
Member Request for Information

Body considering report:	Council
Date of meeting:	17 March 2022
Portfolio Member:	Councillor Ross Mackinnon
Date Portfolio Member agreed report:	8 March 2022
Report Author:	Sarah Clarke
Forward Plan Ref:	C4183

1 Purpose of the Report

- 1.1 This report considers a request by a Member of Council for access to information, under a procedure detailed in the Council's Constitution at paragraph 13.3.7.
- 1.2 The request is seeking disclosure of an operational document, setting out enforcement options in relation to a CIL liability.

2 Recommendations

- 2.1 It is recommended that Council:
 - (a) note the legal position with regard to Members rights to access information, and the limitations of that right.
 - (b) confirm that, in the circumstances, the request for information should be refused.

3 Implications and Impact Assessment

Implication	Commentary
Financial:	None
Human Resource:	None
Legal:	The right of Members to access information is set out in legislation and common law, as reflected in the Council's Constitution.

Member Request for Information

	The legal position is fully considered in the report and is also detailed in the Advice Note produced by James Goudie QC, which is attached at Appendix 3 to this report.			
Risk Management:	Information should not be disclosed or processed without a legal basis for doing so. To do so would give rise to a risk of challenge.			
Property:	No			
Policy:	No			
	Positive	Neutral	Negative	Commentary
Equalities Impact:				
A Are there any aspects of the proposed decision, including how it is delivered or accessed, that could impact on inequality?		X		
B Will the proposed decision have an impact upon the lives of people with protected characteristics, including employees and service users?		X		
Environmental Impact:		X		None
Health Impact:		X		None
ICT Impact:		X		None

Digital Services Impact:		X		None
Council Strategy Priorities:		X		
Core Business:		X		
Data Impact:		X		
Consultation and Engagement:	Governance and Ethics Committee Finance and Governance Group Corporate Board			

4 Executive Summary

- 4.1 The legal framework detailing Members rights to access information is set out in the Local Government Act 1972, or the Local Government Act 2000 for matters relating to executive functions.
- 4.2 Further provisions are also contained in the Openness of Local Government Bodies Regulations 2014, and the Local Authorities (Executive Arrangements)(Meetings and Access to Information)(England) Regulations 2012 for matters relating to executive functions.
- 4.3 Part 8 of the Council's Constitution outlines the legislative framework providing rights to access information, and provides further detail outlining the process by which Members can seek access to information in paragraphs 13.3.6 and 13.3.7 in Part 13.
- 4.4 In addition to the above, Members have a common law right to access information held by the Council on a need to know basis.
- 4.5 On the 21st June 2021, Councillor Rowles requested a copy of a document that had been referred to in an email by the then Head of Development and Planning. Councillor Rowles was advised the following day that the report could not be disclosed as it contained confidential, legally privileged information.
- 4.6 The request for access to the document was considered by the Executive Director, Place, and the Council's Monitoring Officer. Both determined that the report should not be disclosed.
- 4.7 The Member wrote to the Chairman of the Governance & Ethics Committee on 28th September 2021 to request that the matter be reviewed by the Committee, who may refer the matter to Council for debate. It is submitted that there is no legal basis upon

which to justify disclosure of the document in these circumstances, and it is therefore recommended that Council refuse the request that the document be disclosed.

5 Supporting Information

Introduction

- 5.1 There is a detailed legal framework which seeks to support transparency and openness in local government.
- 5.2 The Local Government Act 1972 (sections 100A to 100L), together with the Openness of Local Government Public Bodies Regulations 2014, details the rights of individuals to access relevant documents of local authorities.
- 5.3 In summary, members of the public must be given access to:
 - (a) Agendas and reports for meetings of Council or its committees
 - (b) Minutes of meetings
 - (c) Background papers.
- 5.4 Members of the public do not have the right to access information which is exempt information. The categories of exempt information are detailed in Schedule 12A of the Local Government Act 1972, and a copy of those provisions are detailed in Appendix 1.
- 5.5 In addition to the rights given to individuals to access information, Members are given additional rights under section 100F to inspect documents that are in the possession or under the control of a principal council, and which contain material relating to any business to be transacted at a meeting of the council, or a committee or a sub-committee
- 5.6 The above statutory provision giving additional rights to Members is again restricted to documents containing material that relates to business to be transacted at a meeting of the Council, committee etc. Further, the legislation states that if the proper officer considers that the document includes relevant exempt material, that document does not need to be disclosed. For example, material which is legally privileged, does not need to be disclosed under this provision.
- 5.7 For matters that fall within the responsibility of the Executive, the above provisions are largely replicated by the Local Government Act 2000, and the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.
- 5.8 In addition, in accordance with provisions in the Local Government Act 2000 and Part 5 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, Members of overview and scrutiny committees have additional rights to access documents, where the documents relate to a matter that they are reviewing. The Executive can determine not to provide a document to overview and scrutiny, but must provide a written statement detailing the reasons for that decision.

Member Request for Information

- 5.9 Members of local authorities have additional common law rights to access information held by the council of which they are a Member. Such rights are in addition to the statutory rights given to Members to access information detailed above.
- 5.10 Members need to be provided with information to enable them to perform their duties as Member of the council. However, that is not an unfettered right to have a 'roving commission' through council records. Where a Member wishes to access information, they need to be able to demonstrate why they have a 'need to know', and why that is necessary to enable them to perform their duties as an elected Member.
- 5.11 If a Member's motive for accessing the document is indirect, improper or ulterior, there is no obligation on their council to provide access to that.

Background

- 5.12 Councillor Rowles has been communicating with the Portfolio Holder and officers in Development and Regulation, and Legal Services since early 2020 regarding a Community Infrastructure Levy (CIL) case in Lambourn. Lambourn is not within Councillor Rowles' ward.
- 5.13 A meeting was held in February 2020, to provide background details on the case to Councillor Rowles. Following that, there has been extensive correspondence, where Councillor Rowles has raised queries. Detailed responses were provided, and further queries were raised, which were also responded to.
- 5.14 In early 2021, Members were again involved in the matter of CIL liability for the development in question. The then Head of Development and Planning had provided a detailed response to Councillor Rowles on the 30th April and agreed to keep Councillor Rowles updated with progress.
- 5.15 On the 21st June 2021, Councillor Rowles requested a copy of a document that had been referred to in an email by the then Head of Development and Planning. Councillor Rowles was advised the following day that the report could not be disclosed as it contained confidential, legally privileged information.
- 5.16 Councillor Rowles responded to advise that she considered that the document should be disclosed, as that was necessary to help her support XXX (who was not in her ward) and another resident in her ward. Councillor Rowles stated that the facts of both cases were similar and it was necessary to have sight of the document to enable her to assess the matter.
- 5.17 The Executive Director, Place wrote to Councillor Rowles on the 30th June, to advise that the document in question had been prepared for operational purposes, and that it contained restricted information. It was concluded that it was not appropriate to share this with Councillor Rowles.
- 5.18 Following a response from Councillor Rowles challenging the refusal to disclose the report, the Council's Monitoring Officer wrote to Councillor Rowles on the 15th July and this e-mail confirmed that:

"officers will always work on the basis of openness, and will share information with Members whenever it is appropriate to do so. However, Members do not have an

unqualified right to access data held by the Council and in order to require information to be disclosed, a Member would need to demonstrate a 'need to know'. For example, Members would not be automatically entitled to access data held by Children's and Family Services, or Adult Social Care where that relates to specific identifiable cases. Equally, Members do not have an automatic right to access data or information that relates to potential enforcement action that may be contemplated by the Council relating to its functions, where that relates to individuals or legal persons.

The report in question contains sensitive data and legal advice, and in the circumstances, I do not consider that you have demonstrated a need to know in this matter, which would require officers to disclose that report to you. Officers have agreed to ensure that you are updated with progress as soon as appropriate, which will be after the meeting between officers and xxx"

- 5.19 Councillor Rowles responded with further detail of why she considered there to be a need to know. This stated:

This case is very similar to my ward case of YYY; in both cases the applicant indicated that they wanted to claim a CIL exemption; both failed to provide evidence (either through completing a CIL form or providing further documentary evidence in XXX's case); in both cases the Council did not help or guide the applicant; both applicants instructed agents and in both cases the Council has not felt it "appropriate" to review each case under the legislation. How we approach XXX case as a Council is entirely relevant to YYY case and therefore directly relevant if I am to perform my duties as a ward Member.

- 5.20 A response was provided to that email on the 22nd July, where it was stated:

You have indicated that you have a need to know in this matter, to enable you to perform your duty as Ward Member. I note in this regard that the Council has engaged with you regarding this matter over a considerable period of time, responding to queries and keeping you updated as appropriate.

You have requested sight of a document that refers to a case which is not within your Ward, asserting that this is relevant due to similarities between that case and one within your Ward. However, having considered the report, that is not accepted. It is also clear that you are seeking to advocate on behalf of XXX and / or YYY, which puts you in conflict with the Council's position in this matter. This is a further reason why it would not be appropriate to disclose this document to you.

For the reasons previously given, it is not accepted that you have demonstrated a need to know in this matter, which would require disclosure of the document to you.

- 5.21 Councillor Rowles responded to challenge this conclusion on the 4th August, and a further response was provided to Councillor Rowles on the 16th August. On the 28th September, Councillor Rowles requested that the matter be referred to Governance and Ethics Committee for consideration. A copy of the above e-mail exchange was attached as an appendix to the report that was considered by the Governance and Ethics Committee.

Governance and Ethics Committee

5.22 The Governance and Ethics Committee considered this matter on the 17th January and resolved that this request should be referred to Council for consideration.

5.23 During that meeting, it was asserted by Councillor Rowles that she had a right to access the document for the following reasons:

- That she was entitled to access the information pursuant to rule 13.3.6 of the Constitution
- That the refusal to provide that information amounts to officers questioning her integrity
- That the Monitoring Officers decision should be challenged
- That there were similarities between the case of XXX and YYY and that she had a need to access the document to understand why the cases had been treated differently.

5.24 At Appendix 2 is an extract of the relevant provisions from the Council's Constitution. It is clear that Members do not have a right to access all documents, simply by virtue of their status as a Member. Further, there is a clear distinction between being provided with information, and being given access to inspect documents held by the Council. Councillor Rowles has been provided with extensive information in this matter, including information regarding the proposed enforcement action.

5.25 A refusal to supply a document with restricted or sensitive information to a Councillor does not equate to officers questioning the integrity of Members. The law is that a Member's right to access information is a qualified right. As noted above, the rights of Members to access information as detailed in the Constitution is also qualified.

5.26 In response to the assertion that there are similarities between the case of XXX and YYY, there are also considerable differences between the two cases. It is of note, for example, that the CIL liability in the case of YYY was paid, whereas the CIL liability in the case of XXX remains outstanding. The document being requested by Councillor Rowles considers enforcement options in the case of XXX, to secure recovery of the outstanding debt. This document therefore has no relevance to the case of YYY.

5.27 In order to further assist Council in considering this matter, legal advice has been obtained from James Goudie QC, and this is attached as Appendix 3. Council will note that the legal opinion of James Goudie QC is that the legal position is as set out in this report, and that Councillor Rowles has not demonstrated a 'need to know' in this matter.

Proposals

5.28 The document in question reviewed the different enforcement options available for the Council to secure recovery of the outstanding and overdue CIL liability. It is clear that the document would not meet the criteria in any of the statutory provisions requiring that it be disclosed. The document could therefore only be disclosed under the common law provision of a need to know.

- 5.29 It is clear from the correspondence in this matter, that Councillor Rowles has been given extensive briefings and explanations as to action that the Council has taken in the matter in question.
- 5.30 Councillor Rowles has indicated in correspondence that she disagrees with the Council's position, and has advocated for the CIL charge, that was applied to the development undertaken by XXX, to be removed.
- 5.31 The document in question contains details of the legal implications arising from the various enforcement options available. This document considers the specific facts and circumstances of the case of XXX. Such documents inform decision makers, and provide a helpful audit trail in the event of subsequent legal challenge. Similarly, detailed records will exist in children's or adult social care cases, documenting the reasons why a particular decision is taken. Records will exist at the conclusion of a criminal investigation, which will also consider and document enforcement options and the reasoning for a particular decision. These documents would continue to remain exempt from disclosure in legal proceedings, in the absence of a court order requiring the disclosure thereof.
- 5.32 The Council would not disclose such records containing clearly sensitive information, unless there was a clear need to know.
- 5.33 It is considered that the Council has provided sufficient information in this matter, to enable Councillor Rowles to fully perform her duty as Ward Member and to support XXX and / or YYY as appropriate.

6 Other options considered

- 6.1 Disclosing the document to Councillor Rowles. This is not recommended for the reasons given in the report.

7 Conclusion

- 7.1 There is a clear legislative framework detailing the information held by the Council that individuals, and councillors are able to access. In addition to this, councillors have common law rights to access information where they have demonstrated a need to know.
- 7.2 Councillor Rowles has been provided with detailed and comprehensive responses to her queries in relation to the case in question.
- 7.3 The document in question contains sensitive legally privileged information, which has informed a decision regarding enforcement action in the case of XXX. There is a risk that if this document is disclosed, this will set a precedent that similar documents containing legally privileged material in any future claim or challenge against the Council should also be disclosed.
- 7.4 For all the reasons detailed in this report, it is recommended that Council approve the recommendations set out in paragraph 2 of this report and refuse this request for information.

7.5 The recommendation is proposed on the basis that:

- (a) There is no statutory provision that would require the document in question to be disclosed.
- (b) Councillor Rowles has received detailed information relating to the case in question in accordance with the provisions of rule 13.3.6 of the Constitution. Councillor Rowles has not demonstrated a 'need to know' either as a ward Member or otherwise as a councillor acting as such. The document in question should not therefore be disclosed to her.

8 Appendices

8.1 Appendix 1 – Exempt Material, Schedule 12A of the Local Government Act 1972

8.2 Appendix 2 – Extracts from the Council's Constitution

8.3 Appendix 3 – Advice Note – James Goudie QC.

RESTRICTED

This Appendix is **not for publication** by virtue of exempt information of the description contained in Paragraphs 1,2, 3 and 5 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended by the [Local Government \(Access to Information\)\(Variation\) Order 2006](#). [Rule 8.10.4 of the Constitution also refers](#).

Background Papers:

Member Request for Information - Report to Governance and Ethics Committee, 17 January 2022 - <http://wbccommgrapp/mgChooseDocPack.aspx?ID=6194>

Draft minutes of the meeting of Governance and Ethics Committee of 17th January 2022 - <http://decisionmaking.westberks.gov.uk/documents/g6194/Printed%20minutes%2017th-Jan-2022%2018.30%20Governance%20and%20Ethics%20Committee.pdf?T=1>

You Tube Recording of the meeting of Governance and Ethics Committee of 17th January 2022 - <https://www.youtube.com/watch?v=GqbxERJZjo8>

Subject to Call-In:

Yes: ☐ No: ☒

The item is due to be referred to Council for final approval ☒

Delays in implementation could have serious financial implications for the Council ☐

Delays in implementation could compromise the Council's position ☐

Member Request for Information

Considered or reviewed by Overview and Scrutiny Management Committee or associated Task Groups within preceding six months	<input type="checkbox"/>
Item is Urgent Key Decision	<input type="checkbox"/>
Report is to note only	<input type="checkbox"/>

Wards affected: N/A

Officer details:

Name: Sarah Clarke
Job Title: Service Director, Strategy & Governance
Tel No: 01635 519596
E-mail: sarah.clarke@westberks.gov.uk

Local Government Act 1972, Schedule 12A

Part 1 Descriptions of Exempt Information: England

1

Information relating to any individual.

2

Information which is likely to reveal the identity of an individual.

3

Information relating to the financial or business affairs of any particular person (including the authority holding that information).

4

Information relating to any consultations or negotiations, or contemplated consultations or negotiations, in connection with any labour relations matter arising between the authority or a Minister of the Crown and employees of, or office holders under, the authority.

5

Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

6

Information which reveals that the authority proposes—

- (a) to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or
- (b) to make an order or direction under any enactment.

7

Information relating to any action taken or to be taken in connection with the prevention, investigation or prosecution of crime.]

Extracts from Council Constitution

Part 2 – Articles of the Constitution

2.3.5 Rights and Duties

All Councillors will:

- have such rights of access to such documents, information, land and buildings of the Council as are necessary for the proper discharge of their functions and in accordance with the law;
(NB: Documents dealing with individuals or other confidential matters may not be available.)
- not make public, information which is confidential or exempt without the consent of the Council or divulge information given in confidence by any person or body to anyone other than a Councillor or Officer entitled to know it.

For these purposes, the terms “confidential” and “exempt” information are defined in the Access by the Public to Information Rules of Procedure in Part 8 of this Constitution.

Part 13 – Codes and Protocols

13.3.6 Member Access to Information

Where a Member seeks information or advice from an Officer, the request should normally be responded to within two working days. If longer time is needed to prepare a substantive response an acknowledgement should be given and a full response should be provided, at the latest, within 10 working days (which is the Council's performance target for answering all enquiries). The response should be provided on a confidential basis to the Member making the enquiry unless the original correspondence was copied to other Members or the Member agrees that this should happen.

Where the relevant Director or Head of Service considers that the cost of providing the information requested is unreasonable, the request may be declined. In such cases the relevant Group Leader should be advised.

If a Member is seeking information or advice on a politically contentious or controversial issue they should direct their request to the relevant Director or Head of Service. If a request is made of an Officer by a Member for information/advice of other than a factual nature, the Officer may need to liaise with their manager.

Where a Director or Head of Service provides general information to individual Group Leaders, spokespersons or Members, this information will also be provided to other Party Groups.

Where Officers consider that information is of a confidential nature which should not be openly available to the public or press, this information will be supplied by Officers to

Members on a private and confidential basis. Any information provided to Members on this basis will be treated as such and will not be circulated outside the Council.

The Council's Access to Information Rules contain the formal legal provisions relating to access to documents by Members. This is supplemented in the Code of Conduct in relation to confidentiality.

13.3.7 Inspection of / Access to Documents (see also Access by the Public to Information Rules of Procedure)

A Member of the Executive, Overview and Scrutiny Commission and other Committees or Sub-Committees, has the right to inspect documents about the business of that body. If not a Member of the specific body, they must satisfy the Chief Executive or the relevant Director why sight of the documents is necessary to perform their duties.

Except as otherwise provided, any Member of Council may inspect any document, or have access to information, held by the Council where such inspection or access is necessary to perform their duties as a Member of the Council.

A Member of Council is not entitled to inspect any document, or have access to any information about a matter in which they have a disclosable pecuniary or prejudicial interest or where the Member is acting against the Council in a professional capacity. However, this does not remove from the Member the basic rights of a member of the public.

The Chief Executive or relevant Director may, with good reason, refuse a Member of the Council access to, or inspection of, a document or other information. This is likely to be in cases where the information is of a highly sensitive or personal nature and the Member has not demonstrated adequately why they have a genuine 'need to know' about the information.

If a Member is not satisfied with a decision of the Chief Executive or relevant Director to refuse access to a document or information, they may refer it to the Monitoring Officer. If a Member remains dissatisfied, they may ask for the matter to be considered by the Governance and Ethics Committee, who may decide to refer the issue to Council for decision.

EXEMPT INFORMATION

Advice Note of James Goudie QC

Note: This document is RESTRICTED.

This Appendix is **not for publication** by virtue of exempt information of the description contained in Paragraphs 1, 2, 3, and 5 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended by the [Local Government \(Access to Information\)\(Variation\) Order 2006](#). [Rule 8.10.4 of the Constitution also refers](#).

Paragraph 1 – information relating to an individual

Paragraph 2 – information identifying an individual

Paragraph 3 – information relating to financial/business affairs of particular person

Paragraph 5 – information relating to legal privilege