

Obtaining Access to Legal Advice

Resolution of Council: 28 October 2002



Responsibility:
Legal Services

city of villages

POLICY ON OBTAINING ACCESS TO LEGAL ADVICE

Purpose

The purpose of this policy is to set out arrangements for access to legal advice which has been provided to Council.

Background

1. From time to time, issues arise about access to legal advice. Usually this relates to requests by Councillors, but is nevertheless equally relevant to requests by Council staff, including senior staff.
2. Legal advice attracts legal privilege, the effect of which is that the recipient of the advice is not required to disclose the advice to third parties. Legal privilege may be waived (or lost) by disclosure of the advice to a third party, including by referring to the contents of the advice. Legal advice on the extent of legal privilege will be circulated separately from this policy.
3. Legal privilege is recognised in many circumstances, including:
 - (a) as a basis for withholding documents under the Freedom of Information Act;
 - (b) as a basis for closing a Council meeting to exclude members of the public;
 - (c) as a basis for withholding documents from production under a subpoena or notice to produce, whether or not Council is a party to the legal proceedings.
4. Inappropriate release of information contained in legal advice (whether wilful or inadvertent) can be harmful to Council's interests and, indeed, often the public interest. For example, an adversary knowing the strength of Council's case can severely undermine any negotiations that may occur with another party.
5. It is vital that all Councillors and staff in possession, or aware, of legal advice handle it with the utmost discretion.
6. Clearly it is vital in protecting Council's interests that:
 - (a) all legal advice is treated as confidential;
 - (b) legal advice not be referred to in any published documents, unless there is a sound purpose for doing so;
 - (c) Council establishes policies and procedures governing access to such information and creates:
 - A hierarchy of persons with access rights, with access being on a "need to know" basis; and
 - A grading of confidentiality depending on the nature of the advice;

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- (d) publication to any third party of legal advice or the substance of that advice, be formally authorised by either the Council (formally) or the Lord Mayor (in writing) where it is in Council's interests to do so, or the General Manager or General Counsel (in writing), where it is both in the Council's interest to do so, and the action being taken is consistent with Council policies or decisions on the subject issue.
7. Councillors, privy to such information have a special duty to avoid any disclosure to any party, including any constituent who may have made representation to them. Where a Councillor has chosen to take an advocacy role for any party (other than Council), that Councillor should declare this and disqualify himself or herself from receiving any legal advice (in any form) obtained by Council on the matter. Councillors should also declare any conflict of interest arising in such circumstances including, for example, where representations are made to them by a Council adversary in litigation.
 8. Potential recipients of copies must have regard to actual or potential conflicts of interest and must not obtain access to legal advice in respect of which they have a conflict of interest.
 9. In determining access rights a distinction must be made between the right to read relevant legal advice and the right to have a copy.
 10. Access to legal advice
 - (a) Councillors and staff will only be given access to legal advice on a 'need to know' basis;
 - (b) Staff may read legal advice which (in the opinion of the General Manager or General Counsel) is directly relevant to their work but are not entitled to have copies (unless provided by the General Manager or General Counsel);
 - (c) Councillors, (other than the Lord Mayor), will have access to legal advice on the following basis. Councillors:
 - (i) Must have access to all legal advice relevant to a matter before Council upon which a decision is to be made, but may not have written copies of such material. All copies circulated during a briefing or meeting must be returned at the end of that briefing;
 - (ii) May only have access to advice (to read only) on matters involving potential or current litigation, or where Council has a potential or actual legal liability, at formal briefings or meetings called for that purpose, or unless the Council formally, or the Lord Mayor (with the General Manager's concurrence), approves the provision of copies in writing.

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- (iii) May, on request to the General Manager, have access (to read only) to any legal advice on any other matter not involving matters referred to in paragraph (c)(ii). In making that request, the Councillor shall state the advice requested and the purpose of that request. If such advice exists, the General Manager may provide access to that advice, if he/she considers it appropriate to do so. If such advice does not exist, the General Manager may determine whether to seek such advice, after consultation with the Lord Mayor.

Copies of advice will not be provided unless the Lord Mayor, with the General Manager's concurrence, releases copies of the advice to that Councillor;

- (iv) Should not obtain access to legal advice (in any form) on a matter where he/she (in his/her opinion) has taken an advocacy role for a person in respect of an issue involving the Council;
 - (v) must declare any representations they have received in respect of a matter, before otherwise obtaining access to legal advice (in any form) in respect of that matter;
- (d) The Lord Mayor, General Manager and General Counsel will have access to all legal advice, consistent with existing delegations;
 - (e) Notwithstanding any other provision of this policy, all potential recipients of legal advice, written or oral, must have regard to actual or potential conflicts of interest and must not obtain access to legal advice (in any form):
 - (i) in respect of which they have a conflict of interest;
 - (ii) if it is contrary to Council's interests for that person to receive the advice (in any form);
 - (f) No recipient of legal advice shall publish that advice, or the substance of it, to any third party, unless formally authorised by either:
 - (i) the Council (formally); or
 - (ii) the Lord Mayor (in writing) where it is in Council's interests to do so, or
 - (iii) the General Manager or General Counsel (in writing), where it is both in the Council's interest to do so, and the action being taken is consistent with Council policies or decisions on the subject issue.
 - (g) the following regular reports shall be provided:
 - (i) monthly reports listing planning appeals in Land and Environment Court, to the Planning Development and Transport Committee; and
 - (ii) quarterly reports listing all legal proceedings, on a confidential basis to Councillors.

Monday 28 October 2002

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Implementation of Policy

It is proposed that Council's Code of Conduct be amended so as to incorporate relevant provisions of this Policy.
