



**Subject:** Managing Confidential or Exempt Information in Executive Reports

**Report of:** Kate Charlton, City Solicitor

**Relevant Cabinet Member:** Cllr Ian Ward, Leader

**Relevant O &S Chair(s):** Cllr John Cotton, Co-ordinating O&S Committee

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Are specific wards affected?	<input type="checkbox"/> Yes	<input type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, add Forward Plan Reference:		
Is the decision eligible for call-in?	NA – information report	
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential :		

## **1 Executive Summary**

- 1.1 In response to concerns regarding the amount of information contained on private reports, a new approach is proposed to encourage greater transparency in decision-making.
- 1.2 The new approach would mean that if officers identify that confidential or exempt information should form part of the decision record, and where officers consider that the public interest in maintaining the exemption outweighs the public interest in disclosing the information, then such information should be placed on a private appendix, rather than on a separate private report.

- 1.3 No decisions – except in exceptional circumstances – would be taken in private session.

## 2 Recommendations

- 2.1 That Cabinet notes the new approach to be adopted by officers in the preparation of reports from March 2019 with a view to all reports from 01 April 2019 being submitted in the new format.

## 3 Background

- 3.1 There are two categories of information that may be included on a private agenda:
- **Confidential Information – requirement to exclude public:** information given to the Council by a government department on terms which forbid its public disclosure or information which cannot be publicly disclosed by a Court Order. The public must be excluded from meetings for items where confidential information would be disclosed;
  - **Exempt information – discretion to exclude public:** information falling within the categories outlined in 12A of the Local Government Act 1972 (as amended). Exempt information is subject to apply the public interest test. Officers and Members must ask themselves "Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?" Information should only be exempt if it is in the public interest to make it so.
- 3.2 In recent months, there has been increasing concern voiced by members about the amount of information included on private reports and challenges to whether all the information falls within the definition of confidential or exempt information.
- 3.3 A review of the process was undertaken by officers, which found that Birmingham has a significantly higher number of decisions taken on private agendas than most other core cities.

## 4 Options considered and Recommended Proposal

- 4.1 Current practice in Birmingham, where exempt or confidential information forms part of the decision record, is to produce two reports:
- A public report outlining the subject of the decision and any information that can be shared publically;
  - A private report setting out the exempt or confidential information.
- 4.2 In most cases, where there are two reports, the decisions have been included on the private report, meaning that the public have little information on the decision taken.
- 4.3 *Option1:* One option would be to continue with this approach, but apply tighter oversight of information and decisions set out on private reports to ensure only the

minimum information required is held on private reports. This has been tried in recent months, with some success.

4.4 However, in comparing Birmingham's approach to other councils, it can be seen that this two report approach is not common, and that a more widespread approach is to have a single report, with any confidential or exempt information set out in a private appendix. Crucially, this approach means that decisions are taken in public, even if some the detail is kept private.

4.5 Adopting this approach would mean in practice that:

- The decision resolution must refer to the fact that exempt information was considered;
- The meeting would move into private session only if cabinet members needed to discuss/ask questions on the exempt information before taking the decision. In practice this would happen very rarely (as is the experience of other local authorities) as Cabinet Members would have had the opportunity to consider the information ahead of the meeting;
- There would be an opportunity to review the confidential or exempt information in private session at the end of the meeting.

4.6 The key steps are set out in Appendix 1.

4.7 *Option 2:* Therefore, the second, and preferred, option is that for Cabinet, Cabinet Committee and Cabinet Member/Chief Officer decision reports, the council moves to an approach whereby all reports are public (bar very exceptional cases), with exempt information set out in appendices. All decisions would be on the public report.

4.8 Alongside either option, Cabinet should explicitly agree to treat such information as exempt via a resolution of the Cabinet which would be included on future agendas.

4.9 A process for appeals could be included in the Constitution – whereby members of the public could challenge whether information should be deemed exempt ahead of the meeting. A process for appeals – which will include a pre-agenda notification of proposed confidential or exempt items – will be agreed and then incorporated into the refreshed Constitution.

## **5 Consultation**

5.1 An outline report was presented and discussed at Co-ordinating O&S Committee on 11<sup>th</sup> January 2019. Members were supportive of the new approach as outlined, believing that it would support the culture change needed

5.2 The proposed process has been discussed with Cllrs Robert Alden, Debbie Clancy and Jon Hunt on 30<sup>th</sup> January 2019. They were broadly supportive of the new approach, and asked that guidance is available to officers and members ensure that any confidential or exempt information is both justified and explained. They also requested a process by which information that is confidential or exempt at a

point in time, may become public once the reasons for exemption no longer apply. This will also be considered for inclusion as part of the refreshed Constitution.

## **6 Risk Management**

- 6.1 There are both reputational and legal risks in not addressing member and public concerns about information on private agendas.
- 6.2 In order to manage the introduction of the new process, governance officers will visit directorate management teams to ensure the new process is understood. Clear guidance will be available for members and officers, both on the process and what constitutes confidential or exempt information.
- 6.3 Plans are underway to develop sessions on decision-making in the Council for all officers, to ensure the requirements of the process are fully understood and implemented.

## **7 Compliance Issues:**

### **7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?**

- 7.1.1 Proposals are consistent with the Corporate Governance Plan, and the aim of effective, modern governance and decision-making processes in line with accepted best practice.

### **7.2 Legal Implications**

- 7.2.1 Access to information is governed by the Local Government (Access to Information) Act 1985 and the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012. The proposals in this report strengthen adherence to the legislative requirements with regards to confidential or exempt information.

### **7.3 Financial Implications**

- 7.3.1 None

### **7.4 Procurement Implications (if required)**

- 7.4.1 None

### **7.5 Human Resources Implications (if required)**

- 7.5.1 None

### **7.6 Public Sector Equality Duty**

- 7.6.1 There is no anticipated adverse impact on protected groups.

## **8 Background Documents**

- Outline paper to Co-ordinating O&S Committee, 11<sup>th</sup> January 2019

## **Appendix 1: Proposed Outline Process**

The process would entail the following steps:

### **1. Notification of the Intention for Cabinet to Consider Matters in Private**

In order to comply with the requirement for the Executive to publish 28 days clear notice of its intention to consider matters in private<sup>1</sup>, a pre-agenda notification would be published on CMIS 28 days before the meeting. This states the directorate's intentions 28 days before the meeting and could change later (either an item which was initially intended to have an exempt appendix may become open to the public, or the item may be slipped to a future meeting). However, this ensures the Council is compliant, should any matter need to be considered in private.

<sup>1</sup> (Part 2 of The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012)

### **2. Cabinet/Cabinet Committee/Cabinet Member & Chief Officer Decision Reports**

The decision report should be written as a public report with a private appendix containing the confidential or exempt information. Only in very exceptional circumstances should decisions be taken on a private report.

The public report should state on the front that a private appendix is included and set out the relevant exempt information paragraph number or reason if confidential.

The legal implications section of the report should explain why the information is confidential or exempt and why the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **3. The Cabinet Agenda**

Where any report has a confidential or exempt appendix, there will be a resolution on the agenda requiring members to accept or reject officer recommendations.

A process for appeals could be included in the Constitution – whereby members of the public could challenge whether information should be deemed exempt.

### **4. The Cabinet Meeting**

All decisions would be taken on the public agenda.

A private meeting would be held at the end of the meeting to allow questions from opposition members on and discussion of the exempt information.