

Scrutiny Report

ISLE OF WIGHT COUNCIL

Meeting	CORPORATE SCRUTINY COMMITTEE
Date	9 JANUARY 2024
Title	ACCESS TO INFORMATION – RIGHTS OF COUNCILLORS
Report of	MONITORING OFFICER

Executive Summary

1. The purpose of this report is to explain what legal rights councillors may have in their capacity as councillors to access to information, and if so to what extent and when such information may be requested.
2. In particular, explanation has been requested regarding ‘confidential information’ and ‘exempt information’ held by or on behalf of the Cabinet.

Recommendation

- | |
|------------------------------|
| 3. That the report be noted. |
|------------------------------|

Background

Legal parameters

4. Although democratically elected to administer its local government area, a local authority is not a sovereign body i.e. it cannot simply do what it wants.
5. The local authority is a separate legal “person” from its councillors. It is a corporate body created by statute - hence the expression of a local authority being ‘a creature of statute’.
6. The basic public administrative law principle is that no local authority can do anything except that which is provided for by law. In other words, in contrast with central government which can do anything which is not prohibited by law, local authorities are dependent upon the existence of laws before they can have authority to act.

7. Therefore, no local authority can, by itself, increase its own statutory authority (no matter how well-intentioned or otherwise) and must act within the legal constraints set i.e. it must act within its powers ('intra vires') and not beyond its powers ('ultra vires').

Functions

8. The activities entrusted to local authorities by Parliament through legislation are described as its "functions".
9. The word "functions" embraces all the 'duties and powers' of a local authority. A duty is something that must be done. A power is something that may, but does not have to, be done.
10. But not all activities are its functions. This follows from the restrictions in remit placed upon local authorities due to being a creature of statute.
11. It is therefore necessary to first identify a statutory function given to the local authority, and only then to ascertain who is to be responsible for exercising that identified statutory function, and to what extent.
12. Whether the identified statutory function is categorised as a power (as distinct from a duty), or is categorised as a duty (as distinct from a power), there are certain general statutory subsidiary powers (see section 111 of the Local Government Act 1972 [Local Government Act 1972 \(legislation.gov.uk\)](https://www.legislation.gov.uk)).
13. It is crucial not to inflate any such subsidiary power itself into the category of a statutory function. These subsidiary powers are not freestanding functions, and are dependent upon the existence of one or more identified statutory functions.
14. To ascertain whether a particular activity falls within the lawful functions of a local authority, it is therefore first necessary to identify the particular function, and then, to ask whether the activity in question is incidental to it. An activity is not incidental merely because it is convenient or desirable or profitable.
15. But, within certain statutory limitations, the Council has power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its statutory functions.

Allocation of functions and responsibilities

16. Who is responsible for undertaking what functions of the local authority (as well as for exercising any proper subsidiary powers) needs to be established and understood.

Access to Information

17. Because a local authority is a creation of statute, and is separate from its membership, an elected councillor is not the council and therefore no councillor simply due to their status of a councillor can demand access to all information held by the local authority at any time.

18. Functions and responsibilities are allocated by the local authority in accordance with the law.
19. This basic public administrative law point needs to be accepted as it is the starting point to understanding access to information for councillors.
20. To gain access to information there must be established a “need” to know or the existence of statutory rights to access information.

Information

21. Information includes an expression of opinion, any recommendations and any decision made.

Confidential information

22. The term “confidential information” is sometimes used widely in its lay meaning.
23. In reality, “confidential information” has been given a statutory definition in legislation which gives it a tighter meaning.
24. For example, under the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, regulation 2 defines “confidential information” as
 - (a) information provided to the local authority by a government department on terms (however expressed) which forbid the disclosure of the information to the public; or
 - (b) information the disclosure of which to the public is prohibited by or under any enactment or by the order of a court,and in either case, a reference to the obligation of confidence is to be construed accordingly.

Exempt information

25. The term “exempt information” is often informally referred to as confidential information.
26. But the term “exempt information” has a specific statutory meaning given under section 100I of the Local Government Act 1972 [Local Government Act 1972 \(legislation.gov.uk\)](http://legislation.gov.uk) and Schedule 12A to that Act [Local Government Act 1972 \(legislation.gov.uk\)](http://legislation.gov.uk). Please see Part 5 Section 2 (‘Access to Information Rules’) in the Council’s Constitution [PART 5 - Access to Information Rules.pdf \(modern.gov.co.uk\)](http://modern.gov.co.uk).

Common law “need to know”

27. Councillors are not permitted to simply go on a ‘fishing expedition’ through their local authority’s files. If a councillor’s motive for seeing information is indirect, improper or ulterior this may be raised as a bar.

28. If a councillor is a member of the particular body (such as a committee), they have the right to inspect documents relating to the business of that body (subject to any statutory constraints).
29. If a councillor is not a member of the particular body, the councillor would have to show good cause why sight of them is necessary to perform their duties. This is known as the common law “need to know” test – please see Part 5 Section 1 ‘Protocol for Councillors Rights to Information’ [PART 5 - Protocol for Councillors Rights to Information.pdf \(moderngov.co.uk\)](#)

Statutory rights for councillors to information

30. The local authority presently operates the Leader and Cabinet Executive model of local authority governance. This means that there is an allocation of functions between ‘council functions’ and ‘executive functions’ see, for example, the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 as amended [The Local Authorities \(Functions and Responsibilities\) \(England\) Regulations 2000 \(legislation.gov.uk\)](#).

Council functions – All councillors - Proactive

31. In addition to the ordinary qualified rights of access to information enjoyed by the public, all councillors have certain qualified rights under section 100F of the Local Government Act 1972.
32. The general rule is that any document which is in the possession or under the control of the local authority AND contains material relating to any business to be transacted at a meeting of the council or a committee or sub-committee, shall be open to inspection by any member of the council.
33. This general rule includes certain exempt information but only in two scenarios:
 - (a) information relating to the financial or business affairs of any particular person (including the authority holding that information) but which is not information which relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract (in other words, proposed contract terms whilst negotiations are ongoing are NOT disclosable to all councillors under section 100F). [This is paragraph 3 of Part I to Schedule 12A to the Local Government Act 1972].
 - (b) to the extent that it is information which reveals that the local authority proposes (i) to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or (ii) to make an order or direction under any enactment. [This is paragraph 6 of Part I to Schedule 12A to the Local Government Act 1972].
34. This does not entitle any councillor to release such exempt information to the public, and councillors, being public servants, may be criminally liable for the indictable offence of misconduct in a public office if they unlawfully disclose information.

35. So, unless the exempt information comes within these two limited scenarios, there is no entitlement under section 100F of the Local Government Act 1972 for all councillors to gain access to exempt information.
36. This is a statutory regime and so it is not for any local authority to seek to extend statutory rights beyond that which Parliament has authorised.
37. The Monitoring Officer is the local authority's "proper officer" who decides, following the report author fully briefing them, whether in their opinion the meeting or part of the meeting is likely not to be open to the public or it appears to the proper officer that the document discloses exempt information – please see section 100B (1) [Local Government Act 1972 \(legislation.gov.uk\)](#) and section 100F (2) of the Local Government Act 1972 [Local Government Act 1972 \(legislation.gov.uk\)](#).
38. Councillors are reminded that exempt reports are marked "Not for publication" and with the description, in terms of Schedule 12A to this Act, of the exempt information by virtue of which the council are likely to exclude the public during the item to which the report relates – please see section 100B (5) of the Local Government Act 1972.

Executive functions – All councillors – Proactive/Reactive

39. In addition to the ordinary qualified rights of access to information enjoyed by the public, all councillors have certain qualified rights under regulation 16 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.
40. It is important to realise that regulation 16 is divided up between certain rights to access documents before a public meeting, and certain rights to access documents after the decision has been made.

Regulation 16 (1) – Public meeting - Proactive

41. The general rule is that any document which is in the possession or under the control of the executive AND contains material relating to any business to be transacted at a public meeting, shall be open to inspection by any member of the council, usually at least 5 clear days before that public meeting.
42. Please see paragraph 34 above for the same two scenarios in which exempt information may be accessed by all councillors. Again attention is drawn to the fact that there is no entitlement for all councillors to gain access to proposed contract terms whilst negotiations are ongoing. Also that it is not public inspection.

Regulation 16 (3) – After private meeting/ individual decision - Reactive

43. These qualified rights relate to "after the event" and so cannot be used proactively.
44. The general rule is that where any document is in the possession or under the control of the executive AND contains material relating to:
 - (i) any business transacted at a private meeting;
 - (ii) any decision made by an individual member in accordance with executive arrangements; or

- (iii) any decision made by an officer in accordance with executive arrangements such document must be made available for inspection by any member of the local authority when the meeting concludes or where an executive decision is made by an individual member or an officer immediately after the decision has been made or in any event within 24 hours.
45. Please see paragraph 34 above for the same two scenarios in which exempt information may be accessed by all councillors after the event. Again attention is drawn to the fact that there is no entitlement for all councillors to gain access to proposed contract terms whilst negotiations are ongoing. Also that it is not public inspection.
 46. The Monitoring Officer is the local authority's "proper officer" who decides, following the report author fully briefing them, whether in their opinion the meeting or part of the meeting is likely to be private or it appears to them that the document discloses exempt information (please see regulation 7 (2) and 16 (5) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 [The Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012 \(legislation.gov.uk\)](#)).
 47. Exempt reports are marked "Not for publication" and marked that it contains confidential information or exempt information, giving the description, in terms of Schedule 12A to Local Government Act 1972, of the exempt information by virtue of which the decision-making body discharging the executive function are likely to exclude the public during the item to which the report relates – please see regulation 7 (5) [The Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012 \(legislation.gov.uk\)](#).

Executive functions – Certain relevant overview and scrutiny members - Reactive

48. In addition to the ordinary qualified rights of access to information enjoyed by the public, certain overview and scrutiny members have qualified rights under regulation 17 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.
49. It is vital to understand that any such rights under regulation 17 are "after the event" and cannot be used proactively to obtain information before the business is transacted or the decision is made. This is a statutory regime and so no local authority can grant rights additional to those authorised by Parliament.
50. The general rule is that any document which is in the possession or under the control of the executive AND contains material relating to:
 - (i) any business transacted at a meeting of a decision-making body of the local authority;
 - (ii) any decision that has been made by an individual member of the executive; or
 - (iii) any decision that has been made by an officer in accordance with executive arrangements,
 AND a copy of which document a member of the overview and scrutiny committee has requested, the executive must provide that document as soon as reasonably practicable, and in any case no later than 10 clear days after the executive receives the request (unless the executive refuses such request under regulation 17 (4)).

51. The exception to this is that the qualified right under regulation 17 (2) does not include confidential information or exempt information unless that information is relevant to -
- (i) an action or decision that that member is reviewing or scrutinising; or
 - (ii) any review contained in any programme of work of such a committee or sub-committee of such committee. (please see regulation 17 (3) [The Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012 \(legislation.gov.uk\)](#))
52. Whether to comply with the specific request is for the executive to determine. If the request is refused, the executive must supply the relevant overview and scrutiny committee with a written statement, setting out its reasons for such a decision (please see regulation 17 (4) [The Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012 \(legislation.gov.uk\)](#)).
53. There is no right of appeal against a refusal of a request under the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 [The Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012 \(legislation.gov.uk\)](#).
54. For the avoidance of any doubt, it should be observed that the regulations expressly state that nothing in the 2012 regulations is to be taken to authorise or require the disclosure of confidential information in breach of the obligation of confidence – please see regulation 20 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 [The Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012 \(legislation.gov.uk\)](#).
55. Councillors are, therefore, requested to note this report.

Contact Point: Christopher Potter, Monitoring Officer and Service Director Legal and Governance, ☎ 821000 e-mail christopher.potter@iow.gov.uk

CLAIRE SHAND
Director of Corporate Services