

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Executive Member for Policy & Resources
Date:	13 December 2018
Title:	Access to Exempt/Confidential Information
Report From:	Chief Executive

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1. Recommendations

It is recommended that the Executive Member for Policy and Resources:

- 1.1. Notes the update in this Report on the legal and Constitutional framework and business and governance considerations relating to the access of Members to exempt and confidential reports.
- 1.2. Approves Option 4 as set out in this paper as the future business model for access of Members to Executive exempt and confidential reports, subject to reference to the Monitoring Officer in particular cases falling outside the generality of Option 4.
- 1.3. Agrees continuation of the position in respect of Committee Reports as referred to at Paragraph 5.4.

2. Executive Summary

- 2.1. The purpose of this paper is to outline the legal and Constitutional framework in respect of the rights of access of Members to exempt and confidential information and the current procedure in place in respect of access to exempt and confidential reports, and to seek the view of the Executive Member for Policy and Resources as to whether, particularly with the benefit of Modern.gov, it might be appropriate to revise the current arrangement.
- 2.2. Historically, it is clear that exempt and confidential reports are very much the exception in the County Council's business, which operates on an open and transparent basis, and is fully compliant with the law relating to the rights of access of Members to exempt and confidential information. The County Council is however committed to continuous improvement.
- 2.3. This paper examines a number of varying options in this regard and suggests an appropriate option for a future business model going forward.

3. Contextual information

- 3.1. The legal position regarding rights of access to exempt and confidential information is a combination of statute law, statutory guidance and common law which at times can be quite complex to interpret, not least because the position varies depending on what 'hat' a Member is wearing at any particular time – Opposition Spokesperson, Scrutiny Committee Member, Committee Member, local Member etc. With this in mind, specific guidance was prepared some time ago to assist the business in determining requests, with queries in particular cases being referred to the Monitoring Officer as Proper Officer for Access to Information under the Constitution (the Monitoring Officer having the authority in the County Council's Constitution to 'exempt' reports from publication in the first place).
- 3.2. Other than certain reports to the Executive Member for Policy and Resources which, because of the commercial nature of the portfolio may be exempt for good and proper business reasons, exempt and confidential reports are rare. To put this in context, in the 2017/18 municipal year, there were no exempt reports to Cabinet, or to the Executive Members for Education, Culture Recreation and Countryside, Public Health, Economy and Transport, Human Resources and Performance, or Communities, Partnerships and External Affairs. There were two exempt reports to the Executive Member for Economic Development, two exempt reports and two exempt Appendices to reports to the Executive Member for Adult Social Care and Health, and two exempt Appendices to the Executive Lead Member for Children's Services.
- 3.3. In reality, the overwhelming majority of exempt and confidential reports are routinely shared with Opposition Spokespersons on request, with Select Committee Chairmen and Vice Chairmen, and are also regularly shared with Opposition Spokespersons by Executive Members themselves at Executive Member Decision days. Reports are also shared on request with local Members of all political persuasions when matters relate to a local Member's division, subject, as appropriate, to any redacting of business sensitive information, figures etc.
- 3.4. The differing 'descriptions' of exempt and confidential information are set out at Schedule 12A of the Local Government Act 1972 ('the 1972 Act'), and are as follows:
 - a) Information relating to any individual e.g. appointment of staff
 - b) Information which is likely to reveal the identity of an individual
 - c) Information relating to the financial or business affairs of any particular person (including the authority holding that information) e.g. land disposals, confidential audit reports
 - d) 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 e.g. details of pay and benefit disputes
 - e) Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings e.g. legal advice
 - f) Information which reveals that the authority proposes:-

- to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or
 - to make an order or direction under any enactment e.g. statutory notices.
- g) Information relating to any action taken or to be taken in connection with the prevention, investigation or prosecution of crime.
- 3.5. 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. A copy of paragraph 5 of the Protocol for Member/Officer Relations is attached at the link below.

[Part 4: Appendix D - Protocol for Member/Officer Relations](#)

- 3.6. So far as statutory provisions relating to Members goes, 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 right 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. In addition, in respect of Executive reports, the statutory right of Members only applies when an Executive Meeting is concluded / Executive decision is made, i.e. not at the time of publication of papers. Statutory rights are however in addition to any common law rights Members might have.
- 3.7. 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 local Member requesting access to an exempt or confidential report must make out a need to know in order to perform his duty as a Councillor.
- 3.8. The question of whether or not a report should be exempt 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.

- 3.9. Other than a recent incident where a request was initially refused but on closer consideration agreed and one further instance in the 2013 Administration where an exempt report was requested by a local Member and released subject to redacting of business sensitive information, since the introduction of the current procedure, it is believed there has only been two occasions where access to an exempt report has been refused and this where the reports in question had already been shared with the relevant Opposition Spokesperson, plus a request for access to confidential appeal papers where again no 'need to know' could be demonstrated.
- 3.10. The present procedure agreed in 2011 is however in the context of circulation of exempt or confidential reports in hard copy on blue paper (which was the general procedure prior to Modern.gov and the ability to give 'private' access on the Modern.gov app) to avoid unauthorised transmission further and to allow a judgement call in case of particular issues.

4. Review

- 4.1. Notwithstanding the established procedure outlined above, with the advent of Modern.gov, it is considered timely to review the current arrangements in respect of access by Members to exempt and confidential information, in the interests of business efficiency, balancing the need for transparency and a recognition that Members increasingly work across Executive Portfolios, with the right and expectation of the organisation that sensitive information will be managed carefully and responsibly, and within the constraints of the law.

5. Options

5.1. Executive Decision Reports

a) Option 1 (status quo)

Notwithstanding the wider access of Members to exempt and confidential reports which exists, as outlined at paragraph 3.6 of this report, the present starting point is that there is full access of Members to final copies of all confidential / exempt decision reports containing exempt information falling within paragraphs 3 and 6 of the 1972 Act, subject to the exclusion of information where a report relates to contractual or proposed contractual terms, in accordance with the requirements of the 1972 Act. Individual requests outside the generality of the above are referred to the Monitoring Officer.

There is nothing unlawful in this position and, as indicated above, the starting point in consideration of any requests would be that unless there were clear legal or business reasons for the whole or part of a report to be withheld, any request for access would be agreed.

b) Option 2

Full access to final copies of all confidential/exempt decision reports via Modern.gov 'private', across all Executive portfolios to:

- Appointed relevant Opposition Spokespersons in receipt of an allowance in this regard under the Members' Allowances Scheme
- Select Committee Chairmen/Vice-Chairmen within the remit of the respective Select Committee

This would in effect extend existing custom and practice of allowing access automatically to all qualifying Opposition Spokespersons, rather than on request. It would allow qualifying appointed Opposition Spokespersons automatic access to reports in order to maintain comprehensive knowledge of their respective portfolio to continue to effectively fulfil the role to which they are appointed. This would however mean, if automatic access were given on Modern.gov, that Opposition Spokespersons may as a matter of course receive reports on matters which they would not have an argument as to access if a common law right to know couldn't be made out. So far as Executive reports go, the most common example would be confidential legal advice – other examples (apart from say grants) would be such as information relating to individuals/likely to reveal the identity of individuals, and trade union and employment matters, other than within the responsibility of the EHCC Committee, and business information excluded from the statutory right relating to contractual or proposed contractual terms. The reason for this is that if there were several exempt/confidential decision reports on an agenda, it is not possible to give individual Members access to only one of those reports; access would be to all of the reports regardless of the 'type' of exemption. Under this option, access would also automatically be given to Select Committee Chairmen/Vice-Chairmen.

However unlikely, Option 2 might lead to the processing of confidential information or personal data in breach of the data minimisation principal under Article (5)(1)(c) of GDPR. A pragmatic solution would be to exclude any reports containing such information from Modern.Gov 'private' and circulate them separately only to Members involved in the decision making. This process will be built into Option 2, should this be the preferred Option going forward.

There would be nothing unlawful should the preferred outcome be Option 2, subject to compliance with what has to be provided on request by law to Members, as outlined in this Report.

c) Option 3

Full access to final copies of all confidential/exempt decision reports via Modern.gov 'private', across all Executive portfolios to:

- Appointed relevant Opposition Spokespersons in receipt of an allowance in this regard under the Members' Allowances Scheme

- Opposition Group Leaders in receipt of a Political Group Leaders' Allowance under the Members' Allowances Scheme (if not also the relevant Opposition Spokesperson)
- Cabinet Members (where they are not themselves the decision maker)
- All Select Committee Members (i.e. not limited to Chairmen and Vice Chairmen) within the remit of a respective Select Committee

This would constitute a significant move away from existing custom and practice. This option might also present the risk of the processing of personal data in breach of the data minimisation principle under Article (5)(1)(c) of GDPR, in light of the consequence that Members not involved in the decision making might be supplied with personal details and sensitive information. This option might also lead to the County Council being in breach of the obligation of the duty of confidence, which prohibits disclosure of information forbidden by law or by a court order. For this reason, Option 3 is not recommended.

So far as Select Committee Members go, Members of a Select Committee have in any event a statutory right to exempt information where relevant to a decision the Select Committee is scrutinising or work programme of the Committee.

c) Option 4

- Full access to final copies of all confidential/exempt decision reports via Modern.gov 'private', across all Executive portfolios to:
- Appointed relevant Opposition Spokespersons in receipt of an allowance in this regard under the Members' Allowances Scheme
- Opposition Group Leaders in receipt of a Political Group Leaders' Allowances under the Members' Allowances Scheme (if not also the relevant Opposition Spokesperson)
- Cabinet Members (where they are not themselves the decision maker)
- Select Committee Chairmen/Vice-Chairmen within the remit of the respective Select Committee

This would be a hybrid alternative of Option 2, to additionally include all Political Group Leaders in receipt of a Political Group Leaders' Allowances under the Members' Allowances Scheme, and all of Cabinet. On the current political make-up of the County Council this would mean the Leader of the Liberal Democrat Group having automatic access to all confidential/exempt Executive reports. Currently as Political Group Leaders are not in certain instances appointed Opposition Group Spokespersons, Political Group Leaders in receipt of a Political Group Leaders' Allowance under the Members' Allowances Scheme wouldn't qualify for automatic access, as per Option 2. Whilst Executive reports are regularly shared between Cabinet Members, and Executive Members invite Political Group Leaders to Decision Days,

there is currently no automatic dissemination of individual Executive confidential/exempt reports amongst Cabinet.

However unlikely, Option 4 might lead to the processing of confidential information or personal data in breach of the data minimisation principal under Article (5)(1)(c) of GDPR. A pragmatic solution would be to exclude any reports containing such information from Modern.Gov 'private' and circulate them separately only to Members involved in the decision making. This process will be built into Option 4, should this be the preferred Option going forward.

5.2. Whatever the preferred way forward the use of Modern.gov facilitates access in a secure manner using 'Hampshire private' via the app, which avoids the opportunity for the wider dissemination of exempt/confidential papers. It also places no additional cost or resource pressure following the initial re-configuration of the system. As indicated above the flip side is that it is not possible to distinguish between the different 'types' of exemption on the Modern.gov app, it being a case of either private access to all exempt/confidential reports on a decision cycle or no access to these reports at all.

5.3. **Commentary**

Should Option 2 be agreed as a sensible way forward, Members who are not an officially appointed qualifying Opposition Spokesperson, or a Chairman/Vice Chairman of the relevant Select Committee would continue to be able to request access to a particular exempt/confidential report through the Monitoring Officer as Proper Officer for Access to Information. The same principle would apply to Members without automatic access should Option 4 be preferred. This would include any Political Group Leaders and Opposition Group Spokespersons not qualifying for an allowance under the Members' Allowances Scheme, and Independent Members not part of a political Group. Members wishing to access exempt/confidential reports by virtue of being the local Member would also continue to request this via the Monitoring Officer as Proper Officer for Access to Information. In such cases save where release of a report might cause the County Council to breach the duty of confidence, or inappropriately release confidential employment information or confidential legal advice, the existing presumption of transparency would apply subject to any appropriate redaction of business sensitive information, such as contractual or proposed contractual terms.

5.4. **Committee Reports**

No change is suggested here. Confidential/exempt reports to Committees would continue to be accessible to only appointed Members of that Committee. On the rare occasion that an exempt Executive decision report is referenced in a report to a Committee (this would probably just be the Buildings Land and Procurement Panel), there could be a presumption that access to the confidential/exempt Executive report would be given to Committee Members on request. For logistical reasons this would need to be outside any automatic process on Modern.gov.

5.5. Draft Reports

As indicated above the options only apply to the final published reports. Arrangements relating to the access to reports (exempt or otherwise) for Chairman's briefings may be made with the agreement of, and at the discretion of the relevant Executive Member. The view is that this should remain unchanged, as in draft reports the position is still emerging. 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.

CORPORATE OR 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.

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

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	

IMPACT ASSESSMENTS:

1. Equality Duty

1.1. 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 under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

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

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

1.2. Equalities Impact Assessment:

See guidance at <http://intranet.hants.gov.uk/equality/equality-assessments.htm>

*Inset in full your **Equality Statement** which will either state*

- (a) why you consider that the project/proposal will have a low or no impact on groups with protected characteristics or*
 - (b) will give details of the identified impacts and potential mitigating actions*
- a) How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

There are no identified equalities impacts.