
REVIEW OF DECISIONS MADE IN PRIVATE SESSION

To: **Council – 3 October 2013**

Main Portfolio Area: **Business, Corporate and Regulatory Services**

By: **Democratic Services Manager**

Classification: **Unrestricted**

Ward: **All Wards**

Summary: To review Council's policies on decisions made in private

For Decision

1.0 Introduction and Background

- 1.1 As part of the report: "Review of Policies & Procedures - Probity and Reputation - recommendations from Cabinet and request by Standards Committee" that was considered at Full Council on 11 July, it was a recommendation that a review of decisions made in private session be undertaken.
- 1.2 Council agreed the following:
- THAT the Constitutional Review Working Party be requested to consider the options for revisiting a decision made in private session after one year to determine if the report or information on which the decision was made can be published*
- 1.3 This report was considered by Constitutional Review Working Party on 21 August 2013 and by Standards Committee on 4 September 2013.

2.0 The Current Situation

- 2.1 Under the relevant legislation, the Council can only exclude the press and public from Council meetings when confidential or "exempt" information is discussed.
- 2.2 Under section 100A of the Local Government Act 1972, a resolution needs to be passed in order to exclude the press and public when exempt information is to be considered.
- 2.3 Under section 100B of the Local Government Act 1972, the Proper Officer may exclude from public agenda packs any item which he/she believes will not be considered in public session (i.e. which he/she thinks should or will be regarded as exempt).
- 2.4 Confidential information is information which has been given to the Council by a Government Department on terms which forbid its public disclosure or information which cannot be publicly disclosed by court order. Confidential information must not be considered in public session and no resolution is needed in order to exclude the press and public when such information is to be considered.

2.5 The definition of exempt information is contained in Schedule 12A of the Local Government Act 1972 (as amended), as follows:

Category	Condition
1. Information relating to any individual.	Information is exempt if and so long as in all the circumstances of the case, the public interests in maintaining the exemption outweighs the public interest in disclosing the interests.
2. Information that is likely to reveal the identity of an individual.	Information is exempt if and so long as in all the circumstances of the case, the public interests in maintaining the exemption outweighs the public interest in disclosing the interests.
3. Information relating to the financial or business affairs of any particular person (including the authority holding that information).	a) Information is exempt if and so long as in all the circumstances of the case, the public interests in maintaining the exemption outweighs the public interest in disclosing the interests; b) Information is not exempt if it is required to be registered under: <ul style="list-style-type: none"> • Companies Act 1985; • Friendly Societies Acts 1974 and 1992; • Industrial and Provident Societies Acts 1965 to 1978; • Building Societies Act 1986; • Charities Act 1993. c) The rights of access by Members are contained in Section 1007 of the 1972 Act.
4. Information relating to any consultations or negotiations, or contemplated consultations or negotiations in connection with any labour relations matter arising between the authority or a Minister of the Crown and employees of, or office holders under, the Authority.	Information is exempt if and so long as in all the circumstances of the case, the public interests in maintaining the exemption outweighs the public interest in disclosing the interests.
5. Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.	Information is exempt if and so long as in all the circumstances of the case, the public interests in maintaining the exemption outweighs the public interest in disclosing the interests.
6. Information which reveals that 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 direction under any enactment.	Information is exempt if and so long as in all the circumstances of the case, the public interests in maintaining the exemption outweighs the public interest in disclosing the interests.
7. Information relating to any action	Information is exempt if and so long as in all

Category	Condition
taken or to be taken in connection with the prevention, investigation or prosecution of crime.	the circumstances of the case, the public interests in maintaining the exemption outweighs the public interest in disclosing the interests.

- 2.6 It should be noted that the test for excluding the press and public is two-stage: the first being more a matter of fact (does the information fall within one of the descriptions) and the second more one of judgement (at a particular point in time, what best serves the public interest).
- 2.7 Once regarded as exempt, such information has historically never been published. However it is open to anyone to submit a Freedom of Information Act (FOIA) requesting the disclosure of exempt information and any such request would be dealt with in the same way as any other FOIA request, namely the relevant manager would make the decision on disclosure having first obtained the approval of his or her director. If the decision of the Manager was to still withhold the exempt information and the requestor applied to the Council for an internal review, the Corporate & Regulatory Services Manager would conduct a review and make the final decision for the Council - although if the decision was still to withhold the exempt information, the requestor would have a further right of appeal to the Information Commissioner.
- 2.8 At the risk of generalisation, any request to disclose exempt information will be determined in accordance with the overall public interest at the time the request is made. Thus, if with the passage of time information contained in e.g. an exempt Cabinet report is no longer sensitive (say a valuation report relating to the intended purchase of a property that the Council has since purchased) it is likely that the decision on the request will be to publish the exempt information. .
- 2.9 Confidential information, in this case having the limited meaning of information received from central government on terms that it remains confidential, will always remain confidential and can never be published.
- 2.10 To provide a context for considering the issue, the following table shows the number of decisions that were regarded as exempt in 2012/13:

Decision type or body	No. of items regarded as exempt
Council	0
Cabinet	3
Delegated Executive	0
Officer	0
Overview & Scrutiny Panel	1
Planning Committee	0
Licensing Board	16
General Purposes	2
TOTAL	22

NOTE: Standards Committee is not included in the table and is referred to below.

3.0 Recommendations of Standards Committee

- 3.1 The Constitutional Review Working Party considered this report at its meeting of 21 August 2013. The Working Party felt that not only should there be a review one year after an exempt decision was taken, but that a further review should take place three years later where the outcome of the first review was that the information should remain exempt. This is covered in more detail at paragraph 4.4.4 of this report.
- 3.2 The Working Party also felt that a report on decisions reviewed should be brought to full council on an annual basis; this is covered in more detail in paragraph 4.5 of the report.
- 3.3 The recommendations of the Working Party to Standards Committee, as summarised at paragraph 6.0 of this report, embrace those views. At its meeting on 4 September 2013, Standards Committee endorsed the Working Party's recommendations.

4.0 Options

4.1 Definition of a year since a confidential / exempt report was considered

- 4.1.1 The first issue is how the Council determines the "year" since a decision was made in private.
- 4.1.2 Where the report was only submitted to one meeting, it is reasonably easy to determine when a year has elapsed. But if the report was considered to be exempt at Cabinet and then at Council, then from which point is the year calculated?
- 4.1.3 It is suggested that the definition of the year's anniversary should be from the point the report was considered by the ultimate decision taker.
- 4.1.4 **Recommendation** – That a confidential / exempt report is reviewed a year after the ultimate decision taking body has considered it.

4.2 Which decisions are covered?

- 4.2.1 The recommendation taken by Cabinet did not specify the types of decisions that would be covered by a one-year review. The following table suggests where this rule would be applied, but it is open to Council to decide on a different approach.

Decision type or body	Does a review of exempt status apply?
Council	Yes
Cabinet (or delegated executive)	Yes
Officer (decisions requiring a decision notice to be published)	Yes
Other committees (e.g. Overview and Scrutiny Panel)	Yes
Regulatory (e.g. Planning, Licensing Board)	Yes
General Purposes	Yes
Standards Committee or its sub-committees	No

- 4.2.2 **Recommendation** – That reviews of the status of exempt information relate to all decisions other than those taken by the Standards Committee or its sub-committees.
- 4.2.3 **Recommendation** – That only exempt decisions taken after the constitution has been updated are affected by this process – in other words, it is not retrospective.

4.3 Who decides whether the information is still confidential / exempt or can be published?

- 4.3.1 Paragraph 2.0 notes that it requires a resolution of a Committee to determine that information is exempt and thus cannot be published. It also notes that the Corporate & Regulatory Services Manager currently takes the final decision for the Council in relation to information requests including requests for the disclosure of exempt information. It is therefore proposed that the simplest and most consistent means of undertaking the annual review of whether exempt reports should be published is delegated to the Corporate & Regulatory Services Manager.
- 4.3.3 Such a delegation could include the requirement for the Corporate & Regulatory Services Manager to publish his decisions with reasons.
- 4.3.4 Where the Corporate & Regulatory Services Manager determines that the information can now be published, it would be published through the Council's committee document management system (modern.gov).
- 4.3.5 Where the Corporate & Regulatory Services Manager determines that the information should still not be published, anyone wishing to see the information could submit an FOIA request as outlined above and appeal to the Information Commissioner if the Council did not disclose the exempt information in response to the request.
- 4.3.6 **Recommendation** – That the list of officer delegations in the constitution be amended to include a delegation to the Corporate & Regulatory Services Manager to conduct reviews of exempt information and determine whether it should be published.
- 4.3.7 **Recommendation** - That the Corporate & Regulatory Services Manager publishes his decision on each review giving reasons for such decision.
- 4.3.8 **Recommendation** – That Democratic Services uses the modern.gov system to publish reports that are no longer deemed to be exempt.

4.4 Ensuring that confidential / exempt reports are reviewed after a year.

- 4.4.1 Democratic Services will be able to use the modern.gov system to flag up any exempt reports that are due for annual review.
- 4.4.2 Another issue that emerges is whether there is only one review after a year, or further reviews. The Cabinet decision was that there ought to be one review after one year, but Council may wish to consider whether there should be any further review(s) at a later stage. It could be suggested, for example, that the longer the time that has elapsed since the original decision was taken, the less likely it is that the public interest test will still favour withholding the information.
- 4.4.3 On the other hand, adding multiple reviews for every exempt decision would significantly add to the workload involved.
- 4.4.4 When this issue was discussed at the Constitutional Review Working Party, Members of the Working Party strongly supported the principle of a further review three years after the first review (i.e. after the fourth year). This would then allow for a significant period of time to elapse before another review took place and, as referenced above, such a period of time could significantly affect the result of the public interest test regarding continued withholding of the information.

4.4.5 **Recommendation:** If, after the first year review, a report is still treated as exempt, that report should then be the subject of a further similar review on the third anniversary of the decision having been first reviewed.

4.5 Annual reporting of reviews

4.5.1 The Constitutional Review Working Party felt that to increase transparency there should be an annual report to Full Council that showed the number of decisions that had been reviewed by the Corporate & Regulatory Services Manager, together with a brief summary of each report reviewed, including an explanation of the reasons wherever it was not possible make the report public.

4.5.2 **Recommendation:** That full Council receives a report on the decisions reviewed by the Corporate and Regulatory Services Manager on an annual basis; such a report to include the reasons wherever it is considered not possible to release the report/information to the public.

4.6 Access to Information Rules

4.6.1 In order to facilitate these changes additional paragraphs need to be added to the Access to Information Rules. Attached at Annex 1 to this report are the additional paragraphs needed.

4.6.2 **Recommendation:** To agree to add the additional paragraphs as shown in Annex 1 to the report to the Council's Access to Information Rules.

5.0 Corporate Implications

5.1 Financial and VAT

5.1.1 The measures outlined in the report would not mean that the Council would incur any additional expenditure.

5.2 Legal

5.2.1 The legal implications are outlined in the report itself.

5.3 Corporate

5.3.1 The Council has indicated through the report "Review of Policies & Procedures - Probity and Reputation - recommendations from Cabinet and request by Standards Committee" that it is committed to investigating ways that it can become more transparent. This report addresses some of those issues.

5.4 Equity and Equalities

5.4.1 There are no equity and equalities implications apparent within the report.

6.0 Summary of Recommendations

4.1.4	Recommendation: That a confidential / exempt report is reviewed a year after the ultimate decision taking body has considered it.
4.2.2	Recommendation: That the reviews of the status of exempt information relate to all decisions other than those taken by the Standards Committee or its sub-committees.
4.2.3	Recommendation: That only exempt decisions taken after the constitution has been updated are affected by this process – in other words, it is not retrospective.
4.3.6	Recommendation: That the list of officer delegations in the constitution be amended to include a delegation to the Corporate & Regulatory Services Manager to conduct reviews of exempt information and determine whether it should be published.
4.3.7	Recommendation: That the Corporate & Regulatory Services Manager publishes his decision on each review giving reasons for such decision.
4.3.8	Recommendation: That Democratic Services uses the modern.gov system to publish reports that are no longer deemed to be exempt.
4.4.5	Recommendation: That, if after the first year review a report is still treated as exempt, that report should then be the subject of a further similar review on the third anniversary of the decision having been first reviewed.
4.5.2	Recommendation: That full Council receives a report on the decisions reviewed by the Corporate and Regulatory Services Manager on an annual basis; such a report to include the reasons wherever it is considered not possible to release the report/information to the public.
4.6.2	Recommendation: That the additional paragraphs as shown in Annex 1 to the report to the Council's Access to Information Rules be approved.

6.0 Decision Making Process

6.1 This is a decision for Council.

Contact Officer:	Nick Hughes, Democratic Services Manager
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Annex List

Annex 1	Amendment to Access to Information Rules – New clause 13
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Background Papers

Title	Details of where to access copy
None	

Corporate Consultation Undertaken

Finance	N/A
Legal	Harvey Patterson, Corporate and Regulatory Services Manager