

This report will be made public on 6 November 2018.

**Folkestone**

Hythe & Romney Marsh  
Shepway District Council



Report Number **C/18/50**

**To:** Cabinet  
**Date:** 14 November 2018  
**Status:** Non - key Decision  
**Corporate Director:** Tim Madden - Corporate Director for Customer, Support, and Specialist Services

**Cabinet Member:** Councillor David Monk, Leader of the Council  
Councillor Russell Tillson – Chairman of the Task Group

**Subject:** Councillors Access to Information

#### **SUMMARY:**

This report provides a summary on the issue relating to a Member's right to access Council documents and information, and in particular to access legal advice and commercially sensitive information. This report outlines the findings of the Task Group (established by the Leader) who were instructed to discuss and investigate the above issue.

#### **REASONS FOR RECOMMENDATIONS:**

During a Full Council meeting held on 19 September 2018, the UKIP group raised the following issue as opposition business – *“Councillors of F&HDC have a right to inspect any document in order to make informed decisions. Previously information has been denied to us and we wish bring this to the attention of Full Council for debate”*.

It was resolved during this meeting that the item be referred to Cabinet or relevant Overview and Scrutiny Committee, as the case may be for their observations before deciding whether to make a decision on the issue.

#### **RECOMMENDATIONS:**

- 1. To receive report C/18/50.**
- 2. That the Assistant Director – Governance, Law and Regulatory Services be instructed to prepare a guidance note on this issue for the benefit of Councillors**
- 3. For a report on the matter to be prepared for Council.**

#### **1. BACKGROUND**

Following the Full Council meeting on 19 September 2018 the Leader established a Task Group to explore this issue. Councillor Tillson (Chairman of the Task Group), Councillor Owen and Cllr Laws were appointed as members of the Task Group. Susan Priest (Head

of Paid Service) and Amandeep Khroud (Assistant Director – Governance, Law and Regulatory Services) also attended the Task Group meetings. The Head of Paid Service and the Chairman of the Task Group requested independent legal advice be sought on this issue.

The Task Group met and discussed the legal advice received. The contents of the legal advice are reproduced below.

## **LEGAL POSITION**

### **Common law position**

There is a general principle at common law that Members have the right to have access to any document held by the Council where that access is reasonably necessary to enable the Member to discharge their functions as a Member effectively.

In order to exercise the right, the Member must specify the documents that they wish to see, and clearly state the reason why they consider that they need to have access to the document in order to be able to discharge their functions as a Member.

It is important to note that a Member cannot simply demand access to documents without giving such explanation. Members are unable to go on a fishing expedition in the hope of finding something relevant or of interest.

The 'need to know' principle is set out in case law. It is important to take note of the following points:

- The right is limited to those documents which the Member might reasonably need to enable them to properly discharge their functions as a Member. It is not an unlimited right: *R v Barnes ex p Conlan [1938]*;
- In order to exercise the right, the Member must specify the documents which they wish to see, and clearly state the reason why they consider that they need to have access to the document in order to be able to discharge functions as a Councillor. A Councillor cannot simply demand access to files or documents without giving such explanation, *R v Lancashire Police Authority ex p. Hook [1980]*; and
- The extent of the right will vary according to the individual Member's responsibilities within the authority. A Member generally has a right of access to all information and material in the possession of the Council which relates to the business of any Committee on which the Member serves. A member also has the right to information pertaining to a Committee of which they are not a member, providing they can establish that such access is *necessary* for the proper discharge of their duties as a Member, but in such a case they have no automatic right of access *R v Birmingham City Council ex p. O [1983]*.

### **Legislative position**

Legislation and regulations also set out access rights of Members to certain documents held by the Council:

The right to see papers relating to a non-executive Committee to which the Member does not belong is set out in section 100F of the Local Government Act 1972 ("the 1972 Act"), which grants access to any document in the possession or under the control of the Council containing material relating to any business *to be transacted* at a meeting of the Council or a Committee, unless that document discloses exempt information. Exempt information is

defined under Part 1 of Schedule 12A of the 1972 Act as being information falling within one of the following categories:

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 office 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 on 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.

Section 100F(2A) of the 1972 Act does however require the document to be open to the Member for inspection if it is information falling within:

- (a) paragraph 3 above (except to the extent that the information relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract); or
- (b) paragraph 6 above.

Regulation 16(1) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) ("the 2012 Regulations") contains a very similar provision to that contained in section 100F of the 1972 Act, but which instead relates to documents "*in the possession or under the control of the executive*" containing "*material relating to any business to be transacted at a public meeting.*"

It is to be noted that the above rights of access apply only to documents relating to business to be transacted at a meeting, so for example there needs to be an item on an agenda to be considered at a future committee meeting, and to which the document relates.

Regulation 16(3) of the 2012 Regulations contains a post decision right of access to documents in the possession or under the control of the Executive and which contain material relating to business transacted, or decisions made by individual Members or Officers under executive arrangements.

Again, both of the above rights of access under the 2012 Regulations are qualified in that they do not extend to information which is 'exempt' information defined under Part 1 of Schedule 12A of the 1972 Act, except for exempt information falling within:

- (a) paragraph 3 above (except to the extent that the information relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract); or
- (b) paragraph 6 above.

Regulation 17 of the 2012 Regulations provides an additional right of access to documents for members of Overview and Scrutiny Committees which are in the possession or under the control of the executive and that contain material relating to business transacted, or decisions made by individual Members or Officers under executive arrangements. This right does not in any circumstance extend to a document containing advice by a political advisor or assistant, and only extends to exempt information where that information is relevant to:

- (a) an action or decision that that member is reviewing or scrutinising; or
- (b) any review contained in any programme of work of such a committee or sub-committee of such a committee.

The process requires a member of an Overview and Scrutiny Committee to request a document which falls within the above provisions, then the executive must provide that document as soon as reasonably practicable and in any case no later than 10 clear days after receipt of the request. Where the executive determines that a member of an Overview and Scrutiny Committee is not entitled to a copy of a document (or part) because it does not fall within the scope of the requirements above, it must provide the Overview and Scrutiny committee with a written statement setting out its reasons for that decision.

Members are also able to exercise the rights of access afforded to any person under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, however there are a number of exemptions/exceptions to disclosure of certain types of information or in certain circumstances set out within the same. It is also to be noted that any disclosure under these pieces of legislation is to the world at large, and not just the applicant.

With specific reference to legal advice (this includes all advice received from a Barrister or Solicitor including email correspondence and letters), this is subject to legal professional privilege (LPP), which is set out as one of the categories of 'exempt information' under Part 1 of Schedule 12A of the 1972 Act as outlined above. Notwithstanding the 1972 Act, LPP is a fundamental principle of English law and is necessary to protect confidential communications between lawyers and clients, which helps to ensure complete fairness in legal proceedings. Disclosure of legal advice more widely than is necessary weakens the application of LPP and increases the risk that the advice will lose its protection, putting the Council at significant disadvantage both in terms of any potential proceedings, regulatory matters or legal issues to which the advice relates, and in relation to the Council's ability to be able to seek appropriate advice confidentially and in the best interests of the Council and its constituents in the future.

The Council is already subject to transparency and openness requirements and the law is very clear in terms of Members' rights of access to information. Parliament and the Courts have recognised those situations where a Member has a necessary right of access, and that the right to access is not absolute.

The Monitoring Officer has reviewed the constitution and is satisfied that the constitution reflects the legal position on this issue. If Cabinet agrees the recommendation for a separate guidance note to be prepared, this document will make appropriate cross-reference to various entries in the Constitution. This guidance note will be circulated to all Members.

## 2. RISK MANAGEMENT ISSUES

A summary of the perceived risks is as follows: -

Perceived risk	Seriousness	Likelihood	Preventative action
The issue relating to Members access to information being unclear	Medium	Low	The Council should prepare and circulate a guidance note on this issue for the benefit of all Councillors

## 3. LEGAL / FINANCIAL AND OTHER CONTROLS / POLICY MATTERS

- 3.1 Legal Officer's Comments (AK):  
The legal issues are addressed in the body of the report.
- 3.2 Finance (CS):  
There are no financial implications arising from this report.
- 3.3 Diversities and Equalities Implications (AK):  
There are no diversity or equalities issues arising from this report.

## 4. CONTACT OFFICERS AND BACKGROUND DOCUMENTS

Councillors with any questions arising out of this report should contact the following officers prior to the meeting.

Amandeep Khroud  
Assistant Director – Governance, Law and Regulatory Services  
Telephone: 01303 853253  
Email: [amandeep.khroud@folkestone-hythe.gov.uk](mailto:amandeep.khroud@folkestone-hythe.gov.uk)