

PART 7

---

was not given to elected members unless they had a legitimate justification. He said it also strengthened the need to ensure that access, where it is justified, is given in a form that protects the City's interests. In many cases, he said, this may result in elected members being given access that did not include being given a copy of the advice. His amended advice contained a draft response to Mayor Carlos and Crs Hart and Walker which contained the following paragraph:

*"In considering the question of access by a particular elected member to legal advice, it is also important to take account of the conflict of interest provisions under both the Local Government Act and the City's Code of Conduct. For example, there would appear to be a clear conflict of interest in an elected member being provided with access to legal advice that dealt with the prospect of legal proceedings being taken against that member in his or her professional capacity."*

213. Amendments to the legal advice coincided with Cr Baker sending an e-mail to Mr Smith on 24 October 2003, stating that in his view the information requested should not be available to the Mayor and councillors concerned because "these councillors and the Mayor have an interest which is adverse to the best interests of the City of Joondalup". He expressed concern that, as with previous confidential legal advice, the documentation may be again leaked to the media as it clearly was after the last Council meeting. He also said "the Mayor continues not to represent the City's best interests on this issue as has been confirmed by the City's lawyers": T2151.
214. Mr Robinson gave evidence that he endorsed a faxed copy of the advice (2705KBR65) with a note to Mr Higham stating that he agreed with the advice and sought an assurance that he had been delegated authority to deal with the matter. Mr Robinson explained that he understood Mr Smith to have withdrawn his delegation. Mr Higham was going on leave and he wished to be sure of his position: T11843 27/5/05. Thereafter, Mr Loader had carriage of the elected members' request.
215. There was no mention made in the advice of Section 5.46 which requires a CEO to keep the register of delegations made to the CEO and to employees. Nor was any mention made of Section 5.41 which imposes a duty on the CEO to advise the Council and to "ensure that advice and information is available to the Council so that informed decisions can be made", as well as ensure that records and documents are kept.
216. This section had been relied upon by Mr Douglas in his advice to Mr Higham (1412NFAD10) regarding the question whether letters sent by the Commissioner of Police

to Mayor Carlos and Cr Walker, opened and processed by the City, should remain part of the City's records, notwithstanding advice from the Commissioner's office that the letters were forwarded on a confidential basis and intended for the addressees personally, and whether copies of those letters should be given to the CEO, the elected members and others. On this occasion Mr Douglas advised that the documents should be retained because they had been sent to each member at the City's offices, neither contained anything to indicate that it was sent in confidence or that it was sent to either member in a personal rather than official capacity. He also advised that the CEO had a statutory responsibility to ensure that records and documents were properly kept and would be entitled to have access to all records and documents unless there were compelling reasons to the contrary. In relation to councillors, Mr Douglas advised that the CEO had a duty to ensure that advice and information was available to Council and that councillors had a corresponding entitlement to be provided with relevant information. He said there were strong grounds to conclude that the CEO had an obligation to ensure that copies of the Police Commissioner's letters were provided to the Council: 1412NFAD10.

217. In the scheme of the LGA, and having regard to its stated intention of achieving better decision making, greater community participation, greater accountability and more efficient and effective local government, such a statutory register would constitute a record to which elected members and the public should have access as of right. As for access to legal advice generally, it was stated in the Report of the Inquiry into the City of South Perth that "It is a fundamental right of councillors to seek legal and other advice provided to the City on topics they are required to make decisions on". Given that the Council is the governing body of the local government (LGA Section 2.6(1)) and it is the role of the Council to direct and control the local government's affairs and be responsible for the performance of the local government's functions (LGA Section 2.7(1)(a)(b)), those providing administrative assistance to the Council would be expected to start with the proposition that members of the Council are entitled to all information they seek, unless there are exceptional circumstances.
218. Councillors of the City of Joondalup were required on a number of occasions to make decisions in relation to the CEO's employment. To do so they were entitled to be fully informed not only as to factual information – and evidence, about which comment has been made – but also legal advice which had been obtained by the Administration and the instructions given for that advice. Section 5.92 does not cast an onus on an elected member to prove to the satisfaction of the Administration that the information is relevant to their statutory function. Rather, the interests of good governance and the stated intent of the Act

## CHAPTER 3

### PART 7

---

and statutory role of the Council indicate it is for the Administration, whose function and duty it is to inform and advise, to indicate the reasons for not providing requested information.

219. Furthermore, it is not a relevant consideration, in the discharge of the CEO's statutory duty to provide information to elected members that the information may be forwarded to others who may not be entitled to it. The LGA and the Code of Conduct to which elected members subscribe adequately delimit the use to which such information can be put by an elected member.
220. Mr Robinson then wrote to the Mayor and Crs Hart and Walker on 24 October 2003 referring to Section 5.92 and stating:

*"To enable me to respond to your request, would you please provide me with details of the basis on which you consider that the advice and other material you have sought is relevant to the performance of your functions."*

221. On 28 October 2003 Cr Hart e-mailed Mr Loader requesting a time for councillors to see the terms of reference of legal advice previously requested. This request was referred to Mr Douglas who advised that Mr Loader was not obliged to arrange a meeting and that the councillors concerned should be asked to provide details of the basis on which they considered the legal advice and other information to be relevant to the performance of their functions. The cost in October 2003 of legal advice on the disclosure of legal advice to elected members was over \$2,800.00.
222. There were numerous e-mails between Mr Loader and Cr Hart in the first half of November 2003, but on the evidence available it appears that the requests of Mayor Carlos and Crs Hart and Walker were never satisfactorily answered. The tortuous process which was engaged in by way of response to the request of the councillors is not a cause for adverse reflection on the conduct of the officers involved. They were appropriately acting on legal advice: see *Inquiry into the City of Cockburn* and *Murcia Holdings Pty Ltd v City of Nedlands* [1999] wasc 241, per Anderson J. The legal advice, in the particular circumstances was reasonably sought, given the litigation which was on foot at the time.
223. It is also to be taken into account that the principal thrust of the communications from the administration was to clarify the breadth of the request being made. In addition, the officers