

## GUIDANCE NOTE ON CONFIDENTIAL AND EXEMPT INFORMATION

### MAIDSTONE BOROUGH COUNCIL

#### 1. Introduction

We have prepared this briefing note to assist officers and members to understand the statutory requirements about confidential and exempt information at meetings and to provide guidance on when and how to exclude such items from public disclosure when appropriate.

2. The legislation is set out in the Local Government Act 1972 and also in the Access to Information Procedure Rules. Members and officers will find the Access to Information Procedure Rules in Part 3.2 of the Constitution.
3. There are different rules about information classed as “confidential” and information classed as “exempt”.

#### Confidential Information<sup>1</sup>

4. A local authority **must** exclude the public or press from a meeting during an item of business if it includes confidential information.
5. Confidential information is defined as:
  - Information provided to the local authority by a government department that forbids disclosure of the information to the public.
  - Information that is prohibited from being disclosed to the public under legislation or court order (for example, under the Data Protection Act 1998 or the Freedom of Information Act 2000).
6. A meeting does not need to pass a resolution to exclude the public before discussing an item of business that includes confidential information. Therefore, it is sufficient for a meeting chairman to request that the public withdraw so that the item of business containing confidential information can be dealt with in private.
7. If the Council is planning to exclude the public or press from part of a meeting, any relevant documents should be marked as confidential before the meeting.

#### Exempt Information<sup>2</sup>

8. 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. Note, this provision is not mandatory and therefore the relevant committee can choose whether to exclude the public or not. Before doing so, the committee must pass a resolution to exclude.
9. A resolution must:
  - Identify the proceedings (or part) to which it applies.

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<sup>1</sup> Section 100A(2) and (3) of the Local Government Act 1972

<sup>2</sup> Section 100A (4) and (5) of the Local Government Act 1972

- Describe the exempt information that gives rise to the decision to exclude the public from the meeting

10. If the committee is satisfied that the above criteria have been met, it will pass a resolution allowing it to lawfully exclude the public during the relevant proceedings at a meeting. As with confidential information, any relevant documents should be marked as exempt before the meeting.

### **What is exempt information<sup>3</sup>?**

11. A list of exempt information is given below:

- Information relating to any individual.
- Information which is likely to reveal the identity of an individual.
- Information relating to the financial or business affairs of any particular person (including the authority holding that information). "Person" includes companies and other organisations.
- Information relating to any consultations or negotiations, or contemplated consultations or negotiations, in connection with any labour relations matters arising between the authority or a Minister of the Crown and any employees of, or office holders under, the authority.
- Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- Information which reveals that the authority proposes:-
  - To give under any legislation a notice under which requirements are imposed on a person; or to make an order or direction under any legislation.
- Information relating to any action taken or to be taken in connection with the prevention, investigation or prosecution of crime.

### **The Public Interest Test**

All Councils are subject to strict rules on transparency and openness. A council can only consider information exempt if the public interest in maintaining the exemption outweighs the public interest in disclosing the information<sup>4</sup>. Members and officers are advised to keep committee discussions and reports in the public domain as much as possible. It is possible on occasions to publish an open report but keep the exempt information in an appendix which is not published.

Some practical examples of confidential and exempt information are given below for guidance:

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<sup>3</sup> Part 1 of Schedule 12A of the Local Government Act 1972

<sup>4</sup> Part 2 of Schedule 12A of the Local Government Act 1972

### **Example 1**

In “Stoop v Council of the Royal Borough of Kensington and Chelsea and another” [1991], the court held that a planning committee meeting at which the developer and objectors were present was entitled to go into closed session. This was so the council could hear the advice of its solicitor on the likelihood of a successful appeal against the proposed development and costs being awarded to it if planning permission were refused. The court held that the solicitor’s advice could be held in private as it was exempt information under Schedule 12A of the LGA 1972.

Note: The relevant exemption is that of “legal professional privilege”

### **Example 2**

Officers report about future plans for some of the Council’s assets. The plans include details of investments and property development proposals. The report could be exempt as it falls within the exemption, “Information relating to the financial or business affairs of any particular person (including the authority holding that information)”. The definition of “financial or business affairs” includes contemplated as well as current or past activities<sup>5</sup>. Therefore any report of the council about its own future planned financial or commercial activities could be exempt.

### **Example 3**

Officers report on the outcome of contract negotiations with a company. The report contains commercially sensitive information about the company. The report could be exempt as it contains “Information relating to the financial or business affairs of any particular person (including the authority holding that information).”

### **Example 4**

During the progress of a controversial planning application, the Council seeks expert legal advice. Normally, such advice would be subject to legal professional privilege and therefore exempt. However, due to the level of local interest, the Council finds that, in applying the public interest test, the interest in disclosing the advice outweighs the need to keep it exempt and therefore publishes the full advice.

### **Example 5**

Central Government releases a briefing note to the Council marked “Strictly Confidential” which the Council wishes to discuss. This would be automatically exempt from publication as it is confidential and falls within the definition of “Confidential Information” above.

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<sup>5</sup> Part 3 of Schedule 12A of the Local Government Act 1972