

The Rules on Confidentiality

Councillor Angela Lax – Cabinet Member for Legal and Regulatory

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Agenda Item: 8

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Key Decision? NO

Local Ward Members N/A



**Audit and
Member
Standards
Committee**

1. Executive Summary

- 1.1 In recent months there has been extensive discussion and challenge about when reports are published so that they are available for all to see, or whether they are restricted and considered in private.
- 1.2 Furthermore, the Leader has emphasised that the council must be seen to be as open and transparent as possible in its decision making and operation.
- 1.3 The council has an obligation to ensure that its business is conducted in as transparent a way as possible and that it observes access to information rules. Wherever possible, matters should not be restricted from publication or debate.
- 1.4 However, the council needs to ensure that it tries to get the balance right between transparency and maintaining appropriate levels of confidentiality.
- 1.5 Members, at times, need to be provided with highly confidential information. In these situations the council needs to restrict publication of the papers and to restrict access to a meeting where such material is to be discussed.
- 1.6 The Local Government Act 1972 describes the seven circumstances when councils must, or can choose, to restrict publication of reports and supporting material. This report details those circumstances.
- 1.7 This paper outlines the council's legal obligations in ensuring that what must, or ought to, remain private is kept private, and what must be disclosed. The paper also outlines our approach in determining whether information should be kept private.

2. Recommendations

- 2.1 It is recommended that the committee notes the report.

3. Background

- 3.1 The council's approach to confidentiality is governed by a series of Acts and other documents including the Local Government Act 1972, the Data Protection Act 2018 (which incorporated the General Data Protection Regulations), the Transparency Code and our own Constitution.
- 3.2 Information may also be released, or restricted, by the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.

The Council's Constitution

- 3.3 Part 4 Section 2 of the Constitution describes the Council's Access to Information Procedure Rules.
- 3.4 The Rules refer to the legal obligations placed upon the council by the various Acts and Regulations. The Constitution describes the transparency surrounding our decision making process – for instance, it outlines the forward plan describing the key decisions to be taken by Cabinet and Cabinet Members; rights of the public to attend and record meetings; access to agendas, reports, papers and minutes; access to background papers; and legal definitions of confidential and exempt information.
- 3.5 The Constitution is always our starting point when considering whether reports are published or restricted.

The Local Government Act 1972

- 3.6 The main piece of legislation relating to the council's approach to confidentiality in decision making is the 1972 Act. Sections 100A to 110L requires councils to publish agendas and papers in a format/location accessible to the public at least 5 clear days before a meeting. The meeting must also be open to the public to attend.
- 3.7 These provisions have been further strengthened in recent years by the Openness of Local Government Bodies Regulations 2014 which allows people to film, record and broadcast meetings.
- 3.8 The 1972 Act recognises that there are certain situations where it is not in the public interest for the papers to be made public nor for the public to be entitled to attend or film/record the meetings. The tests are:
- a) whether it falls within the categories of exempt information under Schedule 12A (listed below), and
 - b) whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

- 3.9 The reasons for an exemption are set out in Schedule 12A and are:

1. Information relating to any individual

We do not publish reports that name an individual unless it is in the public interest to do so, or where the individual's name is already in the public domain. In any event we will need to ensure that we protect individuals' personal data in compliance with the Data Protection Act 2018.

For example, we restrict papers relating to applications for licensing, or for employment matters which identify names of individuals, but will reveal the names of planning applicants, or contractors providing goods or services to the council.

2. Information which is likely to reveal the identity of an individual.

Similar to 1 above, we must not reveal information that would be sufficient for a third party to be able to identify an individual.

3. Information relating to the financial or business affairs of any particular person (including the authority holding that information).

The council will use this exemption to ensure that it maintains its strongest possible commercial negotiating position. For instance, some reports relating to Friary Grange Leisure Centre were initially restricted because negotiations were ongoing with Staffordshire County Council and Freedom Leisure. Furthermore, the report to Strategic (O&S) Committee in September regarding the Property Investment Strategy was restricted because it discussed the council's negotiating strategy for property acquisition.

This exemption is also sometimes used when members are being asked to confirm a preferred bidder for a contract for goods or services but there remains further negotiations to be completed with them.

We also use this exemption if the report discloses business information relating to another organisation which is considered to be commercially sensitive and /or confidential. Such information might include intellectual property (as with the advice from KPMG on establishing a development company) or impact on the other party's negotiating position (many Friarsgate reports were restricted because they described progress made by U&I with their lease negotiations).

4. 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.

This exemption is used if the report discusses the council's intended position regarding labour relations where there may be an impact on staffing levels or negotiations regarding terms and conditions.

For instance, reports may be restricted where decisions may lead to the formal consultation on restructuring of teams which impact on staff, or on changes to terms and conditions.

5. Information in respect of which legal professional privilege will apply.

Occasionally, the council may have obtained legal advice in order to be able to consider its position on a specific matter. Such advice will ordinarily be subject to legal professional privilege and not disclosable to any other party. When appropriate the council will consider waiving their legal privilege if it is in the interests of the council to do so.

6. Information which reveals that the authority proposes—

- (a) to give under any enactment, a notice under or by virtue of which requirements are imposed on a person; or**
- (b) to make an order or direction under any enactment**

Specific examples where reports are restricted is on planning enforcement or on action taken by the regulatory services team, say on taxi licensing, food safety or health and safety.

7. Information relating to any action taken or to be taken in connection with the prevention, investigation or prosecution of crime.

The council will not publish information relating to the council's work in preventing, investigating or prosecuting crime, for instance, in the cases of fly-tipping, food safety breaches, health and safety offences, or benefit fraud whilst those investigations are ongoing, but will seek to publicise the results once taken. It will also restrict access to papers that contain details of relevant activity being pursued by other enforcement agents including the police, HMRC, Food Standards Agency, Trading Standards, or the Health and Safety Executive.

Determining Confidentiality

- 3.10 The decision on whether the papers should be confidential rests with the council's Monitoring Officer. If papers are restricted then the agenda and the report will indicate the paragraph(s) that are being relied upon to restrict publication.
- 3.11 Furthermore, in recent months the Council has provided a further explanation on the agenda as to why reports have been restricted. We will look to continue this practice.
- 3.12 It has been suggested that we make increased use of redaction to allow a paper to be published but to hide the sensitive information. But there are challenges in using such a method. For instance, redacting reports is not easy and relies on the skill and judgement of the 'censor' to decide what is redacted. Too much redacted and meaning is lost; too little, and the information is not protected.
- 3.13 Furthermore, redacted reports means that Committee Services are required to manage and publish two separate documents; one for the public and one for Members. There are also then challenges for Members to realise that any discussion in public must not lead to them revealing what has been redacted. In consequence, given the risks of redaction, it is sensible either to write the whole report for publication, or to restrict all or part of it.
- 3.14 The decision as to whether the public and press should be excluded rests with the relevant committee/council. This is why the Motion to exclude the press and public is read out ahead of the confidential items being considered.
- 3.15 Of course, the meeting could decide not to exclude the press and public but extreme care would then need to be taken to ensure that confidential information is not made public. This is possible, as we saw at the September Strategic (O&S) Committee, where members discussed associated non-confidential material before moving the motion to exclude the press and public.

The consequences of releasing confidential/exempt information

- 3.16 Extreme care must be taken not to reveal protected information, as in certain situations this might be considered a criminal act, particularly when dealing with sensitive personal data or information relating to the prevention, investigation or prosecution of crime.
- 3.17 In other circumstances revealing protected information may undermine the council's own negotiating position with potential suppliers, purchasers or employees / unions, to the detriment of the council and its residents. Whilst such disclosure may not be criminal, it is not in the public interest and may be contrary to the Members' Code of Conduct.

Our Approach

- 3.18 When necessary, this council, withholds publication of reports that are exempt in accordance with the above descriptions.
- 3.19 We will never release reports that identify information about an individual or which could identify an individual that would breach the DPA. For instance, we routinely withhold reports that relate to licence applications by individuals, council tax write-offs, employment reports, or reports relating to community safety.
- 3.20 We will also generally restrict reports that seek approval to take enforcement action, or which reveal legal advice which we may rely on litigation, or which undermines our negotiating position with suppliers / customers / purchasers. We also restrict reports which reveal our proposals for negotiations with the unions and workforce.
- 3.21 We restrict reports which describe specific cases of the investigation and detection of crime.
- 3.22 The council must keep the exemption under review and if the report subsequently loses its exempt status it should be made public. Members might recall that this happened with the initial papers prepared for Full Council in July 2019 relating to Friary Grange Leisure Centre. These were restricted because any decision was going to affect the business of a third person – Freedom Leisure and its staff – but by the time Council convened, both the company and employees had been briefed on the decision by Cabinet.
- 3.23 However, any decision to exempt information must also be tested against the public interest. If there is overwhelming public interest then the exemption may be over-ridden. But public interest does not mean public curiosity.
- 3.24 It is also possible that a report is divided into two sections – that to be considered in public and that in private. For instance, an appendix containing exempt background information may accompany a public report. But care must be taken by members in discussing such material in public.
- 3.25 In all our report templates, there is also a brief description of ‘background’ papers. These papers are not routinely published with the reports unless as appendices. However, they should be made available but they can be considered for exemption in the same manner as the reports.

Freedom of Information Act

- 3.27 There is no general provision requiring information to be made public prior to a decision. However, the council is governed by the Freedom of Information Act 2000.
- 3.28 The FOIA 2000 gives any person access to any information held by public authorities. It enables the public to participate in the discussion of policy issues, and so improve the quality of government decision making, and hold government and other bodies to account.
- 3.29 The FOIA works on the premise that information held by public authorities should generally be available to the public, however at the same time it recognises that there are certain circumstances where information needs to be kept private and sets up “qualified” and “absolute” exemptions. The FOIA regime is overseen by the Office of the Information Commissioner, (“ICO”).
- 3.30 Under section 2 of FOIA, even where information has been properly found to be exempt under one of the qualified exemptions in FOIA (such as the qualified exemption for trade secrets and commercially sensitive information (section 43)), the duty to disclose continues unless, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. FOIA does not entail a presumption in favour of disclosure.

3.31 As a council we have a rigorous approach to observing the Freedom of Information Act. In 2018, we reviewed our approach to FOI and re-launched our webpages in a way that allowed for easier access to information, especially to information that is frequently sought. We have also made it easier for people to submit requests.

Alternative Options	This report is for information.
Consultation	Our legal advisors from South Staffordshire Council have been consulted as to the accuracy of this paper.
Financial Implications	There are no financial implications because of this report.
Contribution to the Delivery of the Strategic Plan	This report is for information only.
Equality, Diversity and Human Rights Implications	There are no implications related to this report.
Crime & Safety Issues	There are no such issues relating to this report.
DPA /Privacy Impact Assessment	Whilst there are no DPA implications in preparing this report, there are DPA considerations when deciding whether papers should be published or restricted.

	Risk Description	How We Manage It	Severity of Risk (RYG)
A	Getting our approach wrong and publishing information that is exempt. This might lead to a breach of DPA or the undermining of our negotiating / enforcement positions.	Draft reports are reviewed by Leadership Team and are considered before the Monitoring Officer / Committee Services team before publication	y
B	Getting our approach wrong and restricting information which is not exempt. This can lead to criticism that we are not being transparent in our decision making.	Draft reports are reviewed by Leadership Team and are considered before the Monitoring Officer / Committee Services team before publication. We will consider separating material in reports into public / private sections.	y
C	Not explaining why we are restricting publication leading to criticism that we are not being transparent in our decision making.	We will add an explanation to agendas to provide further reasoning as to why reports are restricted.	G

Background documents

Constitution

Local Government Act 1972

Transparency Code

Data Protection Act 2018

Relevant web links