

Audit Committee

23 November 2020



Report of: Director: Legal and Democratic Services

Title: Access to Information

Ward: n/a

Officer Presenting Report: Director: Legal and Democratic Services

Recommendation

That the Committee notes the contents of this report.

Summary

This report provides the Committee with an overview of the legal framework relating to access to information by Members of the Council, including access to exempt information.

The significant issues in the report are:

This report provides an overview of the legal and constitutional framework for access to information by Members of the Council, including access to exempt information. It identifies the different legal frameworks that govern access to information by members and in particular the rights of access to information for Audit Committee members.



Policy

1. The legal framework relating to access to information is set out in legislation and those rules have been incorporated into the Council's Constitution, in particular the Access to Information Procedure Rules.

Consultation

2. **Internal**
The Head of Paid Service, S151 Officer, Chief Internal Auditor, Head of Legal Services.
3. **External**
The Council's External Auditors.
4. **Overview of the legal framework relating to access to information**

This section of the report provides an overview of the legal framework for access to information. The focus is on the general legal framework and how this relates in particular to the Audit Committee. A detailed consideration of the application of these rules to other committees (i.e. Cabinet, Scrutiny Commissions and the Human Resources Committee) is beyond the scope of this report.

The legal framework relating to access to information for councillors is contained in the Local Government Act 1972 and the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2012. This legislation sets out the general rights of access of councillors as well as specific rights relating to access to exempt information where it is reasonably necessary for a councillor to carry out their duties and the right of members of Scrutiny Commissions to access exempt information.

These statutory provisions build on the common law right of access which is often expressed as a 'need to know'. However, this is not an absolute right and councillors do not have a roving commission to inspect documents out of mere curiosity or desire which do not relate to the exercise of their role as a Member or which arise from an indirect motive, i.e. to assist someone in litigation with the Council. Requests to access information based on a 'need to know' will be considered on a case by case basis. In particular the following questions will need to be asked to establish whether a councillor has a need to know in any given case. Is it necessary for a councillor to see a particular document to get the information that they are seeking? Are the duties that the councillor is seeking to carry out consistent with their responsibilities as an elected member of the council? Requests for information based on a 'need to know' are considered on a case by case basis by the Proper Officer for Access to Information (i.e. the Monitoring Officer).

Local Government Act 1972

The starting point for understanding the statutory framework for access to information is the Local Government Act 1972 ('the 1972 Act'), as amended by the Local Government (Access to Information) Act 1985. This legislation codifies the long-established principle in local government that a councillor has a right to be provided with or to inspect council documents that are

reasonably necessary for them to see in order to carry out their duties as a councillor.

The statutory right of access to documents is provided by s.100F (1) of the 1972 Act, which provides that 'any document which is in the possession or under the control of a principal council and contains material relating to any business to be transacted at a meeting of the council or a committee or a subcommittee' must be open to inspection by any member of the principal council. In practice, this provision governs information that is to be considered at a public meeting and which is published and therefore in the public domain. This right is captured in APR5.1 and APR6 of the Access to Information Procedure Rules. Rights of access to information are limited by the statutory framework. A councillor cannot, for example, request sight of a document that has yet to come before a meeting.

Furthermore, if councillors wish to look into matters that have been dealt with in the past, then they will need to rely on rights of access available to the public generally, principally the Freedom of Information Act 2000.

Exempt information

In addition to the general right of access to information, exempt information will be made available where it relates to business to be transacted at a meeting. Schedule 12A of the 1972 Act sets out the categories of exempt information and these are repeated in APR10.3 of the Access to Information Procedure Rules.

Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2012

Building on the 1972 Act, the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2012 ('2012 Regulations') make further provision in respect of access to information. The 2012 Regulations set out the legal framework for Councils operating executive arrangements and contain two sets of provisions relating to private meetings of Cabinet (i.e. meetings closed to members of the public) at which exempt information is to be considered. The provisions relate to members generally and the additional rights available to members of overview and scrutiny committees.

Under Regulation 16 of the 2012 Regulations, all members are entitled to inspect any information that was considered at a private meeting of Cabinet, at the end of the meeting at which the information has been considered. However, this does not apply where this would involve the disclosure of exempt information falling within paragraphs 1-2, 4-5 and 7 of the categories of exempt information in APR10.4 or information falling within paragraph 3 of APR10.4 to the extent that the information relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract or the advice of a political adviser. These rights of access are set out in APR21 of the Access to Information Procedure Rules.

Under Regulation 17 of the 2012 Regulations, members of an overview and scrutiny committee have additional rights of access to a copy of any exempt information provided that the information relates to any decisions made by Cabinet or officers and also provided that the information is relevant to any action or decision that is being scrutinised or reviewed as part of their work programme. These rights of access are set out in APR20 of the Access to Information Procedure Rules.

The public interest test

The legal framework relating to access to exempt information includes a public interest test. In categorising information as exempt, the public interest in maintaining the exemption is balanced against the public interest in disclosing the information. Public interest considerations focus on the public good, not whether something is of interest to the public or private interests.

Public interest can take many forms, for example transparency and accountability in the conduct of public affairs, promoting public understanding, and safeguarding democratic processes, robust decision-making by public bodies, upholding ethical standards, natural justice and fairness and appropriate use of public resources. However, just because there is a public interest in something does not automatically mean that the information should be disclosed.

The following are general arguments in favour of disclosing information: public interest in transparency and accountability, public interest in a particular issue, probity into decision-making and presenting a full picture of an issue. However, there are various other matters to take into consideration as part of the balancing exercise: the prejudice that might be caused either to the authority or a third party by disclosure, the severity of any prejudice that might be caused by disclosure, the extent to which information is already in the public domain, the age of the information (the older the information the weaker the argument against disclosure), whether the issue is ongoing (i.e. in the case of commercial negotiations), the risk of legal challenge to the authority (if legal advice were disclosed). Such decisions relating to the categorisation of exempt information will be taken on a case by case basis by the Proper Officer for Access to Information.

Rights of Audit Committee members to access exempt information

The legal framework set out above applies in the following ways to members of the Audit Committee. Members of the Audit Committee receive information, including exempt information when it relates to business to be transacted at a meeting of the Audit Committee. The business that may be conducted at a meeting of the Audit Committee is set out in the Terms of Reference for the Committee as set out in Part 3 Responsibility for Functions of the Council's Constitution.

To summarise, the function of the Audit Committee is an assurance function and it takes its assurance from the work of the Council's Statutory Officers, Internal Audit and the work of the Council's External Auditors. Furthermore, it is acknowledged that the Audit Committee has a responsibility to ensure that key representations to the external auditors as part of the external audit are accurate and complete in line with ISA260 and other standards. The Audit Committee should be able to access such information, including exempt information, which is reasonably necessary for them to discharge this duty.

In addition, members of the Audit Committee may access information that has been made publicly available for other meetings of the Council. Furthermore, members of the Audit Committee have the same rights of access that are available to all members as set out in Regulation 16 of the 2012 Regulations, referred to above. Finally, members of the Audit Committee will be able to make requests to access information based on a 'need to know'.

It should be noted that there are no additional rights for members of the Audit Committee to

access exempt information equivalent to those of overview and scrutiny committees. Overview and scrutiny committees have a statutory role to scrutinise and review decisions of the executive. This is a very specific statutory duty as set out in Regulation 17 of the 2012 Regulations referred to above.

To conclude, the legal framework identified in this report affords the Audit Committee a number of mechanisms to access information, including exempt information. As is the case for other decisions relating to access to information, decisions about access to information for the Audit Committee will be made by the Proper Officer for access to information, taking into account the various matters identified in this report.

5. The legal framework set out in above is complex. The responsibility for oversight and decisions relating to access to information and in particular exempt information is that of the Proper Officer for Access to Information. Such decisions are made with support and advice from the Council's legal team. Further advice and guidance to all Members can be provided in respect of these rights on a case by case basis.

Proposal

6. That the Committee notes the contents of this report.

Appendices:

None

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985

Background Papers:

None