

Legal Advice Protocol

Adopted 14 December 2020

(A4266091)



Lifestyle Capital of Victoria

1. Purpose

The purposes of this Protocol are to:

- 1.1 implement a system for Councillors to request external legal advice in connection with their role as a Councillor;
- 1.2 clarify the types of advice that can legitimately be sought and the approvals required; and
- 1.3 ensure consistency, accountability and the best use of public funds.

2. Scope

This Protocol applies in circumstances where a Councillor wants legal advice to be obtained in connection with the performance of their duties and functions as a Councillor.

It is important to note the exclusions set out in clause 7.

The procurement of legal services by Council officers is subject to an administrative *Process for Obtaining Legal Advice* which incorporates appropriate procurement restrictions and oversight provisions.

3. Background

This Protocol has been developed in response to Council's resolution of 1 July 2019, following on from 2019/NOM12.

4. Indemnity

- 4.1 Section 43 of the *Local Government Act 2020* (Act) requires a Council to indemnify its Councillors against claims arising out of any act or omission done in good faith in their capacity as a Councillor. Where this indemnity is sought, a claim may be submitted to Council's insurers, who will determine whether to accept or deny the claim. Pending an insurer deciding whether to accept a claim Council will indemnify the Councillor against any legal costs incurred unless it is clear that the Councillor had not acted in good faith or had not acted in his or her capacity as a Councillor. Any such costs must be reasonable in their amount.
- 4.2 As Council's insurance policies require early notification of any potential claims, it is critical that immediate notice is given to the Chief Executive Officer of any circumstance that may give rise to legal action against a Councillor, and any writ, Magistrates' Court complaint or other originating process commenced against a Councillor or Councillors.

- 4.3 If Council's insurers accept the claim the indemnity will ordinarily be provided through the insurance protection given to the Councillor. Council will meet the cost of any excess or deductible.
- 4.4 If either:
- 4.4.1 no claim is made on Council's insurers because it is clear that no insurance cover applies; or
 - 4.4.2 a claim has been made but has been rejected by Council's insurers
- Council must still indemnify the Councillor if section 43 of the Act applies. In this regard, Council will, through external advisors, carry out an investigation to decide whether the terms of section 43 are satisfied. The Councillor must co-operate with the external advisors and Council.

5. Protocol

Making a request

- 5.1 If the indemnity under the Act is inapplicable but a Councillor requires external legal advice in connection with the performance of their official duties and functions, they may submit a request for Council to facilitate and fund such legal advice.
- 5.2 Ordinarily, such a request should be submitted as a Notice of Motion so that it may be considered by Council at the next available Council meeting.
- 5.3 However, if the requirement for legal advice is urgent and cannot reasonably be deferred until the next available Council meeting, it may be submitted as a written request to the Chief Executive Officer.

Determining a request

- 5.4 If the request is submitted as a Notice of Motion, Council will determine the request at the next available Council meeting, in accordance with the evaluation criteria set out in clause 6 below.
- 5.5 The request will be listed for consideration in open council, unless it includes a specific request to be considered in closed council.
- 5.6 For a request to be considered in closed council, it must qualify as 'confidential information' as defined in section 3 of the *Local Government Act 2020*. Accordingly, if the request specifies a preference for the matter to be considered in closed council, it must state the ground/s on which the matter is said to be confidential, ie:
- a. Council business information, being information that would prejudice the Council's position in commercial negotiations if prematurely released;
 - b. Security information, being information that if released is likely to endanger the security of Council property or the safety of any person;
 - c. Land use planning information, being information that if prematurely released is likely to encourage speculation in land values;

- d. Law enforcement information, being information which if released would be reasonably likely to prejudice the investigation into an alleged breach of the law or the fair trial or hearing of any person;
 - e. Legal privileged information, being information to which legal professional privilege or client legal privilege applies;
 - f. Personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs;
 - g. Private commercial information, being information provided by a business, commercial or financial undertaking that –
 - (i) Relates to trade secrets; or
 - (ii) If released, would unreasonably expose the business, commercial or financial undertaking to disadvantage;
 - h. Confidential meeting information, being the records of meetings closed to the public under section 66(2)(a);
 - i. Internal arbitration information, being information specified in section 145;
 - j. Councillor Conduct Panel confidential information, being information specified in section 169;
 - k. Information prescribed by the regulations to be confidential information for the purposes of this definition;
 - l. Information that was confidential information for the purposes of section 77 of the Local Government Act 1989.
- 5.7 If the requirements in clause 5.6 have been met, the matter will be listed in closed council and Council will determine by resolution whether discussion and debate should occur in open or closed council, and whether the decision on the matter can be released to the public.
- 5.8 If the request is submitted in writing to the Chief Executive Officer, the Chief Executive Officer must assess whether the matter is urgent.
- 5.9 If the Chief Executive Officer considers the matter to be urgent (ie it would be unreasonable for it to be deferred until the next available Council meeting), then the Chief Executive Officer must:
- a. determine the request in accordance with the evaluation criteria set out in clause 6 below; and
 - b. report the matter to Council at the next available Council meeting.
- 5.10 If the Chief Executive Officer considers that the matter is not urgent (ie it would be reasonable for it to be deferred until the next available Council meeting), then the Chief Executive Officer must:
- a. decline to determine the request on the basis that the matter can be deferred to the next available Council meeting; and

- b. report the matter to Council at the next available Council meeting.

6. Evaluation criteria

A Councillor's request for Council to facilitate and fund legal advice will be evaluated against the following criteria:

- 6.1 The extent to which the requested advice relates to the Councillor's performance of their official duties and functions. Examples of the types of circumstances where it may be appropriate for Council to facilitate and fund legal advice for a Councillor include:
 - 6.1.1 Responding appropriately to a Councillor conduct investigation, or to any other investigation by a regulatory body such as the Local Government Inspectorate, the Independent Broad-based Anti-corruption Commission or the Victorian Ombudsman, which relates to activities undertaken in good faith while carrying out official duties and functions.
 - 6.1.2 Responding appropriately to an investigation conducted by Victoria Police in relation to the Councillor's duties and functions (excluding criminal investigations).
 - 6.1.3 A circumstance where external legal advice is required in relation to a Councillor's potential conflict of interest.
- 6.2 The extent to which the requested advice relates to a matter that is before Council;
- 6.3 The extent to which the advice will be relevant to all Councillors;
- 6.4 The public interest, noting that a strong public policy justification must be provided to demonstrate that the decision to use of public funds is a valid use of Council's power;
- 6.5 The absence of any of the exclusions set out in clause 7 below; and
- 6.6 Any other relevant considerations.

7. Exclusions

Council will not fund a Councillor's legal fees in relation to any of the following:

- 7.1 Pursuing a defamation action – defamation is a private cause of action which is aimed at vindicating a person's reputation. It would not be appropriate for Council officers to assist or otherwise be involved, nor for public funds to be used for such an action.
- 7.2 Initiating or defending a legal proceeding arising out of a Councillor's personal or professional life; or
- 7.3 Pursuing a complaint or dispute under the Councillor Code of Conduct.

8. Related documents

- Councillor Expense Reimbursement Policy;
- Councillor Code of Conduct;
- Process for Obtaining Legal Advice (this document sets out the procurement restrictions and oversight provisions which apply to the Council administration).