

PRIVATE AND CONFIDENTIAL

Winchester City Council Advice on Motion

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	Public identification of the body or person responsible for taking the decision	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	Public availability of the decision-making process	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	Advance notice of intention to take a decision in respect of a particular issue	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	Advance consultation with interested parties	Discretionary	Discretionary	Discretionary	Discretionary	Discretionary	Discretionary	No
5	Requirement for the consent of particular individuals	No	No	No	No	No	No	No
6	Advance notice of the date, time and location of the proposed decision (agenda)	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	Availability of a written report	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	Availability of background papers	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	The right to attend when the decision is taken	Yes, except for confidential and exempt information	Yes, except for confidential and exempt information	No	Yes	No	No	No
10	The right to make representations to the decision taker	Discretionary	Discretionary	No	Discretionary	No	No	No
11	The right to require the	No	No	No	No	No	No	No

	decision to be referred to a higher level							
12	Publication of a written record of the decision and the reasons for that decision	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	Requirement to report decision to a higher level	No	Yes — minutes to council or parent committee	No	No	No	No	No
14	Rights to require a review or reconsideration of the decision	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	Rights of appeal against the decision	No	No	No	No	No	No	No
16	Audit trail for decision	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.