



APPENDIX 4

Briefing for:	CEMB	Item number	
Title:	Exempt Information – Clarifying or Amending the Rules on Disclosure between Members		
Lead Officer:	John Suddaby – Monitoring Officer		
Date:	15 December 2009		

1. The issue under consideration

- 1.1 A recent decision of the Standards Panel has found, in the Panel's view, that there are no clear enforceable rules about the extent to which Members can, on their own initiative, share exempt information and reports.
- 1.2 This finding arose from a hearing into an alleged breach of the Members' Code of Conduct which involved a Member of a non-executive Committee passing an exempt and highly confidential report to a fellow Councillor who was not a Member of that Committee. Although the report was passed on without obtaining prior consent from a relevant senior officer, the Leader or the Chair of the Committee, this was not found to be a breach because of the absence of a clear prohibition on Members "sharing" exempt information on their own assessment of their colleagues "need to know".
- 1.3 This report sets out the current rules on exempt information as the Monitoring Officer understands them and suggests options for: (i) affirming them more clearly, or (ii) enforcing them more strictly, or (iii) relaxing them substantially. The issues and the definition of exempt information are explained more fully in the Briefing which is the Appendix to this report.

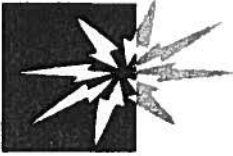
2. Background information

- 2.1 Exempt information is defined in local government legislation and falls within 7 categories with additional categories for Standards Committee



proceedings. To qualify as “exempt”, the public interest in maintaining confidentiality must outweigh the public interest in public disclosure.

- 2.2 Exempt information is the property of the Cabinet or Committee that has the matter within its terms of reference. The Cabinet/Committee could decide that exempt information should be shared with others outside that body or even released into the public domain. It would be open to the full Council, with the Cabinet’s agreement, to redefine the constitutional rules on the availability of exempt information to Councillors not serving on the relevant Member body.
 - 2.3 The right of an individual Councillor to obtain exempt information generally depends on their “need to know” which is a legal right defined by case law not Statute. The “need to know” will depend on the role of the individual Councillor within the Council; so a Cabinet member will have much more extensive rights than a “back-bench” Ward Councillor.
 - 2.4 The “need to know” and related rights of access to information are explained in the Member/Officer Protocol within the Constitution. The Protocol expects that a Councillor will seek exempt information from a Chief Officer or the Monitoring Officer. But there is no clear and express prohibition against Members sharing exempt information unofficially.
 - 2.5 The situation is made more complex by provisions in the Committee Procedure Rules in the Constitution which allow any Councillor not serving on the Cabinet/Committee to attend the closed part of meetings with the Chair’s consent and to obtain exempt reports
- 3. Options for consideration**
- 3.1 The “minimum change option” which is to clarify and re-affirm the current rules, as described in paragraphs 11 to 22 of the Appendix, and to enforce them more consistently with the backing of further Member training, or
 - 3.2 The “more restricted option” which is to enforce the “need to know” more strictly and logically by removing or restricting current exceptions, such as the ability of any Member to obtain an exempt report by attending the relevant Committee/Cabinet, or
 - 3.3 The “more relaxed option” which is to relax the current rules substantially so that all Members can have access to the majority of exempt reports. To protect the interests of the Council and vulnerable individuals, certain limited categories of exempt information and reports should be subject to enhanced confidentiality procedures.



Haringey Council

4. Financial Implications

4.1 There are no specific financial implications.

5. List the proposed routing for the report through the formal decision making process

5.1 CEMB are asked to indicate a view on the 3 options set out above, or make other comments. Consultation will take place with CAB, the Standards Committee and the Groups. In the light of those consultations a report with proposed constitutional changes will be submitted to the Constitution Review Working Group with a view to their recommendations being adopted by the March full Council.

6. One Appendix attached – Briefing on Exempt Information/Reports and the Rules on Disclosure between Members

BRIEFING NOTE ON EXEMPT INFORMATION/REPORTS AND THE RULES ON DISCLOSURE BETWEEN MEMBERS

Summary

1. A recent decision of the Standards Panel has found, in effect, that there are no clear enforceable rules about the extent to which Members can, on their own initiative, share exempt information and reports.
2. It is for the Standards Committee to supervise the enforcement of rules on the disclosure of information by Members. But it is a matter within the power of the full Council, acting with the approval of the Cabinet, to amend the Council's Constitution so as to determine the permissible limits of Members' access to, and sharing of, exempt information.

Background – Standards Panel Decision

3. A complaint was made that Cllr Aitken, a Member of the General Purposes Committee, had breached the Members' Code of Conduct by disclosing an exempt report about a sensitive personnel dispute to Cllr Oakes, who was not a Member of the GPC. Cllr Oakes then passed the report to a journalist. The Standards Panel found that Cllr Oakes had breached the Code but there was no finding that Cllr Aitken had been complicit in this disclosure to the press.
4. The Standards Panel additionally considered whether Cllr Aitken had breached the Code by his mere passing of the report to Cllr Oakes on the assumption that Cllr Aitken was not aware of the plan by Cllr Oakes to disclose to the press. The Panel found that Cllr Aitken had "the implied consent of the Council authorising him to give the report to another Councillor" and so he was found not to have breached the Code.
5. This finding by the Panel was based on the "custom and practice" whereby non-Committee Members can attend the closed part of meetings with the Chair's consent and can usually obtain copies of exempt reports to that Committee. The Panel also heard evidence that Members often shared exempt reports with each other and applied the "need to know" test themselves without seeking prior approval from the Monitoring Officer. Finally, the Panel noted that there was no "protocol" dealing specifically with the transmission of exempt reports or documents between Members.

Members' Access to Confidential Information

6. Members' rights of access to confidential information, that are additional to those enjoyed by members of the public, are set by Statute and common law; principally by the Local Government Act 1972 and by Court decisions on a Member's "need to know".

The Meaning of "Exempt" Information

7. "Exempt information" is defined in local government "Access to Information Rules" (Part 5A of, and Schedule 12A to, the Local Government Act 1972 as amended) as information falling within certain prescribed categories which are set out in the Appendix to this Note. In addition, for information to qualify as "exempt" the Monitoring Officer must conclude that the public interest in maintaining confidentiality outweighs the public interest in disclosure into the public domain that usually exists because of the benefits of transparency in Council decision-making.
8. When a report is wholly or partly "exempt", the Cabinet or Committee will generally pass a resolution excluding the public and press from the meeting before the "exempt" information comes to be considered. "Exempt" reports, or parts of reports, are not available for public inspection before or after meetings in the same way that open reports must be.
9. "Exempt" information is considered as the "property" of the Cabinet or Committee that receives an exempt report and has the matter within its terms of reference. Even if the Monitoring Officer advises that a report is "exempt", the Committee may decide that it should be released more widely, for example, to other Councillors attending a meeting who are not Members of the Committee. Obviously, the Cabinet or a Committee should always obtain and consider the Monitoring Officer's advice before authorising any disclosure into the public domain of "exempt" information.
10. Although the Members Code of Conduct uses the terms "exempt" and "confidential" interchangeably, in the context of the "Access to Information Rules" there is a separate and specific definition of "confidential" information. This is information supplied by a Central Government Department or subject to a Court Order or a Statute that prohibits disclosure to the public. In these circumstances, the Council, Cabinet or Committee will have no discretion and must maintain the confidentiality.

Current Rules on Members' Access to, and Disclosure of, Exempt Information

11. "Exempt" reports are printed on yellow paper and have a large warning at the top that they are "Not for Publication". The reason for the "exempt" status is given in the appropriate box near the beginning of the report.
12. The duty placed on Members not to disclose any "exempt" report or document is set out within Miscellaneous Standing Orders (Part 4, Section C of the Council's Constitution) at paragraph 4 (3). It is implicit that the prohibition is directed against disclosure being made to the public or persons outside the Council. There is nothing in this Part of the Constitution that deals expressly with disclosure by Councillors, who receive exempt reports as Committee Members, to other Councillors who are not Committee Members.
13. The Members' Code of Conduct (Part 5, Section A of the Constitution) contains a rule against disclosure of confidential information at paragraph 4 but this rule does not deal expressly with the disclosure of information by one Councillor to another.

The "Need to Know"

14. Further guidance on Members' rights of access to exempt information is contained in the Protocol for Member/Officer Relations which is in the Constitution at Part 5, Section B. Within this Protocol section 12 states the principle that all Members do not enjoy unlimited rights of access to Council documents, especially exempt information. Generally a Member's rights of access will depend on that Member's individual "need to know" arising from the roles or responsibilities that he/she undertakes as a Councillor. For example, the "need to know" of a Cabinet Member will be very much more extensive than that of a "backbench" Ward Councillor. This can be described as the "need to know" hierarchy. The "need to know" is explained in the Protocol but it is derived from legal case law.
15. In many instances a "need to know" will be obvious, for example membership of a particular Committee. In other cases, for example whether a Ward Councillor genuinely requires certain sensitive information in order to represent a constituent, the facts may be more complex and the Monitoring Officer will have to rule on whether a legal "need to know" has been demonstrated.
16. Even where a legal "need to know" has not been demonstrated, it is still open to any Member to make an "access to information request" to the Leader of the Council, and the appropriate Cabinet Member, seeking disclosure of specified exempt information. The Leader then

has a discretion to agree the request which would generally result in disclosure limited to the individual Member making the request or to a defined group of persons. This procedure is set out in paragraphs 12.13 to 12.16 of the Protocol. It is quite different from a "Freedom of Information Act" request which, if successful, results in the requested information being disclosed into the public domain.

17. As the procedure for making an "access to information request" illustrates, the "need to know" hierarchy can be relaxed at the discretion of an individual Council Leader, an individual Committee or an individual local authority collectively. However, where a legal "need to know" exists there is no discretion to deny or cut down a Member's access to relevant information.
18. It is implicit in the Protocol for Member/Officer Relations that Members should not be disclosing exempt reports, or other exempt documents, to each other on the basis of one Member's individual assessment of the "need to know" claimed by his/her colleagues and without reference to the Monitoring Officer, Head of Local Democracy or the Leader. Unfortunately, the Protocol does not expressly prohibit such unofficial disclosure by one Member to another but there would be little point in having the official procedures for obtaining access to exempt information if they could readily be circumvented by Members disclosing them to each other outside the recognised system.

Obtaining Exempt Reports by Attending Committee Meetings

19. Under Committee Procedure Rules (Part 4, Section B of the Constitution) at paragraphs 46 and 47 there is provision for any Councillor to attend the exempt part of a meeting even though he/she is not a Member of the relevant Committee/Cabinet. This is permitted only with the Chair's consent but, in practice, it appears that such consent is almost invariably granted.
20. Non-Committee Members may not move a resolution nor vote but they may otherwise "take part in the business of the meeting" and, in practice, they will receive copies of exempt reports at the meeting. Usually, these reports are collected at the end of the meeting from the non-Committee Members by the Committee officers but this does not always happen and it is not expressly required in the Constitution.

Section 100F Local Government Act 1972

21. In addition to the rights given to a Member with an individual "need to know", there are statutory rights given to all Members under section 100F of the Local Government Act 1972. These s.100F rights allow all Members, whether they serve on the relevant Committee/Cabinet or

not, to obtain any document held by the Council which contains material relating to any business to be transacted at a meeting of the Committee/Cabinet or other Council body.

22. There are important limitations to s.100F. It only applies where business is to be transacted at a meeting i.e. only where the document is a report or background paper for a meeting that is about to take place. It does not give a Member a right to an exempt report considered at a past meeting. Furthermore, s.100F only applies to some, but not all, of the categories of exempt information. For example it applies to information about the financial affairs of other persons or forthcoming Council enforcement action. It does not apply to the other categories such as information identifying individuals or advice subject to legal professional privilege.

The Issues Arising from the Standards Panel Decision

23. The main issue behind the findings of the Panel, noted at paragraph 5 above, is the seeming lack of logic or consistency in the rules governing Members' access to exempt information.
24. As noted in paragraph 14 above, the "need to know" is, effectively, a hierarchy of rights to information with Cabinet Members having very much more extensive rights than "backbench" Ward Councillors. But the ability of any Member to obtain the great majority of exempt reports by attending the relevant Committee/Cabinet meeting does challenge the logic of restricting access to exempt information through the general application of the "need to know".
25. The s.100F rights available to all Members are less of a challenge to the "need to know" hierarchy because of their limited scope, especially the limited categories of exempt information that must be disclosed to Members. As a statutory right, it cannot be removed or cut down by the Council's Constitution.
26. The procedure for making "access to information requests" to the Leader, described at paragraph 16 above, is relatively rarely used and, of course, involves the Leader's discretion usually with the advice of the Monitoring Officer or other relevant senior officers. The procedure can be a useful way to make "concessions" on information sharing without establishing a legal precedent.
27. The second important issue noted by the Panel was the widespread practice of Members sharing exempt reports with each other and applying the "need to know" test themselves. This suggests that the existing rules are not well known or understood by many Members.

28. Finally, the Panel pointed out that there were no clear and express rules about the transmission of exempt reports between Members. It has to be accepted that the Protocol for Member/Officer Relations does not contain an express prohibition against a Member sharing an exempt report with a colleague without prior approval from the Monitoring Officer or the Head of Local Democracy.

The Options for the Future

29. The first option could be described as the "minimum change option".
- (i) The current rules about the "need to know" hierarchy, the procedure for obtaining exempt reports by attending meetings and the procedure for "access to information requests" to the Leader would all be retained, and
 - (ii) These rules would be better explained in clear, direct terms in a revised "protocol" that prohibited unofficial Member sharing of exempt reports. Such a "protocol" could either an addition to the existing Protocol for Member/Officer Relations or a separate and specific "protocol" that would be added to the Council's Constitution. The new "protocol" should then be publicised and embedded in practice by training sessions for Members and relevant officers.
30. The second option could be described as the "more restricted option".
- (i) The current rules about the "need to know" hierarchy and the procedure for "access to information requests" to the Leader would be retained, but
 - (ii) The current procedure, whereby non-Cabinet/Committee Members can obtain exempt reports by attending the relevant meeting, would be abolished or
 - (iii) The procedure mentioned in (ii) could be made subject to extra restrictions such as:
 - (a) limiting non-Cabinet/Committee Members' access to exempt reports so they could see only those that had been cleared in advance by senior officers, and/or
 - (b) making and enforcing an express rule that all exempt reports given to non-Cabinet/Committee Members at a meeting must be collected from them by officers at the end of the meeting.

- (iv) The rules, as modified, would be clearly explained in a new protocol with appropriate training (as in paragraph 29 (ii) above).
31. The third option could be described as the "more relaxed option".
- (i) The restrictions on access to exempt information could be relaxed so that the majority of exempt reports were made available to all Members not just Cabinet Members or Members of the relevant Committee. The prohibition on disclosure outside the Council would still apply.
 - (ii) A few categories of exempt information should still be subject to special confidentiality procedures, for example reports containing sensitive information about identifiable service users, reports about personnel disputes, highly sensitive commercial information or reports containing sensitive advice from Counsel. In such cases the "need to know" should be applied strictly and/or measures could be taken to allow non-Cabinet/Committee Members to read, but not take away, copies of sensitive exempt reports.
 - (iii) The rules, as modified, would be clearly explained in a new protocol with appropriate training (as in paragraph 29 (ii) above).

CATEGORIES OF EXEMPT INFORMATION

1. Information relating to any individual.
2. Information which is likely to reveal the identity of an individual.
3. Information relating to the financial or business affairs of any particular person (including the authority holding that information)
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 holders under, the authority.
5. Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
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 upon a person; or (b) to make an order or direction under any enactment.

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

Note – there are three further categories of exempt information which relate only to the proceedings of Standards Committees or Sub-Committees.

Terence Mitchison
For Monitoring Officer