

**LATE ITEM M20/5779 – AMENDMENTS TO CP-088: CREATION, ACCESS AND RETENTION OF AUDIO RECORDINGS OF PUBLIC MEETINGS OF COUNCIL (REC)
(ATTACHMENT)****KEY ISSUES / SUMMARY**

- This report relates to a Motion with Notice that was presented by Cr Kepert to the Ordinary Council Meeting held on 15 September 2020.
- The motion was withdrawn to be referred for consideration by the Governance Committee.
- This report provides detailed advice on the proposed motion and the supporting reasons provided by Cr Kepert, and supplements the previous Advice Note provided to Council on the motion.
- The Committee was to consider the proposed amendments, the reasons submitted in support and the officers' advice and advise the Council of the Committee's recommended response.
- This matter was presented to the Governance Committee held 19 October 2020, where the Committee resolved that the matter be deferred for consideration at the Ordinary Meeting of Council to be held 20 October 2020.

BACKGROUND

Cr Kepert submitted a Proposed Notice of Motion to the Ordinary Meeting of Council of 15 September 2020 proposing certain amendments to Council Policy CP-088: Creation, Access and Retention of Audio Recordings of Public Meetings of the Council.

This Item was withdrawn by Cr Kepert with the minutes recording that "The Mayor undertook for this matter to be presented to a future Governance Committee meeting and then to a Special Meeting of Council."

The motion proposed by Cr Kepert was that:

The Council approves the following amendments to be made to CP-088 Creation, Access and Retention of Audio Recordings of Public Meetings of the Council and directs the CEO to adjust the policy accordingly:

1. Adding the following phrase to the Policy Statement "Any record held by the City of Melville is relevant to an Elected Member of the City of Melville."
2. Removing "The Chief Executive Officer (CEO) reserves the right to withhold publication of all or part of the audio recording and will advise the Presiding Member of the reasons for this action. The Presiding Member will advise the Council if such action is decided and the reasons for this action."
3. Removing "other than to Elected Members who were present at the meeting and for the item, and Administrative staff,"

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4. Removing “Elected Members who are absent from the proceedings behind closed doors, either through absence or declaration of interest, may seek a resolution of the Council to access the audio recordings. An Access to Recording Form is to be completed and submitted to the CEO, who will arrange for the necessary item to be prepared for the next available Ordinary Meeting of Council, for Council to make a decision on the matter. If granted, the access will be under the supervision of a person as designated by the CEO. The information provided to Elected Members under this access is not to be shared with third-parties or used for secondary purposes.”
5. Removing “The record of any requests for copies of or access to audio recordings of Council meetings made available to Elected Members will be maintained in the City’s document management system.”

This item has been referred to the Governance Committee for consideration and discussion so that the Committee may make a recommendation to the Council for consideration.

At the Governance Committee meeting held 19 October 2020, the Committee unanimously resolved

“That the Governance Committee recommends that Item M20/5779 – Amendments to CP-088: Creation, Access and Retention of Audio Recordings of Public Meetings of Council be deferred for consideration as a late item at the Ordinary Meeting of Council to be held 20 October 2020.”

DETAIL

Cr Kepert provided the following reasons in support of the motion:

“The amendments provide guidance on the creation, access and storage of audio recordings of Council meetings.

It is fundamental to the role of Elected Members in carrying out their duties to be able to access information, including records and documents, of the organisation they govern and oversee.

Elected Members’ access to information, including access to documents created and held by the local governments they oversee and govern, is clearly set out in the *Local Government Act 1995*:

5.92. Access to information by council, committee members

- (1) *A person who is a council member or a committee member can have access to any information held by the local government that is relevant to the performance by the person of any of his or her functions under this Act or under any other written law.*

Any record held by a local government is relevant to an Elected Member who governs and oversees that organisation.

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Any record held by the City of Melville is relevant to an Elected Member of the City of Melville.

Amendments were made to CP-088 at the Ordinary Meeting of Council 19th March 2019 (item M19/5670). The amendments to the council policy were sought and formulated by the City of Melville administration. The main amendments to this policy were:

1. To be able to cease audio recording via a Council resolution.
2. To be able to block Elected Members from accessing information, with the exception being through a Council resolution directing otherwise.

The first amendment is not covered by the *City of Melville Meeting Procedures Local Law 2017*.

This second amendment essentially supersedes the provisions of the *Local Government Act 1995*.

Item M19/5670 was moved and carried en bloc at the direction of the previous Mayor. The item was carried without discussion or debate.

Prior to the Ordinary Meeting of Council, the Council was briefed on these proposed changes with claims of “verbal advice” justifying the proposed changes.

The amendments mean that Elected Members who were not present in a meeting will not be able to simply access the recordings at a later stage without first being granted permission via a Council motion. This represents a serious and unnecessary impediment to the Council’s ability to govern.”

An officer [Advice Note](#) was provided to the Council for the Ordinary Meeting of 15 September 2020. This report to the Governance Committee deals in detail with the individual amendments proposed in the notice of motion.

It is noted that while the proposed motion recommends the deletion of sections of the Policy, it does not offer effective alternative mechanisms to manage the matters addressed by those sections.

1. **Adding the following phrase to the Policy Statement “Any record held by the City of Melville is relevant to an Elected Member of the City of Melville.”**

The reason given for this amendment reiterates an assumption made in a separate motion by Cr Keper to create a new council policy covering the provision of City records to individual Elected Members. The relevant part of the separate advice to the Governance Committee on that motion is reproduced below in the interests of completeness.

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In proposing these amendments, Cr Kepert has reasoned that:

“It is fundamental to the role of Elected Members in carrying out their duties to be able to access information, including records and documents, of the organisation they govern and oversee.

Any record held by a local government is relevant to an Elected Member who governs and oversees that organisation.

Any record held by the City of Melville is relevant to an Elected Member of the City of Melville.”

These assumptions are not supported by the relevant legislation. The basic premise that individual council members “govern and oversee” the administrative organisation is incorrect.

Section 3.1 of the *Local Government Act 1995* (the Act) states that the general function of a local government is to “provide for the good government of persons in its district”.

Section 2.6(1) of the Act provides that each local government is to have an elected council as its governing body.

Section 5.2 of the Act states that the council of a local government is to ensure that there is an appropriate structure for administering the local government.

The local government thus comprises both the council and an administrative organisation that undertakes the day to day functions of the local government and this is reflected in the legislation.

Section 2.7 of the Act sets out the role of the council as a collective body:

- “(1) The council —
 - (a) governs the local government’s affairs; and
 - (b) is responsible for the performance of the local government’s functions.
- (2) Without limiting subsection (1), the council is to —
 - (a) oversee the allocation of the local government’s finances and resources; and
 - (b) determine the local government’s policies.”

Section 2.10 of the Act sets out the functions of individual councillors:

- “A councillor —
 - (a) represents the interests of electors, ratepayers and residents of the district; and
 - (b) provides leadership and guidance to the community in the district; and
 - (c) facilitates communication between the community and the council; and
 - (d) participates in the local government’s decision-making processes at council and committee meetings; and
 - (e) performs such other functions as are given to a councillor by this Act or any other written law.”

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The role of individual councillors as specified in the Act does not provide for them to “govern and oversee” the organisation, but to participate in the decision-making processes of the governing body in a formal setting and to represent the interests of the electors, ratepayers and residents. An example of the latter that is also consistent with s.2.7(2), is to ensure, as a member of the governing body, that the Council practices effective financial oversight.

Section 5.41 of the Act sets out the functions of the CEO, including, among other functions:

- (d) manage the day to day operations of the local government; and
- (g) be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and
- (h) ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and
- (i) perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.

Regulation 5 of the Local Government (Financial Management) Regulations 1996 lists the duties of the CEO with respect to financial management.

Regulation 8 of the Local Government (Rules of Conduct) Regulations provides for the CEO to authorise a council member to use the resources of the local government.

Certain powers, duties and functions are also specifically conferred or imposed on the CEO in Parts 4, 5, 6, 7, 8 and 9 of the Act, and in the Local Government (Administration) Regulations 1996, the Local Government (Audit) Regulations 1996, the Local Government (Elections) Regulations 1997, the Local Government (Rules of Conduct) Regulations 207 and the Local Government (Uniform Local Provisions) Regulations 1996.

Other Acts similarly directly confer powers and impose duties on the CEO of a local government including, relevantly for the purposes of this motion, the *Freedom of Information Act 1992* and the *State Records Act 2000*.

Under section 50 of the *Interpretation Act 1984*, the CEO is deemed to have all powers as are reasonably necessary to enable the CEO to do or enforce the doing of any act or thing that a written law confers on him. Such legislated powers cannot be fettered by the Council.

Subsections 2.8(1)(f) and 5.41(e) of the Act both require the mayor and the CEO to liaise on the local government’s affairs and the performance of its functions. A requirement to liaise cannot be construed as a “govern and oversee” relationship and in any case relates only to the mayor and not to individual councillors. The Council as a whole monitors the CEO’s performance of the CEO’s functions, but the CEO “governs and oversees the organisation”.

Regulation 9 of the Local Government (Rules of Conduct) Regulations specifically prohibits council members from undertaking a task that contributes to the administration of the local government.

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Taken together, the legislative provisions do not support the premise that individual council members have a function to “govern and oversee the organisation” on which the proposed amendment to the policy is based.

- 2. Removing “The Chief Executive Officer (CEO) reserves the right to withhold publication of all or part of the audio recording and will advise the Presiding Member of the reasons for this action. The Presiding Member will advise the Council if such action is decided and the reasons for this action.”**

No reason has been advanced in support of this amendment.

The whole of the recording is part of the official records of the City and is subject to the requirements of the *State Records Act 2000* and *Freedom of Information Act 1992*.

However, the Act requires only the publication of the agenda documents and the minutes as a record of the meeting and is silent on the publication of a full audio or audio-visual recording of a meeting.

The capacity for the CEO to withhold publication of all or part of the audio recording is a risk mitigation measure. This power is not exercised arbitrarily. It enables the CEO to protect the City from potential reputational harm or legal action resulting from the publication of offensive or defamatory material, and to avoid inadvertent publication of sensitive, private or confidential information or offensive language where this can be heard as part of the background noise.

This power has been used recently, in consultation with the Mayor, to remove sensitive and confidential information that has been inadvertently recorded at the meeting but is not appropriate for publication.

- 3. Removing “other than to Elected Members who were present at the meeting and for the item, and Administrative staff,”**

This wording may be removed without affecting the intent of the document. Making the recording available to meeting participants and to administrative staff in the performance of their duties does not constitute making it publicly available.

- 4. Removing “Elected Members who are absent from the proceedings behind closed doors, either through absence or declaration of interest, may seek a resolution of the Council to access the audio recordings. An Access to Recording Form is to be completed and submitted to the CEO, who will arrange for the necessary item to be prepared for the next available Ordinary Meeting of Council, for Council to make a decision on the matter. If granted, the access will be under the supervision of a person as designated by the CEO. The information provided to Elected Members under this access is not to be shared with third-parties or used for secondary purposes.”**

No reason has been advanced in support of this amendment.

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Section 5.68 provides for a council member who has declared an interest in a matter under section 5.65 to seek the consent of the Council to remain and to participate in the discussion and decision-making procedures relating to the matter. This option is available to all council members. The process also applies to matters discussed in a part of the meeting closed to the public under section 5.23.

A council member who does not seek such consent and does not participate in a part of a meeting that is closed to the public still has the same access as other council members to the agenda documents, including confidential information and advice provided to Council. Any resolutions made during the confidential part of the meeting and voting records must be made public.

A council member who is absent from the closed part of a meeting has access to all relevant information relating to the confidential matter other than the words actually spoken by the council members present at the meeting while it was closed to the public. No evidence has been put forward that access to the record of that discussion is necessary or relevant to a council member's ability to perform their functions under the Act in relation to the matter.

The presence or absence of individual people in meetings affects the meeting dynamic. When a meeting is closed to the public, the people who are present at the meeting have a right to expect that any statements they make during the meeting are heard and responded to only by the people present at the time.

It is therefore reasonable that a person who elected to be absent from the closed meeting be required to seek the consent of those who were present before being granted access to those confidential discussions, and that the request for access and the response be made public in the interests of transparency and accountability.

Controlling access to confidential information is consistent with the CEO's duty under subsection 5.41(h) to "ensure that records and documents of the local government are properly kept for the purposes of the Act and any other written law".

Regulation 29(2) of the Local Government (Administration) Regulations and section 5.95(3) of the Act clearly exempt the record of a closed meeting from being made public and regulation 29(2) further grants to the CEO the power to extend such exemption to information relating to a meeting or part of the meeting that could have been closed to the public but was not.

The prohibition in the policy on sharing confidential information with third parties or using it for secondary purposes reflects the obligation on council members not to misuse information obtained as a consequence of the position they hold. Information is a local government resource, and using it for secondary purposes (including electoral purposes) would be a breach of regulation 8 of the Local Government (Rules of Conduct) Regulations.

Sharing confidential information with third parties may lead to that information being used to gain a benefit for, or cause a detriment to, a person; for which the council member may be held to account.

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Should a council member use information obtained through their position to directly or indirectly gain a benefit for themselves or any other person or to cause detriment to any person, the council member may be found to have breached regulation 7 of the Local Government (Rules of Conduct) Regulations (minor breach), section 5.93 of the Act (serious breach) or section 83 of the Criminal Code (crime).

5. Removing “The record of any requests for copies of or access to audio recordings of Council meetings made available to Elected Members will be maintained in the City’s document management system.”

No argument has been advanced in support of this amendment.

In the interests of transparency and accountability, and to assist investigation in the event that confidential information is disclosed, it is appropriate that all requests for copies of or access to confidential audio recordings or any other confidential information be logged and kept as official records. Such records are also kept when information is sought under the Freedom of Information Act.

This requirement does not apply to requests for copies of audio recordings that have already been published. However, any written request constitutes a record of the City and will be maintained according to relevant legislative requirements.

STAKEHOLDER ENGAGEMENT**I. COMMUNITY**

Community consultation has not been undertaken on the proposed changes to the policy.

II. OTHER AGENCIES / CONSULTANTS

Advice from the Department of Local Government and from the Western Australian Local Government Association has been previously received in relation to this matter.

STATUTORY AND LEGAL IMPLICATIONS

These implications are addressed above under the individual proposed amendments. Relevant legislation includes the:

- *Local Government Act 1995*,
- Local Government (Administration) Regulations 1996,
- Local Government (Functions and General) Regulations 1996,
- Local Government (Rules of Conduct) Regulations 2007,
- Local Government (Elections) Regulations 1997,
- *State Records Act 2000*,
- *Freedom of Information Act 1992*,
- *Criminal Code Act Compilation Act 1913*

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FINANCIAL IMPLICATIONS

There are no financial implications in this report. Costs may be incurred if defamatory material in audio recordings is published by the City.

STRATEGIC, RISK AND ENVIRONMENTAL MANAGEMENT IMPLICATIONS

There are no Environmental Management Implications in this report.

Non-compliance with processes and legislative requirements may leave the City open to challenge on its decisions, actions or processes.

Risk Statement & Consequence	Level of Risk	Risk Treatment
A council member may make a decision based on incomplete information due to not having access to confidential discussions.	Minor consequences which are unlikely, resulting in a Low level of risk.	The policy provides for transparent, accountable and controlled access to confidential information by a council member not in possession of it where Council authorises such access.
Discussions at Council meetings closed to the public are less frank and open due to concerns about confidentiality.	A possible minor consequence which could result in a Medium level of risk.	.The policy provides for the meeting participants to contribute to determining whether the recording of a closed meeting be made available to a non-participant.
Confidential discussions at meetings closed to the public are inappropriately disclosed.	A possible major consequence which could result in a High level of risk.	The policy provides for transparent, accountable and controlled access to confidential information by a council member not in possession of it where Council authorises such access.

POLICY IMPLICATIONS

The motion presented proposes changes to Council Policy CP-088.

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The Officer recommendation to Council will be to support proposed amendment 3 and reject proposed amendments 1, 2 4 and 5. This will ensure the policy:

- is consistent with the letter and intent of the Local Government Act and Regulations,
- protects the confidentiality of statements made by participants at closed meetings , and
- provides for a transparent and accountable process for a council member to access confidential information disclosed at a meeting or part of a meeting closed to the public at which the council member was not present.

The alternative options for the Council are to:

1. undertake public consultation on the proposed amendments to the policy and review them in the context of public comment received, which will ensure the Council is aware of the public view on these matters, or
2. amend the policy CP-088 as proposed by Cr Kepert, which may have deleterious effects on the openness of discussion at closed meetings, reduce the level of transparency and accountability applying to access to and use of confidential information discussed at closed Council meetings, and increase the risk that confidential information be inappropriately disclosed to third parties and/or misused for the benefit or to the detriment of any person.

CONCLUSION

This report advises the Governance Committee of the legislative and governance implications of the proposed changes to Council Policy CP-088 as presented by Cr Kepert. The current policy is consistent with legislation and good practice in the management of confidential information.

The proponent has not advanced alternative mechanisms to manage the matters addressed by the elements of the policy that are proposed to be changed. The argument that the policy “represents a serious and unnecessary impediment to the Council’s ability to govern” is not supported by facts or legislation.

CP- 088 is a policy, to be used as a guide in responding consistently to particular situations. It does not have the force of law and its guidance may be departed from should circumstances justify such action, provided that the departure from policy is transparently authorised, implemented and documented to ensure appropriate accountability.

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OFFICER RECOMMENDATION (5779)

APPROVAL

That the Council:

1. amend Council Policy CP-088 - Creation, Access and Retention of Audio Recordings of Public Meetings of Council as proposed in Amendment 3 by removing:
 - “other than to Elected Members who were present at the meeting and for the item, and Administrative staff,”
2. reject proposed amendments 1, 2, 4 and 5 for the reasons set out in this Report.