



Confidentiality Guidelines: How to Apply Section 90 of the Local Government Act 1999

**Please also see *Model Code for Access to Meetings and
Documents***

ECM 582112

The *Confidentiality Guidelines* have been prepared by the Local Government Association of SA (LGA), in conjunction with KelliedyJones Lawyers, for the guidance of and use by member Councils. The LGA is the statutory peak body for Local Government in South Australia, representing all 68 Councils in the State.

The *Guidelines* were developed following the Ombudsman's findings in the report: "*In the Public Eye: An audit of the use of meeting confidentiality provisions of the Local Government Act 1999 in South Australian councils*" (November 2012).

The *Guidelines* have been updated to reflect the legislative amendments made by the *Local Government (Accountability and Governance) Amendment Act 2015*, which commenced on 31 March 2016.

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Contents

1. Introduction	3
2. Process to Exclude the Public from a Meeting	3
3. The Special Circumstances	4
4. Public Interest Test	4
5. “Could Reasonably be Expected to”	6
6. Grounds under section 90(3) of the Act	6
6.1 Section 90(3)(a) – ‘personal affairs’	6
6.2 Section 90(3)(b) – ‘commercial advantage’	10
6.3 Section 90(3)(c) – ‘trade secrets’	14
6.4 Section 90(3)(d) – ‘commercial information of a confidential nature’	17
6.5 Section 90(3)(e) – ‘matters affecting security and safety’	20
6.6 Section 90(3)(f) – ‘prejudice the maintenance of law’	22
6.7 Section 90(3)(g) – ‘to ensure council does not breach any law’	24
6.8 Section 90(3)(h) – ‘legal advice’	26
6.9 Section 90(3)(i) – ‘information relating to litigation’	28
6.10 Section 90(3)(j) – ‘information provided on a confidential basis by or to a public authority or official’	30
6.11 Section 90(3)(k) – ‘tenders’	33
6.12 Section 90(3)(m) – ‘information relating to a proposed amendment to a Development Plan before consultation’	35
6.13 Section 90(3)(n) – ‘freedom of information’	37
7. Flexibility in applying section 90(2) and 90(3) of the Act	39
8. Keeping Documents Confidential – Section 91(7)	39
9. Content of Minutes	40
10. Duty to Protect Confidentiality	42
Register of Confidential Items	43
APPENDIX 1 – The Public Interest Balance Test	44
APPENDIX 2 – Annual Review of Confidential Items – Some Tips and Traps!	45

1. Introduction

Section 90(1) of the *Local Government Act 1999* (“the Act”) provides that a meeting of a council or council committee must be conducted in a place open to the public. The *Local Government (Procedures at Meetings) Regulations 2013* support this proposition, containing a Guiding Principle that “*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.

In limited circumstances a council or committee may order that the public be excluded from a meeting where the council or committee considers it necessary and appropriate to close the meeting to the public in order to *receive, discuss or consider* in confidence any information or matter that is of a kind listed in section 90(3) of the Act. Section 90(2) of the Act provides councils and committees with discretion to exclude the public from a meeting to discuss information and matters of a kind listed in section 90(3) in confidence.

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.

As explained by the SA Ombudsman¹, the use of section 90(2) as a discretion rather than an obligation is consistent with the overall legislative intent of section 90, given that all meetings are to be conducted in public unless special circumstances apply. If such special circumstances do not apply then a council or committee is unable to exclude the public from a meeting.

As a result of the Ombudsman’s audit it was reported that generally Councils overuse the confidentiality provisions and, when the provisions are used, insufficient details of their reasons for excluding the public under sections 90(2) and 90(3) of the Act are given. These Guidelines are intended to assist councils apply the legal provisions in appropriate circumstances and the considerations that must be given in formulating reasons to exclude the public.

2. Process to Exclude the Public from a Meeting

Before a meeting orders that the public be excluded in order to *receive, discuss or consider* in confidence any information, the meeting must formally determine in public

¹ Ombudsman SA,, *In the Public Eye, an audit of the use of meeting confidentiality provisions of the Local Government Act 199 in South Australian councils*, (November 2012),

if it is *necessary* and *appropriate* to close the meeting to the public. If the meeting determines that it is necessary and appropriate, and there is a ground under section 90(3) that can be relied upon, then once the meeting resolves to exclude the public, the public must leave the room. This means that all members of the public (including staff) unless exempted by being named in the resolution as entitled to remain, are required to leave the room. Council members must remain in the meeting and are not a member of the public for these purposes (section 90(6) of the Act).

Once the council or committee has made the order to exclude the public, it is an offence for a person who, knowing that the order is in force, enters or remains in the room in which such a meeting is being held. It is lawful for an employee of a council or a member of the police to use reasonable force to remove the person from the room if he or she fails to leave on request.

If a meeting is considering multiple items that are recommended to be held in confidence then the meeting must apply sections 90(2) and 90(3) on an item-by-item basis to enable the relevant ground under section 90(3) to be applied and to ensure the meeting resolves to apply section 90 when the meeting is open to the public. This means the public must be invited to return to the meeting after the conclusion of every item that has previously been considered in confidence.

3. The Special Circumstances

The Act recognises that there will be some occasions where it will be *necessary* and *appropriate* to close a meeting to the public in order to *receive, discuss or consider* in confidence information that may fall within one of the recognised grounds contained within section 90(3) of the Act. The 13 grounds listed at section 90(3) of the Act that allow a council or committee to close a meeting to the public are exhaustive. This means a council or committee can only exclude the public if it can meet the necessary statutory criteria to be able to exclude the public. The grounds under section 90(3) are deliberately limited because of the statutory premise that meetings are open to the public and the fundamental principle of transparency and accountability.

4. Public Interest Test

In some sections under section 90(3) of the Act a public interest balancing test must be satisfied for the ground of exclusion to apply. 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*.

It is for good reason that the public interest is not defined in legislation. This is because the categories of public interest are not closed and what the public interest is for a particular matter will be weighed against a number of factors. There is no restriction on the number of factors a council or committee can consider when determining whether disclosure would be contrary to the public interest. The factors referred to will depend on the type of information to be *received, discussed or considered*, the context of the information, and any other circumstances of relevance to making a decision.

In relation to the FOI Act, the District Court of South Australia has noted that to satisfy the test it requires more than merely showing that there is something adverse to the public interest likely to flow from disclosure. Rather, on balance, the factors in the public interest against disclosure must outweigh the factors in favour of disclosure.²

In his report *In the Public Eye*, the Ombudsman emphasises the importance of making a distinction between “*what is in the public interest*” and “*what is of interest to know*”. The Supreme Court of Victoria provides guidance in understanding this distinction:³

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

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

The *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Victoria Freedom of Information Bill 1978* has noted that in weighing the competing factors against each other and making a judgement as to where the balance lies, a default position in favour of public disclosure applies. This is due to the importance of transparency and accountability within our representative democracy. Thus, where the reasons for and against closing a meeting to the public, in the public interest are equally weighted, the scales should be tipped in favour of public disclosure.

In the Public Eye, the public interest reasons for a meeting to remain open to the public include:

- ensuring accountability;
- maintaining transparency of public expenditure;
- facilitating public participation;
- assisting public awareness; and
- allowing for the scrutiny of information.

² *Ipex Info Tech v Department of Info Tech Services* (1997) 192 LSJS 54

³ *Director of Public Prosecutions v Smith* [1991] 1 VR 63, at 75

In contrast, the public interest reasons for a meeting to be closed to the public include:

- the disclosure of certain information would prevent the efficient and effective governance of the Council or Committee;
- the disclosure of the private information of an individual would be unfair or harmful (i.e. by exposing untried allegations of misconduct);
- unreasonably exposing the sensitive or secret interests of a third party;
- prejudice to the fair treatment of a public report by early disclosure; and
- detriment to the public (i.e. disclosing information which would inhibit the flow of information to law enforcement agencies).

The SA Ombudsman has suggested principles and some examples of a ‘public interest balancing test’ for councils. These are contained within Appendix 1.

5. “Could Reasonably be Expected to”

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 that the decision-maker must objectively consider that real and substantial grounds exist for the expectation that the specified outcome will eventuate and must not rely on speculative or theoretical reasoning.⁴ Additionally, the Full Federal Court noted that the phrase is to be given its normal meaning and it is undesirable to consider the operation of the phrase in terms of possibilities or probabilities.⁵

6. Grounds under section 90(3) of the Act

6.1 Section 90(3)(a) – ‘personal affairs’

Section 90(3)(a) of the Act provides that a council or council committee may order that the public be excluded from a meeting in order to *receive, discuss or consider* in confidence any matter which would involve the *unreasonable disclosure* of information concerning the *personal affairs* of any person. Thus, there are two tests that must be satisfied in order to comply with section 90(3)(a) as a ground for exclusion of the public for council or committee meetings. A council or committee must be satisfied that the matter involves ‘personal affairs’ and that there is evidence that discussion of such information in a public forum would be unreasonable. Sections 90(9)(a) and (b) of the Act define the ‘personal affairs’ of a person to include:

- financial affairs;

⁴ *Attorney-General’s Department v Cockcroft* (1986) 10 FCR 1180

⁵ *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 108 ALR 163

- criminal records;
- marital or other personal relationships;
- personal qualities, attributes or health status; and
- employment records, employment performance or suitability for a particular position, or other personnel matters relating to a person.

In the Public Eye, it was noted that some matters for which an order was made citing section 90(3)(a) involved both procedural matters and issues concerning personal affairs. The Ombudsman suggests that where there are sensitive matters discussed which fall within the legislative definition of ‘personal affairs’, such as a discussion of staff dynamics and an individual’s leadership qualities, it may be appropriate to consider the issue in two parts. For example, a discussion of the procedure and criteria to be used in a performance appraisal of the Chief Executive Officer may be considered in public, whereas the actual appraisal of the Chief Executive Officer might reasonably be held in confidence.

In considering whether the disclosure of ‘personal affairs’ by way of discussion at a public council or committee meeting would be unreasonable, it is irrelevant that the discussion may cause embarrassment to, or loss of confidence in, the council or committee. The ‘unreasonable’ test is an objective one, which requires the decision-maker to consider all the surrounding circumstances. The *Freedom of Information Act 1982* (Cth) (“FOI Act Cth”) provides that, in determining whether the disclosure of a document would involve the unreasonable disclosure of personal information, the agency must have regard to the extent to which the information is well known, the availability of the information from publicly accessible sources and any other matters that the agency considers relevant. The FOI Act Cth provides guidance in relation to interpretation, as it contains provisions relative to the accessibility of information that mirror those contained in section 90(3)(a) of the Act. Accordingly, it would be appropriate for a council or committee to undertake similar considerations in relation to determining whether public discussion of personal affairs would be reasonable.

Model Order under Section 90(3)(a)

Pursuant to s.90(3)(a)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB}, except **[insert names and job title for staff members present and/or names of any other person i.e. consultant/external advisor]** be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(a) of the Act, the information to be received, discussed or considered in relation to the Agenda Item is information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead), being **[insert name of person]** because **[insert reasons]**.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(a) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

6.1.2 Examples

These examples are not exhaustive, and are given to illustrate some situations where confidentiality orders could be made.

1. Performance Matters of the Chief Executive Officer

Section 90(3)(a) Order

Pursuant to s.90(3)(a)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Joe Bloggs, Human Resource Consultant be excluded from attendance at the meeting for Agenda Item 3 (Performance Matters of the Chief Executive Officer).

The Council is satisfied that, pursuant to section 90(3)(a) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of the Chief Executive Officer, in that details of her performance review will be discussed, which are sensitive and are details only known to those who have participated in the review process.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of details of the Chief Executive Officer's performance may prematurely be disclosed before the details of the review have been discussed with the Chief Executive Officer.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 3 (Performance Matters of the Chief Executive Officer) in confidence under section 90(2) and (3)(a) of the *Local Government Act 1999*, the Council, pursuant to section 91(7)(b) of that Act orders that the documents and all minutes be retained in confidence until the Performance Review process has been completed by the provision of a final report to Council.

2. Notification to Council of absence of a Council Member due to terminal illness of a family member

Section 90(3)(a) Order

Pursuant to s.90(3)(a)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB}, except Joe Bloggs, CEO ABC Council be excluded from attendance at the meeting for Agenda Item 5 (Absence of Councillor Citizen).

The Council is satisfied that, pursuant to section 90(3)(a) the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of Councillor Citizen in that details personal to the

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

family of the Member will be disclosed.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances as the matters is personal to Councillor Citizen.

6.2 Section 90(3)(b) – ‘commercial advantage’

Section 90(3)(b)(i) of the Act provides a ground for a council or a committee to order that the public be excluded from a meeting in order to *receive, discuss or consider* in confidence any matter which could *reasonably be expected to* (see paragraph 5) confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or which may prejudice the commercial position of the council. Additionally, subsection (3)(b)(ii) imposes the application of a public interest test (see paragraph 4) for this ground of exclusion to apply. This means there are two tests which must be satisfied before an order may be made under section 90(3)(b) of the Act.

The Ombudsman suggests that when relying on section 90(3)(b) to exclude the public from a meeting, a council or committee should outline how the information could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting business or how the information could prejudice the commercial position of the council; and how and why the disclosure of the information would be contrary to the public interest. This is the level of detail that should be included in the minutes. The Act defines neither commercial advantage nor the meaning of prejudice of the council's position. Thus, the natural meaning of these terms applies. Lunn J in the case of *Ipex Info Tech v Dept of Info Tech Services (1997)* suggests that the expectation of a commercial advantage or prejudice must be reasonable and not so slight as to warrant it inconsequential.

The council or committee is also responsible for ensuring the reasons for closing a meeting to the public clearly outweigh the general requirement for meetings to be held in public before relying upon section 90(3)(b) of the Act.

6.2.1 Model Order under Section 90(3)(b)

Pursuant to s.90(3)(b)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB}, except **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is:

- **conducting business; or**
- **proposing to conduct business; or**
- **would prejudice the commercial position of the Council**

[select applicable situation (more than one ground may be applicable)]*

[insert explanation]

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(b) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

6.2.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Consideration of a the terms for a waste resources contract

Section 90(3)(b) Order

Pursuant to s.90(3)(b)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Joe Bloggs, CEO of ABC Council and Ivana Citizen, lawyer, XYZ Lawyers, be excluded from attendance at the meeting for Agenda Item 10.1 (Terms of Waste Resources Contract).

The Council is satisfied that, pursuant to section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is proposing to conduct business, and the information would prejudice the commercial position of the Council, in that the Council is currently engaged in a post tender negotiation with a preferred tenderer to finalise the terms and conditions of engagement for this service – the information to be considered in relation to this Agenda Item include detailed costings for in-house provision of waste resources services and other specific financial information, the disclosure of which would prejudice the Council's commercial position during the current ongoing negotiations.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of Council's commercial position may severely prejudice Council's ability to be able to negotiate a cost-effective proposal for the benefit of the Council and the community in this matter and in relation to other contract negotiations.

Section 91(7) OrderPursuant to s.91(7)

That having considered Agenda Item 10.1 (Terms of Waste Resources Contract) in confidence under section 90(2) and (3)(b) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the Tender documents and related Council reports and all minutes be retained in confidence for a period of 2 years, or until a contract has been signed and that this order be reviewed every 12 months.

Pursuant to section 91(8)(b) of the Act, details of the identity of the successful tenderer must be released once Council has made a selection. Pursuant to section 91(8)(ba) of the Act, details of the amount(s) payable by the Council under a contract for the provision of green waste services must be released once this contract has been entered into by all concerned parties.

6.3 Section 90(3)(c) – ‘trade secrets’

A council or a committee has the discretion to cite section 90(3)(c) of the Act as a ground to exclude the public from a meeting in order to *receive, discuss or consider* in confidence any matter or information that would reveal a trade secret. This is a singular test, whereby the council or committee must be satisfied that discussion of the information or matter would reveal a trade secret. The use of the term ‘would’ rather than ‘could reasonably be expected to’ invokes a stricter test, meaning that the revelation of a trade secret must be more of a certainty for the ground of exclusion under section 90(3)(c) to apply.

The FOI Act Cth provides some guidance in relation to interpretation, as it contains provisions relative to the accessibility of information that are consistent with those contained in section 90(3) of the Act. In interpreting the meaning of ‘trade secret’ within an equivalent section of the FOI Act Cth, the Full Court in *Searle* noted, at 171:

...the term has come to be an ordinary term of the English language. Thus, the Oxford English Dictionary gives ‘trade secret’ the meaning ‘a device or technique used in a particular trade or occupation and giving an advantage not generally known’ ...

At least in the context of the FOI Act, we think that the term does not have a technical legal meaning but is an ordinary term of the English language...

The Full Court in *Searle* went on to draw a distinction between a trade secret and confidential commercial information, emphasising that a trade secret must give a trader an advantage over their competitors in a particular trade, at 174:

An aspect of the concept of ‘trade secrets’... is that the secrets must be used in or useable in the trade. A trade secret is an asset of the trade. Past history and even current information, such as mere financial particulars, may be confidential. The law may protect the disclosure of such information by a person who has obtained it in the course of a relationship which requires confidentiality, such as that of employee, solicitor or accountant. But such information may not be a trade secret.

Thus, in order to rely on section 90(3)(c) as a ground of exclusion, a council or committee must be satisfied that discussion of the information would reveal a trade secret which gives the respective trader a competitive advantage within their specified trade.

6.3.1 Section 90(3)(c) Order

Pursuant to s.90(3)(c)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB}, except **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(c) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would reveal a trade secret because **[insert explanation]**.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(c) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration]

6.3.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

5. Consideration of Stormwater Retention System

Section 90(3)(c) Order

Pursuant to s.90(3)(c)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Joe Bloggs, CEO of ABC Council and Janine Human, General Manager City Services ABC Council, be excluded from attendance at the meeting for Agenda Item 4.2 (Consideration of Stormwater Retention System).

The Council is satisfied that, pursuant to section 90(3)(c) of the Act, the disclosure of the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would reveal a trade secret in that the details of the research undertaken and the intellectual property created in the system will be disclosed.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because such disclosure may compromise the Council's ability to complete its research.

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

Section 91(7) OrderPursuant to s.91(7)

That having considered Agenda Item 4.2 Consideration of Stormwater Retention System in confidence under section 90(2) and (3)(c) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the research details, design and experimental analysis details and all minutes be retained in confidence for a period of 6 months, or such lesser period as may be determined by the Chief Executive Officer.

6.4 Section 90(3)(d) – ‘commercial information of a confidential nature’

Section 90(3)(d)(i) of the Act provides a ground for a council or committee to order that the public be excluded from a meeting in order to *receive, discuss or consider* in confidence any matter which *could reasonably be expected* (see paragraph 5) to prejudice the commercial position of the person who supplied the information or confer a commercial advantage on a third party. In addition, subsection (3)(d)(ii) requires that a public interest balancing test be satisfied for this ground of exclusion to apply (see paragraph 4). Thus, there are two tests which must be satisfied before a meeting can resolve to apply section 90(3)(d). As is the case with 90(3)(b), it would be reasonable for a council citing section 90(3)(d) as a ground to exclude the public from a meeting to outline how the information could reasonably be expected to prejudice the commercial position of the person who supplied the information or to confer an advantage on a third party; and how and why the disclosure of the information would be contrary to the public interest. This is the level of detail that should be recorded in the minutes.

Although still relative to commercial information, section 90(3)(d) may be distinguished from both subsections 90(3)(b) and (c). Section 90(3)(b) involves the disclosure of information that could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct business. In contrast, section 90(3)(d) applies where the disclosure of the information could reasonably be expected to prejudice the commercial position of the person who supplied the information or confer a commercial advantage on a third party, regardless of whether the council is, or proposing to, conduct business with the person or third party. Additionally, section 90(3)(d) applies to commercial information of a confidential nature that is not a trade secret. Section 90(3)(c) is the appropriate ground of exclusion that deals with the disclosure of trade secrets.

Simply marking a document as ‘confidential’ is not sufficient in and of itself to show that the documents were communicated confidentially. As outlined by the Full Court in *Searle*, confidential information may include past history and current information, such as financial particulars that have been obtained in the course of a relationship which requires confidentiality, or secret documents of a commercial nature. Councils and committees must ensure that there is a reasonable expectation that discussion of the information in a public meeting could prejudice the commercial position of the person who supplied the information or confer a commercial advantage on a third party. In the case of *Ipex Info Tech*, Lunn J suggests that the expectation of a commercial advantage or prejudice must be based on reason and not so slight as to warrant it inconsequential.

Additionally, the council or committee is responsible for ensuring the reasons for closing a meeting to the public clearly outweigh the general requirement for meetings to be held in public in order to satisfy section 90(3)(d)(ii) of the Act.

6.4.1 Section 90(3)(d) Order

Pursuant to s.90(3)(d)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB}, except **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which 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.**

[select applicable (more than one ground may be applicable)]*

[insert explanation]

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(d) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

6.4.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Joint Venture Arrangement – Proposed Health and Leisure Centre

Section 90(3)(d) Order

Pursuant to s.90(3)(d)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Joe Bloggs, CEO ABC Council, be excluded from attendance at the meeting for Agenda Item 6 (Joint Venture Arrangement – Proposed Health and Leisure Centre).

The Council is satisfied that, pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information in that the financial capability of the joint venture partner to secure finance, and the developer's capability to undertake the project will be discussed in detail, and that this information may prejudice the commercial position of the joint venture partner as financial details and the resources of the developer will be disclosed.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of this information may result in a competitor receiving the information to the detriment of the developer.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 6 (Joint Venture Arrangement – Proposed Health and Leisure Centre) in confidence under section 90(2) and (3)(d) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the Council report and all minutes be retained in confidence for a period of 2 years or such lesser period as may be determined by the Chief Executive Officer.

6.5 Section 90(3)(e) – ‘matters affecting security and safety’

A council or a committee may rely upon section 90(3)(e) of the Act as a ground to exclude the public from a meeting in order to *receive, discuss or consider* in confidence any matter or information that affects the security of the council, members or employees of the council, or council property, or the safety of any person. This is a singular test, whereby a council or committee must be satisfied that the information or matter affects the safety of any person or the security of one or more of the following:

- the council;
- council property;
- members of the council; or
- employees of the council.

The terms ‘safety’ and ‘security’ are to be interpreted as ordinary terms of the English language.

6.5.1 Section 90(3)(e) Order

Pursuant to s.90(3)(e)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB}, except **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(e) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is related to matters affecting the security of

- **the Council, or**
- **members, or**
- **employees of the Council, or**
- **Council property, or**
- **the safety of any person**

[select applicable (more than one ground may be applicable)]*

[insert explanation]

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(e) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

6.5.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Review of Security Systems

Section 90(3)(e) Order

Pursuant to s.90(3)(e)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Joe Bloggs, CEO of ABC Council, be excluded from attendance at the meeting for Agenda Item 10 (Security System Review).

The Council is satisfied that, pursuant to section 90(3)(e) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is related to matters affecting the security of the Council, members and employees of the Council, and Council property, in that details of the trigger points, sensors and security codes for the Council's security system will be discussed.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because of the safety risk to Council premises and staff if the abovementioned details are disclosed publicly.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 10 (Security System Review) in confidence under section 90(2) and (3)(e) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the Security System manuals and review documents and all minutes be retained in confidence until such time as a new security system is installed, and the current system is made redundant and that this order be reviewed every 12 months.

6.6 Section 90(3)(f) – ‘prejudice the maintenance of law’

Section 90(3)(f) of the Act provides a ground for a council and a committee to exclude the public from a meeting in order to confidentially *receive, discuss or consider* information which could reasonably be expected to prejudice the maintenance of law. This includes prejudice to the maintenance of law by affecting, or potentially affecting, the prevention, detection or investigation of a criminal offence, or the right to a fair trial. Information which may affect the right to a fair trial would include the disclosure of untried allegations of misconduct or wrongdoing.

For example in a NSW case,⁶ which considered the NSW FOI Act, it was found that a Standard Operating Procedure of a model of speed camera and a Police Speed Enforcement Program document contained information which, if disclosed, could reasonably be expected to prejudice the effectiveness of any law enforcement method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law.

This ground may apply if a council member or council employee was subject to court proceedings for a breach of the *Criminal Law Consolidation Act 1935* or if the council were subject to specific requirements under the *Independent Commissioner Against Corruption Act 2012*.

6.6.1 Section 90(3)(f) Order

Pursuant to s.90(3)(f)

Pursuant to section 90(2) of the Local Government Act 1999 the Council orders that all members of the public^{NB}, except **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(f) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the:

- **prevention, or**
- **detection, or**
- **investigation of a criminal offence, or**
- **the right to a fair trial.**

[select applicable (more than one ground may be applicable)]*

[insert explanation]

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

⁶ *Johnston v Commissioner of Police* [2008] NSWADT 191

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(f) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

6.6.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Corruption Allegations and Investigation of a Council Member

Section 90(3)(f) Order

Pursuant to s.90(3)(f)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Joe Bloggs, CEO ABC Council and Ivana Citizen, Lawyer, XYZ Lawyers, be excluded from attendance at the meeting for Agenda Item 10.2 (Criminal Complaint about, and Investigation of, a Council Member).

The Council is satisfied that, pursuant to section 90(3)(f) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the detection, and investigation of a criminal offence, in that details of a criminal allegation made against a Council Member will be discussed, the details of which may prejudice a related criminal investigation by SAPOL.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the SAPOL investigation is not yet complete, and disclosure of the above information may prejudice this investigation.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 10.2 (Criminal Complaint about, and Investigation of, a Council Member) in confidence under section 90(2) and (3)(f) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the Police and Council reports and all minutes be retained in confidence until such a time as the investigation is resolved and confirmed as such by SAPOL and that this order be reviewed every 12 months.

6.7 Section 90(3)(g) – ‘to ensure council does not breach any law’

A council or a committee may rely upon section 90(3)(g) of the Act to exclude the public from a meeting in order to *receive, consider or discuss* any matters that must be considered in confidence in order to ensure that the council or committee does not breach any law, order or direction of a court or tribunal, any duty of confidence, or any other legal obligation or duty. This section would apply where a council or committee has a duty of confidence, which would be breached through discussion of the relevant matter in a public meeting. This is a single test, common sense provision, whereby councils and committees must be aware of, and have knowledge about, their legal obligations and duties.

6.7.1 Section 90(3)(g) Order

Pursuant to s.90(3)(g)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB} except, **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(g) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information concerning 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,**
- **breach any duty of confidence, or**
- **breach any other legal obligation or duty**

[select applicable (more than one ground may be applicable)*]

[insert explanation]

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[Brief Description of Agenda Item]** in confidence under section 90(2) and (3)(g) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

6.7.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Consideration of proposed Supreme Court settlement Orders

Pursuant to s.90(3)(g)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public except, Joe Bloggs, CEO ABC Council and Ivana Citizen, Lawyer, XYZ Lawyers, be excluded from attendance at the meeting for Agenda Item 13 (proposed Supreme Court settlement Orders from recent litigation involving the Council and Ms Harris)

The Council is satisfied that, pursuant to section 90(3)(g) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information concerning 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, and breach any other legal obligation or duty in that the draft orders proposed by Ms Harris in relation to the potential settlement of this litigation in the Supreme Court will be discussed, and a possible counter-offer may be formulated. These draft orders must be kept confidential by direction of the Supreme Court.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of this information would be acting contrary to an order of the Court and could prejudice the Council's position in relation to settlement discussions.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 13 (Supreme Court Orders from recent litigation involving the Council) in confidence under section 90(2) and (3)(g) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the relevant legal advice and all minutes be retained in confidence until such a time as this litigation is finalised and that this order be reviewed every 12 months.

Please note that in this instance section 90(3)(h) of the Act could also be relied on if legal advice was provided to the Council.

6.8 Section 90(3)(h) – ‘legal advice’

Section 90(3)(h) of the Act provides that a council or a committee may exclude the public from a meeting in order to receive, consider or discuss legal advice. This is consistent with the principle of legal professional privilege, whereby communications between a legal practitioner and a client made for the dominant purpose of giving or obtaining legal advice are to remain confidential.⁷ This includes all oral and written communications between a client and lawyer that are made primarily for the purpose of giving or receiving legal advice. This privilege allows councils and committees to obtain full and frank legal advice and, where necessary, prepare for proceedings. Information about a client's legal affairs is confidential and the privilege belongs to the client. Therefore, the council or committee may waive the privilege of client confidentiality if they so choose. However, under the *Australian Solicitors' Conduct Rules* (2011), legal practitioners have a duty not to disclose any information which is confidential to a client without the written permission of the client.

6.8.1 Section 90(3)(h) Order

Pursuant to s.90(3)(h)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB} except, **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice **[insert explanation]**.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(h) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

⁷ *Grant v Downs* (1976) 11 ALR 577; 135 CLR 674.

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

6.8.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Advice received as to process by which the Council deals with open space and financial contributions

Section 90(3)(h) Order

Pursuant to s.90(3)(h)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Joe Bloggs, CEO ABC Council and Ivana Citizen, Lawyer, XYZ Lawyers, be excluded from attendance at the meeting for Agenda Item 4 (Legal Advice Concerning Open Space and Financial Contributions).

The Council is satisfied that, pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice, in that it has been provided by XYZ Lawyers on instructions from the Council and Ms Citizen from XYZ Lawyers will be explaining this advice in detail to the Council Members.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because a Council decision has not yet been made in relation to the advice and its subject matter.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 4 (Legal Advice Concerning Open Space and Financial Contributions) in confidence under section 90(2) and (3)(h) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that legal advice from XYZ Lawyers and all minutes be retained in confidence for a period of 2 years or such lesser period as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.

6.9 Section 90(3)(i) – ‘information relating to litigation’

The necessary and appropriate need to receive, discuss or consider in confidence matters or information relating to actual litigation, or reasonably anticipated litigation, involving the council or an employee of the council is a ground to exclude the public from a council or committee meeting under section 90(3)(i) of the Act. In relation to anticipated proceedings, the council or committee must have a reasonable belief that the litigation will in fact proceed, rather than the mere possibility of litigation occurring: *Grant v Downs* (1976) 11 ALR 577; 135 CLR 674. Legal professional privilege, as discussed above in ‘**legal advice**’, extends to communications regarding current or anticipated legal proceedings: *Baker v Campbell* (1983) 49 ALR 385. The prevailing intent of this ground of exclusion is to ensure the fairness of proceedings by preventing the disclosure of information which may hinder the administration of justice.

6.9.1 Section 90(3)(i) Order

Pursuant to s.90(3)(i)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB} except, **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(i) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is 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 **[insert explanation]**.

[select applicable (more than one ground may be applicable)]*

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(i) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

6.9.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Consideration of whether a Supreme Court appeal should be commenced against a decision of the ERD Court

Pursuant to s.90(3)(i)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public except, Joe Bloggs, CEO ABC Council, Susanne Mackey, Manager Environmental Services ABC Council and Ivana Citizen, Lawyer, XYZ Lawyers, be excluded from attendance at the meeting for Agenda Item 15 (Consideration of possible Supreme Court Appeal – 15 Boronia Way, Boronia Park).

The Council is satisfied that, pursuant to section 90(3)(i) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information relating to actual litigation involving the Council or an employee of the Council in that legal advice as to the chances of success of an appeal to the Supreme Court against the decision of the ERD Court handed down recently for a development proposal at 15 Boronia Way, Boronia Park will be discussed, and this information ought not be made available to the public as it could detrimentally affect the Council's position if such an appeal is commenced.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because disclosure of this information may compromise the Council's position if an appeal is commenced.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 15 (Consideration of possible Supreme Court Appeal) in confidence under section 90(2) and (3)(i) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the legal advice relating to this Item and all minutes be retained in confidence until such a time as any appeal in relation to this matter has been finalised, and that this order be reviewed every 12 months.

6.10 Section 90(3)(j) – ‘information provided on a confidential basis by or to a public authority or official’

Section 90(3)(j)(i) of the Act provides a ground for a council or a committee to order that the public be excluded from a meeting in order to *receive, discuss or consider* in confidence any matter which would reveal information provided on a confidential basis by or to a Minister of the Crown, another public authority or a public official who is not an employee of the council, or a person engaged by the council. In addition, subsection (3)(j)(ii) requires that a public interest balancing test be satisfied before this ground of exclusion may be relied upon (see paragraph 4). Therefore, there are two tests which must be satisfied before a confidentiality order may be made citing section 90(3)(j); the first being that information provided on a confidential basis by or to a Minister of the Crown, another public authority or a public official who is not an employee of the council, or a person engaged by the council would be divulged; and the second being that the reasons for closing a meeting to the public clearly outweigh the general requirement for meetings to be held in public.

In considering the proper interpretation of ‘confidential communications’ in the context of the Act, the South Australian Supreme Court found that ‘would’ is synonymous with ‘could’, and an objective test should be applied to determine whether a communication was made in confidence.⁸ In this case, it was held that the document in issue had been obtained under the promise of secrecy and therefore a promise of confidence. Additionally, it has been held that the test of confidentiality is satisfied at the time the information was supplied and it was regarded as confidential.

6.10.1 Section 90(3)(j) Order

Pursuant to s.90(3)(j)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB} except, **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(j) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would divulge information provided on a confidential basis by or to:

- **a Minister of the Crown, or**
- **[Insert Name of other Public Authority or official if applicable]** (not being an employee of the Council, or a person engaged by the Council).

[select applicable (more than one ground may be applicable)]*

[insert explanation]

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

⁸ *Bray and Smith v WorkCover* (1994) 62 SASR 218.

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(j) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

6.10.2 Example

This example is not exhaustive, and is given merely to illustrate a situation where a confidentiality order could be made.

Consideration of Update on State Sports Stadium

Section 90(3)(j) Order

Pursuant to s.90(3)(j)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public except, Joe Bloggs, CEO ABC Council, be excluded from attendance at the meeting for Agenda Item 10 (Update on State Sports Stadium).

The Council is satisfied that, pursuant to section 90(3)(j) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would divulge information provided on a confidential basis by or to The Recreation and Sport Minister in that information between the Council, Minister and relevant parties relating to the Sports Stadium is requested by the Minister to remain confidential until all contracts are signed.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the update provided will include discussion and consideration of material relevant to the project that the Minister has requested remain confidential.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 10 (Update on State Sports Stadium) in confidence under section 90(2) and (3)(j) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that all minutes and correspondence be retained in confidence for a period of 6 months.

6.11 Section 90(3)(k) – ‘tenders’

The necessary and appropriate need to *receive, discuss or consider* in confidence matters or information relating to tenders for the supply of goods, the provision of services or the carrying out of works is a ground to exclude the public from a council or a committee meeting under section 90(3)(k) of the Act. However, section 91(8)(b) and (ba) provide that a council may not make an order to prevent the disclosure of the identity of a successful tenderer for the supply of goods and services, or of the council’s reasons for selecting the successful tenderer, once the successful tenderer is selected.

The Ombudsman noted that, beyond the requirement to ensure that the public has the ability to ascertain what the council has agreed to pay for a good or service and who is to supply or provide that good or service, councils have discretion under the Act to determine the extent to which confidentiality applies to the tender decision making process.⁹ The Ombudsman goes on to suggest that tender documents which reveal detailed information about, for example, a company’s pricing strategy, other sensitive product information, or detailed discussions analysing elements of a project or tender appraisal process might reasonably be considered in confidence.

The Local Government Association of South Australia’s model procurement policy, *Council as a Buyer: Model Policy for the Acquisition of Goods and Services*, makes clear reference to the transparency of decisions made in relation to the purchasing activities of a council. The Ombudsman interprets this to mean transparency of all decisions made, with the exception of maintaining confidentiality for sensitive commercial information of the type identified above.

6.11.1 Section 90(3)(k) Order

Pursuant to s.90(3)(k)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB} except, **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(k) of the Act, the information to be received, discussed or considered in relation to this Agenda Item are tenders for the:

- **supply of goods, or**
- **the provision of services, or**
- **the carrying out of works.**

[select applicable (more than one ground may be applicable)]*

[insert explanation]

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

⁹ Ombudsman SA,, *In the Public Eye, an audit of the use of meeting confidentiality provisions of the Local Government Act 1999 in South Australian councils*, (November 2012),

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(k) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

6.11.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Consideration of tender for the supply of cleaning services to the Council

Pursuant to s.90(3)(k)

Pursuant to s.90(2) of the *Local Government Act 1999* the Council orders that all members of the public except, Joe Bloggs CEO ABC Council, be excluded from attendance at the meeting for Agenda Item 13 (Cleaning Services Tender).

The Council is satisfied that, pursuant to s.90(3)(k) of the Act, the information to be received, discussed or considered in relation to this Agenda Item are tenders for the provision of services in that they are for the provision of cleaning services for the Council's buildings.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the information to be disclosed and discussed has the potential to impact adversely on each of the tenderers as competitive commercial information will be disclosed.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 13 (Cleaning Services Tender) in confidence under section 90(2) and (3)(k) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the tender documents and all minutes be retained in confidence for a period of 6 months or until the tender process has been finalised.

This order is subject to section 91(8)(b) of the Act which provides that details of the identity of the successful tenderer must be released once Council has made a selection. In addition, section 91(8)(ba) of the Act requires details of the amount(s) payable by the Council under a contract for the provision of cleaning services must be released once the contract has been entered into by all concerned parties.

6.12 Section 90(3)(m) – ‘information relating to a proposed amendment to a Development Plan before consultation’

A council or a committee may rely upon section 90(3)(m) of the Act to exclude the public from a meeting in order to *receive, consider or discuss* any information relating to a proposed amendment to a Development Plan under the *Development Act 1993* (SA) (“Development Act”) before a Development Plan Amendment proposal relating to the amendment is released for public consultation under the Development Act. Hence, there are two limbs to this ground of exclusion. Firstly, the matter or information must relate to a proposed amendment to a Development Plan under the Development Act and, secondly, the order must be made at a time before the proposed amendment to a Development Plan has been released to the public for consultation in accordance with the requirements under the Development Act.

6.12.1 Section 90(3)(m) Order

Pursuant to s.90(3)(m)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB} except, **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to section 90(3)(m) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information relating to an amendment under the *Development Act 1993* before a Development Plan Amendment report relating to the amendment is released for public consultation under that Act **[insert brief explanation]**.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(m) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

6.12.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

Discussion of unreleased Development Plan Amendment

Pursuant to s.90(3)(m)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public except, Joe Bloggs CEO ABC Council, be excluded from attendance at the meeting for Agenda Item 12, (Historical Development Plan Amendment).

The Council is satisfied that, pursuant to section 90(3)(m) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information relating to an amendment under the *Development Act 1993* before a Development Plan Amendment report relating to the amendment is released for public consultation under that Act, in that a draft report prepared by DD Planners as part of Council's recent Historical Development Plan review will be considered.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances as the Development Plan amendment has not yet been finalised which could result in the public becoming inadvertently misinformed of the proposed changes.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 12, (Historical Development Plan Amendment) in confidence under section 90(2) and (3)(m) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the draft Development Plan Amendment report and all minutes be retained in confidence for a period of 6 months or such lesser period as may be determined by the Chief Executive Officer.

6.13 Section 90(3)(n) – ‘freedom of information’

Under section 90(3)(n) of the Act, a council or a committee may exclude the public from a meeting in order to *receive, consider or discuss* any information relevant to the review of a determination made by a council under the FOI Act. The information relevant to the review is likely to include the application, original determination, any documents relevant to the original application and any notes made by the accredited FOI officer during the decision making process.

6.13.1 Section 90(3)(n) Order

Pursuant to s.90(3)(n)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public^{NB} except, **[insert names and job title for staff members present and/or names of any other person]**, be excluded from attendance at the meeting for Agenda Item [...] **[insert brief description of agenda item]**.

The Council is satisfied that, pursuant to s.90(3)(n) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information relevant to the review of a determination of the Council under the *Freedom of Information Act 1991* **[insert explanation]**.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because **[insert reasons]**.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item [...] **[insert brief description of agenda item]** in confidence under section 90(2) and (3)(n) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the **[identify the documents and/or minutes relevant to Agenda Item X]** be retained in confidence **[for a period of (insert period of time i.e. 6 months, 18 months) or until (trigger can be an event i.e. the contract has been signed, a public announcement has been made)]** and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

^{NB} For these purposes a member of the public includes all persons (including staff), but does not include members of Council

6.13.2 Example

This example is not exhaustive, and is given to illustrate a situation where a confidentiality order could be made.

Request for Information by State Ombudsman regarding FOI determination

Pursuant to s.90(3)(n)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public except, Joe Bloggs CEO ABC Council, be excluded from attendance at the meeting for Agenda Item 12, (Request for Information by State Ombudsman regarding FOI determination).

The Council is satisfied that, pursuant to section 90(3)(n) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information relevant to the review of a determination of the Council under the *Freedom of Information Act 1991* in that correspondence from the Ombudsman's Office concerning the review and requesting documents will be considered.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because of the nature of the documents subject to the FOI request, in that they relate to a Code of Conduct investigation and because the application is currently subject to review.

Section 91(7) Order

Pursuant to s.91(7)

That having considered Agenda Item 12, (Request for Information by State Ombudsman regarding FOI determination) in confidence under section 90(2) and (3)(n) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the determination and review documents and all minutes be retained in confidence for a period of 6 months subject to any requirement to release documents in accordance with the *Freedom of Information Act 1991*.

7. Flexibility in applying section 90(2) and 90(3) of the Act

Section 90(2) of the Act provides that when it is considered to be necessary and appropriate to close a meeting to the public a Council or Committee can receive, discuss or consider in confidence any information or matter listed in section 90(3) of the Act. This means that provided the grounds to exclude the public in accordance with section 90(3) can be satisfied, a council or a committee is able to use these provisions in the following circumstances:

- to close a meeting to the public in order to receive information. It may be information from the Council itself or from a third party such as a presentation to the Council;
- the ability to receive and discuss information in confidence when a council or committee is not necessarily required to make a decision as a consequence of consideration of information;
- to receive, discuss and consider in confidence any information, but then for the Council's formal decision making process to be undertaken open to the public.

Further, prior to a council meeting the Chief Executive Officer has the power in accordance with section 83(5) of the Act to indicate on a document or report provided to members of the Council (or under separate notice) any information or matter contained in or arising from a document or report that may be considered in confidence, provided the Chief Executive Officer at the same time is able to specify the basis on which an order could be made under section 90(2) and (3) of the Act. This has the practical effect of requiring any items on the agenda to be kept confidential from the time the agenda is distributed to Council members until the meeting at which the item is to be considered. At the relevant meeting it is discretionary as to whether a council adopts such a recommendation. This means that after due and proper consideration a council may decide to consider the item in public and not adopt the recommendation given by the Chief Executive Officer.

Confidential Information can also be made available to Council members outside of the formal meeting process, which means it does not form part of the agenda or any supporting documentation. In these circumstances, each Council member is required to be bound by their obligations to not make improper use of information and to maintain confidentiality under sections 62(3) and (4a) of the Act.

8. Keeping Documents Confidential – Section 91(7)

A council or a committee can only resolve to keep documents confidential under section 91(7) of the Act if the Council or Committee has applied a ground under section 90(3) of the Act. The application of section 91(7) of the Act enables minutes, reports and associated documents to be kept confidential. The Act, however, does not permit the provision to be used in isolation. This means that a council or committee must first resolve to exclude the public from a meeting before it can further resolve to keep a document, such as minutes, confidential. This “two-step” process required by the Act is, in itself, 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. This means a council or a committee can resolve to exclude the public from a meeting for discussions to take place but does not need to proceed and resolve to keep documentation confidential.

9. Content of Minutes

The *Local Government (Procedures at Meeting) Regulations* require the details of the making of an order under section 90(2) of the Act to be included in the minutes. Section 90(7) of the Act provides that “a note must be made in the minutes of the making of the order and specifying:

- *the grounds on which the order was made; and*
- *the basis on which the information or matter to which the order relates falls within the ambit of each ground on which the order was made; and*
- *If relevant, the reasons that receipt, consideration or discussion of the information or matter in a meeting open to the public would be contrary to the public interest.*

The detail necessary to demonstrate the making of the order is for the Council or Committee to separately resolve to exclude the public under section 90(2) and to specify the ground under section 90(3) that is relied upon. Compliance with the above requirements requires more than simply stating the relevant ground under section 90(3) of the Act. Different tests apply to different grounds under section 90(3). They each require different legal and practical considerations to justify reliance on the particular ground. The factual reasons for the relevance and application of the ground in the circumstances must be provided and consideration of the public interest test must be demonstrated, if relevant to the ground relied upon. The view of the Ombudsman is that:

Councils (and Committees) must, after identifying the relevant paragraph of section 90(3) of the Act, then articulate the reasoning behind the order. Details of the reasons for relying on a particular paragraph in section 90(3) must be provided in order to allow the public to better understand the Council’s decision for moving into confidence. This is part of good decision making. Further, articulating reasons will also help the administrative staff and Councillors to think more carefully about why the public should be excluded from the meeting. In the latter case, this may also help add an appropriate measure of caution to weighing up the recommendations for secrecy.

The Regulations also require a note of the making of an order under section 91(7) of the Act in accordance with the requirements of sub-section 91(9). Sub-section (9) requires the resolution recorded in the minutes to include:

- the duration of the order; or
- the circumstances in which the order will cease to apply; or
- a period after which the order must be reviewed;
- the making of the order;
- the grounds on which the order was made; and
- (if applicable) whether the power to revoke the order will be delegated to an employee of the Council.

In the case of an order of specified duration:

- the duration of the order cannot be extended after the order has ceased to apply (as a result of the expiry of the period for which the order was specified to apply); and
- an order extending the duration of such an order cannot be delegated by the relevant council or council committee.

If the order operates for a period exceeding 12 months the order must be reviewed at least once every year. A Confidential Items Register will assist to identify relevant review dates and critical dates such as the expiration of an order.

10. Duty to protect confidentiality

Under the Act there is an explicit obligation to protect confidentiality for both Council members and Council employees.

Unless it is for the purpose of making a disclosure that is required or authorised by law, under the Act, a Council member, a former Council member a Council employee or a former Council employee must not disclose information or a document in relation to which there is an order of a council or council committee in effect under sections 90 and 91 requiring the information or document to be treated confidentially. A breach of the relevant provisions amount to a criminal offence that, if proven, is subject to a financial penalty or a term of imprisonment.

The public interest balancing test ⁵⁰

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

1. *The public interest test favours openness*

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX 2**ANNUAL REVIEW OF CONFIDENTIAL ITEMS: SOME TIPS AND TRAPS!**

1. A confidentiality order made under Section 91(7) of the *Local Government Act 1999* must specify:
 - the duration of the order; or
 - the circumstances in which the order will cease to apply; or
 - a period after which the order must be reviewed.

Any order that operates for a period exceeding 12 months must be reviewed at least once in every year. The review is not just of orders made within the last 12 months, but of every such order a Council has made. For example, a document that is subject to a confidentiality order for 3 years must be reviewed every 12 months.

2. The order will lapse if the time or event specified has been reached or carried out. There is no need for a Council to resolve for the confidential order to be lifted. Once the order has lapsed, the minutes and/or documents previously protected by the order automatically become public. At this point in time it is important that the Council make this information publicly available and also include it on the Council's website. It is recommended that the Code of Practice for Access to Council and Committee Meetings and Documents include a provision as to when confidentiality orders will be reviewed.
3. The duration of an order cannot be extended after the order has ceased to apply (as a result of the expiry of the period for which the order was specified to apply).
4. It is best practice to record all orders (whether they exceed 12 months or more) in a confidential items register. This will assist orders that are less than 12 months to be tracked and diarised, either for release or if unable to be released publicly, to be subject to a further order to keep the documents in confidence.
5. The annual review in accordance with Section 91(9) of the Act is merely a 'review'. This does not mean every order needs to be remade. The only orders that need to be remade are those where the existing order is due for expiration and the documents are assessed against the relevant ground contained in Section 90(3) and determined to be required to remain confidential.
6. The review should include an assessment of whether the grounds for non-disclosure are still relevant and, if so, provide the relevant grounds and reasons for the minutes and/or documents remaining confidential.
7. It is good practice to avoid making orders for 12 months because this can cause an impost when the review is due to be undertaken. Avoiding 12 month orders may also avoid an inadvertent lapse of a confidential order that occurs before the annual review takes place.
8. The Act has been misconstrued to suggest that Section 90 orders can only be for a 12 month period.

9. The conduct of the annual review does not need to be undertaken by Council. The review can be delegated to the Chief Executive Officer and sub-delegated to an employee of a Council if appropriate.
10. While a Council may delegate the power to undertake an annual review, a Council cannot delegate the power to apply Sections 90(3) and 91(7) of the Act.
11. In relation to an order for a specified time, an order extending the duration of such an order cannot be delegated by the relevant council or committee.
12. It is not for Council officers to determine whether the confidential status of documents should remain. The appropriate process is for the review to prepare a report to Council making recommendations with respect to whether each item is to be retained in confidence.
13. Part of the annual review can be addressed by an 'information only' report. This report will include those orders that have expired or are about to expire where there is no requirement for a Council to resolve to continue to keep the documents confidential, and any orders that can be revoked under delegated power. The other part of the review will include a report that addresses matters requiring a decision by a Council. This will only include those items where the confidentiality orders needs to be remade in whole or in part.
14. A review of confidential items must be undertaken on an 'item by item' basis. If there is a requirement for documents to remain confidential and a need for a new order to be made, a 'fresh' application of the grounds under Section 90(3) must be applied and a new motion must be put to the Council – moved, seconded and carried. A Council cannot resolve to 'continue' a previous confidentiality order or for documents to 'remain' confidential. Not only is this approach consistent with good decision making principles (providing adequate reasons) it is also consistent with the requirements set out in Section 91(9)(b) of the Act.
15. A review is undertaken for the purpose of ascertaining whether the documents can be released for confidentiality. This may occur either by the expiration of the order due to the passage of time or by revoking the order. The decision to revoke an order can be made by the Council or Chief Executive Officer or staff member with appropriate delegation under Section 91(9)(c) of the Act.
16. A Council may resolve to exclude the public from a meeting to discuss and undertake consideration of the recommendations arising from the annual review in confidence, subject to the application of the relevant ground under Section 90(3) of the Act. However, Section 90(3) of the Act must be applied separately to each item and not 'en bloc'.