

Name	Confidentiality Provisions
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Applicable Legislation	Local Government Act 1999
Related Governance Documents	Nil.
City Plan Theme	Leadership - A City confident in its leaders

## (In accordance with Part 5 Section 92 of the Local Government Act 1999)

### Introduction

Eighteen Elected Members constitute and govern the City of Port Adelaide Enfield. These Elected Members, meeting as the Port Adelaide Enfield Council, are responsive to the needs of the community through consistent, open and transparent decision making and long term planning.

While Council is committed to the principles of open government it recognises that on some occasions it may be necessary to restrict public access to discussion or documents presented at Council / Committee meetings.

Port Adelaide Enfield Council is required to operate within the legal framework as prescribed by the Local Government Act. This code of practice is intended to provide clear guidance as to why and how the Port Adelaide Enfield Council may use the provisions in the Local Government Act 1999 to restrict public access to its Council or Council committee meetings. The following information is covered by this Code:-

- the relevant 'confidentiality' provisions of the Act;
- the Council's use of these provisions;
- the process utilised to restrict public access to discussions, decisions and documents of a confidential nature by the Council and Council committee meetings;

- Council's contact officer, should additional information be required; and
- a process for dealing with any complaints.

## **Local Government Act 1999 – Confidentiality Provisions**

Chapter 6, Parts 1, 2, 3, 4, 5 and 6 of the Act deal with practice and procedure for Council and Council committee meetings. The key provisions relating to 'confidentiality' are noted as follows:

- 83(5) – the ability for the Chief Executive Officer to indicate on the meeting agenda that information or a matter contained in or arising from a document or report may be considered in confidence under Section 90;
- 87(10) – the ability for the Chief Executive Officer to indicate on a document or report provided to Members of a Committee that information or a matter contained in or arising from a document or report may be considered in confidence under Section 90;
- 90(2) – provides for the Council or Council Committee to make an order to close the meeting to the public to consider a matter in confidence under Section 90(3);
- 90(3) – the grounds on which the public can be excluded at a meeting;
- 91(7) – provides for the Council or Council committee to make an order to keep a document that was considered in confidence, under a Section 90(2) order, to be kept confidential;
- 91(8) – provides for those circumstances where the Council must not make an order that a document be kept confidential;
- 91(9) – provides for the maximum period of time that any order made under Section 91(7) to keep a document confidential requires the grounds on which an order was made under Section 90(2) and (3) to be specified and provision for the order to be revoked by a delegate of the Council;

In particular, Part 3 of the Local Government Act makes provision for and requires that all Council and Council Committee meetings are open to the public except where grounds exist as prescribed in the Act allowing the public to be excluded.

The grounds that are prescribed by the Act operate to allow debate or discussion to take place, documents to be considered and resolutions to be made in a Council or Council Committee meeting without the public being present and those documents and resolutions to be kept confidential for a prescribed time period.

## **Public Access To The Agenda And Reports For Meetings**

At least three clear days (that includes weekdays and weekends) before the date of a Council or Council Committee meeting (unless it is a special meeting) the Chief Executive Officer must give notice of the meeting by supplying a copy of the meeting agenda to all Elected Members and displaying the agenda publicly at each office of the Council until the meeting is completed. The agenda outlines the items of business to be considered at the meeting. The Port Adelaide Enfield Council publicly displays its agenda at each office of the Council including any reports relating to the matters listed, unless the matter or report

has been recommended to be considered in confidence. The Council also publishes the Council meeting agendas and reports on its website five days prior to the meeting.

Section 83(5) of the Act allows agenda papers, that are distributed to Elected Members, to include advice from the Chief Executive Officer indicating that a document or report concerning a particular matter or containing particular information may be considered, if the Council so determines, in confidence to the exclusion of the public. Where this occurs, the Chief Executive Officer must specify the basis (or grounds) on which his/her advice (that the matter be considered in confidence) is made. This advice from the Chief Executive Officer does not preclude the members of the Council or Council Committee to identify or consider other grounds on which it determines are relevant to an order of confidentiality under the Act.

Such advice from the Chief Executive Officer could be identified by a recommendation such as the following:-

### **CONFIDENTIALITY RECOMMENDATION**

*Pursuant to Section 83(5) of the Local Government Act 1999 the Report attached to this Agenda and the accompanying documentation is delivered to the Council members upon the basis that the Council consider the Report and the documents in confidence under Part 3 of the Act, specifically on the basis that:*

- the disclosure of the Report and the documents would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead) (Section 90(3)(a)); and
- the Report and documents contain legal advice (Section 90(3)(h)).

### **Public Access To Meetings**

Council and Council Committee meetings are open to the public and the public is encouraged to attend. This position can only be altered where the Council or Council Committee believes it is necessary to exclude the public from the discussion of a particular matter, in accordance with the grounds specified at Section 90(3) of the Act.

The public will only be excluded where the need for confidentiality outweighs the principle of open decision making.

Once Council, or committee, has made the order it is an offence for a person, who knowing that an order is in force, enters or remains in a room to which such a meeting is being held and the person is liable to a penalty of up to \$500.00. It is lawful for an employee of Council or a member of the Police to use reasonable force to remove the person from the room if he/she fails to leave on request.

Section 90(8) provides that it is not unlawful for members of Council, a committee and staff to participate in informal gatherings or discussion provided that a matter which would ordinarily form part of the agenda for a formal meeting is not dealt with in such a way as to obtain, or effectively obtain, a decision outside of a formally constituted meeting of Council or committee. Examples of these informal gatherings include:

- planning sessions associated with the development of policies and strategies;

- briefing or training sessions;
- workshops
- social gatherings to encourage informal communication between staff members or between members and staff.

## **Process For Determining If The Public Are To Be Excluded**

At the Council or Council Committee Meeting, Elected Members will consider if excluding the public is necessary and appropriate by looking at the facts of the particular matter and assessing whether they satisfy any of the grounds contained in Section 90(3).

### **Examples:**

1. *Public disclosure of information pertaining to the personal affairs of a person could be unreasonable in the circumstances [Ground: Section 90(3)(a)];*
2. *The Council is intending to bid at auction to acquire land and would not want others involved such as the vendor to have prior knowledge of what the Council was setting as an upper limit to bid at the auction, as to do so would prejudice the position of the Council and indirectly disadvantage the community [Ground: Section 90(3)(b)];*
3. *Public disclosure of information could affect the security of the Council, members or employees of the Council or Council property, or the safety of any person [Ground: Section 90(3)(e)].*

Where Elected Members or Committee members have made an assessment of the facts and are satisfied that one or more grounds under Section 90(3) exist then the Council or Council Committee can proceed to make an order allowing the matter to be considered in confidence.

There is no reason to make an order under Section 90(2) of the Act to discuss a matter in confidence, on the basis that it may cause embarrassment to the Council, Council Committee, its members or employees, or would cause a loss of confidence in the Council or Council Committee.

## **Process To Exclude The Public**

The process of assessing the facts and the making of the order to exclude the public from the meeting for discussion of the particular matter must take place whilst the meeting is open to the public. The Elected Members or Council Committee members must pass a resolution to order that the public be excluded from attendance of the matter. Such an order to exclude the public can only relate to one matter at a time. Once discussion on that particular matter is concluded, the public are then permitted to re-enter the meeting.

## **Grounds For Use Of Confidentiality Provisions**

Any consideration of use of the confidentiality provisions to exclude the public from the discussion of a particular matter at a meeting requires the identification of the grounds

under Section 90(3). Annexed to this Code is an extract from the Act of the 13 grounds under Section 90(3) on which the Council or Council Committee meeting can resolve to be closed to the public for discussion, decision-making or receipt of documents on a particular item of business.

In identifying whether or not grounds exist and whether the confidentiality provisions will be applied the Port Adelaide Enfield Council will take the following approach:-

1. Utilise the confidentiality provisions only where it is considered absolutely necessary.
2. If a decision to exclude the public is taken, the grounds for this are to be communicated to the public, both in the meeting at the time of them being requested to leave and in the Minutes.
3. Once a discussion of the matter in confidence is concluded, the meeting will then consider if it is necessary to make an order that a document or part of it associated with the agenda item be kept confidential. In determining this, the meeting shall have regard to the provisions of Sections 91(7) and 91(8) the latter sub-section details some circumstances when a Council must not order that a document be kept confidential.
4. If the meeting determines that it is necessary to keep a document confidential, then a resolution for an order to this effect will be carried by the meeting.
5. Once discussion of the matter is concluded and the public have returned, the decision of the meeting in relation to this matter should be made publicly known unless the Council has resolved to order that some information (including some resolutions) remain confidential. The making of the order, the grounds of the order and duration of the order to keep information or a document confidential in accordance with sections 91(7) will be made publicly known, and are recorded in the Minutes of the meeting which are required to be available within five days after the meeting.
6. In all cases the intention is that the confidential information and/or resolutions will be made publicly available at the earliest, yet appropriate opportunity.
7. The use of all confidentiality provisions will be reported annually to the community, in the Council's annual report.

It is important that any persons making a request to the Council or Council Committee for confidentiality read and understand this Code of Practice and the relevant provisions of the Local Government Act that determine Council's approach in meeting its legal obligations.

If a matter does not fall within the grounds specified at Section 90(3) the maintenance of confidentiality is not possible. If a matter does fall within the grounds, it will be for Council to determine whether confidentiality should be ordered. Further, no guarantee can be given that Council will order that the matter will remain confidential for a particular period of time. A person requesting the Council to consider a matter in confidence should provide reasons for that claim, and if necessary contact the relevant Council officer responsible for this Code.

## **Confidential Documents**

The Port Adelaide Enfield Council will only order a document associated with a discussion, from which the public were excluded, to remain confidential if it is considered absolutely necessary in the circumstances.

Only once a matter has been discussed in confidence, (under Section 90(2) and (3)) can the Council further order that a document, relating to the matter considered in confidence, be kept confidential under Section 91(7). However, there are some situations in which the Council is not able to order that a document remain confidential see Section 91(8) of the Act.

These relate to the remuneration and conditions of service of officers, the identity of successful tenderers and the identity of land acquired or disposed of by the Council and the amount(s) payable by council for goods and/or services under a contract after the contract has been entered into by all parties.

Where keeping a document confidential is considered absolutely necessary, a resolution to this effect is required which shall include the grounds for confidentiality and the duration of the order or circumstances in which the order will cease to apply, or when the order must be reviewed. All confidential orders must either, cease to apply or, be reviewed within 12 months of being made.

The Council may include in the resolution a delegation, to an officer or employee to revoke the order and if relevant, any conditions associated with this delegation.

The minutes shall record the relevant grounds under which the documents are considered confidential, the duration of the order and any delegation to revoke the order, should this be applicable [Section 91(9)].

## **Public Access To Documents Generally**

Any inquiries in relation to the process for seeking access to Council documents that are not already publicly available should be directed to the Freedom of Information Officer, which is the person who holds the position of the Director Corporate Services on telephone (08) 8405 6778.

## **Revoking Or Amending Previous Resolutions**

Council and Council Committees can pass resolutions which amend or revoke resolutions previously adopted. Whilst this is not a regular practice it can happen where for example new information is presented, or circumstances have changed.

## **Accountability And Reporting To The Community**

Council will report on an annual basis on the use of the confidentiality provisions. The report will provide details of the manner in which the provisions have been applied during the year and the numbers of occasions they have been applied including by reference to the total number of items dealt with by Council and its committees in that period.

This information will be made available by the Council and a summary will be included in the Council's Annual Report.

## Availability Of Code

A copy of this Code of Practice is available for inspection at each of the Council's offices, the Civic Centre located in Port Adelaide and on Council's website [www.portenf.sa.gov.au](http://www.portenf.sa.gov.au).

## Currency and Review

This Code of Practice has been reviewed and is current. Whilst endeavours are taken to update the Code where there are amendments to the Act which affect this Code, it is not always possible to amend the Code immediately. Should you have any queries regarding the accuracy of this Code please direct them to the Council's Executive Research Officer.

The operation of this Code of Practice will be reviewed on an annual basis, however, the Port Adelaide Enfield Council has the ability to review this Code at any time if considered necessary. Changes to this Code will be made in accordance with Section 92(5) of the Local Government Act.

## Complaints

In the first instance, a complaint about the use of the confidentiality provisions should be raised with the Chief Executive Officer of the Council. A complaint should be made in writing addressed to the Chief Executive Officer to ensure all complaints are considered and acted upon in a proper manner.

If you remain concerned about an action of Council relating to an issue or order of confidentiality, you have the option of seeking to have the Ombudsman review the matter as an independent umpire. It is hoped that all complaints can be resolved with the Council, but if that is not the case, Council's contact officer can provide details of how to contact the Ombudsman if required.

In relation to access to documents, the Local Government Act does provide for a range of review mechanisms including the Ombudsman and the Courts.

## Further Information

For further information with regards to this Code of Practice please contact your local Elected Member or Council's Executive Research Officer on (08) 8405 6956.

## Annexure

The Grounds relevant to an order of confidentiality at Section 90(2) of the Local Government Act 1999

- (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—
  - (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 Plan Amendment Report 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*.