

**IN THE MATTER OF COUNCILLOR ACCESS TO  
CONFIDENTIAL/ EXEMPT INFORMATION  
Local Government Act 1972, section 100A and 100I**

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**INSTRUCTIONS TO ADVISE**

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Counsel is sent herewith the following copy documents:

1. Full Council Agenda dated 25 September 2019. Item 23 – Notice of Motion.
2. Part 3(17) of the Council's Constitution setting out the process for Motions on Notice.
3. Briefing Note for Council meeting – 25 September 2019 – Motion on Access to Information.
4. Guidance Note on Confidential and Exempt Information - 8 January 2019.
5. Council Procedure Rules 3.3 to 12 – Access to Information Procedure Rules and Additional Rights of Access for Councillors.
6. Extract Minutes – Council Meeting - Motion relating to agenda item 23.
7. The following link to a webcast of the Full Council meeting. Debate on motion commences at 1:21:30  
[https://www.youtube.com/watch?v=L0ZTV\\_hmGYs](https://www.youtube.com/watch?v=L0ZTV_hmGYs)

1. Leading Counsel is instructed by Patricia Narebor, Head of Legal Partnership, Mid Kent Legal Services, for Maidstone, Swale and Tunbridge Wells Borough Councils on behalf of Maidstone Borough Council for the purpose of this instruction.

2. At a meeting of the Maidstone Full Council on 25 September 2019, a Member (Cllr Perry, following amendments) gave notice of the following motion:

“Members of this Council are elected by the Residents of this Borough to represent their interests. In order for Members to carry out their duties effectively this Council agrees that all committee agendas and reports relating to items on the agenda (including minutes, supporting documentation, and urgent updates and relevant exempt information) will be provided to committee members and made available to any other interested members on request.” (Document 1).

3. Leading Counsel is referred to the Briefing Note for the Council meeting which provided guidance to all Councillors regarding the Local Government (Access to Information) Act 1985 and related statutory provisions. (Document 3).

4. Guidance had been provided to Councillors in the past following the release of exempt information to the press. Leading Counsel is referred to Document 4 - the Guidance Note on Confidential and Exempt Information dated 8 January 2019.

5. Full Council resolved that the amended motion be considered by Democracy and General Purposes Committee (“DGP Committee”). The terms of reference for the DGP Committee enables it to “review the Constitution in conjunction with the Monitoring Officer and recommend proposed changes, where significant, to the Council”.

6. Cllr Perry expressed that whilst the common law case of ‘**R v Birmingham City Council ex p O** (1983)’ had been cited in support of the “need to know” approach currently adopted by the Council, there are other examples of common law in existence which support the motion.

7. Another member then proceeded to advise that various case law in support of the motion exists whilst confirming his understanding that case law is open to interpretation. The following case was cited:

- ‘**R v Sheffield City Council Ex parte Chadwick** (1985) in which the Divisional Court (Woolf J) took the view that it is not lawful for a council, by allowing a sub-committee to be used for party political purposes, to justify a need for confidentiality and secrecy which would not otherwise arise.

8. The Councillor then went on to advise that Lord Brightman had, in the case of a Councillor with a reasonable request for information stated that bias should be to allow release of information rather than conceal and that Lord Granger extended this by stating that a Council's refusal of information was almost "Wednesbury unreasonable". No cases were cited however.

9. Amendments to the motion were proposed by both Cllr Clarke and Cllr Blackmore and there was general support for Councillors having access to any information they requested and Officers not having any powers to prevent that.

10. Leading Counsel is referred to the Access to Information Procedure Rules within the Council's Constitution – Document 5 and in particular procedure rule 3.2. to 3.12. The Council's current practice is that Committee papers, appendices, background papers and exempt papers are provided to Committee members to enable decisions to be made. All papers are published electronically and available to the public and non committee members (except exempt information) in accordance with the Local Government (Access to Information) Act 1985 and CPR 5. The Council operates a Committee system of governance under the Local Authorities (Committee System) (England) Regulations 2012 rather than an executive model of governance.

11. All Councillors are entitled to inspect any document which is in the possession or under the control of the Council where they are able to demonstrate a "need to know" to the satisfaction of the Monitoring Officer or her Deputy. Leading Counsel is referred to CPR 12. The implication of the motion is that Council Procedure Rules will require revision if all Councillors are to be provided with all information to include exempt information without demonstrating a "need to know".

12. Leading Counsel is referred to caselaw addressing the issue of Members' access to information and meetings, namely:

***R v Birmingham City Council ex p O*** (1983 1 AC 578 – members had a right of access to all written material in the possession of the local authority if they could demonstrate a "need to know" to enable them to properly perform their duties.

***R v Hinckley and Bosworth BC ex p Handford*** (1992) *unreported*: A members statutory right of access is limited to documents concerned with business about to be transacted at a meeting. For access to other documents, Members must rely on their common law rights if they can demonstrate a need to know, or on the rights available to the public, including through the FOI Act 2000.

***R v Rushmoor BC ex p Crawford*** (1981) *The Times* 28 November: There is no automatic right to membership of a committee.

***R v Brent BC ex p Gladbaum*** (1989) *The Times* 14 December: Members of the committee should be appointed by full Council and this task and the power to remove members from committees should not be delegated to a committee. *R v Eden DC ex Moffat* (1988) *The Times* 24 November – removal from a committee must be fair. The case of Eden also demonstrated that each case had to be

taken on its merits with the advantages of the member attending being weighed against the interests of the Council and any disadvantages.

**R v Sheffield City Council ex p Chadwick** (1985) 84 LGR 563: If a Councillor can establish a “need to know”, then he or she will be entitled to attend meetings in the same way that a councillor will have access to papers.

13. The Local Government Act 1972, section 100A (4) provides that:

“A principal council may by resolution exclude the public from a meeting during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information, as defined in Part 1 of Schedule 12A of the Local Government Act 1972 – Section 100I. Leading Counsel is referred to the categories of exempt information as outlined in paragraph 11 of the Guidance Note dated 8 January 2019.

14. Leading Counsel is requested to advise on the implications should the Council procedure rules be revised in line with the motion. Further, how the Council can avoid compromising its position in relation to release of information if the public interest in maintaining the exemption outweighs the public interest in disclosing the information:

- relating to an individual or likely to reveal the identity of an individual,
- how to protect information relating to the financial or business affairs of any particular person (including the Council’s information);
- information relating to labour relations arising from consultations or negotiations;
- Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings;
- Information that reveals that a notice, order or direction under any legislation is proposed to be imposed on a person;
- Information relating to any action taken or to be taken in connection with the prevention, investigation or prosecution of crime.

15. This is particularly so if Councillors are no longer required to demonstrate “a need to know” and all information is to be made available to all Councillors. As noted earlier, the Council undertook an investigation following release of exempt information to the Press which had been considered by members at a Committee. The Council was not able to identify whether the source of the leak to the Press was by a member or an officer of the Council.

16. Leading Counsel or an appointed Senior Junior Counsel may be required to attend the Democracy and General Purposes Committee on 13 November 2019 to provide clarification to the Committee and guidance on the implications should the proposal in the motion be accepted and the Council Procedure rules be revised.

Leading Counsel is requested to advise on:

- i) the general legal position currently accepted on access to information by Councillors and when and how this is limited.
- ii) whether it would be feasible for Councillors to be granted full access to information as proposed.
- lii consider whether limitations on any such access would be advisable and why.
- iv) consider available case law and provide an opinion on whether there is support for the Council's current approach as outlined in the Council's Access to Information Procedure Rules and Additional Rights of Access for Councillors under procedure rule 12 or the approach proposed by the Notice of Motion.
- v) advise generally.

Should Leading Counsel require further information, please contact Gary Rowland on 01622 602276 and at [Gary.Rowland@midkent.gov.uk](mailto:Gary.Rowland@midkent.gov.uk).

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Timothy Straker QC  
4-5 Gray's Inn Square  
Gray's Inn  
London  
WC1R 5AH

020 7404 5252

Patricia Narebor  
Head of Legal Partnership  
Mid Kent Legal Services  
DX: 4819 Maidstone  
Tel: 01622 602182

Patricia.Narebor@midkent.gov.uk

Copy to – [gary.rowland@midkent.gov.uk](mailto:gary.rowland@midkent.gov.uk)

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