

OVERVIEW AND SCRUTINY COMMITTEE**MEMBERS' ACCESS TO INFORMATION
9th December 2009****Report of the Monitoring Officer****PURPOSE OF REPORT**

To report on the arrangements and protocols for making information available to Members, following the Committee's debate at its meeting on the 9th September 2009.

This report is public

RECOMMENDATION

- (1) That the Committee approve the proposed procedure for dealing with Member requests for information as set out in this report, and request the Standards Committee to include this procedure in its recommendations to the Council Business Committee following its scheduled review of the Member/Officer Protocol in January 2010.

1.0 Introduction

- 1.1 At its meeting on the 9th September 2009, the Committee heard from the Chief Executive regarding his decision to reject a request from a ward councillor for sight of a document concerning a development in his ward.

- 1.2 The Committee, in Minute 15, resolved as follows:

- (1) That the Monitoring Officer be requested to prepare a report for the Overview and Scrutiny Committee setting out options to revise the Council's existing protocol for dealing with the rights of Councillors in relation to access to information and Council documents, taking into account the issues raised at today's meeting, namely:
- (a) ensuring that, in considering requests for information made by Councillors, the provisions of Freedom of Information legislation are taken into account alongside the 'need to know' rather than requiring Councillors to submit a separate FOI request as a member of the public;

- (b) the division of responsibilities for considering the merits of a Councillor's case for a 'need to know' separately from the determination of the decision on whether or not a piece of information should be provided;
 - (c) the potential for the scrutiny function to play a role in viewing information which it has been determined should not be provided to an individual Councillor.
- (2) That having considered the report of the Monitoring Officer, the Committee submit its recommendations on the matter to enable the Monitoring Officer to report to the Council Business Committee on proposed amendments to the Council's existing protocol for inclusion in Part 7, Section 6 of the Constitution.
 - (3) That, once any amendments are made or the existing protocol confirmed, the Head of Democratic Services be requested to ensure that all Councillors are made aware of the guidelines relating to access to information and the process to be followed should they wish to request additional information over and above that made publicly available.
- 1.3 This report is presented to the Committee in accordance with the first part of that resolution.

2.0 Constitutional and Legal Position

- 2.1 The Council's Constitution currently contains provisions relating to Members' access to information in paragraph 21 of the Access to Information Rules (Part 4 Section 2), and in paragraph 6 of the Protocol on Member/Officer Relations (Part 7 Section 6). Copies of these provisions are set out in Appendix 1.
- 2.2 The legal position with regard to the right of Members to have access to information is based both in statute and in common law.
- 2.3 Local Government Act 1972 Any Member may inspect any document in the possession or control of the Council which contains material relating to any business to be transacted at a meeting of the Council, Cabinet, or a Committee or Sub-Committee. This right applies to reports and background papers. The right does not apply where the document discloses "exempt" information as defined in paragraphs 1,2,4,5 and 7 of Schedule 12 A of the 1972 Act. Documents falling within paragraphs 3 (business and financial information) and 6 (proposal to give a notice or order under any enactment) are open to inspection by Members except to the extent that the paragraph 3 information relates to any term proposed in the negotiation of a contract. This means that a Member's right of access to information under the Local Government Act 1972 is slightly wider than the public right under that Act.
- 2.4 Common Law Any Member has a prima facie right to inspect council documents so far as his/her access to the documents is reasonably necessary to enable the Member to carry out his/her duties as a Member. This is referred to as the "need to know". If a Member is a member of Cabinet or a committee, then he/she generally has the right to inspect documents relating to the business of Cabinet or the committee. Otherwise, the Member has to demonstrate why sight of the document is necessary to enable the performance of his/her duties as a member. This could be by reference to the role of ward member. Members have no right to a "roving commission" to go and examine documents of the Council; mere curiosity is not

sufficient. If the Member's motive for seeing the documents is improper or ulterior, then there would be no right of access at common law.

- 2.5 Freedom of Information Act 2000 A member has the same rights of access to information under the Freedom of Information Act 2000 as any member of the public. A request must be in writing and describe specifically the information requested. The exemptions set out in the Act apply whoever is requesting the information. Once information has been made available in response to a Freedom of Information request, it becomes public – information could not be given to one person and refused to another. The person receiving the information is at liberty to make it public. Where information is refused under the FOI, there is a right of internal review, which is undertaken by the Monitoring Officer. If the person making the request is still not satisfied, the Act provides for a complaint to be made to the Information Commissioner.

3.0 Current Practice

- 3.1 In response to routine requests from Members, information is often provided informally, and without specifically identifying under what provision the information is being provided. In many cases such requests clearly relate to a committee that the Member is on, or to routine information that would readily be provided to any member of the public without the need for a formal request under the Freedom of Information Act.
- 3.2 Where there is any doubt as to whether a Member is entitled to the information, the request is generally passed to the relevant Service Head, Corporate Director or the Chief Executive. Indeed, in some cases, the request will have been made at this level. In these circumstances, the officer generally seeks advice from the Monitoring Officer as to whether the common law "need to know" is satisfied. If it is, the information is provided; if it is not the Member is advised accordingly.
- 3.3 A Member request that has been rejected under the "need to know" has not in the past automatically then been considered under the Freedom of Information Act, although there have been occasions when a Member, who has been denied on the ground of "need to know" has subsequently made a Freedom of Information request which has been considered in the light of the relevant exemptions. In some cases this has resulted in the request being partially allowed, for example with some information redacted. It is difficult to generalise, but it is more likely that information, or more of the information, will be available under the "need to know" than under FOI.

4.0 Proposal

- 4.1 It is proposed that if a Member makes a request for information that is not routine, the request should be made to the relevant Service Head. The first consideration would be whether the information would be made available to a member of the public making a similar request. If so, the information would be provided.
- 4.2 If the request is such that the information would not automatically be provided to a member of the public, then the Service Head should consider whether the information can be provided under Section 100F of the Local Government Act 1972 or under the common law "need to know". The Service Head may consult with the relevant Corporate Director, and should seek advice from the Monitoring Officer.
- 4.3 If the Service Head is not satisfied that either Section 100F or the "need to know" are met, then the request should be dealt with as an FOI request, without the need for

the member to make a specific FOI request. The FOI request should be dealt with in the normal way, with advice being sought from the relevant Service's allocated solicitor within Legal Services. This would result in the information being provided in part, with an exemption applying to the remainder, or the request being refused in its entirety as a result of an exemption. The Member should be informed that the request has been considered under the Freedom of Information Act and that there is a right of internal review by the Monitoring Officer. Following such a review, the Member would be advised of the right to pursue the matter with the Information Commissioner. The Member would be informed that any information provided under the Freedom of Information Act can be made public.

- 4.4 With regard to Minute 15(1)(b), the consideration of whether there is a "need to know" a piece of information is inextricably linked to the decision whether or not to provide that information under the "need to know". If a need is established then the information must at common law be provided; if a need is not established then the information cannot be provided under common law, and it is necessary to consider any statutory provision for the disclosure of the information. It is not possible to separate consideration and determination.
- 4.5 With regard to Minute 15(1)(c), the Member/Officer Protocol currently provides for the relevant Service Head to determine whether there is a "need to know", with the Monitoring Officer determining the matter in the event of dispute. The Protocols of many other local authorities make similar provision, although in some cases the decision is to be made by the Chief Executive, and in a few cases there is provision, in the event of dispute, for the matter to be referred for determination by the Standards Committee or by the member body in connection with whose functions the document is held. It is recommended that the final determination should continue to be made by the Monitoring Officer. The Overview and Scrutiny Committee may hold the Monitoring Officer to account in accordance with Rule 14 of the Overview and Scrutiny Procedure Rules.
- 4.6 With regard to Member requests that are dealt with under the Freedom of Information Act, the Monitoring Officer would recommend that the standard procedure for internal review with the subsequent statutory right to pursue the matter with the Information Commissioner should apply, in the same way as to any other FOI request.
- 4.7 The Standards Committee has in its work programme for January 2010 a review of the Member/Officer Protocol. This will be a review of the whole document. With regard to Minute 15(2), Members may feel that it would be preferable for this Committee's views on any amendments that should be made to paragraph 6 of the Protocol in the light of this report, to be considered by the Standards Committee, with recommendations from both this Committee and the Standards Committee then being referred to the Council Business Committee. This would avoid any piecemeal amendment of the Protocol. Clearly once any amendments to the Protocol have been confirmed, it will be recirculated to both members and officers and advice given on the procedures to be followed to comply with it.

**CONCLUSION OF IMPACT ASSESSMENT
(including Diversity, Human Rights, Community Safety, Sustainability and Rural Proofing)**

None arising from this report.

FINANCIAL IMPLICATIONS

There are no additional financial implications. The only costs of the review and proposed procedure for the Member/Officer Protocol is in officer and committee time, which can be met from within existing budgets.

SECTION 151 OFFICER'S COMMENTS

The Section 151 Officer has been consulted and has no further comments.

LEGAL IMPLICATIONS

Legal Services have been consulted and have no further comments.

MONITORING OFFICER'S COMMENTS

The report has been prepared by the Monitoring Officer as requested by the Committee. The Deputy Monitoring Officer has also been consulted in its preparation.

BACKGROUND PAPERS

None

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Part 4, Section 2

Access to Information Procedure Rules

21. ADDITIONAL RIGHTS OF ACCESS FOR MEMBERS

21.01 Material relating to previous business

All members will be entitled to inspect any document which is in the possession or under the control of the Cabinet or its committees and contains material relating to any business previously transacted unless either (a) or (b) below applies:

- (a) it contains exempt information falling within paragraphs 1, 2, 4, 5, or 7 of the categories of exempt information; or
- (b) it contains the advice of a political adviser, if any.

21.02 Material relating to Key Decisions

All members of the Council will be entitled to inspect any document (except those available only in draft form) in the possession or under the control of the Cabinet or its committees which related to any Key Decision unless paragraph (a) or (b) above applies.

21.03 Nature of Rights

These rights of a member are additional to any other right they may have in statute or at common law.

Part 7, Section 6

Protocol and Member/Officer Relations

6. MEMBERS' ACCESS TO INFORMATION AND TO COUNCIL DOCUMENTS

- 6.1 Members are free to approach the appropriate Service to provide them with such information, explanation and advice as they may reasonably need in order to assist them in discharging their role as Members of the Council. This can range from a request for general information about some aspect of a Service's activities to a request for specific information on behalf of a constituent. Such approaches should be directed to the Service Head or nominated representative. If Members wish to visit offices, they should contact the Service Head to make arrangements whenever possible.
- 6.2 With respect to the legal rights of Members to inspect Council documents, these are covered partly by statute and partly by the common law. Guidance is also given in Part 4 Section 2 of the new Constitution.

- 6.3 Members have a statutory right to inspect any Council document which contains material relating to any business which is to be transacted at a Council, Cabinet, Regulatory Committee or Overview and Scrutiny meeting. This right applies irrespective of whether the Member is a Member of the Cabinet, Regulatory Committee or Overview and Scrutiny concerned and extends not only to reports which are to be submitted to the meeting, but also to any relevant background papers. This right does not, however, apply to documents relating to certain items or part of items which may appear on the 'exempt' agenda for meetings. The items in question are those which contain exempt information.
- 6.4 The common law right of Members is much broader and is based on the principle that any Member has a *prima facie* right to inspect Council documents so far as his/her access to the documents is reasonably necessary to enable the Member properly to perform his/her duties as a Member of the Council. This principle is commonly referred to as the "need to know" principle.
- 6.5 The exercise of this common law right depends, therefore, upon the Member's ability to demonstrate that they has the necessary "need to know". In this respect a Member has no right to "a roving commission" to go and examine documents of the Council. Mere curiosity is not sufficient. The crucial question is the determination of the "need to know". The particular Service Head who holds the document in question must initially determine this question. In the event of dispute, the question falls to be determined by the Council's Monitoring Officer.
- 6.6 In some circumstances (eg a Cabinet Member wishing to inspect documents relating to the functions of the Cabinet) a Member's "need to know" will normally be presumed. In other circumstances (eg a Member wishing to inspect documents which contain personal information about third parties) a Member will normally be expected to justify the request in specific terms.
- 6.7 Whilst the term "Council document" is very broad and includes, for example, any document produced with Council resources, it is accepted by convention that a Member of one party group will not have a "need to know" and, therefore, a right to inspect, a document which forms part of the internal workings of another party group.
- 6.8 Further and more detailed advice regarding Members' rights to inspect Council documents may be obtained from the Monitoring Officer.
- 6.9 Finally, any Council information provided to a Member must only be used by the Member for the purpose for which it was provided, ie in connection with proper performance of the Member's duties as a Member of the Council. This point is emphasised in the Members' Code of Conduct in the following terms:

"A member must not disclose information given to him/her in confidence by anyone, or information acquired which they believes is of a confidential nature, without the consent of a person authorised to give it, or unless they is required by law to do so."

**OVERVIEW AND SCRUTINY
COMMITTEE**

6.00 P.M.

9TH DECEMBER 2009

PRESENT:- Councillors John Gilbert (Chairman), Susan Bray (Vice-Chairman), Sarah Fishwick (substitute for Val Histed), Emily Heath (substitute for Jude Towers), Karen Leytham, Roger Plumb and Morgwn Trolinger

Apologies for Absence:-

Councillors Bob Roe and Roger Sherlock

Also present:-

Councillors Jon Barry, Tony Johnson (part) and Ron Sands (part)

Officers in attendance:-

Sarah Taylor	Head of Legal and Human Resources and Monitoring Officer (part)
Mark Davies	Head of City Council (Direct) Services (part)
Ged McAllister	Senior Engineer (part)
Stephen Metcalfe	Principal Democratic Support Officer
Liz Bateson	Senior Democratic Support Officer

33 MINUTES

The Minutes of the meetings held on 4th November and 30th November 2009 were signed by the Chairman as a correct record.

34 CONSIDERATION OF ANY REQUESTS FOR COUNCILLOR CALL FOR ACTION (IN ACCORDANCE WITH THE PROCESS)

It was noted that there had not been any requests for items to be considered in accordance with the Councillor Call for Action.

35 MEMBERS' ACCESS TO INFORMATION

The Chairman welcomed the Monitoring Officer to the meeting. The Monitoring Officer presented a report on Members' Access to Information and advised the meeting that this had been prepared following on from the Committee's discussions with the Chief Executive at the Overview and Scrutiny Committee meeting on 9th September 2009.

It was noted that the legal position with regard to the right of Members to have access to information was based in statute (Local Government Act 1972 and the Freedom of Information Act 2000) and in common law (need to know) and the report included proposals for improved procedures for considering all these aspects when a request for information was received. It was reported that the Member/Officer Relations Protocol, Part 7, Section 6 of the Constitution would need to be updated to reflect the proposals within the report and that this would be considered by the Standards Committee in January as part of that Committee's review of the Protocol as a whole. Any proposed

amendments would then be considered by the Council Business Committee. Members were requested to agree to the proposals or suggest any revisions which would then be forwarded to the Standards Committee.

Members sought clarification on aspects of the proposals and the Monitoring Officer responded. It was noted that once any amendments to the Protocol had been confirmed it would be re-circulated to members and officers with advice on the procedures to be followed to comply with it.

It was proposed by Councillor Bray and seconded by Councillor Fishwick and agreed unanimously:-

"That the Committee approve the proposed procedure for dealing with Member requests for information as set out in the proposal appended to these minutes, and request the Standards Committee to include this procedure in its recommendations to the Council Business Committee following its scheduled review of the Member/Officer Protocol in January 2010."

Resolved:

- (1) That the Committee approve the proposed procedure for dealing with Member requests for information as set out in the proposal appended to these minutes, and request the Standards Committee to include this procedure in its recommendations to the Council Business Committee following its scheduled review of the Member/Officer Protocol in January 2010.
- (2) That the Monitoring Officer be thanked for attending.

The Monitoring Officer left the meeting at this point

36 PRESENTATION REGARDING WASTE DISPOSAL ARRANGEMENTS

Councillor Fishwick declared a personal interest in the following item in view of her position as a county councillor.

The Chairman welcomed Mark Davies, the Head of City Council (Direct) Services, to the meeting. He delivered a presentation outlining the waste management strategy for Lancashire 2008-2020, 'Rubbish to Resources.' Details were provided of current waste management and the main drivers for change including waste hierarchy, wasted resources, climate change, waste legislation and the vision to promote a culture whereby waste was recognised as a resource with an acceptance of responsibility for minimising its production and maximising its recovery.

Members were informed of the clear and realistic objectives of the strategy and how these objectives would be met. This included a segregated collection service to all households to include collection of food waste for composting, a review of bring sites, provision of recycling litter bins in town and the provision of a trade waste recycling service. Targets were challenging and the success of the strategy was dependent on partnership working.

Reference was made to the Mechanical Biological Treatment and Waste Technology Parks, the woodland from waste initiative and targets to divert municipal waste from landfill, rising from 80% by 2010 to 88% by 2020. The role of the community sector was

MEMBERS' ACCESS TO INFORMATION - APPENDED MINUTE 35

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- 4.1 It is proposed that if a Member makes a request for information that is not routine, the request should be made to the relevant Service Head. The first consideration would be whether the information would be made available to a member of the public making a similar request. If so, the information would be provided.
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- 4.3 If the Service Head is not satisfied that either Section 100F or the "need to know" are met, then the request should be dealt with as an FOI request, without the need for the member to make a specific FOI request. The FOI request should be dealt with in the normal way, with advice being sought from the relevant Service's allocated solicitor within Legal Services. This would result in the information being provided in part, with an exemption applying to the remainder, or the request being refused in its entirety as a result of an exemption. The Member should be informed that the request has been considered under the Freedom of Information Act and that there is a right of internal review by the Monitoring Officer. Following such a review, the Member would be advised of the right to pursue the matter with the Information Commissioner. The Member would be informed that any information provided under the Freedom of Information Act can be made public.
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Overview and Scrutiny Committee may hold the Monitoring Officer to account in accordance with Rule 14 of the Overview and Scrutiny Procedure Rules.

- 4.6 With regard to Member requests that are dealt with under the Freedom of Information Act, the Monitoring Officer would recommend that the standard procedure for internal review with the subsequent statutory right to pursue the matter with the Information Commissioner should apply, in the same way as to any other FOI request.