

## Appendix 1

### Notice of Motion

*This council notes the presumption of openness expressed in the council's constitution and that reasonable access to information underpins the ability of members to fulfil their duties effectively.*

*Council also notes the decision by officers following annual council to 'tighten up' on access to information, and that this represents, without reference to full council, a reduction in the scope of members' access to information prevailing in the previous administration (and before).*

*Council further notes the commentary by the monitoring officer in an email to Cllr Brookes dated 31st August (which was copied to the leader and chair of Overview and Scrutiny) that:*

*'...The legislation and the common law set out "rights" to information – rights which cannot be reduced. However, my understanding is that if the Council wishes to make exempt Cabinet information available to B&PP members or indeed to all members, it can amend the constitution to allow this – there is nothing to stop it giving members access which goes beyond their legal rights. However, in widening access to such information Council would of course have to recognise that there would be a greater risk of it being passed on, resulting in possible breaches of confidentiality and of the Data Protection Act, and possible prejudice to the Council's own business and financial interests.'*

*Weighing this commentary in the balance, this council resolves that:*

- 1) All members should be able to attend all meetings of cabinet and committees for all agenda items as of right, except those involving exempt agenda items concerning individual employees of the council (other than chief officers and the chief executive) or individual members of the public;*
- 2) All members should have access to all exempt papers as of right, with the exception of those exempt papers which deal with individual employees of the council (other than chief officers and the chief executive) or individual members of the public;*
- 3) All members should have access to both exempt and confidential information on matters concerning their wards, as of right.*
- 4) And that rights to access for members to exempt or confidential information carry proportionate responsibilities about its use.*

*Council requests that officers bring forward a report which enables the principles on access to information identified in resolutions 1-4 to be incorporated into the constitution and that the report is submitted to December full council for final decision by members.*

*Proposed by Cllr Tim Hamilton-Cox. Seconded by Cllrs Dave Brookes and Caroline Jackson.*

### Officer Briefing Note

As a matter of law, an elected member who is not a member of a particular elected member body, for example Cabinet or a Committee, has only the same rights as a member of the public

to access exempt or confidential reports or background papers, or to attend a meeting of that body.

There are some exceptions, in that elected members are by law entitled to access information falling within paragraph 3 of Schedule 12A to the Local Government Act 1972 (information relating to the financial or business affairs of any particular person), except to the extent that the information relates to any terms proposed by or to the authority in the course of negotiations for a contract, and within paragraph 6 (information which reveals that the authority proposes to give a notice under which requirements are placed on a person, or to make an order or direction under any enactment).

The Local Authorities (Executive Arrangements) (Meetings and Access to Information (England) Regulations 2012 give additional rights to members of an Overview and Scrutiny Committee to have access to Cabinet papers, but the right to exempt information applies only where the information is relevant to an action or decision that the member is reviewing or scrutinising, or to any review contained in any programme of work of an Overview and Scrutiny Committee.

Further, under the common law “need to know”, a member is permitted to access exempt or confidential information if the member is able to demonstrate that sight of the relevant document is necessary to enable the member to carry out his/her duties as a member.

The case of *R v Hackney London Borough Council ex parte Gamper* in 1985, applied the “need to know” principle to attendance at meetings. Previously it had been thought that a member had only the same right to attend a meeting as a member of the public. However, in the Hackney case, the court took the view that there was no logical distinction between access to documents and access to meetings.

Generally, these legal principles have been applied to access to agendas and attendance at meetings within the City Council. Members and substitute members of this Council’s Overview and Scrutiny Committee have had access to Cabinet exempt reports and are permitted to attend meetings of Cabinet during consideration of exempt information.

However, over the last year or so of the last Council, it came to light that Budget and Performance Panel members and substitutes had, as a matter of custom, also been allowed to access exempt Cabinet reports and to remain in the Cabinet meeting during the consideration of exempt items. Officers looked at the terms of reference of the Budget and Performance Panel, and felt that because, unlike the Overview and Scrutiny Committee, its remit was not to scrutinise and call in Cabinet decisions, members of the Budget and Performance Panel did not have a need to routinely see exempt Cabinet papers in the same way that Overview and Scrutiny members did. Officers took the view that the best time to regularise the position was after the election when the “mod.gov” system access entitlements were being set up for all members. This was the only change that was made at that time.

As referred to in the text of the motion above, there is no reason why the Council’s Constitution should not be amended to permit members to have a wider entitlement to access to information and attendance at meetings than is provided for at law. However, it is important to recognise that information is not lightly designated as “exempt” or “confidential”, and that the purpose of such designation is generally to limit the circulation of information relating to individuals, which is protected under the Data Protection Act 1998, to prevent the Council from being liable for claims of breach of confidence, or to prevent commercial or financial or legal prejudice to the Council itself or to any third party. For example, in any case where a financial or legal settlement were being negotiated, the Council’s bargaining position could be weakened if confidential information were inadvertently disclosed. Any widening of the legal rights would need to take these issues and risks into account.

Indeed it is noted that the motion is expressed not to apply to reports relating to individual officers below the level of Chief Officer (examples would be disciplinary appeals to Personnel Committee) or relating to members of the public (examples would be consideration of individual licensing applications by the Licensing Regulatory Committee). The Motion appears to recognise that in these situations it would be inappropriate for information to be passed to a wider audience within the Council. Council might also wish to consider whether Standards Committee reports about individual members should be excluded in the same way as reports relating to individual officers.

It is noted that the motion states that, "*all members should have access to both exempt and confidential information on matters concerning their wards, as of right.*" The Protocol on Member/Officer Relations in Part 7 of the Constitution contains at paragraph 10 provisions about the involvement of ward councillors. Paragraph 10.2 states that "if an individual contacts the Council about a general Council service, for example ...taxi licensing or a housing benefit or council tax issue, such contact is unlikely to be a ward issue, as the address of the individual is unlikely to be significant to the particular contact or complaint. In these circumstances officer will not generally involve the ward councillor." Further, paragraph 10.4 provides that "in no circumstances will correspondence from an individual, or from a third party representing an individual, be disclosed to a ward councillor if it is marked confidential or contains personal data. If ..... there is a need for the ward councillor to know of the issue.... then the relevant individual's consent will first be obtained."

On this basis, and in order to ensure the proper protection of personal data, officers would recommend that members' rights to exempt or confidential information on matters concerning their wards should be restricted to property matters or matters relating to a specific location within the ward, and should not extend to personal data about any ward resident.

Another issue that Council may wish to consider is whether there should be specific provision to prevent members from accessing exempt information in situations where they have a disclosable pecuniary interest or other interest in the matter. The Code of Conduct would generally require members to withdraw from a meeting in these circumstances

With those provisos, and on the basis that Council is aware of the risks as referred to above, there is no reason why the Constitution should not be amended to widen members' access to exempt and confidential information. Draft amendments could be put forward to the December meeting of Council, as requested in the motion.

#### Monitoring Officer Comments

The briefing note has been prepared by the Monitoring Officer

#### Section 151 Comments

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