

Guidance to Members and officers regarding confidential information

1 Introduction

1.1 The Council is committed to the principles of openness and transparency in decision making. However, in the practical application of these principles, the Council needs to have regard to legal obligations, which, in some cases, may require information to be kept confidential. One issue that Members and officers come across from time to time is the rights and obligations of Members regarding confidential information and the circumstances when such information may be disclosed. This note is intended as a general guidance to assist Members and Officers in dealing with such issues and covers the following topics:

- What is “confidential information”;
- Member’s rights to access information;
- Members’ duty of confidentiality;
- The position regarding officers; and
- Some “do’s and don’ts”.

2 What is confidential information

2.1 There is no legal definition of “confidential information” that is of general application. The confidentiality or otherwise of information therefore needs to be considered in the context of individual circumstances. However, by way of general indicative guidance, the following categories of information would normally be treated as confidential.

- (a) All reports that are in part II of Council or committee agendas (pink papers).
- (b) Matters concerning details of commercial negotiations.
- (c) Where there is a legal restriction on the disclosure of information (for example under the Data Protection Act, contractual obligations, a court order or pending legal proceedings covered with the sub judice rule).
- (d) Where information is supplied to a Member by an officer or other person and is stated to be confidential.
- (e) Matters concerning terms and conditions of employment of individual officers or pending grievance or disciplinary proceedings.
- (f) Personal information concerning individual service recipients (for example child protection cases, benefits investigations etc).

(g) Information which, given its nature, timing and context is such that a reasonable person would consider it to be confidential. The disclosure of such information would normally tend to have a detrimental effect on the interests of the Council, the service users or third parties involved.

2.2 Some information which would otherwise be confidential may nevertheless be subject to public rights of access under the law. This, for example, would cover subject access under the Data Protection Act 1998, a specific request for access under the Freedom of Information Act 2000, access to accounts and records under the Audit Commission Act 1998 as well as access to meetings and documents under the Local Government Act 1972. Such rights may be general or limited to a “qualifying” individual. Some rights of access to information also have procedural requirements attached to them (such as the need to submit the request in writing.) It is therefore generally advisable for such requests to be forwarded to the relevant officer, even where the Member may have the information at his/her disposal.

3 Members’ rights to access confidential information

3.1 The Council has a general commitment to openness and transparency. Members’ access to information and documents should therefore be restricted only where there is a good reason for doing so.

3.2 So far as the legal position is concerned, Members do not have unrestricted rights of access to all information. They have a common law right to access information on a “need to know” basis. This entitles them to access information or documents that are reasonably necessary to enable them to discharge their functions as Members of the Council. This would cover their roles as Cabinet Members, members of committees, subcommittees or working groups as well as positions to which they are appointed by the Council as Members and their community Councillor roles. The right is limited to a need to know and a mere curiosity or desire to know is not sufficient. The courts have also held that there is no right to a “roving commission” to examine the books or documents of the Council.

3.3 An officer receiving a request is entitled to know the reasons why the information is needed so that a proper assessment of the need to know can be made. Where a Member is dissatisfied with the decision, the matter may be referred to the Monitoring officer, who is authorised to make a final decision under the Code of Conduct for Member/Officer relations.

3.4 In addition to the Common Law rights mentioned under 3.3 above, Members have the same rights as ordinary members of the public, including those mentioned in paragraph 2.2 above.

3.5 The Council has developed a protocol for access to information as part of the Council's constitution. A copy of this is attached as an annex to this note.

4 Members' duty of confidentiality

4.1 The Local Code of Conduct for Members provides under paragraph 4:

"You must not ---

(a) disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where---

- (i) you have the consent of a person authorised to give it;
- (ii) you are required by law to do so;
- (iii) the disclosure is made to a third party for the purpose of obtaining professional advice provided that the third part agrees not to disclose the information to any other person; or
- (iv) the disclosure is ---

(aa) reasonable and in the public interest; and

(bb) made in good faith and in compliance with the reasonable requirements of the authority; or

(b) prevent another person from gaining access to information to which that person is entitled by law."

4.2 The duty of confidentiality under the code applies only when a Member is acting in an "official" capacity. The information must therefore have been received and/or disclosed by the Member as a Councillor and not in a private capacity unconnected with the role of the Councillor. Subject to that, the duty is not limited to information supplied by officers or the Council; it covers information given to a Member by **any** person in his/her capacity as a Councillor.

4.3 The code does not define what is confidential. However, what is clear is that it is not necessary for the person who supplied the information to have stated expressly that the information is confidential. For example, the fact that correspondence is not marked "confidential" does not necessarily stop it from being confidential. In many cases the fact that the information is confidential may be inferred from the subject matter and the surrounding circumstances. If you believe or "ought reasonably to be aware of" the confidential nature of the information, the duty under the code applies. You may wish to consider the guidance under paragraph 2 of this note to help you form a view regarding confidentiality.

- 4.4** The fact that information given in confidence has been improperly made public does not mean that it loses its confidential nature and can thereafter be recited in public with impunity. It is a breach of the code to disclose information of a confidential nature however it is acquired.
- 4.5** There is a public interest in Councils being able to rely on confidential information remaining so where the proper process has been followed. This would for example be the case where Members unanimously resolve that an item should remain exempt from disclosure.
- 4.6** **Disclosure with consent:** The Code of Conduct refers to “the consent of the person authorised to give it” as a potential justification for the disclosure of confidential information. This would normally be the author of the document or the Director or a senior officer of the department for the area of service. Alternatively, consent may be obtained from the Chief Executive. In appropriate cases, the officer may need to consult the chairman of the relevant committee or sub-committee before giving consent.
- 4.7** **Disclosure required by law:** Disclosure may be required by law for example in connection with legal proceedings or the Data Protection Act or the subject Access provisions of the Data Protection Act. In such cases the obligations to disclose overrides the duty of confidentiality.
- 4.8** **Disclosure for the purpose of obtaining advice:** You can disclose confidential information if the disclosure is for the purpose of enabling you to obtain professional advice, such as legal advice from a solicitor. However, your need to make sure that he/she agrees not to disclose the information to a third parties.

5 Is there “a public interest” defence?

- 5.1** Paragraph 4 (iv) of the new code permits Members to disclose information “in the public interest.” However, the provision is much more restricted than may appear at first sight. It is subject to four conditions. These are that the disclosure:
- (1) must be reasonable;
 - (2) must be in the public interest;
 - (3) must be made in good faith; and
 - (4) must be made in compliance with any reasonable requirements of the council.

A. Reasonableness: the first condition (reasonableness) requires consideration of matters such as:

- Whether you believe that the information disclosed, and any allegation contained in it, is substantially true. If you do not believe this, the disclosure is unlikely to be reasonable.
- Whether you make the disclosure for personal gain. If you are paid to disclose the information, the disclosure is unlikely to be reasonable.
- The identity of the person to whom the disclosure is made. It may be reasonable to disclose information to the police or to an appropriate regulator. It is less likely to be reasonable for you to disclose the information to the world at large through the media.
- The extent of the information disclosed. The inclusion of unnecessary detail, and in particular, private matters such as addresses or telephone numbers, is likely to render the disclosure unreasonable.
- The seriousness of the matter. The more serious the matter disclosed, the more likely it is that the disclosure will be reasonable.
- The timing of the disclosure. If the matter to which the disclosure relates has already occurred, and is unlikely to occur again, the disclosure may be less likely to be reasonable than if the matter is continuing, or is likely to re-occur.
- Whether the disclosure involves your authority failing in a duty of confidence owed to another person.
- **The legitimate expectations of third parties about the information being kept confidential are an important relevant factor when considering whether the disclosure is reasonable.**

B. Public Interest: the second requirement, that the disclosure must be in the public interest, needs to involve one or more of the following matters or something of comparable seriousness, that has either happened in the past, is currently happening, or is likely to happen in the future:

- (a) A criminal offence is committed.
- (b) Your authority some other person fails to comply with any legal obligation to which they are subject.
- (c) A miscarriage of justice occurs.
- (d) The health or safety of any individual is in danger.
- (e) The environment is likely to be damaged.

- (f) That information tending to show any matter falling within (a) to (e) is deliberately concealed.

In looking at whether disclosure is reasonable and in the public interest for the purposes of the code of conduct for Members, one has to take account of the Human Rights Act. In particular, article 10 (right to freedom of expression) and article 8 (right to respect for private and family life, home and correspondence.) Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life. Neither article 8 nor article 10 has any pre-eminence over the other.

C. Good Faith: the third requirement, that the disclosure is made in good faith, will not be met if you act with an ulterior motive, for example, to achieve a party political advantage or to settle a score with a political opponent.

D. Council's Reasonable Requirements: The fourth requirement, that you comply with the reasonable requirement of your authority, means that before making the disclosure you must comply with your authority's policies or protocols on matters such as whistle-blowing and confidential information, you must raise your concerns through the appropriate channels set out in such policies or protocols.

5.2 Given the restrictions and qualifications set out above, you need to proceed with extreme caution before disclosing confidential information's. If you are unsure, it is always advisable to seek guidance from the Chief Executive or the Monitoring Officer.

6 Position regarding officers

6.1 Although (until now) there is no a statutory code of conduct for officers similar to the code of conduct for Members, officers are subject to a duty of confidentiality under their contract of employment. The unauthorised disclosure of information is a disciplinary offence which in certain cases could lead to dismissal. In addition to the other express or implied conditions of contracts of employment, officers are subject to the Code of Conduct for Employees which forms part of the Council's constitution. In particular, paragraph 14 of the Code outlines the duties of officers, which are similar to the duties imposed on Members. They include the following:

"You should be aware that types of information which must remain confidential (even after you or the person concerned has left employment with the Council) include:

- *personal information given in confidence*
- *information that might compromise the right of commercial confidentiality*
- *information that if disclosed might prejudice enforcement action*
- *information that the authority is not allowed by law to disclose (e.g. under data protection legislation)*
- *information relating to the prevention, investigation or prosecution of a crime*
- *information that is defamatory*
- *requests for information that are unreasonable because of its volume or complexity*

“You should never pass on information, confidential or otherwise, for personal or financial benefit.

“You should be clear about the scope of information to which you have access and the constraints and freedoms applicable.”

7 Whistleblowing

- 7.1 The Public Interest Disclosure Act 1998 gives employees and contract workers protection from detrimental treatment if, in the public interest, they “blow the whistle.” However, the types of disclosure that are protected by the Act are restricted. They include disclosure of a criminal offence, a breach of legal duty, a miscarriage of justice, damage to the health or safety of an individual, damage to the environment and any deliberate concealment of information tending to show any of the foregoing.
- 7.2 In order for the protection to apply, the disclosure has to be to the employer (i.e. the council itself) or some other person prescribed by regulations. The secretary of state has made regulations which prescribe, among others, the District Auditor, the Charity Commission, the Data Protection Registrar, the Environment Agency and the Health and Safety Executive. In some cases an employee may disclose information to a person not prescribed by the regulations, but only if he/she believes that the disclosure to the employer would result in the destruction or concealment of the information. Disclosure to a newspaper would therefore not be covered the act in most situations.

8 Some “Do’s and Don’ts”

8.1 By way of good practice, the following “Do’s and Don’ts” are suggested for Members.

“Do’s”:-

- When seeking access to what you believe to be sensitive or confidential information, you should, in the first place, approach a senior officer, preferably at Director or Assistant Director level.
- Unless it is obvious from the context, you should always say what you need the information for so that a “need to know” can be established.
- It is usually better to ask for a briefing or advice from officers rather than demanding to see files or original documents. If you are not satisfied with the information, you could always ask for specific documents.
- One aspect of the need to know principle is proportionality. In asking for information and documents therefore you need to ensure that what you are asking (in terms of volume of documents, time needed to locate, research and collate the information etc.) is commensurate to your need to know.
- Information in documents held by the Council belongs to the Council corporately rather than to individual officers or Members. Members and officers therefore need to accept that they do not “own” information or documents and they should access them or disclose them only for the purposes of discharging their functions.
- If Members have concerns about matters of a confidential nature, they should raise them with the Chief Executive or the relevant Director. If they have serious concerns and believe that disclosure would hamper a resolution of the matter, they may, in appropriate cases, raise the matter with the District Auditor or, in cases involving a criminal offence, the police. Disclosure of confidential information to the press is most likely to involve a breach of the code of conduct for Members and is rarely justified.
- Members should have regard to their fiduciary duty to the Council and council taxpayers and that they have joint responsibility to avoid the disclosure of information of a commercially sensitive nature. Any confidential information gained by Members in connection with pending or ongoing litigation should not be disclosed under any circumstances as this would amount to a breach of trust.

- Before asking for information of a confidential or sensitive nature you should always ask yourself whether you have a “need to know.”

“Don’ts”:-

- Never allow your party political interests to override the interests of the Council and Council Tax payers in the way that you deal with access to or the disclosure of information.
- Just because communication is not labelled “confidential”, you should not assume that it is for general release. You should always consider the circumstances.
- The disclosure of confidential information that does not come within the narrowly defined exemptions is a breach of the Code of Conduct. You should not try justify any such action by reference to other principles.
- Do not disclose information gained while serving in working groups or panels, which is not meant to be for public consumption. You should have regard to the guidance on working groups, which states that there is a presumption that information relating to the business of such groups is confidential.
- Members should avoid stepping into a role, which is more appropriate for officers, and Officers likewise should respect Members’ need to know and not withhold information unless there is good reason for doing so.
- Don’t take risks. If in doubt, ask!

9 General

- 9.1 This paper is meant by way of general guidance as does not attempt to cover all eventualities. If you need further advice or clarification, you may contact Alex Bailey, Director of Strategy & Governance (and Monitoring Officer), on extension 1295 or Abraham Ghebre-Ghiorghis, Head of Law, (and Deputy Monitoring Officer) on extension 1500.

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