

## Confidentiality Provisions – Code of Practice

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<b>Applicable Legislation:</b>	<i>Local Government Act - Sections 83(5) Council &amp; 87(10) Committee.); Section 90[3] and Section 91(7); (Section 91[9]) and as defined in Appendix 1 and 2.</i>
<b>Relevant Policies:</b>	<i>Code of Conduct Elected Members and Committee Members; Council Representation and Delegations; Access to Meetings - Code of Practice; Review of Council Decisions Policy (including Handling Complaints).</i>
<b>Related Procedures:</b>	<i>Public Consultation <b>not</b> required prior to adoption</i>
<b>Delegations:</b>	<i>Berri Barmera Council Delegations Register</i>

### 1. Purpose

The objective of this Policy is to:

- Clearly outline to the community for what purpose and on what basis a Council may apply the provisions of the Local Government Act 1999 to restrict public access to meetings or documents.
- Prepare and provide information on Council's code of practice to the community.
- Summarise the legal position relating to public access to Council Meetings and documents.

The document is intended to provide clear guidance as to the basis upon which the Berri Barmera Council may use the provisions in the Local Government Act 1999 to restrict public access to meetings or documents. It also includes information on:

- the relevant provisions in the Act
- adopted policy on the use of these provisions
- the process that is utilised to restrict public access when this is considered necessary
- the need to identify the Council contact officer should additional information be required, and
- refers to a process for dealing with any grievances.

This document sets out the policy framework of the Berri Barmera Council for access to meetings and documents. It includes:

- a statement of Council principle
- access to the agenda for meetings
- public access to meetings
- process to exclude the public
- matters for which Council, or a Committee, can order that the public be excluded
- how Council will approach the use of the confidentiality provisions
- public access to documents
- accountability and reporting to the community, including the availability of the code, and
- grievances about the use of the code by Council.

## 2. Definitions

<b>Council</b>	means Berri Barmera Council
<b>Act</b>	means the Local Government Act 1999
<b>CEO</b>	refers to the Chief Executive Officer (including their delegate) of the Berri Barmera Council
<b>Agenda</b>	as defined in the Local Government Act 1999 means a list of items of business to be considered at a meeting
<b>Elected Members</b>	includes the Councillors and the Mayor of the Berri Barmera Council
<b>Minutes</b>	a written record of the proceedings at every meeting of the Council or a Committee in accordance with the Act and Regulations

## 3. Principles

In fulfilling the role of an effective Council that is responsive to the needs of the community and operates within the legal framework as prescribed by the Local Government Act, 1999 the Berri Barmera Council is fully committed to the principle of open and accountable government. However Council also recognises that on a limited number of occasions it may be necessary in the broader community interest to restrict public access to discussion or documents.

## 4. Access to the Agenda for Meetings

At least three clear days before a Council and Council Committee Meeting (unless it is a special meeting) the Chief Executive Officer (CEO) must supply a copy of the agenda for the meeting to all elected members and have the agenda on public display in the principal office of the Council and on Council's website [www.berribarmera.sa.gov.au](http://www.berribarmera.sa.gov.au). Items listed on the agenda are to be described with reasonable particularity and accuracy. Copies of any documents and reports (where practicable) that are to be considered at the meeting, are to be supplied to members. A reasonable number of copies are also to be available for public inspection as soon as practicable after they are supplied to members of Council.

Distribution of agenda papers to members of Council, or members of a Council Committee, may include advice from the CEO of the Council (after consultation with the principle member of the Council, or in the case of a Committee - the presiding member) that a document or report on a particular matter may be considered in confidence with the public to be excluded. Where this occurs, the CEO must specify the basis under which the order could be made in accordance with Section 90(3) of the Act. (Ref: Sections 83(5) Council & 87(10) Committee of the Act.)

## **5. Public Access to Meetings**

Public access to Council (and Council Committee) Meetings is guaranteed and encouraged, except where the Council (or the Council Committee) believes it is necessary in the broader community interest to exclude the public from the discussion of a particular matter (refer Section 90(3) Local Government Act).

The public will only be excluded when considered proper and necessary, i.e. the need for confidentiality outweighs the principle of open decision making.

It is not unlawful for members of Council, a committee and staff to participate in informal gatherings or discussion provided that a matter which would ordinarily form part of the agenda for a formal meeting is not dealt with in such a way as to obtain, or effectively obtain, a decision outside a formally constituted meeting of Council or committee. The Council is not bound to hold an informal gathering open to the public in accordance with Section 90(1) of the Act as openness to the public only applies to Council and Council Committee meetings. This means that section 90(2) to exclude the public has no role to play.

It is recommended that public notice of an informal gathering, such as a workshop, be given and that the notice clearly indicate whether or not the informal gathering will be open to the public.

## **6. Process to Exclude the Public from a Meeting**

Before a meeting orders that the public be excluded to enable the receipt, discussion and consideration of a particular matter, the meeting must, in public, formally determine if this is necessary and appropriate, and then pass a resolution to exclude the public. 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. For the operation of section 90(2) a member of public does not include a member of Council. If this occurs then the public must leave the room.

Once Council, or Committee, has made the order it is an offence for a person, who, knowing that an order is in force, enters or remains in a room in which such a meeting is being held. It is lawful for an employee of Council or a member of the Police to use reasonable force to remove the person from the room if he/she fails to leave on request. It is recommended however, that if any form of force is required, that it be left to the police to deal with.

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

Please note that the Council, or Council Committee, can by inclusion within the resolution, permit a particular person or persons to remain in the meeting. An example would be allowing a ratepayer who is suffering personal hardship to remain in the meeting when their circumstances concerning the payment of rates is being discussed.

It is the practice of this Council that for the convenience of the public present at a meeting, where it is resolved to consider a matter in confidence, that this matter, unless there are pressing reasons as to why it should be debated at that point of the meeting, will. This is the preferred option of Council rather than asking the public to leave the

room, to wait around for however long it takes until the matter is concluded and then invite them back to the meeting room with the possibility of the same process being repeated for a subsequent matter.

**7. Matters for which Council or a Committee can Order that the Public be Excluded (Section 90 [3])**

Council, or a Council Committee, may order that the public be excluded in the following circumstances (in accordance with the requirements of Section 90(3) of the Act:

- (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
- (b) information the disclosure of which:
  - could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
  - would, on balance, be contrary to the public interest;
- (c) information the disclosure of which would reveal a trade secret;
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which:
  - could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
  - would, on balance, be contrary to the public interest;
- (e) matters affecting the security of the council, members or employees of the council, or council property, or the safety of any person;
- (f) information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial;
- (g) matters that must be considered in confidence in order to ensure that the council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;
- (h) legal advice;
- (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;
- (j) information the disclosure of which:
  - would divulge information provided on a confidential basis by or to a Minister of the Crown, or another public authority or official (not being an employee of the council, or a person engaged by the council); and
  - would, on balance, be contrary to the public interest;
- (k) tenders for the supply of goods, the provision of services or the carrying out of works;
- (l) information relating to a proposal to prepare or amend a designated instrument under Part 5 Division 2 of the Planning, Development and Infrastructure Act 2016 before the draft instrument or amendment is released for public consultation under that Act;
- (m) information relevant to the review of a determination of a council under the *Freedom of Information Act 1991*.
- (n) information relating to a proposed award recipient before the presentation of the award.

The Act provides for a definition of “personal affairs”, being a person’s financial affairs, criminal records, marital or other personal relationships, personal qualities, attributes or

health status, or that person's employment records, employment performance or suitability for a particular position, or other personnel matters relating to the person, but does not include the personal affairs of a body corporate.

Council, or a Council Committee, cannot make an order under section 90(2) that the public be excluded from a meeting only on the basis that discussion of a matter in public may;

- cause embarrassment to the Council or Committee concerned, or to members or employees of the Council; or
- cause a loss of confidence in the Council or the Committee.[Section 90(4)]

If a decision to exclude the public is taken, Council or the Council Committee will make a note in the minutes of the making of the order and the grounds on which it was made.

## **8. Public Access to Minutes**

Minutes of a meeting of the Council or Council Committee will be publicly available within five days after the meeting.

## **9. Use of the Confidentiality Provisions**

Any consideration of the use of the confidentiality provisions to exclude the public from the discussion of a particular matter at a meeting will require the identification of one or more of the grounds listed within section 90(3) of the Act and the factual reasons for the relevance and application of the ground(s) in the circumstances. These are listed in the previous section of this code.

The policy approach of the Council is:

- The principle of open and accountable government is strongly supported.
- Confidentiality provisions will only be utilised after careful consideration and when considered proper and necessary.
- Information of the grounds on which an order to exclude the public is made will be conveyed to the public at the time of them being ordered to leave the meeting.
- Once discussion of the matter is concluded, the meeting will then consider if it is necessary to make an order that a document associated with this agenda item remain confidential. In determining this, the meeting shall have regard to the provisions of Section 91.
- If the meeting determines that it is proper and necessary to keep a document confidential, then a resolution for an order to this effect is required to be carried by the meeting in accordance with section 91(7) of the Act.
- The Council will not consider a number of agenda items "in confidence" together i.e. en bloc. It will determine each item separately and consider the exceptions relevant to each item.
- Once discussion of the matter is concluded and the public have returned, the decision of the meeting in relation to this matter will be made publicly known unless the Council has resolved to order that some information remain confidential. Details relating to any order to keep information or a document confidential in accordance with Section 91 (7) are also to be made known. When making an order the meeting 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. If the section 91(7) order is to apply for a period exceeding 12 months, then this order must be reviewed every 12 months from the date it was made. This,

- along with the making of the order pursuant to section 90(2) and the grounds on which it was made pursuant to section 90(3) are also to be recorded in the Minutes.
- In all cases the objective is that the information be made publicly available at the earliest possible opportunity and that the community is informed of any Council order and the associated implications.
- The use of all confidentiality provisions will be reported to the community and included in Council's Annual Report. Where a person provides information to the Council and requests that it be kept confidential the Council is not able to even consider this request unless the matter is one that falls within Section 90 (3). If this is the case, Council will then be in a position to consider the request on its relative merits.

## **10. Public Access to Documents**

The Council and Council Committee will only order that a document associated with a discussion from which the public are excluded will remain confidential if it is considered proper and necessary in the broader community interest. Council can only make such orders in relation to documents that are considered in confidence under Section 90(3).

Once a matter has been dealt with, the Council/Council committee may order that a document relating to the matter considered in confidence is to be kept confidential. There are some exceptions. Council/Council Committees must not make an order to prevent:

- the disclosure of the remuneration or conditions of service of an employee of the Council after the remuneration or conditions have been set or determined; or
- the disclosure of the identification of a successful tenderer for the supply of goods or provision of services (including the carry out of works) or of any reasons adopted by the Council as to why a successful tenderer has been selected; or
- The disclosure of the amount or amounts payable by the Council under a contract for the supply of goods or the provisions of services (including the carrying out of works) to, or for the benefit of, the Council after the contract has been entered into by all parties to the contract; or
- the disclosure of the identity of land that has been acquired or disposed of by the Council, or of any reasons adopted by the Council as to why land has been acquired or disposed of by the Council

Where keeping a document confidential is considered proper and necessary, a resolution to this effect is required which shall include:

- the grounds for confidentiality; and
- the duration of the order or circumstances in which the order will cease to apply or when the order must be reviewed – if the order has a duration of more than 12 months, the order must be reviewed at least once in every year (if applicable) whether the power to revoke the order will be delegated to an Employee of the Council [s.91(9)]

Requests to access Council and Council Committee documents can be made under the Freedom of Information Act 1991. Any inquiries in relation to the process for seeking access documents held by Council should be directed to Council's accredited Freedom of Information Officer on Phone 8582 1922.

## **11. Review of Confidentiality Orders**

A confidentiality order made under section 91(7) of the Act 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. In any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year.

An order will lapse if the time or event specified has been reached or carried out. There is no need for the Council to resolve for the confidentiality order to be lifted. Once the order has lapsed, the minutes and/or documents automatically become public.

A review of the reports or documents that were considered under the provision of sections 90(3) and 91(7) of the Act will be conducted every 3 months to ensure that items are released in accordance with the resolution of Council, when the confidential provision no longer applies.

Orders that exceed 12 months must be reviewed annually and the Council must assess 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. The conduct of the annual review can be delegated to the Chief Executive office and sub-delegated to an employee of the Council if appropriate. If there are any items that require a fresh confidentiality order because the original order is about to expire, then the reviewer will prepare a report to Council making recommendations with respect to each item to be retained in confidence. Each item must then be addressed separately and assessed against section 90(3) and section 91(7) of the Act. While a Council may delegate the power to undertake an annual review, the Council cannot delegate the power to apply sections 90(3) and 91(7) of the Act.

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. Section 90(3) of the Act must be applied separately to each item and not en bloc.

If there is no longer any need for the confidentiality order then the Council or Council Committee may delegate to an employee of the Council the power to revoke an order made in accordance with section 91(7) of the Act. The Council or Council committee may also include in the resolution whether any delegation is given to an employee to revoke the order and if relevant, any conditions associated with the delegation.

## **12. Accountability and Reporting to the Community**

A report on the use of sections 90(2) and 91(7) by the Council and Council committees must be included in the annual report of a Council as required by Schedule 4 of the Act. This supports commitment to the principle of accountability to the community. The reporting should include the following information, separately identified for both Council and Council committees:

- Number of occasions each of the provisions of sections 90(2) and 90(3) were utilised.
- Number of occasions each of the provisions of sections 90(2) and 90(3) and section 91(7) were utilised, expressed as a percentage of total agenda items considered'
- An indication of any particular issues that contributed to the use of confidentiality provisions on more than one occasion e.g. a proposal to acquire a parcel of land was considered on 3 separate occasions;
- Number of occasions that information originally declared confidential has subsequently been made publicly available; and
- Number of occasions that information declared confidential has not been made publicly available and the reason for this in each case.

### **13. Availability of Code**

A copy of this Code will be available from the principal office of the Council, 19 Wilson Street, Berri and on Council's website [www.berribarmera.sa.gov.au](http://www.berribarmera.sa.gov.au).

### **14. Grievance**

*Note: Refer to Council's Review of Council Decisions (Including Handling Complaints) Policy*

A grievance about the use of confidentiality provisions should be expressed in writing, addressed to the CEO of Council, unless the Council grievance procedures provide for an officer other than the CEO to receive grievances.

Council is required to establish procedures for the review of decisions of:

- Council, and its committees; employees of the Council, and other persons acting on behalf of the Council.

Should a person be aggrieved about public access to either a meeting or a document then they can lodge an application for consideration under the grievance procedure established by Council.

A person may also lodge a complaint with the Ombudsman, who may carry out an investigation if it appears (to the Ombudsman) that a Council (or Committee) may have unreasonably:

- excluded members of the public from a meeting; or
- prevented access to documents.

If an investigation is conducted, the Ombudsman must supply the Minister and the Council with a copy of the written report that is prepared. After considering the report of the Ombudsman if the Minister believes the Council has unreasonably excluded members of the public from a meeting or prevented access to a document, he/she may give directions to a Council about the future exercise of its powers concerning the exclusion of the public from meetings or the making of orders to withhold a document (or part thereof) or to release information that should, in the opinion of the Minister, be available to the public.

Before taking such action, the Minister must give the Council a reasonable opportunity to make submissions to the Minister in relation to the matter.



## **Appendix 1**

### **LOCAL GOVERNMENT ACT 1999 PROVISIONS**

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

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

83 (5) Council & 87 (10) Committee: - The Chief Executive Officer (CEO) may, after consultation with the principal member of Council, or in the case of a Committee the presiding member, indicate on a document or report (or on a separate note) provided to members of Council or Committee, as the case may be, that the matter may, if the Council or Committee so determines, be considered in confidence. The CEO is required to specify at the same time the basis on which such an order can be made.

84 (1a) that the notice and the agenda for of council meetings – be on public display or published on a website

88 (1a) that the notice and the agenda for of committee meetings – be on public display or published on a website

90 (2) & (3): - Circumstances where Council may order that the public can be excluded from attendance at a meeting, or part of it, to enable a matter/s to be considered in confidence.

91 (7): - Circumstances when a document considered in confidence can be ordered to remain confidential.

91 (8): - Circumstances where a Council must not order that a document remain confidential.

91 (9): - The Council or Committee must specify the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order will be reviewed. The power to revoke an order can also be delegated to an employee of Council.

92: - Requires the Council to prepare and adopt a code of practice relating to access to meetings and documents. Prior to adoption, alteration or substitution the proposed code (or changes) must be available for inspection and purchase. Council is also required to follow the relevant steps set out in its Public Consultation Policy.

94: - Provides that the Ombudsman may, on receipt of a complaint, investigate the use of these provisions.

132 (1), and (3a) That the Council must make documents publicly available for inspection at the Principal office of Council, in electronic form or on published on a website within a reasonable time after they are available at the principal office of the Council.

270: - Council to establish grievance procedures.

Council should consider how a member of the community who seeks to access the provisions in the Act should go about this. An option could be to:

- attach to the code of practice a copy of the Act provisions in full, or indicate that they are available for inspection on request.

## **Appendix 2**

### **Supplementary document - for possible Council use:**

## **DRAFT EXAMPLE RECOMMENDATIONS/RESOLUTIONS:**

### **Example Recommendation/Resolution 1:**

#### **- General - Section 90(2)**

It is recommended (resolved):

- (a) that under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence (agenda item No. ...)
- (b) that the (Council/Committee) is satisfied that it is necessary that the public be excluded to enable the (Council/Committee) to (receive, discuss, or consider) the (information/matter/report) at the meeting on the following ground/s:
  - \* [identify one or more of the grounds in Section 90(3)]
- (c) that, accordingly, on this basis, the principle that meetings of the (Council/Committee) should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.

### **Example Recommendation/Resolution 2:**

#### **- Public Official or Authority Request/Direction - Section 90(3)(j)**

It is recommended (was resolved) that under the provisions of Section 90(3)(j) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence information relating to (identify subject without breaching confidence) provided to the Council by (a public official or authority - give name) with a (request/direction) that it be treated by the Council as confidential.

### **Example Recommendation/Resolution 3:**

#### **- Development Plan - Section 90(3)(m)**

It is recommended (was resolved) that under the provisions of Section 90(3)(m) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence information relating to a proposed amendment to (a Development Plan) (Alternative would be to specify which Development Plan) under the *Development Act 1993* before a Plan Amendment report in relation to the amendment is released for public consultation under the Act.

### **Example Recommendation/Resolution 4:**

#### **Legal Obligation - Section 90(3)(g)**

It is recommended (was resolved) that under the provisions of Section 90(3)(g) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting (in order to ensure that the Council does not breach any law, order or direction of a court or tribunal constituted by law, or other legal obligation or duty).

### **Example Recommendation/Resolution 5:**

#### **Order for document to remain confidential - Section 90(7)**

It is recommended (was resolved) that an order be made under the provisions of Section 90(7) of the Local Government Act 1999 that the undermentioned document (or part of such document) including the minutes of the (Council/Committee) relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds that (identify Section 90(3) reason) (for a period of ...give date) **OR** (until... here list the circumstances in which the order will cease to apply) **OR** (for a period of ... after which this order shall be reviewed).

**Document:** - Report of CEO (Appendix to report of CEO if part only - example).

### **Example Recommendation/Resolution 6:**

#### **- Delegation to Officer - Section 91 (9)(c).**

It is recommended (was resolved) that the Chief Executive Officer be authorised to revoke the order made on (date) by the (Council/Committee) under Section 91(9)(c) of the Local Government Act 1999 in relation to (details of matter) (Minute Number ... refers), subject to (outline the conditions or circumstances which will allow the CEO to revoke the order e.g., the acquisition or disposal of land has been completed).

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