

BRISTOL CITY COUNCIL

Overview and Scrutiny Management Board

2nd March 2016

Report of: Shahzia Daya - Interim Service Director- Legal & Democratic Services

Title: Dealing with 'exempt' information

Ward: Citywide

Officer Presenting Report: Shahzia Daya

Contact Telephone Number: 0117 922 2413

1. Background

- 1.1 At its meeting of 3rd September 2015, the Overview and Scrutiny Management Board received a discussion paper on dealing with exempt/confidential information at meetings.
- 1.2 That paper set out the process applied when taking a report to a committee which contained information that would be considered in exempt/confidential session, being that part of the meeting that the Committee had resolved should be exempt from access by public and press and held in private.
- 1.3 The report concerned the steps taken in publishing reports and agenda in advance of meetings that were 'not for publication'. The report explained the legal tests and made reference to those parts of the Council's Constitution concerning the Access to Information Procedure Rules, the Member/Officer Protocol and application of the public interest test when considering disclosure of sensitive information.
- 1.4 Members questioned further how the assessments are made and the part that members have to play in being able to make these judgements. As an outcome of that discussion, it was resolved that:

Officers develop a mechanism for Councillors to challenge Monitoring Officer decisions with respect to decisions on exempt information

2. Context and Issues

- 2.1 The decision on whether or not information is exempt or not is one for the committee deliberating on that item of business, not officers.
- 2.2 The duty to allow members of the public and press access to a meeting, and also the papers provided to that meeting, are contained in the Local Government Act 1972 (as amended and as applied to the elected mayor and cabinet). The power to decide that an item of business on an agenda is 'exempt' from this duty resides in the Committee deliberating on that item.
- 2.3 These provisions are set out at section 100A (Admission to meetings of principal councils), which states that
- (1) *A meeting of a principal council shall be open to the public except to the extent that they are excluded (whether during the whole or part of the proceedings) under subsection (2) below or by resolution under subsection (4) below.*
- ...
- (4) *A principal council may by resolution exclude the public from a meeting during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information, as defined in section 100I below.*
- (5) *A resolution under subsection (4) above shall—*
- (a) *identify the proceedings, or the part of the proceedings, to which it applies, and*
- (b) *state the description, in terms of Schedule 12A to this Act, of the exempt information giving rise to the exclusion of the public, and where such a resolution is passed this section does not require the meeting to be open to the public during proceedings to which the resolution applies.*
- 2.4 This decision is one for that meeting alone. The process for officers therefore is, in effect, to work backwards from this decision. Officers are in the position that they must consider whether or not it is likely that a Committee will resolve to go into private session and, therefore, not publish the papers in advance as they would otherwise do.
- 2.5 The process before a meeting reflects the decision, and legal tests associated with that, to be made by the Committee. In this instance, the law places that responsibility upon the 'proper officer' who, in Constitutional terms, is the monitoring officer.
- 2.6 These provisions are set out at section 100B (Access to agenda and connected reports)

- (1) *Copies of the agenda for a meeting of a principal council and, subject to subsection (2) below, copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below.*
- (2) *If the proper officer thinks fit, there may be excluded from the copies of reports provided in pursuance of subsection (1) above the whole of any report which, or any part which, relates only to items during which, in his opinion, the meeting is likely not to be open to the public*

- 2.7 Whilst what is likely or not likely to be determined as being exempt information at the meeting will be discussed in the Chair's pre-meeting, it is the monitoring officer who is the final arbiter, as proper officer, who must take the decision over what is or is not likely to result in a resolution to exclude the public and press. That translates in practical and real terms to a professional determination over what will or will not meet the, now fairly clear, legal tests in terms of what is exempt from public access in a report before a meeting takes place.
- 2.8 The key word in the above, however, is 'before'. That role then changes from one of arbiter to one of advisor at the committee meeting itself. The monitoring officer will duly advise on the matter, sometimes with some force, but the law is quite clear that the decision on the application of the legal test set out above is one for the Committee or Cabinet to make in voting on whether or not to exclude the public.
- 2.9 It is this point which answers the question raised by OSM Board at 1.4 above, because the final and actual decision of whether or not papers are exempt from public access is for the Committee or Cabinet to make, not the monitoring officer.
- 2.10 If a meeting makes a decision to remain in public session, the reports and papers previously marked 'not for publication' in the likelihood of them being exempt, would be duly made available to the public with immediate effect and then published in the normal way.
- 2.11 If a Member is unhappy with that decision of the committee or cabinet, there are two potential courses of action.
 - a) The first is judicial review of the Committee or Cabinet's decision, dependent on the nature of the decision.
 - b) The second is a request for the information under FOI. As the access to information regime is aligned with the provisions of the Freedom of Information Act, the response should be the same. That process has the advantage of complaint and recourse to the Information Commissioner's Office, which may ultimately lead to the Information Tribunal(s)

3. Other Issues

- 3.1 Once made, the effect of passing of such a resolution is it removes the provision that the meeting is open to anyone but the membership of that committee and those persons expressly invited to attend.
- 3.2 This decision includes Members of the Council who are not members of that committee. Each council will have its own protocol on how other members may or may not be then a party to that exempt discussion, but the law is clear that it does exclude any other Member not part of that committee.
- 3.3 There are separate rights for Overview and Scrutiny Committees to demand information about executive meetings. There are also rights for individual Members, which are discussed elsewhere.

4. Recommendation

- 4.1 That the Overview and Scrutiny Management Board request officers to arrange a training and briefing session on the issues set out in the report, both specifically for Scrutiny and also for all Members..