

CODE OF PRACTICE



Name	Confidentiality Provisions
Document Number	CO01
Responsible Section	Chief Executive Office
Responsible Department	Chief Executive Office
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Applicable Legislation	Local Government Act 1999 Local Government (Procedures at Meetings) Regulations 2013
Related Governance Documents	Nil
City Plan Theme	Leadership

Purpose

This document has been developed in accordance with Part 5 Section 92 of the Local Government Act 1999. This document may also be referred to as the Code of Practice - Access to Meetings and Documents.

Introduction

The Port Adelaide Enfield Council are committed to consistent, fair, open and transparent public decision making.

The Local Government (Procedures at Meetings) Regulations 2013 contains a Guiding Principle that states "procedures should encourage appropriate community participation in the affairs of the Council." One of the fundamental means of enabling community participation is to encourage attendance at meetings of council and committees. This can only occur when meetings are open to the public.

Council 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 1999. 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 where appropriately provided for under the Act.

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:

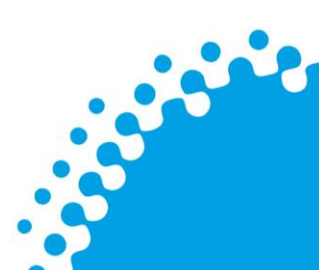
- 83(5) - the ability for the Chief Executive Officer to indicate on the meeting agenda that information or a matter contained in or arising from a document or report may be considered in confidence under Section 90;
- 87(10) - the ability for the Chief Executive Officer to indicate on a document or 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 1999 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.

Further, when considering whether an order should be made to exclude the public it is irrelevant that discussion of a matter in public may (section 90(4)):

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



Public Interest test and reasonable expectations

In some sections under section 90(3) of the Local Government Act 1999 require that a public interest balancing test must be satisfied before grounds of exclusion can be determined.

The "public interest balancing test" applies to sections:

- 90(3)(b)(ii) - 'commercial advantage';
- 90(3)(d)(ii) - 'commercial information'; and
- 90(3)(j)(ii) - 'information provided on a confidential basis'.

This test requires that public interest reasons for closing a meeting to the public must outweigh the general requirements for meetings to be held in public. This requirement to satisfy a public interest test is mirrored in certain provisions of the Freedom of Information Act 1999 (SA) ("the FOI Act").

The Act does not provide a legislative definition to guide decision makers in considering confidentiality orders. Specifically, the test requires that to make a valid order a council or committee must demonstrate that disclosure of information would, on balance, be contrary to the public interest.

There are also several grounds to exclude the public from a meeting in section 90(3) that require a Council or a Committee to determine whether a specified outcome "could reasonably be expected to" result from disclosure in a public meeting. The grounds that require this assessment are:

- 90(3)(b)(i) - 'commercial advantage';
- 90(3)(d)(i) - 'commercial information'; and
- 90(3)(f) - 'prejudice the maintenance of law'.

In considering the correct interpretation of this phrase, it has been suggested individual and objective consideration is given to determine that real and substantial grounds exist for the expectation that the specified outcome will eventuate and must not rely on speculative or theoretical reasoning, or on possibilities or probabilities.

Meetings to be held in public except in special circumstances

A Council committee meeting or information or briefing session will be taken to be conducted in a place open to the public even if 1 or more Council members participate in the meeting by electronic means provided that:

- (a) the chief executive officer (or a person nominated in writing by the chief executive officer) makes available to the public a live stream of the meeting on a website determined by the chief executive officer and ensures that members of the public can hear the discussion between all participants present at the meeting via the live stream; or
- (b) if the chief executive officer (or a person nominated in writing by the chief executive officer) has taken reasonable steps to make available a live stream of the meeting but is unable to make available a live stream of the meeting, the chief executive officer (or a person nominated in writing by the chief executive officer) makes available to the public a recording of the meeting as soon as practicable after the meeting on a website determined by the chief executive officer and ensures that members of the public can hear the discussion between all participants present at the meeting via the recording.

If the chief executive officer (or a person nominated in writing by the chief executive officer) has taken reasonable steps but is unable to make available a live stream of the meeting, or make available a recording of the meeting as soon as practicable after the meeting (on a website determined by the chief executive officer), the chief executive officer (or a person nominated in writing by the chief executive officer) must publish on a website determined by the chief executive officer the steps taken to comply and the requirement regarding live streaming and recoding is suspended.

The council committee or information or briefing session must disconnect any live stream or recording of a meeting for the period that the meeting is closed to the public pursuant to an order made under section 90(2) of the Act.

Public access to the agenda and reports for meetings

The notice of meeting and agenda is not required to be placed on public display at each office of the Council.

A person is entitled, on payment of a fee fixed by the Council, to obtain a copy of a notice and agenda published on a website determined by the Chief Executive Officer and the notice and agenda will continue to be published on the website until the completion of the relevant meeting.

Copies of any document or report supplied to members of the Council for consideration at a meeting of the Council are not required to be made available for inspection by members of the public at the principal office of the Council or at the meeting.

The chief executive officer (or a person nominated in writing by the chief executive officer) will ensure that any document or report supplied to members of the Council for consideration at a meeting of the Council is available for inspection by members of the public:

- in the case of a document or report supplied to members of the Council before the meeting - on a website determined by the chief executive officer as soon as practicable after the time when the document or report is supplied to members of the Council; or
- in the case of a document or report supplied to members of the Council at the meeting - on a website determined by the chief executive officer as soon as practicable after the time when the document or report is supplied to members of the Council.

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. The agenda outlines the items of business to be considered at the meeting. 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.

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 Local Government Act 1999 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 Local Government Act 1999 of the 14 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 1999 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 (also known as the trigger for release), 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 Council may, upon considering the release of documents under a confidentiality order, determine to apply a fresh order, if the Council is satisfied that the requirements of the Local Government Act 1999 are met. In applying a fresh order to retain the documents in confidence, Council must apply the conditions under which the order will cease to apply (specifying a trigger for release).

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

A copy of the minutes of a meeting of the council must be placed on public display on a website determined by the chief executive officer within five days after the meeting and kept on display for a period of one month.

Any inquiries in relation to the process for seeking access to Council documents that are not already publicly available should be directed to the Governance Section or the Freedom of Information Officer.

Revoking or amending previous confidential 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 The 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.cityofpae.sa.gov.au.

Currency and Review

The operation of this Code of Practice will be reviewed on a 4 yearly 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 1999.

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. It is hoped that all complaints can be resolved with the Council, but if that is not the case, Council can provide details of how to contact the Ombudsman if required.

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 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.*
- (o) *information relating to a proposed award recipient before the presentation of the award.*

