

Appendix 4

PROTOCOL ON MEMBERS' RIGHTS OF ACCESS TO INFORMATION

1. INTRODUCTION

- 1.1 The purpose of this protocol is:
- (a) to set out the rights of access to Council information that members of the Council have; and
 - (b) to provide guidance to members and officers on the approach to be adopted in the exercise of these rights in respect of availability of Executive and Committee Reports and to information held by the Council generally.
- 1.2 This protocol does not deal with the rights of access of the public and the press which are set out in the Access to Information Rules.

2. GENERAL PRINCIPLES

- 2.1 Members are free to approach Council staff of appropriate seniority 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 department's activities to a request for specific information on behalf of a constituent. Such approaches should normally be directed to the Service Area or Corporate Director or another senior officer of the department concerned.
- 2.2 Members should not try to use their position to coerce officers into releasing to them information which they are not entitled to see. Any issues should be taken up with the relevant Service Area or Corporate Director.
- 2.3 Any difficulty as to whether a member is entitled to particular information should be referred by the relevant member or officer for advice from the Borough Solicitor. The final decision in a disputed case is a matter for the relevant Council committee or sub-committee or in the case of executive functions, the Executive or its committee(s).
- 2.4 The effect of the rules contained in statute and regulations is that all councillors are entitled to see all reports to the Executive and Committees in advance, together with documents relating to the matters contained in the report, except those falling into the exempt categories marked as "restricted" in the table at the end of the Access to Information Rules in Part 6 of the Constitution ("the Table"). The restriction on access under category 3 only applies in so far as the information relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract. Members of an Overview and Scrutiny Committee may be able to see those excluded reports after the decision has been taken if the report concerns a matter in their work programme or is called in to be considered by them.

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This is the position set out in the Access to Information Rules in the Constitution.

- 2.5 Reports containing confidential information as defined in the legislation (i.e. information stated by the government to be confidential or which is covered by a prohibition on disclosure in legislation or which is covered by a court order) cannot be made public and the public must be excluded from any part of a meeting during which such a report is discussed. There is no discretion in respect of this category of information.
- 2.6 The decision as to whether a report due to be considered by the Executive or its Highways Committee or the Council or one of its committees contains exempt information as set out in the legislation and whether or not it should be generally circulated is made by the "proper officer". The proper officer in Brent is the Democratic Services Manager. The proper officer will be exercising a discretion in deciding whether to circulate exempt papers other than to members of the relevant body and that discretion must be exercised reasonably. The Democratic Services Manager will take advice from the Borough Solicitor.
- 2.7 There is no statutory right for councillors to attend meetings of bodies of which they are not a member while confidential or exempt reports are being considered.
- 2.8 It is a matter for the body which is meeting (i.e. the Executive or its Highways Committee or a Council committee) whether other councillors are allowed, as a matter of discretion, to remain at an otherwise open meeting while exempt matters are discussed. The Executive or the committee will be exercising discretion in deciding whether to allow any councillors who are not members of the body to remain and that discretion must be exercised reasonably.
- 2.9 Members have further rights of access beyond those specifically given in statute in certain circumstances. These additional rights are described as "common law rights". A member is entitled to see documents which are reasonably necessary to enable him or her to carry out his or her duties **as a Councillor**. This is generally described as the "need to know" principle.
- 2.10 There is no simple definition of this. Various court cases have given indications of how the common law right should be interpreted. There is no right to a "roving commission" to satisfy curiosity and the right will not arise if there is some form of ulterior or indirect motive (such as to assist someone in litigation against the council) which underlies the wish for access. Ulterior or indirect motive would cover any case where the "real" reason the Councillor wants access is not to do with carrying out his or her role **as a Councillor** (e.g. where the reason is to do with the members position as a party member, as a resident or as a member of any association.) Extra care will need to be taken in considering the application of this right in cases where there is litigation underway or contemplated connected to the information sought. However, the fact that the information is potentially embarrassing for the Executive or Council as a whole is not in itself a reason to deny access to information to which a Councillor is otherwise entitled. A member of a committee will normally be entitled to access to papers concerning matters for which the committee is responsible.

- 2.11 Reports which members are not entitled to see as of right may be made available to them and this Protocol explains the circumstances when this may happen.

3. APPLYING A PRINCIPLE OF OPENNESS IN THE WRITING OF REPORTS

- 3.1 Reports to Committees and the Executive should only be marked exempt when this cannot reasonably be avoided in order to protect the interests of the Council and/or third parties in accordance with the statutory rules on exempt reports. Report writers should bear in mind the qualifications in respect of the categories of exempt information as marked in the Table at paragraph 53 of Part 6 of this Constitution and should also bear in mind that information which has been exempt at one stage may not remain so. For example, information which if disclosed at an early stage might have prejudiced the Council in negotiations for a contract may at a later stage not be capable of having that effect. The information would then no longer be exempt.
- 3.2 It is sometimes possible for reports to be written in such a way that exempt information is separated out from the main body of the report to be included in a separate exempt sheet. Sometimes information in reports could be made anonymous without the effectiveness of the report being reduced. This is one way of ensuring that as many reports, and as much information, are made accessible as possible. There will still inevitably be a number of reports which are marked exempt.
- 3.3 Officers who write reports should strive to avoid entire reports being below the line (exempt) by omitting exempt information where possible and appropriate and in other cases trying to separate out the exempt information on to separate sheets.
- 3.4 Where a report is split in this way, the chair at the meeting at which it is considered will need to be careful to ensure that members are aware that there is additional information in an exempt section of the report. Guidance on how to handle reports split in this way is contained in section 6.4 of this Protocol.

4. ACCESS TO REPORTS

- 4.1 The Democratic Services Manager intends to apply a presumption of openness when exercising his discretion concerning giving members access to exempt reports that they do not have a positive right to see. The following sections set out the normal practice that will be followed in respect of automatic despatch of reports to members and in respect of responding to requests from members for reports.
- 4.2 All reports will of course be despatched to all members of the relevant committee or other body.
- 4.3 Subject to section 5 below, all reports (normally including exempt reports) will be sent to Leaders of Party Groups and to the Chair of Overview and

Scrutiny. The Democratic Services Manager would of course retain discretion not to despatch copies automatically in appropriate cases, for example if a report concerned a matter in which the member had a personal interest or concerned a person known to the member.

- 4.4 Subject to section 5 below, specific reports (normally including exempt reports) will be despatched to any councillor on request.
- 4.5 In some cases it may be appropriate for a member requesting access to a report to be given an opportunity to see the report without a copy being supplied for the member making the request to take away.
- 4.6 Members automatically sent exempt reports, or receiving them after making a request, would not be entitled to share the reports with other members of their party group but could alert them to the advisability of requesting a copy of the report/calling the report in. Other members could request a copy direct from the Democratic Services Manager. Such a request would then be dealt with in accordance with the principles set out in this section 4 and in section 5 below.
- 4.7 The Democratic Services Manager reserves the right not to provide exempt information to any councillor not entitled to it as of right if he believes the information is wanted for an improper purpose.

5. PARTICULARLY SENSITIVE CATEGORIES OF INFORMATION

- 5.1 Reports containing some categories of exempt information are less appropriate for automatic circulation or distribution on request to members not directly concerned in them through their role on the Executive or a committee than others.
- 5.2 It would not normally be appropriate for reports covered by categories 1, 2 and 5 in the Table at paragraph 53 of Part 6 of this Constitution to be made generally available. These categories cover information about particular individuals or which enables individuals to be identified. Reports containing information falling into these exempt categories will only be provided to (or in some case made available to) councillors who are not members of the relevant body if they are able to positively demonstrate to the Democratic Services Manager (if necessary on the advice of the Borough Solicitor) that they have a need to have a copy of or see the report in order properly to carry out their duties as a Councillor.
- 5.3 Reports containing information falling into category 3 to which members are not automatically entitled (terms proposed in the course of negotiations for a contract) may also be particularly sensitive. These reports will normally be provided as a matter of course to the Chair of the Overview and Scrutiny Committee and to the Leaders of each political group and be made available or copied to other members on their specific request. However, where the report is particularly sensitive this will not happen. This may be the case for example where negotiations are on going in relation to price or price sensitive aspects of the contract.

- 5.4 Officers relying on category 3 on the basis that a report contains information about terms proposed in the course of negotiations for a contract will be expected either to prepare a report which separates the exempt from the non exempt information so the latter can be freely circulated, or to produce, on request, an expanded summary of the report for councillors who are not members of the decision making body and are not provided with a copy of the report but who want to know more about the matter than is contained in the brief "Summary" section within the report.
- 5.5 Separating out exempt information into a separate appendix, where possible, in order that the main body of the report can be publicly available is good practice in all cases and not just where category 3 (in respect of information about terms proposed in the course of negotiations for a contract) is relied on. Where a report is split in this way, when the open part of the report is considered at the Council, committee or Executive meeting the chair of the meeting shall draw to the meeting's attention that the report is a split report and that further information appears in the exempt papers. If any member of the body considering the report indicates that they wish to comment on or question the report in a manner likely to involve discussion of the exempt information, the body shall consider whether discussion of the item should be postponed until a part of the meeting from which it is expected the public will be excluded.
- 5.6 Information falling into categories 8-10 (Standards Committee reports) may also be particularly sensitive. The Democratic Services Manager will seek the advice of the Borough Solicitor on any request by a member who is not a member of the Standards Committee for a report covered by these exemptions before providing a copy of, or allowing access to, the report.

6. ESTABLISHING A NEED TO KNOW

- 6.1 It is not possible to include in this Protocol hard and fast rules as to the application of the "need to know" principle as it will inevitably depend very much on the specific circumstances. Where this principle applies members will be entitled to access to reports as of right even if access would not otherwise be given under the earlier sections of this protocol. However, the following general principles can be identified.
- 6.2 The Chairs of the overview and scrutiny committees are likely to have a greater need (but no absolute right) to have access to exempt reports specifically concerning those issues for which those committees are responsible, principally matters forming part of the work programme of the committee and matters which have been recently considered by the Executive.
- 6.3 Party Leaders are likely to have a greater need (but no absolute right) to have access to exempt reports than ordinary councillors with no special role.
- 6.4 Ward Members may have a particular need to know about matters affecting their ward. This does not mean they are entitled to access all information the Council has concerning matters affecting their ward. For example, if the information is confidential and could not in any event be passed on by the Ward member to constituents, a clear need to know for reasons that did not involve sharing the information with constituents would need to be established.

- 6.5 A Councillor will generally have a need to know information a constituent had asked the councillor to obtain on their behalf if the constituent would themselves be entitled to that information.

7. ACCESS TO OTHER FORMS OF INFORMATION

- 7.1 All Service Area and Corporate Directors should ensure that relevant information within their areas of responsibility is supplied to particular members according to their legitimate individual needs and requests. This may be by way of committee reports, letters or any other appropriate means. In fulfilling this obligation, such directors should have particular regard to the information needs of members as local representatives, including:

- information on all significant matters which particularly affect the member's ward
- information on local matters in which the member may have expressed a specific interest, even though they do not directly concern the ward he/she represents
- where relevant, information at two stages: when a decision is being considered and when it is being implemented.

- 7.2 If a director considers that meeting a request for information would involve an unreasonable commitment of resources, the member making the request shall be so advised. If that member persists in requesting the information then the director may refer the matter initially to the Leader of the Executive or the appropriate committee of sub-committee chair (or in the absence of the Leader or chair the Deputy Leader or Vice Chair) and then on to the Executive or the appropriate committee or sub-committee if necessary.

- 7.3 Officers should not release to members or non-members any information which they are aware is exempt or confidential and which that person is not entitled to receive.

- 7.4 Positive briefings (i.e. those which originate from officers otherwise than in response to a request or enquiry) will generally only be given to members of the Executive or chairs or vice-chairs of committees or sub-committees although officers are not prevented from giving briefing to other members if they feel that is appropriate.

- 7.5 'Fishing expeditions' will not be responded to and the reasons for a member's request for information will be sought.

- 7.6 Ward members have a legitimate role as advocates for their constituents as a group and as individuals. Ward members seeking information about individual constituents will need to demonstrate that they have the agreement of their constituent to the disclosure by the Council of the information. This will usually be by way of written confirmation, especially in the case of sensitive personal information. Ward members cannot use their role as a Councillor to obtain for constituents information to which the constituents themselves would not be entitled.

7.7 All requests for information will be dealt with in accordance with the established legal principles governing members' rights to information.

7.8 More detailed advice about access to specific documents can be obtained from the Borough Solicitor.

8. FREEDOM OF INFORMATION ACT

8.1 Councillors have the same rights to access to information under the FOIA as anyone else. The special rights of access members have, as described above, may overlap with rights under the FOIA or may allow Councillors access to information (or documents) that would not be available to them under the FOIA. For example, it is not necessary to say why information is wanted if it is requested under the FOIA but it would be necessary to state this if a Councillor was relying on their need to know as a Councillor. It may be that information that is not available to a Councillor under the FOIA (because it is covered by an exemption) may be available to them on the basis of their special rights as a Councillor. So, in some respect the FOIA rights are wider than Councillor's other rights and in some respects they are narrower.

9. GUIDANCE ON POTENTIAL PENALTIES AND CLAIMS IF LOSS IS CAUSED BY DISCLOSURE OF PERSONAL OR COMMERCIAL SENSITIVE INFORMATION

9.1 Much of the information kept by the Council relates to individual clients and officers and members are expected to be discreet in their handling of such information which is disclosed to them.

9.2 One element of this will be obligations to individuals or organisations about whom a report contains information which is confidential to respect that confidentiality. Wrongful disclosure of information which results in some form of damage to a person or business to which the obligation is owed could be actionable against the Council. Information is often provided by people to the Council for a particular purpose and to disclose or use it for another purpose can lead to a Data Protection Act breach. Clearly the Council itself could be damaged by information wrongly disclosed. Wrongful disclosure by a Councillor would be a matter to be dealt with under the Members Code of Conduct and could result in a complaint to the Standards Board about the member concerned.

9.3 The Brent Members Code of Conduct provides that:

“4. You must not—

(a) disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where—

(i) you have the consent of a person authorised to give it;

(ii) you are required by law to do so;

(iii) the disclosure is made to a third party for the purpose of

obtaining professional advice provided that the third party agrees not to disclose the information to any other person; or

(iv) the disclosure is—

(aa) reasonable and in the public interest; and

(bb) made in good faith and in compliance with the reasonable requirements of the authority; or”

“6. You –

(a) must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage

“3. A member must not –

(a) disclose information given to him or her in confidence by anyone, or information acquired which he or she believes is of a confidential nature, without the consent of a person authorised to give it, or unless he or she is required by law to do so;”

“5. A member –

(a) must not in his or her official capacity, or any other circumstance, use his or her position as a member improperly to confer on or secure for himself or herself or any other person, an advantage or disadvantage.”

9.4 A breach of the Brent Members Code of Conduct can lead to suspension or disqualification of the member concerned.