



Premier & Cabinet
Division of Local Government

The Closure of Council Meetings to the Public

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Director General's Guidelines issued pursuant to section 10B(5) of the *Local Government Act 1993*

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INTRODUCTION

Meetings are the key forum in which councils make strategic and policy decisions on behalf of their communities. As elected institutions, councils are ultimately accountable to their communities for their decisions. It is therefore important that council meetings are open and can be attended by members of the community.

However, there will be occasions where councils are required to consider information which, by its nature, is confidential and ought not to be publicly disclosed. The *Local Government Act 1993* (the Act) recognises that on such occasions, the public interest in protecting confidential information will outweigh the public interest in ensuring accountability through open meetings.

This publication offers practical guidance on how councils can appropriately weigh these competing public interests and ensure that they comply with their obligations under the Act when closing meetings to the public. They do this by addressing commonly asked questions that have been raised with the Division about the closure of council meetings and provide best practice examples.

This publication is issued under section 10B(5) of the Act. It therefore constitutes a guideline that councils are required to consider when closing meetings to the public.

GUIDELINES

1. Who can attend Council or Committee meetings?

Any person can attend a council meeting or the meeting of a committee of which all the members are councillors (a committee of councillors) (see section 10 of the Act).

However, members of the public are not entitled to attend other types of meetings (eg committees comprising of councillors and non-councillors or informal briefing meetings). Councils can make these meetings open to the public if they choose to do so.

2. What are the grounds on which a council can close its meeting to the public?

Despite the right of members of the public to attend meetings of a council or a committee of councillors, the council or the committee may still close to the public, parts of the meeting that involve the discussion or receipt of any of the following matters or information:

- personnel matters concerning particular individuals (other than councillors)
- the personal hardship of any resident or ratepayer
- information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business
- commercial information of a confidential nature that would, if disclosed:
 - prejudice the commercial position of the person who supplied it, or
 - confer a commercial advantage on a competitor of the council, or
 - reveal a trade secret
- information that would, if disclosed, prejudice the maintenance of law
- matters affecting the security of the council, councillors, council staff or council property
- advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege
- information concerning the nature and location of a place or an item of Aboriginal significance on community land
- alleged contraventions of the council's code of conduct.

(see section 10A(2))

In order to close a meeting to the public, a council or committee must be satisfied that the matter or information being discussed or received falls within at least one of the above grounds.

It should be noted that the existence of any of these grounds does not place any obligation on a council to close its meeting to consider a matter or information, (though in many cases, it would be appropriate for it to do so). It simply permits a council to do so. As will be discussed below, in the case of most of these grounds, the council will also need to demonstrate why it is in the public interest to close the meeting to discuss the matter or information.

3. When can a council meeting be closed?

A council or committee of councillors can close its meeting to the public without further discussion to consider three types of matters; personnel matters concerning particular individuals, matters involving the personal hardship of a resident or ratepayer or matters that would disclose a trade secret.

However, in the case of the other grounds listed in Part 2 above, the existence of these grounds on their own is not enough to allow the closure of a meeting. In such cases, the council or committee must also be satisfied that discussion of the matter in an open meeting would, **on balance, be contrary to the public interest** (see section 10B(1)(b)).

This in effect creates a two step process:

- first, the council must be satisfied that the matter falls within at least one of the grounds listed in Part 2
- second, the council must be satisfied that if the matter does not fall within one of the 3 grounds set out in this Part, that discussion of the matter in an open meeting would, on balance, be contrary to the public interest.

Example

To illustrate, consider the example of a proposal to sell off council-owned land by auction. The council would not be able to close the meeting to consider a proposal to sell the land or the reasons for the sale. These are not matters that fall within the grounds listed above.

However, where the discussion concerns the valuation of the land and the reserve price, this would potentially fall within one of the grounds for closure because the disclosure of a reserve price could confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business.

The existence of these grounds is not on its own enough to permit the closure of the meeting to the public. The council also needs to demonstrate why it would, on balance, be in the public interest for it to do so.

In such circumstances, it could be argued that the disclosure of the reserve price would, on balance be contrary to the public interest because it would put the council at a competitive disadvantage in its negotiations preventing it from achieving a 'best value for money' outcome for the community.

4. What matters should not be considered when determining the public interest?

The Act says that when determining whether the discussion of a matter in an open meeting would be contrary to the public interest, it is irrelevant that:

- a person may misinterpret or misunderstand the discussion, or
- the discussion of the matter may:
 - cause embarrassment to the council or committee concerned, or to councillors or to employees of the council
 - cause a loss of confidence in the council or committee.

(see section 10B(4))

5. When can a meeting be closed to consider legal advice?

The Act says that a meeting is not to be closed for the receipt and consideration of information or advice concerning litigation or the subject of legal professional privilege unless the advice concerns legal matters that:

- are substantial issues relating to a matter in which the council or committee is involved, **and**
- are clearly identified in the advice, **and**
- are fully discussed in that advice.

(See section 10B(2))

6. Can a meeting be closed to consider a conduct reviewer's report?

Yes. The Act specifically allows a meeting to be closed to the public to consider alleged contraventions of a council's code of conduct (see section 10A(2)(i)). Clause 8.45 of the prescribed *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* state that a council is to close its meeting to the public to consider a final investigation report where

it is permitted to do so under section 10A. However, in closing a meeting to consider a conduct reviewer's report, the council is still required to apply the public interest test under section 10B(1)(b).

7. Do members of the public have any say on the closure of council meetings?

Yes. A council, or a committee of a council, may allow members of the public to make representations to or at a meeting, before any part of the meeting is closed to the public, as to whether that part of the meeting should be closed (see section 10A(4)).

8. How long can a council meeting remain closed?

The Act requires councils to close their meeting for only so much of the discussion as is necessary to preserve the relevant confidentiality, privilege or security being protected.

(See section 10B(1)(a))

Example

In the proposal to auction council-owned land, the relevant confidentiality in relation to the proposed sale is limited to the valuation and the reserve price information.

As such, discussion of the reasons justifying the sale could occur while the meeting was open. However, when the discussion turned to the valuation and reserve price, the meeting may then be closed to the public.

9. What notice must be given of matters that are proposed to be considered in a closed meeting?

Where the general manager is of the opinion that the agenda includes the receipt of information or discussion of matters that are likely to take place when the meeting is closed to the public, the agenda for the meeting must indicate that the relevant item of business is of such a nature (but must not give details of that item) (see section 9(2A)).

It should be noted that the ultimate decision to close the meeting rests with the council. This means that the council is not under any obligation to close the meeting where the general manager identifies a matter in the agenda as being one that the council may close its meeting to discuss.

Conversely, where a matter has not been identified in the agenda for the meeting as one that is likely to be considered when the meeting is closed, the

council can still close the meeting to consider the item. However, it can only do so if:

- it becomes apparent during the discussion of a particular matter that the matter is one for which any of the grounds for closure exist (see above), **and**
- the council or committee, after considering any representations made by members of the public, resolves that further discussion of the matter:
 - should not be deferred (because of the urgency of the matter), **and**
 - should take place in a part of the meeting that is closed to the public.

(See section 10C)

Example

In the proposed auction of council-owned land case, the agenda for the meeting would identify the matter as one that is likely to be considered when the meeting is closed.

A best practice approach would be for the valuation and reserve price information to be included in a confidential attachment to the report that is not made available to the public. This would enable the report, including the reasons justifying the sale to be made public prior to the meeting and at the same time preserve the confidentiality of the valuation and reserve price information.

10. What must be recorded in the minutes about the decision to close part of a council meeting?

The Act requires that the grounds on which part of a meeting is closed must be stated in the decision to close that part of the meeting and must be recorded in the minutes of the meeting. The grounds must specify the following:

- the relevant grounds on which the meeting is being closed
- the matter that is to be discussed during the closed part of the meeting
- the reasons why the part of the meeting is being closed, including an explanation of the way in which discussion of the matter in an open meeting would be, on balance, contrary to the public interest (unless the matter relates to a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret).

(See section 10D)

Example

The decision to close the meeting to consider the auction of a parcel of council-owned land may be recorded as follows:

RESOLVED: *Councillor Borg/Lee*

- 1. That the meeting is closed during the discussion of the matter "Item 1 - Sale of 393 Smith Street, Jonestown by public auction" in accordance with section 10A(2)(c) on the basis that:*

Item 1 involves the receipt and discussion of information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business.

On balance, the public interest in preserving the confidentiality of information about the reserve price outweighs the public interest in maintaining openness and transparency in council decision-making because the disclosure of this information would put the Council at a competitive disadvantage in its negotiations with a prospective purchaser, preventing it from achieving a 'best value for money' outcome for the community.

11. Must a decision made during a closed part of a meeting be made public?

It is important to remember that the purpose of section 10A is to protect the confidentiality or privilege of the information upon which council relies. It does not allow councils to make secret decisions.

This intention is reflected in clause 253 of the *Local Government (General) Regulation 2005* (the Regulation). This requires that where a council passes a resolution during a meeting or a part of a meeting that is closed to the public, the chairperson must make the resolution public as soon as practicable after the meeting or the relevant part of the meeting has ended.

12. Do resolutions made during a closed part of a meeting have to be recorded in the minutes?

Yes. Under clause 254 of the Regulation, details of each motion moved at a council meeting (including those moved when the meeting is closed to the public) must be recorded in the minutes as well as whether the motion is passed or lost. Once passed, a motion becomes a resolution.

This means that when framing a motion relating to a matter being considered in a closed part of a meeting, councils need to be careful to ensure that the wording of the motion does not disclose any confidential information.

However, the resolution should be sufficiently clearly framed to enable the public to identify the decision that has been made by the council. A resolution to “adopt the recommendation contained in the staff report” for instance does not meet the requisite standards of accountability expected of council decision making.

In addition, under clause 243(3), a recommendation made in a report of a council employee is, so far as adopted by the council, a resolution of the council. As a result, where a council resolves to accept a recommendation contained in a report of a council employee, that recommendation is deemed to be the resolution and must be made public as soon as practicable under clause 253 and recorded in the minutes of the meeting under clause 254.

This means that when framing a recommendation relating to a matter being considered in a closed part of a meeting, council staff need to be careful to ensure that the wording of the recommendation does not disclose any confidential information.

Example

The motion or staff recommendation on the proposed auction of council-owned land could be worded as follows:

- 1. That Council proceed with the sale of 393 Smith Street, Jonestown (**NB clearly indentify the parcel of land**) by way of public auction.*
- 2. That the reserve price be set at the amount specified in the confidential attachment to the report.*

13. When can members of the public access confidential business papers?

The business papers and minutes of council meetings are deemed to be open access information under the *Government Information (Public Access) Act 2009* (the GIPA Act) and the *Government Information (Public Access) Regulation 2009*. This means they must be publicly available for inspection by anyone free of charge, including on the council’s website.

However, where a matter is considered in a part of a meeting that is closed to the public, only the resolutions and recommendations of the meeting are open access information.

This does not necessarily mean that reports and business papers cannot be otherwise accessed under the GIPA Act. Where a council receives a request for access to a confidential business paper under the GIPA Act it must comply with the provisions of that Act. This means that it must be decided whether there is an overriding public interest against disclosure which outweighs the public interest in favour of disclosure. Further information about council obligations under the GIPA Act is available on the Office of the Information Commissioner’s website www.oic.nsw.gov.au.

Example

If the council received a request for access to the confidential valuation and reserve price information after the sale of the land has been completed, the reason for confidentiality (i.e. putting council at a competitive disadvantage in its negotiations with a prospective purchaser) no longer exists. Similarly, the relevant public interest consideration against disclosure for the purposes of the GIPA Act (see part 4 of the table to section 14 of the Act) no longer exists. In such circumstances, the council may be obliged to provide access to the report.

14. What obligations do council officials have in relation to information about matters that were considered in a part of a meeting that was closed to the public?

Under the Model Code of Conduct for Local Councils in NSW, all council officials have an obligation to maintain the integrity and security of confidential documents or information in their possession, including confidential business papers. In particular, all council officials must:

- protect confidential information
- only release confidential information if they have authority to do so
- only use confidential information for the purpose it is intended to be used
- not use confidential information for the purpose of securing a private benefit for themselves or for any other person
- not use confidential information with the intention to cause harm or detriment to the council or any other person or body
- not disclose any information discussed during a confidential session of a council meeting.

It is also an offence under section 664(1A) of the Act to disclose information about a matter that was considered in a meeting that was closed to the public under section 10A.

15. What happens if a council official inappropriately discloses information about a matter that was considered in a part of a meeting that was closed to the public?

Where a council official fails to comply with their obligations in relation to the protection of confidential information they may face disciplinary action. This might include termination of employment for council staff or suspension or disqualification from civic office for a councillor.

A council official may also face prosecution under section 664 of the Act if they disclose information about a matter that was considered in a meeting that was closed to the public under section 10A.

The inappropriate disclosure of such information can also have broader ramifications for the trust and constructive working relationships between staff and councillors so necessary to the effective functioning of a council.