

**ACCESS BY COUNCILLORS  
TO CONFIDENTIAL OR EXEMPT INFORMATION**

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**OPINION**

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1. I am concerned particularly with Maidstone Borough Council but the matters discussed will be equally applicable to all district councils (such as Swale and Tunbridge Wells).
2. Every district in England (such as those mentioned) has a council consisting of a chairman and councillors with each council being a body corporate: section 2 of the Local Government Act 1972. Accordingly, a council has legal personality which is, necessarily, separate from the legal personality an individual councillor enjoys. Putting the matter briefly no councillor can say 'I am the council' (whereas Louis XIV, an absolute monarch, could say *l'etat, c'est moi*).
3. This is an important, although seemingly elementary or trivial point. It means that no councillor can say that by virtue of being a councillor he or

she is entitled to all the material the council has. Further, it is clear that councillors have, see section 6 of the 1972 Act, a term of office. Indeed the office they hold is that of councillor. It is only to be expected that certain material will be referable to the discharge of that office; and certain material will not be so referable.

4. It is fundamental to the operation of district councils that a committee structure is put in place. The legislation expressly recognises that a local authority may arrange for the discharge of their functions by a committee, a sub-committee or an officer: see section 101 of the 1972 Act. Further, committees are appointed by the local authority: section 102.
5. Accordingly, it is clear that some councillors rather than all councillors will be appointed to any given committee and it is for those councillors as the committee to discharge the relevant functions of the committee (as delegated to the committee by the council). This means, as a matter of a statutory approach, that those councillors who are not on the committee do not, in general terms, for the immediate performance of their office, need to have the material used by the committee in making its decisions.
6. The preceding approach is consonant with the approach of the House of Lords in *R v. Birmingham City Council ex p O* [1983] 1 AC 578. The speech of Lord Brightman considered the legal structure of councils and

the role of committees. He drew attention to an extract from the judgment given earlier by Donaldson LJ. He had cited a judgment (in a case called *R v. Barnes ex p Conlan* [1938] 3 All ER 226) which said that a right exists on the part of a councillor to inspect documents in the possession of a council so far as access was reasonably necessary to enable the councillor properly to perform his duties as councillor.

7. In the *Barnes* case the judgment stated there was a limit on the part of a councillor to keep himself informed of all matters necessary to enable him to discharge his duty as a councillor. The judgment went on to say it was wrong to say that a councillor had to make himself familiar with every document in possession of the council. This would be an impossible burden. It was plain, the judgment recorded (as decided in *R v. Southwold Corp ex p Wrighton* (1908) 97 LT 431), that a councillor had no right to a roving commission to go and examine books or documents of a corporation simply because he is a councillor. Mere curiosity or desire to see and inspect documents is not sufficient.
8. Lord Brightman in *ex parte O* expressly considered the case of a committee of which a councillor was not a member. Such a councillor Lord Brightman said, had no automatic right of access to documentary material (of that committee). A need to know had to be demonstrated. In the Divisional Court in *O*, Donaldson LJ whose judgment was approved in the House of

Lords, said that no official – and he appears to have been embracing councillors in that expression – had any right to acquire any part of the authority's stock of information, whether or not confidential, save in so far as needed by him in order to do his job. There had to be a need to know.

9. *Ex parte O* must still (subject to what follows) be counted as a leading decision in this field, authoritatively stating the law. On 25 September 2019 notice, at a meeting of the Council of Maidstone, was given. The motion invites the Council to agree that all committee agendas or 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.
10. The reference to 'any other interested members' ought to be noted. The motion, if carried, would, if put into effect, mean that any councillor would be able to secure all the documents, including so called exempt information, that a committee (of which he or she was not a member) was to consider.
11. On the face of it this is inconsistent with *ex parte O*, which makes plain there is no roving commission. Further, there is no automatic right of access to documentary material of a committee (of which the councillor is

not a member). At this point I should mention public access provisions, which, of course, councillors can enjoy as members of the public.

12. Part VA of the 1972 Act is headed 'Access to Meetings and Documents of Certain Authorities Committee and Sub-Committee'. Part VA consists of a suite of sections (100A to 100K) designed to provide a comprehensive regime for admission to meetings (s.100A), access to papers (s.100B), inspection of minutes (s.100C), inspection of background papers (s.100D), application of preceding sections to committees and sub-committees (s.100E), inspection of records relating to functions exercisable by members (S.100EA), additional rights of access to documents for members of principal councils (s.100F), publication of additional information (s.100G), supplemental provisions and offences (s.100H), exempt information (s.100I), application to new authorities (s.100J) and interpretation (s.100K).
13. It is important to observe that these provisions were introduced by the Local Government (Access to Information) Act 1985. There have, however, been some subsequent amendments or additions. Thus, the legislation was introduced in the light of *ex parte O*. Parliament is taken to know the law and thus enacted the 1985 Act bearing in mind *ex p O*.

14. Two points are therefore clear. First, that Parliament specifically enacted that certain material should be exempt. Considerable trouble was taken to identify such material: see schedule 12A. There is no suggestion exemptions were not to be taken seriously. Second, Parliament specifically introduced additional rights of access to documents for members of councils: section 100F.
15. In those circumstances we can be sure that, in conjunction with common law rights explained in *ex p O*, the relevant part (VA) of the Local Government Act 1972 is intended to provide a code of access to material both for the public and for councillors. The latter as well as enjoying the public rights also enjoy such rights as derive from *ex parte O* (need to know) and those rights given in section 100F.
16. Section 100F therefore repays careful attention. The section provides that any document in the possession or under the control of a council which contains material relating to any business to be transacted at a meeting of the council or a committee or a sub-committee shall, subject to certain provisions, be open to inspection by any member of the council. This provision accordingly provides a general right to members not being committee members to inspect material which relates to business to be transacted.

17. It should be noted that this provision is referable to business to be transacted and provides for inspection by members. In other words this is a matter of a councillor choosing to inspect material relating to business to be transacted rather than wholesale provision of such material. (The material is in the possession or control of the council because the council is the body corporate and the committees are undertaking functions in the name of the council).
18. It must immediately be noted that the entitlement that material should be open to inspection by councillors does not require a document to be open to inspection if it appears to the officer appointed for the purpose that the document discloses exempt information. Accordingly, if we have in mind the motion to which reference has been made, it is apparent that it offends against section 100F in at least these respects. First, it seems universal the provision rather than one of documents being open to inspection (to councillors). Second, the motion disregards the inhibition on exempt information.
19. It should be noted that there is an exception to the inhibition given by section 100F(2A) if certain exempt information falls within paragraph 3 of schedule 12A to the Act or paragraph 6 of Schedule 12A to the Act. However, that exception is itself subject to an exception. Accordingly, in

the operation of section 100F care has to be taken in the application of the ability to inspect.

20. In those circumstances I turn to the specific matters on the last page of my instructions. First, the general legal position in respect of access to information by councillors. The position is that a councillor does not have free range over material held by the council. There is an entitlement on a need to know basis as per *ex parte O*. (This covers committee members seeing all committee members together with councilors having need to know). Further, there is an entitlement under section 100F for inspection by members of papers relating to business to be transacted. The position under section 100F excludes (subject to the particular operation of the section) exempt information.
21. It follows I do not consider it feasible or lawful for councillors to be granted full access to information as sought. The reaction of a court would be that *O* stated the position at common law and that section 100F gave, as its heading, records additional rights. It follows, the court would say, that there are no yet further rights.
22. It also follows that I consider the Council not merely should but has to follow the terms of section 100F of the 1972 Act. This means as stated that a councillor should seek to inspect (and possibly be refused if material is



exempt) rather than (as sought in the motion) be provided with all. Consequently, limitations on access are required.

23. The final matter to consider is the current approach of the Maidstone Borough Council to information in the light of the law as explained above and in other cases. I have considered this question in relation to councillors (rather than more generally). The only criticism I make of the current approach is the lack of sufficient reference to section 100F of the 1972 Act.
24. The effect of section 100F does not alter the position of councillors greatly when contrasted to members of the public under Part VA of the 1972 Act. However, it does enable limited categories of exempt information to be open to inspection by a councillor not being a member of the committee having to consider such information. The information potentially available (to such councillors) is (see paragraph 3 of schedule 12A) information relating to the financial or business affairs of any particular person but excluding such information to the extent it relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract.
25. The other piece of exempt information capable of being inspected (see section 100F(2A) of the 1972 Act) is (see section 100F(2A)(b)) information revealing that the authority proposes to give under any

enactment or notice under or by virtue of which requirements are imposed on a person or to make an order or direction under any enactment: see paragraph 6 of schedule 12A of the 1972 Act.

26. Save in respect of those particular matters the right to inspection under section 100F of the 1972 Act appears to disclose little if anything more than might otherwise be available to a member of the public.
27. I have already discussed *ex p O*. In *R v. Hackney ex p Gamper* [1985] 3 All ER 275. This case followed the approach of *ex p O* and indicated that the council had to consider whether there was a need to know. *R v. Hinckley and Bosworth ex p Handford* (1972) is unreported but the character of the case is consistent with the approach in this opinion.
28. I do not consider *ex p Crawford* or *ex p Gladbourn*, dealing as they do with committee membership, to be of particular assistance in this matter. *R v. Sheffield ex p Chadwick* (1985) 84 LGR 563 applied *ex parte O*.
29. Generally, I consider the Council needs to ensure that the access to information provisions operate in accordance with *ex parte O* and the legislative provisions. The motion pushes the matter too far. I do not consider that it is open to a council to secure arrangements that go beyond what the law provides. It is quite apparent that to do can have poor

administration and expose the council, putting the matter at its lowest, to concerns that there are breaches of provisions touching on confidentiality or exemptions.

30. CONCLUSION: The notice of motion as presently drafted pushes at the boundaries of the law and, as explained above, goes too far.

23<sup>rd</sup> October 2019  
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