

F - Protocol on Members' Access to Information and other Confidentiality Issues

1. Introduction

- 1.1 The Council agreed at its meeting on 12 December 2012 to adopt revised Access to Information in relation to Decision-making Rules for Part 2 of the Constitution to meet revised legal requirements contained within The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.
- 1.2 The purpose of this Protocol is to detail Members' wider access rights to information held by the Council and complements the Rules mentioned above. The Protocol is a key background governance document of the Council and forms part of Part 3 of the Council's Constitution. The contents reflect the Council's policy of adopting the legal position in relation to Members' access to information.
- 1.3 Rights of access for Members to Council information comprise a complex interaction of various pieces of legislation, regulations and the common law. The general public - including all Members - have rights of access to information under the Freedom of Information Act, the Data Protection Act, the Environmental Information Regulations and the Local Government Act 1972. Members have additional rights, although the extent is not always clear. All Members have a common law right to inspect documents which relate to their role as an elected representative and which they have a "need to know", although improper motive may be a bar to their entitlement. Similarly, regulations give all Members additional rights of access to information (such as some documents in the possession of the Cabinet), and additional rights to Members of the Scrutiny Committees.
- 1.2 It is not always clear when information is or is not confidential. The law of confidentiality, privacy, and public rights to information is constantly developing in a piecemeal fashion and there is no such thing as a quick guide to all the law on confidentiality.
- 1.3 There are two basic requirements in order for information to benefit from the protection of confidentiality. Firstly, information which is already widely and publicly available is unlikely to benefit from the protection of rules relating to confidentiality. Secondly, the information must be of a nature for which the protection of the confidentiality laws may be appropriate, eg personal data, commercially sensitive data, military secrets and the like. In many areas of law such as Data Protection and Freedom of Information the categories of information for which confidentiality may be claimed are set out relatively clearly. Under the general law the position is far less clear. Often there also has to be a legitimate expectation of confidentiality. There are no

hard and fast rules as to what is confidential, however, simply writing “confidential” at the top of a document will not provide legal protection, nor is it “confidential” merely because its disclosure may be embarrassing or inconvenient to someone.

- 1.4 Usually, the issue of confidentiality arises because somebody or organisation such as the Council claims confidentiality for information that they hold, and want to stop other people having access to it. In the public sector anyone wishing to claim protection at law for confidential information is increasingly likely to have to justify that claim.
- 1.5 Members and Officers should note that if they come into the possession of confidential information by fair means or foul, the information is still likely to have the protection of confidentiality and they must not pass the information on to anyone else without proper authority, eg, without the consent of a person properly authorised to give it. To do otherwise could lead to legal action (against either the individual personally and/or the Authority). In the case of an elected Member it may also constitute a breach of the Members’ Code of Conduct. In the case of an Officer, it may also result in disciplinary action being taken by the Authority. You are strongly advised to obtain and have due regard to appropriate professional advice before passing on to any person any confidential information (or information which you suspect, or ought to suspect, is confidential). If in doubt consult the Monitoring Officer or the County Solicitor.
- 1.6 If a Member or Officer passes on confidential information with legal justification or permission they must make it clear to the recipient of the information, whether Member, Officer or other third party, that the information is confidential and must not be disclosed. Without an appropriate assurance from the recipient that the confidentiality will be properly respected, the information must not be passed on.

2. Confidentiality in the Context of Decision-Making

- 2.1 Somerset County Council will conduct its decision-making in accordance with legal requirements concerning openness, transparency and public access.
- 2.2 In accordance with general legal requirements, decisions will be made public together with any supporting documentation such as reports unless the matter concerns confidential or exempt information. This exception will only apply if the content contains information relating to the following categories:

Confidential Information

- a) Information furnished to the Council by a Government Department on terms which forbid the disclosure of the information to the public.

- b) Information the disclosure of which to the public is prohibited by or under any law or by the Order of a court
Exempt Information
- c) Information relating to any individual.
- d) Information which is likely to reveal the identity of an individual.
- e) Information relating to the financial or business affairs of any particular person (including the authority).
- f) Information relating to any consultations or negotiations, or contemplated consultations and negotiations, in connection with any labour relations matter arising between the Authority, or a minister of the Crown and the employees of, or office holders under, the Authority.
- g) Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- h) Information which reveals that the Authority proposes-
- to give under any enactment notice under or by virtue of which requirements are imposed on a person; or
 - to make an order or direction under any enactment.
- i) Information relating to action taken or to be taken in connection with the prevention investigation or prosecution of crime.
- N.B. – there are an additional 3 exemptions available to Standards Committee.

- 2.3 Categories (a) and (b) above which are classified as ‘confidential’ business are absolute in that the public will be excluded from accessing papers and discussions on such matters and members access is limited by statute. The application of the remaining categories (‘exempt’ business) is discretionary and rests with the decision-maker, on the advice of officers, to decide whether or to make the information publicly available. It should also be noted that information which falls within paragraphs c) to i) can only be kept confidential for so long as in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- 2.4 Where it is necessary to consider a report in private, Officers will usually, where practicable, provide the confidential information as a confidential annex to a report that is otherwise publicly available. If this is not practicable or otherwise reasonable, Officers will produce a public summary of the confidential report and/or an information sheet, so that as much information as possible is publicly available. The same approach is taken to decision records or the minutes of the meeting dealing with confidential business.
- 2.5 Confidential reports will be provided to all members of the relevant decision-making body with the agenda for the meeting. This does not prevent consultation with, for example, opposition group spokespersons in advance of the report being considered. The entitlement of other Members to see confidential reports circulated with agendas, at common law, depends upon such Members being

able to demonstrate a “need to know” to carry out their functions as a councillor effectively and having a proper motive. Members are not allowed a roving commission through Council documents. However, Members may have other statutory rights to see some such reports, for example, members of the Scrutiny Committee (see below “Access to papers relating to executive business by Scrutiny Committee Members”).

- 2.6 Any query about the continuing extent of confidentiality once a decision has been made should be addressed, in the first instance, to the Lead Officer for the report in question. If necessary, the Lead Officer will consult with, and have proper regard to, the advice of the Monitoring Officer.
- 2.7 Generally, if a Member is entitled (at either common law or under statute) to see a confidential report, they may also have access to relevant background documents which relate to it. However, the Members must maintain the confidentiality of those background papers.

Access to papers relating to executive business by a Councillor who is not a Member of the Cabinet

- 2.8 Members have certain statutory rights to documents relating to executive business which are as follows and are contained in the Local Authorities (Executive Arrangements) (Meetings and Access to Information) Regulations 2012. These rights are outlined below:
- 2.8.1 Members of local authorities can inspect any document (including background papers) in the possession or control of the Cabinet which contains material relating to any business to be transacted at a meeting and this shall be available five clear days before the meeting. If the meeting is convened or an item added to an agenda at shorter notice, then relevant documents must be available for inspection by any Member of the local authority from the time this occurs. Subject to 2.8.2 below, the right to inspect also extends to any document in support of and a decision made by:
- (a) a Cabinet Member under delegated powers, or
 - (b) an Officer as a key decision or under a delegation from the Cabinet or a Cabinet Member.
- 2.8.2 With regard to confidential or exempt information transacted in a meeting or in relation to decisions by an individual Member or Officer under 2.8.1 above, the right of access is limited – see para 2.8.3 below. A document which can be inspected can only be viewed after the meeting and / or the decision is made and must be available on request within 24 hours of the conclusion of the meeting or the decision being made.

- 2.8.3 The rights of access for Members to exempt information under 2.8.1 above only applies to documents (1) that fall under paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972 ie information relating to the financial and business affairs of any particular person [including the authority]) except for information relating to terms proposed or to be proposed in negotiations for a contract) and (2) paragraph 6 ie information which reveals the authority proposes (a) to give under any enactment a notice under or by virtue of which requirements are imposed on a person or (b) to make an order or directions under any enactment.
- 2.8.4 For clarification, a Member is bound by the confidentiality of any document they access which contains confidential or exempt information.
- 2.8.5 If, following a request, a Member is refused access to information and is dissatisfied with this response, he or she may take the matter up with the appropriate Senior Leadership Team Officer (or Chief Executive for corporate or cross-cutting issues) who, if necessary, will consult with the Leader of the relevant group, the relevant Cabinet Member or opposition group spokesperson and the Monitoring Officer before responding.

Access to papers relating to executive business by Scrutiny Committee Members

- 2.9 A member of the Council's Scrutiny Committees can inspect any document in the possession or under the control of the executive and contains material relating to:
- (a) any business that has been transacted at a meeting of a decision monitoring body of the authority, or
 - (b) any decision made by a Cabinet Member under delegated powers, or
 - (c) any key decision made by an Officer or any Officer decision made under a delegation from the Cabinet or a Cabinet Member
- 2.10 The right to inspect as set out in 2.9 above does not extend to confidential or exempt information, unless that information is relevant to:
- (a) an action or decision that the member is reviewing or scrutinising, or
 - (b) any review contained in any programme of work of the Scrutiny Committee.
- 2.11 For clarification, a Member of the Council's Scrutiny Committees is bound by the confidentiality of any document they access which contains confidential or exempt information.
- 2.12 The Cabinet may determine that the Scrutiny Member(s) do not have a right to the information requested but if they make such a

determination, they must provide the relevant Scrutiny Committee with a written statement of its reasons for the decision.

3 Confidentially in the Context of the Members' Code of Conduct

3.1 The Council's Code of Conduct requires members:-

(1) Not to disclose information given in confidence by anyone, or information acquired by the member which he/she believe, or ought reasonably to be aware, is of a confidential nature, except where:

- (a) the Member has the consent of a person authorised to give it;
- (b) the Member is required by law to do so;
- (c) the disclosure is made to a third party for the purpose of obtaining professional legal advice provided that the third party agrees not to disclose the information to any other person; or
- (d) the disclosure is:
 - i. reasonable and in the public interest; and
 - ii. made in good faith and in compliance with the reasonable requirements of the Council; and
 - iii. the Member has consulted the Monitoring Officer prior to its release.

(2) Not to prevent another person from gaining access to information to which that person is entitled by law; and

(3) Not to conduct themselves in a manner which could reasonably be regarded as bringing their office or the Council into disrepute.

3.2 The exceptions set out above are fairly self-explanatory. However, (1) (d) is more complex than it may at first appear. If a member is considering disclosing confidential information, particularly if they intend to rely on (d), they are very strongly advised to obtain appropriate legal advice, preferably from the Monitoring Officer, before so doing and, if appropriate, to discuss their concerns with the Chief Executive or appropriate Senior Leadership Team Officer.

3.3 In order for disclosure to be in the "public interest", the information should involve one or more of the following matter(s), or something of comparable seriousness:

- a) a criminal offence;
- b) failure to comply with a legal obligation;
- c) a miscarriage of justice;
- d) serious health or safety issue
- e) potential damage to the environment
- f) deliberate concealment of any of the above matters;

3.4 For the disclosure to be in "good faith", a Member should not be acting with an ulterior motive, eg to achieve a party political

advantage or to settle a score with a political opponent or some other person.

- 3.5 In order to comply with a “reasonable requirement to the Authority”, a Member must comply with the Council’s policy or protocols on matters such as whistle blowing, confidential information and any other specific requirements which the Council may reasonably make. The Member must first raise his or her concerns through the appropriate channels set out in such policies or protocols.
- 3.6 The Council’s Whistle Blowing Policy provides an opportunity for allegations of improper conduct on the part of the Authority to be investigated. Issues may be raised with the Chief Executive or Monitoring Officer or directed through the Leaders of political groups.

4 Interpretation

- 4.1 For clarification, in this Protocol “information” means information, including any document, report or background paper other than in a draft form. In excluding drafts from the definition, the Protocol reflects the requirements of The Local Authorities (Executive Arrangements) (Meetings and Access to Information) Regulations 2012.
- 4.2 In the event of any conflict between this Protocol, any other policy, protocol, or guidance of the Council and any law (either common law or statutory), the law shall take precedence.

Note: This Protocol is provided for the benefit of Somerset County Council only. It is intended as a general guide only. It is not intended to set out the entire legal position in this large and complex area of law. Members or Officers should obtain appropriate professional advice in relation to any specific issue they may have.