



Meeting	Audit and Governance Committee
Date and Time	Wednesday, 29th June, 2022 at 6.30 pm.
Venue	Walton Suite, Winchester Guildhall

**Note:** *This meeting is being held in person at the location specified above. In line with relevant legislation and public health guidance the following arrangements apply. Members of the public should note that a live audio feed of the meeting will be available from the councils website ([www.winchester.gov.uk](http://www.winchester.gov.uk)) and the video recording will be publicly available on the council's YouTube channel shortly after the meeting.*

*For members of the public and "visiting councillors" who are unable to utilise this facility a limited number of seats will be made available at the above named location however attendance must be notified to the council at least 3 clear working days before the meeting. Please note that priority will be given to those wishing to attend and address the meeting over those wishing to attend and observe.*

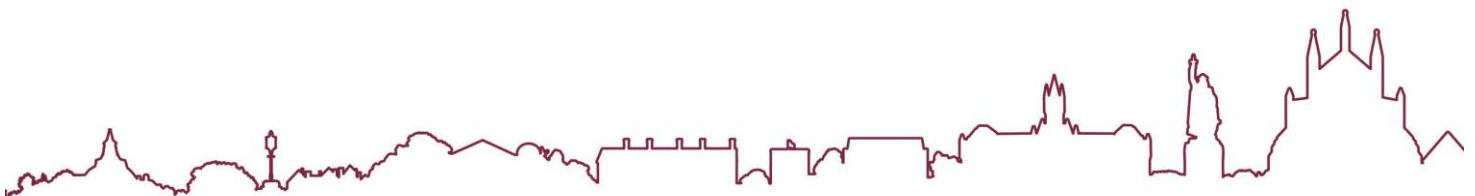
## AGENDA

### PROCEDURAL ITEMS

- 1. Apologies**  
To record the names of apologies given.
- 2. Disclosure of Interests**  
To receive any disclosure of interests from Members and Officers in matters to be discussed.  
*Note: Councillors are reminded of their obligations to declare disclosable pecuniary interests, personal and/or prejudicial interests in accordance with legislation and the Council's Code of Conduct.*
- 3. Appointment of Vice Chairperson for the 2022/23 Municipal Year**
- 4. Chairperson's announcements**

### BUSINESS ITEMS

- 5. Minutes of the previous meeting held on 8 March 2022 (Pages 5 - 10)**



## 6. **Public Participation**

– To receive and note questions asked and statements made from members of the public on matters which fall within the remit of the Committee..

*NB members of the public are required to register with Democratic Services three clear working days before the meeting (see below for further details).*

Members of the public and visiting councillors may speak at this Committee, provided they have registered to speak three working days in advance. Please contact Democratic Services **by 5pm on Thursday 23 June 2022** via [democracy@winchester.gov.uk](mailto:democracy@winchester.gov.uk) or (01962) 848 264 to register to speak and for further details.

7. **Audit Committee work programme 22/23 (AG078) (Pages 11 - 16)**
8. **Workforce report 21/22 (AG079) (Pages 17 - 26)**
9. **Q4 Governance Monitoring (AG077) (Pages 27 - 40)**
10. **Background to Notice of Motion on open & transparency of decision making (AG084) (Pages 41 - 92)**

**L Kirkman**  
**Strategic Director and Monitoring Officer**

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21 June 2022

Agenda Contact: Nancy Graham, Senior Democratic Services Officer  
Tel: 01962 848 235 email: [ngraham@winchester.gov.uk](mailto:ngraham@winchester.gov.uk)

*\*With the exception of exempt items, Agenda, reports and previous minutes are available on the Council's Website [www.winchester.gov.uk](http://www.winchester.gov.uk)*

## **MEMBERSHIP**

**Chairperson:**  
Cutler (Liberal Democrats)

**Vice-Chairperson:**

### **Conservatives**

Bolton  
Godfrey  
Miller

### **Liberal Democrats**

Achwal  
Bronk  
Craske  
Laming

### **Deputy Members**

Cunningham and Lumby

Batho and Radcliffe

Quorum = 3 members

## **TERMS OF REFERENCE**

Audit and Governance Committee – Included within the Council's Constitution (Part 2, Article 9)

## **PUBLIC PARTICIPATION**

A public question and comment session is available at 6.30pm for a 15 minute period. There are few limitations on the questions you can ask. These relate to current applications, personal cases and confidential matters. Please contact Democratic Services on 01962 848 264 in advance of the meeting for further details. If there are no members of the public present at 6.30pm who wish to ask questions or make statements, then the meeting will commence.

*NB members of the public are required to register with Democratic Services three clear working days before the meeting (see below for further details).*

## **FILMING AND BROADCAST NOTIFICATION**

This meeting will be recorded and broadcast live on the Council's website. The meeting may also be recorded and broadcast by the press and members of the public – please see the Access to Information Procedure Rules within the Council's Constitution for further information, which is available to view on the [Council's website](#).

## **DISABLED ACCESS:**

Disabled access is normally available, but please phone Democratic Services on 01962 848 264 or email [democracy@winchester.gov.uk](mailto:democracy@winchester.gov.uk) to ensure that the necessary arrangements are in place.

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## **AUDIT AND GOVERNANCE COMMITTEE**

**Tuesday, 8 March 2022**

Attendance:

Councillors  
Power (Chairperson)

Bentote  
Becker  
Craske

Gemmell  
Godfrey

Others in attendance who addressed the meeting:

Councillors Horrill and Cutler (Cabinet Member for Finance and Service Quality)

Apologies for absence:

Councillors Laming and Miller

[Audio and video recording of the meeting](#)

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1. **APOLOGIES AND DEPUTY MEMBERS**

Apologies were noted as above. There were no deputy members in attendance.

2. **DISCLOSURE OF INTERESTS**

Councillor Craske declared a personal (but not prejudicial) interest with regards to his employment with KPMG, who provided audit services to the Council.

3. **CHAIRPERSON'S ANNOUNCEMENTS**

Councillor Power announced that she would be attending a South East Regional Forum of Audit Committee chairs.

4. **MINUTES OF THE PREVIOUS MEETING OF THE AUDIT AND GOVERNANCE COMMITTEE HELD ON 16 DECEMBER 2021**

RESOLVED:

That the minutes of the previous meeting of the Audit and Governance Committee held 16 December 2021 be approved and adopted.

5. **PUBLIC PARTICIPATION**

No members of the public had registered to speak.

6. **AUDITOR'S ANNUAL REPORT 2020/21 (AG70)**

Kevin Suter and James Stuttaford from the council's external auditors, Ernst & Young LLP (EY) were present at the meeting and introduced the report. Mr Suter explained that there was no new information since the Audit Results Report was presented to the Committee on 11 November 2021 (report AG64 refers).

Mr Suter and Mr Stuttaford responded to members' questions regarding potential risks relating to valuation of property assets.

In response to members' questions, the Strategic Director and Section 151 Officer confirmed that work on the Council's Asset Management Strategy was progressing and the informal meeting between committee members and the Corporate Head of Asset Management would be arranged shortly.

RESOLVED:

That the Annual Audit Letter 2020/21 be accepted.

7. **INTERNAL AUDIT PLAN 2022/23 - 2024/25 (AG74)**

Antony Harvey from the Southern Internal Audit Practice (SIAP) was present at the meeting and introduced the report.

Mr Harvey responded to members' questions including confirming sufficient resources would be allocated to perform the audits planned and the approach to audits within the rapidly changing field of IT.

RESOLVED:

That the Internal Audit Plan for 2022-23 be approved as attached as appendix A to the report.

8. **INTERNAL AUDIT CHARTER 2022/23 (AG75)**

Antony Harvey from the Southern Internal Audit Practice (SIAP) was present at the meeting and introduced the report confirming that the Charter was unchanged since 2018/19 because standards had not changed and it was still fit for purpose.

RESOLVED:

That the Internal Audit Charter 2022-23 be approved as attached as Appendix A to the report.

9. **PLANNING FOR AND THE AUDIT OF THE 2021/22 ACCOUNTS (AG71)**

The Strategic Director and Section 151 officer introduced the report and advised there were no significant changes to previous reports. The council's external auditors had indicated that they would again be unlikely to have completed their audit in time to meet the target publication date for the audited financial statements this year.

The Strategic Director responded to members' questions and confirmed that as there were no significant new areas for the auditors to examine it was expected the fees would remain at a similar level to the current year.

RESOLVED:

That the report in respect of the council's Statement of Accounts for 2021/22 be noted.

10. **GOVERNANCE QUARTERLY UPDATE Q3 2021/22 (AG68)**

The Strategic Director and Monitoring Officer introduced the report and confirmed that eight actions that were reported as overdue at the last meeting of the committee in December have now been completed and an audit by Homes England had been undertaken.

The Strategic Director responded to members' questions regarding declarations of gifts and hospitality by officers and the improvements in the time taken to deal with complaints was welcomed.

The Strategic Director and Section 151 officer and the Service Lead – Corporate Support responded to members' questions regarding disabled facilities grants.

RESOLVED:

1. That the content of the report and the progress against the internal audit management actions be noted.

2. That the outcome of the Homes England audit and the successful completion of the Valley new build scheme be noted

11. **LOCAL CODE OF GOVERNANCE 2022 (AG69)**

The Strategic Director and Monitoring Officer introduced the report and advised that the Annual Governance Statement would be submitted to the July Committee meeting.

RESOLVED:

That the Local Code of Corporate Governance 2022 be approved, as set out in Appendix 1 of the report

12. **RISK MANAGEMENT POLICY 2022/23 (AG073)**

The Service Lead – Corporate Support introduced the report and highlighted that the main changes to the policy were set out in the table at paragraph 12.18 of the report. She confirmed that the council’s risk appetite had not changed.

The Service Lead – Corporate Support and the Strategic Director and Monitoring Officer responded to members’ questions regarding the implementation of the policy in practice and the core principle of “openness” in relation to questions of governance.

Councillor Cutler responded to members’ questions regarding the risk appetite and it was noted that the approach to risk necessarily remained flexible. He stated that a review was proposed for the way risk was defined in committee reports. Antony Harvey (Southern Internal Audit Practice) acknowledged the advanced approach adopted by the council to risk analysis and reporting and how he referenced the Council as an excellent authority in its risk policy and management of risk.

The Committee noted that the report would be considered by Cabinet at its meeting on 9 March 2022.

RESOLVED:

That the Cabinet Member for Finance and Service Quality have regard to the discussion of this Committee on the policy in his presentation of report CAB3338 which would be considered by Cabinet at its meeting on 9 March 2022.

13. **TO CONSIDER RESPONSE TO NOTICE OF MOTION REFERRED TO THIS COMMITTEE BY COUNCIL ON 12 JANUARY 2022**

The Strategic Director and Monitoring Officer introduced the item and draw the committee’s attention to the motion from Full Council (which had been moved by Councillor Godfrey and seconded by Councillor Horrill) and a minute extract of the Council response as set out on the agenda sheet.

Councillor Power stated that following discussions with officers, she was proposing that an informal task and finish group be established to examine the points raised. A draft of the proposed terms of reference for such a group had been circulated to all members of the Committee prior to the meeting.

At the invitation of the Chairperson, Councillor Horrill addressed the Committee as summarised briefly below.

Requested that with regard to the recommendation that proper consultation was undertaken, this should apply whether or not consultation was a formal requirement. The notice of motion sought agreement for the Council to clearly demonstrate a commitment to act in an open and transparent manner, with an expectation in favour of disclosure. Considered that the proposal to set up a task and finish group



in response to the notice of motion would unduly delay its implementation. For example, the core governance principles could be confirmed immediately.

In response to questions, the Strategic Director advised that the proposed terms of reference for a task and finish group were circulated to committee members earlier that day and if this approach was agreed, the conclusions and recommendations of the group would be reported back to the next Committee meeting. However, she clarified that it was a matter for the Committee to decide how it wished to deal with the notice of motion and the establishment of a task and finish group was only one option. It had not been possible for officers to examine all the legal and practical implications of the motion, as had been set out in the amendment to the motion as set out in the minutes, prior to the current meeting, although initial investigations and some work on suggested solutions in some areas had been undertaken.

Following debate, the Committee did not support a task and finish informal group and instead agreed that a report be brought back to an additional meeting of the Committee to be held in late May 2022. It was noted that it might be necessary for a further additional meeting to be scheduled due to the volume of work involved.

The Committee discussed each of the points contained in the amendment to the notice of motion agreed at Council (and reproduced below with numbering added for ease of reference).

*AMENDMENT – Moved by Councillor Cutler and seconded by Councillor Thompson as follows (changes shown in bold): “This Council asks that the Audit and Governance Committee review that the Council commits to clearly demonstrate that it is open and transparent in its decision making, specifically by:*

- a. Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions.*
- b. Within 12 months of a decision being made, publishing without restriction all papers used to support decisions on projects and other major financial transactions that were marked as exempt from publication at the time of the decision unless Full Council decides that these papers should remain exempt for a further 12 months.*
- c. Recording the discussions, submissions and decisions at all meetings attended by any person outside Winchester City Council and, where those meetings relate to any decision made afterwards, for these records to be available to all councillors within 2 weeks and to the public within 12 months of the meeting unless Full Council decides that these papers should remain exempt for a further 12 months.*
- d. Stopping the use of Non-Disclosure Agreements that councillors have been required to sign before being able to see some Council or Committee papers and to cancel any indemnity clauses in such NonDisclosure Agreements previously signed by serving*

*Councillors.*

*And that in their considerations the Audit and Governance Committee review the legality, practicality and resource implications of these specific proposals.”*

Point (a)

Members discussed the requirement to consider the definition of “properly” and also the meaning of “significant decisions.” The possibility of using the existing definition of “key decisions” was suggested but the implications of a requirement to consult on all of these decisions was flagged by the Strategic Director. It was agreed that further work was required to address this point.

Point (b)

The Strategic Director advised that a draft procedure on reviewing exempt reports had been produced and could be submitted to the next Committee for members’ consideration.

Point (c)

Councillor Godfrey clarified that it was intended only to refer to meetings that led to a decision. However, a number of members expressed concerns about the practical implications of this proposal, including with regard to data protection and the resource implications of seeking a decision at council for papers to remain exempt. It was agreed that further work was required to address the issues raised by this point.

Point (d)

The Strategic Director suggested that the Committee could consider the previous examples of when a non-disclosure agreement (NDA) had been used over the previous five years. It was noted that the notice of motion only referred to the use of NDAs in relation to committee reports but a wider examination, as suggested by the Strategic Director, was welcomed where there were confidentiality agreements. It was also suggested that the committee could agree the terms for any future confidentiality agreement and agree a system of regular reporting back on their use through the quarterly reporting mechanisms. Discussion was also had about how officers might assist members through the mod.gov committee system on identifying exempt information more easily. This would be presented to the next meeting.

RESOLVED:

That additional meeting(s) of the Committee be arranged in May/June 2022 to examine further the contents of the Council’s referral of the notice of motion, having regard to the comments summarised in the minute above.

The meeting commenced at 6.30 pm and concluded at 9.00 pm

Chairperson

REPORT TITLE: AUDIT AND GOVERNANCE COMMITTEE WORK PROGRAMME  
2022/23

29 JUNE 2022

REPORT OF CABINET MEMBER: CLLR MARGOT POWER – CABINET MEMBER  
FOR FINANCE AND VALUE

Contact Officer: Lisa Kirkman/Richard Botham Tel No: 01962 848 501 Email  
[lirkman@winchester.gov.uk/rbotham@winchester.gov.uk](mailto:lirkman@winchester.gov.uk/rbotham@winchester.gov.uk)

WARD(S): ALL

## PURPOSE

This report sets out the work programme for the Committee for the 2022/23 municipal year.

## RECOMMENDATIONS:

That the Audit and Governance Committee Work Programme for 2022/23 be approved.

IMPLICATIONS:1 COUNCIL PLAN OUTCOME

- 1.1 The setting of a work programme for the Committee for the coming municipal year supports the Council's approach to delivering efficient services.

2 FINANCIAL IMPLICATIONS

- 2.1 There are no financial implications arising from this report.

3 LEGAL AND PROCUREMENT IMPLICATIONS

- 3.1 None.

4 WORKFORCE IMPLICATIONS

- 4.1 None.

5 PROPERTY AND ASSET IMPLICATIONS

- 5.1 None.

6 CONSULTATION AND COMMUNICATION

- 6.1 The Head of the Southern Internal Audit Partnership has been consulted on the proposed work programme as set out in Appendix 1.

7 ENVIRONMENTAL CONSIDERATIONS

- 7.1 Not applicable.

8 PUBLIC SECTOR EQUALITY DUTY

- 8.1 The work programme for the Committee will take notice of recommendations by the newly formed Equality, Diversity and Inclusion Members' Forum and be updated to include reports arising from the identification of equality issues that impact on the town area.

9 DATA PROTECTION IMPACT ASSESSMENT

- 9.1 None.

10 RISK MANAGEMENT

<b>Risk</b>	<b>Mitigation</b>	<b>Opportunities</b>
Financial Exposure	n/a	n/a
Exposure to challenge	n/a	n/a
Innovation	n/a	n/a

Reputation	Ensure that the Committee is undertaking its role and fulfilling its responsibilities and function	Provides the evidence that demonstrates that the Committee is carrying out its duties and responsibilities in an open and transparent way.
Achievement of outcome		
Property	n/a	n/a
Community Support	n/a	n/a
Timescales	n/a	Having a clear work programme allows the Committee to ensure that it and the Council meets its responsibilities in a timely manner (e.g. approval and publication of the accounts within statutory deadlines.
Project capacity	n/a	n/a
Other	n/a	n/a

## 11 SUPPORTING INFORMATION:

- 11.1 The Appendix to this Report sets out the work programme for the coming municipal year for the Audit and Governance Committee.
- 11.2 The programme includes a forward look at the reports that will be presented to the Committee during the coming year supporting its purpose of providing independent assurance to members of the adequacy of the internal control environment and risk management framework.

## 12 OTHER OPTIONS CONSIDERED AND REJECTED

- 12.1 None.

### BACKGROUND DOCUMENTS:-

#### Previous Committee Reports:-

None.

#### Other Background Documents:-

None.

### APPENDICES:

Appendix 1 – Audit and Governance work programme 22-23

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## WINCHESTER CITY COUNCIL – AUDIT & GOVERNANCE COMMITTEE WORK PROGRAMME – UPCOMING ITEMS

	Item	Lead Officer	Date of Meeting
1	Response to notice of motion on open & transparency of decision making	Lisa Kirkman	29 Jun 2022
2	Workforce report 21/22	Robert O'Reilly	29 Jun 2022
3	Audit Committee work programme 22/23	Nancy Graham	29 Jun 2022
4	Q4 Governance Monitoring	Simon Howson	29 Jun 2022
5	Draft annual financial report 21/22	Liz Keys	21 Jul 2022
6	Treasury Management outturn 21/22	Liz Keys	21 Jul 2022
7	External Audit Plan 22/23	Liz Keys	21 Jul 2022
8	Annual Governance Statement	Lisa Kirkman	21 Jul 2022
9	Certification of Claims and Returns Annual Report 2021/22	Liz Keys	21 Jul 2022
10	Annual internal audit report & opinion 21/22	Liz Keys	21 Jul 2022
11	Monitoring Officer's annual report	Lisa Kirkman	27 Sep 2022
12	Governance quarterly update – Q1 22/23	Simon Howson	27 Sep 2022
13	Governance quarterly update 22/23 – Q2	Simon Howson	10 Nov 2022
14	Treasury management mid-year monitoring 22/23	Liz Keys	10 Nov 2022
15	Annual financial report 21/22	Liz Keys	10 Nov 2022
16	Audit results report for the year ending 21/22	Liz Keys	10 Nov 2022
17	Final report and pay policy statement 23/24	Robert O'Reilly	10 Nov 2022
18	Risk Management Policy 23/24	Amy Tranah	2 Mar 2023
19	Local Code of Corporate Governance	Lisa Kirkman	2 Mar 2023
20	Governance quarterly update 22/23 – Q3	Simon Howson	2 Mar 2023
21	Planning for and audit of the 22/23 accounts	Liz Keys	2 Mar 2023
22	Internal audit charter 23/24	Liz Keys	2 Mar 2023
23	Internal audit plan 23/24 – 24/25	Liz Keys	2 Mar 2023
24	Auditors annual report 21/22	Liz Keys	2 Mar 2023
25	Constitution review (date tbc)	Lisa Kirkman	

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REPORT TITLE: - WORKFORCE REPORT 2021/22

29 JUNE 2022

REPORT OF CABINET MEMBER: Cllr Margot Power Cabinet Member for Finance and Value

Contact Officer: Robert O'Reilly (Service Lead HR) Tel No: 07890732036  
Email ROReilly@winchester.gov.uk

WARD(S): ALL

PURPOSE

To provide an overview of the workforce of the Council and a summary of key HR activities for the year ending 31 March 2022.

RECOMMENDATIONS:

1. That the report be noted.

IMPLICATIONS:1 COUNCIL PLAN OUTCOME

- 1.1 The performance of the Council's workforce is critical to the delivery of all outcomes set out in the Council Plan.

2 FINANCIAL IMPLICATIONS

- 2.1 None.

3 LEGAL AND PROCUREMENT IMPLICATIONS

- 3.1 None.

4 WORKFORCE IMPLICATIONS

- 4.1 Employees are critical to the delivery of the council's services and priorities and monitoring and reporting on key employment metrics enables proactive employment practises.

5 PROPERTY AND ASSET IMPLICATIONS

- 5.1 None.

6 CONSULTATION AND COMMUNICATION

- 6.1 This report is for information only and therefore no consultation or communication is required.

7 ENVIRONMENTAL CONSIDERATIONS

- 7.1 None.

8 PUBLIC SECTOR EQUALITY DUTY

- 8.1 There is no differential impact on a specified group as all HR matters are applied consistently.

- 8.2 As required nationally, the council reports on any potential discrepancies in pay, based on gender ("Gender Pay Gap" reporting); in accordance with the statutory timeframe.

9 DATA PROTECTION IMPACT ASSESSMENT

- 9.1 This report does not include any confidential data and therefore a data protection impact assessment is not required.

10 RISK MANAGEMENT

<b>Risk</b>	<b>Mitigation</b>	<b>Opportunities</b>
Financial Exposure <i>Failure to apply pay principles and rules fairly and consistently leading to discrimination and/or legal challenge</i>	Consistent application of pay principles and rules.	Positioning the council as an Employer of Choice.
Exposure to challenge <i>Failure to comply with statutory reporting requirements, resulting in adverse local media coverage or legal challenge</i>	Statutory reporting is embedded within HR's annual work programme, and within the committee work programme where appropriate, to ensure publication within statutory timeframes.	
Reputation <i>Failure to deliver public services and the Council Plan due to reduced workforce capacity, leading to public criticism and/or adverse local media coverage</i>	Ongoing workforce monitoring to enable early identification and remedial action where recruitment difficulties and/or high sickness levels could impact on the Council's ability to deliver public services and the Council Plan	

11 SUPPORTING INFORMATION:

- 11.1 The purpose of this report is to provide the Audit and Governance Committee with an overview of the workforce of the Council and a summary of key HR activities for the year 1 April 2021 to 31 March 2022.
- 11.2 This is the second workforce report to be considered by the Audit and Governance Committee since it assumed responsibility for the human resources functions of the Council from the former Personnel Committee.
- 11.3 Appendix 1 provides a range of indicators supporting the report commentary relating to:
- (i) the Council's staff establishment
  - (ii) recruitment and turnover
  - (iii) sickness absence

## (iv) equality

Tables, charts and graphs in Appendix 1 are as at 31 March 2022 unless stated otherwise and have been extracted from the Council's Access HR system and separate monitoring records.

**The Council's staff establishment**

- 11.4 As at 31 March 2022, the Council employed 431 permanent and fixed-term staff. This was a decrease of 1.1% headcount compared to March 2021.
- 11.5 Staff numbers by headcount and Full-Time Equivalent (FTE), distribution by grade and contract type metrics are provided in Appendix 1. Headcount is the actual number of staff employed by the council whereas FTE is the total number of hours worked by all staff (headcount) divided by the standard working week of 37 hours.

**Recruitment and turnover**

- 11.6 There were 60 external appointments, made up of 44 permanent employees and 16 employees (including 1 apprentice) on fixed-term contracts.
- 11.7 There were 60 leavers (46 permanent employees and 14 employees on fixed-term contracts). Reasons for leaving are shown in Appendix 1.
- 11.8 Staff who both started and left within the same year are included in the figures above.
- 11.9 Total annual turnover (i.e. employees leaving the Council for all reasons) was 14.5% as compared to 20% in 2020/21.
- 11.10 The average length of service was 10 years.

**Sickness absence**

- 11.11 Sickness absence continues to be closely monitored. Reports on sickness absence and completion of return to work interviews are reviewed with the Strategic Directors on a quarterly basis.
- 11.12 The average number of days of sickness per employee rose to 6.76 days from 5.95 days in 2020/21 explained further in 11.15 below. The 2021/22 absence figures represent a fall from pre-pandemic levels of 7.51 days in 2019/20.
- 11.13 The current rates are below the average sickness rate for the public sector of 8.2 days per employee in 2021 as reported by XpertHR.
- 11.14 The pandemic had caused a swing towards a higher proportion of long term sickness (20 days or more) vs short term sickness in 2020/21, due to less seasonal illness and working from home enabling continued productivity with minor ailments. However, we saw a reversal of this throughout 2021/22 to more typical pre-pandemic levels as Covid 19 restrictions were lifted. This

was also evident in the absence reasons as we saw a re-entry of historically common absence reasons such 'Infections including cold and flu' into the top 5 most common sickness reasons recorded for the year.

- 11.15 Sickness rates relating to COVID 19 have broadly peaked and troughed in accordance with national rates and the roll out of the vaccination programme – with the most days lost for COVID 19 sickness absence since the start of the pandemic occurring in March 2022. However, the average length of time per COVID-19 sickness has reduced and subsequently flattened since December 21 – this is likely explained by the Omicron variant's increased transmissibility but milder symptoms.
- 11.16 'Mental health – Personal' was consistently the top sickness reason across the year at 24.25%, and if mental health for all reasons (personal, work and reason not stated) are combined they account for 37% of all sickness, an increase of 1% from last year.
- 11.17 Whilst mental health related absence rates are concerning, they are not surprising given wide reporting of the effect of the pandemic on the nation's mental health. HR continue to lead on a number of mental health initiatives including mental health first aiders, an externally provided counselling service and an Employee Assistance Programme via the corporate health plan.
- 11.18 HR continues to support managers to manage sickness absence within their teams including referral to an external occupational health provider as required.
- 11.19 A revised absence management policy has been published and HR will run a series of sickness absence management workshops for managers in the autumn.

### **Equality**

- 11.20 The Council's gender profile of 62% female and 38% male closely aligns with the public sector as a whole as reported by the ONS (65% female and 35% male EMP13: Employment By Industry January- March 2022). The Council reported a 15.5% median gender pay gap as at the snapshot date of 31 March 2021. Median average percentages are the way the government reports on gender pay gap data across the economy.
- 11.21 HR will continue to encourage staff to update their ethnicity and disability status, which is disclosed on a voluntary basis, to facilitate equality monitoring and reporting. Ethnicity data for the 40% of staff who have disclosed their ethnicity as at 31 March 2022 is included in Appendix 1. Meaningful analysis is not possible to be published in this report from the disability data available as it could possibly result in identification of individual employees.

## HR Update

- 11.22 At the request of the A&G Committee at the November 21 meeting, a Workforce Matters Task & Finish sub-group of selected members met three times over January – March 22 to consider a number of workforce matters and provide recommendations to ELB. The following recommendations were submitted to ELB:
- Recruitment - to trial a “CV first” approach for specific roles and to establish on the WCC website front (home) page a prominent, separate tile to advertise job vacancies
  - Apprenticeships - to submit a budget bid for one supernumerary apprentice to start in September 2023
  - Appraisals - HR to review the appraisal process and form for use in April 2023
- 11.23 HR organised an employee attitude survey to find out how employees feel about various aspects of their working lives at the council and to inform senior managers and elected members how engaged employees are with their work and the Council as a whole. Due to close on 1 July, the survey results will be discussed with ELB and Members (details to be discussed at A&G on 29<sup>th</sup> June 2022).
- 11.24 HR continues to deliver a variety of on-line and workplace resources to support staff wellbeing and mental health.
- 11.25 HR delivered suicide awareness training to 65 employees in the last quarter of 2021 in response to increased suicide related safeguarding referrals. The training provides officers with the confidence and skills to respond to someone at increased risk of suicide.
- 11.26 HR is reviewing and updating HR policies and has recently published a new Menopause Policy and a revised Absence Management Policy.

## 12 OTHER OPTIONS CONSIDERED AND REJECTED

- 12.1 This report is for information only. No decisions are required therefore consideration of other options was not required.

## BACKGROUND DOCUMENTS:-

### Previous Committee Reports:-

AG63 Workforce Report 2020/21 11 November 2021

### Other Background Documents:-

None

## APPENDICES:

Appendix 1 – Workforce Report 2021/22 Data

## Appendix 1

### Workforce Report 2020/21 Data

#### Establishment

Table 1 – Staff numbers by headcount and Full-time Equivalent (FTE)

	Headcount	% reduction	FTE	% reduction
<b>March 2021</b>	436	1.1%	392.06	0.7%
<b>March 2022</b>	431		389.28	

Table 2 – Headcount of staff by grade

Pay Grade	Headcount
<b>Apprentice Scale 3</b>	0
<b>Degree Apprentice Scale 4</b>	1
<b>Scale 3</b>	84
<b>Scale 4</b>	121
<b>Scale 5</b>	82
<b>Scale 6</b>	81
<b>Scale 7</b>	23
<b>Scale 8</b>	19
<b>Scale 9</b>	8
<b>Scale 10</b>	8
<b>Scale 12</b>	3
<b>Chief Executive</b>	1
<b>Total</b>	431

Table 3 – Contract Type

<b>Full time (37 hours)</b>	75%
<b>Part-time</b>	25%
<b>Permanent contract</b>	94%
<b>Fixed-term contract</b>	6%

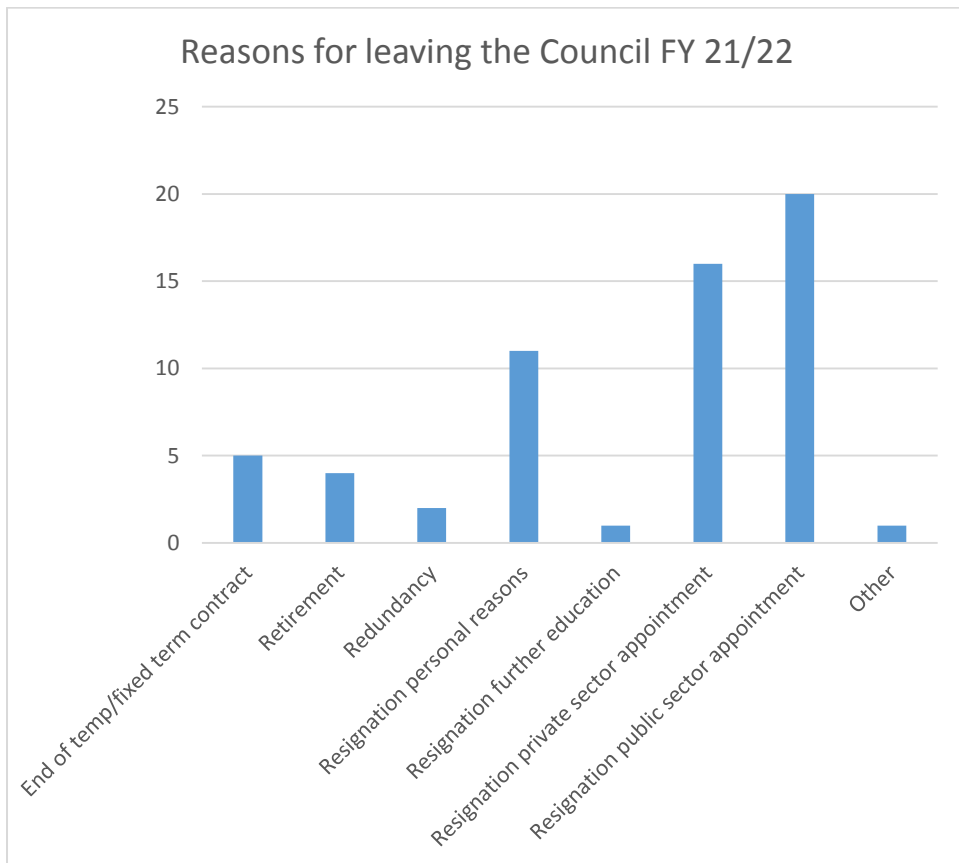
**Sickness**

Table 4 - Top 5 sickness absence reasons (averaged over April 21 – March 22)

Sickness Reason	Percentage of total annual sickness	Previous Year's ranking (out of 19)	Direction of travel
Mental Health – personal	24.25%	1	↔
COVID-19 Coronavirus	13.48%	2	↔
Mental Health – work-related	9.91%	7	↑
Stomach, liver, kidney & digestion	9.79%	5	↑
Infections incl cold and flu	8.54%	8	↑

**Recruitment and Turnover**

Table 5 – Reasons for leaving the Council





**Equality**

Table 6 – Age profile

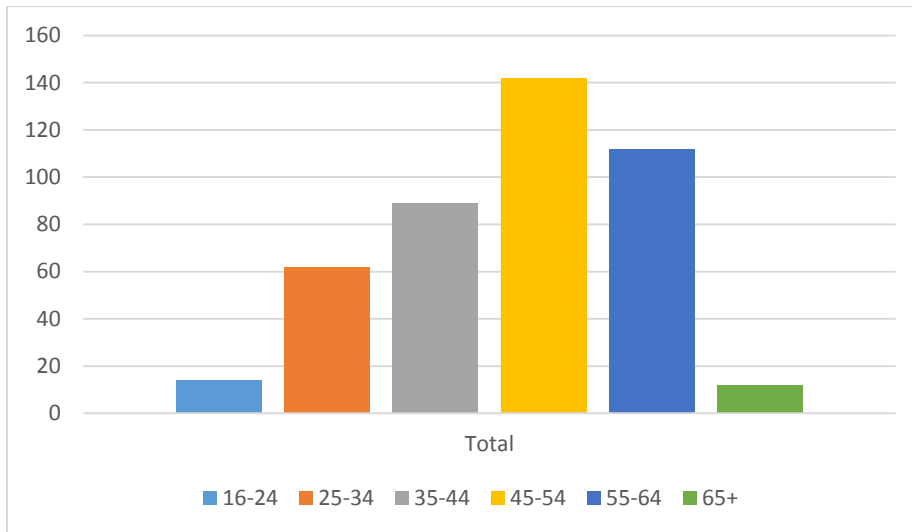
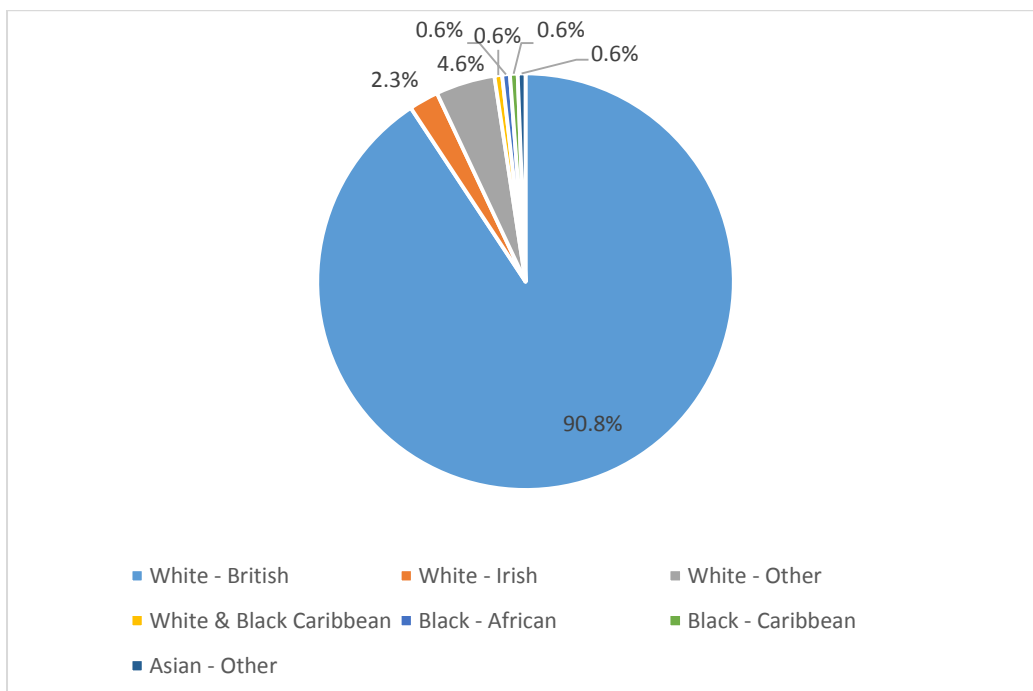


Table 7 – Ethnicity profile as at March 2022



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REPORT TITLE: Q4 GOVERNANCE MONITORING

29 JUNE 2022

REPORT OF CABINET MEMBER: CLLR POWER – CABINET MEMBER FOR FINANCE AND VALUE

Contact Officer: Lisa Kirkman Tel No: 01962 848 501 Email  
lkirkman@winchester.gov.uk

WARD(S): ALL

PURPOSE

To provide members of the Audit and Governance Committee with a summary overview of the key issues in respect of governance during the fourth quarter of the 2021/22 financial year.

RECOMMENDATIONS:

1. That the Audit and Governance Committee notes the content of the report, the progress against the internal audit management actions and raises any issues with the cabinet member

## IMPLICATIONS:

### 1 COUNCIL PLAN OUTCOME

- 1.1 This summary document supports the council to be open and transparent by reporting the effectiveness of its governance framework and highlighting areas of weakness or issues of concern

### 2 FINANCIAL IMPLICATIONS

- 2.1 There are no financial implications.

### 3 LEGAL AND PROCUREMENT IMPLICATIONS

- 3.1 There are no legal or procurement implications arising from the content of this report.

### 4 WORKFORCE IMPLICATIONS

- 4.1 None.

### 5 PROPERTY AND ASSET IMPLICATIONS

- 5.1 None.

### 6 CONSULTATION AND COMMUNICATION

- 6.1 Consultation on the content of the report has been undertaken with members of the Executive Leadership Board (ELB) and Corporate Heads of Service. Owners of actions included in the internal audit reports that are referred to in this report have provided updates on the progress achieved.

### 7 ENVIRONMENTAL CONSIDERATIONS

- 7.1 None

### 8 PUBLIC SECTOR EQUALITY DUTY

- 8.1 None arising from the content of the report, although officers will need to consider the council's Public Sector Equality Duty and if required complete an Equality Impact Assessment on any specific recommendations or future decisions to be made. This report is not making any decisions and is for noting and raising issues only

### 9 DATA PROTECTION IMPACT ASSESSMENT

- 9.1 None required.

### 10 RISK MANAGEMENT

- 10.1 This report presents a summary update on how the council is performing against the governance processes and procedures that are in place and set out in the Risk Management Policy 2022/23 and Local Code of Corporate Governance. Independent assurance provided by the council's internal and external auditors evidence where there are weaknesses in the council's governance arrangements and are highlighted in this report.

## 11 SUPPORTING INFORMATION:

- 11.1 This report sets out the summary information in respect of the fourth quarter of the 2021/22 financial year concerning governance.

### ***Annual Governance Statement***

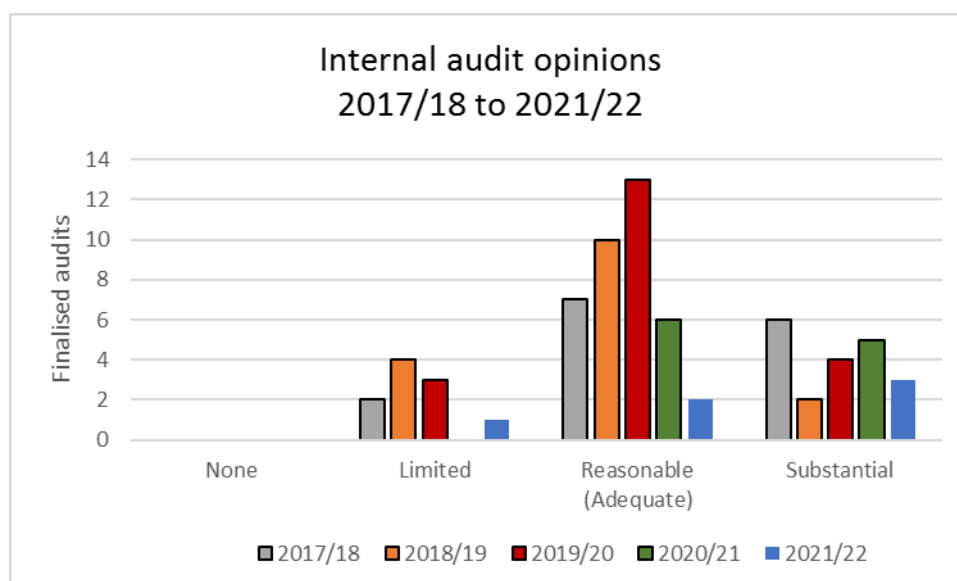
- 11.2 Progress against the actions included in the 2020/21 Annual Governance Statement is included in appendix 1 to this report.

### ***Declarations of gifts and hospitality***

- 11.3 During the period of 1 January 2022 to 31 March 2022 there were no declarations of gifts and hospitality made by Members or officers in accordance with the policy.

## 12 INTERNAL AUDIT ASSURANCE REPORTS

- 12.1 The graph below shows the assurance levels of the completed internal audits that were included in the audit plans in the years 2017/18 to the current year; 2021/22.



- 12.2 There have been no published audit reports that concluded with a 'no assurance' opinion.

- 12.3 Since the last Audit and Governance Committee meeting on 8 March 2022 there have been no final audit reports issued however draft reports have been issued for the six remaining audits that were included in the approved 2021/22 audit plan. These reports will be issued once finalised. An update on the progress of these final reports will be provided in next quarterly governance monitoring report.
- 12.4 The Annual Internal Audit Report and Opinion 2021/22 which provides the Audit and Governance Committee with the Chief Internal Auditor's opinion on the adequacy and effectiveness of the council's framework of governance, risk management and control for 2021/22 will be included on the agenda for the next meeting of this committee on 21 July.
- 12.5 This report covers the final quarter of the 21/22 financial year and the Annual Internal Audit Report and Opinion replaces the quarterly Internal Audit Progress report that is normally appended to this report.

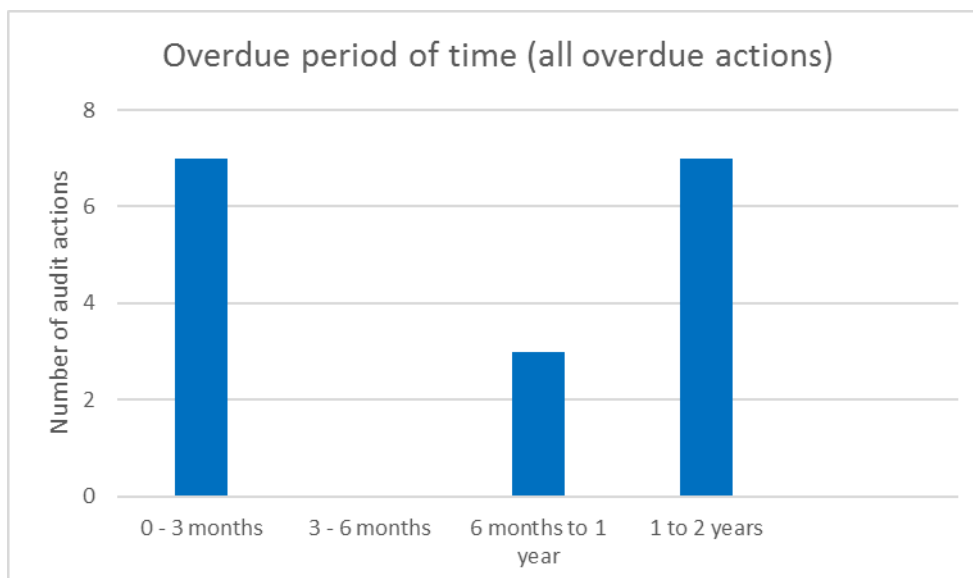
#### ***Internal Audit Management Tracking***

- 12.6 Progress against the management actions included in the internal audit reports are regularly reviewed by corporate heads of service, service leads and Executive Leadership Board (ELB).
- 12.7 A summary table showing the status of these actions is reported on a quarterly basis. These management actions are kept under regular review to assess where actions might become superseded or obsolete due to external or internal factors.
- 12.8 During the time of the COVID-19 pandemic this had an impact on staff capacity with a number of staff actively supporting the council's response. For these reasons there has been some slippage in the completion due date of a number of audit actions.
- 12.9 To assist member's understanding an additional narrative is included in the table to provide a brief explanation of the progress being made against the overdue audit actions and the reasons for the delay in completion, including where the delay is caused by reduced staff capacity owing to the response to the COVID-19 pandemic.
- 12.10 There are currently 17 overdue audit actions with six being high priority. This is four actions more than were reported as overdue at the last meeting of the committee in March and these largely relate to the actions from the Disabled Facilities Grants audit for which an update is given in paragraph 12.14.

Audit Review	Report Date	Audit Sponsor	Assurance Opinion	Management Actions ('High Priority')					LOW	MEDIUM	HIGH
				Reported	Not Accepted	Pending	Cleared	Overdue			
<b>Capital Programme &amp; Monitoring</b>	18/02/20	SDR	Reasonable	4 (0)	0 (0)	0 (0)	3 (0)	1 (0)			
<b>Progress update:</b> The one overdue action relates to the review and updating of the council's Asset Management Plan. The draft Asset Management Strategy is currently being prepared for consideration by Cabinet in September 22.										1	
<b>Partnerships 19/20</b>	09/09/20	SDR	Limited	12 (2)	0 (0)	0 (0)	7 (2)	5 (0)			
<b>Progress update:</b> Five overdue actions remain and these are being progressed by the Corporate Head of Economy and Community. Following a briefing to senior managers in November, work is ongoing with the support of partner lead officers including to understand who our partnerships are, how they are governed, the value they provide and the benefits they bring to the council and the communities of the Winchester district.										5	
The creation of a partnership performance reporting framework aligned to the Council Plan priorities and update of the partnership register including an annual assessment as to continued benefit / appropriateness will be reviewed in 2022/23 financial year.											
<b>Building Control</b>	24/09/20	SDR	Reasonable	10 (0)	0 (0)	2 (0)	7 (0)	1 (0)			
<b>Progress update:</b> One overdue outstanding action relating to carrying out a survey relating to KPI 06 owing to reduced management staffing within Building Control Team. This will be completed when staffing levels allow.										1	

Audit Review	Report Date	Audit Sponsor	Assurance Opinion	Management Actions ('High Priority')					LOW	MEDIUM	HIGH
				Reported	Not Accepted	Pending	Cleared	Overdue			
<b>Health and Safety 20/21</b>	22/10/20	SDR	Reasonable	17 (4)	0 (0)	0 (0)	14 (3)	3 (1)			
<b>Progress update:</b> Good progress is now being made by the new Health and Safety Advisor with a further 4 actions having been completed since the last meeting of this committee on 8 March 2022. Further information is given in paragraph 12.11 below											1
<b>IT Business Continuity &amp; Disaster Recovery</b>	06/07/21	SDR	Reasonable	4 (0)	0 (0)	0 (0)	1 (0)	3 (0)			
<b>Progress update:</b> There are three overdue actions, of which two relate to the undertaking an exercise to test disaster recovery scenarios which has been delayed owing to resources being diverted to support the council's response to COVID. The third action relates to a review of options for cloud storage which would IT disaster recovery. All three actions are actively being progressed with a BCP exercise being planned for November 2022.										3	
<b>Disabled Facilities Grants</b>	21/12/21	SDR	Limited	16 (0)	0 (0)	0 (0)	10 (0)	6 (5)			
<b>Progress update:</b> Work is ongoing to complete the audit actions and in particular the updating of the Disabled Facilities Grants Policy and Procedure. Discussions have taken place with other Hampshire local authorities on inclusion of other being included within the Policy brining consistency in approach. A further update is included in para 12.15										1	5





### ***Health & Safety***

12.11 Progress against the agreed management actions continues and since the last meeting of the committee four more actions included in the Health and Safety internal audit have been completed.

12.12 Quarterly Health and Safety monitoring reports are now being presented to Executive Leadership Board (ELB) for consideration and any significant immediate risks or concerns are being reported directly to ELB so that they can be responded to quickly.

12.13 Further progress achieved during the last quarter is as follows:

- Risk assessment reviews to be completed for all areas of the business by end June 2022.
- H&S Advisor confirming in June with Service Leads in higher risk services that agreed work needed was achieved by end of May 2022.
- Health & Safety Advisor working with all service leads to ensure Health & Safety risk assessments are embedded into business as usual and reviewed on a regular basis and that any significant risks are identified.
- Health & Safety Advisor has been working with the Policy Team to update the Health & Safety homepage on the intranet. The new corporate intranet is anticipated to go live in June however the H&S home page and Knowledge Hub update for the new intranet is complete, with only most recent versions of documents included. A new easily accessible location on SharePoint on new intranet site has been agreed for the latest risk assessments to be displayed. This link will now be shared with all Service Leads to ensure that they transfer their risk assessments to this location.

12.14 Completion of the remaining overdue high-priority action is expected by the end of June and an update will be provided in the next quarterly governance monitoring report.

### ***Disabled Facilities Grants***

- 12.15 Progress against the agreed audit management action points arising from the internal audit review of disabled facilities grants continues including the reviewing and updating of the policy and procedures and ensuring that they are aligned with current practices.
- 12.16 Work has been ongoing since the outcome of the audit and a lot of work was completed by December 2021. The Private Sector Housing team then became aware new government guidance was being produced due for publication in February 2022 and would contain information on a new DFG grant limit and also how means tests were to be completed. This would have a huge impact on our policy so we took the decision not to finalise the policy and procedures until this guidance was available. Unfortunately, the launch of this guidance was delayed and it was not published until late March 2022. The content of the guidance had to be assessed and understood, hence the delay in finalising the policy. This has been exacerbated by high work load within the PSH Team. We plan to revisit this late June / early July as a team, to address the few changes that will need to be made to meet the new guidance.
- 12.17 Due to changing HCC practices this part of the policy is no longer relevant and will be reflected in the amended policies and procedures.
- 12.18 A new 'Process of Referral' document has been added to the new policy and procedures as an appendix.
- 12.19 In the new Disabled Facilities Grants policy an interim payment framework has been detailed which was agreed with colleagues in procurement.
- 12.20 An update to the list of approved contractors is currently being undertaken in consultation with Hampshire County Council's Strategic Procurement Team to establish a new list of contractors capable of undertaking DFG installation work for level access showers and general building works and should be completed by the end of July 2022.
- 12.21 Evidence of consultation with Housing Services going forward will be documented and the requirement incorporated into the new policy, in addition to a statement of rationale for any additional works should they be required.
- 12.22 The new policy and procedures set out how the grant will be processed with additional quick reference explanatory notes. The publication of the new Disability Facilities Grant Guidance in March 2022 has identified a slight change of focus of the grant to facilitate hospital discharges. This has been reflected in some of the referrals PSH have recently received for none standard DFG works. As a result a meeting has been arranged with the area representative from Foundations to gain some advice and guidance of how to manage these requests which need to be dealt with in a much timelier manner. The meeting is due to take place on 28/06/22 and following this and any adjustments required the policy will nearly be completed.

**Information Governance – Records Retention 2020/21**

- 12.23 Included in the Internal Audit Plan for 2020/21, a review was undertaken of information governance and in particular records retention. The final audit report was issued on 4 March 2022 and offered a limited opinion.
- 12.24 The audit set out to review the effectiveness of the council's records and retention policy and procedures ensuring they were defined, documented and maintained to guide staff and inform stakeholders in line with the requirements of the UK General Data Protections Regulations (UK GDPR).
- 12.25 There were a number of areas assessed where the current controls are working well and found to be effective and included the presence of an effective Information and Technology (IMT) Security and Conduct Policy being in place and the requirement for all staff to have signed it. Also that staff have access to training courses and material to promote their understanding of the requirements of their roles and responsibilities within data protection (GDPR) records retention. The audit also found that archived paper records are secured in a safe location with only appropriate personnel being able to access them.
- 12.26 However, the audit review also observed a number of areas where governance, risk management and controls could be improved. To mitigate these risks, management actions have been agreed and when completed will mitigate the identified risks.
- 12.27 Across six business areas 14 management actions have been agreed, of which four have been defined as being high priority. None of the actions were classed as being overdue at the end of the quarter 4 (31 March 2022) and two have already been completed.
- 12.28 **Retention and Disposal Policy** - The auditor observed that it was not possible to confirm when the current Retention and Disposal Policy was last updated or approved. Work has now commenced on reviewing and updating the Policy with a target date of the end of July for the Policy to be considered and endorsed by Executive Leadership Board (ELB) so that it may be published and guidance rolled out across the organisation.
- 12.29 Further actions relate to the archiving of records and documents and the procedures will be updated following endorsement of the updated Retention and Disposal Policy.
- 12.30 A number of actions relate to the retention of records stored within the business systems that the council uses on a daily basis with the overarching aim of mapping and aligning the retention schedule to content and indexing of records in these systems and in particular the council's corporate document management system; SharePoint. This council-wide exercise will include multiple systems and take several months to complete and has a target date of early 2023.

- 12.31 Updates on the progress achieved against the actions will be provided to future meetings of this committee until all the actions have been completed.

### ***Risk Management***

- 12.32 The council's Risk Management Policy 2022/23 sets out a timetable for this committee to review the policy and corporate risks (section 11 of the Risk Management Policy). At its meeting on 8 March 2022 the committee reviewed and gave comments to the Cabinet Member on the Risk Management Policy and Corporate Risk Register for 2022/23. The Q1 22/23 Governance Monitoring report will provide the committee with an update on Risk Management and the Corporate Risk Register.
- 12.33 A Risk Management workshop has been arranged for Cabinet and members of Audit and Governance Committee for 14 July 2022.

### ***Code of Conduct Complaints***

- 12.34 The Audit and Governance Committee has two sub-committees including the Standards Sub-Committee, whose purpose is to consider investigation reports, in respect of Code of Conduct Complaints, that have been referred to it by the Monitoring Officer.
- 12.35 Appendix 2 provides brief details of the Code of Conduct complaints that have been received and where the assessment (or investigation) into the complaint has concluded, a brief update on the outcome.

## **13 OTHER OPTIONS CONSIDERED AND REJECTED**

- 13.1 None.

### **BACKGROUND DOCUMENTS:-**

#### **Previous Committee Reports:-**

AG068 Governance Monitoring Quarterly update Q3 2021/22, 8 March 2022

#### **Other Background Documents:-**

None.

### **APPENDICES:**

Appendix 1 – Annual Governance Statement 2020/21 – progress update

Appendix 2 – Code of Conduct complaints

**Annual Governance Statement 2020/21 – Action Plan update – June 2022**

No.	Issue	Actions	Progress Update	Lead Officer	Target Date	Current Status
1.	<b>Partnership working</b> – the need to ensure that the council maintains effective partnership working	Review partnerships to ensure all required documents are in place and up to date	Initial partnership register is complete.  Second stage review of documentation due to be completed during the summer of 2022.	Corporate Head of Engagement	September 2020	<b>RED</b>
		Annual report covering the performance of key partnerships scheduled to be considered at The Scrutiny Committee.	An overall report on partnerships is being prepared and will be completed during the summer of 2022.	Corporate Head of Engagement	September 2020	<b>RED</b>
		Complete Partnership Working Guide for Managers	Partnership Working Guide for managers has been produced and presented to ELB for approval and is now signed off.	Corporate Head of Engagement	September 2020	<b>COMPLETE</b>
3.	<b>Equality Impact Assessments (EqIA)</b> reviewing the current arrangements in place to enable the council to meet the requirements of the Equalities Act 2010	Review and update current EqIA policy, guidance and templates and brief out to staff ensuring that the council meets the requirements of the Equalities Act 2010	Refreshed EqIA policy presented to ELB on 10 November alongside action plan and template. The updated Policy was considered by this Committee on 16 December 2021 before being adopted by cabinet on 25 January 2022. Training workshops held for members and officers during March.	Service Lead – Legal	30 September 2021	<b>COMPLETE</b>

**Code of conduct complaints**

A. Code of Conduct Complaints received by office of the Monitoring Officer since previous meeting of Audit & Governance Committee and update of those previously reported - as at **31 March 2022**.

Date contact first made with Monitoring Officer	Complaint against district or parish/town councillor	Details
30 September 2020	District Councillor	Complaint received 30 September 2020 though insufficient information to progress initially. Resolved and progressed/investigated. Hearing must now be progressed - complainant had been unable to attend due to personal circumstances for several months.
5 October 2020	Parish Councillors	Complaint withdrawn and resubmitted 5 October 2020 – further, extensive complaints received over several months. Investigation report finalised and has been reviewed by the IP. Next step release to Parish Council – DPA implications need consideration.
11 February 2021	District Councillors	Recommendation received from Independent Person – to complete report.
8 September 2021	Parish Councillor	Under review by Monitoring Officer (previously heard by Standards Sub-Committee).
8 November 2021	Entire Parish Council	Under assessment by Monitoring Office (Independent Person advice received).  Under assessment by Monitoring

<b>Date contact first made with Monitoring Officer</b>	<b>Complaint against district or parish/town councillor</b>	<b>Details</b>
13 November 2021	Parish Councillor	Office. (Independent Person advice received).
24 January 2022	City Councillor	Under assessment by Monitoring Office. (Independent Person advice sought).
28 January 2022	Parish Councillors	Under assessment by Monitoring Office. (Independent Person advice sought).
1 February 2022	City/Parish Councillors	Under assessment by Monitoring Office. . (Independent Person advice sought).
18 February 2022	Parish Councillor	Under assessment by Monitoring Office.
17 March 2022	Parish Councillor	Under assessment by Monitoring Office.

B. Issues raised and discussed with the office of the Monitoring Officer since the previous meeting of Audit & Governance Committee - as at 31 March 2022.

	<b>Number of issues raised</b>	<b>Comments</b>
<b>City Councillors</b>	3 issues raised by email or phone	None have led to receipt of complaint to date.
<b>Parish/Town Councillors</b>	4 issues raised by email or phone	None have led to receipt of complaint to date.

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REPORT TITLE: BACKGROUND TO NOTICE OF MOTION ON OPEN & TRANSPARENCY OF DECISION MAKING

29 JUNE 2022

Contact Officer: Lisa Kirkman Tel No: 01962 848501 Email  
lkirkman@winchester.gov.uk

WARD(S): ALL

PURPOSE

In order to assist members in their consideration of the council motion the following papers have been produced;

1. Winchester City Council – Advice on Motion. This note has been written by Mark Heath working for Veale Wasbrough Vizards and sets out the full background, their instructions, legal points, the council's constitution, Members' access to information and to council documents, general points and then addresses each of the 4 bullet points lifted directly from the motion. Whilst the note is marked private and confidential it is not considered the information contained within it is exempt under Schedule 12A of the Local Government Act 1972. During questions and debate it *may* become necessary to move into exempt session.
2. Point 2 - Exempt Report Review – Summary
3. Point 4 - Non Disclosure Agreements (NDA)/Confidentiality Agreements

RECOMMENDATION:

That the Audit and Governance Committee are asked to confirm their recommendations in response to the motion.

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# **PRIVATE AND CONFIDENTIAL**

## **Winchester City Council Advice on Motion**

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June 2022

## 1 Background

1.1 We were instructed by the Monitoring Officer at Winchester City Council ("the Council") to provide advice in relation to a motion presented to the Full Council meeting at the Council on 12 January 2022.

1.2 The agenda, minutes and video recording of that meeting can be found here:

<https://democracy.winchester.gov.uk/ieListDocuments.aspx?CId=138&MIId=2725&Ver=4>

1.3 The motion (Item 8b) was moved by Cllr Godfrey and seconded by Councillor Horrill.

1.4 The motion was amended and subsequently the substantive motion was approved as amended. The matter was then referred to the Council's Audit and Governance Committee on 9 March 2022.

1.5 We set out below the motion that went to full council on 12 January 2022, an extract from the minutes of that meeting which includes the amendment as approved, and an extract from the minutes of the Audit and Governance Committee on 9 March 2022.

***To consider the following Notice of Motion to be proposed by Councillor Godfrey and seconded by Councillor Horrill:***

*"This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by:*

- Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions.*
- Within 12 months of a decision being made, publishing without restriction all papers used to support decisions on projects and other major financial transactions that were marked as exempt from publication at the time of the decision unless Full Council decides that these papers should remain exempt for a further 12 months.*
- Recording the discussions, submissions and decisions at all meetings attended by any person outside Winchester City Council and, where those meetings relate to any decision made afterwards, for these records to be available to all councillors within 2 weeks and to the public within 12 months of the meeting unless Full Council decides that these papers should remain exempt for a further 12 months.*
- Stopping the use of Non-Disclosure Agreements that councillors have been required to sign before being able to see some Council or Committee papers and to cancel any indemnity clauses in such Non-Disclosure Agreements previously signed by serving Councillors."*

## 1.6 Minute extract - Council, 12 January 2022

*Councillor Godfrey introduced his Motion and Council then proceeded to ask questions and debate the Motion. In summary, the following matters were raised:*

- Some Members raised concern of the use of Non-Disclosure Agreements regarding exempt and confidential information that was required to be provided to Members as part of the decision-making process.*

- *Other areas of the motion referred to the council being open and transparent in all its decision-making and it was highlighted that various improvements to this had included introduction of public questions at council, streaming and videoing meetings and regular open forum meetings.*
- *Some other areas of the motion may require further discussion regarding their legality and the practicality and resource implications although processes to review previously exempt information were already in place however their implementation had been delayed due to the pandemic.*

**AMENDMENT** – Moved by Councillor Cutler and seconded by Councillor Thompson as follows (changes shown in bold):

*“This Council **asks that the Audit and Governance Committee** review that the Council commits to clearly demonstrate that it is open and transparent in its decision making, specifically by:*

- *Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions.*
- *Within 12 months of a decision being made, publishing without restriction all papers used to support decisions on projects and other major financial transactions that were marked as exempt from publication at the time of the decision unless Full Council decides that these papers should remain exempt for a further 12 months.*
- *Recording the discussions, submissions and decisions at all meetings attended by any person outside Winchester City Council and, where those meetings relate to any decision made afterwards, for these records to be available to all councillors within 2 weeks and to the public within 12 months of the meeting unless Full Council decides that these papers should remain exempt for a further 12 months.*
- *Stopping the use of Non-Disclosure Agreements that councillors have been required to sign before being able to see some Council or Committee papers and to cancel any indemnity clauses in such Non-Disclosure Agreements previously signed by serving Councillors.*

***And that in their considerations the Audit and Governance Committee review the legality, practicality and resource implications of these specific proposals.”***

Council proceeded to ask questions and debate the Amendment. In summary the following matters were raised:

- Some commercially and personally sensitive information should be managed appropriately, however the expectation should be for disclosure wherever possible. However, reviewing this information at full council was not practical
- To create a record of all meetings with outside organisations and with individuals would be inappropriate in most cases and would create an unacceptable level of bureaucracy
- It was appropriate to revisit what may be practical to further increase the council’s commitment to being open and transparent by having further discussion of the motion at the Audit and Governance Committee
- Regarding the third part of the motion, the only discussions that should be recorded were those that concluded with the council committing to expenditure. The remaining three elements of the motion were not

controversial and should be accepted without referral to the Audit and Governance Committee.

- Not all councils release exempt information to all Members
- The council's code of conduct already obliged Members to keep exempt information confidential
- Non-Disclosure Agreements indemnified each individual for the council's losses and should therefore be released as soon as possible

#### **AMENDMENT CARRIED**

Council then voted on the substantive motion (original motion as amended).

#### **SUBSTANTIVE MOTION CARRIED**

##### **RESOLVED:**

This Council asks that the Audit and Governance Committee review that the Council commits to clearly demonstrate that it is open and transparent in its decision making, specifically by:

- Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions
- Within 12 months of a decision being made, publishing without restriction all papers used to support decisions on projects and other major financial transactions that were marked as exempt from publication at the time of the decision unless Full Council decides that these papers should remain exempt for a further 12 months
- Recording the discussions, submissions and decisions at all meetings attended by any person outside Winchester City Council and, where those meetings relate to any decision made afterwards, for these records to be available to all councillors within 2 weeks and to the public within 12 months of the meeting unless Full Council decides that these papers should remain exempt for a further 12 months
- Stopping the use of Non-Disclosure Agreements that councillors have been required to sign before being able to see some Council or Committee papers and to cancel any indemnity clauses in such Non-Disclosure Agreements previously signed by serving Councillors.

And that in their considerations the Audit and Governance Committee review the legality, practicality and resource implications of these specific proposals.

#### **1.7 Minute Extract: Audit and Governance Committee 9 March 2022**

*13. The Strategic Director and Monitoring Officer introduced the item and draw the committee's attention to the motion from Full Council (which had been moved by Councillor Godfrey and seconded by Councillor Horrill) and a minute extract of the Council response as set out on the agenda sheet.*

*Councillor Power stated that following discussions with officers, she was proposing that an informal task and finish group be established to examine the points raised. A draft of the*

*proposed terms of reference for such a group had been circulated to all members of the Committee prior to the meeting.*

*At the invitation of the Chairperson, Councillor Horrill addressed the Committee as summarised briefly below.*

*Requested that with regard to the recommendation that proper consultation was undertaken, this should apply whether or not consultation was a formal requirement. The notice of motion sought agreement for the Council to clearly demonstrate a commitment to act in an open and transparent manner, with an expectation in favour of disclosure. Considered that the proposal to set up a task and finish group in response to the notice of motion would unduly delay its implementation. For example, the core governance principles could be confirmed immediately.*

*In response to questions, the Strategic Director advised that the proposed terms of reference for a task and finish group were circulated to committee members earlier that day and if this approach was agreed, the conclusions and recommendations of the group would be reported back to the next Committee meeting. However, she clarified that it was a matter for the Committee to decide how it wished to deal with the notice of motion and the establishment of a task and finish group was only one option. It had not been possible for officers to examine all the legal and practical implications of the motion, as had been set out in the amendment to the motion as set out in the minutes, prior to the current meeting, although initial investigations and some work on suggested solutions in some areas had been undertaken.*

*Following debate, the Committee did not support a task and finish informal group and instead agreed that a report be brought back to an additional meeting of the Committee to be held in late May 2022. It was noted that it might be necessary for a further additional meeting to be scheduled due to the volume of work involved.*

*The Committee discussed each of the points contained in the amendment to the notice of motion agreed at Council (and reproduced below with numbering added for ease of reference).*

**AMENDMENT** – *Moved by Councillor Cutler and seconded by Councillor Thompson as follows (changes shown in bold): “This Council asks that the Audit and Governance Committee review that the Council commits to clearly demonstrate that it is open and transparent in its decision making, specifically by:*

- a. Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions.*
- b. Within 12 months of a decision being made, publishing without restriction all papers used to support decisions on projects and other major financial transactions that were marked as exempt from publication at the time of the decision unless Full Council decides that these papers should remain exempt for a further 12 months.*
- c. Recording the discussions, submissions and decisions at all meetings attended by any person outside Winchester City Council and, where those meetings relate to any decision made afterwards, for these records to be available to all councillors within 2 weeks and to the public within 12 months of the meeting unless Full Council decides that these papers should remain exempt for a further 12 months.*
- d. Stopping the use of Non-Disclosure Agreements that councillors have been required to sign before being able to see some Council or Committee papers and to cancel any indemnity clauses in such Non-Disclosure Agreements previously signed by serving Councillors.*

*And that in their considerations the Audit and Governance Committee review the legality, practicality and resource implications of these specific proposals.”*

Point (a)

*Members discussed the requirement to consider the definition of “properly” and also the meaning of “significant decisions.” The possibility of using the existing definition of “key decisions” was suggested but the implications of a requirement to consult on all of these decisions was flagged by the Strategic Director. It was agreed that further work was required to address this point*

Point (b)

*The Strategic Director advised that a draft procedure on reviewing exempt reports had been produced and could be submitted to the next Committee for members’ consideration.*

Point (c)

*Councillor Godfrey clarified that it was intended only to refer to meetings that led to a decision. However, a number of members expressed concerns about the practical implications of this proposal, including with regard to data protection and the resource implications of seeking a decision at council for papers to remain exempt. It was agreed that further work was required to address the issues raised by this point.*

Point (d)

*The Strategic Director suggested that the Committee could consider the previous examples of when a non-disclosure agreement (NDA) had been used over the previous five years. It was noted that the notice of motion only referred to the use of NDAs in relation to committee reports but a wider examination, as suggested by the Strategic Director, was welcomed where there were confidentiality agreements. It was also suggested that the committee could agree the terms for any future confidentiality agreement and agree a system of regular reporting back on their use through the quarterly reporting mechanisms. Discussion was also had about how officers might assist members through the mod.gov committee system on identifying exempt information more easily. This would be presented to the next meeting.*

**RESOLVED:**

*That additional meeting(s) of the Committee be arranged in May/June 2022 to examine further the contents of the Council’s referral of the notice of motion, having regard to the comments summarised in the minute above*



## 2 Our Instructions

- 2.1 The Council instructed VWV LLP to provide advice.
- 2.2 VWV are a full service law firm with a specialism in public sector legal advice for over 25 years. The advice has been provided by Mark Heath.
- 2.3 Mark Heath has over 30 years of service within the public sector. Until December 2016, he worked at Southampton City Council. At Southampton, he was Solicitor to the Council (and Monitoring Officer) for 20 years. Subsequent to that he held the positions of Director of Place and subsequently Chief Operating Officer. His legal experience includes drafting and reviewing constitutions, advising on standards and all aspects of local authority governance and decision making.
- 2.4 The Council sought advice on a motion set out in section 1 of this advice.
- 2.5 Our advice was sought on the 4 bullet points contained in the motion which we repeat here (with our numbering added) and which we have addressed individually as well as the opening sentence / paragraph. Namely:

*“This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by:*

- *1. Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions.*
- *2. Within 12 months of a decision being made, publishing without restriction all papers used to support decisions on projects and other major financial transactions that were marked as exempt from publication at the time of the decision unless Full Council decides that these papers should remain exempt for a further 12 months.*
- *3. Recording the discussions, submissions and decisions at all meetings attended by any person outside Winchester City Council and, where those meetings relate to any decision made afterwards, for these records to be available to all councillors within 2 weeks and to the public within 12 months of the meeting unless Full Council decides that these papers should remain exempt for a further 12 months.*
- *4. Stopping the use of Non-Disclosure Agreements that councillors have been required to sign before being able to see some Council or Committee papers and to cancel any indemnity clauses in such Non-Disclosure Agreements previously signed by serving Councillors.”*

### 3 Legal Points

3.1 A crucial aspect of the issues that we were asked to advise on relates to the decision making regime in councils and some of the key legal grounds for challenging that. We summarise those aspects of the regime here that are relevant to our advice

3.2 The Localism Act 2011 amended the Local Government Act 2000 (LGA 2000) (Parts 1A and Schedule A1) making changes to local authority governance arrangements in England.

#### 3.3 Models of governance

3.3.1 Schedule 2 to the Localism Act 2011 prescribes the following forms of governance:

- (a) Executive arrangements. This can be a leader and cabinet executive (England) or a mayor and cabinet executive.
- (b) A committee system. This operates its decision-making process in accordance with sections 101 and 102 of the Local Government Act 1972.
- (c) Prescribed arrangements. As made by the Secretary of State in regulations. (Paragraph 9B, Schedule 2, Localism Act 2011.)
- (d) Paragraph 9H of Schedule 2 to the Localism Act 2011 also provides for a new system of directly-elected mayors

#### 3.4 Executive arrangements

3.4.1 A council which has adopted executive arrangements must ensure that its executive takes the form specified in section 9C(2) of Schedule 2 to the Localism Act 2011. The executive is responsible for certain functions and there must be a division between the making of a decision by the executive and the scrutiny of that decision.

3.4.2 An executive can either be a:

- (a) mayor and cabinet executive (an elected mayor of the authority and two or more councillors of a local authority appointed by the elected mayor); or
- (b) a leader and cabinet executive (a councillor of the authority (executive leader) elected as leader of the executive by a local authority (full council) and two or more councillors of the authority appointed by the executive leader). (Section 9C(2), (3), LGA 2000).

3.4.3 In the absence of regulation specifying the contrary, an executive can have up to a maximum of ten members (paragraph 9C(5), Schedule 2, Localism Act 2011).

#### 3.5 Functions of the executive

3.5.1 The functions of the executive are set out in sections 9D and 9DA of the LGA 2000 and regulations made thereunder. The regulations specify functions not to be the responsibility of the executive. As a consequence, there is a presumption that all functions not so specified will be the responsibility of the executive, rather than the full council (section 9D(2), LGA 2000).

3.5.2 Executive arrangements mean any arrangements by a local authority:

- (a) "(a) for and in connection with the creation and operation of an executive of the authority; and

- (b) (b) under which certain functions of the authority are the responsibility of the executive.” (Section 10, LGA 2000.)

### 3.6 Executive meetings

3.6.1 Meetings of a local authority’s executive can be held in public or private and it is the choice of the executive as to whether/which meetings are held publicly or in private (section 9G, LGA 2000).

3.6.2 If a local authority executive chooses to hold its meetings in private then:

- (a) a written record must be kept of any “prescribed decisions” (those designated as such by the Secretary of State) and of any decisions made by individual members of an executive; and
- (b) any written records or accompanying documents must be made available to members of the public. (Sections 9G, 9GA, LGA 2000).

3.6.3 The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) (“The LAR 2012”) apply to those local authorities in England that are operating executive arrangements under Part 1A of the LGA 2000, as amended by section 21 and Schedule 2 to the Localism Act 2011. The Regulations:

- (a) clarify and extend the circumstances in which local authority executive decisions are to be open to the public (Part 2);
- (b) make provision in relation to key decisions of the executive and the publicity that must be given before the key decision is taken (Part 3) and for the inclusion of prescribed information in a written statement of the executive decision (Part 4); and
- (c) set out the additional rights of local authority members and members of overview and scrutiny committees to access documents (Part 5) and general provisions relating to information, such as the information which is exempt from disclosure (which includes advice from a political adviser).

### 3.7 Local authority constitutions

3.7.1 Every local authority is required to prepare and keep up-to-date a constitution. This must also be made publically available at its offices (and is also often on council’s websites).

3.7.2 The constitution must containing:

- (a) its standing orders;
- (b) its code of conduct;
- (c) any information directed by the Secretary of State;
- (d) any other information considered appropriate by the local authority; and
- (e) in the case of a local authority operating the committee system the constitution must also contain a statement as to whether it has an overview and scrutiny committee (OSC). (Section 9P, LGA 2000.)

### 3.8 The executive

3.8.1 The executive is made up of elected executive councillors appointed by the leader or mayor.

3.8.2 Members of a leader and cabinet executive can be made up of :

- (a) a councillor of the authority (an executive leader) elected by the authority; and
- (b) two or more councillors of the authority appointed to the executive by the executive leader. (Section 9C(3), LGA 2000.)

### 3.9 **Councillors**

3.9.1 Councillors are elected local authority members. They are elected by the community of a certain area known as a ward or electoral division, and either represent a political party or are independent.

3.9.2 Councillors are elected for a term of four years during which they are expected to perform a number of functions on behalf of the local authority acting as a link between it and their wider communities. Councillors are likely to be involved in any decisions relating to the running of a local authority.

3.9.3 Councillors are not employed by the local authority that they serve and are not paid a wage but are paid allowances and expenses.

3.9.4 Councillors are bound by a code of conduct and must sign up to it as part of their declarations of acceptance of office.

### 3.10 **Council officers**

3.10.1 The day-to-day business of a local authority is carried out by its employees, known as council officers. Local authorities are required to appoint council officers to a number of specified posts, such as:

- (a) head of the paid service, usually known as the chief executive;
- (b) chief finance officer, who cannot also be the head of the paid service (the “section 151 officer”); and
- (c) monitoring officer appointed under section 5 of the Local Government and Housing Act 1989, whose main role is to report unlawful or potentially unlawful acts to their local authority. The role is usually fulfilled by the head of the legal department.

### 3.11 **Overview and Scrutiny Committees (OSC)**

3.11.1 Where a local authority operates under executive arrangements then it must also have an OSC, which is responsible for overseeing and scrutinising the local authority’s decisions. An OSC may be split into a number of OSC select committees (also called sub-committees) dealing with the scrutiny of different areas such as planning and education.

3.11.2 Members of a local authority OSC must be different to those in the local authority’s executive (section 9FA(3), LGA 2000). OSC members are made up of members from all political parties.

### 3.12 **OSC functions**

- 3.12.1 OSCs in local authorities may appoint a number of different sub-committees to discharge their functions, for example, committees dealing with adult social care, education and children’s services, environmental issues or housing (section 9FA(1), LGA 2000). Each sub-committee will then undertake investigations into issues of concern for local residents in relation to their respective areas.
- 3.12.2 OSCs are prevented from investigating “excluded matters”. This means any matter which is:
- (a) a local crime and disorder matter under section 19 of the Police and Justice Act 2006; or
  - (b) specified in an order made by the Secretary of State. (Section 9FC(5), LGA 2000.)

### 3.13 **OSC Powers**

- 3.13.1 A council operating under executive arrangements must ensure that its OSC has the power to:
- (a) review or scrutinise decisions or actions taken which relate to the discharge of any functions which are and are not the responsibility of the executive;
  - (b) make reports or recommendations to a local authority or its executive relating to the discharge of any functions which are the responsibility of the executive and also those that are not; and
  - (c) make reports or recommendations on matters which affect a local authority’s area or its inhabitants (Section 9F(2), LGA 2000).
- 3.13.2 OSCs have the power to require council officers or members of the executive to appear before it in order to give evidence on a particular matter (section 9FA(8), LGA 2000).
- 3.13.3 They are also able, following a review of a local authority decision, to require the local authority or executive to consider its report or recommendations and respond indicating what (if any) action it intends to take (section 9FE, LGA 2000). Where an OSC has given a local authority notice in writing requiring it to consider its recommendations/report and to respond indicating any proposed action, then a local authority (that is, the responsible cabinet member) will have two months from the date that it receives the recommendations/report to comply (section 9FE(4), LGA 2000). It is the duty of the local authority or executive to which a notice is given to comply with the requirements specified in the notice (section 9FE(5), LGA 2000).

### 3.14 **Local authority meetings: procedural requirements**

- 3.14.1 The main pieces of legislation that regulate local authority meetings are:
- (a) 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;
  - (b) The LGA 1972. This extends the rights in PBA 1960 to meetings of committees and joint committees. It also includes additional provisions, for example, the right to exclude the public and press from meetings and the duty to provide reasonable facilities to the press;

- (c) The Local Government (Access to Information) Act 1985 (LGAIA 1985). Section 1 added Part VA (sections 100A-100K) to the LGA 1972, providing greater public access to local authority meetings and documents (subject to specified confidentiality provisions). It also extended the rights in the LGA 1972 and PBA 1960 to sub-committee meetings. However, the PBA 1960 ceased to apply to local authorities where the LGAIA 1985 applied. The LGAIA 1985 also applies to meetings of parish and community councils, and to joint boards or joint committees (section 100J, LGA 1972);
- (d) The Local Government Act 2000 (LGA 2000). This includes provisions relating to meetings of local authority executives and their committees (section 99, LGA 1972);
- (e) The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) (“The LAR 2012”) apply to local authorities in England that operate executive arrangements under Part 1A of the LGA 2000. The regulations extend the LGA 2000 provisions to provide greater public access to meetings and documents;
- (f) The Openness of Local Government Bodies Regulations 2014 (SI 2014/2095) (OLGBR 2014). These extend the PBA 1960, LGA 1972 and LAR 2012 to allow for greater rights for the public to report on local authority meetings in England. They also require written records to be kept of certain decisions taken by officers of a local authority. These regulations were made under section 40 of the Local Audit and Accountability Act 2014 and only apply to England.

### 3.15 Meetings

#### 3.15.1 Public meetings

- (a) The committee and sub-committee meetings of every principal council (that is, the councils of counties and districts in England and Wales and the London boroughs (as defined in section 100J of the LGA 1972)) must be open to the public and press (section 100A(1), LGA 1972). However, a local authority can exclude the public and press in certain circumstances, for example to suppress or prevent disorderly conduct.
- (b) Regulations made by the Secretary of State prescribe the circumstances in which meetings of a local authority’s executive or its committees must be open to the public and which must be held in private (section 9GA(4), LGA 2000). There is a presumption under regulation 3 of the LAR 2012 that all meetings of a local authority’s executive, its committees and sub-committees are to be held in public unless a narrowly defined legal exception applies (see regulation 4(2), LAR 2012).

#### 3.15.2 Private meetings

- (a) A private meeting is a meeting, or part of a meeting, where the decision-making body (which includes a local authority’s executive and its committees and sub-committees) excludes the public and press (section 100A, LGA 1972 and regulations 2 and 4, LAR 2012). For example, the public and the press can be excluded from a local authority meeting if an item of business includes confidential or exempt information (section 100A, LGA 1972) (for local authorities in England that operate executive arrangements,

the public and the press must be excluded in such circumstances (regulation 4(2), LAR 2012)).

#### 3.15.3 Notice of a public meeting

- (a) Notice of the time and location of a public meeting must be publicised by a local authority in England at its offices and on its website at least five clear days before the date of the meeting (section 100A(6)(a), LGA 1972 and regulation 6(1)(a), LAR 2012).
- (b) When a meeting is convened at short notice (for example, in the case of an emergency), notice must be given when the meeting is convened (section 100A(6)(a), LGA 1972 and regulation 6(1)(b), LAR 2012).

#### 3.15.4 Items of business at a public meeting

- (a) An item of business may only be considered at a public meeting where a copy of the agenda (or part of an agenda) including the particular item has been made available for public inspection at least five clear days before the meeting (section 100B(4)(a), LGA 1972 and regulation 6(2)(a), LAR 2012).
- (b) When a meeting is convened at short notice, an item of business can only be considered if a copy of the agenda including the item is available once the meeting is convened (section 100B(4)(a), LGA 1972 and regulation 6(2)(b), LAR 2012).

#### 3.15.5 Special circumstances

- (a) In addition, for local authorities operating a committee structure, an item of business can also be considered if, as a result of special circumstances (specified in the minutes), the chairman of the meeting is of the opinion that the item of business is a matter of urgency (section 100B(4)(b), LGA 1972).
- (b) The special circumstances requirement implies a mandatory duty to give good reasons, which have to be recorded in the minutes and will be considered carefully by the courts. When deciding whether there is a good reason to depart from the usual procedure for considering an item of business, the chairman must take into account all the circumstances of the particular matter. A chairman's opinion that an item should be considered as a matter of urgency must be substantiated as there could be a risk of judicial review.

#### 3.15.6 Order of business at a public meeting

- (a) A local authority's order of business at public meetings will vary depending on the individual local authority, the nature of the meeting and the subject of the meeting. The local authority's constitution and standing orders usually provide for the order of business and for it to be capable of being altered at the meeting, within the law.

#### 3.15.7 Procedure for private meetings

- (a) A local authority's decision to hold a private meeting is subject to the LAR 2012 (made under section 9GA(4) of the LGA 2000). A decision to hold a private meeting is a prescribed decision for the purpose of section 9GA(5) of the LGA 2000 (regulation 5(1), LAR 2012). "Prescribed" means prescribed by regulations made by the Secretary of State (section 9GA(9), LGA 2000).

### 3.15.8 Notice of a private meeting

- (a) Notice of a private meeting must be given by a local authority operating executive arrangements at its offices and on its website at least 28 clear days before the meeting (regulation 5(2), LAR 2012). The notice must include a statement of reasons explaining why the meeting is being held in private (regulation 5(3)).
- (b) A local authority must give further notice at its offices and publish that notice on its website at least five clear days before the meeting. The notice must include:
  - (i) a statement of reasons for holding the meeting in private;
  - (ii) details of any representations received by the local authority about why the meeting should be held in public; and
  - (iii) a statement of responses to any representations. (Regulation 5(4) and (5).)

### 3.15.9 Exceptions

- (a) A local authority operating executive arrangements can hold a private meeting contrary to the above notice procedure if the meeting is urgent and cannot reasonably be deferred, and it has received approval from one of the following:
  - (i) the chairman of the relevant overview and scrutiny committee;
  - (ii) the chairman of the local authority; or
  - (iii) the vice-chairman of the local authority. (Regulation 5(6), LAR 2012.)
- (b) Once the local authority has received approval to hold the meeting, notice must be given as soon as reasonably practicable at its offices and be published on its website. The notice must explain why the meeting is urgent and cannot reasonably be deferred (regulation 5(7)).

### 3.15.10 Order of business at a private meeting

- (a) This will be similar to that of a public meeting, but a private meeting will not include public questions

### 3.15.11 Documents for public inspection

- (a) A local authority must provide the following documents relating to its meetings for public inspection:
  - (i) copies of meeting agendas and accompanying reports relating to items on an agenda (section 100B, LGA 1972 and regulation 7(1), LAR 2012);
  - (ii) the minutes of the meeting (apart from those concerning parts when the public were excluded). Where the minutes do not provide a fair reflection of the meeting because part of it was excluded, then the proper officer will provide a summary of the excluded part, but without disclosing the exempt information (section 100C, LGA 1972);



- (iii) any further statements or particulars that are necessary to indicate the nature of the items included in an agenda (regulation 7(7)(b), LAR 2012);
- (iv) copies of any other documents supplied to members of the executive in connection with an item on a local authority meeting agenda (as the proper officer sees fit) (regulation 7(7)(c), LAR 2012);
- (v) any record prepared in accordance with an executive decision and any report (or part) considered in a meeting that is relevant to a recorded executive decision (regulation 14(1), LAR 2012);
- (vi) a written record of a wide variety of decisions taken by officers of a local authority. Decisions that must be recorded are those made under a specific express authorisation or a general authorisation if the effect of the decision is to grant a permission or licence, affect the rights of an individual or award a contract/incur expenditure which materially affects the local authority's financial position (regulation 8, OLGBR 2014);
- (vii) background papers to reports referred to at meetings. This includes a copy of a list of background papers to a report (compiled by the proper officer) and at least one copy of each of the documents in that list (sections 100B, 100C and 100D, LGA 1972 and regulation 15, LAR 2012).

### 3.16 Decision-making under executive arrangements

#### 3.16.1 Key decisions

- (a) A key decision for local authorities operating executive arrangements is an executive decision that could result in either:
  - (i) a local authority incurring expenditure or making savings that are significant in its budget for the service or function relating to the decision; or
  - (ii) having a significant effect on communities living or working in an area comprising two or more wards or electoral divisions in the area of a local authority (Regulation 8(1), LAR 2012).

### 3.17 Decision-making and avoiding legal challenge

#### 3.17.1 Decision-making; the context

- (a) Councils make many decisions every day which affect the lives of individuals, groups of citizens and industry. The law sets down parameters within which such decisions should be made. The overall purpose of this is simple: to avoid the state and its agencies wielding power in an arbitrary way. Most decisions are capable of challenge by way of an appeal mechanism and, failing that, judicial review.
- (b) Challenge and The Ultra Vires Principle
  - (i) Should a local authority exceed the statutory powers expressly or impliedly given by parliament its actions will be ultra vires and can be challenged by way of judicial review in the High Court. The review is not so much concerned with the merits of the case but

with whether the decision is one which the authority could legally make. The effect of a successful judicial review is that the public authority is prevented from taking a decision, or taking it in a particular way, or that a decision already made is quashed or declared invalid. Judicial review must be distinguished from an appeal, which is available only when specifically provided for, and in which the appeal court or tribunal can substitute its decision for that of the body appealed from.

- (ii) A convenient classification of the legal grounds on which judicial review may be sought was given by Lord Diplock in the GCHQ case (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374) where his Lordship identified three categories of challenge that a decision was ultra vires – illegality, irrationality and procedural impropriety.
- (iii) The principles of ultra vires are flexible as well as complex. The categories of challenge are used for convenience of analysis. They do not form rigid compartments and there is considerable overlap. The flexibility of the ultra vires principles and the discretionary nature of the remedies mean that a court will have a considerable degree of latitude in deciding whether a local authority has acted unlawfully and if so whether a legal remedy is to be issued.
- (iv) **Illegality**
  - (A) A decision may be challenged for illegality where, due to an error of law, the local authority did not have legal authority for the decision made. There may have been a lack of jurisdiction, an absence of evidence to support the decision, a fettering of the exercise of a discretionary power, the exercise of a power for an improper purpose or the taking into account of irrelevant considerations.
- (v) **Unreasonableness and Irrationality**
  - (A) Beyond the matters already outlined, although often intertwined with them, a separate and distinct ground of invalidity exists that has become known as ‘Wednesbury unreasonable’: ‘an authority may come to a conclusion so unreasonable that no reasonable authority could ever come to it ... but to prove a case of that kind would require something overwhelming’ (Lord Greene MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223). More than ordinary negligence, there must be ‘something overwhelming’.
- (vi) **Procedural Fairness**
  - (A) The notion of procedural fairness in relation to the activities of public authorities is contained in the common law rules of natural justice. The rules of natural justice embody the right to be heard before a decision is taken (*audi alteram partem*) and an absence of bias in the decision maker (*nemo iudex in causa sua*).

- (B) Apart from unfair procedure (breach of the rules of natural justice) there are many other forms of potential procedural irregularity. Particular aspects of procedural irregularity have been recognised over the years. First, the body or person taking a decision must have been properly constituted or appointed. This will depend upon the interpretation of the relevant statutory provisions. A second aspect of procedural irregularity is improper delegation of authority (*delegatus non potest delegare*). This is one of the most important principles contained within the ultra vires doctrine and requires that a discretionary power is to be exercised only by the person or body properly authorised

### 3.18 Legal requirements

#### 3.18.1 Following correct procedure

- (a) Departure from an established prescribed procedure can give rise to a successful legal challenge, for example, by way of judicial review, even if no unfairness results:

*"... susceptibility to judicial review under this head [procedural impropriety] covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice"*  
(Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (at 411A-B)).

- (b) Examples of prescribed procedures for decision-makers include express duties to:
- (i) consult;
  - (ii) serve notice of the intended decision;
  - (iii) publish an agenda for the meeting at which the decision will be made;
  - (iv) seek written representations;
  - (v) hold oral hearing if requested;
  - (vi) give reasons for the decision; and
  - (vii) be informed of any right of appeal.
- (c) While it is necessary for a public body making decisions to follow a set procedure, doing so does not necessarily render its procedure fair.

#### 3.18.2 Consultation

- (a) On 5 November 2013, the Cabinet Office published new guidance on the consultation principles that government departments and other public bodies should adopt when engaging stakeholders in policy and legislation developments. While the guidance is not legally binding and does not prevail over other statutory and mandatory requirements, it is persuasive and

provides a useful ‘best practice’ approach for conducting a lawful consultation process.

- (b) The legal requirements for a proper consultation exercise are known as the Sedley Criteria reflecting arguments put forward by Stephen Sedley QC in R v Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168 and adopted in the judgement.
- (c) The Sedley Criteria are that:
  - (i) consultation must be made at a time when proposals are at a formative stage;
  - (ii) sufficient reasons for the proposal must be given to allow intelligent consideration and response;
  - (iii) adequate time must be given for a response; and
  - (iv) the product of the consultation must be conscientiously taken into account in finalising proposals.

#### 3.18.3 Within remit

- (a) It is a fundamental principle of administrative law that a public body may only do what it is empowered or required to do by statute, whether expressly or by necessary implication.
- (b) This means that a public body must make decisions that lie within the requirements of its governing legislation. Equally, if the decision-makers have a duty to perform in determining a question, they must not evade their duty. Doing otherwise would render their decision ultra vires and void.
- (c) Public bodies are also governed by the requirements of other legislation, such as the European Communities Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA), which respectively implement European Law and the European Convention on Human Rights., although the supremacy of EU law in the UK will end when the European Union (Withdrawal) Bill 2017-19 repealing the ECA 1972 is enacted. There may be general duties imposed on public bodies, for example, by the Equality Act 2010. Accordingly, public bodies must make their decisions compliant with all duties placed on them by statute.

#### 3.18.4 Rational and evidence-based

- (a) Whether a public body has a duty or discretion to exercise in making its decision, that decision must be rational.
- (b) An irrational or unreasonable decision is one that was not reasonably open to it, as stated by Lord Green MR in the Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.
- (c) The courts have offered the following interpretation of “irrationality”:
  - (i) *“Unreasonableness can include anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice,*

*fatuousness or excessive lack of common sense*". (In Re W (An Infant) [1971] AC 682, Lord Hailsham (at 699H).)

- (ii) *"a decision which does not add up"*. (In R v Parliamentary Commissioner for Administration, ex parte Balchin [1998] 1 PLR 1.)
- (iii) *"a decision which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt"*. (In Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, Lord Diplock (at 1064 E-F).)
- (d) Decision-makers are given a degree of latitude by the courts when challenged by way of judicial review on grounds of unreasonableness. The courts recognise that the decision was for the public body to make, not the court, and so they are reluctant to interfere where they might disagree with a decision but it is objectively rational.
- (e) One way that a public body can ensure that its decisions are objectively reasonable is to ensure they are evidence-based. Regulators such as the Financial Conduct Authority proceed to assess risk and apply their powers according to evidence-based decision-making; this is also an approach that is promoted by the Better Regulation Executive.
- (f) Those making decisions in the public interest should not do so arbitrarily or on the basis of personal feeling. They should look at the available information and evidence and reach a considered view in light of their powers and duties. It does not matter if another person looking at the same material might have reached another decision. What matters is that the decision-maker can be shown, objectively, to have taken the material into account and reached its own conclusion based on the evidence

#### 3.18.5 All relevant considerations

- (a) One aspect of reaching a rational and evidence-based decision is taking all relevant factors or considerations into account. This was made clear by the House of Lords in Anisminic v Foreign Compensation Commission [1969] AC 147 (confirmed in Lumba v Secretary of State for the Home Department [2012] 1AC 245, paragraph 66), and by Lightman J in R v Director General of Telecommunications, ex parte Cellcom Ltd [1999] COD 105:

*"The Court may interfere if the Director has taken into account an irrelevant consideration or has failed to take into account a relevant consideration"*.

- (b) This does not mean that a decision-maker must consider all material, but it should have as much information as possible, that is relevant to the decision that it is about to make. Deciding what is relevant depends on the subject matter of the decision, but examples include:
  - (i) the proposal;
  - (ii) responses to consultation or written representations received;
  - (iii) guidance on parameters for the decision;
  - (iv) cost of the decision;

- (v) effects of decision on others. If the decision affects those with protected characteristics under the Equality Act 2010, due regard must be had to the decision-maker's public sector equality duty; and
  - (vi) advice from officers.
- (c) Examples of irrelevant considerations include:
- (i) the need to get business finished quickly otherwise than for lawful and proper reasons;
  - (ii) assumptions not based on evidence;
  - (iii) personal experience of a different situation; and
  - (iv) dislike for the person affected by the decision or what they represent.

### 3.18.6 Proper purpose

- (a) A public body must act for a proper purpose. Those making public decisions must not have ulterior motives and must apply their minds when making decisions to the correct statutory objective (Padfield v Minister of Agriculture, Fisheries & Food [1968] AC 997 ).
- (b) A public body must not act in bad faith, which is akin to dishonesty (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (at 229)).
- (c) An example of an improper motive is exercising local authority powers for the electoral advantage of a particular political party (Magill v Porter [2001] UKHL 67).

### 3.18.7 ECHR-compliant

- (a) It is unlawful for any public body to act contrary to one of the rights contained in the European Convention on Human Rights (ECHR) that has been incorporated into domestic law by the HRA:

### 3.18.8 Proportionate

- (a) Public decision-makers should act in a way that is proportionate. While the common law does not necessarily accept proportionality as a ground for judicial review, it is a principle embedded in both EU and ECHR law and touches on most of the decisions taken by public bodies:
- (b) A decision that is proportionate, is also likely to be rational, evidence-based and reasonable. See R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696):

*"reliance on proportionality is simply a way of approaching the Wednesbury formula: was the administrative act or decision so much out of proportion to the needs of the situation as to be "unreasonable" in the Wednesbury sense."* (Lord Lowry (at 766D-E).

### 3.18.9 Properly reasoned

- (a) Procedural requirements may specify that a public body must give reasons for its decisions. It should do so in any event, not only because the common

law may require it, but because a well-reasoned decision will fully inform those affected about the decision the body has taken. Reasoned decisions also enable those affected to consider whether to subject it to legal challenge, and on what grounds. Well-reasoned decisions help public bodies withstand legal challenge by explaining their thought processes.

- (b) The process of setting out written reasons for a decision also improves the decision-making process by making the decision-maker focus on the logic lying behind its decision.
- (c) Reasons do not need to be excessively detailed, but do need to be adequate.

### 3.19 Practical requirements

#### 3.19.1 Reading all the papers

- (a) Decision-makers are often busy people. The decision to hand may be only one of a handful of things that occupy their time on any given day. They may also have been presented with a substantial bundle of papers to read that are relevant to the decision to be made.
- (b) Decision-makers must read all the papers that have been provided and that are relevant to the decision they are about to make. Failure to do so, out of laziness, insufficient time or a belief that they are irrelevant, would be a breach of their duty. It could also likely lead to a decision that is unlawful as it fails to take account of relevant considerations.

#### 3.19.2 Minutes

- (a) Some decision-makers' procedural rules require minutes to be taken. Others prohibit this, either expressly or as a matter of practice. Some public decision-makers will have rules concerning the process for agreeing minutes, but having a procedure for doing so is good practice.
- (b) The relevant procedure should be followed, provided that an adequate record is kept of the decision reached and the reasons.
- (c) Minutes may also be covered by a public body's publication scheme, under section 19 of FOIA, and so be made available to the public and any interested parties following the decision-making process. For information on guidance issued by the Information Commissioner on when minutes should be published.

#### 3.19.3 Transparency and FOIA

- (a) Public bodies do not operate in a vacuum. Even though many may deliberate in private, their papers may subsequently be disclosed to the public, either in accordance with the relevant publication scheme under FOIA, or as a result of a specific request for information under section 1 of FOIA by a person affected by the decision.
- (b) Decision-makers should remember that all the material they consider and any notes they make, as well as their ultimate decision, may be disclosable in this way.

## 4 The Council's Constitution

4.1 Every local authority is required to prepare and keep up-to-date a constitution containing:

- (a) its standing orders;
- (b) its code of conduct;
- (c) any information directed by the Secretary of State;
- (d) any other information considered appropriate by the local authority; and
- (e) in the case of a local authority operating the committee system the constitution must also contain a statement as to whether it has an overview and scrutiny committee (OSC). (Section 9P, LGA 2000.)

4.2 A local authority's constitution must be made available:

- (a) at its principal office to members of the public to inspect; and
- (b) on request for a "reasonable fee" determined by the local authority. (Section 9P(3), (4), LGA 2000.)

4.3 The Council's Constitution can be found here:

<https://democracy.winchester.gov.uk/ieListDocuments.aspx?CId=352&MId=2032&info=1&Ver=4>

4.4 There are a number of key constitutional points that are worthy of note relevant to our advice and to which we shall refer:

4.5 Article 13.02 states that decisions of the Council will be made in accordance with these principles:

- a) *The actions must be proportionate to the desired outcome*
- b) *After due consultation and the taking of professional advice from officers*
- c) *With a respect for human rights*
- d) *With a presumption in favour of openness*
- e) *Natural justice*
- f) *With a clarity of aims and design options*
- g) *Giving reasons for the decision and the proper recording of those reasons"*

<https://democracy.winchester.gov.uk/documents/s6851/Part%202%20-%20Article%2013%20Decision%20Making.pdf>

4.6 Part 4.4 - Access to Information Procedure Rules. These lay out the obligations for the Council / members in respect of openness and transparency. As already made clear in section 3 of this advice, the law provides a comprehensive framework for openness and transparency in decision making. The Council's constitution reflects and summarises that in this part. This can be seen here:

[Part 4 - Part 4.4 - Access to Information Procedure Rules.pdf \(winchester.gov.uk\)](#)



- 4.7 The Officer / Member Protocol provides guidance so set out how the relationships between officers and members should operate. In relation to commercial matters, the protocol says:

*2.15 Members should only become involved in commercial transactions at the formal decision making stage. When dealing with a commercial transaction Members should be aware of the requirements of the Contracts Procedure Rules and relevant guidance. Members should take into account that where officers are involved in commercial transactions at a preliminary to or part of delegated decision making then it is not open to an individual member to conduct parallel discussions or negotiations or to seek disclosure of financial information where there is not a demonstrated need to know that relates to the member's specific exercise of their Councillor duties in each case.*

- 4.8 The protocol can be found here:

<https://democracy.winchester.gov.uk/documents/s6874/Part%205%20-%20Part%205.2%20Protocol%20for%20Member%20Officer%20Relations.pdf>

- 4.9 The Council is obliged to adopt a Code of Conduct for members (Localism Act 2011) and the Council's Code makes particular reference to contact with external bodies and contractors as follows:

*Members should note the following guidance and comply accordingly.*

*1.1 On occasions, a Member may be involved not only in business meetings of external bodies to which they have been appointed by the Council but also with third party contractors and developers with which the Council has a relationship or is seeking to have one. Members may also be approached by speculative developers. Members must be mindful of the scope and nature of any interventions with which they initiate or are involved in. There is a line between fact finding and awareness raising, and being drawn into a position of negotiating on behalf of the Council. Should the latter occur, or be necessary, the Member should ensure that an appropriate Council officer is in attendance to ensure a consistent and fair approach is taken across the Council. In some scenarios, a Member could potentially jeopardise contractual negotiations already underway or even expose the Council to legal challenge.*

*1.2 The officer in attendance should take brief notes of the purpose of the meeting, who was in attendance, when and where it took place, what was discussed and a note of actions arising from it. This should be made available to all parties as soon as possible after the meeting, and a central record kept that the meeting took place.*

- 4.10 The Code may be found here:

<https://democracy.winchester.gov.uk/documents/s6873/Part%205%20-%20Part%205.1%20-%20Members%20Code%20of%20Conduct.pdf>

## 5 **Members' Access to Information and to Council Documents**

- 5.1 Members have the ability to ask for information pursuant to their legal rights to information. This right extends to such information, explanation and advice as they may reasonably need in order to assist them in discharging their role as a Member of the Council. This can range from a request for general information about some aspect of the Council's activities to a request for specific information on behalf of a constituent.
- 5.2 As regards the legal rights of Members to inspect Council documents, these are covered partly by statute and partly by the common law.
- 5.3 In summary:
- 5.3.1 The rights of access to information by Councillors is a complex mix of legislation available to Councillors and the public alike, legislation specific to local government and "common law rights" given to Councillors by the Courts.
- 5.3.2 For general rights of access available to the public and/or members, see the Access to Information Procedure Rules as set out in the Council's Constitution .
- 5.3.3 The law relevant to access to information by Councillors includes the following:
- (a) The Freedom of Information Act 2000. This makes non-personal information freely available to all, with only limited exceptions.
  - (b) The Data Protection Act 1998. This relates to personal information, and generally makes this non-disclosable except in certain circumstances.
  - (c) Local Government Legislation / Common Law
    - (i) Access to Information provisions of the Local Govt Act 1972. This gives the public access to Committee Minutes and Agenda, and to background material relevant to those documents.
    - (ii) Other legislation (Local Government (Executive Arrangements) (Meetings and Access to Information) Regulations 2012)) ensures that Members are entitled to material relevant to public / private meetings of the Leader and Cabinet (and decision making by individual portfolio holders).
    - (iii) However, these rights do not apply to draft documents, to the advice of a political advisor or to most exempt / confidential information (unless such information is needed for the work of the Scrutiny Committee).
    - (iv) "Common Law Rights" (derived from Court judgements) give Members the right to inspect Council documents insofar as this is reasonably necessary to enable a Member to perform his/her duties as a Councillor – this is known as the "need to know" basis.
- 5.3.4 However, Members do not have any right to "a roving commission" through Council documents – mere curiosity is not sufficient.
- 5.4 In relation to business of the Executive, by virtue of Regulation 16 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012:

- 5.4.1 where there is a meeting (e.g. Cabinet) and there is a document which is in the possession / under the control of the Executive relating to the business to be conducted at that meeting, that document shall be available for inspection at least five clear days before that meeting;
  - 5.4.2 where the decision is made at a private meeting by a Cabinet Member or is a Key Decision delegated to an Officer, the document shall be available either after the meeting closes or when the decision is made;
  - 5.4.3 there are savings for exempt and confidential material and any document that contains advice provided by a political advisor or assistant.
- 5.5 Finally, any Council information provided to a Member is deemed to be information provided in confidence, is subject to the protections afforded by the Data Protection Act 1998 and must only be used by the Member for the purpose for which it was provided, ie in connection with the proper performance of the Member's duties as a Member of the Council. Therefore, for example, early drafts of Committee reports / briefing papers are not suitable for public disclosure and should not be used other than for the purpose for which they were supplied.
- 5.6 This point is emphasised in the Members' Code of Conduct
- 5.7 Failure to observe this obligation or disclosure of confidential information may amount to a breach of the Code of Conduct. Failure to safeguard and protect the confidentiality of personal information within the meaning of the Data Protection Act 1998 may result in prosecution of the Authority and / or any individual Officer or Member by the Information Commissioner and the imposition of significant monetary penalties.
- 5.8 Any Member request for personal information or personal data about an individual employee (rather than a general group of employees as a whole) should only be supplied where there is a demonstrable need for that Member to have the information at that level of detail in order to carry out their duties as a Member of the Council.
- 5.9 In cases where such information is to be released, officers will remind the Member that the information is confidential, subject to the protection of the Data Protection Act 1998 and confirm the necessary measures for handling that data in order to keep it confidential and ensure that it is not further disclosed to any other person or body either within or external to the Council.

## 6 General Points

6.1 The 4 bullet points in the motion are preceded by the words:

*"This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by..."*

6.2 Local authorities are statutory corporations, created by Parliament as single legal entities, as described in *Hazell v Hammersmith and Fulham* [1991] 1 All ER 545:

*'local authority, although democratically elected and representative of the area, is not a sovereign body and can only do such things as are expressly or impliedly authorised by Parliament'.*

6.3 There are many such statutory provisions, some of which provide an overall framework such as decision making and governance, but most of which charge the authority with carrying out one among many, sometimes competing, functions of a council or local authority for a particular purpose.

6.4 When making a decision, each relevant statutory provisions and more general rules about corporations and public authorities needs to be considered. Failure to do so could result in:

- the quashing of the decision through a judicial review if successful
- prejudice to the finances of the authority, and
- in the most extreme cases, liability for the individuals concerned

6.5 The decision making process for Councils is tightly prescribed by law. Amongst other things, the law sets out what steps must be taken within a timetable for decision making. The whole governance framework, the obligations around notice for meetings, the requirements to make papers and meetings accessible, the ability to scrutinise decisions (more fully set out in section 3 of this advice ) mean that the very nature of local authority decision making is very open and transparent in its nature.

6.6 We have included in Section 3 details of how overview and scrutiny and the executive function, in terms of openness and transparency. Overview and scrutiny is of course, in its own right, an important part of the governance framework providing challenge to but also member and public access to executive decision making. The executive are critical decision makers within the council's governance framework taking the majority of the decisions (as the majority of functions are executive functions) in the Council. There is a framework of legal obligations relating to executive decision making, openness and transparency. Seen as a whole therefore, the Council's decision making regime as prescribed by the law requires openness and transparency.

6.7 Also, the courts have shown that they are willing to intervene when local authority decisions do not follow the legal requirements and hence the requirements relating to openness and transparency.

6.8 Further the rights of access to information for members and the public is rightly considerable. Data protection subject access requests, FOIA requests, the application of the Local Government Act 1972 regime for meetings are available to both. Members also have their common law need to know. Section 5 specifically addresses members rights to information.

- 6.9 One therefore starts from a position where it is clear that the legal framework, which must be followed prescribes a high level of openness and transparency in decision making and beyond that for both members and the public.
- 6.10 The Council have replicated this in their Constitution and as a result the Council have correctly reflected the law in their Constitution.

## 7 **Bullet Point 1**

7.1 *“This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by:*

*Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions.”*

7.2 Apart from those situations in which legislation imposes an express duty to consult, the incidence of the duty and its content are governed by the overriding duty of public authorities to act fairly in the exercise of their functions. Unless there are prescribed procedures for consultation in statute, and subject to the overall requirements of fairness, a public authority usually has a broad discretion as to how a consultation exercise should be carried out although there is no such thing as unfettered discretion.

7.3 The requirements of fairness are heavily dependent on context and do not readily lend themselves to the formulation of inflexible rules, but it is possible to extract from the relevant cases some key factors that should steer the Council in determining whether fairness requires consultation and, if so, in what form.

7.4 In some areas, legislation expressly imposes a duty on a public authority to engage in some form of consultation before taking a particular decision or exercising a particular function.

7.5 In addition, statutory guidance may require public authorities to consult. Statutory guidance should be followed, unless the authority has good reason to depart from it.

7.6 Even where there is no express duty to consult, the courts may imply a duty to consult as part of a public authority’s general duty to act fairly.

7.7 The general duty to act fairly does not equate with a general duty to consult (see *R (Bapio Action Ltd) v Secretary of State for the Home Department and another* [2007] EWCA Civ 1139, Sedley LJ at paragraphs 43-44). As Dillon LJ commented:

*“Obviously it could be said to be best practice, in modern thinking, that before an administrative decision is made there should be consultation in some form, with those who will clearly be adversely affected by the decision. But judicial review is not granted for a mere failure to follow best practice. It has to be shown that the failure to consult amounts to a failure by the local authority to discharge its admitted duty to act fairly.”* (*R v Devon County Council, ex parte Baker* [1992] EWCA Civ 16).

7.8 Where a public authority has promised that it will engage in consultation before making a specific decision or a specific type of decision, fairness generally requires that the public authority should be held to this promise.

7.9 Public authorities may also promise to consult on specific decisions. For example, where the Government had stated that any decision in favour of new builds of nuclear power stations would be preceded by “the fullest public consultation”, this level of consultation was required (*R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin)).

7.10 It is important to identify clearly the nature of the relevant decision to see whether there has been a past practice of consultation in relation to decisions of that type.

7.11 Note however that in *R (Dudley Metropolitan Borough Council) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin), the High Court held that there was no procedural expectation, based on past practice, that the DCLG would consult

with the council even though there had been an earlier consultation with the consultation in 2004 about a similar proposal. One incident of consultation of that type could not amount to a practice of consultation in the future.

- 7.12 Broadly, the more serious the impact, the more likely it is that fairness requires the involvement of affected individuals in the decision-making process in some manner (that may not if not legally be “full” consultation but may well be some other form of involving them that legally in the opinion of the Council is appropriate and proportionate).
- 7.13 The courts’ reticence in finding a duty to consult, in the absence of an express promise to consult or established practice of consultation, stems from their understanding of public decision-making as involving wide discretionary powers that must be exercised in the public interest, balancing a wide spectrum of interests and resolving disputes (see R (on the application of Bhatt Murphy (a firm) and others v Independent Assessor [2008] All ER (D) 127 at paragraph 41).

*“...Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (BAPIO [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another’s will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.”*

- 7.14 If the courts too readily imposed a requirement of public consultation in decision-making, the exercise of public authority functions may be stultified and the “host of litigable issues” that consultation brings may generate defensive public administration (see Bapio, Sedley LJ at paragraphs 43-4)
- 7.15 When looking at whether a duty to consult should be implied into the legislative framework conferring a power to act on a public authority, the courts will pay close attention to the legislative purpose and scheme to see what clues are given on the appropriateness of imposing a duty to consult.
- 7.16 Where the applicable legislation expressly imposes a duty to consult on other aspects of the authority’s functions but is silent on consultation in relation to the particular function, this may indicate that a duty to consult should not be implied. This is because it suggests that Parliament had procedural protections in mind when setting up the legislative framework and made a conscious choice not to impose a duty to consult in this case.
- 7.17 This is significant. Undertaking a consultation where the duty should not be applied could render the authority susceptible to challenge for acting outside its powers (*ultra vires*) (para 3.17.1), outside its remit (para 3.18.3) and not for a proper purpose (para 3.18.6).
- 7.18 Similarly, where the legislation requires consultation with particular named bodies or consultation in a particular form, it is difficult to persuade a court to imply a parallel duty to consult some other body or to consult in some other way (see R (Hillingdon London Borough Council) v Lord Chancellor [2008] EWHC 2683 (Admin). It is not unheard of for the courts to

supplement a legislative procedure, but it must be clear that the statutory procedure is insufficient and that any additional requirements implied into it will not frustrate the legislative purpose, (see *Wiseman v Borneman* [1971] AC 297 at page 308).

- 7.19 The need to guard against overly prescriptive procedures leading to defensive or stultified decision-making is part of the wider picture (*R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) at paragraph 42).
- 7.20 Overall, in most cases, a number of these factors are relevant and are weighed in the balance when determining whether or not fairness requires consultation before a decision is taken or a function is exercised.
- 7.21 That is the test. It is not uniform and cannot be determined by the use of the word "properly" unless the arbiter of that is the Monitoring officer, given the legal issues at play.
- 7.22 A blanket decision to always not consult will almost certainly fail legally. The law on some occasions will require consultation.
- 7.23 Equally, a blanket decision to always may well be susceptible to successful challenge depending upon the facts and circumstances. Such a blanket decision may well be viewed as unreasonable and irrational, does not take into account duties such as the fiduciary duty as well as the obligations within decision making and operational matters. Pars 7.13-7.17 of this advice explains how this may arise in more details.
- 7.24 When looking at the precise circumstances of a case, however, the court will have in mind certain guiding principles that must be followed if consultation is to be fair. The formulation most commonly adopted is set out in *R v London Borough of Brent, ex p Gunning* [1985] LGR 168 and frequently referred to as "the Gunning principles":
- The consultation must be at a time when proposals are still at a formative stage.
  - The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Those consulted should be aware of the criteria that will be applied when considering proposals and which factors will be considered decisive or of substantial importance at the end of the problem, see *R (Robin Murray & Co) v The Lord Chancellor* [2011] EWHC 1528 (Admin) (16 June 2011).
  - Adequate time must be given for consideration and response.
  - The product of consultation must be conscientiously taken into account in finalising any statutory proposals.
- 7.25 A further factor to consider, in addition to the Gunning principles, is whether or not the form of consultation is appropriate in all the circumstances. Who should be consulted and how?
- 7.26 This involves not only consideration of the factors outlined above (such as the nature and impact of the decision and the legislative framework), but also more practical considerations relating to the characteristics of those who are potentially affected by the decision.
- 7.27 Section 3 LGA 1999 requires an authority "to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness" ("the best value duty"). It also obliges the authority to consult certain groups of persons "for the purpose of deciding how to fulfil the duty" (s.3(2)).
- 7.28 Section 3 has been interpreted by the courts and it is now clear that the consultation duty has its limits.



- 7.29 In 2013, the High Court considered in *R (Nash) v Barnet LBC* [2013] EWCA Civ 1004 section 3(1) of the 1999 Act. This requires best value authorities to comply with a general duty to make arrangements to secure continuous improvement in the way in which its functions are exercised having regard to a combination of economy, efficiency and effectiveness. Section 3(2) requires the authority to consult a range of representatives of persons listed in that section for the purpose of deciding how to fulfil the general duty. Authorities are to have regard to statutory guidance in deciding how to fulfil the general duty, who to consult and how to conduct consultation.
- 7.30 Mrs Nash argued that the Council was under a duty to consult specifically about the proposals relating to outsourcing. The Council argued that the duty to consult was satisfied by the general consultation exercises it had undertaken in relation to its annual budget process. These consultations did not specifically refer to outsourcing, but they did raise a number of high level issues relating to resourcing and service delivery. The general consultations were conducted by way of on-line surveys, via information on the Council's website, in public meetings and a workshop event involving the voluntary sector.
- 7.31 The judge undertook a detailed analysis of s.3 of the 1999 Act and concluded that a general consultation about "priorities" or other general matters which might assist the authority in deciding whether to outsource of the type undertaken by the Council was not sufficient in this case. He took care to emphasise that the duty does not extend to consulting on all decisions, great or small, relating to the implementation.
- 7.32 The case of *Peters v Haringey LBC; Lendlease Europe Holdings Ltd (Interested Party)* [2018] EWHC 192 (Admin) concerned an application for judicial review brought by a coalition of residents who were opposed to the Haringey Development Vehicle (HDV), a joint venture between the Council and the private sector, where the partner would bring finance, experience and expertise to the task of developing the Council's land for its better use, and thereby achieve the Council's strategic aims in housing, affordable housing and employment.
- 7.33 The judge, Ouseley J, dismissed this ground on the basis that the application was out of time. He then gave guidance on application of the duty, setting out two steps:
- 7.33.1 Was the Council was making "arrangements to secure continuous improvement in the way its functions are exercised", having regard to economy, efficiency and effectiveness, when it proposed or decided on its strategy for developing its land or for doing so with a private sector company, or doing so through the HDV? The judge noted that the duty was not limited to outsourcing – it covered arrangements with other parties, aimed at improving the way "its functions are exercised". The proposed overarching vehicle could be viewed as an "arrangement" or one "to secure continuous improvement" in the way the Council exercised various property management and housing functions, and so the duty to consult arose.
- 7.33.2 When did that duty have to be fulfilled? The section required consultation about a "high level" decision, policy or approach, and not one about awarding, let alone entry into, a particular contract. The equivalent decisions on the HDV were taken in February 2015, or at the latest November 2015, and the consultation duty should have been undertaken before those decisions were actually arrived at.
- 7.34 The judge ruled that the language of s.3 made it clear that the level of decision-making, about which consultation was required, was the point where an authority was selecting the option in principle and establishing its approach, before significant expenditure on implementing the established approach was to be incurred, and before the third parties were approached, who would in their turn have to incur significant expenditure before any particular arrangement was agreed and entered into. It did not matter that the Council

thereafter remained able to change its approach, whether through a change of heart or because the preferred approach proved unsatisfactory.

- 7.35 The court applied the Court of Appeal's decision in *R (Nash) v Barnet LBC* [2013] EWCA Civ 1004 that where a public law decision was made at the end of a process which involved one or more previous decisions, the earlier and later decisions are distinct, each addressing what are substantially different stages in a process.
- 7.36 The Section 3 duty must be seen in this context.
- 7.37 The motion specifically referred to members. Members have certain rights legally and constitutionally, Some arise through the operation of overview and scrutiny, Others arose by virtue of members rights to information. The public's rights to access information and be consulted with will vary (as outlined above) when it comes to consultation.
- 7.38 The decision making process is as already laid out and stated prescriptive and such that certain rights are common across all types of member decisions.
- 7.39 The Council needs to be able to reflect those requirements and balance those obligations in making lawful decision about when / how / with whom etc to consult alongside other duties, such as its fiduciary duty.
- 7.40 In all the circumstances, the wording of the motion should reflect the wide ranging set of legal principles as well as specific duties regarding the decision making processes that must be followed, as well as the Council's Constitution (article 13.02, for example). It must also balance any commitment to consult alongside the legal obligations and rights already available, as well as the need to maintain effective governance and decision making, and broader duties placed on the Council such as the fiduciary duty.
- 7.41 We therefore...suggest that a better starting point would be to endorse and reflect the current Constitutional commitment to such matters:

*"This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by:*

*Properly consulting all councillors and the public before making any significant decisions about council projects or other major financial transactions."*

*By committing to act in accordance with the Council's Constitution (Article 13.02) which states that decisions of the Council will be made in accordance with these principles:*

- a) The actions must be proportionate to the desired outcome*
- b) After due consultation and the taking of professional advice from officers*
- c) With a respect for human rights*
- d) With a presumption in favour of openness*
- e) Natural justice*
- f) With a clarity of aims and design options*
- g) Giving reasons for the decision and the proper recording of those reasons"*

**8      Bullet point 2.**

8.1      *"This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by:*

....

*Within 12 months of a decision being made, publishing without restriction all papers used to support decisions on projects and other major financial transactions that were marked as exempt from publication at the time of the decision unless Full Council decides that these papers should remain exempt for a further 12 months."*

8.2      We are aware that the Monitoring Officer has a draft process that was in a state of readiness to address this just prior to the pandemic, which for obvious reasons was not then regarded as a priority during Covid 19 and virtual meetings etc but which will now be presented to a future meeting of Audit and Governance for approval.

**9 Bullet point 3.**

9.1 "This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by:

....

*Recording the discussions, submissions and decisions at all meetings attended by any person outside Winchester City Council and, where those meetings relate to any decision made afterwards, for these records to be available to all councillors within 2 weeks and to the public within 12 months of the meeting unless Full Council decides that these papers should remain exempt for a further 12 months."*

9.2 The first point to be made in relation to this bullet point is that as already said, the decision making process obliges decision makers to take all relevant considerations into account. Therefore anything material which is relevant to the decision must be placed before the decision maker. This would normally be contained within the report, appendices or background papers. These by law must be made available in advance of the decision unless exempt.

9.3 What this proposal would therefore capture would be outside this, hence irrelevant material and would require its release after the decision.

9.4 It is useful to summarise what is already in play within councils. In terms of Council meetings generally and access to information, the following table (reproduced from Lexis PSL) sets out the general position in a typical authority. Some authorities grant additional rights to councillors and members of the public

		Council	Committees and sub-committees	Officers' non-executive decisions	Cabinet (key and non-key decisions)	Individual executive members (key and non-key decisions)	Officers' key executive decisions	Officers' non-key executive decisions
1	<b>Public identification of the body or person responsible for taking the decision</b>	Yes — statute and constitution	Yes — statute and constitution (terms of reference), and council minutes for ad-hoc delegations to committees and sub-committees	Yes — scheme of delegations and minutes for ad-hoc delegations	Yes — statute and constitution	Yes — statute and constitution (scheme of delegation to cabinet members)	Yes — scheme of delegations and cabinet minutes for ad-hoc delegations	Yes — scheme of delegations and cabinet minutes for ad-hoc delegations
2	<b>Public availability of the decision-making process</b>	Yes — statute and constitution (Council Decision-	Yes — statute and constitution (Council Decision-	No	Yes — statute and constitution (Executive Decision-	Yes — statute and constitution (Executive Decision-	Yes — scheme of delegation	No

		Making Procedure Rules)	Making Procedure Rules)		Making Procedure Rules)	Making procedure Rules)		
3	<b>Advance notice of intention to take a decision in respect of a particular issue</b>	No	No	No	Yes for anticipated 'key decisions' — forward plan	Yes for anticipated 'key decisions' — forward plan	Yes for anticipated 'key decisions' — forward plan	No
4	<b>Advance consultation with interested parties</b>	Discretionary	Discretionary	Discretionary	Discretionary	Discretionary	Discretionary	No
5	<b>Requirement for the consent of particular individuals</b>	No	No	No	No	No	No	No
6	<b>Advance notice of the date, time and location of the proposed decision (agenda)</b>	Yes — 5 clear days	Yes - 5 clear days	No	Yes - 5 clear days or shorter notice in case of urgency with consent of Chairman of Scrutiny Committee	Yes - 5 clear days or shorter notice in case of urgency with consent of Chairman of Scrutiny Committee	Yes - 5 clear days except in cases of urgency	No
7	<b>Availability of a written report</b>	Yes — 5 clear days or when added late to agenda with chairman's consent, unless it discloses confidential or exempt information	Yes — 5 clear days or when added late to agenda with chairman's consent, unless it discloses confidential or exempt information	No	Yes — 5 clear days or when agenda published, unless it discloses confidential or exempt information	Yes — 5 clear days or when agenda published, unless it discloses confidential or exempt information	Yes — 5 clear days except in cases of urgency, or unless it discloses confidential or exempt information	No
8	<b>Availability of background papers</b>	Yes — on publication of report, unless they disclose confidential or exempt information	Yes — on publication of report, unless they disclose confidential or exempt information	No	Yes — on publication of report, unless they disclose confidential or exempt information	Yes — on publication of report, unless they disclose confidential or exempt information	No	No
9	<b>The right to attend when the decision is taken</b>	Yes, except for confidential and exempt information	Yes, except for confidential and exempt information	No	Yes	No	No	No
10	<b>The right to make representations to the decision taker</b>	Discretionary	Discretionary	No	Discretionary	No	No	No
11	<b>The right to require the</b>	No	No	No	No	No	No	No

	<b>decision to be referred to a higher level</b>							
12	<b>Publication of a written record of the decision and the reasons for that decision</b>	Yes — a summary may be published where the minute would otherwise disclose confidential or exempt information	Yes — a summary may be published where the minute would otherwise disclose confidential or exempt information	No	Yes — a summary may be published where the minute would otherwise disclose confidential or exempt information	Yes — a summary may be published where the minute would otherwise disclose confidential or exempt information	Yes — a summary may be published where the minute would otherwise disclose confidential or exempt information	No
13	<b>Requirement to report decision to a higher level</b>	No	Yes — minutes to council or parent committee	No	No	No	No	No
14	<b>Rights to require a review or reconsideration of the decision</b>	No	No	No	Yes — scrutiny committee may require the cabinet to reconsider the decision	Yes — scrutiny committee may require the cabinet member to reconsider the decision	Yes — scrutiny committee may require the officer to reconsider the decision	Yes — scrutiny committee may require the officer to reconsider the decision
15	<b>Rights of appeal against the decision</b>	No	No	No	No	No	No	No
16	<b>Audit trail for decision</b>	Yes	Yes	Sometimes	Yes	Yes	Yes	Sometimes

- 9.5 The implementation of a proposal such as this on the face of it requires considerable cost and effort, a cost that places a potentially significant burden on the public purse.
- 9.6 On the face of it, such an obligation seems irrational both in terms of what it requires (the capture of and publication of information other than that which is a relevant consideration as that is already available) and the basis of that being after the decision.
- 9.7 Further, as the law requires relevant information to be taken into account by the decision maker, and this is included within information that is placed before the decision maker and usually (subject to legal requirements ) placed in the public domain in advance, the cost of implementing such a proposal raises significant questions as to how such a requirement (given its lack of merit) fits with the Council's obligation to act legally and meet its fiduciary duty. Such an obligation seems irrational and unnecessary, based on improper purposes, namely political purposes, the latter being unlawful (Para 3.18.6).
- 9.8 The law requires relevant considerations to have been included with the decision makers papers (Para 3.18.5).
- 9.9 Further, the practicalities (as well as the costs) of delivering this as drafted are unworkable in any sizeable local authority. It is clear this will have staffing implications. Decisions will slow down. And what of confidential matters that should not be disclosed? How will this work alongside such issues?

- 9.10 When it comes to decision making, not only must the local authority act within the letter of the statute but it must also carry out that action for the purpose that Parliament intended when passing the Act in question. It is not good enough to simply identify that a statutory provision says the authority can do something, one must ask what is the purpose of that provision and does the prospective decision accord with that purpose(Para 3.18.7).
- 9.11 There have been a string of cases about local authorities misusing legislation for other means in this way. Most are where common sense might say that the local authority could do something that in fact it couldn't, such as councils banning activities on land and property they owned, such as fox hunting or carrying calves for overseas veal production, on moral grounds not associated with the purpose of the law allowing for local authority ownership in the first place. The most infamous of these in recent times was quite deliberate (Porter v Magill), being Westminster Council using combined provisions to move prospective tenants out of the City and to sell council houses in an attempt to socially engineer voting patterns of the electorate.
- 9.12 The fiduciary duty and this are of concern to us. The local authority is the steward of the public purse and has a duty not to squander those resources and to act in the local taxpayer's interests.
- 9.13 Given how the decision making system already obliges the taking into account of and inclusion of all material considerations, how will the courts view the proposal on its merits and taking account of the resource implications?
- 9.14 Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680 said that the court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.
- 9.15 We cannot but say that the proposal as drafted is in our view fundamentally flawed.
- 9.16 If pursued it could see the Council facing a legal challenge that in our view may well succeed on the basis that the introduction of this policy is irrational and given the resource consequences, fails to take into account the impact on the councils resources.
- 9.17 Hence it fails on its merits and is also in breach of the fiduciary duty.
- 9.18 This is even more apparent when balanced against the limited merits of the proposal (given that any material considerations will subject to lawful grounds for confidentiality already have been made public prior to any decision).

10 **Bullet Point 4**

10.1 *“This Council commits to clearly demonstrate that it is open and transparent in all its decision-making, specifically by:*

...

*Stopping the use of Non-Disclosure Agreements that councillors have been required to sign before being able to see some Council or Committee papers and to cancel any indemnity clauses in such Non-Disclosure Agreements previously signed by serving Councillors.”*

10.2 As a general point, the use of NDA's in our view should very (very) much be the exception. Whilst we would never say never to their use, their use should be in genuinely very exceptional circumstances.

10.3 We are aware that an issue has arisen with confidential documents use through ModGov at the council and it is intended to revise the council's system so as to make it quite clear (through the use of coloured pages on the online system akin to the way in which printed pages are presented) those papers that are / are not confidential.

10.4 Our view is that the Code of Conduct, which makes breach of confidentiality by a member a potential breach of the Code , is an adequate solution.

10.5 Members should be aware that breach of confidential personal information may be a matter that the ICO gets involved in, and that can result in liabilities for the organisation and individuals (which could include members as well as officers).



11 **Conclusions.**

11.1 The Council sought advice on a motion set out in section 1 of this advice.

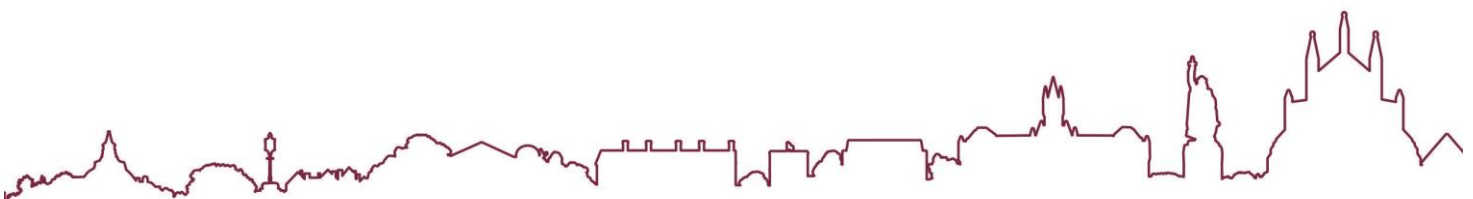
11.2 Our advice was sought on the 4 bullet points contained in the motion. Our advice is set out in this paper in sections 6-10 of this advice as we consider initially some general points and then specifically the 4 bullet points.

11.3 We are happy to clarify or expand further if required.

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Exempt report review – Procedure (summary)

1. Democratic Services Team will maintain a spreadsheet of exempt items (reports, appendices etc) as and when they are published and will set a review date of 6 months from the date of publication.  
*NB the report template will be amended to include a note to report authors highlighting that an exempt item will be subject to review of after 6 months.*
2. On a monthly basis, the Democratic Services Team will check to see which exempt items are due for review and will email the report author to ask them to recommend whether or not the item should be reclassified as open and to give reasons for their decision. Report author will be advised to contact the Legal Services team for advice if required and given 10 working days to respond.
3. After 10 working days, Democratic Services Team will email the Monitoring Officer with a table detailing the item under review (including SharePoint link) and the recommendation from the report author, including their reasons.
4. The Monitoring Officer confirms whether or not the item should be reclassified as open:
  - a) If decision to publish as open, the Democratic Services Team will publish the report as a new item on the original meeting page. **Example attached.** An email will be sent by Mod Gov (including to all councillors) to advise.
  - b) If the information is to remain exempt, the Democratic Services Team will set a new review date for 6 months' time.
5. Summary of items reviewed and the decision made by the Monitoring Officer reported to Audit & Governance Committee as part of the quarterly governance performance report.





**Meeting** Cabinet

**Date** 12 October 2021

The following item should no longer be classified as exempt under Part 1 of Schedule 12A of the Local Government Act 1972 (as amended):

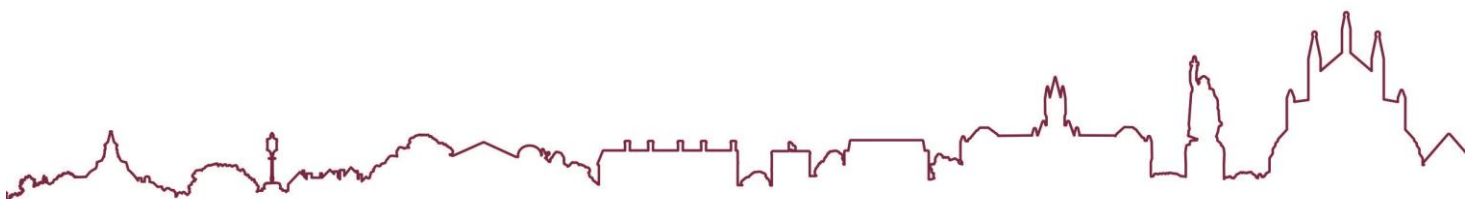
Agenda Item.

Eg – “Central Winchester regeneration costing – report CAB#####”

**Lisa Kirkman**  
**Strategic Director and Monitoring**  
**Officer**

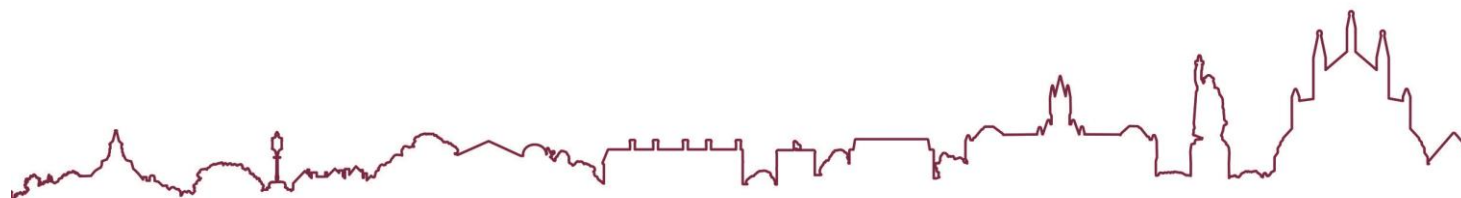
3 May 2022

Agenda Contact: Nancy Graham, Senior Democratic Services Officer Tel: 01962 848 235, Email: [ngraham@winchester.gov.uk](mailto:ngraham@winchester.gov.uk)



# SAMPLE REPORT

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## Council Motion referral – Audit and Governance Committee – June 2022

### Point 4 - Non Disclosure Agreements (NDA)/Confidentiality Agreements – sometimes called both

The Monitoring Officer has sought to gather as much information on the use of these agreements. Much was held across various teams in the council depending on the project/project lead/managers. Agreements relating to cabinet reports were held by Democratic Services.

Subject Matter	When	How Many?
Station Approach Architects Panel	July 2017	5 individuals including 2 councillors
Viewing Winchester Sport and Leisure Park Contract	June 2019	3 known
Viewing Environmental Services Contract	November 2019	2 known
CWR Reference Group	September 2021	9 individuals including 3 councillors
CWR – Cabinet Report - outline business case. Appendix containing financial information	July <b>and</b> December 2020	12 councillors

### Monitoring Officer opinion

The use of these agreements should always be the exception. Whilst understanding the caution erred by officers in respect of the financial appraisal in the outline business case for CWR, on consulting with both the Project Director lead and Section 151 officer, when the matter was raised with the Monitoring officer in

December 2021, she took the following action to remove the requirement for the NDA as follows;

**From:** Lisa Kirkman  
**Sent:** 17 December 2021 09:19  
**To:** \_Members - All [Members-All@winchester.gov.uk](mailto:Members-All@winchester.gov.uk)  
**Subject:** CWR Cabinet Papers - NDA - Update  
**Importance:** High

Good Morning Members,

While I had, pre-despatch, reviewed and agreed with the exemption applied to appendix E of the CWR Cabinet papers for next week I have now had opportunity to review and discuss the NDA for the same with the S151 Officer and lead Director.

I do not think the NDA is necessary for this report and exempt appendix and my colleagues agree. Members are obliged to comply, as they always are, with the confidentiality that applies to the exempt paper. The available remedies for any breach of confidentiality remain the same and any breach will be acted upon.

As a result the exempt appendix will be loaded to mod.gov today for members to access in the usual way.

Many thanks and best wishes,

Lisa

**Lisa Kirkman**  
Strategic Director and Monitoring Officer

### **NDA's and use of Indemnities – councillors**

It is arguable whether an indemnity is legally enforceable against a councillor – this argument relates to the intention to create legal relations. If agreed by Audit and Governance committee all councillors should be formally released from any indemnity clause with the remainder of the agreement to remain in force.

The exception would relate to the CWR – Cabinet Report outline business case (Appendix containing financial information). As the Monitoring Officer removed the NDA from the **second** Cabinet paper, with the agreement of Audit and Governance committee, the same process should be gone through in relation to release of the NDA on the **first** Cabinet report.

### **Improvements**

In terms of process **any** use of NDA/confidentiality agreements in future should always be signed off by the Executive Leadership Board and the terms of the NDA



approved by the Monitoring Officer. The Monitoring Officer therefore recommends this change to the committee.

The Monitoring officer has sought improvements to the marking of exempt papers in mod.gov and puts to Audit and Governance Committee this sample of an obviously presented pink exempt paper and how this would be viewed in mod.gov. The Monitoring Officer therefore recommends this change to the committee.

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***In accordance with SCHEDULE 12A of the LOCAL GOVERNMENT ACT, 1972,  
PART I. Para 3*** ( Information relating to the financial or business affairs of any particular person (including the authority holding that information).

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