



Department of
Local Government, Sport
and Cultural Industries

Local Government Operational Guidelines

December 2019

Disclosure of interests affecting impartiality



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About DLGSC

The DLGSC works with partners across government and within its diverse sectors to enliven the Western Australian community and economy through support for and provision of sporting, recreational, cultural and artistic policy, programs and activities for locals and visitors to the State.

The department provides regulation and support to local governments and the racing, gaming and liquor industries to maintain quality and compliance with relevant legislation, for the benefit of all Western Australians. This publication is current at December 2019.

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1. Introduction

Council members, Chief Executive Officers (CEOs) and local government employees are expected to make decisions in the best interests of their community. To do this, they must consider each issue on its merits.

Decision-making could be influenced – or perceived to be influenced – in a number of ways, including through financial relationships, personal relationships and the receipt of gifts. The *Local Government Act 1995* sets out requirements on council members, CEOs and other employees to ensure transparency and accountability in decision-making.

This guideline deals with interests that affect the impartiality of a person, generally arising because of personal relationships or membership of an association. This should be read in conjunction with Operational Guideline: Disclosure of gifts and disclosure of interests relating to gifts.

Local government council members and employees are required to disclose an interest that may adversely affect their impartiality in any matter discussed at a council or committee meeting. In addition, employees are also required to disclose interests when providing advice or reports to be discussed at a council or committee meeting.

The *Local Government (Rules of Conduct) Regulations 2007* set out uniform rules to guide the behaviour of council members. Regulation 11 prescribes how and when disclosure of an impartiality interest must be made by a council member.

Regulation 34C of the *Local Government (Administration) Regulations 1996* prescribes how and when disclosure of an impartiality interest must be made by a local government employee. These provisions are to be included within each local government's employee code of conduct.

Each piece of legislation establishes precise and detailed provisions which clarify the disclosure requirements and general responsibilities of individuals within local government.

2. The decision to disclose

For the purposes of requiring disclosure, an impartiality interest is defined in Regulation 34C of the *Local Government (Administration) Regulations 1996* and Regulation 11 of the *Local Government (Rules of Conduct) Regulations 2007* as, "an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association."

The above definition includes examples of the type of relationships from which an interest could arise. However, a significant element is the likely public perception as to whether there may be an interest.

It is sometimes difficult to judge what a reasonable belief of another person is. Therefore, when deciding if such an interest should be disclosed, it is helpful to establish answers to the following questions:

If you were to participate in assessment or decision making without disclosing, would you be comfortable if the public or your colleagues became aware of your association or connection with an individual or organisation?

Do you think there would be a later criticism of perceived undisclosed partiality if you were not to disclose?

The regulations provide some examples of what constitutes an "interest".

3. The impact of an impartiality disclosure

There are very different outcomes resulting from disclosing an interest affecting impartiality compared to that of a financial interest.

With the declaration of a financial interest a council member leaves the room and does not vote or otherwise participate in that part of the meeting (unless permitted to do so by the meeting or the Minister).

Similarly, if an employee has a financial interest in a matter for which they have delegated authority, section 5.71 of the *Local Government Act 1995* requires that the employee makes the necessary disclosure and prohibits the employee from exercising the delegated power or duty in the matter for which they have declared a relevant financial interest.

With the declaration of an impartiality interest, the council member stays in the room, participates in the debate and votes. Following disclosure of an interest affecting impartiality, the member's involvement in the meeting continues as if no interest existed. This recognises that everyone has interests and relationships which affect the way they think and feel; making a disclosure of this type makes it clear both to the council member with the interest and the other council members that bias could creep in.

4. Disclosing an interest

4.1 Who is required to make a disclosure?

Council members and employees (including persons under contract) of local governments are required to disclose interests affecting impartiality.

4.2 When should a disclosure be made?

If the matter in which a council member or employee has an interest affecting impartiality is to be discussed at a council or committee meeting, the council member or employee is to disclose the interest either in a written notice given to the CEO before the meeting or verbally at the meeting immediately before the matter is discussed.

Local government report templates often include sub-headings for employee disclosures of interest. An employee should ensure that their interests are disclosed at the time they are asked to commence any work toward providing advice or a report, rather than after they have completed work on preparing the advice or report.

In any case, disclosure of interest is required to occur as soon as the person becomes aware that they have a conflict of interest.

4.3 What to disclose

To assist with making the disclosure, the department has prepared the following declaration which council members or employees may use when they consider it necessary to disclose an interest affecting impartiality. The nature of the interest must also be stated.

Council Member Declaration:

"With regard to the matter in item x I disclose that I have an association with the applicant (or person seeking a decision). This association is (nature of the interest).

As a consequence, there may be a perception that my impartiality on the matter may be affected. I declare that I will consider this matter on its merits and vote accordingly."

Employee Declaration:

"With regard to the matter in item x I disclose that I have an association with the applicant (or person seeking a decision). This association is (nature of the interest).

As a consequence, there may be a perception that my impartiality on the matter may be affected. I declare that I will consider this matter on its merits and provide advice accordingly."

4.4 How to disclose

At meetings

A council member or employee attending a meeting who wishes to disclose an interest affecting impartiality can make a verbal declaration or do so in written form. If a council member or employee chooses to make a verbal disclosure, they should do so during the meeting, immediately prior to discussion of the matter to which the disclosure relates.

A written notice of interest must be given to the CEO prior to commencement of the meeting. In this instance the CEO must make the person presiding at the meeting aware of the interest prior to commencement of the meeting. During the meeting the presiding person must then bring the contents of the notice to the attention of the person's present at the meeting immediately prior to discussion of the matter to which the disclosure relates.

All disclosures made are to be recorded in the minutes of the relevant meeting. It is important that the minutes distinguish between disclosures of interests affecting impartiality and disclosures of financial interests.

At other times

Situations will arise where an employee has provided advice to council in the form of a report without being in attendance at the meeting but will have the need to disclose an interest. The regulations set out that an employee who has given, or who will give advice in respect of a matter in which they have an interest and which is to be discussed at a council or committee meeting where they will not

be in attendance, is to provide written notice to the CEO prior to the meeting or at the time the advice is given.

For example, an officer preparing a report for a matter to be discussed at a council or committee meeting but will not be in attendance at the meeting should disclose their interest in a written notice given to the CEO before the meeting and may also include the disclosure in the body of the report.

4.5 Failure to disclose

In failing to disclose an impartiality interest, a council member contravenes a rule of conduct and in doing so commits a minor breach. The *Local Government (Rules of Conduct) Regulations 2007* focus on providing avenues for dealing with allegations specifically concerning council member misconduct. Under this legislation, minor breaches are referred to a Local Government Standards Panel which is supported by the department.

An employee who fails to disclose their interest in accordance with *Local Government (Administration) Regulations 1997*, Regulation 34C commits a breach of the local government's code of conduct, in which case is a matter to be dealt with by the CEO.

4.6 Exceptions

The requirement to disclose an interest does not apply in circumstances where a council member or employee fails to do so because they were not aware that an interest existed.

The same is true when a council member or employee fails to disclose an interest because they did not know the matter in which they had an interest was to be discussed. In the second instance disclosure of the interest must be made as soon as possible following commencement of the discussion.

These exceptions are not automatic and will depend on the circumstances and facts relating to the reasons for non-disclosure.

5. When does an interest affecting impartiality arise?

The existence of an interest affecting impartiality is dependent on:

- the council member or employee having an association with a person or organisation that has a matter being discussed at a council or committee meeting,
- the employee being required to give advice on a matter where they have an association with a person or an organisation related to that matter,
- the type of matter being discussed at a council or committee meeting, and
- an employee considering a matter under delegated authority, in which they have an association with a person or an organisation related to that matter.

The department would not expect a disclosure to be made in matters which are solely related to:

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- an individual's beliefs, philosophies or attitudes;
 - a member's election pledges; or
 - any other public pledges made by a member.

No disclosure should be necessary – unless the matter also involves an association with a person or organisation connected to the member.

5.1 What types of matters could result in a perception of partiality?

The department's view is that the intent of the impartiality provisions is to capture those matters where persons or organisations associated with members or employees are, by their own action, seeking a decision from the local government (for further detail please see discussion on associated persons).

The types of matters where disclosure is warranted include any matters which require applications for approval, consent or a licence where the financial interest provisions of the Act do not apply. This would include development applications, extensions or construction of facilities, requests for financial assistance, tenders, staff recruitment and so on.

It is recognised that decisions on impartiality disclosures are most difficult where a council member or employee has an association with an individual or organisations, which has a passive involvement in a matter before Council, a committee or the local government for a decision.

Example:

A matter is before a council meeting which requires a decision to be made about the provision of footpaths on a particular group of streets. The employer of one of the elected members lives on one of the streets.

Scenario A:

The employer had been a leader in the community push to request the construction of the footpaths.

Decision:

There is no doubt, the council member should make an impartiality disclosure.

Scenario B:

The employer had not been involved in any of the community efforts which have caused council to consider the provision of footpaths.

Decision:

This scenario is more doubtful. Criticism of the member for not making a disclosure could be considered unfair. However, the council member may still wish to declare, as it does not affect their ability to debate and vote on the issue.

5.2 What types of associations may give rise to a perception of partiality?

There are two major categories of associations that council members or employees may have which in certain circumstances may give rise to interests that affect impartiality. These are associations with people and associations with organisations.

5.3 Associations with Persons

The financial interest provisions of the Act identify particular relationships that a council member or employee may have which can result in a financial interest arising. In a similar way, matters involving persons that a council member or employee has a relationship with may result in an interest which affects impartiality.

The regulations relating to disclosures of impartiality make direct reference to an interest arising from kinship, friendship or membership of an association.

Therefore, in the context of kinship and other formal connections, if a relevant matter is discussed at a council or committee meeting, to avoid a later criticism of undisclosed partiality, disclosure is warranted if the matter involves a member's or employee's:

- spouse or de facto spouse;
- brother and sister;
- parents and spouse's parents;
- children;
- employer; or
- business partner.

Scenario A:

An employee (ranger), appointed as an authorised person, is required under the Parking Local Law to determine an application from the local Country Women's Association to park cars in contravention of parking signs, during a Country Women's week event. The ranger's mother is an office bearer and member of the local CWA.

Decision:

The employee must disclose an impartiality interest arising from kinship (their mother's membership of the CWA), before dealing with the application.

5.4 Associations with friends and adversaries

In addition to the persons mentioned in the previous section, the general public is often concerned about impartiality in matters which involve people who are friends or adversaries of council members or employees. However, while the definition of persons linked by family ties is generally indisputable, there is some argument about the existence of an acceptable definition of a friend or adversary.

In relation to a friend, the definition which probably comes closest to the department's view is given in the Macquarie dictionary which defines a friend as "one attached to another by feelings of affection or personal regard", or "one who is on good terms with another".

In another interpretation, it is suggested that two people could be considered friends because they frequently socialise, have business lunches and regularly go on trips or outings together.

A friend may also be considered as someone who regularly participates at another person's family functions or other significant events, or there may be a length of time component which would form part of the definition.

Nonetheless, it would be fair to say that the definition would vary from person to person depending on age, background, gender, geographic location and so on. It is a judgement for each council member to make as to whether a person in their local government district would have a reasonable belief that another person is a friend of the council member.

Following this judgement, it is then up to each council member to decide whether to disclose or not, bearing in mind the potential for later criticism of undisclosed partiality.

It is important to note, in addition to a friend, the same level of partiality could be perceived to exist for an adversary or person that a member or employee strongly disliked. When relevant matters come before Council involving such persons, disclosure may well be warranted.

It is recognised that in many small country towns, council members and employees may know a high proportion of the Shire's population. As a consequence, although this is a difficult area, the department encourages individual local governments to formulate a definition of a close friend and adversary, which is appropriate to their circumstances which would assist council members and employees when they face a decision with regards to disclosing an association.

5.5 Associations with organisations

Subject to the person considering the extent of their involvement in an association or organisation, disclosure is warranted when matters are discussed at council or committee meetings which directly relate to groups with which council members and employees are affiliated. These include sporting clubs, resident groups and associations, business groups and associations, professional associations and so on.

Example:

A sporting group has a request before Council seeking a donation or other financial contribution.

Scenario A:

An elected member is an office bearer in the sporting club.

Decision:

The member should make an impartiality disclosure at the meeting.

Scenario B:

An elected member is a member of the sporting club but the extent of involvement is occasional attendance at meetings and events.

Decision:

Disclosure required as 'membership of an association' is established.

5.6 Other associations

Regulations relating to disclosure of interest affecting impartiality make direct reference to an interest arising from kinship, friendship or membership of an association. However, the department recommends that council members and employees consider and include other types of associations as they see fit. These may also include other categories of persons or it may include secondary relationships, for example, matters which involve friends of spouses, or friends of children etc.

It is important to consider how others may perceive your associations and connections and make disclosures that are reasonable and promote a consistent probity standard.

The disclosure of an impartiality interest will not prevent a council member from participating and voting in a matter, but the proactive disclosure of impartiality interests that may be perceived by the community will protect the council member and the local government from potential criticism.

Matters which involve a council member's beliefs, philosophies, attitudes and election or public pledges

As stated earlier, a council member's, CEO's or employee's beliefs, philosophies, attitudes and election or public pledges are not matters for which an impartiality disclosure is warranted. The key issue is the association with people or organisations who have business with the local government.

As one of the objectives of the interest affecting impartiality provisions is to help make local government decision making transparent, it should be unnecessary for a member to disclose issues openly campaigned upon before their election. The following examples outline the department's views on this matter.

Examples:**Example 1:**

A person who actively campaigns on a platform of keeping the rates down is elected in October and in the following July faces the decision of voting for the budget.

Decision:

As the council member's views on the matter are well known and it does not relate to a specific application, the member would not be required to disclose an interest.

Example 2:

A council member is known to be anti-development and is a strong campaigner on environmental issues. An issue comes before Council with regards to the clearing of 20ha of pristine bushland known as "Tinglewood Dell".

Decision:

As the council member's views on the matters are well known and there is no association with other individuals or organisations that have an interest in the matter, the member would not be required to disclose an interest.

Example 3:

As in example 2, except the council member is deputy president of the organisation "Friends of Tinglewood Dell", a non-profit organisation dedicated to saving the land from development and trying to raise sufficient funds to buy the land.

Decision:

As the council member is an office holder in an organisation which is heavily involved in the matter before Council, the council member should disclose that association with the organisation.

Example 4:

A council member campaigned at the last election for the zoning of a certain area of land to be retained as residential in contrast to the local government's publicly announced preference to rezone the land commercial. By the time the rezoning of the land is debated in Council it has become known the council member's son (who does not live with the Councillor) has an option to buy a block of land, which will become zoned for a commercial building (the financial interest provisions do not apply).

Decision:

The council member should disclose an impartiality interest because in dealing with this matter there is an association with a relative even though the council member's eventual vote is against the interests of this person.

6. Concluding remarks

Council members, CEOs and employees are expected to make decisions in the best interests of their community. To do this, they must consider each matter on its merits.

Decision-making could be influenced – or perceived to be influenced – in several ways, including through financial relationships, personal relationships and the receipt of gifts.

The *Local Government Act 1995* sets out requirements for council members, CEOs and other employees to ensure transparency and accountability in decision-making. The disclosures of interest are not onerous and much of the information disclosed may already be known by community members or be available in public documents.

Guidance on how and when to disclose interests should be provided by local governments to council members and employees. This is particularly important for new council members and employees who have never dealt with the disclosures of interests before, and should be incorporated into their induction process.

The onus is on you to be aware of the nature of any of the relationships you have with other people and disclose those relationships at the appropriate time. While assistance can be sought from the CEO about these matters there is no requirement for the CEO or any other person to remind you of your disclosure obligations.