

Report for: ACTION
Item Number: 4



Contains Confidential or Exempt Information	No – Part I
Title	CONSTITUTION AMENDMENTS - Member / Officer Protocol
Responsible Officer(s)	Sean O'Connor
Contact officer, job title and phone number	Sean O'Connor, Monitoring Officer, 0118 908 8177
Member reporting	Councillor Burbage
For Consideration By	Constitution Sub Committee
Date to be Considered	29 October 2015
Implementation Date if not Called In	n/a
Affected Wards	All
Keywords/Index	Constitution

<p>Report Summary</p> <ol style="list-style-type: none"> 1. This report sets out possible options relating to amendments to 'Part 7D – Member / Officer Protocol' in particular to procedures where information is supplied to Councillors. 2. It recommends to Sub Committee accepts a change to the Protocol permitting information to be shared with Lead Members but with limitations in certain circumstances. 3. These recommendations are being made as the Constitution needs to be fit for purpose and relevant to the Officers and Members of the Borough. 4. If adopted, there are no key financial implications for the Council.

If recommendations are adopted, how will residents benefit?	
Benefits to residents and reasons why they will benefit	Dates by which residents can expect to notice a difference
An up to date Constitution reflecting best practice will ensure democratic processes run	From date of decision

efficiently and effectively, and ensure residents are informed of the correct processes.	
--	--

1. Details of Recommendations

RECOMMENDATION: That Subcommittee adopts Option 5 in this Report permitting that :

- 1.1 information provided to a Councillor will be supplied to the Chairman of the appropriate Panel, Forum or Committee, or the relevant Lead Member of the Cabinet, and relevant Officers; and
- 1.2 in certain defined circumstance such as third party confidentiality reasons that information will not be supplied as stated in recommendation 1.1.

2. Reason for Recommendation(s) and Options Considered

- 2.1 The Constitution of the Royal Borough of Windsor and Maidenhead is a single point of reference which contains the principal operating structures and procedures of the authority. It sets out how the Council operates, how decisions are made and the procedures which are followed to ensure that these are efficient, transparent and accountable to local people. A full review of the Constitution was carried out in December 2012 and regular changes have been made since as required.

Why are amendments requested to be made to the Constitution?

- 2.2 At Council meeting 22nd September 2015, the Leader of the Council suggested the following amendment to the paper “Constitution Amendments” relating to sections 2.3 and 2.4 of “Part 7D – Member/Officer Protocol”:

“Where a Councillor requests factual information (usually written) from an Officer as set out in paragraph 2.3 above, that information will also be supplied to the Chairman of the appropriate Panel, Forum or Committee, or the relevant Lead Member of the Cabinet, and relevant Officers.”

- 2.3 The reason for the change was that a recent exchange between Members and officers had highlighted the need for the change and if the issue wasn’t resolved then ambiguity would remain.
- 2.4 A further proposed amendment was considered of ‘*except where a Councillor requests a question remains confidential*’. The reason for the further proposal was a safeguard was needed for confidential matters, for example if a question was raised on behalf of a resident.

- 2.5 The Council resolved unanimously that Constitutional Sub Committee be requested to consider the inclusion of the proposal into the Constitution.

How is information requests specified within the Constitution?

- 2.6 The principle sections within the Constitution concerned with information provision and confidentiality are contained within Part 7D Member / Officer Protocol. This Protocol is not designed to be prescriptive or comprehensive to cover every eventuality but to give a set of underlying guidelines.
- 2.7 Section 7 of Part 7D "Access to Information" specifies the rights and restrictions of Councillors to access Council information. This section reflects the general 'need to know' common law provisions which has evolved since legal cases such as *R v Birmingham City Council ex p O [1983]*.
- 2.8 The sections considered relevant are tabulated below :

Section 2.1	<i>Officers are available to assist and advise all Councillors upon matters relating to the Council's business. Unless otherwise agreed, Officers and Councillors will treat such discussions as confidential and Officers will not reveal the contents to other Councillors or to third parties. It may be necessary however for the Officer to advise his/her Head of Service/Director of the discussions</i>
Section 2.2	<i>When Councillors seek assistance and advice from Officers they should adhere to the requirements of this protocol and should not seek information to which they are not properly entitled.</i>
Section 2.3	<i>Whilst any Councillor may ask a relevant Head of Service, Director or the Managing Director for written factual information about a service, such requests must be reasonable. Requests will be met subject to any overriding legal considerations (which will be determined by the Monitoring Officer) or if the recipient of any request considers the cost of providing the information requested or the nature of the request to be unreasonable. If that is the case, she/he will raise the matter with the relevant Director who will discuss the issue with the relevant Group Leader(s) or, in the absence of a Group Leader, with the Member concerned</i>
Section	<i>Where a Councillor requests policy advice (usually oral)</i>

2.4	<i>that advice will not be supplied to any other Councillor without the consent of the requesting Councillor.</i>
Section 3.3 (v)	<i>Officers, when questioned by Members of a Group, should not disclose or be asked to disclose the views expressed at a meeting of any other Group except to ensure that action is taken on a particular matter, if appropriate.</i>
Section 3.6	<i>Officers must respect the confidentiality of any party group discussions at which they are present in the sense that they should not relay the content of any such discussion to another party group.</i>
Section 4.4	<i>Meetings with Ward Councillors and/or MPs and/or others are generally private. Officers may confirm the events which occurred at the meeting and the outcome of it with the Members who attended, but will not reveal those matters to other Members or to other political groups except with the specific authority of the Member(s) who attended or called the meeting.</i>

- 2.9 The Constitution favours maintaining confidentiality between Officers and Councillors irrespective of the circumstances or nature of the information requested.
- 2.10 A review of the Constitutions for the other Berkshire authorities show that their constitutions are largely comparative. Links to the relevant codes are in Appendix 1. Some (Bracknell & Reading) expressly state that information will be passed to the relevant Lead Members in certain circumstances.
- 2.11 However, it must be emphasised that the Code is locally determined and because other Constitutions are comparable does not automatically mean the Borough must maintain or adopt similar principles. It is for the Councillors to decide the terms that information is supplied to each other and the impact of such terms on their activities.

Issue with the existing process

- 2.12 The Borough generally exceeds the 'need to know' principles and volunteers the free exchange of information to Councillors (subject to limitations e.g. due to Data Protection or Schedule 12 of the Local Government Act 1972 constraints).

- 2.13 The issue isn't whether information shall be provided to a Councillor as generally information is readily volunteered.
- 2.14 However, this free dissemination of information does cause concerns for Officers in certain circumstances. The information may reveal matters that an Officer is duty bound to report (including to a Lead Member) even though such action would be in breach of the obligations of confidentiality under the Constitution. Potentially, the officer would have the difficult decision of breaching a Councillor's confidence or not making a necessary report at the correct time.
- 2.15 This issue could be addressed by arrangements that range from the strict application of the 'Need to Know' principles through to continuing the current process but with the understanding that such information will also be readily shared with others within the Council.
- 2.16 There are 5 identified possible options and the potential risks and benefits are as follows:

Option 1 - A more restrictive application of 'Need to Know'

- 2.17 The Council could adopt a more restrictive approach similar to other Councils. That is, information should only be shared with Councillors strictly in accordance with common law 'Need to Know' principles. This means information would only be passed to those Councillors with a genuine requirement to properly carry out his or her duties. This would be a reversal of the current system where the Council's current approach is to provide any information upon request unless there is reason the information must be restricted (for example, confidential information or Data Protection reasons)
- 2.18 This means that any request would require an officer to assess whether the Councillor legitimately requires the information to carry out such duties. In the case of a Councillor with no special responsibility, they would only be provided with such information needed for their ward duties.
- 2.19 This approach is not supported as it will inhibit frank discussions amongst Councillors and will involve officers having to make judgements on the reasons why the Councillor wants the information. Councillors exercising ward duties only would potentially have little recourse for information unless it directly relates to their ward and potentially, the Council would lose their contribution to any debate. Currently, any restriction on the supply of information is based upon the nature of the information rather than the identity or intention of the Councillor requesting the information.
- 2.20 The overall effect of this approach is to stifle debate between Councillors and limit information supply to primarily those Councillors that hold a special responsibility.

2.21 This Option is not recommended.

Option 2 – operate a ‘Need to Know’ with appeal provisions

2.22 The restrictive approach in Option 1 could be supplemented with a mechanism that if information is not supplied then the Councillor could ‘appeal’ this decision.

2.23 This approach would allow the Councillor the opportunity to convince a third party (i.e. Director, Lead Member or Council Committee) that the information is necessary.

2.24 This approach does provide a mechanism for appeal but is considered unsatisfactory as it would be slow, bureaucratic and the mechanism itself would mean that confidentiality of the Councillor’s request is lost.

2.25 This Option is not recommended.

Option 3 - Continue with the current approach.

2.26 The Council can continue with the current approach. This has been applied since at least 2011 when the new Constitution was adopted by Council.

2.27 The benefits of the current approach is that Councillors who have been provided with information are confident that it has been provided on a confidential basis. Similarly, officers do not make any judgement on the motive for request and only restrict information based upon the nature of the information (i.e. if it was confidential).

2.28 The risks of this approach is that officers often are unsure whether it should be released based upon the nature of the information.

2.29 It is therefore incumbent on the officer to have to make a judgement on the nature of the information whether to release or to check whether it is restricted. The problem is that checking to identify if information is restricted would then place the officer in breach of the requesting Councillor’s confidence and the relevant parts of the Constitution.

2.30 The officer would have the unenviable choice of (i) respecting the requesting Councillor’s confidentiality but then releasing information which could be restricted or (ii) ignoring the requesting Councillor’s confidentiality but then ensuring that the information isn’t restricted before release.

2.31 The reality is that any expectation of confidentiality by the requesting Councillor (as set out in the Constitution) could not be delivered by the officers.

2.32 Continuing with this Option is not recommended.

Option 4 – Continue with current approach with notification to the relevant Lead Member

2.33 This is the current proposal put forward by the Leader of the Council.

2.34 Currently, any request for information, if the officer believes the information is confidential then they are likely to check with the relevant senior officer or Lead Member in any event.

2.35 As such, the expectation of the requesting Councillor (relying upon the assurances given in the Constitution) cannot be met as it may be incumbent on the officer to seek guidance from the Lead Member whether information can be released. By seeking guidance, the officer will then be inadvertently breaching any assurances of confidentiality that the Councillor may have given to a third party.

2.36 A suggested solution is that if the officer cannot release the information without checking with a third party, then the officer should inform the requesting Councillor who can then decide whether to continue with the request or not. However, this isn't really an option as the officer may be under a professional duty to report the matter in any event or report the matter and not inform the requesting Councillor that they have done so.

2.37 The result of the current approach is that any expectation of confidentiality by the requesting Councillor in some cases, cannot be met by the officers. This means that the requesting Councillor (and any third party they are trying to assist) could be acting under a belief that a matter is confidential where the reality is that the Council would not or could not have treated the matter as confidential.

2.38 The proposal put forward means that the requesting Councillor (and any third party) are clear that information is only confidential within the Council (and not just between the Councillor and the third party). Officers are also clear that they do not have to make a judgement on the nature of the information as it will automatically be provided to the Lead Member.

2.39 A risk is that when a Councillor is approached by a resident to assist with a matter, this may be on the basis that the matter remains private between the Councillor and the resident. If the Councillor cannot give assurances of privacy then it is possible that no help can be provided and the Councillor cannot assist their resident.

2.40 This principle of this Option is supported and is refined in Option 5.

Option 5 – Continue with current approach with notification to the relevant Lead Member subject to exceptions.

2.41 It was proposed in Council on the 22nd September that Option 4 could be accepted but with ‘*except where a Councillor requests a question remains confidential*’.

2.42 For the reasons mentioned in the previous paragraphs, there are considerable good reasons for maintaining confidentiality where possible. However, there does not appear to be compelling reasons why advice (as opposed to supplying written information) should remain confidential other than already set out in section 2.4, 3.3(v), 3.6 and 4.4 of the Constitution already (replicated in paragraph 2.8 of this report). Likewise, there isn’t any reason why this should be limited to written advice or ‘factual’ information.

2.43 There is merit in maintaining confidentiality as suggested by the proposed amendment but this suggestion is very subjective and a Councillor could take the view that all their requests are confidential. It is recommended that some form of evidence should be provided to the officer to consider the need for confidentiality. The suggested recommendation is that this should at least be evidenced in the form of a ‘request by a resident’.

2.44 The proposed amendment after paragraph 2.3 & 2.4 of Part 7D would be :

Where an Officer provides information to a Councillor, that information will also be supplied to the Chairman of the appropriate Panel, Forum or Committee, or the relevant Lead Member of the Cabinet, and relevant Officers.

Information will not be supplied where the Councillor request is supported by a request by a resident to treat the matter as confidential.

For clarity purposes this paragraph does not include information provided in circumstances in section 3.3(v). 3.6 or 4.4.

2.45 This is the recommended option and is recommended as being an appropriate balance between (i) Councillors continuing to receive necessary information (ii) the ability of the Council to respond to any challenges revealed in an information request and (iii) the ability for residents to request that their confidence is respected where necessary.

Option	Comments
<p>1. Approve the changes to the Constitution Recommended Option</p>	<p>This will ensure that the Constitution is legally compliant and up to date with best practice.</p>

2. Do not approve changes	The Constitution will not be up to date and the Council will not be complying with the law.

3. Key Implications

Defined Outcomes	Unmet	Met	Exceed	Significantly Exceeded	Date they should be delivered by
Amend the Constitution by the date set out.	Do not amend the Constitution by the date set out.	Amend by the date set out.	n/a	n/a	First Council after 11 May 2015

4. Financial Details

a) Financial impact on the budget (mandatory)

There are no financial implications. No additional fees may be paid to the Independent Person.

5. Legal Implications

The Constitution must be in compliance with the terms of the Local Government Act 2000, Local Government and Public Involvement in Health Act 2007 and Local Democracy, Economic Regeneration and Construction Act 2009, Localism Act 2011 and any other relevant statutory acts or guidance.

6. Value for Money

An updated Constitution will ensure that the Council is less likely to be challenged on its procedures and processes.

7. Sustainability Impact Appraisal

There is no impact on sustainability objectives.

8. Risk Management

Risks	Uncontrolled Risk	Controls	Controlled Risk
There is a risk of challenge if the Constitution is not legally updated.	Constitution is not updated.	Constitution is regularly reviewed and updated.	Revised Constitution available on website.
There is a risk of non compliance with the Constitution if it is not relevant to residents, the duties of the Council or its Councillors	Constitution is not fit or relevant to purpose of the Council	Constitution regularly reviewed to reflect the requirements of the residents, the duties of the Council and its Councillors	Revised Constitution available on website.

9. Links to Strategic Objectives

The main links are to:

Residents First

- Work for safer and stronger communities

Delivering Together

- Deliver Effective Services

Equipping Ourselves for the Future

- Developing Our Systems and Structures

10. Equalities, Human Rights and Community Cohesion

These amendments to the Constitution do not require a full EQIA. No negative impacts were identified.

11. Staffing/Workforce and Accommodation implications:

None.

12. Property and Assets

None.

13. Any other implications:

None.

14. Consultation

N/A

15. Timetable for Implementation

N/A

16. Appendices

Appendix A - Links to 'Access of Information & Confidentiality' sections of Berkshire Authorities

17. Background Information

None

18. Consultation (Mandatory)

Name of consultee	Post held and Department	Date sent	Date received	See comments in paragraph:
Internal				
Cllr Burbage	Leader of the Council	19/10/15		
Sean O'Connor	Interim Monitoring Officer	19/10/15	-	
Alison Alexander	Managing Director & Director of Children's	19/10/15		

	Services			
Andrew Brooker	Head of Finance	19/10/15		
External				

Report History

Decision type:	Urgency item?
Non-key decision	No

Appendix A

Links to 'Access of Information & Confidentiality' sections of Berkshire Authorities

Bracknell:<http://democratic.bracknell-forest.gov.uk/documents/s85718/Constitution%20-%20Part%204.15%20-%20Member%20and%20Officer%20Protocol.pdf>

Reading: (p297) http://www.reading.gov.uk/media/1338/Constitution-of-The-Council/pdf/Constitution_of_the_Council.pdf

Slough:
<http://www.slough.gov.uk/moderngov/documents/s33755/Part%205.4%20Member%20Officer%20Relations%20Code%202014.pdf>

West Berkshire:
<http://info.westberks.gov.uk/CHttpHandler.ashx?id=38477&p=0>

Wokingham:
<http://wokingham.moderngov.co.uk/documents/s3824/Section%203%20Citizens%20and%20the%20Council.pdf>