

SOUTH STAFFORDSHIRE COUNCIL

RULES ON CONFIDENTIALITY – FOR INFORMATION ONLY - 11 SEPTEMBER 2019

Summary

- 4.1 The July 2019 meeting of the Standards and Resources Committee at South Staffordshire District Council received a report on confidentiality and how it works. The Committee asked that this paper is adapted to reflect the rules on Parish Councils and is then distributed to Parishes. This is that paper. It is simply intended to assist Parish Councils on the Monitoring Officer's interpretation of the law and is not sought to be instructing on how matters should operate at Parishes as that is of course entirely a matter for the relevant Parish.
- 4.2 This paper came about as some District Members asked questions about the rules relating to confidentiality about District Council matters and specifically when matters are able to go in the public domain and when they can't. This report seeks to provide some information on these issues and also set out some of the potential consequences of a breach of these rules.
- 4.3 In short there are three distinct areas where confidentiality might apply:
- 1) *In relation to Council decisions/meetings*
 - 2) *Prior to a decision being reached*
 - 3) *In relation to a legal duty of confidentiality or other legal restriction (eg Data Protection rules)*
- 4.4 Councillors may at times have access to confidential information and as such there are certain limited situations where the Parish Council may need to restrict sight of the papers and to restrict access to a meeting discussing the papers in relation to a formal decision or prior to reaching that decision. A good example would be where authority is being sought to purchase or sell a property at a specific price, if the other party (or others) were to become aware of this it would adversely impact on the Parish Council's negotiating position; another is in relation to employment matters relating to staff employed by the Parish Council.

In relation to Council decisions/meetings

- 4.5 The main piece of legislation for Parish Councils on attendance of the press etc. is the Public Bodies (Admission to Meetings) Act 1960 ("PBA 1960"). This allows members of the public and press to attend meetings of certain public bodies, including local authorities.
- 4.6 The PBA 1960, permits parish councils (and community councils in Wales) to enter private or closed sessions. Section 1 states that a meeting of a parish council shall be open to the public unless the council excludes the public by resolution whenever publicity would be prejudicial to the public interest because of confidential business or for other "special reasons" (section 1(2)). This is less specific than the reasons that are used in relation to District Councils – a good example could be where an employment dispute is being discussed in relation to an employee of the Parish Council, another example could be in relation to confidential legal advice provided to the Parish Council regarding a dispute that it has.
- 4.7 These provisions have, in recent years, been built on through the Openness of Local Government Bodies Regulations 2014 for example through the ability for the public to film and record meetings.
- 4.8 I have for completeness copied the relevant provisions of the PBA 1960 below (as amended by the 2014 Regulations) – as at today's date:

1— Admission of public to meetings of local authorities and other bodies.

- (1) *Subject to subsection (2) below, any meeting of a body exercising public functions, being a body to which this Act applies, shall be open to the public.*
- (2) *A body may, by resolution, exclude the public from a meeting (whether during the whole or part of the proceedings) whenever publicity would be prejudicial to the public interest by reason of the confidential nature of the business to be transacted or for other special reasons stated in the resolution and arising*

from the nature of that business or of the proceedings; and where such a resolution is passed, this Act shall not require the meeting to be open to the public during proceedings to which the resolution applies.

(3) A body may under subsection (2) above treat the need to receive or consider recommendations or advice from sources other than members, committees or sub-committees of the body as a special reason why publicity would be prejudicial to the public interest, without regard to the subject or purport of the recommendations or advice; but the making by this subsection of express provision for that case shall not be taken to restrict the generality of subsection (2) above in relation to other cases (including in particular cases where the report of a committee or sub-committee of the body is of a confidential nature).

(3A) Where the public are excluded from a meeting of a relevant local government body under subsection (2), the body may also prevent any person from reporting on the meeting using methods—

(a) which can be used without that person's presence at the meeting, and

(b) which enable persons not present at the meeting to see or hear the proceedings at the meeting as it takes place or later.

(4) Where a meeting of a body is required by this Act to be open to the public during the proceedings or any part of them, the following provisions shall apply, that is to say,—

(a) public notice of the time and place of the meeting shall be given by posting it at the offices of the body (or, if the body has no offices, then in some central and conspicuous place in the area with which it is concerned) three clear days at least before the meeting or, if the meeting is convened at shorter notice, then at the time it is convened;

(b) there shall, on request and on payment of postage or other necessary charge for transmission, be supplied for the benefit of any newspaper a copy of the agenda for the meeting as supplied to members of the body (but excluding, if thought fit, any item during which the meeting is likely not to be open to the public), together with such further statements or particulars, if any, as are necessary to indicate the nature of the items included or, if thought fit in the case of any item, with copies of any reports or other documents supplied to members of the body in connection with the item;

(c) while the meeting is open to the public, the body shall not have power to exclude members of the public from the meeting and duly accredited representatives of newspapers attending for the purpose of reporting the proceedings for those newspapers shall, so far as practicable, be afforded reasonable facilities for taking their report and, unless the meeting is held in premises not belonging to the body or not on the telephone, for telephoning the report at their own expense [;]5

[d) in the case of a meeting of a relevant local government body, while the meeting is open to the public any person attending is to be permitted to report on the meeting.]5

[

(4A) Subsection (4)(d) does not require a relevant local government body to permit oral reporting or oral commentary on a meeting as it takes place if the person reporting or providing the commentary is present at the meeting.]6

(5) Where a meeting of a body is required by this Act to be open to the public during the proceedings or any part of them, and there is supplied to a member of the public attending the meeting, or in pursuance of paragraph (b) of subsection (4) above there is supplied for the benefit of a newspaper, any such copy of the agenda as is mentioned in that paragraph, with or without further statements or particulars for the purpose of indicating the nature of any item included in the agenda, the publication thereby of any defamatory matter contained in the agenda or in the further statements or particulars shall be privileged, unless the publication is proved to be made with malice.

(6) When a body to which this Act applies resolves itself into committee, the proceedings in committee shall for the purposes of this Act be treated as forming part of the proceedings of the body at the meeting.

(7) Any reference in this section to a newspaper shall apply also to a news agency which systematically carries on the business of selling and supplying reports or information to newspapers, and to any organisation which is systematically engaged in collecting news for sound or television broadcasts or for programme services (within the meaning of the Broadcasting Act 1990) other than sound or television

broadcasting services [or, in the case of a relevant local government body, for use in electronic or any other format to provide news to the public by means of the internet]7 ; [but, subject to subsection (4)(d), nothing in this section]8 shall require a body to permit the taking of photographs of any proceedings, or the use of any means to enable persons not present to see or hear any proceedings (whether at the time or later), or the making of any oral report on any proceedings as they take place.

(8) *The provisions of this section shall be without prejudice to any power of exclusion to suppress or prevent disorderly conduct or other misbehaviour at a meeting.*

(9) *In this Act—*

"relevant local government body" means—

(a) the Council of the Isles of Scilly;

(b) a parish council; or

(c) a parish meeting of a parish which does not have a separate parish council;

"reporting" means—

(a) filming, photographing or making an audio recording of proceedings at a meeting;

(b) using any other means for enabling persons not present to see or hear proceedings at a meeting as it takes place or later; or

(c) reporting or providing commentary on proceedings at a meeting, orally or in writing, so that the report or commentary is available as the meeting takes place or later to persons not present.

1A— Publication and dissemination of reports

(1) *Any person who attends a meeting of a relevant local government body for the purpose of reporting on the meeting may use any communication method, including the internet, to publish, post or otherwise share the results of the person's reporting activities.*

(2) *Publication and dissemination may take place at the time of the meeting or occur after the meeting.*

Prior to a decision being reached

- 4.9 In order to get a matter ready to go to the stage of a decision being reached at a meeting there will often have been a number of documents produced in order to get to that stage. Prior to the Freedom of Information Act 2000 (FOIA) there was no clear legal mechanism for this information to be made public (other than under the PBA 1960 above). I now seek to cover how the FOIA rules are likely to apply to certain types of information
- 4.10 A requester may ask for any information that is held by a public authority. However, this does not mean you are always obliged to provide the information. In some cases, there will be a good reason why you should not make public some or all of the information requested. You can refuse an entire request under the following circumstances:
- It would cost too much or take too much staff time to deal with the request (subject to specific amounts).
 - The request is "vexatious".
 - The request repeats a previous request from the same person.
- 4.11 In addition, the Freedom of Information Act contains a number of exemptions that allow you to withhold information from a requester. In some cases it will allow you to refuse to confirm or deny whether you hold information. These can be split into absolute exemptions and qualified exemptions.
- 4.12 Under section 2 of FOIA, even where information has been properly found to be exempt under one of the qualified exemptions in FOIA (such as the qualified exemption for trade secrets and commercially sensitive information (section 43)), the duty to disclose continues *unless, in all the circumstances, the*

public interest in maintaining the exemption outweighs the public interest in disclosing the information.
FOIA does not entail a presumption in favour of disclosure.

- 4.13 If further information is needed on the FOIA exemptions these can be found on the ICO's website [here](#).

In relation to a legal duty of confidentiality or other legal restriction (eg Data Protection rules)

- 4.14 The other circumstance that we need to cover are the restrictions imposed when a duty of confidentiality is imposed e.g. from another party, such as through a non-disclosure agreement in a commercial negotiation or through restrictions under the Data Protection legislation.
- 4.15 It is a broad principle of law that a person who has received information in confidence cannot take unfair advantage of it. That person must not make use of it to the prejudice of the person who gave the information without obtaining his consent. To be protected by the law of confidential information, information must be:
- Confidential in nature, meaning that it must have the "necessary quality of confidence".
 - Disclosed in circumstances importing an obligation of confidence
- 4.16 The rights conferred by the law of confidential information can be enforced against the recipient of the information. It can also be enforced against any subsequent third party recipient of that information, even where that third party had no knowledge of its confidential nature when it received the information but subsequently becomes aware of that fact.
- 4.17 A report was taken recently to the Standards and Resources Committee on the rules on Data Protection and the need to ensure that those rules are not breached – the recent report to the Committee on this can be seen [here](#).

Consequences of breach of confidentiality

- 4.18 There are 3 main areas that I wished to cover:

- Code of Conduct
- Misfeasance in public office/Bribery
- Data Protection rules/Action of breach of confidence

Code of Conduct

- 4.19 The Code of Conduct used by the District, and adopted by most Parish Councils, sets out clearly the conduct expected of members, one of these is to ensure that matters which are told in confidence are kept confidential. There will be times, for example in commercial matters, where disclosing that confidential matter could prejudice the Council's financial interests or others' interests.
- 4.20 The specific provision in the Code of Conduct is at paragraph 8:
- 8. Confidentiality - You must not—
(a) disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where—*
- (i) you have the consent of a person authorised to give it;*
- (ii) you are required by law to do so; the disclosure is made to a third party for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person; or*
- (iii) the disclosure is—*
- (aa) reasonable and in the public interest; and*
- (bb) made in good faith and in compliance with the reasonable requirements of the authority; or*
- (b) prevent another person from gaining access to information to which that person is entitled by law.*

- 4.21 This provision applies where the Member is made aware that the information is confidential or where the Member ought reasonably to be aware of its confidential nature. As members will be aware whilst the penalties for breach of the Code of Conduct are more limited than they were prior to the Localism Act 2011 one power available for breach of the Code is to restrict the relevant member's future access to

confidential information. If Members are in doubt as to whether information is confidential or not they should ask the relevant officer.

Misfeasance in public office/Bribery

4.22 If Members disclosed matters that are confidential, and are known to be, then there is in theory also a potential risk of an offence, eg that of misconduct in a public office. It is a very serious, indictable-only offence carrying a maximum sentence of life imprisonment. The offence is reserved for cases of serious misconduct or deliberate failure to perform a duty that is likely to injure the public interest. This is most likely to be in situations where persons used information that they obtained as a councillor to benefit their own interests or those of others.

4.23 The elements of this offence were set out in the case of Attorney-General's Reference (No 3 of 2003) [2004] EWCA Crim 868 as:

- *A public officer, acting in that capacity.*
- *Wilfully neglecting to perform their duty (or wilfully misconducting themselves).*
- *To such a degree as to amount to an abuse of the public's trust in the office holder.*
- *Without reasonable excuse or justification.*

To establish wilful neglect or misconduct by a member, there has to be:

- *an awareness of the duty to act; or*
- *subjective recklessness about the existence of the duty.*

4.31 The test is subjective, so the member is judged by his own standards. Before a Member can be considered to be liable, they must be **aware** of the risk that they are running. The knowledge or appreciation of risk of some damage must have entered the Member's mind, even though he may have suppressed it. The defendant's motive and the likely consequences of the breach (viewed subjectively) may be relevant to assessing whether an individual Member's conduct **is so far below acceptable standards that it amounts to an abuse of the public's trust in the member.**

4.32 An example of this is the case of R v Spreechley [2004] EWCA Crim 3067, where the leader of the council was found to have dishonestly failed to disclose an interest when pressing for a particular route for a road that passed near land owned by him. The value of his land would have increased as a result of the proposal. He was sentenced to 18 months' imprisonment and ordered to pay £25,000 costs (on appeal, this was reduced to £10,000). In attempting to influence the route, his motivation was dishonest in that he was motivated by considerations of personal advantage to a significant degree.

4.33 The other aspect that Members need to be aware of are the rules relating to bribery/fraud etc. and the passing on of information to others. If confidential information were passed on or actions were taken as a Member influenced by others promise or reward etc. then there would be a risk of committing an offence under the Bribery Act 2010 and other related legislation – please see the guidance on the District Council's website [here](#).

Data Protection rules/Action of breach of confidence

4.34 Parishes Councillors will be aware of the much stronger penalties now available for breach of Data Protection rules as illustrated by recent press coverage of issues concerning British Airways. In addition if information has been passed under a duty of confidence then there is the possibility of a private legal action by a relevant party to prevent disclosure of information passed under a duty of confidence.

Summary

4.35 The starting point for Parish Councils will generally be a desire to be open and transparent, however there are a limited number of situations where either legally or for good policy reasons it is not in the public interest to disclose all of the information it holds at that moment in time. By virtue of their position Parish Councillors will be entitled to see information that they will at times need to keep confidential such as information relating to an individual e.g. in an employment matter.

Report prepared by: David Pattison – Monitoring Officer (Corporate Director Governance)

Signed by to indicate that the report has been read, understood and the advice will be followed