
**LATE ITEM M20/5780 - CREATION OF NEW POLICY: ELECTED MEMBERS
ACCESS TO INFORMATION (REC)****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 and referred to the Governance Committee for consideration.
- This report provides 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.
- A policy containing the terms proposed is not supported, and is considered to potentially incur substantial risk to the City's reputation and legal compliance and to the public's trust in the City's commitment to maintaining data security and individual privacy.
- The Committee was to advise the Council of the Committee's recommendation with respect to the motion.
- [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 the creation of a new policy relating to Elected Members accessing information, with a list of certain provisions to be included in the proposed policy.

This Item was withdrawn by Cr Kepert with the minutes recording that "The Mayor undertook for this matter to be presented to a future Governance Committee meeting and then to a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 is as follows:

The Council directs the CEO to create a new Council Policy with the following terms of reference:

1. City of Melville Elected Members are to be able to access any record held by the City of Melville.
2. All information, including records and documents, held by the City of Melville is considered relevant to performance of an Elected Member of the City of Melville.
3. Inclusion of relevant definitions including information, records and documents as defined by relevant legislation.
4. Where information is not provided to Elected Members, a reason must be given and the item to be addressed by the Governance Committee within 14 days.
5. Where no reason or information has been provided, the item is to be addressed by the Governance Committee within 21 days after the information was first sought by the Elected Member.
6. The policy is not to include any non-legislative advice.

The policy is to be presented to the Council at the Ordinary Meeting of Council on 20 of October 2020 for final approval.

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This item has been referred to the Governance Committee for consideration and discussion and for the Committee to make a recommendation to a future meeting of the Council.

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

“That the Governance Committee recommends that Item M20/5780 – Creation of New Policy: Elected Members Access to Information be deferred for consideration as a late item at the Ordinary Meeting of Council to be held 20 October 2020.”

DETAIL

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

“A new Council Policy is required to clearly outline the access to information for City of Melville Elected Members.

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

An officer [Advice Note](#) was provided to the Council for the Ordinary Meeting of 15 September 2020. This report to the Governance Committee supplements that advice and deals with the legal context and implications of the proposed policy and the assumptions underlying it.

**LATE ITEM M20/5780 - CREATION OF NEW POLICY: ELECTED MEMBERS
ACCESS TO INFORMATION (REC)****1. Role and function of council members**

Cr Keper in proposing this policy provides the following reason:

“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.

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 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. Regulation 9 of those Regulations specifically prohibits council members from undertaking a task that contributes to the administration of the local government.

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 motion and the terms of the proposed policy are based.

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ACCESS TO INFORMATION (REC)****2. Access to information**

It is essential to good government that there is public scrutiny and accountability of its activities, which means transparency and access to information used to support decisions.

Sections 5.94, 5.95, 5.96 and 5.96A of the Act and Regulations 29, 29A and 29B of the Local Government (Administration) Regulations specify the local government information to which the public must or may have access and information that must not be made public or which is exempted from the general right to inspect information..

Section 5.95(1) of the Act, regulations 29(2) and (3) and 29B of the Local Government (Administration) Regulations and regulation 6 of the Local Government (Rules of Conduct) Regulations specifically empower the CEO to make decisions on access to certain information.

Other legislation including the *Building Act 2011*, the *State Records Act 2000* and the *Freedom of Information Act 1992* govern how local governments must manage their records and provide access to information in a fair and transparent way. This legislation includes built-in accountability mechanisms to balance the public interest with legitimate private interests.

Section 5.92 of the Act deals with the right of council members to access information held by the local government that is not accessible to the public under the Act.

Section 5.92 states that:

- (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.
- (2) Without limiting subsection (1), a council member can have access to —
 - (a) all written contracts entered into by the local government; and
 - (b) all documents relating to written contracts proposed to be entered into by the local government.

Importantly, section 5.92 refers to information that is relevant to the performance of a council member's functions (as set out in section 2.10), and does not extend to all information that an elected member may declare is "relevant" to them. Also importantly, the word used in section 5.92(1) is "can", inferring "allowable", and not "shall", which under the *Interpretation Act 1984* would have made access imperative.

Section 5.91 specifies that the reference in section 5.92 does not apply to functions that are undertaken by a person in any capacity other than that of a council member under the Act.

The wording of sections 5.91 and 5.92 of the Act indicates that a council member seeking information under section 5.92 is responsible for demonstrating to the CEO – who is responsible under section 5.41(h) for keeping the records and documents of the local government – that the information sought is relevant to the performance of a legislated function of the member in their capacity as a council member under the Act.

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Regulation 8 of the *Local Government (Rules of Conduct) Regulations* prohibits council members from using local government resources – which has been defined by the Local Government Standards Panel as including information – for electoral or any other purpose unless authorised to do so under the Act, by Council or by the CEO.

Council members have a right to be informed before making decisions, and in order to facilitate communication between the community and the Council. Council members may seek information that they need for such purposes under the current procedures.

Cr Keper's statement that "*Any record held by the City of Melville is relevant to an Elected Member of the City of Melville*" as justification for unrestricted access to all information held by the City of Melville is not supported by the legislation.

3. Security of information held by the local government

The Act and Regulations clearly contemplate that certain information held by a local government is confidential and impose on the CEO, not the Council, the duty of maintaining that confidentiality.

Relevant provisions include section 5.123 of the Act, regulations 29 and 29B of the Local Government (Administration) Regulations 1996, regulation 16 of the Local Government (Functions and General) Regulations 1996; regulation 16 and schedule 1 of the Local Government (Elections) Regulations 1997 and regulation 6 of the Local Government (Rules of Conduct) Regulations 2007. The Freedom of Information Act also contains exemptions for certain types of information.

Local government holds a great deal of information, including:

- personal information about individuals, including their home addresses, dates of birth, identification details such as pension card or drivers licence numbers, credit card and bank account details, vehicle registration, house plans, pets, and sensitive information about their family and economic circumstances;
- information provided in confidence by businesses on the understanding that their commercial sensitivity will be respected;
- information about directions, orders and notices that have been sent to residents and businesses, infringement notices issued, and other matters relating to the administration of laws that are operational in nature;
- information that people have elected to provide on a confidential basis regarding their views or concerns regarding particular services, actions or decisions of the local government, including the Council, or the activities of other residents. In some cases, people have specifically requested anonymity when providing such information because of a fear of retribution.

Where the local government seeks information from people for a specific purpose, that purpose must be disclosed to the person asked to provide it.

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There is a social compact of trust between the local government and the people providing their information that this information will be kept secure, will not be accessed by any person other than those directly involved in the course of their duties in the purpose for which the information was collected, and that it will not be used for any purpose other than that disclosed when it was requested. Personal information in particular must not be released to a third party without the consent of the person concerned, a safeguard that is also in the Freedom of Information Act.

Failure to maintain confidentiality on sensitive matters would be a disincentive for people to share such information with the City. Inappropriate disclosure of sensitive information would damage the trust between the public and the local government. This is particularly the case if the information is then shared with third parties and/or used for a purpose detrimental to the person to whom it relates.

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), or
- section 5.93 of the Act (serious breach), or
- section 83 of the Criminal Code (crime).

4. Department of Local Government, Sport and Cultural Industries view

The Department's website provides the following information in relation to access to information by council members:

“Council and committee members have rights to access information additional to those given to the public. These rights ensure members are properly informed on matters that are relevant to their functions.

Members can access the following additional information held by a local government:

- *all written contracts of the local government;*
- *all documents relating to written contracts which the local government proposes to enter; and*
- *any information that is relevant to their functions.*

The functions of council members in this context are likely to include:

- *any function that a member is appointed or authorised to carry out by the council (such as attending a meeting or conference);*
- *preparations for an upcoming meeting agenda item decision; or*
- *anything the member is doing in carrying out his or her role as mayor or president or councillor.*

The access provisions do not give members unlimited licence to information held by the local government. Members may only seek access to information that is relevant to the performance of a specific function. Access arrangements should be made through the CEO.

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Important to note: Council members, committee members or employees who make improper use of information acquired in the performance of their functions to:

- *gain an advantage for themselves or any other person either directly or indirectly; or*
- *cause detriment to the local government or any other person, commit a serious breach under section 5.93 of the Act and may be liable to a penalty of up to \$10,000 or two years in jail.*

The Local Government Act 1995 does not define the term “improper use”, but it is likely to include wilfully taking advantage of confidential or restricted information held by a local government.”

STAKEHOLDER ENGAGEMENT**I. COMMUNITY**

No community consultation has been undertaken on this matter.

The proposed policy to provide individual council members with unrestricted access to any information held by the local government, including sensitive and confidential information pertaining to individuals and businesses, without disclosing their reason or justification for seeking the information, has serious implications for privacy and data security.

It is essential that any draft policy of the kind proposed is subject to appropriate community consultation and that the views and concerns of the community are addressed before it is considered by Council.

II. OTHER AGENCIES / CONSULTANTS

The views of the Department of Local Government, Sport and Cultural Industries were sought at officer level on this matter, and the Department’s public position is reproduced earlier in this advice.

STATUTORY AND LEGAL IMPLICATIONS

The statutory and legal implications of this proposal are explored above.

FINANCIAL IMPLICATIONS

There are no immediate financial implications, but costs may be incurred to ensure adequate accountability mechanisms are implemented in the provision of sensitive information to council members. Costs may also be incurred should action be taken against the City for inappropriate disclosure or use of confidential information.

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STRATEGIC, RISK AND ENVIRONMENTAL MANAGEMENT IMPLICATIONS

There are no Environmental Management Implications.

The risk management implications of non-compliance with processes and legislative requirements may leave the City open to challenge on decisions or processes.

Risk Statement & Consequence	Level of Risk	Risk Treatment
A council member may make a decision at Council based on incomplete knowledge due to not having access to relevant information held by the local government.	Minor consequences which are unlikely, resulting in a Low level of risk.	Processes are in place for Council to be provided with relevant information to determine matters on which it must decide, and for council members to seek information relevant to the performance of their functions as they need it.
Confidential information may be inappropriately disclosed, causing detriment to a person or enabling a person to gain a benefit.	A possible major consequence which could result in a High level of risk.	Confidential information is accessed under strict accountability and record keeping processes that limit risk and provide an audit trail should information be misused.

POLICY IMPLICATIONS

Any new policy of this nature will need to be consistent with all relevant legislation, and integrate with existing policies concerning the City's management of information.

ALTERNATE OPTIONS AND THEIR IMPLICATIONS

There is merit in the City having a Council Policy to provide guidance on the types of information relevant to the performance of individual council member's functions.

The policy would also set out the mechanisms for council members to access information relevant to their functions as individual councillors, including accountability and reporting processes.

Such a policy would improve clarity for council members about the types of information covered by section 5.92 of the Act, and may provide comfort to the public concerning protection of the information that the City holds about them.

The Council has the option of seeking advice from the Department of Local Government and/or legal advice before making a decision in relation to this matter. |

**LATE ITEM M20/5780 - CREATION OF NEW POLICY: ELECTED MEMBERS
ACCESS TO INFORMATION (REC)****CONCLUSION**

This report advises the Governance Committee of the legislative and governance implications of the proposed new policy on council member access to information held by the City, as suggested by Cr Kepert in his motion.

The premise on which Cr Kepert has based his proposal: that individual council members have a role to “govern and oversee” the organisation is not supported by the legislation. His proposal that council members have unrestricted access to any information held by the City is inconsistent with legislation and the role of council members.

The policy as proposed is inconsistent with the legislation and a policy containing the suggested provisions would potentially incur major legal and reputational risks for the City.

However, there is merit in developing a policy that clarifies the information to which elected members may reasonably expect access, and the mechanisms by which such access may be sought and granted.

OFFICER RECOMMENDATION (5780)**APPROVAL**

That the Council directs the Chief Executive Officer to develop a policy dealing with Elected Members access to information held by the City and this be published for public comment prior to being formally adopted by the Council, and that the policy should be consistent with relevant legislation, good information management practice and public expectations about the security of personal information.