

## Section 2.2 – Governance

**POLICY 2.2.8 – LEGAL REPRESENTATION FOR ELECTED MEMBERS AND EMPLOYEES****OBJECTIVE**

Under the *Local Government Act 1995*, the City's 'good government' powers allow it, in appropriate circumstances, to pay for the Legal Representation Costs of an individual Elected Member or Employee.

This Policy sets out guidelines to assist the Council in determining when it is appropriate to pay Legal Representation Costs.

This Policy does not cover legal representation provided to, or on behalf of, the City.

**Explanation of Key Terms**

**Approved Lawyer** is to be:

- (a) a 'certificated practitioner' under the *Legal Practice Act 2003*; and
- (b) approved in writing by the Council.

**Elected Member or Employee** means a current or former Commissioner, Elected Member, or Employee of the City.

**Legal Proceedings** may be civil, criminal or investigative (including an inquiry under any written law).

**Legal Representation** is the provision, to or on behalf of an Elected Member or Employee, by an Approved Lawyer of Legal Services that are in respect of:

- (a) a matter or matters arising from the performance of the functions of the Elected Member or Employee; and
- (b) Legal Proceedings involving the Elected Member or Employee that have been, or may be, commenced.

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**Legal Representation Costs** are the costs, including fees and disbursements, properly incurred in providing Legal Representation.

**Legal Services** includes advice, representation or documentation that is provided by an Approved Lawyer.

**Payment** by the City of Legal Representation Costs may be either by:

- (a) a direct payment to the Approved Lawyer (or the relevant law firm); or
- (b) a reimbursement to the Elected Member or Employee.

### GUIDELINES

#### 1 Payment criteria

There are three major criteria for determining whether the City should pay the Legal Representation Costs of an Elected Member or Employee. These are:

- (a) the Legal Representation Costs must relate to a matter that arises from the performance, by the Elected Member or Employee, of his or her functions;
- (b) the Legal Representation Costs must be in respect of Legal Proceedings that have been, or may be, commenced; and
- (c) in performing his or her functions, to which the Legal Representation relates, the Elected Member or Employee must have acted in good faith, and must not have acted unlawfully or in a way that constitutes improper conduct.

#### 2 Examples of Legal Representation Costs that may be approved

2.1 If the criteria in clause 1 are satisfied, the City may approve the Payment of Legal Representation Costs:

- (a) where proceedings are brought **against** an Elected Member or Employee in connection with his or her functions – for example, an action for defamation or negligence arising out of a decision made or action taken by the Elected Member or Employee; or
- (b) for involvement in a statutory or other inquiry that requires information to be given, or to which information is given, by an Elected Member or Employee in connection with his or her functions.

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- 2.2 This policy does not relate to situations where legal proceedings are commenced by an elected member or employee and there is a presumption that the City will not pay for legal representation costs in these circumstances. However this policy does not preclude such a request being submitted and considered by the Council for extenuating circumstances where the elected member or employee is the subject of threatening behaviour by another person.
- 2.3 The City will not approve the Payment of Legal Representation Costs to an Elected Member or Employee for a defamation action, or a negligence action, instituted by the Elected Member or Employee.

**3 Application for payment**

- 3.1 An Elected Member or Employee who seeks assistance under this Policy is to make an application(s) for Payment of Legal Representation Costs.
- 3.2 The application:
- (a) is to be made in writing to the Council; and
  - (b) is to give details of:
    - (i) the matter for which Legal Representation is sought;
    - (ii) how that matter relates to the functions of the relevant Elected Member or Employee;
    - (iii) the lawyer (or law firm) who is to be asked to provide the Legal Representation;
    - (iv) the nature of Legal Representation to be sought (such as advice, representation in court, preparation of a document etc); and
    - (v) the estimated cost (if known) of the Legal Representation.
  - (c) is to contain a declaration by the applicant that he or she has acted in good faith, and has not acted unlawfully or in a way that constitutes improper conduct in relation to the matter to which the application relates; and
  - (d) so far as possible, is to be made before seeking the Legal Representation to which the application relates.
- 3.3 The application is to be accompanied by a written statement by the applicant that he or she:
- (a) has read, and understands, the terms of this Policy;

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- (b) acknowledges that any approval of Legal Representation Costs is conditional on the repayment provisions of clause 7 and any other conditions to which the approval is subject; and
- (c) undertakes to repay to the City any Legal Representation Costs in accordance with the provisions of clause 7.

3.4 An application is also to be accompanied by a report prepared by or on behalf of the CEO or, where the CEO is the applicant, by the Director Corporate Services and Resource Management.

**4 Legal Representation Costs - limit**

- 4.1 Unless otherwise determined by the Council, payment of Legal Representation Costs in respect of a particular application is not to exceed \$5,000.
- 4.2 An Elected Member or Employee may make a further application to the Council in respect of the same matter.

**5 Council's powers**

- 5.1 The Council may:
  - (a) refuse;
  - (b) grant; or
  - (c) grant subject to conditions, including a financial limit,an application for payment of Legal Representation Costs.
- 5.2 A condition under clause 5.1 may include a financial limit and/or a requirement to enter into a formal agreement, including a security agreement, relating to the payment, and repayment, of Legal Representation Costs.
- 5.3 In assessing an application, the City may have regard to any insurance benefits that may be available to the applicant under the City's Councillors and Officers insurance policy (or its equivalent).
- 5.4 The Council may at any time revoke or vary an approval, or any conditions of approval, for the payment of Legal Representation Costs.
- 5.5 The Council may, subject to clause 5.6, determine that an Elected Member or Employee whose application for Legal Representation Costs has been approved has, in respect of the matter for which Legal Representation Costs were approved:
  - (a) not acted in good faith, or has acted unlawfully or in a way that constitutes improper conduct; or

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(b) given false or misleading information in respect of the application.

5.6 A determination under clause 5.5 may be made by the Council only on the basis of, and consistently with, the findings of a court, tribunal or inquiry.

5.7 Where the Council makes a determination under clause 5.5, it may also determine that all or part of the Legal Representation Costs paid by the City are to be repaid by the Elected Member or Employee in accordance with clause 7.

**6 CEO's powers**

6.1 In cases of urgency, the CEO, subject to clause 6.2, may exercise, on behalf of the Council, any of the powers of the Council under clauses 5.1 and 5.2, to a limit of \$2,000, where a delay in approving an application would be detrimental to the legal rights of an elected member or employee.

6.2 Where the CEO is the applicant, the powers in clause 6.1 are to be exercised by the Director Corporate Services and Resource Management.

6.3 An application approved by the CEO under clause 6.1, or by the Director Corporate Services and Resource Management under clause 6.2, is to be submitted to the next meeting of the Council which may exercise any of its powers under this Policy, including its powers under clause 5.4.

**7 Repayment of Legal Representation Costs**

7.1 An Elected Member or Employee whose Legal Representation Costs have been paid by the City is to repay the City:

- (a) all or part of those costs – in accordance with a determination by the Council under clause 5.7; or
- (b) as much of those costs as are available to be paid by way of set-off – where the Elected Member or Employee receives monies paid for costs, damages, or settlement, in respect of the matter for which the City paid the Legal Representation Costs.

7.2 The City may take action in a court of competent jurisdiction to recover any monies due it under this Policy.

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Previous Policy No:	A2-12, EM15
Amendments:	CJ213-06/99, CJ001-02/01, CJ136-06/04
Issued:	July 2004
Related Documentation:	

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Carol Mackintosh  
8 Vaucluse Place  
Kallaroo  
Perth WA 6025

9 December 2004

Mr Kevin Robinson  
City Of Joondalup

Application to the City Of Joondalup for Legal funding assistance for carol June mackintosh for  
Statutory Inquiry into the City Of Joondalup

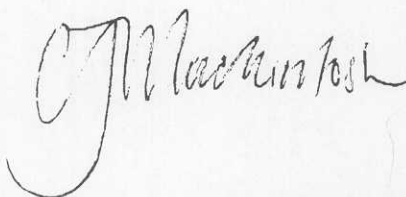
Further to our conversation today, please place before the City's commissioners my application for additional funding of \$7383.67 (being outstanding balance re; invoices before you from Su lloyd associates).

My application is based on the following:

- 1) The matters indicated in the Inquiry's terms of reference relate to the functions of my position as an elected member of the City Of Joondalup
- 2) The lawyer, who is representing me, is Mr Ron Birmingham QC of law firm, Lloyd Associates
- 3) The additional application of \$7383 (over and above the \$5000 plus \$2500 already approved), represents representation and preparation of documents by my appointed legal representatives. At this stage I have been advised that I will be appearing at the hearing sometime in February 2005.
- 4) All matters in which I have been involved as an elected member of the City Of Joondalup have involved acts and omissions performed in good faith and so I declare.
- 5) I have read and understand the City's Policy 2.2.8 and base this application upon it's conditions.

Yours sincerely

Carol Mackintosh



May it please be noted, that I am a retired person with no means of income. They may be further outstanding invoices for my present legal representatives. Please advise re: your current policy, in regards to meeting these invoices and the representation that I believed was due me as a voluntary elected member of this City.  
Your advice is much appreciated

**Robinson, Kevin**

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**From:** Carol and Paul Mackintosh [carolandpaul@iprimus.com.au]  
**Sent:** Monday, December 13, 2004 1:36 PM  
**To:** Robinson, Kevin  
**Subject:** City Of Joondalup Inquiry

Dear Kevin,  
Thankyou for your letter of 9 December 2004, which I received today.

You would by now, have received my application for the \$7383.67 re invoice 0343 (in relation to the City Of Joondalup Inquiry) under Policy 2.2.8.

You will also be aware (re Mike O'Brien's e-mail) that we (being Cllr's Kimber, O'Brien and mackintosh) have been obliged to suspend with our legal representation (being Su Lloyd and Associates and Ron Birmingham QC) until the matter of the funding is setteled.

I have today received a final invoice from Su Lloyd (until such time that the funding arrangements, i.e Insurance, is settled) for the amount of \$819.50.

Will you therefore please either ammend the request for \$7383.67 to \$8203.17 or accept this e-mail as a further application under Policy 2.2.8 for further funding to the amount of \$819.50.

I will fax you under seperate cover, the invoice no. 0361, for your attention.

Yours sincerely,

Carol Mackintosh

12/13/2004

For the attention of Mr Kevin Robinson.

See e-mail: from Carol Mackintosh 13/12/04

3 pages (including cover page)



## Robinson, Kevin

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**From:** Paul Kimber [kimber@bigpond.net.au]  
**Sent:** Monday, December 13, 2004 6:57 AM  
**To:** Higham, Clayton; Mike O'Brien JP  
**Cc:** Robinson, Kevin; Schneider, Peter; sclloyd@bigpond.com; carolandpaul@iprimus.com.au; Hill, Helen  
**Subject:** Re: Urgent Late Item for Commissioners - Tuesday 14th December 2004

Clayton,

Can the request provided by Mike to Council have my name included, as I suffer the identical circumstances and would be providing the same submission.

As you are aware, Mike, Carol and I are represented by the same legal counsel.

If you respond to this email, can you please respond to my work address at pkimber@fesa.wa.gov.au as I am away until Friday this week and may get to log on at some stage.

Regards.

Paul Kimber  
93000565  
0417914812

----- Original Message -----

**From:** "Higham, Clayton" <clayton.higham@joondalup.wa.gov.au>  
**To:** "Mike O'Brien JP" <obrienclan@arach.net.au>  
**Cc:** "Robinson, Kevin" <Kevin.Robinson@joondalup.wa.gov.au>; "Schneider, Peter" <Peter.Schneider@joondalup.wa.gov.au>; <sclloyd@bigpond.com>; <kimber@bigpond.net.au>; <carolandpaul@iprimus.com.au>; "Hill, Helen" <Helen.Hill@joondalup.wa.gov.au>  
**Sent:** Sunday, December 12, 2004 11:45 AM  
**Subject:** RE: Urgent Late Item for Commissioners - Tuesday 14th December 2004

Dear Mike

I note that you have copied Kevin Robinson in on this request. Kevin has indicated to me that he would like to put a late report to the Council Mtg on the 14th to deal with this matter. I have agreed with this approach.

Will keep you informed of the progress.

Regards

Clayton Higham

> -----Original Message-----

> From: Mike O'Brien JP [mailto:obrienclan@arach.net.au]  
> Sent: Saturday, December 11, 2004 7:50 PM  
> To: Higham, Clayton  
> Cc: Robinson, Kevin; Schneider, Peter; sclloyd@bigpond.com; kimber@bigpond.net.au; carolandpaul@iprimus.com.au  
> Subject: Urgent Late Item for Commissioners - Tuesday 14th December 2004  
>  
>  
> << File: Funding 11.12.04.doc >>  
>  
> Good Evening Clayton,  
>  
> The attachment is a copy of a signed fax I forwarded your Office at 18:58 hrs this day after being informed by Kevin Robinson that the last Meeting of the Commissioners for 2004 is to occur on Tuesday Evening 14th December 2004.  
>  
> I think everybody was hopeful the Insurers would have exercised an

indication that they would have accepted responsibility long before the crisis stage that this matter has resulted in, with Legal Counsel being unable to continue representing summoned witnesses without funding.

>

> As no doubt you have read in the Transcript it has been our legal team that have affected the suppression of some matters, that, if left unattended by Counsel Assisting and with due respect some perceived omission by the Inquirer some witnesses would have been no doubt the subject of adverse media comment.

>

> In addition as identified in point 10. of my request to the Commissioners benefits from our Legal Team have wider side effect advantage to witnesses in general resulting from the > "> Documents Order> "> centring on Mr Staude.

>

>

**MIKE O'BRIEN JP**

45 ABERDARE WAY, WARWICK WA 6024

PHONE/FAX 61 8 9448 1717

MOBILE 0438 948 001 (OR) 0419 946 801

**FACSIMILE TRANSMITTAL MESSAGE**

TO:	Mr Clayton Higham Acting CEO	FROM:	Mike O'Brien JP email : obrienclan@arachnet.net.au
COMPANY:	City of Joondalup	DATE:	11 <sup>TH</sup> DECEMBER 2004
FAX NUMBER:	9400 4569	TOTAL NO. OF PAGES INCLUDING COVER:	
PHONE NUMBER:	9400 4556	SENDER'S REFERENCE NUMBER:	
RE:	Urgent Late Item Matter for Tuesday 14.12. 2004	YOUR REFERENCE NUMBER:	

☐ URGENT    ☐ FOR REVIEW    ☐ PLEASE COMMENT    ☐ PLEASE REPLY    ☐ PLEASE RECYCLE

## NOTES/COMMENTS:

The Acting CEO  
The City of Joondalup  
Davidson Terrace  
JOONDALUP WA 6027

**Good Morning,**

**Application to the City of Joondalup for Continuance of Legal funding assistance, for Michael Cave O'Brien JP, for the ongoing State Government Statutory Inquiry into the City of Joondalup**

Please place before the City's Commissioners my application for funding update for Legal Representation based on the following ;

1. The matters indicated in the Inquiry's Terms of Reference relate to the functions of my position as an Elected Member of the City of Joondalup;
2. The Instructing Solicitor granted leave to appear is Su Lloyd and Senior Counsel Granted Leave to appear is Ron Birmingham QC and their Accounts have been forwarded to the City as requested by the City's Officers and my understanding is that there are outstanding amounts owing to the Legal Team that are at this stage unattended and unpaid by the City;

3. The Nature of the Legal Representation sought is, but not limited to, legal advice, representation before the Inquiry Panel, preparation of Submission to the Inquiry, cross examination of witnesses giving evidence to the inquiry, the instructing of Senior Counsel and appearance of Senior Counsel on my behalf, required for protection of my interests during the course of the Inquiry and/or related Legal Proceedings and/or other matters related to my function as an Elected Member of the Municipality of The City of Joondalup;
4. The cost is the rate per hour charged by Su Lloyd and Ron Birmingham QC and agreed by the City's Officers to be their recognised rate, already previously invoiced and the total Tax Invoiced Accounts are apportioned as, 1/3 Paul Kimber, 1/3 Carol Mackintosh, and 1/3 Mike O'Brien, as all three of us are represented by the same Legal Team. Such funding is in the interests of the City in order that Good Government continues to prevail within the City's Boundaries and Current and Past Elected Members, Appointed Officers and Appointed Commissioners are able to participate without fear or favour from particular phases of political groups activities within and without the City's Boundaries;
5. All matters in which I have been involved as an Elected Member of the City of Joondalup have involved acts and omissions performed in good faith and I so declare;
6. I have read and understand the City's Policy 2.2.8. and I am aware that there is a "Policy" cap limit of \$5,000.00 affecting each application and any further extension above the current Policy cap would require additional consideration by the Commissioners;
7. My correspondence files show that I first raised the matter of payment being able to be claimed back by the City from the City's Insurers in my letter to Brendan Peyton emailed at 10:03 hrs on Friday 16<sup>th</sup> July 2004 and of course it is the City that is the party to the Insurance Contract, not the individual Officer, Commissioner and/or Elected Member;
8. A "primary matter" over which I have no control, is the Determination by The Inquirer that only Legal Practitioners, pursuant Section 35 of the *Legal Practice Act 2003* will be allowed to cross examine witnesses.
9. Another matter over which I have had no control, has been the "delayed and prolonged negotiations" between the Ace Insurance, the City's Insurers and the City's Officers, with no reflection or criticism cast in any manner, on the City's Officers, regarding that matter;
10. I might say that Ron Birmingham QC had "persuasive influence" in achieving a response by the Inquiry's Officers, resulting from an "Order issued by Mr McIntyre the Inquirer", the result of which, was a one hundred



and eighty degree about turn, from the negative response by Brendon Peyton (CEO of the Inquiry) that I received by email, at 12:48 hrs on Friday 16<sup>th</sup> July 2004;

11. The Inquirer's (Documents) Order, is of benefit equally to all witnesses, being the City's Officers as well as Elected Members and as such, affects not only the three witnesses represented by the Su Lloyd/Ron Birmingham Legal Team, as the order, places on foot, actions required to be performed by John Staude Counsel Assisting the Inquiry, in the making available reasonable "discovery" of documents;

12. The Tax Invoicing, for the Birmingham advocacy, by our Legal Team, mentioned in point 10. above, had "a side effect benefit" for a much wider range of witnesses than ourselves, in that, witnesses, are now not so likely to be "ambushed" and are required to be pre-warned if they seek an indication of documents, which have been collected by the Former Police Officers who work for the Department of Local Government and are documents which are being "put" to witnesses by John Staude, during the course of the Inquiry;

13. I note and applaud, that Commissioner Anderson, achieved an undertaking by the Former Minister for Local Government and Regional Development acting on behalf of the State Government, that the State Government would not be requiring "recoup" of Inquiry Costs from the Municipality and such an undertaking is "right and proper" in my view, due to questionable advice given the Former Minister by the Departmental Officers, as evidenced in the text in the Hansard of the Former Minister's address to the Standing Committee on Public Administration and Finance in the latter part of 2003 and followed by the criticism of the Former Minister in the SC on F & PA Report to Parliament;

14. If the Insurer's Decision, which I understand is due to be delivered to the City this coming week, is "a negative decision" I would expect that the Commissioners, would have discussions with all summoned witnesses, about representations to the State Government, to cover the Legal Costs of witness Legal Representation, as was the precedent, set by the Commonwealth Government funding witnesses Legal Representation Costs, in the Costigan Inquiry and I think the WA State Government, funding some Police Officers Legal Costs, in the recent WA Police Royal Commission.

Sincerely



Mike O'Brien JP