

# ***Code of Practice***

## ***For Public Access to Council and Committee Meetings and Associated Documents***

*Prepared pursuant to Section 92 of the Local Government Act 1999*

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## 1. INTRODUCTION

The City of Charles Sturt is committed to the principle of honest, open and accountable government and encourages community participation in the business of Council.

However, in some special circumstances it may be necessary to restrict public access to Council discussions and documents.

This Code sets out the commitment of the City of Charles Sturt to provide public access to Council meetings and associated documents and outlines the policies, procedures and practices on why and how the City of Charles Sturt may use the provisions in the Local Government Act to restrict public access. The Code includes:

- Information on the relevant provisions of the Local Government Act.
- Council's policy on public access and participation.
- The process and practices that will be adopted where public access is restricted.
- Grievance procedures if a member of the public believes that the Council has unreasonably restricted public access on a particular matter.

### 1.1 Public Health Emergency: Electronic Participation in Council Meetings

On 15 March 2020, the Chief Executive of the Department for Health and Wellbeing in the State of South Australia, pursuant to section 87 of the *South Australian Public Health Act 2011*, declared that an emergency which threatens to cause the death of, or injury or other damage to the health of any person is occurring or about to occur in relation to the transmission of COVID-19, and declared the emergency to be a public health emergency.

On 22 March 2020, the State Co-ordinator for the State of South Australia declared, pursuant to section 23 of the *Emergency Management Act 2004*, that a Major Emergency is occurring in respect of the outbreak of the Human Disease named COVID-19 within South Australia.

On 30 March 2020 the Minister for Transport, Infrastructure and Local Government issued a notice pursuant to section 302B of the *Local Government Act 1999* (**Notice No 1**) varying or suspending the operation of the specified provisions of the Local Government Act 1999 as set out in Schedule 1 to Notice No 1. Notice No 1 commenced operation on 31 March 2020.

For the period Notice No 1 has effect (as provided for in Notice No 1), this Code of Practice is altered as set out below and those alterations have effect notwithstanding any other provision in this Code of Practice to the contrary.

## 2. LOCAL GOVERNMENT ACT PROVISIONS

Chapter 6 of the Local Government Act 1999 sets out the arrangements for Council and Council Committee meetings. These meetings are to be held in public except where special circumstances exist as prescribed in the Act and a Council or Committee orders that the public be excluded.

There are very strict circumstances in which a discussion or document considered in a Council or Committee meeting can be kept confidential. These provisions are covered in the following sections of the Act:

- 83(5) Council and 87(10) Committee – the Chief Executive may, after consultation with the principal member of Council, or in the case of a Committee the presiding member, indicate on a document or report provided to the members of the Council or the Committee that the matter may, if the Council or Committee so determines, be considered in confidence. The Chief Executive is required to specify at the same time the basis on which such an order can be made.
- 90(2) and (3) - circumstances where Council may order that the public can be excluded from attendance at a meeting, or part of it, to enable a matter to be considered in confidence. [Refer **Appendix 1** for a list of matters which fall into this category.]
- 91(7) – circumstances where a document considered in confidence can be ordered to remain confidential.

## 2. LOCAL GOVERNMENT ACT PROVISIONS continued

- 91(8) – circumstances where a Council must **not** order that a document remain confidential.
- 91(9) – the Council or Committee must specify the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order will be reviewed. The power to revoke an order can also be delegated to an employee of Council.
- 92 – requires the Council to prepare and adopt a Code of Practice relating to access to meetings and documents. Prior to adoption, alteration or substitution the proposed Code (or changes) must be available for inspection and purchase. Council is also required to follow the relevant steps set out in its public consultation policy. Council must, at least once in every financial year, review the Code.
- 94 – provides that the Ombudsman may, on receipt of a complaint, investigate the use of these provisions.

**Note:** A copy of the Act can be viewed at the Council offices and on the internet at <http://www.legislation.sa.gov.au>

## 3. WHY RESTRICT PUBLIC ACCESS

Situations where discussions and reports may need to be kept confidential are illustrated by the following examples:

- Council has decided to seek to **purchase a parcel of land** at auction for a reserve and needs to decide how much to bid for the land. The report and discussion dealing with this purchase needs to be kept confidential until the transaction is completed in order to protect Council's interests [s.90(3)(b)];
- Council has **called for tenders** for the supply of irrigation services for parks and gardens in the City. Some commercially sensitive details of tenders submitted to Council may need to be kept in confidence to protect the commercial interests of the companies submitting the tenders and the financial interests of the Council during the negotiation and tender assessment process [s.90(3)(k)];
- Council has sought **legal advice** on a matter that may go to Court. It may be necessary to keep the advice and the discussion about that advice confidential to protect Council's interests in any subsequent negotiations or Court proceedings [s.90(3)(h)].

#### 4. POLICY ON PUBLIC ACCESS TO MEETINGS

The City of Charles Sturt will conduct all formal Council and Council Committee meetings in public and will provide public access to all documents considered at these meetings except where the Council or Committee meeting is clearly satisfied that the need for confidentiality outweighs the principle of open decision making.

The following procedures and practices will apply when considering whether to restrict public access to a Council or Council Committee meeting or a report presented to these meetings:

- (a) Where the Chief Executive Officer, in consultation with the Mayor, believes that a matter should be considered in confidence, the nature of the matter and the reasons why it should be considered in confidence will be clearly stated on the agenda for the meeting which is made available to the public.
- (b) Information of a confidential nature will be placed in attachments to reports, wherever possible, so that the report itself can be made available to the public.
- (c) Recommendations and resolutions will be framed, wherever possible, so that public access to the minutes of these meetings does not need to be restricted.
- (d) Public access will be restricted for the minimum period of time necessary to allow the matter to be resolved.
- (e) Council reports on assessment of tenders for the provision of goods and services to Council will become public as soon as the contract documentation is finalised.
- (f) Council and Committee items declared confidential will be recorded in a *Register of Confidential Items* listing the following information:
  - title of the item
  - date of the Council or Committee meeting
  - reason for holding the matter confidential
  - date of release from confidentiality

and the *Register* will be made available for public inspection.

- (g) Council will consider objections by a member of the public that a matter is subject to restricted access and will advise that person of their right to seek a review by the Ombudsman if they disagree with a decision to restrict access.

**Public Health Emergency: Electronic Participation in Council Meetings**

*A Council meeting 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 delegate) 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 council members present at the meeting via the live stream; or*
- (b) if the chief executive officer (or delegate) 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 delegate) 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 Council members present at the meeting via the recording.*

*If the chief executive officer (or delegate) 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 or council committee 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.*

*It is an offence for person who, knowing that an order is in force under section 90(2), to connect to a meeting of the Council or Council committee by electronic means, or fail to disconnect from a meeting of the Council or Council committee.*

**5. AGENDA FOR COUNCIL MEETINGS**

One of the main opportunities for the community to get information about the business of Council is from the agendas for Council and Committee meetings and associated reports and attachments. Therefore, public access to Council agenda papers is encouraged.

In the City of Charles Sturt the following procedures apply to encourage public access:

- (a) At least three days before an ordinary Council or Council Committee meeting a copy of the agenda for the meeting will be placed on public display in the Council offices.

- (b) The agenda will list the items of business for the meeting and a brief description of these items.
- (c) A copy of reports, attachments and recommendations prepared by Council officers for members will be available for public inspection. Members of the public may obtain a copy of a particular report or reports for a small fee to cover the costs of duplication. Copies of agendas, reports and minutes for all Council and committee meetings are also available on Council's web site at [www.charlessturt.sa.gov.au](http://www.charlessturt.sa.gov.au)
- (d) Where the Chief Executive, in consultation with the Mayor, believes that a matter should be considered in confidence, the nature of the matter and the reasons why it should be considered in confidence will be clearly noted on the agenda.
- (d) If a member of the public objects to the recommendation to consider a matter in confidence, the person will be invited to provide reasons (in writing) for the objection which will be put to the meeting before it votes on whether or not to restrict public access.

***Public Health Emergency: Electronic Participation in Council 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 published for at least the term of Council*

*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 delegate) 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.*

*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 at least the term of Council.*

## 6. PROCEDURE AT MEETINGS

In the City of Charles Sturt public access to Council and Council Committee meetings is always available, except where indicated on the agenda that a matter may need to be discussed in confidence as outlined in Sections 4 and 5 of this Code. The meeting will adopt the following procedure before deciding to exclude the public:

- (a) Any written objections to the proposal to exclude the public will be provided to all members.
- (b) The meeting will then consider the recommendation for the matter to be discussed in confidence and will satisfy itself that:
  - the matter falls within the relevant provisions of the Local Government Act 1999 as a matter justifying treatment in confidence;
  - the matter complies with this Code warranting treatment in confidence;
  - any written objections have been adequately considered.

**[Note: Section 90(4) of the Act stipulates that in considering whether a confidentiality order should be made, it is irrelevant that discussion of a matter in public may cause embarrassment to the Council or Committee concerned or to members or employees of the Council; or cause a loss of confidence in the Council or Council Committee.]**

- (c) The debate on whether or not the public should be excluded will be held in public.
- (d) The public will only be excluded after a motion to that effect is carried.
- (e) If a resolution to exclude the public is made, the **grounds** for this will be communicated to the public present at the meeting and will be recorded in the minutes.
- (f) In order to minimise inconvenience to the public, the meeting will consider delaying consideration of any item excluding the public until after the other business of the meeting is concluded.
- (g) Once debate on the matter is concluded, the meeting will then consider if it is necessary to make an order that some or all documents associated with this matter remains confidential. In determining this, the meeting will have regard to the provisions of the Local Government Act and this Code. If an order is made the meeting will also determine for what

period, or for what circumstances (eg settlement of land acquisition) the document or portion of the document will remain restricted from public access.

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

## **7. PERSON REQUESTING A MATTER TO BE KEPT CONFIDENTIAL**

Where a person provides information to the Council and requests that it be kept confidential the Council is not able to even consider this request unless the matter is one that falls within the provisions of Section 90(2) of the Act. If this is the case, Council will then be in a position to consider the request on its relative merits in accordance with the Act and this Code.

## **8. ACCOUNTABILITY AND REPORTING TO THE COMMUNITY**

The City of Charles Sturt will report on an annual basis on its use of confidentiality provisions. The report will include:

- The number of occasions each of the confidentiality provisions of the Local Government Act was used, categorised by the section of the Act relied upon.
- A summary of the reasons for the use of the confidentiality provisions in that year.
- The total number of agenda items considered in that year and the proportion of items where confidentiality provisions were utilised.
- Commentary on any particular issues that contributed to the use of confidentiality provisions on more than one occasion (eg a proposal to acquire the same parcel of land was considered on 2 separate occasions).
- Any changes made to the Code of Practice during the year.

This report will be made available to the public and a summary will be included in Council's Annual Report.

This Code will be on public display in the Council offices and a copy will be made available on request at a fee fixed by Council to cover the cost of duplication.

## 9. REVIEW

The City of Charles Sturt will formally review this Code on an annual basis to ensure that the principle of open government is being observed. However, the City of Charles Sturt may review the operation of the Code at any time and make any changes as necessary. Before formally adopting an amended or new Code, Council will make copies of the proposed changes available for public inspection at the Council offices and follow the relevant steps set out in its Public Consultation Policy and Procedures.

Public comment on the Code and its operations is welcome at any time.

### ***Public Health Emergency: Electronic Participation in Council Meetings***

*Council members may meet by electronic means to alter the code of practice of the Council, or substitute a new code of practice of the Council, even if the existing code of practice prevents or inhibits the Council members from meeting by electronic means.*

*The requirement in section 92(5) that before a Council adopts, alters or substitutes a code of practice it make copies of the proposed code, alterations or substitute code (as the case may be) available for inspection and purchase at the principal office of the Council and on a website determined by the Council and that the Council follow the steps set out in its public consultation policy is suspended while these provisions are in effect.*

## 10. GRIEVANCES

In the first instance, any questions or complaints about the use of the confidentiality provisions should be raised with the Manager Governance & Operational Support. The question or complaint should be made in writing (wherever possible) to ensure all grievances are considered and acted upon in a proper manner.

Initially information on the application of confidential provisions and a full explanation of the details and circumstances relating to the complaint will be provided. It is anticipated that most, if not all, questions or complaints will be resolved through this process.

Should this not resolve the matter, a formal application for internal review of this decision can be made. This will be dealt with in accordance with Council's adopted "Procedure for the Internal Review of Council Decisions".

However, if a person is not satisfied about the response from Council the person may also seek to have the Ombudsman review the matter. Council staff will provide details on how to contact the Ombudsman's office on request.

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

**APPENDIX 1****Matters for Which Council, or a Committee Can Order that the Public be Excluded**

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

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

Section 90(9) of the Local Government Act 1999 provides for a definition of “personal affairs” being a person’s financial affairs, criminal records, marital or other personal relationships, personal qualities, attributes or health status, or that person’s employment records, employment performance or suitability for a particular position, or other personnel matters relating to the person.

### **Commentary**

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

- Council and Committee meetings; and
- the minutes and documents discussed at those meetings.

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

### *The Exceptions*

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

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

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

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

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

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

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

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

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

The public interest test requires a Council (or committee) to identify what the public interest is for the matter. This requires the Council to weigh up the factors for and against disclosure and to determine, on balance, whether the exclusion of the public from the discussion or denial of access to the documents is contrary to the public interest. This is not always an easy task but is a necessary and important one all the same.

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

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

#### *Practical application*

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

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

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

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

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

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