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Responsible Officer:	Chief Executive Officer
Applicable Legislation:	<i>Local Government Act 1999</i>
Relevant Policies:	
Related Procedures:	
Compliance Standard:	Section 92 Local Government Act 1999

Statement of Principle

The District Council of Robe supports the principle that the procedures to be observed at a meeting of Council or a Council Committee should contribute to open, transparent and informed decision-making and encourage appropriate community participation in the affairs of Council. 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.

Objectives

The objectives of this code are to:

- ✦ clearly outline to the community for what purpose and on what basis Council may apply the provisions of the Act (*Local Government Act 1999*) to restrict public access to meetings or documents
- ✦ provide information on Council's code of practice to the community
- ✦ summarise the legal position relating to public access to Council and committee meetings and documents.

NB - These guidelines relate to the provisions of the Act. See **Appendix 1**.

Introduction

The code intends to provide clear guidance as to the application of the provisions in the Act 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 Council contact officer should additional information be required
- ✦ a process for dealing with any grievances.

It sets out the policy of 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 confidential provisions
- ✦ public access to documents
- ✦ accountability and reporting to the community, and the codes availability
- ✦ grievances about the use of the Code by Council
- ✦ Review of the Code.

Community Involvement in the Development of the Code

Council is required prior to adopting a code of practice, and prior to alteration or substitution of a code, to make copies available for inspection or purchase at the principal office. In involving the community, Council must follow the relevant process set out within Council's community consultation policy. A copy of that policy can be accessed at the Council office during normal business hours or on Council's website www.robe.sa.gov.au.

Access to the Agenda for Meetings

At least three clear days¹ before a Council or Committee Meeting (unless it is a special meeting) the CEO (Chief Executive Officer) must give written notice of the meeting to all Council/ Committee Members setting out the date, time and place of the meeting and the notice must contain or be accompanied by the agenda for the meeting. The notice and agenda are also to be placed on public display at the principal office of Council at the same time as they are forwarded to Council and Committee Members. Items listed on the agenda are to be described with reasonable particularity and accuracy. The practice of Council is to place on public display, three days prior to the meeting, a list of the items of business plus any documents and reports relating to these matters (with the exception of any matters that might be indicated as potentially subject to the making of an order of confidentiality). Copies can be viewed or downloaded on Council's website.

Note: - these provisions apply to Council meetings, committees that have as part of their responsibility some regulatory activities and those other committees to which Council has determined these procedures will apply. The committees involved are listed as appendix 2 to this code. Where a committee is not performing a regulatory activity these procedures may be varied, e.g. notice may be given in a form decided by the committee, and need not be given for each meeting separately. Public notice may be given at a place determined by the CEO taking into account the nature and purpose of the committee.

Distribution of agenda papers to members of Council, or members of a committee, may include advice from the CEO of Council (after consultation with the principal member of 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 such an order could be made.

The following is an example (this could be included in the copy that is placed on public display):

The Council Services Committee is to consider tenders for the provision of electrical services. The document outlining the tenders received and the agenda item are clearly marked by the CEO to indicate that they may need to be considered in confidence under clause 90 (3)(k) - tenders for the supply of goods, provision of services or the carrying out of works.

¹ clear days' means that the time between the giving of the notice and the day of the meeting, but excluding both the day on which the notice was given and the day of the meeting, e.g. notice is given on a Thursday for a following Monday meeting, the clear days are Friday, Saturday and Sunday.

Should the council not confirm, and thereby not place an order of confidentiality on an item that the CEO has indicated may be considered as such, then a copy of the document will be available to the public at the meeting (publicly tabled) and placed on public display the next working day.

Public Access to Meetings

Council and Committee meetings are open to the public and attendance is encouraged, except:

- where Council (or the Committee) believes it is necessary in the broader community interest to exclude the public from the discussion of a particular matter in accordance with Section 90 (3) of the Act; or
- when holding a meeting by electronic means in accordance with the '*Public Health Emergency: Electronic Participation in Council Meetings (No 1) Notice*' issued on 31 March 2020..

The public will only be excluded when considered proper and necessary i.e. the need for confidentiality outweighs the principle of open decision-making. The following is an example (this could be included in the copy placed on public display):

Council is intending to bid at an auction to acquire land and would not want others involved, such as the vendor to have prior knowledge of what Council was setting as an upper limit to bid at the auction, as to do so would prejudice the position of Council and disadvantage the community.

Council encourages public attendance/involvement at Council and Committee meetings through public notification of meetings.

It is not unlawful for members of Council, a Committee and employees 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 following are examples of informal gatherings or discussions that may be held in accordance with section 90(8) of the Act:

- ✦ planning sessions associated with the development of policies and strategies
- ✦ briefing or training sessions
- ✦ workshops
- ✦ social gatherings to encourage informal communication between members or between members and staff.

Process to Exclude the Public

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 while dealing with that particular matter. If this occurs then 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. For the operation of section 90(2) of the Act a member of the public **does not** include a Member of Council. Once Council or a 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 force to use reasonable force to remove the person from the room if that person fails to leave on request. Once discussion on that particular matter concludes, 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 Council, or the 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 policy of 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 debate should take place at that point of the meeting, will be deferred until all other business has been dealt with. This is the preferred option of Council.

Matters for which Council, or a Committee can Order that the Public be Excluded (Sect. 90(3))

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

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

Of the grounds, particular note should be made of sections 90(3)(b), (d) and (j) of the Act which require a Council to meet two separate criteria before the public can be excluded. When a Council is looking at applying any one of these three grounds it will be necessary for a Council to satisfy both elements of each ground. The first limb requires a Council to identify whether the facts of the matter satisfy the particular ground specified. For example, a Council should readily be able to identify if the facts of the matter:

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

The second limb is the 'public interest' test. The test requires Council to apply the facts of the matter and determine whether or not disclosure would be **contrary to the public interest**. Principles of good decision making require Council to demonstrate the relevance and application of the public interest test: it is not sufficient just to say that it would be contrary to the public interest to consider the matter in public.

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

- ✦ in the public interest as opposed to, of interest to the public
- ✦ of concern or benefit to the public, not merely of individual interest.

This is a concept that will have different considerations in each matter.

The Act provides 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. This is an inclusive (not exhaustive) list of personal affairs matters and so can always, relevantly, be added to by the Council.

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

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

If a decision to exclude the public is taken, Council or the committee is required to make a note in the minutes of the making of the order and the grounds on which it was made. Minutes of a meeting of Council must be publicly available within five days after the meeting. The underlying principle of the Act is to provide for transparency and accountability by local government in its business and everyday operations, and this is achieved by the public having, as a matter of right, access to:

- ✦ council and committee meetings
- ✦ the minutes and documents discussed at those meetings.

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

A Council's reasoning must be able to withstand objective scrutiny because the exclusion of the public goes to the fundamental principle of transparency and accountability. With the powers of review available to the Ombudsman, a Council must exercise this privilege carefully otherwise, its decisions and processes could be subject to successful challenge.

Approach to the 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 the Act. These are listed in the previous section of this Policy. They are referred to as Section 90(3). The policy approach of the District Council of Robe is that:

- ✦ 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 and in particular section 91 (8) which details when a council must not order that a document remain confidential

- ✦ 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
- ✦ 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 Council has resolved to order that some information remain confidential, e.g. the price to which Council is prepared to bid for land yet to be auctioned. 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. This along with the making of the order and the grounds on which it was made 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 in Council's Annual Report.

Where a person provides information to Council and requests that it be kept confidential the Council is not able to 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.

Public Access to Documents

Various documents are to be available for inspection and purchase (for a fee) by the public. Council may also make a document available in electronic form and place it on the Internet for access.

Council/ the committee will only make an 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/ the committee 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, Council/ the committee may order that a document relating to the matter considered in confidence is to be kept confidential. However, there are some exceptions. Council/a committee must not make an order to prevent:

- ✦ the disclosure of the remuneration or conditions of service of an employee after they have been set or determined
- ✦ the disclosure of the identification of a successful tenderer or any reasons as to why that tenderer has been selected
- ✦ the disclosure of the amount or amounts payable by the under a contract for the supply of goods or the provision 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
- ✦ the disclosure of the identity of land that has been acquired or disposed of by Council, or of any reasons as to why acquisition or disposal has occurred.

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

- ✦ the grounds for confidentiality
- ✦ 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 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)].

The resolution will also indicate whether any delegation is given to an employee to revoke the order and if relevant, any conditions associated with this delegation.

The following is an example (this could be included in the copy placed on public display):

Council decided to bid \$100,000 at auction for a parcel of land. An order that the discussion be confidential could be made in accordance with section 90(2). Council resolved that the document containing information on the value of the land remain confidential in accordance with section 91(7). Council could delegate to the CEO the authority to make this information

public following the completion of the acquisition in accordance with section 91(9)(c).

The minutes shall record the relevant grounds and duration of the order and any delegation to revoke the order, should this be applicable.

Requests to access confidential Council and committee documents can be made under the *Freedom of Information Act 1991*. Any inquiries in relation to the process for seeking access to documents held by Council can be directed to Council's nominated Freedom of Information Officer.

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 a Council to resolve for the confidential order to be lifted. Once the order has lapsed, the minutes and/or documents automatically become public. At this point in time it is important that Council make this information publicly available and also include it on the Council's website. Confidentiality orders will be reviewed on an annual basis.

Orders that exceed 12 months must be reviewed annually and a 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 is delegated to the Chief Executive Officer. 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 on 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. A 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.

Accountability and Reporting to the Community

It is a statutory requirement (Schedule 4 the Act) for Council to report on an annual basis on the use of all of the confidentiality provisions. This supports commitment to the principle of accountability to the community. The reporting includes the following information, separately identified for both Council and committees:

- ✦ Number of occasions each of the provisions of section 90(2) and 90(3) were utilised
- ✦ Number of occasions each of the provisions of section 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 x was considered on 3 separate occasions
- ✦ Number of occasions that information originally declared confidential has subsequently been made publicly available
- ✦ Number of occasions that information declared confidential has still not subsequently been made publicly available and the reason for this in each case.

Council will make this information available for inspection by the public at the Council office

annually and a summary will be included in the Annual Report.

Availability of Code

The public may inspect a copy of this Code, without charge, at the offices of Council during office hours, and may obtain a copy for a fee fixed by Council. The Code will be available to view and/ or download on Council's website.

Review

In accordance with section 92(2) of the Act each Council is required to review the Code within 12 months after the conclusion of each periodic election.

Grievance

Council is required to establish procedures for the review of decisions under section 270 of the Act for:

- ✦ Council, and its committees
- ✦ Employees of the Council
- ✦ other persons acting on behalf of the Council.

A request for a review of a decision should be expressed in writing and be addressed to the CEO, District Council of Robe, PO Box 1, Robe SA 5276. The application will then be given consideration under the Internal Review of Decisions procedure established by Council. A copy of the procedure adopted by Council is available from the Council office or on the Council website www.robe.sa.gov.au.

A person may also lodge a complaint with the Ombudsman, who may carry out an investigation if it appears (to the Ombudsman) that 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 Council with a copy of the written report that is prepared. After considering the report of the Ombudsman, if the Minister believes Council has unreasonably excluded members of the public from a meeting or prevented access to a document she/he may give directions to 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 Council a reasonable opportunity to make submissions to the Minister in relation to the matter.

Revoking or Amending Previous Resolutions

Subject to some circumstances, Council and Council committees can pass resolutions that amend or revoke resolutions previously adopted. Whilst this is not a regular practice, it can happen where for example, new information is presented.

FURTHER INFORMATION

This policy will be available for inspection at the Council offices listed below during ordinary business hours and available to be downloaded, free of charge, from Council's internet site: www.robe.sa.gov.au

Royal Circus, Robe SA 5276

Copies will be provided to interested parties upon request. Email council@robe.sa.gov.au

Any grievances in relation to this policy or its application should be forwarded in writing addressed to the Chief Executive Officer of Council.

POLICY REVIEW

This policy may be amended at any time and must be reviewed at least every four years since its adoption (or latest amendment).

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 committee meetings are to be held in public except where special circumstances exist as prescribed in the Act and a council or committee orders that the public be excluded.

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

83 (5) Council and 87 (10) Committee - The Chief Executive Officer may indicate on a document or report provided to members of the council under subsection (4) (or separate notice) any information or matter contained in or arising from a document or report that may, if the council so determines, be considered in confidence under Part 3, provided that the chief executive officer at the same time specifies that basis on which an order could be made under that Part.

87 (15) & 88 (7) - the regulations may modify the application of this section for council committees that are not performing regulatory activities of councils. Regulations 23 & 24 of the Local Government (Procedures at Meetings) Regulations 2000 enable variation to the notice of meetings for members and public notice of meetings.

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.

90 (8) - informal gatherings and discussions are not unlawful under certain circumstances.

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. Council must, at least once in every financial year, review the code.

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

270 - Council to establish procedures for the review of decisions.

Appendix 2

Council has determined that the Code of Practice for Access to Meetings and Documents is to apply to all Committees of Council formed under Section 41 of the Local Government Act 1999.