



# Corporate & Works Committee

**Agenda:** *Corporate & Works Committee*

**Date:** *Monday 3 September 2007*

**Time:** *6.00pm*

### **Outline of Meeting Protocol & Procedure:**

- The Chairperson will call the Meeting to order and ask the Committee/Staff to present apologies or late correspondence.
- The Chairperson will commence the Order of Business as shown in the Index to the Agenda.
- At the beginning of each item the Chairperson will ask whether a member(s) of the public wish to address the Committee.
- If person(s) wish to address the Committee, they are allowed four (4) minutes in which to do so. Please direct comments to the issues at hand.
- If there are persons representing both sides of a matter (eg applicant/objector), the person(s) against the recommendation speak first.
- At the conclusion of the allotted four (4) minutes, the speaker resumes his/her seat and takes no further part in the debate unless specifically called to do so by the Chairperson.
- If there is more than one (1) person wishing to address the Committee from the same side of the debate, the Chairperson will request that where possible a spokesperson be nominated to represent the parties.
- The Chairperson has the discretion whether to continue to accept speakers from the floor.
- After considering any submissions the Committee will debate the matter (if necessary), and arrive at a recommendation (R items which proceed to Full Council) or a resolution (D items for which the Committee has delegated authority).

### **Delegated Authority (“D” Items):**

- General financial and corporate management of the Council, except those specifically excluded by statute, by Council direction or delegated specifically to another Committee.
- Note: This not to limit the discretions of nominated staff members exercising Delegated Authorities granted by the Council.
- Quarterly review of Council's Management Plan.
- Finance Regulations, including:-
  - Authorisation of expenditures within budgetary provisions where not delegated;
  - Quarterly review of Budget Review Statements;
  - Quarterly and other reports on Works and Services provision; and
  - Writing off of rates, fees and charges because of non-rateability, bad debts, and impracticality of collection.
- Auditing.
- Property Management.
- Asset Management.
- Traffic Management - Works Implementation.
- Works and Services - Monitoring and Implementations.
- Legal Matters and Legal Register.
- Parks and Reserves Management.
- Infrastructure Management, Design and Investigation.
- To require such investigations, reports or actions as considered necessary in respect of matters contained within the Business Agenda (and as may be limited by specific Council resolution).
- Confirmation of Minutes of its Meeting.
- Any other matter falling within the responsibility of the Corporate and Works Committee and not restricted by the Local Government Act or required to be a Recommendation to Full Council as listed below.

### **Recommendation only to the Full Council (“R” Items):**

- Such matters as are specified in Section 377 and within the ambit of the Committee considerations.
- The voting of money for expenditure on works, services and operations.
- Rates, Fees and Charges.
- Donations
- Matters which involve broad strategic or policy initiatives within responsibilities of the Committee.
- Matters not within the specified functions of the Committee.
- Asset Rationalisation.
- Corporate Operations:-
  - Statutory Reporting; - Delegations.
  - Adoption of Council's Management Plans; - Policies.
  - Quality Service/Communications; - Tenders as per Regulation requirements.
  - Leases.
  - Matters reserved by individual Councillors in accordance with any Council policy on "safeguards" and substantive changes

**Committee Membership:**

7 Councillors

**Quorum:**

The quorum for a Committee meeting is 4 Councillors.

# WOOLLAHRA MUNICIPAL COUNCIL

## Notice of Meeting

29 August 2007

To: Her Worship the Mayor, Councillor Huxley, ex-officio  
Councillors      Julian Martin                      (Chair)  
                         Marcus Ehrlich  
                         Wilhelmina Gardner  
                         Isabelle Shapiro  
                         David Shoebridge              (Deputy Chair)  
                         Fiona Sinclair King  
                         John Walker

Dear Councillors

### **Corporate & Works Committee Meeting – 3 September 2007**

In accordance with the provisions of the Local Government Act 1993, I request your attendance at a Meeting of the Council's **Corporate and Works Committee** to be held in the **Council Chambers, 536 New South Head Road, Double Bay, on Monday 3 September 2007 at 6.00pm.**

Gary James  
General Manager

# **Additional Information Relating to Committee Matters**

**Site Inspection**

**Other Matters**

## Meeting Agenda

<b>Item</b>	<b>Subject</b>	<b>Pages</b>
1	Leave of Absence and Apologies	
2	Late Correspondence	
3	Declarations of Interest	

### **Items to be Decided by this Committee using its Delegated Authority**

D1	Confirmation of Minutes of Meeting held on 20 August 2007	1
D2	Tender Evaluation Process – 1193.G	2
D3	Freedom of Information Act applications to Council – 900.G	9
D4	Minutes of the Assets Working Party Meeting Tuesday 22 August 2007 – 1143.G * See Confidential annexure distributed separately	59

### **Items to be Submitted to the Council for Decision with Recommendations from this Committee**

R1	Lease of Stratum of part of Oswald Lane adjoining 14 New Beach Road, Darling Point – 327.14	60
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**Item No:** D1 Delegated to Committee  
**Subject:** **Confirmation of minutes of meeting held on 20 August 2007**  
**Author:** Les Windle, Manager – Governance  
**File No:** See Council Minutes  
**Reason for Report:** The Minutes of the Meeting of Monday 20 August 2007 were previously circulated. In accordance with the guidelines for Committees' operations it is now necessary that those Minutes be formally taken as read and confirmed.

**Recommendation:**

That the Minutes of the Corporate and Works Committee Meeting of 20 August 2007 be taken as read and confirmed.

Les Windle  
Manager - Governance

**Item No:** D2 Delegated to Committee  
**Subject:** **Tender EVALUATION process**  
**Author:** Zubin Marolia – Manager, Property & Projects  
**File No:** 1193.G  
**Reason for Report:** To further advise on tender evaluation procedures.

**Recommendation:**

- A. That a probity adviser be included in the tender invitation and evaluation process for high value, high profile or sensitive projects.
- B. That an independent member be included on the tender evaluation panel where the commissioning department and the superintending department are the same.
- C. That independent specialist advice be sought to further evaluate tenders where additional expertise is called for, e.g. in a specialised field of construction practice or for financial analysis; in such cases the specialist adviser would review short-listed tenders following initial ranking by the tender panel.
- D. That selection criteria be published and, where appropriate, attention be drawn to relative importance, but the specific selection criteria weightings not be published in tender invitations.

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**Background:**

In December 2006, a presentation was made to this Committee by the Director Technical Services on Council's tender evaluation process. On 5 March 2007, a report on the advertising of the weightings of selection criteria and a method of internal auditing was considered by the Corporate and Works Committee which resolved the following:

*"A. That a further report be prepared to reconsider points previously identified. These being:*

- *use of a "stranger" or probity auditor,*
- *weighting of evaluation criteria, and*
- *if the weighting is to be made public.*

*B. That a representative from the Independent Commission Against Corruption be invited to attend the meeting when the further report comes back to the Committee."*

With regard to Part B of the resolution, ICAC have been approached and at their request a forward copy of this report has been distributed to them for comment. At the time of writing this report no response has been received. ICAC has declined to attend.

The remainder of this report addresses part A of the resolution.

Subsequent to the resolution of December 2006, the tender assessment process for major works has been carried out with Geoff Clarke, Director Corporate Services, acting as a Probity Adviser. In this regard, Mr Clarke has reviewed the tender and contract documents, attended all relevant meetings of the tender panel and reviewed the actions taken by the panel for consistency, probity and transparency. He has provided advice to panel members on issues arising from the tender submissions and has prepared a number of recommendations for enhancing Council's current processes, which are currently being implemented. In Mr Clarke's absence on leave, Les Windle, Manager Governance, has also performed this role.

### **Probity Auditor**

The practice of auditing can be divided into financial and non-financial categories. Financial audits are mandatory and involve external auditors verifying the Council's financial statements. Non-financial audits such as referred to in the resolution above focus on compliance with policy and procedures, or industry best practice, in relation to processes such as tendering.

An internal audit of our systems and procedures, known as the Annual System Review, is coordinated by the Manager Risk Control and Safety Services. Audits of Council's systems and procedures are also conducted periodically by expert external consultants.

Auditing is usually after the event and backward looking in nature. We consider it would be more beneficial to build this function into the process and undertake auditing of accountability as the process is being undertaken rather than at the end. Therefore, the involvement of a probity adviser is preferred.

### **Probity Adviser**

As suggested above, although an audit performed at the conclusion of a tender process enables us to review the process and provides assurance that appropriate practices have been undertaken, there is greater value for Council and enhanced risk management in using a probity adviser during the various stages of the tender process. This approach enables the probity adviser to identify departures from probity fundamentals or standards in sufficient time for errors to be avoided or corrected.

Probity and probity advising guidelines for managing public sector projects, prepared by ICAC in Chapter 2 of their publication *'Deciding whether to use a probity adviser'*, make a specific recommendation that probity advisers should generally not be appointed for routine projects. It is recommended instead that project managers and team members alike should ensure they incorporate probity fundamentals into their projects and develop a probity framework or controls.

These recommendations have guided our practice. During the tender evaluation process, panel members follow Council's Tendering Procedure. This procedure has been recently revised and updated. It follows the Local Government Tendering Regulation and ICAC guidelines, and comprises a transparent process which can be audited. The procedure is documented in our database and accessible to all relevant staff. The deliberations of the tender panels are documented and filed. The Council reports and decisions are public documents. All participating staff have been given training in the procedures including their legislative and regulatory basis, their intent and their application.

In the guidelines, the ICAC has identified a number of criteria that should be considered before deciding whether a probity advisor is required. The engagement of a probity adviser can be considered when:

1. *The expected cost of the project is high relative to the types of project normally undertaken by the agency.*
2. *The project itself is inherently complex or risky.*
3. *There has been a relevant history of controversy or litigation in relation to the agency, the project or one of the potential proponents.*
4. *The project is politically sensitive (for example, a major privatisation or a project with a significant environmental impact).*
5. *It is anticipated that there will be an in-house or public sector bid and independent scrutiny is needed to avoid actual or perceived bias. Additionally, if there is an incumbent contractor with a strong relationship with the agency other competitors may require additional assurance that the process is genuine.*
6. *The costs of bidding are expected to be high relative to the size of the contract.*
7. *The project involves significant intellectual property, an unsolicited proposal for a major project or highly subjective selection criteria.*
8. *The agency wishes to make substantial changes to the scope of the project or the bidding process after it has already commenced.*
9. *The evaluation process requires lengthy and detailed face-to-face meetings with individual proponents and/or site visits.*
10. *The project is expected to be privately financed; or uses a complicated contract structure such as a build-own-operate-transfer contract or alliance contract; or where a very long term public-private partnership is to be established.*
11. *Guidelines issued pursuant to section 400C of the Local Government Act 1993 (or any other guidance from the Department of Local Government) either recommend or require the appointment of a probity adviser for a public-private partnership.*
12. *The market is highly concentrated or there are very few players and information sharing; collusion or other forms of anti-competitive behaviour are a possibility.*
13. *A proponent has already been involved in the feasibility study or pre-tender stages of the project, having thereby potentially obtained an unfair advantage.*
14. *The agency is expecting to make a sizeable profit or generate a considerable income stream from the project.*
15. *The agency is not an informed buyer, or lacks experience in the nature or magnitude of the project being undertaken.*

In high value, high profile or sensitive projects, such as the Five Ways Streetscape and Rose Bay Promenade upgrade projects, where many of the above criteria apply, a strong case can be made for including a probity adviser in the process.

The appointment of probity advisers on a 'full service' basis can be expensive, and in many cases unnecessary, as noted by ICAC. Therefore, it is recommended that the procedure of including a probity adviser during the tender assessment stage should be continued but only for high risk, high value and sensitive projects.

### **When not to use a Probity Adviser**

ICAC's advice is that probity advisers should, in general, not be used to oversight the routine or standard business of the Council. In addition, ICAC has also noted other circumstances in which it would not be appropriate to use a probity adviser, such as:

- *Agencies relying solely on the presence of a probity adviser to demonstrate probity when they have or should have systems in place that incorporate probity fundamentals.*
- *Agencies conceiving of and using probity advisers as a form of 'insurance' and as a possible scapegoat should problems emerge, or to avoid being held accountable as managers. A probity adviser should give the agency (Council) a degree of assurance but not create a sense of complacency.*

- *Using a probity adviser to justify a decision to depart from a competitive process and negotiate directly with one bidder.*

Generally, probity advisers should not be engaged on a 'set and forget' basis. The presence of a probity adviser should not give the project team a reason for ignoring or ignoring probity issues.

### **Inclusion of a "stranger" on the Assessment Panel**

The inclusion of a "stranger" on the panel would be intended to add value to the tendering process and ensure that the process is carried out in a fair manner without bias. Inclusion of the 'stranger' would be to ensure there is no potential collusion among panel members who may have a vested interest in the outcome, or who may be perceived to be biased, through past experience or associations, towards or against certain tenderers. However, there are logistical and technical difficulties which also have to be considered.

Council's tender panels as currently structured comprise representatives from departments which have three distinct functions within the Council. For capital works projects these are:

- Organisational support function (Purchasing Section in Depot & Waste Services),
- Asset management function (Public Infrastructure or Public Open Space) and
- Project or service delivery function (Property & Projects, Civil Works or Parks & Street Trees).

The members of the panel from these areas are:

- The Purchasing Coordinator, who is responsible for making sure the tender process adheres to the Local Govt Tendering Regulation and Council's procedures and that all tenders are managed consistently. The Purchasing Coordinator is not involved in the projects being tendered and is considered to fulfil the role of an independent member of the panel.
- The "Commissioning Officer" is the Council Officer managing the asset, who is responsible for preparing and coordinating the tender documentation and responsible for meeting the Council's objectives with respect to time, budget and quality of finished works or services provided.
- The "Superintendent of the Project" is the Council Officer or contract Project Manager managing the delivery of the project who will be responsible for the day to day running of the works, or supervising the provision of the service, or in the case of major plant, supervising the operational use of the item.

On average less than once a year, we call tenders for a large plant item where the commissioning department and the service delivery department are the same, namely Depot and Waste Services. The Purchasing Coordinator also reports to this department. Therefore, in such cases, a person from another Council department or another organisation will be included as a fourth independent member. Generally in these instances, the panel will have access to government contracts for the purpose of benchmarking against the tendered prices.

However, this panel member will need to have appropriate technical or operational knowledge to be able to evaluate the competing claims of tenderers. A "stranger" who lacked such expertise or technical knowledge would be unlikely to be able to counteract any "bias" which may be perceived to be brought by the other members in evaluating the often complex technical information provided in tenders.

Normally tenders go through the following process, involving members of the Assessment Panel:

- Design/specification prepared for approved projects/items
- Request for Tenders (RFT) prepared including selection criteria
- Panel members approve RFT and agree on selection criteria
- RFT advertised
- Pre-tender meeting
- Opening of tenders (by separate tender opening panel)
- Tender assessment
- Post-tender interviews
- Recommendation to Council

To include such an independent member, with appropriate specialist understanding, in all tendering processes would pose considerable logistic problems. We convene about 15 tender panels per year. The tender assessment panel meets once to rank and short-list, in most cases will meet again one or more times to interview short-listed tenderers, and will probably need to meet again to review and finalise rankings and recommendations. We would need to source expert independents generally from other Councils, and there would be considerable difficulty in arranging the necessary 45 to 60 meetings a year.

Some independent members may be found to more available, or more knowledgeable, etc than others, so over time there could be a tendency to rely on a small number of independents, which in turn could again give rise to perceptions of bias or potential collusion.

On the other hand, there can be considerable benefit in calling in an independent specialist adviser to further evaluate tenders, e.g. for a particular field of construction practice or for financial analysis. In such a case the specialist adviser would not sit on the initial tender panel meeting, as this would not be cost-effective, but would be asked to review the tenders (either all of them, or a select list) once they had been initially reviewed and ranked for all of the selection criteria. The rankings would then be adjusted if necessary to reflect the specialist advice.

### **Advertising the Weighting of Selection Criteria**

The procedure that is followed with regard to weighting the selection criteria is used in many other organisations, including all SSROC Member Councils, and conforms to the Local Government Tendering Regulation and ICAC Guidelines. The selection criteria are advertised with the tender. As has been suggested by Geoff Clarke, as Probity Adviser, we have refined and documented the definitions we will use to rank tenders on each of the selection criteria, to ensure consistency and comparability. Where relevant, some information may be provided about critical issues to be dealt with in delivering the project, such as time to complete, community consultation, etc.

Before tenders close, the members of the selection panel agree on the weightings to be used to score and rank the selection criteria, and these are recorded. The weightings are not disclosed to tenderers.

It has been suggested that weightings might be published with the tender invitation to guide tenderers. Research shows that State and Commonwealth Departments do not disclose weightings and caution against the publishing of weightings in the request for tenders. The Department of Finance in their *Market Testing Toolkit* states that "Agencies should carefully consider whether the use of weightings is appropriate and whether these weightings should be advertised in the request for Tenders".

The newly established Local Government Procurement unit which provides procurement services to Councils and invites tenders on a regular basis as its core business, have advised us that they do not disclose weightings in tender documents as normal practice. We sought opinion on this matter from Phil Scott (Contracts Manager Local Government Procurement):

“In answer to your question, LGP lists the evaluation criteria in its RFT document but does not list the evaluation criteria weightings. We hold Tender Briefings for all our tender processes and to date, have only been asked at one briefing for information regarding the weightings. At that briefing, I was of the opinion that the question was reasonable and so determined to make public the weightings when we distributed the official Tender Briefing questions and answers. That briefing session was actually for three (3) related tenders...”

“Rather than showing actual weightings in future RFTs, we are currently considering whether we should indicate importance eg most important, important, least important, for each criteria. I believe this is in line with comments from Col Lange. Past experience amongst our team is that showing the actual weighting can lead to debate with tenderers about weighting correctness and accusations that a weighting is disadvantaging a tenderer. Hence our conservatism in this regard.”

“As a comparison, I understand Dept of Commerce show a weighting for non-price criteria and a weighting for price. However the non-price weighting does not get broken down into each of the individual criteria.

LGP is currently evaluating its first tender using APET tender evaluation software. This software allows weightings to be applied against non-price criteria, but doesn't put a weighting as such, on price. Instead, there is an inherent method in the software for bringing non-price and price together in the evaluation...”

The Department of Local Government has issued *Draft Tendering Guidelines for NSW Local Government* and recommends in clause 2.6, that the weightings should not be included in the tender documents as this may influence a potential tenderer's response. Accordingly, none of the SSROC Councils advertise weightings in their tenders.

As required by the Regulation, Council advertises in the tender documents the selection criteria that will be used to evaluate tenders by the evaluation panel. The selection criteria are linked to the information schedules asked for in the tender response. In most cases, the importance placed on certain criteria (time to complete, cost, minimal disruption to residents) are discussed in general terms, but numerical weightings or ratios are not published.

The weightings are determined by the tender assessment panel prior to the tender closing date and time. The weightings differ from case to case dependent on the nature and scope of the works, for example, if works are required by a certain time frame due to seasonal influences, then the panel would weight the “delivery of service timeframe” higher than other criteria; if the cost was an overriding factor for the delivery of goods, works and services, then the panel would weight the “cost” higher than the other criteria.

The weightings are agreed and recorded and dated on file before the tenders close. Staff are not permitted to create or adjust weightings after close of tenders as this could give rise to a perception the weightings had been influenced by the content of the tenders received.

For similar reasons, it is not considered prudent to publish the weightings during the tender period, as this would enable a tenderer to structure its tender quite precisely to achieve a high score, e.g. on a project where time is given a high weighting, by projecting an unrealistically short construction period, or where the value of proposed capital works in a lease has a high weighting, by overvaluing these to improve the score. Because of the focus on the high weighted factors, there is the potential for other parts of the tender to be less well considered and documented, than in a situation where the tenderer is giving attention to all elements of the project.

**Conclusion:**

It is not necessary, nor in ICAC's view appropriate, that a probity auditor or adviser be used in every tender. In line with best practice, the use should be limited in circumstances that satisfy the criteria listed above. For example, the Five Ways Streetscape Project would require a probity adviser because of its high profile and a number of potentially contentious issues.

The addition of a "stranger" to the current composition of tender panels is not considered to be practical or necessary for most projects, but will be included in circumstances where otherwise all members would be drawn from the same department.

Selection criteria must be advertised as required by the Regulation, and may include information about attention to be given to special circumstances, ie traffic management, disruption to local businesses, etc but numerical weightings should not be advertised, to avoid tenders potentially being adjusted to attract the best scores rather than to address all the selection criteria.

Zubin Marolia  
Manager – Property & Projects

Warwick Hatton  
Director Technical Services

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**Annexures:**

Nil

**Item No:** D3 Delegated to Committee  
**Subject:** **Freedom of information Act Applications to Council**  
**Author:** Les Windle - Manager Governance  
**File No:** 900.G  
**Reason for Report:** To respond to a Notice of Motion adopted by Council on 12 June 2007

**Recommendation:**

That the information be noted and no further action taken in relation to the Notice of Motion.

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**Background:**

The following Notice of Motion was adopted at the Council Meeting held on 12 June 2007:

*That a report be brought to the Corporate and Works Committee outlining:*

- 1. The existing practice of Council in responding to Freedom of Information ("FOI") requests;*
- 2. Current exemptions in place that enable Council to withhold the provision of information requested under FOI; and*
- 3. A draft policy that would provide for the greatest possible and most timely disclosure of materials requested under FOI, consistent with minimum safeguards for personal information, commercially sensitive and legally privileged materials.*
- 4. That the report include associated costs and charges.*

This report responds to the Notice of Motion.

**The existing practice of Council in responding to Freedom of Information ("FOI") requests**

The Freedom of Information Act (FOI Act) allows a person to apply for access to Council documents, subject to the provisions of the Act. The FOI Act is only one vehicle for a person to apply for access to Council held documents. Other NSW legislation that contains access provisions that Council must consider when processing an application for access to documents include the Local Government Act, Environmental Planning and Assessment Act, Privacy and Personal Information Protection Act, Health Records and Information Privacy Act and the Companion Animals Act.

Council receives most requests for access to its documents under the Freedom of Information and Local Government Acts and actively encourages, in accordance with the Department of Local Government's considered view, that the Local Government Act is the preferred avenue for applications for access to Council's documents.

When an application is received under the Freedom of Information Act the application is managed by the Manager Governance with the processing undertaken, depending on the complexity of the application, by either the Team Leader Governance or Manager Governance. The Freedom of Information Act requires applications to be determined within 21 days or if consultation is required with a third party, within 35 days. If the application is not determined within these time limits the application is deemed to have been refused and the applicant is entitled to commence the Internal Review entitlements of the Act.

When a Freedom of Information Act application is received, the processing officer undertakes the following process:

- Identifies the document(s) requested,
- Checks whether the document(s) are available free of charge or on payment of a fee through other legislative requirements,
- Checks whether the document(s) are exempt document(s),
- Checks whether release of the information is prohibited under the Privacy and Personal Information Protection Act, Health Records and Information Privacy Act or other Acts,
- Determines whether consultation should be undertaken with other parties and if necessary, consults with those other parties,
- Considers other parties submissions,
- Makes a determination,
- Advises the applicant of the determination and if so determined, releases the document(s).

After locating the documents requested, the processing officer reviews the type and content of the documents and considers whether there are any legislative exemptions that need to be considered and whether any consultation is required with a third party. Exemptions under the FOI Act are discussed later in the report.

Consultation with third parties is required before consideration can be given to releasing a document if the document falls into the following categories:

- Documents affecting inter-governmental relations (section 30 FOI Act)
- Documents affecting personal affairs (section 31 FOI Act)
- Documents affecting business affairs (section 32 FOI Act)
- Documents affecting the conduct of research (section 33 FOI Act)

Consultation is undertaken in writing and the third party is advised of their legislative rights.

Once a determination is made, the applicant is advised in writing of the determination and if so determined, given access to the document. If access is refused, the applicant is advised of the legislative reason for refusal and also advised of their right of appeal of Council's determination. If an applicant is aggrieved by Council's decision, the applicant may apply for an Internal Review and pay the statutory \$40.00 application fee. If an application for an Internal Review is received by Council, the review is conducted by a staff member who is not subordinate to the original determining officer.

If the original determining officer was the Team Leader Governance and the Manager Governance was not involved in the original determination, then the Manager Governance would conduct the Internal Review. If the Manager Governance had assisted with the original determination or made the original determination, the Director Corporate Services would normally conduct the Internal Review.

If an applicant is aggrieved by the determination of an Internal Review they may apply for an external review through either the NSW Ombudsman or the NSW Administrative Decisions Tribunal.

**Current exemptions in place that enable Council to withhold the provision of information requested under FOI**

Council may refuse access to a document in accordance with section 25 of the FOI Act if:

1. it is an exempt document, or
2. the work involved in dealing with the application would, if carried out, substantially and unreasonably divert Council's resources away from their use in the exercise of the Council's functions, or
3. the document is available for inspection under the requirements of the FOI Act or other legislation, or
4. the document is available from Council in accordance with Council's policies and practices, or
5. the document is usually available for purchase, or
6. the document forms part of the library material held by Council.

Schedule 1 (Exempt Documents) of the FOI Act identifies documents that may be exempt from release under the operation of the Act. The schedule provides an exemption to the public accessing documents, under certain circumstances, that relate to:

1. Cabinet documents
2. Executive Council documents
3. (Repealed)
4. Documents affecting law enforcement and public safety
- 4.A Documents affecting counter-terrorism measures
5. Documents affecting inter-governmental relations
6. Documents affecting personal affairs
7. Documents affecting business affairs
8. Documents affecting the conduct of research
9. Internal working documents
10. Documents subject to legal professional privilege
11. Documents relating to judicial functions etc
12. Documents the subject of secrecy provisions
13. Documents containing confidential material
14. Documents affecting the economy of the state
15. Documents affecting financial or property interests
16. Documents concerning operations of agencies
17. Documents subject to contempt etc
18. Documents arising out of companies and securities legislation
19. Private documents in public library collections
20. Miscellaneous documents
21. Exempt documents under interstate Freedom of Information legislation
22. Documents containing information confidential to Olympic Committees
- 22A. Documents containing information confidential to the International Masters Games Association
23. Documents containing information relating to threatened species, Aboriginal objects and Aboriginal places
24. Documents relating to threatened species conservation
25. Plans of management containing information relating to places or items of Aboriginal significance
26. Documents relating to complaints under health legislation.

The main exemptions Council has used in the past are for documents affecting law enforcement and public safety (clause 4), personal affairs (clause 6), business affairs (clause 7), internal working documents (clause 9), legal professional privilege (clause 10) and documents containing confidential material (clause 13).

Before an exemption provision is used to refuse access to a document, Council must demonstrate that it has considered other relevant factors. Council must also consider whether parts of a document can be released with exempt material deleted from the document.

The following additional factors are reviewed when considering documents that fall under the exemption categories that have previously been used by Council.

#### **Clause 4 Documents affecting law enforcement and public safety**

A public interest test is applied to this exemption and any document that could be considered to be an exempt document is not exempt if it is considered by Council that disclosure of the document would, on balance, be in the public interest.

#### **Clause 6 Documents affecting personal affairs**

A document that contains personal affairs of a third party is not automatically an exempt document. Where a document contains personal affairs of a third party the Council must consult with the third party to obtain the views of the third party as to whether release of the information would be an unreasonable disclosure of their personal affairs. If the third party convinces Council that the release of the information would be an unreasonable disclosure of their personal affairs, Council would claim the exemption provision and refuse access to the document.

#### **Clause 7 Documents affecting business affairs**

A document that contains business affairs information of a third party is also not automatically an exempt document. Certain business affairs information is exempt, such as trade secrets however other business information that may have a commercial value to the business is only exempt if the third party can demonstrate to Council that release of the information could reasonably be expected to destroy or diminish the commercial value of the information.

### **9. Internal working documents**

A claim for exemption as internal working documents of Council can only be made if the matter is still before Council for consideration and it is considered that disclosure of the document would, on balance, be contrary to the public interest.

### **10. Documents subject to legal professional privilege**

The Act allows a document to be an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. Council would need to demonstrate how the document complied with this exemption provision.

### **13. Documents containing confidential material**

The Act allows a document to be an exempt document if disclosure would found an action for breach of confidence or if the information was obtained in confidence and release of the document could reasonably be expected to prejudice the future supply of such information and would, on balance, be contrary to the public interest.

As can be seen from the above, documents are not automatically exempt documents and Council must justify their exempt status.

For a number of years Council has operated under a practice of openness in terms of access to information and has claimed exemptions, after careful consideration of all information available, on a limited number of occasions. This is demonstrated in the following freedom of information statistics:

	2005-06	%	2006-07	%
Applications Granted in full	91	93	59	83
Applications granted in part	2	2	6	8
Applications refused	Nil	0	2	3
Applications withdrawn	5	5	4	6
Total applications	98	100	71	100

In addition to the above, in 2006-07 Council also received 61 applications under the Local Government Act for access to documents. These applications were determined as follows:

	2006-07	%
Applications Granted in full	54	89
Applications granted in part	3	5
Applications refused	2	3
Applications withdrawn	2	3
Total applications	61	100

**The report to include a draft policy that would provide for the greatest possible and most timely disclosure of materials requested under FOI, consistent with minimum safeguards for personal information, commercially sensitive and legally privileged materials.**

Developing a policy for processing applications under the Freedom of Information Act has proved difficult for local government generally, due to the number of provisions of other legislation that require Council to also give consideration to various parties rights to access and rights to privacy.

In recognition of the difficulties caused by the number of legislative considerations required to be considered when processing access applications, a local government practitioners group working party has been working on a Model Information Access Policy for Local Government since early 2006. A draft policy was reviewed and approved by the NSW Ombudsman's Office and NSW Privacy Office in mid 2006 however the Department of Local Government has refused at this stage to endorse the Policy in its current form. Local Government Managers Australia (NSW Division) is currently endeavouring to resolve the outstanding issues with the Department.

In the mean time, the practice has generally been for Council's to endorse a policy statement concerning the principles regarding public access to Council held documents.

Council is currently operating under the following policy statement:

*Council will provide access to all documents it holds except where there is a legal requirement exempting Council from releasing the document or where releasing the document would not in the public interest.*

*Council will not release the name, address or other personal information of members of the community who report, in good faith, information to Council*

*relating to actions of others who may have acted contrary to Council's laws and regulations.*

*Council will require a written application for access to all documents other than those documents identified in Section 12(1) of the Local Government Act.*

*Applications for access to documents will be assessed in accordance with the relevant legislative requirements and procedures in Council's Procedures Database.*

Council's policy is attached to this report as annexure 1.

In addition to the Policy, Council also has a number of operational procedures in its procedures database to assist with the practical implementation of the policy statement. These procedures are attached as annexures 2 to 18. These procedures have been developed to capture the majority of access requests that Council receives and as new types of requests are received an appropriate procedure will be developed to document and guide staff through the legislative considerations.

It is considered that a policy devoted only to the FOI Act procedures is not the most appropriate way to demonstrate Council's commitment to openness, at this stage, as:

- the comprehensive requirements are contained in the FOI Act,
- FOI applications are dealt with by specific staff members who receive ongoing training on the Act's requirements,
- as there are many other legislative requirements that also need to be taken into consideration the policy would become too complicated, if these were included in a policy, for the public to easily understand,
- a generic policy is currently being prepared by a local government practitioner's working party.

### **Associated costs and charges.**

Costs associated with Freedom of Information Act processes are statutory charges and are as follows:

Nature of application	Application fee	Processing charge
Access to records by natural person about their personal affairs	\$20 - \$30*	\$30 per hour after first 20 hours*
All other requests	\$20 - \$30*	\$30 per hour*
Internal review ***	\$20 - \$40* **	Nil
Amendment of records	Nil**	Nil

\* subject to 50% reduction for financial hardship and public interest reasons

\*\* refunds may apply as a result of successful internal reviews and successful applications for amendment of records

\*\*\* No application fees may be charged for internal reviews in relation to amendment of records.

Council has determined that the application fee be \$30.00 and the Internal Review fee be \$40.00.

**Conclusion:**

Council is required to consider the provisions of a number of Acts when processing applications for access to its documents, including the Freedom of Information Act, Local Government Act, Environmental Planning and Assessment Act, Privacy and Personal Information Protection Act, Health Records and Information Privacy Act and the Companion Animals Act.

Council maintains a practice of openness in terms of access to information and provides access to its documents unless there is a legislative requirement exempting Council from releasing a document or where releasing the document would not be in the public interest.

Council has a policy statement stating Council's open and transparent approach to the disclosure of information which is supported by a number of operational procedures to assist staff with the practical implementation of the policy statement.

In view of the existing Access to Council Information policy and access procedures it is recommended that no action be taken in relation to developing a policy specific to the FOI Act requirements.

Les Windle  
Manager Governance

Geoff Clarke  
Director Corporate Services

**Annexures:**

1. Access to Council Information Policy
2. Access to Documents – Approvals Register
3. Access to Documents – Building Certificates
4. Access to Documents – Companion Animal Information
5. Access to Documents - Complaints
6. Access to Documents – Development Applications and Construction Certificates
7. Access to Documents – Graffiti Register
8. Access to Documents – Land Register
9. Access to Documents – Property files
10. Access to Documents – Public Register of Licenses
11. Access to Documents – Rates Register
12. Access to Documents – Record of Impounded Items
13. Access to Documents – Register of BA's and IDA's for Approved Applications
14. Access to Documents – Register of Building Certificates
15. Access to Documents – Register of Consents and Certificates
16. Access to Documents – Register of Public Notices issued under the POE Act
17. Access to Documents – Register of Returns Disclosing Interests of Councillors and Designated persons
18. Access to Documents - Section 12(1) Documents Local Government Act

**Item No:** D4 Delegated to Committee  
**Subject:** Minutes of the assets working party Meeting tuesday 22 August 2007  
**Author:** Zubin Marolia – Manager – Property & Projects  
**File No:** 1143.G  
**Reason for Report:** To report on the outcomes of the Assets Working Party meeting held on Wednesday 22 August 2007

**Recommendation:**

- A. That the minutes of the Assets Working Party meeting, held on Wednesday 22 August 2007, be noted.
- B. That the following recommendations of the Assets Working Party be adopted:

Item 2 (i) and (ii)  
Item 3 (Actions 1 to 19)

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**BACKGROUND:**

At a Property Asset Study workshop held on 5 June 2007, the Councillors agreed on options in the study that were considered worth further investigation. These options were in line with the Councillors paramount objectives agreed on 8 November 2006. The options were ranked and colour coded to reflect the Councillors decision to provide future direction as investigating all options would be time consuming and very costly.

The purpose of this report is to provide the Corporate & Works Committee with a copy of the minutes of the Assets Working Party meeting held on Wednesday 22 August 2007 to which all Councillors were invited. The minutes provide the Committee with an update on the ‘next actions’ discussed for the three categories of Council’s building assets, being Community Facilities, Operational Facilities and Income Earning Properties. At the Property Asset Working Party meeting the attendees considered each of the properties identified and decided on the appropriate future action.

**Identification of Income & Expenditure:**

Council had budgeted \$150,000 in the 2006/2007 Capital budget. To date \$50,000 has been spent on the study and associated advice. The remaining \$100,000 is proposed to be rolled over into the 2007/2008 Capital budget so further advice in relation to feasibility studies can be obtained.

**CONCLUSION:**

Reporting of the minutes of the Property Asset Study will keep Council informed on the progress and highlight any development initiatives associated with Council owned and/or controlled assets which are being considered by the Assets Working Party. Any actions recommended by the Working Party will be submitted for the Committee’s adoption.

Zubin Marolia  
Manager – Property & Projects

Warwick Hatton  
Director – Technical Services

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**CONFIDENTIAL ANNEXURES:**

1. Minutes of the Assets Working Party of Wednesday 22 August 2007
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**Item No:** R1 Recommendation to Council  
**Subject** **Lease of Stratum of part of Oswald Lane adjoining 14 New Beach Road, Darling Point.**  
**Author:** Anthony Sheedy – Property Officer  
**File No:** 327.14  
**Reason for Report:** To recommend the affixing of Council’s Seal to the Subdivision Plan to enable its registration at the Land and Property Information Office, Sydney

**Recommendation:**

That, in accordance with S195D of the Conveyancing Act 1919, it is recommended that the Seal of Council be affixed to the Subdivision Plan relating to the lease approved 25 June 2007, to Gregory William Solomons and Andrew Peter Solomons of the stratum of land below the surface of the road portion adjoining 14 New Beach Road, Darling Point.

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**Background:**

The Council resolved on 25 June 2007 in the following terms:

- A. *That Council enter into an Agreement for Lease with Gregory William Solomons and Andrew Peter Solomons in respect of the garage construction on the stratum of land below the surface of the road portion adjoining 14 New Beach Road, Darling Point.*
- B. *That Council enter into a Lease with Gregory William Solomons and Andrew Peter Solomons, subject to Council’s satisfaction as to completion of the garage on the stratum of land below the surface of the road portion adjoining 14 New Beach Road, Darling Point, and in accordance with the Roads Act, 1993.*
- C. *That the term of the lease be twenty years with an option to renew for a further twenty years.*
- D. *That the lease have a commencement rental of \$2,700 per annum plus GST, with review to market on every fifth anniversary of the commencement date of the lease and annual review to CPI in the intervening years. The lessee is to pay all outgoings, including but not limited to all rates and taxes.*
- E. *That the lessee is to pay all Council’s lease preparation costs, including but not limited to advertisement, valuation, reasonable legal fees and survey, etc associated with the stratum lease.*

In accordance with S195D of the Conveyancing Act 1919, the signature of all parties to the plan, including the landowner (Council), is required before registration can occur (Annexure 2). Because this was a lease of land and not sale, it was thought that the General Manager could sign the Subdivision plan under delegated authority. However, the Department’s Plan and Title Adviser informed Council’s property staff that the Council Seal would need to be affixed notwithstanding the fact that this is a lease of land and not sale.

Because the Council resolution of 25 June 2007 contained no specific recommendation for affixing Council’s Seal, a Council resolution is now sought to enable Council to enter into the lease with Gregory and Andrew Solomons.

**Conclusion:**

In accordance with S195D of the Conveyancing Act,1919 it is recommended that the Seal of Council be affixed to the Subdivision Plan relating to the lease approved 25 June 2007, to Gregory William Solomons and Andrew Peter Solomons of the stratum of land below the surface of the road portion adjoining 14 New Beach Road, Darling Point.

Anthony Sheedy  
Property Officer

Warwick Hatton  
Director Technical Services

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**ANNEXURES:**

- 1. Subdivision Plan for creation of Lot 14 (DA 526/2004/1).**
- 2. S195D extract from Conveyancing Act,1919.**
- 3. Corporate and Works Committee Meeting report (R4) of 18 June 2007.**