

# CONSTITUTION OF THE LONDON BOROUGH OF CROYDON

## Part 5.K – Protocol on Members’ rights of access to information

### 1. Introduction and background

#### 1.1 The purpose of this protocol is to:

- a) set out the rights of access to Council information that members of the Council have to enable them to carry out their duties as Members; and
- b) provide guidance to Members and Officers on the approach to be adopted in exercising these rights in relation to the availability of Cabinet and Committee Reports and to information held by the Council generally.

1.2 This protocol does not deal with the wider rights of access of the public and the press which are set out in the Access to Information Procedure Rules at Part 4B of the Constitution. Members are advised to refer to Part 4B which also sets out members’ statutory rights to information: this protocol expands on those rights.

1.3 The Council is committed to ensuring that Members have the information they need in a timely way to carry out their duties, in line with Members’ statutory and common law rights to access information.

1.4 The term ‘Member’ as used throughout this Protocol includes both elected Councillors and any individuals co-opted to Council Committees and Sub-Committees. Co-optees’ rights under this Protocol apply only in relation to the function(s) of the committee or sub-committee for which they are co-opted and are subject to specific advice from the Director of Legal Services to ensure information is not disclosed when it is not legally permissible to do so.

#### 1.5 Statutory rights and guidance: summary

- a) The Local Government Act 1972, as amended primarily by the Local Government (Access to Information) Act 1985 governs the statutory rights that Members have, along with the public, to access agendas, background documents, reports to meetings and minutes. The Act also gives Members rights to see exempt information (i.e. information which would be kept off the public agenda and public part of the meeting) if it falls into certain categories of information;
- b) The Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 give anyone the right to access information held by the Council, provided that information is not determined to be exempt under the Act (e.g. personal information about others, information that is about to be published, confidential information or information that would prejudice the commercial interests of the Council or others if released). Many of the

exemptions are subject to a Public Interest Test to determine whether the information should be withheld.

Members have the same rights to access to information under the FOIA as anyone else. Members' rights of access may overlap with rights under the FOIA or may allow Members access to information (or documents) that would not be available to them under the FOIA. For example, it is not necessary to say why information is wanted if it is requested under the FOIA but it would be necessary to state this if a Member was relying on their need to know as a Member. Information that is not available to a Member under the FOIA (because it is covered by an exemption) may be available to them on the basis of their rights as a Member. So, in some respects the FOIA rights are wider than Members' other rights and in some respects they are narrower.

- c) The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 include additional rights for Members of the Council and for Members of an Overview and Scrutiny Committee to see information held by the executive, including exempt or confidential information. Where a Scrutiny Member or Committee requests information in relation to matters which they are scrutinising, the executive must provide it no later than ten clear working days after the executive receives the request;
- d) For Members carrying out casework, there are rights to access the personal information of individuals within protections set out in the Data Protection Act 2018 and General Data Protection Regulation 2018 (more information is provided in the Members' Handbook);
- e) The Government has published statutory guidance on the conduct of overview and scrutiny which states that:

*A scrutiny committee needs access to relevant information the authority holds, and to receive it in good time, if it is to do its job effectively.*

and

*While each request for information should be judged on its individual merits, authorities should adopt a default position of sharing the information they hold, on request, with scrutiny committee members.*

1.6 The statutory guidance includes the following points:

- Scrutiny members need access to a regularly available source of key information about the management of the authority, including information on performance, management and risk;
- Officers should speak to Scrutiny Members to ensure they understand the request and the reasons why information is needed, so that the authority is better able to provide relevant and timely information in a format that meets the recipient's needs;
- In instances where it is legitimate for a council to withhold information, the executive is required to provide a written statement to the Scrutiny Committee setting out its reasons for that decision;

- Before deciding not to share information, the council should give serious consideration to whether that information could be shared in closed session;
- Scrutiny committees can require Cabinet members and Officers to attend before them to answer questions.

### 1.7 Case law

Members have certain 'common law' rights to information in addition to the statutory rights outlined above, which have been established through historic case law and which intersect with the Freedom of Information Act and statutory guidance. **Members are entitled to see documents which are reasonably necessary to enable them to carry out their duties as a Member.** This is generally described as the 'need to know' principle.

1.8 There is no simple definition of the 'need to know', but there is no right for Members to access information if it does not relate to carrying out their role as a Member (e.g. where the reason is to do with their position as a party member, as a resident or as a member of an association). Extra care will be needed when considering the application of this right in cases which are legally sensitive, e.g. where there is litigation underway or contemplated, where the Council is acting as a quasi-judicial body (such as planning or licensing matters), employment or conduct related matters, or any matter relating to an individual or entity where that individual/ entity has right of appeal or review which is pending.

1.9 The following principles relate to the 'need to know':

- i) A Member will generally have a need to know information a constituent had asked the Member to obtain on their behalf if the constituent would themselves be entitled to that information.

Members have a legitimate role as advocates for their constituents as a group and as individuals. Members seeking information about individual constituents will need to demonstrate that they have the agreement of their constituent to the disclosure by the Council of the information. This must be by way of written confirmation, especially in the case of sensitive personal information. Ward members cannot use their role as a Member to obtain for constituents information to which the constituents themselves would not be entitled.

- ii) Ward Members may have a particular need to know about matters affecting their ward. This does not mean they are entitled to access all information the Council has concerning matters affecting their ward. For example, if the information is confidential and could not in any event be passed on by the Ward Member to constituents, it would be necessary to establish a clear 'need to know' for reasons that did not involve sharing the information with constituents.
- iii) The Party Leaders are likely to have a greater need (but no absolute right) to have access to exempt reports than ordinary Members with no special role.

- iv) Members of the Scrutiny Committees are entitled to have access to exempt or confidential reports relevant to an action or decision being reviewed or scrutinised.

#### 1.10 Principles

All Officers and Members are expected to adhere to the Seven Principles of Public Life which include the principle of Openness:

*Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.*

- 1.11 Croydon Council has adopted a number of values which define the way that Officers will work on a day to day basis: this includes the principle 'Honest and open'.

- 1.12 When requesting information, Members will:

- be mindful of the resource implications of providing a response and will ensure that their enquiries are proportionate and focused on enabling them to carry out their duties as Members;
- understand that Officers will, as part of undertaking good governance, seek to understand the basis on which the Member is requesting the information (for example, as a Ward Member or as a Scrutiny Member).

- 1.13 This protocol has been drafted to ensure compliance with relevant legislation, statutory guidance, current case law and the above principles.

## **2. The process**

### 2.1 Information requests from all Members

The Council has established a Members' Enquiries system which is designed to ensure that Members receive timely responses to requests for information and resolution of casework issues. The process works as follows:

- i) Members enter their enquiry on the desktop member enquiries app and can see the case number allocated;
- ii) An immediate acknowledgement is sent in response via email, showing the case number against the subject of the request identified by the Member;
- iii) A response is provided within ten clear working days of receipt of the request.
- iv) If a full response is not provided within ten clear working days, the Member Enquiries system will chase a response from the relevant Officer and continue to chase until the response is provided.

- 2.2 Use of the Members' Enquiries system enables the production of reports on speed of response, (enabling areas for improvement to be identified and addressed) and generation of information on enquiry trends, to inform the proactive provision of briefings and other information for Members.

2.3 Members should use the Members' Enquiries' system to follow up casework issues on behalf of their constituents when normal procedures and timescales (for example, reporting fly tipping, applying for Housing Benefit) have not led to an appropriate outcome. Issues raised as a Members' Enquiry at the same time as a resident raises the same matter as a complaint to the Council will result in duplication of effort and reduced resources available to respond to other matters. Officers will ensure that Members are well-briefed on the routes for members of the public to use when reporting issues and making requests to the Council.

2.4 Officers will follow these principles when responding to Members' enquiries:

- i) Officers will seek clarification from the Member at the earliest possible opportunity as necessary to ensure that the request (and the intent behind the request) is fully understood, to enable a full and appropriate response to be given;
- ii) If an Officer considers that meeting a request for information would involve an unreasonable commitment of resources (for example a request to compile information which does not already exist in the form requested by the member):
  - the relevant Director will take legal advice to ensure that the Member's right to information is not being inappropriately denied;
  - the Officer will discuss with the Member what information is currently available and whether the request can be adjusted to reflect that availability;
  - the Member will be informed of the outcome within ten clear working days of making the request, including reference to the legal reason for the decision. The Officer will provide the Member with any parts(s) of their request which can be provided through reasonable expenditure of resources;
  - the Executive Leadership Team will receive regular reports on any instances of non-provision of information in response to Member requests to ensure an appropriate and consistent approach;
- iii) Draft documents compiled in the context of Council policy development and draft Committee reports will not normally be supplied in response to Member enquiries;
- iv) Where a response would otherwise lead to the dissemination of particularly sensitive information (see section 2.11 below) which cannot be made available, Officers will either:
  - a) redact source material only to the extent necessary to ensure that information not appropriate for dissemination is obscured or
  - b) give the Member an explanation of the reason why the information cannot be provided, with reference to the relevant definition of exempt information (as set out in Appendix 1, Part 4B of the Access to Information Procedure Rules) or any other relevant reason, on the advice of the Director of Legal Services.

This response will be provided to the Member within ten clear working days of making the request;

- v) Where a request for information in relation to the Cabinet would otherwise lead to the dissemination of the advice of a political adviser or assistant, Officers will either
  - a) redact source material only to the extent necessary to ensure that information not appropriate for dissemination is obscured or
  - b) give the Member an explanation of the reason why the information cannot be provided, with reference to the relevant definition of exempt information.

This response will be provided to the Member within ten clear working days of making the request;

- vi) Where it is not possible to provide the information for any other reason (e.g. the information is not held by the Council) the Member will be provided with a full explanation within ten clear working days of making the request;
- vii) Officers will aim to respond quicker than the ten clear working days timescale wherever resources and other priorities permit.

2.5 Both Members and Officers will act in accordance with the Protocol for Staff-Councillor relations as set out in the Council's Constitution when requesting and responding to requests for information.

#### 2.6 Access to reports

All reports will be despatched to the members of the relevant committee or other body and all published reports will be available to all Members via the ModGov app.

2.7 Except where reports contain particularly sensitive information (as set out in section 2.11 and following below), exempt reports to Cabinet will additionally be accessible to Shadow Cabinet Members, Scrutiny Leads (majority and minority groups), Group Whips (majority and minority groups) and the Majority Group Secretary. The Director of Legal Services retains discretion not to make exempt reports automatically available in appropriate cases (for example if a report concerned a matter in which the Member had a Disclosable Pecuniary Interest).

2.8 Any Member may request a copy of an exempt report, demonstrating their 'need to know'. The Director of Legal Services reserves the right not to provide exempt information to any Member not ordinarily entitled to it if they believe the 'need to know' has not been demonstrated, or the information is wanted for an improper purpose or if the member has a financial or personal interest relating to the matter... In such cases, the Director of Legal Services will advise the Member of the legal reason/s why access to the exempt report has been denied. (see also section 2.11 below).

2.9 In some cases it may be appropriate for a Member to be given an opportunity to see the report without a copy being supplied to take away.

2.10 Members automatically sent exempt reports, or receiving them after making a request, are not entitled to share the reports with other members of their party group but may alert them to the opportunity to request a copy of the report from the Head of Democratic Services. Such a request would be dealt with in accordance with the principles set out in this section and at 2.11 below.

2.11 Categories of particularly sensitive information

It would not normally be appropriate for exempt information covered by categories 1, 2 and 4-7 in Appendix 1 of Part 4.B (Access to Information Procedure Rules) of this Constitution to be made available on request or automatically circulated. The 'public interest' test states that the right to disclosure of exempt information does not apply when the public interest in maintaining the exemption outweighs the public interest in disclosing it. Reports containing information falling into these exempt categories will only be provided to (or in some cases made available to) Members who are not members of the relevant Committee if they are able to positively demonstrate to the Director of Legal Services that they have a need to have a copy of or see the report in order properly to carry out their duties as a Member and where complying with the councillor's request would not breach the terms of the Data Protection Act or General Data Protection Regulation.

2.12 Reports containing information falling into category 3 to which Members are not automatically entitled (for example, terms proposed in the course of negotiations for a contract) may also be particularly sensitive. These reports may be made available or copied to Members on their specific request. However, where the report is particularly sensitive this will not happen. This may be the case for example where negotiations are ongoing in relation to price or price sensitive aspects of the contract.

2.13 The advice of the Director of Legal Services will be sought in response to requests for information in cases which are legally sensitive, for example where there is litigation underway or contemplated, where the Council is acting as a quasi-judicial body (such as planning or licensing matters), employment or conduct related matters, or any matter relating to an individual or entity where that individual/ entity has right of appeal or review which is pending.

2.14 Additional rights of access to information for Scrutiny

Scrutiny committee members are entitled to a copy of any document in the possession or under the control of the Council's executive which:

- contains material relating to any business that has been considered at a Cabinet meeting or a meeting of any other decision-making executive body; and/or
- any executive decision that has been made by an individual Cabinet Member or Officer

where that document relates to a matter they are scrutinising. In making requests for information, members should have regard to the relevance of that request to the scrutiny workplan in order to ensure that scrutiny's attention and resource is appropriately focused.

2.15 Scrutiny Members may additionally request information which relates to the Council's functions in relation to the borough and/or the borough's residents and which the Committee reasonably requires to carry out its functions. Such

requests will be made in writing through the Statutory Scrutiny Officer or their direct reports, who will:

- coordinate requests to avoid duplication of activity;
- ensure that requests are passed to the relevant Officer for response;
- track and chase responses as appropriate;
- support Officers to clarify requests for information as required, including consideration as to the best format to enable Members to assimilate the information.

2.16 Information supplied in response to requests from scrutiny members will be copied to the relevant Cabinet Member and/or the Leader of the Council.

2.17 The Scrutiny Officers will also work with Scrutiny Chairs and Officers to agree appropriate timescales for the scheduling of reports for scrutiny meetings, as part of a planned and prioritised scrutiny work programme.

2.18 Where a Scrutiny Member requests such a document Officers must provide it as soon as reasonably practicable and in any case no later than ten clear working days after the request is received.

2.19 The above entitlement to documents does not apply to any document or part of a document if:

- i) it contains advice provided by a political adviser or assistant; or
- ii) it would be a breach of confidence for the Council to share that information; or
- iii) disclosure would, or would be likely to prejudice the Council's ability to exercise its functions or to prejudice the legitimate interests of any person or the Council;
- iv) it contains personal information as defined by the Data Protection Act 1988 (unless the Act permits its disclosure); or
- v) any other legislation prohibits its disclosure.

Officers will ensure that, where iii) has previously applied, this is not used to deny requests by Scrutiny for information if the conditions which led to a decision about actual or likely prejudice no longer apply.

Where iv) applies, Officers will revise the information so that the individual concerned cannot be identified and, having checked that disclosure is now permitted under the Data Protection Act 2018 and the General Data Protection Regulations, disclose it.

2.20 Where a Scrutiny Member requests information which is classified as exempt (Part 4B of the Constitution, Appendix 1) or confidential, this will only be supplied if that information is relevant to:

- i) an action or decision that that Member is reviewing or scrutinising; or



- ii) any review contained in any programme of work of such a committee (or sub-committee).

2.21 Before a decision not to share information is taken, Officers will give serious consideration to whether that information could be shared in an informal briefing or meeting from which the public are excluded. Once the Scrutiny Committee has received exempt or otherwise sensitive information, the Statutory Scrutiny Officer and their direct reports will support Members to consider how the matter can be discussed by the Committee if it includes confidential or sensitive information.

2.22 Where a Scrutiny Member is denied a copy of a document or part of any such document, the Executive will provide Scrutiny with a written statement, usually no later than ten clear working days after the request is received setting out its reasons for that decision.

### **3. Proactive provision of information to Councillors**

3.1 Officers will take action to ensure that Members are appropriately briefed to enable them to carry out their duties, including, but not limited to:

- i) Members' bulletin;
- ii) Forward Plan of reports for Member decision;
- iii) Regular reports to Cabinet on delivery against Council plans and financial monitoring;
- iv) Informal briefings of topics of relevance to Ward Members;
- v) Proactive publication on the Council's website of information identified as being of public interest through Members' Enquiries.

Additionally, Scrutiny Members will be provided with regular digests of finance, performance and risk information to support them to prioritise their workplan.

### **4. Applying the principle of openness when writing reports**

4.1 Reports to Committees and the Cabinet will only be marked as exempt when this cannot reasonably be avoided in order to protect the interests of the Council and/or third parties in accordance with the statutory rules on exempt reports.

4.2 When Officers are preparing a report that contains information about terms proposed in the course of negotiations for a contract they will separate the exempt from the non-exempt information so the latter can be freely circulated. Sometimes information in reports can be made anonymous without the effectiveness of the report being reduced. This is one way of ensuring that as many reports, and as much information, are made accessible as possible. This applies in all cases and not just where category 3 of Appendix 1 of Part 4B of the Access to Information Procedure Rules is relied on. There will still inevitably be a number of reports which are marked exempt.

## **5. Confidentiality and restrictions on the use of information**

- 5.1 Members have a duty to comply with the requirements of the Member Code of Conduct, including provisions relating to the treatment of confidential information. Members must be alert to whether the information they receive from the Council is and/or continues to be confidential.
- 5.2 Officers will ensure that confidential information is clearly marked as such before its release to Members.
- 5.3 Members should only use information obtained in the course of their official duties and which is not public information for the specific purpose of fulfilling their work as a member of the Council. This information should not be shared further except in specific circumstances: any Member considering doing so should seek advice from the Monitoring Officer.
- 5.4 There are detailed provisions concerning the use of personal data by elected representatives contained in the Data Protection Act and General Data Protection Regulations (GDPR), and advice is included in the Members' Handbook.
- 5.5 A request from a Member acting in a personal capacity will be treated in the same confidence as an enquiry from a member of the public. Officers are also under a duty not to relate any information disclosed privately by a Member(s) (for example during Part B discussions at Committee or informal briefings) to another Member, Officer or person not already privy to that information.
- 5.6 The duty of Officers to observe a Member's confidence will however not apply if the information disclosed relates to something which could severely damage the Council or which is illegal or constitutes maladministration. In this event, the Officer will refer the matter to the appropriate Corporate Director and/or Monitoring Officer and Chief Executive for further investigation and action as appropriate. Officers are also expected to seek advice from senior officers as part of any query they may have on their interaction with a Member.

## **6. Implications of disclosure of personal or commercially sensitive information**

- 6.1 Much of the information kept by the Council relates to individual clients: Officers and Members are expected to be discreet in their handling of such information which is disclosed to them.
- 6.2 Inappropriate disclosure of information can have significant consequences for the Council and individual Members. Members and Officers have obligations to individuals or organisations about whom the Council holds confidential information to respect that confidentiality. If information was wrongfully disclosed, this could lead to legal action against the Councillor and/or Council. Information is often provided by people to the Council for a particular purpose and to disclose or use it for another purpose can lead to a Data Protection Act breach or criminal sanctions under the Data Protection Act. The Council itself could be damaged by information wrongly disclosed. Wrongful disclosure of

information by a Member could also result in action under the Members' Code of Conduct.

## **7. Procedure for handling queries or disputes in relation to this protocol**

- 7.1 Members should seek advice from the Monitoring Officer on any matters relating to duties, obligations or requirements related to access to information.
- 7.2 Any disputes relating to the rights of access of any person under these rules or any statutory provision or common law rights shall be referred to the Monitoring Officer of the Council.
- 7.3 On the rare occasion that a Member disagrees with the Monitoring Officer's decision on a dispute relating to rights of access under these rules, statutory provision or common law rights, the matter shall be escalated to the Chief Executive for decision. In such cases, the Member shall detail the grounds on which they believe that their request is consistent with the provisions of this Protocol.

## **8. Review**

- 8.1 This Protocol will be reviewed annually by Ethics Committee.