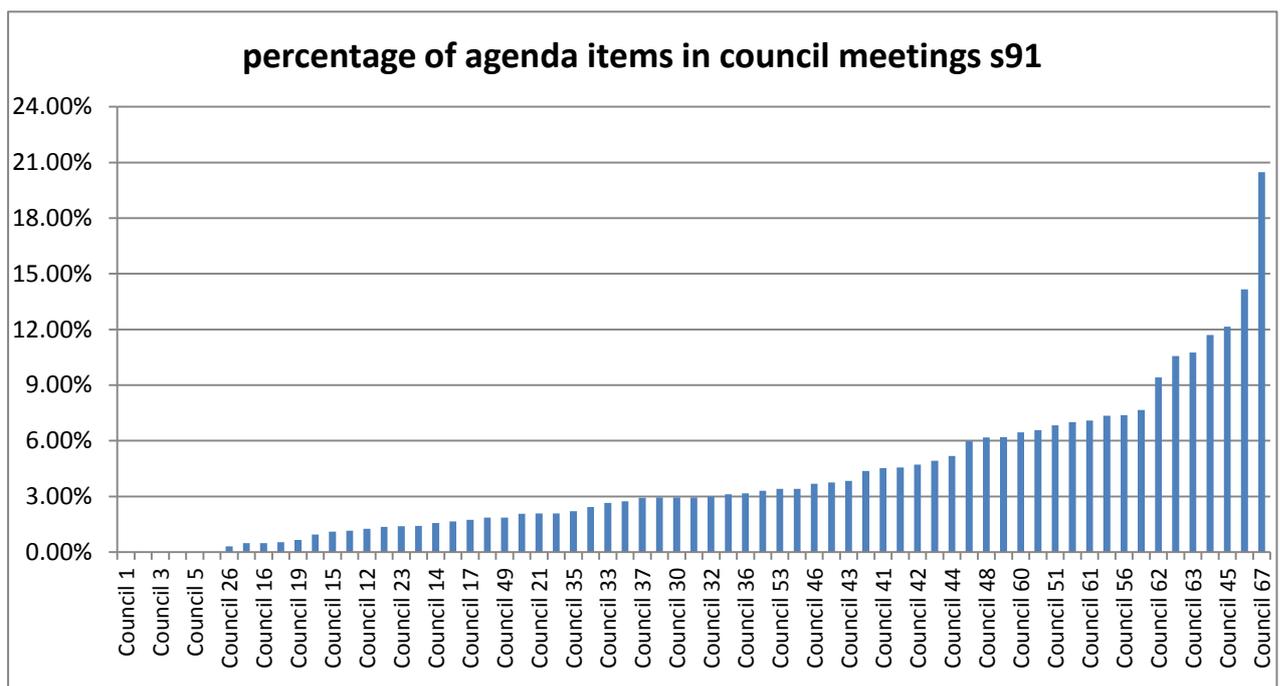


Chart 3

70. The audit results in 2012 generally reflected the rate of meeting confidentiality orders, i.e. an average of almost 9% of council agenda items considered in confidence. The close proximity of the rates of orders made reflected the common practice of many councils to 'automatically' make a document confidentiality order. Many saw this as the natural follow-on from the making of a meeting confidentiality order.

71. As noted in my audit report, 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>13</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 public disclosure responsibilities.
72. Chart 3 shows that 35 councils averaged 3% or less for section 91(7) document orders in the 2013 designated survey. Another 25 councils averaged between 3% and 9% for section 91(7) document orders, while 7 councils averaged in excess of 9% of matters held in confidence. Overall, the total rate of council document orders was 4%. This is significantly below the 4.6% rate for meeting confidentiality orders and is evidence that some councils are now more readily discriminating between the need for the two types of confidentiality orders.

### Document confidentiality orders - committee meetings

73. Of some interest is the rate of section 91(7) document confidentiality orders reported for council committees. Overall the rate is 2.8%, below the average of 3% I have recommended as an aspirational target for all councils.

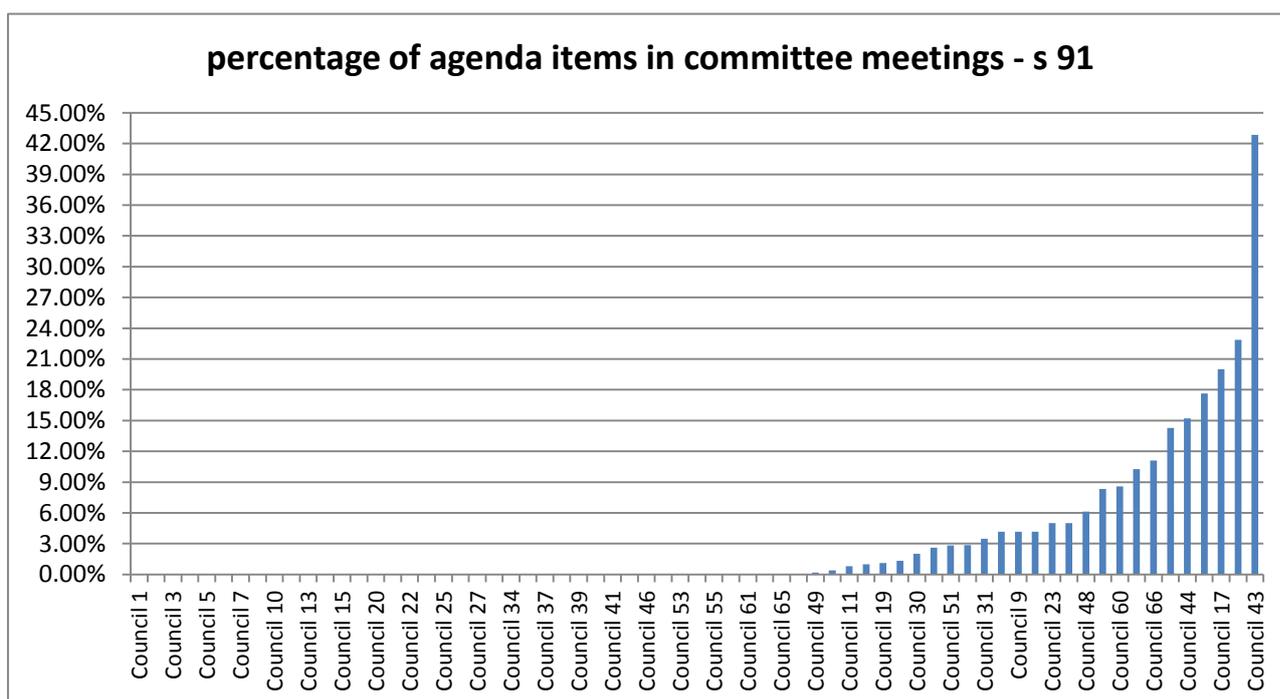


Chart 4

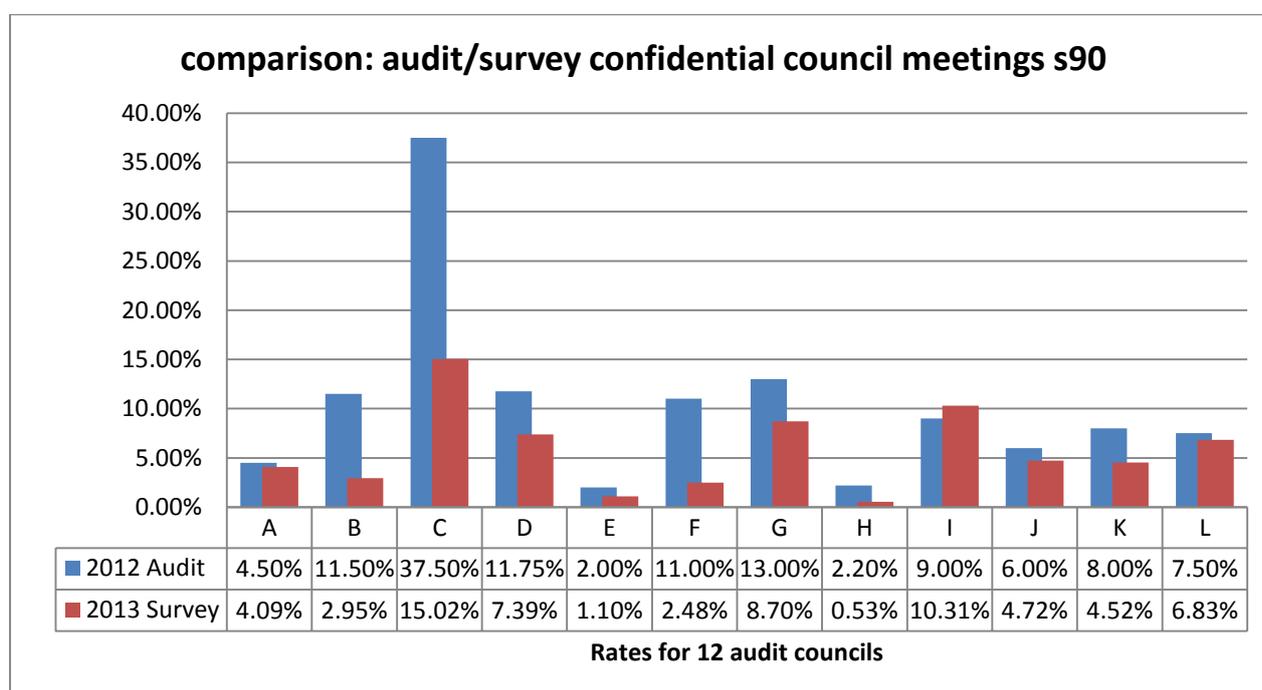
74. Chart 4 shows that 40 councils - or 60% of the total, reported that they made no document confidentiality orders in committee for the 10 month survey period. There were another 12 councils reporting a rate below 3%, while 15 councils averaged in excess of 3% of matters held in confidence.

<sup>13</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.

75. Leaving aside the one council with an aged care facility run by a section 41 committee, there remains a small number of councils with very high rates of document confidentiality orders made in committees. Five councils recorded rates of 10%, 11%, 15%, 18% and 23% respectively. This seems to be an unacceptable level of document suppression and inconsistent with the intent of the legislation.

### From audit to implementation survey - a comparison

76. In 2012, I prepared a detailed feedback report for each of the 12 councils involved in the original audit. I calculated the rate of section 90 meeting confidentiality orders for each council over the two year period for 2009-2011. For the implementation survey I asked the same question of all councils for the 10 month period in 2013. Chart 5 shows the comparative figures for each of the audited councils between the 2012 audit and the implementation survey taken 12 months later.



**Chart 5**

77. The numbers reveal a noticeable and often substantial drop in the percentage of business items considered by each council in confidence. Only in one instance, the Council I figure, has the rate actually increased in the 12 months following the audit.
78. The comparative figures are a strong indication that the audit process itself has had an impact on the local government sector. There was also publicity and local media scrutiny which followed the release of the audit final report. Feedback from councils points to a much higher level of awareness of the need for caution when councils are considering closing a meeting to the public.
79. The evidence from councils demonstrates a heightened sense of awareness that the public want transparency and accountability from local government decision-making. This is balanced by an understanding of the need to use the confidentiality provisions in the Act when there are good reasons to go behind closed doors.

## Concluding comments

80. I note that the Local Government Association of SA has revised and updated its *Model Code of Practice for Access to Council and Committee Meetings and Associated Documents* to take into account the findings and recommendations from my audit report *In The Public Eye*.
81. The Association has also developed *Confidentiality Guidelines* that are designed to assist councils with the application of the provisions in the Act to restrict public access to meetings and/or documents. Both publications are available at [www.lga.sa.gov.au](http://www.lga.sa.gov.au) I consider these are invaluable resources for councils seeking to review and refine their policies and practices on the use of the confidentiality provisions of the Act.
82. I draw attention to the requirement in the Act for councils to consider and justify resolutions made under section 90(3) which require a 'double test' to be satisfied for the making of a valid confidentiality order. Sections 90(3)(a),(b),(d) and (j) all fall into this category. Section 90(3)(a) requires a council to provide evidence that the information is of a personal nature and why disclosure would be unreasonable. Sections 90(3)(b),(d) and (j) all require the council to specify why disclosure would, on balance, be contrary to the public interest - as well as satisfying the primary exclusion criteria.
83. It appears that the 'double' test criteria, which must be clearly identified and recorded in the meeting minutes, are not well understood by many councils. This understanding is important if councils wish to avoid challenges to the validity of their confidentiality orders.
84. As noted above, I am also concerned with the poor implementation by many councils of Recommendation 7. This concerns public access to release of previously confidential documents. Councils' website registers should clearly show which documents are currently retained in confidence and which documents have been released, as well as the dates of the meetings where confidentiality orders have been made.
85. For these reasons, I intend to continue monitoring councils' use of the confidentiality provisions of the Local Government Act. I will make inquiries of councils that come to my attention for possible breaches of the provisions.

## APPENDIX 1



### ***IN THE PUBLIC EYE* - An audit of the use of meeting confidentiality provisions of the Local Government Act 1999 in South Australian councils.**

#### **AUDIT RECOMMENDATIONS SURVEY**

As a follow-up to the 2012 audit *In the Public Eye* the Ombudsman is seeking feedback from all South Australian councils.

This survey documents implementation details about the nine recommendations from the final audit report which relate directly to council business.<sup>14</sup>

Data from this document concludes the audit process. The information from each council will be collated for a report to be made public in early 2014.

Those audit recommendations which relate to the legislative and regulatory framework will be followed-up separately with the state government.

Part C seeks to collect baseline data on the frequency of recent confidentiality meeting and document orders. Your answers will help build a good overall picture of how often councils are using the confidentiality provisions.

A completed hardcopy of this survey is requested by **Friday 29 November 2013** to Ombudsman SA PO Box 3651 Rundle Mall SA 5000.

#### **Part A: Council details**

*(Please check the relevant multiple choice boxes and attach additional pages if more space is required for comments)*

Council name.....

CEO *(for sign-off)*

Name.....

Signature.....

Date.....

<sup>14</sup> Note that the numbering of recommendations below omits Recommendation 4 which is directed specifically to the state government.

## **Part B: Audit Recommendations relevant to SA councils**

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

#### **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.

Council has:

- Fully implemented recommendation
- Partially implemented recommendation (*please explain*)
- Accepted recommendation but not yet implemented (*please explain*)
- Not accepted recommendation (*please explain*)

Comment:

### **2. Public participation at council meetings**

#### **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.<sup>15</sup>

Council has:

- Fully implemented recommendation
- Partially implemented recommendation (*please explain*)
- Accepted recommendation but not yet implemented (*please explain*)
- Not accepted recommendation (*please explain*)

Does your council attend meetings of the Local Government Governance and Policy Officers Network?

- Yes
- No
- Only by correspondence

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<sup>15</sup> The full name is the Local Government Governance and Policy Officers Network

Comment:

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

**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.

Council has:

- Fully implemented recommendation
- Partially implemented recommendation *(please explain)*
- Accepted recommendation but not yet implemented *(please explain)*
- Not accepted recommendation *(please explain)*

Comment:

**4. Making orders to keep documents confidential using section 91(7) 'document orders'**

**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.

Council has:

- Fully implemented recommendation
- Partially implemented recommendation *(please explain)*
- Accepted recommendation but not yet implemented *(please explain)*
- Not accepted recommendation *(please explain)*

Comment:

**5. Reviewing the duration of document orders - section 91(9)**

**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.

Council has:

- Fully implemented recommendation
- Partially implemented recommendation (*please explain*)
- Accepted recommendation but not yet implemented (*please explain*)
- Not accepted recommendation (*please explain*)

Comment:

**6. Public access to release of previously confidential 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.

Council has:

- Fully implemented recommendation
- Partially implemented recommendation (*please explain*)
- Accepted recommendation but not yet implemented (*please explain*)
- Not accepted recommendation (*please explain*)

Comment:

**7. 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.

Council has:

- Fully implemented recommendation
- Partially implemented recommendation (*please explain*)
- Accepted recommendation but not yet implemented (*please explain*)
- Not accepted recommendation (*please explain*)

Comment:

**8. Use of informal gatherings**

**Recommendation 9**

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

Council has:

- Fully implemented recommendation
- Partially implemented recommendation *(please explain)*
- Accepted recommendation but not yet implemented *(please explain)*
- Not accepted recommendation *(please explain)*

Comment:

**9. Minute taking standards**

**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

Council has:

- Fully implemented recommendation
- Partially implemented recommendation *(please explain)*
- Accepted recommendation but not yet implemented *(please explain)*
- Not accepted recommendation *(please explain)*

Comment:

**Part C: Council meeting details**

*(Please put total numbers in the boxes)*

1. How many times did your council meet in the ten months January to October 2013 (the relevant period)?

Ordinary meetings

Special meetings

Section 41 Committees

2. How many business agenda items did council consider in the relevant period?<sup>16</sup>

Ordinary meetings

Special meetings

S.41 Committee meetings

3. Please list, in the boxes below, the number of business 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

Special meetings

S.41 Committee meetings

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<sup>16</sup> Business items excludes administrative and procedural matters listed on the meeting agenda.

4. 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

Special meetings

S.41 Committee meetings

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