

CONFIDENTIAL ITEMS 2003 – SEPTEMBER 2012

#	Date	Item Title	Confidential Order Details	Item being kept confidential - Agenda/ Attachment/ Minutes	Reason regarding retention or recommend-action to release	Resolution Regarding Action	Last Review Date	Next Review Date	Date Released
13	19 Feb 07	YMCA	<b>Reason:</b> S 90(3) (d) Commercial information of a confidential nature (not being a trade secret) the disclosure of which: (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and (ii) would on balance be contrary to public interest	Agenda Report	Commercial in confidence information provided  Released under delegated authority	Maintain Confidential Order until contract expiration (31 December 2011 – extended to 31 December 2012).  The Chief Executive Officer be delegated the authority to revoke all or part of the order and directed to present a report containing the item for which the confidentiality has been revoked.	3 Sept 12	2 Sept 13	Released 10/12/12

**17            CONFIDENTIAL REPORTS**

**17.1           REPORT TITLE:        CONFIDENTIAL REPORT  
                                 CLAIM FOR COMPENSATION - YMCA**

**DATE OF MEETING: 19 FEBRUARY 2007**

**AUTHOR:                    ANDREW STUART**

**AUTHOR'S TITLE:       CHIEF EXECUTIVE OFFICER**

**REPRESENTORS:        NIL**

**FILE NUMBER:           52/050/007  
                                 70/040/086**

**ATTACHMENTS:        NIL**

**DEPARTMENT:           CHIEF EXECUTIVE OFFICER**

**DEPARTMENT  
MANAGER:               ANDREW STUART**

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**PURPOSE**

To seek Council's approval to offer the YMCA \$50,000 as compensation for the loss of income for the fitness centre at the Adelaide Hills Recreation Centre and to extend the current management agreement with the YMCA for the management of the Adelaide Hills Recreation Centre by one year.

**RECOMMENDATION**

1. That pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 the District Council of Mount Barker orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding
  - (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which:
  - (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
  - (ii) would on balance be contrary to public interest.
2. That the Chief Executive Officer, General Manager Assets Infrastructure, General Manager Strategy and Development,

General Manager Corporate and Community Services, and the Minute Secretary be permitted to remain in the room.

3. That the Council approves a compensation payment to be offered to the YMCA Board as follows:
  - 3.1 payment of \$50,000 (ex GST) to the YMCA of South Australia for costs incurred to date and losses of revenue resulting from the inability to operate a Fitness Centre from the Adelaide Hills Recreation Centre from November 2006;
  - 3.2 the payment of \$50,000 be made in two annual instalments of \$25,000 each; and
  - 3.3 the current Management Agreement with the YMCA for the management of the Adelaide Hills Recreation Centre be extended by one year to 30 December 2011.
4. Council notes the YMCA's initially claim totalling \$89,000.
5. Council notes the agreement by the Chief Executive Officer's to acknowledge ownership of the database.
6. That the Council delegate authority to the Chief Executive Officer to finalise negotiations with the YMCA to enable a resolution to the compensation claim.
7. That the Council orders pursuant to Section 91(7), (8) and (9) of the Local Government Act 1999 that the discussion, reports, attachments and minutes relating to this item be kept confidential until 19 February 2008.

extended until 6 September 2008 at 3 September 2007 meeting

### **BACKGROUND**

At its meeting on 15 January 2007, the Council noted a report on a claim for compensation from the YMCA for an amount of \$88,223.77. The claim arises due to the YMCA not being able to commence operations of a fitness centre at the Adelaide Hills Recreation Centre on 1 November 2006.

Whilst the YMCA quantified their compensation claim there was an indication that it was willing to negotiate and Council was informed that Council staff were in the process of determining an appropriate compensation "counter offer" and also exploring options for the payment of the offer, for example to be settled in stages as an additional management fee.

Council staff submitted an initial counter offer of a payment of \$24,000 to the YMCA to cover start-up shortfalls. Further negotiations between the Chief Executive Officer's of both organisations have resulted in a tentative agreement for the YMCA to receive an amount of \$50,000 with an additional year extension to the current agreement for the management of the Adelaide Hills Recreation Centre. The YMCA Chief Executive Officer acknowledges that the payment of \$50,000 would be made in two annual instalments of \$25,000 each.

In addition to the above terms of compensation, it was agreed that the YMCA would provide the fitness centre membership database to Council for no charge at the expiration of the Management Agreement. This will enable Council or another operator of the fitness centre to continue to operate the centre with no disruption to the Centre or its members.

To enable the fitness centre at the Recreation Centre to begin operation as soon as possible (eg March 2007), an undertaking has been agreed between Council and the YMCA that Council will, in the event that a compensation agreement cannot be reached by the two parties, purchase the gym equipment from the YMCA. Council's offer is valid until the offer of compensation has been accepted with agreement reached between the two parties. This provides the opportunity for the YMCA to purchase the required gym equipment now pending the finalisation of the compensation claim and the continuation of the management of the Adelaide Hills Recreation Centre.

The negotiations undertaken and agreed to date between Council and the YMCA have been on the basis that both the Council and the YMCA's Board will need to agree to the terms of compensation. The YMCA have requested that the Council endorse the content of the compensation claim prior to putting the details of the claim to the YMCA's Board for acceptance and approval.

The YMCA require that the information regarding the compensation claim with Council be kept confidential under conditions contained in *Clause 23.2 Confidential Information and Freedom of Information* of the existing Management Agreement between the District Council of Mount Barker and the YMCA of South Australia Inc. Clause 23.2.1 of the Management Agreement states that *"Each of the Council and the Contractor agrees that it will not use any confidential information of the other party or allow any confidential information of the other party to be used for any purpose whatsoever, except for the purposes of and in the manner contemplated by this Contract, and agrees that it will....keep confidential any confidential information belonging to the other party...."* The YMCA refer to Clause 23.2.2.2 of the Agreement where it states *"The duty of confidence referred to in Clause 23.2.1 will not extend to such of the confidential information*

*as was in or becomes part of the public domain otherwise than as a result of a breach by the Receiving Party of its obligations under the Contract...". It is therefore recommended that the content of the compensation claim negotiations between Council and the YMCA remain as commercial in confidence.*

### **POLICY IMPLICATIONS**

**1. Financial/budget**

Payment of \$50,000 to the YMCA, payable in two annual instalments of \$25,000.

**2. Legal**

As previously reported, legal opinion from Norman Waterhouse Lawyers is that the tender documents made clear representation to the YMCA that they would be able to operate a fitness centre when the lease with the then current operator (Shape Up Pty Ltd) expired in October 2006. The YMCA has acted in reliance to that representation. The likely compensation is difficult to quantify but it would likely include their expenses to date. As to the question of future losses, it is possible that the YMCA would be successful in its claim but the quantum of any award in its favour is difficult to ascertain.

**3. Staffing/Work Plans**

The matter will be co-ordinated by existing staff.

**4. Environmental**

Not applicable.

**5. Social**

Not applicable.

**6. Strategic Plans**

The following provisions of the Community Strategic Plan (2004-2007) are considered relevant to this matter:

### **5. COMMUNITY ASSETS**

**Goal**

*Provide a comprehensive range of accessible services and facilities in a financially, socially and environmentally responsible manner.*

**Objective**

*1. Fulfil Council's responsibility as custodian and provider of community assets.*

**COMMUNITY CONSULTATION**

- 1. Customer Needs Analysis**  
Not applicable.
  
- 2. Promotion/Communications**  
Not applicable.