

Investigation into the Release of Exempt Information Contrary to Paragraph 3 of Part 1 of Schedule 12A to the Local Government Act 1972 (Report)

1. Introduction and Summary

This Report has been prepared following an investigation into the release of exempt information contained within an exempt item that went to the Policy and Resources Committee at Maidstone Borough Council on 22nd May 2019. The release of exempt information was in contravention of Paragraph 3 of Part 1 of Schedule 12A to the Local Government Act 1972.

Circulation of exempt information contained within the report that was entitled “Call for Sites” had the potential to compromise the financial and business affairs of the Council and third parties. It was deemed to be in the public interest to apply the exemption to avoid the Council breaching its contractual obligations and avoid compromising the Council’s financial position.

2. Statutory and Constitutional Responsibilities of the Chief Executive and Monitoring Officer

Part 2.3 of the Constitution of Maidstone Borough Council sets out the responsibility for functions relating to officers and paragraph 2.3.1 provides that the Chief Executive may undertake any decision in respect of the matters listed under paragraph 1 to 21. Paragraph 4 of that list provides for a decision to ensure the propriety of the Council’s actions together with the Monitoring Officer. Therefore, this delegation enables the Monitoring Officer, on the authority of the Chief Executive, to undertake an investigation. In addition, the Monitoring Officer has specific delegated power to provide advice to Councillors and Officers of the Council on all legal issues.

The Local Government and Housing Act 1989, section 5 enables the Monitoring Officer to review actions taken by an officer or member where the action has given rise to or is likely to give rise to a contravention of any enactment or rule of law.

The purpose of this investigation is to enable the Monitoring Officer to review actions taken by an officer or member where the action has given rise to or is likely to give rise to a contravention of any enactment or rule of law, namely the release of exempt information in contravention of Paragraph 3 of Part 1 of Schedule 12A to the Local Government Act 1972. As a result the investigation could result in a formal code of conduct complaint or an officer disciplinary complaint.

It is important for there to be a public audit trail of any investigation and so the outcome of the investigation, as set out in this Report, is to be reported to the Audit, Governance and Standards Committee of Maidstone Borough Council. The Constitution of Maidstone Borough Council states that the purpose of the Audit, Governance and Standards Committee of Maidstone Borough Council is the promotion and maintenance of high standards of Councillor and Officer conduct within the Council.

In order for this to be achieved the ability of the Monitoring Officer to investigate and or take action is essential, and facilitates the close and good working relationship between the Monitoring Officer and the Audit, Governance and Standards Committee. This enables the Monitoring Officer to fulfil her role and responsibilities in keeping up ethical standards within the Council.

3. Guidance Previously Given to Members

The Monitoring Officer felt the need to produce a briefing note dated the 10th January to the Leaders' Forum, giving guidance entitled "Councillor Press Briefings and dealing with the Press". This was detailed guidance reminding Councillors about their obligations as set out in the Protocol on Councillor/Officer Relations and the Code of Conduct.

On the 21st January 2019 the Monitoring Officer provided Members of Maidstone Borough Council with guidance about dealing with confidential and exempt items on agendas and at meetings. The guidance in relation to exempt information explained that a local authority can exclude the public or press from a meeting by resolution during an item of business if the item includes exempt information. Members were given a list of the types of information that could be regarded as exempt, and information on the importance of the public interest test. They were also given practical examples of confidential and exempt information for guidance.

In addition, there is a Protocol on Councillor/Officer Relations and the Code of Conduct for Members, details of which are given to Members on induction along with information on dealings with the media and the Policy on Social Media.

Maidstone Borough Council also has its own communications team, through which press inquiries should be channelled.

4. The Need for the Exemption to Apply

The Chief Executive and the Monitoring Officer reminded the Policy and Resources Committee on the 22nd May 2019 the reason why the agenda item was being considered as exempt under Paragraph 3 of Part 1 of Schedule 12A to the Local Government Act 1972, this being information relating to the financial or business affairs of any particular person (including the authority holding that information). Circulation of the information had the potential to compromise the financial and business affairs of the Council and third parties. It was in the public interest to apply the exemption to avoid the Council breaching its contractual obligations and compromising the Council's financial position. The Chief Executive advised the Policy and Resources Committee that the Council had signed non-disclosure agreements with respect to an item in the exempt report.

The investigation obtained a transcript of the debate that took place at the Policy and Resources Committee on the 22nd May 2019 when deciding whether to go into exempt session. The webcast of the debate was also viewed. The debate was lengthy and did take into account the public interest test. The publicly available minutes are as follows:

“TO CONSIDER WHETHER ANY ITEMS SHOULD BE TAKEN IN PRIVATE BECAUSE OF THE POSSIBLE DISCLOSURE OF EXEMPT INFORMATION

The Committee considered whether to take Item 10, Call for Sites in public. Advice was provided by Officers, and the Committee decided that it was not possible to consider the report in public as non-disclosure agreements had been signed with some landowners impacted by sites in the report.

RESOLVED: That Item 10. Call for Sites be taken in private as proposed.

Voting: For – 11 Against – 3 Abstentions – 1

Note: Two Councillors requested that their dissent be noted”.

5. Exempt Information that was Leaked to the Press in Contravention of Paragraph 3 of Part 1 of Schedule 12A to the Local Government Act 1972

The author of the Exempt Report entitled “Call for Sites” was the Director of Regeneration & Place, who willingly took part in the investigation process. He identified those parts of the exempt report that had been leaked to the press in contravention of Paragraph 3 of Part 1 of Schedule 12A to the Local Government Act 1972. These were as follows:

- Downs Mail publication entitled “Lenham could be hit with 5,000 new homes in council’s call for sites” dated 23rd May 2019

“Lenham could be hit with up to 5,000 extra houses in one hit as the Maidstone Borough Council’s “call for sites” reaches its conclusion. Downs Mail understands a proposal favoured by officers at Liberal Democrat-led Maidstone Borough Council would see a “garden village” scheme, possibly at or near Lenham Heath for 2,500 – 5,000 new houses. It would, fear critics, turn an historic village into a small town.

....One MBC insider said “Lenham is seen as a good spot as it has links via rail and road. The officers have it near the top of the list”. The scheme would cause fewer political headaches as both local councillors, ... are independents..... Cllr. ... who spoke passionately about the scheme to a closed session of Maidstone Borough Council’s policy and resources committee last evening, was unavailable for comment today”.

- Downs Mail publication entitled “Landowner reveals 1,000 homes plans as council ‘call for sites’ deadline passes” dated 24th May 2019

“one is for a massive “garden village” development on or near Lenham Heath. This would comprise 2,500 to 5,000 houses. Local independent councillor ... was moved to tears as he spoke about the possibility at a closed session meeting this week at the town hall”.

- Kent Messenger, Maidstone publication entitled “Council head urged to end housing talks secrecy” dated June 13th 2019

“It was later leaked to the press the meeting of the authority’s policy and resources committee included a proposal for a ‘garden community’ of up to 5,000 homes at Lenham Heath”

The Director of Regeneration & Place only identified those press articles that he considered contained truly exempt information, by virtue of the fact that the information had not previously been reported publicly by Maidstone Borough Council. Such identification took place via a process whereby the Director of Regeneration & Place examined each press article and circled those parts of the various articles that contained exempt information, not previously within the public domain, being paragraphs 1.31 to 1.49 of the exempt report.

Any reference to named Councillors has been redacted from the press articles for Data Protection purposes.

6. Councillors and Officers that were interviewed as part of the process of investigation

All Members present at the Policy and Resources Committee held on Wednesday 22nd May 2019 and listed in the Minutes of the Meeting were invited for interview.

In addition, all those Members who would have received the exempt papers, being Members of the Committee, although not present at the actual meeting, were also invited for interview, as well as all Group Leaders, and any Member having the exempt papers on a “need to know” basis.

All officers present at the meeting were also invited for interview as well as an officer from the Communications team at Maidstone Borough Council.

The majority of Councillors invited for interview willingly took part in the process, with only a hand full not taking part, three of whom were present at the meeting on the 22nd May 2019.

All those officers invited for interview willingly agreed to be interviewed.

None of the Members and Officers interviewed, or who communicated in writing, admitted to leaking exempt information to the Press in contravention of Paragraph 3, of Part 1 of Schedule 12A of the Local Government Act 1972. In fact they all strongly denied any involvement in leaking the exempt information.

No evidence emerged to identify who may have leaked the exempt information.

It was established that there had been one press release by a Member of the Committee to the Downs Mail on the 23rd May 2019, which was the day after the Policy and Resources Committee had met. The contents of the press release was to do with the Exempt item on the Agenda. However, the contents of the Press release was examined by the Director of Regeneration & Place who confirmed that the Press Article did not contain any exempt information.

7. Conclusions reached as a result of the Investigation

Unfortunately, the investigation has not been able to establish, based on the balance of probabilities, who was, or may have been responsible for the exempt information being leaked to the press.

However, the majority of Members and Officers interviewed were extremely concerned that exempt information had been leaked to the press, in breach of the legislative requirements.

The investigation did establish that adequate guidance had been given by the Monitoring Officer, prior to the leak, in relation to Members' responsibilities regarding the need to keep certain Council information confidential and the need not to leak exempt information. Consequences of leaking confidential or exempt information to the press had also been high-lighted to Members.

8. Potential damage that can be caused by Exempt Information Being Leaked

The initial position should always be in favour of disclosure of as much information as possible about the decisions the council takes, and only in limited circumstances should information be withheld, where there is a justification, in law. However, once that decision has been taken both Members and Officers should respect that decision and abide by the ruling.

The potential damage that can be caused as a result of leaking exempt information to the press is far reaching, and can have damaging results, for example:

- The authority can be brought into disrepute.
- Member(s) of the authority can themselves be brought into disrepute.
- Members can be shown to have breached the Code of Conduct.
- There could be disciplinary action taken against Officers.
- Data Protection breaches or Freedom of Information breaches.
- The relationship between Councillors and Officers could be severely damaged
- Public respect for Members and Officers could be diminished.
- Trust within Political Groups could be tarnished as well as overall Member and Officer relations.
- Third party rights could be affected, and the Councils ability to negotiate successfully in the interests of the Council, and the wider community.
- Legal proceedings, such as the ability to settle a claim successfully could be put in jeopardy.

- The Council's good relationship with the press could also be tarnished as the press could be seen as a 'demon' rather than an important ally to both Councillors and Officers, and to the democratic process as a whole.

9 Recommendations for the future

Safeguards can be put in place to try and minimise the risk of exempt information being leaked to the press.

Practical measures could be adopted, for example:

- Members and Officers being asked to sign up to a Confidentiality Undertaking before being provided with confidential information. The Undertaking could also include the non-disclosure of exempt information.
- Training in relation to dealings with the Media could be increased within the organisation for both Officers and Members via the Council's Communication Team.
- The Democratic Services Team could put in place tighter controls on the return of exempt papers.
- Where there is considered to be exempt information in a report, officers could see whether the exempt information could be placed in a schedule separate to the main body of the report, rather than making all the report exempt.
- Group Leaders and the Communications Team could work together to establish press procedures which would promote the Council and keep residents informed.

These are only a few suggestions in order to facilitate the culture of one team, Members and Officers working together to enhance two of the principles within the Local Code of Corporate Governance for Maidstone, this being:

- A. Behaving with integrity, demonstrating strong commitment to ethical values, and respecting the rule of law
- B. Ensuring openness and comprehensive stakeholder engagement.

Investigation Report compiled by
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Dated