

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Leader and Executive Member for Hampshire 2050 and Corporate Services
Date:	25 September 2023
Title:	Access to Exempt/Confidential Information
Report From:	Chief Executive

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Purpose of this Report

1. The purpose of this report is to advise of proposed changes to the County Council's normal business arrangements for Members' access to Exempt and Confidential information.

Recommendation (s)

2. That the new normal business arrangements for the provision of Exempt and Confidential information to Members set out in paragraphs 12 and 13 of this Report are endorsed.
3. That the new arrangements should be kept under review and urgent consideration be given to revising the arrangements should they lead to the disclosure of Exempt and Confidential Information to unauthorised parties.

Executive Summary

4. This issue was last considered in 2018 when options were evaluated for the provision of Exempt and Confidential Information to Members.
5. It is now considered that the majority of Exempt and Confidential Information contained in reports to Committees, Cabinet or other Executive Members can normally be shared with all Members as a matter of course except for the following:
 - 5.1. Any reports which contain information relating to any individual or which is likely to reveal the identity of an individual; or

- 5.2. Any particularly sensitive reports or information which, for example, contain or relate to particularly sensitive legal advice or commercial information.

For these reports the strict statutory and common law position will be applied by the Monitoring Officer.

6. Contextual information

- 6.1. The current arrangements provide access to final copies of all confidential/exempt decision reports via Modern.gov 'private', across all Executive portfolios to:
 - 6.2. Appointed relevant Opposition Spokespersons in receipt of an allowance in this regard under the Members' Allowances Scheme
 - 6.3. Opposition Group Leaders in receipt of a Political Group Leaders' Allowances under the Members' Allowances Scheme (if not also the relevant Opposition Spokesperson)
 - 6.4. Cabinet Members (where they are not themselves the decision maker)
 - 6.5. Select Committee Chairmen/Vice-Chairmen within the remit of the respective Select Committee
7. All other Members must request a copy of the report and demonstrate a legal right to the information to perform their duties as Councillors before it is provided.
8. The legal position including the specific rights of access by Members to exempt and confidential information is reflected in paragraph 5 of the Protocol for Member/Officer relations, contained within Part 4, Appendix D of the Constitution, and approved by the County Council at its meeting on 14 July 2011 as part of an overall review of the Constitution.
9. So far as statutory provisions relating to Members go, Members of the County Council have additional rights of access to Executive and Committee reports containing exempt and confidential information as set out at Paragraphs 16 and 17 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, and Section 100F of the 1972 Act. The important point to note is that unless a common law 'need to know' applies, apart from the position of Scrutiny Committees (where different rules apply), certain information is always exempt from any statutory requirement to be open to Members for inspection. This includes information relating to individuals or likely to reveal the identity of individuals, labour relations and employment matters, legal privilege and information relating to criminal investigations. There is only a statutory right of Members to have access to certain 'business' reports, but then the position is complicated where the report relates to contractual or proposed contractual terms – information of this nature is excluded from the statutory right, plus proposals relating to statutory notices. Statutory rights are however in addition to any common law rights Members might have.

10. The position is further complicated by the fact that such case law as there is predates Executive Arrangements. Therefore, while the statutory position is helpful as a starting point in considering any requests for exempt or confidential Reports, individual requests need also to be considered purely on application of the common law rules. In consideration of a common law right, whilst a presumption of a 'need to know' might readily extend to all Members of a Committee, a Member requesting access to an exempt or confidential report must make out a need to know in order to perform their duty as a Councillor.
11. The question of whether or not a report should be exempt from publication is undertaken by the Monitoring Officer as Proper Officer for Access to Information in the Constitution, and a rigorous review of any such request is undertaken before it is agreed that a report should be exempt from publication. In cases where only part of a report needs to be exempt, for example confidential legal advice, this would be contained in an exempt Appendix to the report, the report itself being published.

Proposed normal business arrangements for the provision of Exempt and Confidential information to Members.

12. Notwithstanding the statutory position it is proposed that all Members of the Council will normally be given access to all final copies of Exempt and Confidential reports except for
 - 12.1. Any reports which contain information relating to any individual or which is likely to reveal the identity of an individual; or
 - 12.2. Any reports or information which, in the opinion of the Monitoring Officer as the Proper Officer for Access to Information, are particularly sensitive, for example, they may contain particularly sensitive legal advice or commercial information ('Particularly Sensitive Reports').
13. Access to Particularly Sensitive Reports or reports falling within paragraph 12.1 above will be provided to Members on request provided they can demonstrate a legal right to access the report, and, in this regard, the strict statutory and common law position will be applied by the Monitoring Officer as the Proper Officer for Access to Information. It is anticipated that only a very small number of reports will be designated as Particularly Sensitive Reports.

Draft Reports

14. As indicated above the proposed normal business arrangements only apply to the final published reports. Case Law is clear that the Common Law right arises from a Councillor's common law duty to keep himself informed of matters necessary to enable him to properly discharge his duties as a Councillor, and accordingly is limited to such documents as might reasonably

be necessary to enable him to properly perform his duties. There is no Common Law right of access to draft reports.

Exempt and Confidential Reports at Committees, Cabinet and Decision Days

15. Where a Committee, Cabinet or an Executive Member are considering an Exempt or Confidential report (other than a report which contains information relating to any individual or which is likely to reveal the identity of an individual or which in the opinion of the Monitoring Officer is a Particularly Sensitive Report) then all Members of the Council may normally remain at the meeting or decision day for the consideration of the item.
16. Where a Committee, Cabinet or an Executive Member are considering an Exempt or Confidential report which contains information relating to any individual or which is likely to reveal the identity of an individual or which in the opinion of the Monitoring Officer is a Particularly Sensitive Report then, other than the members of the Committee, members of Cabinet and the relevant Executive Member, only those Members who have demonstrated their legal right to access the exempt or confidential information in the Report may normally remain in the meeting or Decision Day for the consideration of the item (subject to the discretion of the decision maker).

Practical Arrangements for the Provision of Exempt and Confidential Reports.

17. All Members will be added to all formal Committees, Cabinet and Decision Days on modern.gov and will receive the full pack of final published papers via the private application.
18. Any reports which contain information relating to any individual or which is likely to reveal the identity of an individual and Particularly Sensitive Reports will be added to the agenda for the meeting or decision day with custom access for those Members who may access copies of the Report.
19. If the process within the Modern.Gov App changes as software develops then the Monitoring Officer will determine an appropriate method to circulate relevant confidential and exempt information.

Consultation and Equalities

20. There are no equality impacts arising from the recommendations set out in this Report.

Climate Change Impact Assessment

21. Hampshire County Council utilises two decision-making tools to assess the carbon emissions and resilience impacts of its projects and decisions. These tools provide a clear, robust, and transparent way of assessing how projects, policies and initiatives contribute towards the County Council's climate change targets of being carbon neutral and resilient to the impacts of a 2°C temperature rise by 2050. This process ensures that climate change considerations are built into everything the Authority does.

22. The carbon mitigation tool and/or climate change adaptation tool were not applicable because the decision is administrative in nature.

REQUIRED CORPORATE AND LEGAL INFORMATION:

Links to the Strategic Plan

This proposal does not link to the Strategic Plan but, nevertheless, requires a decision for the good governance of the County Council.

Links to previous Member decisions:

<u>Title</u>	<u>Date</u>
Access to Exempt/Confidential Information	13/12/18

Direct links to specific legislation or Government Directives

<u>Title</u>	<u>Date</u>
Local Government Act	1972
Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations	2012
Part 4: Appendix D - Protocol for Member/Officer Relations	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

<u>Document</u>	<u>Location</u>
None	

EQUALITIES IMPACT ASSESSMENT:

23. Equality Duty

The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act with regard to the protected characteristics as set out in section 4 of the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);
- Advance equality of opportunity between persons who share a relevant protected characteristic within section 149(7) of the Act (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic within section 149(7) of the Act (see above) and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- The need to remove or minimise disadvantages suffered by persons sharing a relevant protected characteristic that are connected to that characteristic;
- Take steps to meet the needs of persons sharing a relevant protected characteristic that are different from the needs of persons who do not share it;
- Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

24. Equalities Impact Assessment:

There are no equality impacts arising from the Recommendations set out in this Report.