



Burwood Council

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REIMBURSEMENT OF LEGAL EXPENSES – DESIGNATED PERSONS

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Council Policy
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Team Responsible: Governance

Purpose

To ensure that Designated Persons (in their role as a public official) who have not had an adverse finding or recommendation against them as part of an investigation or legal proceeding have the ability to seek reimbursement of their legal expenses.

Definitions

Designated Persons - has the meaning specified in Section 441 of the *Local Government Act 1993* and Council's Councillors and Officers Liability Insurance Policy is as follows:

- the General Manager
- other Senior Staff of the Council
- a person (other than a member of the senior staff of the council) who is a member of staff of the council or a delegate of the council and who holds a position identified by the council as the position of a designated person because it involves the exercise of functions under this or any other Act (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the person's duty as a member of staff or delegate and the person's private interest
- a person (other than a member of the senior staff of the council) who is a member of a committee of the council identified by the council as a committee whose members are designated persons because the functions of the committee involve the exercise of the council's functions under this or any other Act (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the member's duty as a member of the committee and the member's private interest.
- Council Officer acting in a designated persons role.

Investigative Body – means one of the following:

- NSW Police Force
- Australian Federal Police
- New South Wales Ombudsman
- Independent Commission Against Corruption (ICAC)
- Chief Executive of the Division of Local Government (DLG)
- Local Government Pecuniary Interest Tribunal
- Director of Public Prosecutions
- Council's Conduct Review Committee/Reviewer
- Information Commissioner – Officer of the Information Commissioner
- any other investigative body constituted under legislation

No adverse findings or recommendations – that the investigative body has confirmed in writing that it has made no findings of corrupt conduct, maladministration or criminality with respect to the Designated Person.

Legal Expenses – any fees paid for legal representation or legal advice.

Insurance Expenses and Obligations

Designated Persons are to receive the benefit of insurance cover for Designated Persons' and Officers' Liability. This cover provides indemnity for Designated Persons in circumstances where they cannot be indemnified by Council.

The indemnity provided by this policy applies to the Designated Person personally and covers liability to pay civil damages, their legal costs and other costs incurred in defending a claim. This policy only covers matters arising out of a Designated Person's performance of civic duties or exercise of their functions as Designated Persons provided that performance or exercise of the relevant civic duty or function is in the opinion of Council *bona fide* and/or proper and is carried out in good faith, as required under Section 731 of the *Local Government Act 1993*.

It should be noted that the insurance policy does not cover criminal liability (including legal costs) arising from a breach of statute.

Legal Expenses & Obligations

Eligible Legal Costs

Council will meet the reasonable legal expenses of a Designated Person in the following circumstances:

- legal proceedings being taken against a Designated Person in defending an action arising from the performance in good faith of a function under the *Local Government Act 1993*
- defending an action in defamation, provided that the outcome of the legal proceedings is favourable to the Designated Person

Reasonable legal costs may also be available for an inquiry, investigation or hearing into a Designated Person's conduct by an appropriate investigative or review body subject to the following conditions being met:

- the subject of the inquiry, investigation or hearing arises from the performance in good faith of a Designated Person's functions under the Act
- the matter before the investigative or review body has proceeded past any initial assessment phase to a formal investigation or review
- in the case of a conduct complaint made against a Designated Person the matter has been referred by the General Manager to a conduct reviewer/conduct review committee to make formal enquiries in accordance with the Burwood Council Code of Conduct
- in the case of a pecuniary interest or misbehaviour matter a formal investigation has been commenced by the Division of Local Government

Legal costs will only be met where the investigative or review body makes a finding that is not substantially unfavourable to the Designated Person. This may include circumstances where a matter does not proceed to a finding.

Note: In relation to a Designated Person's conduct, a finding by an investigative or review body that an inadvertent minor technical breach had occurred may not necessarily be considered a substantially unfavourable outcome.

Ineligible Legal Costs

Council will not meet legal costs in the following circumstances:

- legal proceedings that are initiated by a Designated Person under any circumstance

- a Designated Person seeking advice in respect of possible defamation, or in seeking a non-litigious remedy for possible defamation
- the proceeding does not involve a Designated Person performing their role as a Council Officer

Reimbursement of Legal Expenses

Council will reimburse a Designated Person for legal expenses incurred in connection with:

- attendance at an interview conducted by the investigative body
- attendance at a cautioned interview conducted by the investigative body
- acting as a witness under summons or at the request of the investigative body
- attendance at a hearing (public or private) conducted by the investigative body

Where the Designated Person is the subject of the investigation by the investigative body or a hearing conducted by the investigative body, Council must be satisfied that:

- the subject-matter of the investigation or hearing by the investigative body arises from the Designated Person's bona fide discharge of a duty or function of their official duties
- Council is of the opinion that the discharge of the relevant duty or function was bona fide
- the investigative body confirms that it has completed the investigation or hearing/s and that no adverse finding or recommendation has been made with respect to the Designated Person
- the Designated Person has, in responding to the investigative body's request, complied with any reasonable and lawful directions of the Council's insurer and/or the General Manager

Where the Designated Person is not the subject of an investigation or hearing conducted by the investigative body, Council must be satisfied that:

- the substantial focus of the investigative body's subpoena or reason for requesting attendance of the Designated Person is to obtain information from the Designated Person that directly derives from the Designated Person's discharge of their official duties
- Council is of the opinion that the discharge of the relevant duty or function was bona fide
- the investigative body confirms that it has completed the Investigation or Public Hearing and that no adverse finding or recommendation has been made with respect to the Designated Person
- the Designated Person has, in responding to the investigative body's request, complied with any reasonable and lawful direction of the Council's insurer and/ or the General Manager

Additional limitations with respect to reimbursement of legal expenses incurred in connection with an investigation or hearing conducted by an investigative body include:

1. A Designated Person may only be reimbursed for legal expenses under this Policy where the expenses are a result of their official duties at Burwood Council.
2. Provided the other requirements under this Policy for reimbursement of legal expenses incurred in connection with an investigation or hearing conducted by an investigative body under these provisions are satisfied, it is no bar to reimbursement that a person no longer holds office as a Designated Person at the time the legal expenses are incurred or the person makes the claim for reimbursement.

3. Legal expenses incurred by a Designated Person will only be paid following the investigative body confirming that it has completed its Investigation and Hearings (where relevant) and confirming its findings in writing, or, where a Report is to be prepared pursuant to the relevant legislation, publishing its Report.
4. A Designated Person may only be reimbursed for legal expenses incurred as a result of being called as a witness to an investigation conducted by the ICAC if they have first made an application to the Attorney General for legal assistance pursuant to Section 52 of the *Independent Commission Against Corruption Act* 1988 and they have written confirmation that such an application has been refused.
5. This Policy does not preclude a Designated Person claiming non-legal expenses incurred by a Designated Person while appearing as a witness before ICAC from ICAC pursuant to Section 51 of the *ICAC Act*, or a Designated Person's receiving such a payment.
6. That legal expenses incurred by a Designated Person will be capped at \$150,000 per Designated Person per issue. A resolution of the full Council is required if the matter exceeds this amount.

Process for Claiming Reimbursement of Legal Costs

1. To whom do you make the application for reimbursement?

The application for reimbursement of legal expenses should be made in writing to the General Manager.

2. When can you make an application for reimbursement?

An application for reimbursement of legal expenses may be made at any time after the expenses have been incurred.

However, the decision as to whether to provide reimbursement will only occur once the investigative body (including Council's Conduct Review Committee) has:

1. Confirmed in writing that it has completed the investigation/s or hearing/s or, where a Report is to be prepared pursuant to the relevant legislation, published its Report

and
2. Confirmed in writing that no adverse finding or recommendation has been made with respect to you.

Note: The policy provides that "no adverse finding or recommendation" means no finding of corrupt conduct, maladministration or criminality (whichever is relevant given the relevant investigative body and the particular investigation or hearing being conducted).

3. Requirement for previous application to the Attorney-General where acting as a witness before an ICAC hearing

If you have been called as a witness at a hearing (public or private) conducted by the Independent Commission Against Corruption (**ICAC**), you must have:

- 3.1 Prior to or during your appearance as a witness at the hearing, applied in writing to the Attorney General for financial assistance with respect to your legal representation, pursuant to Section 52 of the *Independent Commission Against*

Corruption Act 1988

and

3.2 Have been refused such financial assistance.

Note: Your application to the Attorney-General will need to include the full details of your financial situation and, provided your summons does not prevent you from doing so, the evidence you expect to give.

4. What other eligibility requirements need to be addressed in your application?

Your application should:

4.1 specify your name, position title and that you are a designated person in accordance with Section 441 of the *Local Government Act 1993*

4.2 specify which investigative body has conducted the relevant interview/s and hearing/s (except where a suppression order or other such order is in force which prevents disclosure of this information – see paragraph 6)

Note: see the definition of “investigative body” in the Policy.

4.3 state whether you are the subject of the investigation/s and/or the hearing/s and, if not, specify who is the subject (except where a suppression order or other such order is in force which prevents disclosure of this information – see paragraph 6)

Note: where you are uncertain as to whether you are the subject of the investigation/s and/or the hearing/s, or as to whom the subject is, you should state this.

4.4 provide details of the request or summons to attend an interview/s or hearing/s by the relevant investigative body (except where a suppression order or other such order is in force which prevents disclosure of this information – see paragraph 6)

4.5 detail the legal expenses incurred in connection with attending the interview/s or hearing/s (public or private)

4.6 describe the nature of the information the investigative body has, through requesting an interview or your attendance at a hearing, sought from you (except where a suppression order or other such order is in force which prevents disclosure of this information – see paragraph 6)

4.7 describe how the information the investigative body has sought from you directly derives from your discharge of duties or your exercise of functions as the Mayor or as a Designated Person (except where a suppression order or other such order is in force which prevents disclosure of this information – see paragraph 6)

4.8 state whether you are satisfied you discharged the duties or exercised the functions in question in good faith or with honest intent (except where a suppression order or other such order is in force which prevents disclosure of this information – see paragraph 6)

4.9 show that you have complied with any reasonable and lawful direction of your

insurer and/or the General Manager (if there has been any such direction); and

4.10 provide evidence that the investigative body has:

- confirmed in writing that it has completed the investigation/s or hearing/s or, where a Report is to be provided pursuant to the relevant legislation, published its Report
- confirmed in writing that no adverse finding or recommendation has been made with respect to you

Note: You may choose to submit your application without this confirmation – however, no decision as to whether to provide reimbursement will be made until this confirmation has occurred.

5. What documents need to be included with your application?

- 5.1 A copy of the document requesting your attendance at an interview/s or hearing/s by the investigative body, for example, a letter or summons (except where a suppression order or other such order is in force which prevents disclosure of this information – see paragraph 6).
- 5.2 If you have been called as a witness at a hearing (public or private) conducted by ICAC, a copy of your request to the Attorney-General for legal assistance pursuant to Section 52 of the *Independent Commission Against Corruption Act 1988*, and a copy of the Attorney General's response.
- 5.3 Copies of any invoices issued to you for legal expenses (fees charged for legal representation or legal advice) in connection with the interview/s or hearing/s and any receipts for payment for such invoices.
- 5.4 Confirmation in writing from the investigative body that it has completed its investigation/s or hearing/s or, where a Report has been prepared, a copy of the Report.
- 5.5 Where not included in the Report, or where a Report is not provided, written confirmation that no adverse finding or recommendation has been made with respect to you.
- 5.6 Any other documents relevant to the eligibility requirements outlined in paragraph 4.

6. What will happen where a suppression order or other order restricting disclosure of information applies?

- 6.1 Where you have been ordered by the investigative body, for example, in your summons, not to disclose information which the Policy requires you to provide (see paragraph 4 and 5 above), you should refrain from including such information in your application.
- 6.2 Once any suppression order or other order has been lifted by the investigative body, you should immediately provide the General Manager with the information previously omitted from you application on this basis.
- 6.3 The General Manager may not be able to consider your application, including

referring it to Council for a determination regarding the bona fide discharge of your duties or exercise of your functions (see paragraph 7 below) until such information is provided.

7. Will Council need to pass a resolution regarding my application?

- 7.1 Yes, Council will need to pass a resolution that it is satisfied the discharge of your relevant duty or function was “bona fide”, that is, in good faith or with an honest intent.
- 7.2 Accordingly, where the General Manager is satisfied that your application has satisfied the other eligibility requirements, the General Manager will refer your application to Council for a determination as to whether it is satisfied your discharge of your duty (or duties) or exercise of your function (or functions) was “bona fide.”
- 7.3 Where Council is not satisfied of the above, Council should provide reasons for its determination.
- 7.4 Where Council resolves that it is satisfied of the “bona fide” discharge of your duties or exercise of your functions as set out above, the General Manager may make a final determination, as an operational matter, as to whether reimbursement of legal expenses should occur under the Policy.

8. Conflict of interest

- 8.1 You will need to comply with the pecuniary interest provisions of the *Local Government Act 1993*, and the pecuniary interest and conflict of interest provisions of Council’s Code of Conduct.
- 8.2 This would include disclosing your interest at the meeting where Council is determining whether it is satisfied your discharge of your duty (or duties) or exercise of your function (or functions) was bona fide, leaving the meeting and remaining out of sight of the meeting and not participating in discussion or voting on the matter.

Other Council/Government Policy Provisions

- Council’s Code of Conduct
- Council’s Conduct Reviewer/Review Committee Policy
- Councillors’ Expenses & Facilities Policy
- *Local Government Act 1993*
- *Independent Commission Against Corruption Act 1988*
- Councillors and Officers Liability Insurance – Policy Wording 02/11

Review

To be reviewed every four years.

Contact

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