

TO: GOVERNANCE AND AUDIT COMMITTEE  
6 NOVEMBER 2012

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**THE LOCAL AUTHORITIES (EXECUTIVE ARRANGEMENTS) (MEETINGS AND ACCESS TO INFORMATION) (ENGLAND) REGULATIONS 2012**  
**Director of Corporate Services (Legal)**

**1 PURPOSE OF REPORT**

- 1.1 The purpose of this report is to appraise the Committee of the recently introduced Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (“the Regulations”). The report also seeks authority to amend the Council Constitution to reflect the provisions of the new Regulations, subject to one important caveat relating to the recording of officer decisions.

**2 RECOMMENDATION**

- 2.1 **That Council be recommended that the Borough Solicitor be authorised to amend the Council’s Constitution to reflect the Regulations save that provisions relating to the recording of decisions taken by officers shall be subject to consultation with Corporate Management Team and the Chairman of the Committee.**

**3 REASONS FOR RECOMMENDATION**

- 3.1 The Council is required by law to observe the provisions of the Regulations. However, a literal interpretation to that part of the Regulations which relate to the recording of decisions by officers in discharging Executive functions would be impractical to implement.

**4 ALTERNATIVE OPTIONS CONSIDERED**

- 4.1 The Council could seek to implement the Regulations giving a literal interpretation to that part which relates to the recording of officer decisions. However, to do so would impose a large bureaucratic burden to no great effect.

**5 SUPPORTING INFORMATION**

Introduction

- 5.1 Public access to Council and committee meetings, agenda, reports and background papers is provided for by the Local Government Act 1972 (as amended in 1984). When Executive Arrangements were required to be implemented under the Local Government Act 2000 similar provision was made by Regulations for Executive meetings and decisions. Those Regulations also introduced the concepts of Forward Plans and Key Decisions. The Council’s Constitution reflects the requirements of those Regulations.
- 5.2 To the surprise of many, a new set of Regulations were issued in September. The Regulations were not the subject of any consultation with local authorities. Instead,

## Unrestricted

the Department of Communities and Local Government conducted what it has described as a “short, focused informal soundings exercise with partners”. One such “partner” was the Local Government Association, which responded that changes proposed by the Regulations were unnecessary.

- 5.3 The key differences between the Regulations and their predecessor are described below.
- 5.4 It is important to bear in mind that the Regulations relate only to Executive functions. Other functions (relating to Planning, Employment, Licensing and decisions taken by Council) are unaffected.

### Key Decisions

- 5.5 The previous Regulations stipulated that Key Decisions (defined in this Council as a decision involving expenditure/savings of more than £400,000 or a decision affecting two or more wards could only be taken after notice of it was included in a published Forward Plan at least 14 days in advance of the decision being taken. The requirement was subject to urgency and special urgency exceptions.
- 5.6 The obligation to produce and publish a Forward Plan has been abolished. Instead, save in cases of urgency or special urgency a Key Decision (whether made by Members or an officer) cannot be taken until at least 28 days clear notice has expired from publication at the Council’s offices and on the Council’s web-site of a document which states (inter alia):-
- the subject matter of the decision
  - the name(s) of the decision maker(s)
  - the date of the decision
  - a list of the documents submitted to the decision maker(s) for consideration in relation to the matter

### Notice of Meetings to be held in private

- 5.7 The previous Regulations allowed the public to be excluded when “confidential” or “exempt” (e.g. commercially sensitive) information is likely to be disclosed. That capacity is retained but the Regulations prescribe additional requirements to be fulfilled before a meeting can move into confidential session. Those requirements are:-
- at least 28 clear days before the meeting a notice must be published at the Council’s offices and on the Council’s web-site giving notice of the intention to hold the meeting (or part) in private
  - at least 5 clear days before the meeting the Council must publish another similar notice but on this occasion including a statement of the reasons for the meeting to be held in private, details of any representations received as to why the meeting should be held in public and the Council’s response to such representations

There is an urgency exception

### Recording of Decisions by Officers

- 5.8 The previous Regulations contained provisions which required individual Members, when making any decision and officers when making Key Decisions to make a record of the decision. However, when the Regulations were issued it was observed, to the astonishment of many, that they sought to extend the requirement to make a record to all "Executive Decisions" made by officers. The term "Executive Decision" is defined such that it encompasses all decisions made by officers other than those relating to non-Executive functions such as Planning, Licensing and Employment. It includes all decisions taken by officers in, for example, the areas of Adult Social Care, Children's Social Care, Education and Leisure.
- 5.9 Under the Regulations whenever an officer takes any "Executive Decision" he/she must produce a written statement including:-
- a record of the decision and the date it was made
  - the reasons for the decision
  - details of any alternative options considered and rejected
  - a record of any conflict of interest declared by any Executive Member consulted
  - in respect of any declared conflict of interest, a note of dispensation granted by the Head of Paid Service

A record of the decision must be published on the Council's web-site.

- 5.10 The requirements alluded to above have caused some consternation throughout local government. In response to concerns expressed, the Department of Communities and Local Government has indicated that it considers that the relevant Regulation does not apply to "operational" decisions taken by officers. That view is not shared by the Monitoring Officer nor is it supported in any of the many commentaries which have been issued on the Regulations. Counsel instructed by the Association of Council Secretaries and Solicitors has advised that the term "Executive Decision" does cover operational decisions, although thankfully it is unlikely to be interpreted to apply to purely administrative tasks (for example, ordering paper clips).
- 5.11 Whilst the DCLG appear to be in a state of denial about the consequences of the Regulations which they promulgated, it is unsafe to rely upon their interpretation that operational decisions do not fall within the scope of the new requirements. However, to require all officers to make records of all their operational decisions and to publish those decisions on the Council's web-site would be enormously inefficient and unproductive. It is likely that if the Council had to publish a record of all "operational decisions" for Executive functions that would entail publishing particulars in relation to many hundreds of routine decisions per month. For example, it would include deciding to purchase an inexpensive item of equipment for a care home or cancelling a leisure class because of adverse weather conditions. Instead, it is proposed that a middle path be steered and that Corporate Management Team formulate for approval by the Chairman of the Committee criteria as to when officer non-Key Decisions should be recorded and published.

Member Right to Access to Documents

- 5.12 At common law Members have a right of access to Council documents reasonably required for the exercise of their functions but that does not allow a “fishing expedition”. The previous Regulations extended the common law right. The Regulations re-cast those extensions. The right to access documents containing material to be transacted at a public meeting applies now from 5 clear days before the meeting. There is also a general right of access to any document which “contains material relating to any business to be transacted at a private meeting” or to decisions made by individuals (Members or officers) under Executive Arrangements; the documents are required to be available within 24 hours of the meeting or the decision being taken.

Reporting Meetings

- 5.12 The previous Regulations stipulated that “reasonable facilities for journalists” were required to be provided. The Regulations now provide that “any person attending the meeting for the purpose of reporting the proceedings is, so far as practicable, to be afforded reasonable facilities for taking their report”. This amendment has given rise to some press comments about opening up Council meetings to bloggers and such like. However, as one commentator has observed, the new duty probably does not extend to any more than affording access to a desk on which a laptop can be placed. The Regulations do not require Councils to permit recordings to be either recorded or broadcast, though they can choose to do so if they wish.

**6 ADVICE RECEIVED FROM STATUTORY AND OTHER OFFICERS**

Borough Solicitor

- 6.1 The Borough Solicitor is the author of this report.

Borough Treasurer

- 6.2 There are no financial implications directly arising.

Equalities Impact Assessment

- 6.3 Not required.

Strategic Risk Management Issues

- 6.4 Failure to record and publish decisions in accordance with the Regulations could provide scope for challenge by way of Judicial Review. Accordingly, the criteria for publication of decisions should take into account the degree of risk of challenge.

Other Officers

- 6.5 None.

**7 CONSULTATION**

Principal Groups Consulted

- 7.1 None.

Method of Consultation

7.2 Not applicable

Representations Received

7.3 None.

Background Papers

Advice from Counsel to ACSeS.

Weightmans "Tilting at windmills for transparency"

ACSeS guidance – note on the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012

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