

### GUIDANCE ON THE DISCLOSURE OF CONFIDENTIAL INFORMATION BY MEMBERS

#### 1. Introduction

- 1.1 As a Member, you will have access to a great deal of information which is confidential, either because it is personal information or because it is commercially sensitive or it is information which would not otherwise be placed in the public arena/domain. Information is a broad term. It includes facts, advice and opinions. It also covers written materials, including tapes, videos, CDs, DVDs and other electronic media.
- 1.2 The handling of confidential information is an essential element in the relationships of trust that should exist between Members, Officers and the public and a mishandling of such information and/or its accidental or deliberate disclosure is likely to damage trust as well as lead to formal proceedings being taken against the Council, individual Members or Officers.
- 1.3 The Council is committed to the principles of openness and transparency. However, in the practical application of these principles, you need to have regard to legal obligations which, in some cases, may require information to be kept confidential.
- 1.4 The [Member Code of Conduct](#) (paragraph 4) provides that:
- ‘You must not 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 the person authorised to give it;
  - (ii) you are entitled by law to do so;
  - (iii) 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
  - (iv) 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.’
- 1.5 Standing Order 51 sets down the rules which you must follow in relation to inspection of and/or access to Council information. These rules are summarised in para. 6 of this Guidance.
- 1.6 The Council has policies on data protection, freedom of information, human rights and whistleblowing. Other statutory provisions may also be relevant to the disclosure of confidential information. You should seek advice from the Head of Legal Services on the application of the law if you are in doubt.

1.7 Information in documents held by the Council, belongs to the Council corporately and not to individual Officers or Members.

## **2. What is confidential information?**

2.1 In order to ascertain whether information is confidential, it is important to understand what is meant by a duty of confidence and how confidentiality can be established.

2.2 A duty of confidence arises when one person (the 'confident') is provided with information by another (the 'confider') in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. This is generally known as the common law duty of confidence.

2.3 There are various ways in which a person or the Council may be under a duty of confidentiality (either explicitly or implied), such as:

(i) if the relationship is inherently confidential e.g. between client and lawyer.

(ii) if the relationship is personal e.g. it is between colleagues in circumstances that suggest an expectation of confidentiality.

(iii) if the source of the information will be put at risk if identified e.g. whistle blowers.

2.4 Confidentiality is unlikely to be established where the information is already known to a wide circle or is in the public domain.

2.5 Information which at one time was to be treated as confidential may subsequently cease to be confidential by passage of time or where, in the case of exempt Information, the relevant meeting did not resolve to exclude the press and public.

2.6 Confidentiality can be agreed either verbally or in writing. However, it is not necessary for the person who supplied the information to have stated expressly that the information is confidential. For example, the fact that correspondence is not marked 'confidential' does not necessarily prevent it from being confidential. In many cases, the fact that the information is confidential may be inferred from the subject matter and the surrounding circumstances.

2.7 With the consent of the 'confider', confidentiality can be set aside.

2.8 It may be difficult to establish that a confidentiality agreement existed retrospectively. This is especially true if there is little or no evidence of an attempt having been made to restrict or protect the information at the time the information was given, but, as outlined in para. 2.3 of this Guidance, some relationships are inherently confidential and in those circumstances, confidentiality may well be implicit, rather than explicit.

## 2.9 Committee agenda context

The meaning of the term 'confidential' in the committee agenda context, is very restricted and tightly defined in law and will relate to information which has been supplied to the Council by a government department upon terms which prevent its disclosure to the public, or information which by law, is prohibited from being disclosed to the public. The public and press must be excluded from meetings where such information is being considered.

## 3. What is exempt Information?

- 3.1 Schedule 12A of the Local Government Act 1972 sets out a number of categories and circumstances of exemption: information about individuals, financial or business affairs of an individual including the Council, trade disputes, legal advice, crime and Standards Committee deliberations etc.
- 3.2 Reports in Part II of a committee agenda (referred to as 'the pink items') will relate to exempt information matters which remain confidential until the Proper Officer (i.e. the Managing Director) considers the public interest test and decides that it is in the interests of the public to release some or all of the information. In practice, this exercise is undertaken at the time the report is drafted and/or following a specific Freedom of Information or Environmental Information Regulations request.

The public and the press may be excluded from a meeting where exempt information is being considered.

## 4. Other confidential Information

- 4.1 It would be a mistake to consider that it is only 'confidential information' or 'exempt information' as defined in the legislation that should be protected from disclosure. Information other than that which is to be discussed at, or is the subject of a report to, a committee meeting may be provided to you in confidence.
- 4.2 Information provided expressly 'in confidence' to you (whatever words are used to describe its confidential nature), should be treated as confidential information. An example might include sensitive legal or financial information provided to you by Officers outside the context of a formal committee meeting, or sensitive information provided to you by a constituent.

## 5. When is information likely to be confidential?

- 5.1 Generally, the confidentiality or otherwise of information needs to be considered in the context of individual circumstances. By way of indicative guidance, the following categories of information would normally be treated as confidential:
  - (a) Where there is a legal restriction on the disclosure of information for example under the Data Protection Act 1998, contractual obligations, a court order or pending legal proceedings covered by the sub judice rule.
  - (b) All reports that are in Part II of committee agendas (refer to paras. 2.10 and 3 of this Guidance).

- (c) Where information is supplied to a Member by an Officer or other person in confidence.
- (d) Matters concerning terms and conditions of employment of individual Officers or pending grievance or disciplinary proceedings.
- (e) Matters concerning details of commercial negotiations.
- (f) Personal information concerning an individual.
- (g) Information protected by legal professional privilege (i.e. arising from a relationship of lawyer and client).
- (h) Information which, given its nature, timing and context is such that a reasonable person would consider it to be confidential.
- (i) Information relating to the business of working groups (there is a presumption that the business of working groups is confidential).
- (j) Where the disclosure of information would normally tend to have a detrimental effect on the interests of the Council, the service users or third parties involved.

## **6. Your right as a Member to access confidential information**

- 6.1 The Council has a general commitment to openness. Your access to information and documents is therefore restricted only where there is a good reason for doing so.
- 6.2 You have a common law right to access information on a 'need to know' basis. This entitles you to access information or documents that are reasonably necessary to enable you to discharge your functions as a Councillor. This would cover your role as a member of committees, sub-committees or working groups, as well as positions to which you are appointed by the Council and in the undertaking of your ward Councillor responsibilities. The right is limited to a need to know and a mere curiosity or desire to know is not sufficient. The courts have also held that as a Councillor, you have no right to a 'roving commission' to examine the books or documents of the Council.
- 6.3 One aspect of the need to know principle is proportionality. In asking for information and documents, you need to ensure that what you are asking (in terms of volume of documents, time needed to locate, research and collation of the information etc.), is commensurate to your need to know.
- 6.4 An Officer receiving a request for information from you, is entitled to know the reasons why the information is needed so that a proper assessment of the need to know can be made. Where you are dissatisfied with the Officer response, you may refer the matter to the Managing Director for a review. The Managing Director's decision will be final.
- 6.5 You cannot demand to see a document which relates to business not yet due to come before a committee meeting.

## **7. When am I subject to a duty of confidentiality under the Member Code of Conduct?**

7.1 The duty of confidentiality under the Code applies only when you are acting in an 'official' capacity. The information must therefore have been received and/or disclosed by you in your role as a Councillor. This should however not be interpreted as meaning confidential information which has been received in your role of Councillor, can be disclosed with impunity in a private capacity.

The duty under the Code is not limited to information supplied by Officers or the Council - it also covers information given to you in your capacity as a Councillor, by any person.

## **8. What requirements must I comply with under the Member Code of Conduct?**

8.1 The Member Code of Conduct imposes a duty of confidentiality on you and prohibits the disclosure of confidential information except in a defined range of circumstances and subject to a number of requirements.

### **8.2 The defined range of circumstances**

8.2.1 The **first defined range of circumstances** is that before disclosing confidential information, you must have the consent of the person authorised to give it. This would normally be the author of the document or the Director or a Senior Officer of the Department for the area of service. In appropriate cases, the Chairman of the relevant committee may need to be consulted.

8.2.2 The **second defined range of circumstances** is that you may disclose confidential information if you are entitled by law to do so e.g. by a court order.

8.2.3 The **third defined range of circumstances** is that you may disclose confidential information to a third party e.g. a lawyer for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person.

### **8.3 The requirements**

8.3.1 The **first requirement** that the disclosure must be reasonable, requires you to consider matters such as:

- whether you believe that the information disclosed and any matters contained in it, is substantially true. If you do not believe this, then the disclosure is unlikely to be reasonable;
- if the disclosure is made for personal gain e.g. where you are paid to disclose the information, the disclosure is unlikely to be reasonable;
- the identity of the person to whom the disclosure is made: it may be reasonable to disclose information to the police or to an appropriate regulator. It is less likely to be reasonable for you to disclose the information to the world at large through the media;
- the extent of the information disclosed: the inclusion of unnecessary detail, and in particular, private matters such as addresses or telephone numbers, is likely to render the disclosure unreasonable;

- the seriousness of the matter - the more serious the matter, the more likely it is that the disclosure will be reasonable;
- the timing of the disclosure - if the matter to which the disclosure relates has already occurred and is unlikely to occur again, the disclosure is less likely to be reasonable than if the matter is continuing or is likely to re-occur;
- whether the disclosure involves the Council failing in a duty of confidence owed to another person.

### Points to remember

- You must not disclose confidential information merely to make political capital/gain.
- Disclosure of confidential information to the press is most likely to involve a breach of the Member Code of Conduct and is rarely justified.
- You should have regard to your fiduciary duty to the Council and council taxpayers and that you have joint responsibility to avoid the disclosure of information of a commercially sensitive nature.
- Confidential information gained by you in connection with pending or ongoing litigation should not be disclosed under any circumstances, as this would amount to a breach of trust.

8.3.2 The **second requirement** that the disclosure must be in the public interest, needs to involve one or more of the following matters or something of comparable seriousness that has either happened in the past, is currently happening, or is likely to happen in the future:

- (a) a criminal offence is committed.
- (b) the Council or some other person fails to comply with any legal obligation to which they are subject.
- (c) a miscarriage of justice occurs.
- (d) the health or safety of any individual is at risk.
- (e) the environment is likely to be damaged.
- (f) that information tending to show any matter falling within (a) to (e), is deliberately concealed.

### Points to remember

- 'Public interest' has been described as something that is of serious concern or benefit to the public, not merely of individual interest. The public interest does not mean 'of interest to the public' but 'in the interest of the public'. The term is not defined in law, so you will need to make a subjective judgement, in which policy and legal interpretations are both involved to some degree.
- Because of the implications associated with releasing confidential information e.g. risk to an individual, risk to commercial negotiations etc, any decision to release such information has to be made with great care. In evaluating the effect of disclosing confidential information, it will be necessary for you to consider the full context of that disclosure, and to make a risk assessment of the disclosure. Therefore:

- a. identify the relevant public interest factors;

- b. list the factors for and those against releasing the information;
- c. evaluate the relevant public interest factors, e.g. no weight, minimal weight, moderate weight or considerable weight;
- d. determine where the balance lies.

8.3.3 The **third requirement** that disclosure is made in good faith, will not be met if you act with an ulterior motive, for example to achieve a party political advantage or to settle a score with a political opponent.

#### Points to remember

- The law defines good faith as a state of mind consisting in:
  - (1) honesty in belief or purpose;
  - (2) faithfulness to one's duty or obligation;
  - (3) observance of reasonable commercial standards of fair dealing in a given trade or business; or
  - (4) absence of intent to seek unconscionable advantage.
- In law, the consensus is that someone does something 'in good faith' when they do it honestly and with no ulterior motive.
- It would be prudent for you to balance any risk against the merits of disclosing confidential information. You may believe that you act 'in good faith,' in that you genuinely believe it is in the public interest to disclose certain information (such as personal information about individuals or commercially sensitive information about companies) where on a more objective test, it may not be in the public interest. An example might be the disclosure of the address of a housing benefit claimant or suspected paedophile.
- You must never release confidential information for personal gain, reward or motive.

8.4 The **fourth requirement** that you comply with the reasonable requirements of the authority, means that before making the disclosure, you must comply with the Council's policies or protocols on matters such as data protection, freedom of information, human rights, whistleblowing and this Guidance (refer to para.9 for the procedure to be applied before you disclose confidential information).

#### Points to remember

- Never allow your party political interests to override the interests of the Council and council tax payers in the way that you deal with access to or the disclosure of confidential information.
- Just because communication is not labelled 'confidential', you should not assume that it is for general release. You should always consider the circumstances.
- Don't take risks.

### 9. What procedure must I comply with before disclosing confidential information?

9.1 Where any of the defined range of circumstances do not apply (para. 8.2 of this Guidance), you must not disclose confidential information unless you have first:

- (i) challenged the requirement for confidentiality, by submitting a Freedom of Information/Environmental Information Regulations request to the Freedom of Information Officer; or
- (ii) made the disclosure under the Council's Whistleblowing Policy having first applied the range of requirements referred to in paras. 8.3.1 to and including 8.3.3 of this Guidance.

## **10. General**

- 10.1 This Guidance is meant by way of a general guide and does not attempt to cover all eventualities. Any breaches of this Guidance may result in a complaint to the Council's Standards Committee or to the Standards Board for England, where any allegation, if proven, warrants the Adjudication Panel for England's penalties.
- 10.2 Further advice or clarification can be sought from the Monitoring Officer [chris.oliver@dartford.gov.uk](mailto:chris.oliver@dartford.gov.uk), or the Head of Legal Services [marie.kelly-stone@dartford.gov.uk](mailto:marie.kelly-stone@dartford.gov.uk)

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