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11 APRIL 2001

Dear Chief Executive

**Consultation paper on aspects of the access to information regime for local authorities in England**

The Department has today published a consultation paper inviting comments on three aspects of the access to information regime for local authorities in England. These are:

- proposals to revise the definition of exempt information given by Schedule 12A of the Local Government Act 1972;
- extending the "three clear days" requirement to make agendas, reports and background papers available to the public prior to public meetings; and
- the framing of guidance on financial thresholds for key executive decisions.

The issues relating to exempt information and three-day requirements apply to all English authorities covered by Part VA of the 1972 Act defined in section 100J of that Act, including Police, Fire and National Parks Authorities. The issue of financial thresholds for key executive decisions applies to County, District and London Borough Councils who intend to operate executive arrangements.

I enclose a copy of the consultation paper, and a further three copies which you may wish to distribute within your authority. The consultation paper is also available on the Department's website at <http://www.local-regions.detr.gov.uk>, and further copies can be obtained from the contact address on the inside cover of the paper.

**You are invited to respond to the consultation by 30 June, and we of course welcome comments from authorities on all three of these important issues. Responses should be sent to Michael Wright in DETR's Local Government Sponsorship Division, Zone 5/B2, Eland House, Bressenden Place, London SW1E 5DU or by email to [lgsp@detr.gsi.gov.uk](mailto:lgsp@detr.gsi.gov.uk).**



P ROWSELL



INVESTOR IN PEOPLE

# Access to Information in Local Government

A Consultation Paper on  
Aspects of the Access to Information Regime  
for Local Authorities in England

April 2001

Department of the Environment, Transport and the Regions

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Published by the Department of the Environment, Transport and the Regions. Printed in the UK, April 2001 on paper comprising 75% post-consumer waste and 25% ECF pulp.

*Product code:* 01DPL001

# **Access to information in local government**

## **A consultation paper on aspects of the access to information regime for local authorities in England**

### **1. Introduction and Summary**

1.1 This paper invites comments on a number of aspects of the access to information regime for local authorities in England. These are:

- proposals to revise the definition of exempt information given by Schedule 12A of the Local Government Act 1972<sup>1</sup> (the 1972 Act);
- extending the “three clear days” requirement to publish minutes, agendas, reports and background papers to be made available to the public prior to public meetings<sup>2</sup>; and
- the framing of guidance on financial thresholds for key executive decisions.

1.2 The Government is committed to ensuring consistently high standards of accountability in local government. The delivery of this commitment is dependent upon a culture of openness in which the public, press and elected members know how best to influence decisions affecting local communities. This consultation follows commitments given by the Government to Parliament to undertake a review of the exemptions in Schedule 12A, consult on extending the three clear days requirement to publish papers prior to public meetings and the definition of appropriate financial thresholds for “key decisions”.

1.3 It should be noted that the issues relating to exempt information and three-day requirements apply to all English authorities covered by Part VA of the 1972 Act defined in Section 100J of the that Act, including National Parks, Fire and Police Authorities. The issue of financial thresholds for key executive decisions applies to councils in England which operate executive arrangements.

#### **The Access to Information Regime**

1.4 The Government is committed to ensuring that decisions made by local authorities are made in accordance with the following principles<sup>3</sup>:

- proportionality (i.e. the action should be proportionate to the desired outcome);
- decisions should be taken on the basis of due consultation and professional advice from officers;
- respect for human rights;
- a presumption in favour of openness; and
- clarity of aims and desired outcomes.

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<sup>1</sup> See Part VA, Section 100I, of the Local Government Act 1972.

<sup>2</sup> See Section 100 K of the Local Government Act 1972 as amended by Section 98 of the Local Government Act 2000

<sup>3</sup> See paragraph 7.3 of New Council Constitutions: Local Government Act 2000 Guidance to English Local Authorities published 26 February 2001, ISBN 0-10- 0-11-753566-4

### ***Part VA of the Local Government 1972 Act***

1.5 The access to information regime in Part VA applies to the full council and to committees and sub-committees of local authorities defined in Section 100J of the Local Government Act 1972, including principal councils, the navigational committee of the Broads Authority, joint boards and committees, National Parks, Fire and Police Authorities. It does not apply to parish councils. Where councils are operating executive or alternative arrangements under Part II of the Local Government Act 2000<sup>4</sup> Part VA also applies to overview and scrutiny committees and sub-committees. For councils operating executive arrangements equivalent provisions to Part VA apply to public meetings of the executive and committees of the executive.

1.6 Under Part VA the presumption is that the public and press have access to meetings and papers, there are two qualifications to this presumption. First where information is of the category "confidential information" it cannot be disclosed; hence the public and press are prohibited from having access to meetings and papers which would disclose confidential information. Secondly information falling in the category of "exempt information" may be withheld from being disclosed to the public and press at the discretion of the decision-making body.

1.7 Subject to provisions on confidential and exempt information, agendas for meetings and reports for meetings are required under Part VA to be open to inspection "three clear days" in advance of the meeting and available to the public at the meeting. Reports for meetings which include exempt information may, where an officer thinks fit, be closed to inspection by the public, such reports must be marked "not for publication" and should state on every copy of the report, part or whole, a description of why the information is exempt with reference to Schedule 12A to the 1972 Act.

1.8 Where meetings are convened at a shorter notice than three days late papers are required to be made available at the time the meeting is convened. Similarly where a late item is added to the agenda the copies of any report relating to that item must be made available at the time the item is added to the agenda.

1.9 Under Part VA after a meeting of a committee or sub-committee minutes, the agenda and reports relating to items considered at the meeting must be made available to the public. Again this requirement is subject to provisions on confidential and exempt information. Where parts of the minutes and meeting itself are excluded from public in order to prevent the disclosure of exempt information the minutes must provide a summary of the proceedings which provides a record without disclosing the exempt information.

### ***Part II of the Local Government Act 2000***

1.10 For councils operating executive arrangements the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 - the access to information regulations and statutory guidance<sup>5</sup> under section 38 of the Local Government Act cover the access of press and public to documents, decisions and meetings of the executive and its committees. These regulations also cover access to documents and decisions of individual members of the executive, officers and joint committees discharging delegated executive functions.

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<sup>4</sup> The Local Government Act 2000, Chapter 22, ISBN 0-10-542200-2.

<sup>5</sup> See chapter 7 of New Council Constitutions: Local Government Act 2000 Guidance to English Local Authorities published 26 February 2001, ISBN 0-10- 0-11-753566-4

- 1.11 The access to information regulations require the recording of executive decisions (including key decisions taken by officers). Such records must include the reasons for the decisions any alternative options considered when the decision was made and list any declarations of interest and dispensations granted. Once a decision has been made, either at a meeting or by an individual, the record and background papers have to be made public.
- 1.12 Regulation 7 of the access to information regulations sets out the circumstances whereby the executive or committees of the executive must meet in public – broadly when they are taking a "key decision" collectively or discussing with officers present a "key decision" to be taken collectively in the next 28 days. "Key decisions" are defined in regulation 8 and described later in this paper. Where a report about a key decision is given to the decision-maker it must be made publicly available at the same time and not less than three days before the decision is taken.
- 1.13 The access to information regulations require the publication of a forward plan setting out key executive decisions (insofar as they are known) which will be taken over the coming four months. The forward plan must be updated on a monthly basis. Key decisions not on the forward plan can be taken provided there is at least three days public notice of the decision including publication of papers. Where three days notice is unfeasible there is an urgency procedure whereby the decision can be taken if the chair of a relevant overview and scrutiny committee agrees that the decision is urgent. The executive will have to report on a quarterly basis to full council on how often it has used the urgency procedure and what those decisions were and why they were urgent.
- 1.14 The access to information regulations apply the same definitions of exempt and confidential information as those in Part VA and Schedule 12A to the 1972 Act.

#### ***The Freedom of Information Act 2000***

- 1.15 Under the Freedom of Information Act 2000 local authorities will have to draw up a publication scheme which has to be approved by the Information Commissioner. Local authorities will have to publish information in accordance with their approved scheme.
- 1.16 Section 78 of the Freedom of Information Act ensures that nothing in the Act limits the existing powers of public authorities to disclose information held by them. Therefore, local authorities must continue to publish information that they are otherwise required by law to publish. This includes requirements under Part VA of the Local Government Act 1972 and The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000. Therefore, publication schemes under the Freedom of Information Act would naturally have to comply as a minimum with any other publication requirements in other enactments.
- 1.17 Over and above the publication scheme approved by the Information Commissioner anyone can make a written request to a local authority for any information. The local authority must tell the applicant whether it holds the information, and if so disclose it to the applicant, unless an exemption applies. In cases where information is exempted from disclosure under the Freedom of Information Act 2000, except where an absolute exemption applies (statutory prohibitions to disclosure in other enactments are covered by an absolute exemption), public authorities are under a duty to inform the applicant whether they hold the information, and communicate it to her or him, unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

1.18 If a local authority refuses to provide the requested information then the person requesting it can approach the Information Commissioner. If the Commissioner decides that the requested information should have been provided, she can then issue the local authority with a decision notice under section 50 of the Freedom of Information Act 2000 setting out that decision. The local authority can appeal to the Information Tribunal against the decision notice. If on the other hand the Commissioner's decision is that the local authority complied with the provisions in Part I of the Act in respect of the particular request, the applicant may appeal to the Tribunal. The Tribunal may review the facts on which the decision notice is based, and, if it allows the appeal, it may substitute the notice with another one. The Commissioner is also able to issue an enforcement notice to a local authority, under section 52 of the Freedom of Information Act, if she is satisfied that the local authority has failed to comply with the requirements of Part I of the Act (and again, the local authority can appeal to the Tribunal against the enforcement notice).

1.19 If a local authority fails to comply with a decision notice or an enforcement notice, then the Commissioner may certify failure to the court. The court may enquire into the matter, and can deal with the local authority as if it had committed a contempt of court.

1.20 Schedule 12 A of the Local Government Act 1972 (which is the subject of consultation in this paper) defines information that a local authority need not disclose but may disclose unless prohibited from doing so by any other enactment. Therefore, such information must, under the Freedom of Information Act, be disclosed to anyone requesting it (notwithstanding that it is exempt information under local government law) unless, as described above, it either: falls within an absolute exemption in the Freedom of Information Act (including prohibitions in other enactments); or is covered by any other exemption in the Freedom of Information Act and the balance of public interest is against disclosure.

### Summary of this paper

#### *Exempt Information*

1.21 Modern local government which is based on efficient, accountable and transparent decision-making must be accountable to the public and press. It is the Government's intention that all councils apply the spirit as well as the letter of the law allowing public access to information.

1.22 The Government appreciates that many councils do their utmost to operate in an open and transparent manner with regard to providing the press and public with access to meetings and documents. However there is evidence to suggest that whilst some councils operate within the letter of the law as specified in Part VA and Schedule 12 A of the Local Government Act 1972, they do not all observe the spirit of this legislation<sup>6</sup>.

1.23 To this end the Government seeks views on how to modify Schedule 12A<sup>7</sup> to the Local Government Act 1972<sup>8</sup>, which includes definitions, qualifications and interpretations of exempt information, to make it less susceptible in its practical

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<sup>6</sup> Public Access to Information: An evaluation of the Local Government (Access to Information) Act. Jane Steele, Public Policy Studies Institute & the Department of the Environment 1995. ISBN 0 85374 666 4.

<sup>7</sup> The power to amend schedule 12 A is in 100I (2) and (3) Part VA of the Local Government Act 1972.

<sup>8</sup> See, in particular section 100I of, and Schedule 12A to, the 1972 Act.

application to councils securing outcomes contrary to the spirit and presumption of openness. The Government is clear that local people and local stakeholders deserve a consistently high standard of access to information. At their best, councils have consistently gone beyond minimum statutory requirements to allow public access to meetings and documents. However, at their worst, under Schedule 12A information may only come to light through leaks or may only be attained by interested parties with years of experience in "using the system".

1.24 The purpose of any modifications to Schedule 12A would be to secure a better balance of the needs of the individuals delivering and receiving council services and the need for genuine confidentiality in certain circumstances with the underlying principle, as recognised by many councils, to make as much information public as possible.

1.25 The Government's aim is that Schedule 12 A must not allow the exemption of information on the grounds that it might be "slightly difficult" or "embarrassing" for the authority concerned, whilst equally to ensure that genuine cases of legitimately exempt information which need to be considered in private can still be so treated. For example, councils should not be prevented from ensuring that personal information of employees, including those engaged by contract, genuinely commercially confidential information and information relating to services provided to a child is not disclosed.

1.26 This paper seeks views on revising and updating Schedule 12A (see Annex A) with the intention of ensuring greater clarity for those who interpret it and ensuring that the descriptions of exempt information relate to genuinely exempt information. **Specifically the Government invites views about revising the Schedule in order to:**

- **encourage more good practice and openness;**
- **cross-reference between Part I with the rest of Schedule 12A;**
- **update the Schedule in line with current legislation (see Annex B); and**
- **include a general qualification that information required to have been made available to the public by virtue of any other law cannot be interpreted as exempt information by the local authorities.**

#### *Extending the "three clear days" requirement*

1.27 Section 100 K of the Local Government Act 1972 amended by Section 98 of the Local Government Act 2000<sup>9</sup>, allows the Secretary of State to extend the "three clear days" requirement to publish agendas, reports and background papers to be made available to the public prior to public meetings.

1.28 Such an extension would be in line with requirements for greater public access to and influence over decision-making as illustrated by the requirement under executive arrangements for the executive to produce a forward plan<sup>10</sup> so that significant decisions ought not to be a surprise to those whom they affect.

1.29 Extending the requirement would apply to public meetings of the full council and its committees, meetings of overview and scrutiny committees and meetings of the executive

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<sup>9</sup> The Local Government Act 2000, Chapter 22, ISBN 0-10-542200-2.

<sup>10</sup> See in particular regulations 13 and 14 of the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000, published December 19 2000, ISBN 0 11 018946 9



and its committees under new constitutions<sup>11</sup> and to the requirement of advanced publication of papers relating to key decisions of the executive, to be taken individually by members of the executive or by officers. Extending the requirement would equally apply to meetings of other authorities covered by Part VA of the 1972 Act defined in Section 100J of the that Act, including National Parks, Fire and Police Authorities.

1.30 Councils' new constitutions will only achieve the Government's aim of more efficient, transparent and accountable decision-making and greater openness if there is effective access for the public to decision-making and decision-makers. Accordingly, this paper seeks views on:

- the Government's proposal to extend the minimum requirement for advanced notification from three clear days to five clear days; and
- the timetable for implementing any new requirement.

### *Thresholds for Key Decisions*

1.31 The access to information regulations underpin the principles of open and accountable decision-making. In particular these regulations make provision about, including a definition of, key decisions. Statutory guidance on key decisions is also provided.<sup>12</sup>

1.32 The definition of key decisions involves a two-stage test. The first test is whether a decision is likely to be significant in terms of expenditure or savings having had regard to a council's budget for that particular service or function. If a decision did not meet this test, but would nevertheless be likely to be significant in terms of its effect on local communities, it is also key.

1.33 This definition provides the basis for local authorities to decide which decisions are key decisions. In regard to the first test the statutory guidance states that local authorities will need to agree and publish the thresholds above which the likely expenditure or savings arising from a decision would make it a key decision.

1.34 The Government wishes to allow local authorities flexibility to take account of local circumstances and arrangements when specifying financial thresholds, but recognises the need to ensure reasonable consistency between authorities of the same type and size. It intends further to refine the statutory guidance which underpins this definition to include indicative financial thresholds. The guidance will describe local authorities' best practice nationally, and provide practical advice and statutory guidance to which local authorities must have regard when setting their thresholds. This paper seeks views on the form that indicative thresholds must take, and how the guidance might best be framed.

1.35 This consultation paper invites comments on the definition of appropriate thresholds. In particular:

- the form that indicative thresholds for local authorities' service and function budgets might take, including any examples of good practice; and
- how the guidance might best be framed to ensure that, taking into account the need to ensure reasonable consistency between authorities of the same type and

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<sup>11</sup> See in particular Volume 1 of the Guidance Pack on new council constitutions, published October 26, ISBN 0-10-0-11-753566-4

<sup>12</sup> Chapter 7 Guidance

size, thresholds can be described which will include sufficient flexibility to be able to suit local circumstances and arrangements.

**Responses to the consultation**

1.36 All responses to this consultation should be sent, to arrive **no later than 30 June 2001** to:

**Michael Wright  
Local Government Sponsorship Division  
Department of the Environment, Transport and the Regions  
Zone 5/B2, Eland House  
Bressenden Place  
London SW1E 5DU**

**Tel: 020 7944 4275  
Fax: 020 7944 4109  
E-mail: [lgsp@detr.gov.uk](mailto:lgsp@detr.gov.uk)**

If you have any questions or other views about this consultation exercise please contact the above address.

1.37 Ministers may wish to publish responses to this consultation paper in due course, or place copies of them in the libraries of the Houses of Parliament. Should respondents wish their comments to be treated in confidence, they should make this clear in any papers they submit. All responses may nevertheless be included in statistical summaries of the comments received and views expressed.

## 2. Exempt information

- 2.1 Schedule 12A to the Local Government Act 1972 lists, in fifteen paragraphs, descriptions of types of information which may be treated as exempt. These are qualified in Part II of the Schedule. Section 100I of the 1972 Act allows the Secretary of State by order to amend, delete or add to any part of Schedule 12A.
- 2.2 Many authorities already have in place mechanisms for checking officer reports to ensure that they are only made exempt when they contain genuinely exempt information which if separated from the bulk of the report would make the report and a public meeting to discuss it either impossible to understand or pointless. Such mechanisms may include the report being checked by the Head of Committee Services, the Monitoring Officer and or the leader of the council. Councils must also specify in agendas<sup>13</sup> why the report or part of the report has been made exempt in relation to Schedule 12A. As a matter of best practice reports which contain exempt information in whole or part should be accompanied by a statement of why it is exempt information with reference to all the relevant parts of Schedule 12A.
- 2.3 Council officers responsible for drafting and monitoring reports and councillors who take decisions based on these reports exercise discretion in considering whether or not these reports and the meetings to consider them should be private. Information falling within the descriptions of exempt information in Schedule 12 A may be discussed in public, if the council or committee agree, and may be published in minutes, agendas or background papers. Confidential information (which is not covered in Schedule 12A) cannot be disclosed.

### Current Practice

- 2.4 There is a great deal of variation between local authorities in how reports and meetings are dealt with in relation to Schedule 12A. In itself this is not detrimental to transparent and accountable local government. However, it would be of concern were there not to be a satisfactory level of access to information in every local authority.
- 2.5 The Government intends that those responsible for interpreting Schedule 12A should do so from the premise that discretion is used to enable reports to be made public and the issues within them discussed in public. In other words decisions about exempt information are made in accordance with the fundamental principle that there is a presumption in favour of openness. Under this approach wherever possible, this should involve separating out exempt parts of a report but nevertheless ensuring the report can be understood and discussed meaningfully in public without the exempt information. When interpreting Schedule 12A council officers and councillors should consider the potential outcome of disclosure of this information.
- 2.6 The Government also expects the authors and "adjudicators" of reports containing exempt to consider the consequences of making the report public rather than applying a blanket interpretation of Part I of Schedule 12A. In particular councils comply with the provisions in parts II and III of the Schedule which only provide for information to be exempt if at the time of publication it qualifies and can be interpreted as exempt information.

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<sup>13</sup> See in particular 100B (5) of the 72 Act.

- 2.7 In its current form Schedule 12A can be open to a wide interpretation and some poor practice (see Annex C). It is important to encourage good practice in interpreting Schedule 12A and to reduce the risks of its application being contrary to the spirit and presumption of openness.
- 2.8 It is against this background that the Government is proposing modifications to the Schedule. These proposals are made both on the basis of the fundamental principles of openness and that each council should equally apply this fundamental principle in its interpretation of Schedule 12A

#### **Revision of Schedule 12A**

- 2.9 To achieve these intentions, the Government believes certain of the descriptions, qualifications and interpretations in Schedule 12A (see Annex A) need to be updated and clarified. In particular certain definitions of exempt information might be capable of being refined and tightened up to avoid the possibility of the definition being used to give exempt status to information which should legitimately in the spirit of openness be public.
- 2.10 **The Government invites views on how the descriptions, interpretation and qualifications of exempt information in Schedule 12A might be modified (including deletion), refined and tightened.**
- 2.11 The Government recognises that certain of the statutory references in Schedule 12A are out of date, it is the Government's intention to update the Schedule to bring it into line with the current statutory framework.
- 2.12 **Annex B includes a list of changes to statutory references which need to be made to Schedule 12A and the Government welcomes views on these proposals.**
- 2.13 The Government is also minded to include in the revised Schedule 12A a general qualification that information required to have been made available to the public by virtue of any other law is not exempt information (see Annex B).
- 2.14 **The Government seeks views on this general proposal for exempt information in Schedule 12 A.**
- 2.15 Whilst committed to the presumption of openness the Government recognises that there is a genuine place for certain information to be exempt and on occasion for the decision-maker to conclude that this exempt information should not be made publicly available. The Government believes that any proposed modifications to Schedule 12A should be of a form which tends to encourage good practice and discourage bad practice. Annex C contains examples of both good practice to be encouraged and bad practice to be discouraged.
- 2.16 **The Government welcomes views on how Schedule 12A might be modified so as to provide as far as practicable incentives for good practice, including targeted additions to Schedule 12A so as to avoid the temptation of using a far wider interpretation of Schedule 12A than is within the spirit of the legislation.**

**Cross-referencing Parts I, II and III in Schedule 12A**<sup>14</sup>.

2.17 At present there is a risk that Part I (Descriptions of Exempt Information) of Schedule 12A may not always be read and interpreted in conjunction with Parts II (Qualification of Exempt Information) and III (Interpretation). This may lead to an inaccurate presumption of what may or may not be interpreted as exempt information.

2.18 **Therefore the Government would be interested in any views on how, within the powers available in section 100I of the 1972 Act, to include in the revised Schedule 12A more cross-referencing between the description and the corresponding qualification and interpretation.**

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<sup>14</sup> See, in particular section 100I of, and Schedule 12A to, the 1972 Act.

### 3. Extension of "three clear days" requirement

#### Efficient, Transparent and Accountable Local Government

- 3.1 Some responses to the second consultative draft guidance<sup>15</sup> on the Local Government Bill and the draft regulations on executive decision-making<sup>16</sup> were concerned that the existing standards of openness in local authorities should be increased, noting that this is entirely compatible with the Government's aim of efficiency. Others expressed concern that moves towards more accountable decision-making would increase bureaucracy.
- 3.2 The Government is committed to creating an enhanced access to information regime for local government where accountable and transparent decision-making goes hand in hand with increased efficiency and is not an obstacle to it. Efficient local decision-making requires councils to be responsive to what local people want. Where local people are denied adequate access to information local decision making is less likely to ensure that services can be delivered to meet local needs.
- 3.3 The Government believes that there is a balance to be reached with respect to the minimum period for papers to be made available to the public prior to decisions being made. However, this balance should not deny local people and the press adequate access to information in sufficient time for them to make appropriate representation to the decision-makers. The Government therefore proposes to increase this minimum period from "three clear days" to "five clear days".

#### Administrative Implications

- 3.4 The Government is aware that extending the "three clear day" requirement<sup>17</sup> to "five clear days", may have some administrative implications for councils who may be required to hold more documents and produce them in quicker time to ensure that they are available to the public in time.
- 3.5 The Government is also aware that, where under new constitutions the executive meets more frequently than committees have in the past, changes in the minimum requirement to publish background papers, agendas and reports may have a particularly significant impact on producing papers. There could also be a risk that some councils attempt to define more and more decisions as urgent in order to side step the new requirements.
- 3.6 However, the Government believes the extension of the "three clear day" requirement to "five clear days" will lead to enhanced accountability by enabling greater public and press participation in decision making and increasing the ability of overview and scrutiny committees and others to influence the decision making process. It is the Government's intention to use the power in Section 100 K of the Local Government Act 1972 amended by Section 98 of the Local Government Act 2000 to extend the "three clear days" requirement to "five clear days".

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<sup>15</sup> The Local Government Bill Second Consultative Drafts of Proposed Guidance and Regulations on New Constitutions for Councils, published by the DETR in May 2000.

<sup>16</sup> The Local Government Bill Draft executive arrangements (Decisions, Documents and Meetings) (England) Regulations [2000] published by the DETR in July 2000.

<sup>17</sup> See in particular 100B (2) of the 72 Act.

**3.7 The Government seeks views on the proposal to extend the minimum requirement to publish background papers, agendas and reports from "three clear days" to "five clear days"**

**Timetable**

**3.8 The Government is aware extending the "three clear day" requirement to five days will result in some administrative change for councils. The extension would apply to documents for all public meetings and to documents relating to key decisions to be taken by individual members of the executive and officers. All of the documents will be subject to the same rules on exempt and confidential information.**

**3.9 The Government therefore seeks views on what the timetable should be for local implementing a "five clear days" minimum requirement to publish background papers, agendas and reports.**

## **4. Thresholds for Key Decisions**

- 4.1 The concept of key decisions is central to the access to information regime for executive decision taking. Key decisions are decisions which must be included in the executive's forward plan, and in relation to which there are particular requirements about public access.

### **Forward Plan**

- 4.2 Regulation 13 of the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 - the "regulations" - requires the executive to set out its programme of work for the coming four months, so far as it is known, in a forward plan.
- 4.3 The forward plan underpins the Government's aim of greater accountability and transparency in local authority decision making, and will be the primary means by which electors will know the decisions that local authority executives are planning to take. Local authority executives will need to update the plan each month, and make it publicly available. It will include the key executive decisions that are expected to be taken, when they are expected to be taken, and who is responsible for taking them.

### **Public Access**

- 4.4 The general principle of the Regulations is for the public to have access to meetings and decisions, and prior access to papers, where the executive collectively, a committee of the executive or an individual is to take a key decision. Regulation 7 makes clear that a meeting of the executive or its committees must be public if at that meeting key decisions are taken collectively, or where there is substantive discussion, with officers present, of such a decision that is expected to be taken at a meeting to be held within the coming 28 days. The public can be excluded from part or parts of a meeting only when it is likely that confidential information, exempt information or the advice of a political advisor or assistant would be disclosed. For all decisions made by members of the executive, key or otherwise, a record of the decision (including the reasons for it) must be made publicly available together with reports and background papers - subject to the usual rules on confidential and exempt information.
- 4.5 Regulation 14 requires a forward plan to include a list of documents submitted to a decision-maker in relation to the key decision being made. Where a key decision is to be taken collectively, regulation 11 makes clear that agendas, reports and background papers must be made publicly available once they are available to that decision maker. There must be at least three clear days between reports being made publicly available and a decision being taken (the feasibility of extending this timescale is subject to consultation elsewhere in this paper).
- 4.6 If a key decision needs to be taken at short notice, and it is unfeasible to include it in the forward plan, regulation 15 allows the person or body to whom the decision has been delegated to make the decision. At least three clear days notice of the decision will need to be given to the relevant overview and scrutiny committee(s) and the public before it is taken. Exceptionally, it may be necessary to take a decision with less than three days notice. In such cases, regulation 16 requires the decision maker to obtain agreement from the chair of the relevant overview and scrutiny committee that the decision is urgent. If the relevant person does not agree, the decision cannot be taken without three days notice for publication of the relevant papers. If a meeting is convened at shorter notice under regulations 15 or 16, a copy of the agenda must be available for inspection by the public from the time that the meeting is convened.



4.7 Executive decisions may be taken by individual members of the executive, or may be delegated to officers. Where a report relating to a key decision has been given to an individual decision maker, the person who has prepared the report must ensure that it is put into the public domain at the same time and at least three days before the decision is taken. Where decisions are taken by individual members of the executive, regulation 4 places a duty on that individual either to make a record of that decision or to request an officer to make a record of the decision and, under regulation 5, for the proper officer to make that record publicly available.

### **Definition of Key Decisions**

4.8 Regulation 8 provides a definition of decisions which must be included in the plan -the key decisions. The definition is a two-stage test. First, any decision in relation to an executive function that is likely to result in expenditure which is, or making savings that are, significant having regard to the budget for the service or function to which the decision relates. Second, a decision that is likely to have a significant impact on two or more wards or electoral divisions within the local authority. Chapter 7 of the statutory guidance, as published on 26 February 2001, sets out the process for defining decisions as key. In regard to the first test, this is summarised below.

4.9 Potential decision-makers within a local authority will need to decide whether a decision to be taken is likely to involve significant expenditure or savings. To assist them to reach consistent and objective judgements, and to ensure that electors are clear about what is regarded as significant locally, each local authority will need to agree at a full council meeting financial thresholds above which decisions are significant - and hence key decisions.

4.10 Local authorities will need to publish the agreed thresholds, and should bear in mind the underlying principles of open and accountable decision-making when setting them (the principles are set out in full in the introduction to this paper). In particular, local authorities will need to ensure that there is a consistency of openness between neighbouring local authorities at the same tier. The statutory guidance, issued under section 38 of the Local Government Act 2000, makes clear that there should not be a wide discrepancy of approach, for example, between similar districts within a county or between neighbouring metropolitan boroughs. There may however be a higher threshold set for certain matters in, for example, a large metropolitan local authority than in a small shire district.

4.11 A local authority will, of course, need to set different thresholds for different services or functions, bearing in mind the overall budget for those services and functions and the likely impact on communities of each service and function. The Government expects local authorities to make allowances for local circumstances when setting such thresholds. For example, the structure of budgets for particular services and functions may vary considerably between similar local authorities, in particular some might sub-divide their budgets to a greater extent than others did.

### **Indicative Thresholds**

4.12 The two-stage definition provides a clear and practical basis for local authorities to decide which decisions should be key. As the guidance makes clear, the Government intends to further refine the statutory guidance which underpins this definition to include indicative financial thresholds which match existing good practice. It has in mind

providing guidance that would apply to different types and sizes of authority and, if and as far as practical, to different service and function budgets.

- 4.13 In specifying indicative thresholds, it is essential to strike the right balance between allowing local authorities flexibility to take account of local circumstances and arrangements, and the need to ensure consistency between authorities of the same type and size. It will not be appropriate, for example, to specify overly simplistic or universal thresholds that do not take adequate account of these factors. The Government believes that a single specific threshold applying across all local authorities would be crude and unworkable and would cut across the principles of accountable decision-making that underpin new constitutions.
- 4.14 For example, an universal threshold of £10,000 would almost certainly mean that every decision to purchase a car by officials for social services workers would be a key decision and therefore subject to the full access to information regime, even if the local authority had approved a programme of such purchases as part of the budget. Whereas expenditure of £10,000 on other services may be very significant indeed. Similarly, setting a universal threshold as a percentage at, for example, 1% of a budget, would not provide the flexibility for local authorities to take account of local circumstances.
- 4.15 The Government believes that rather than a single universal threshold, good practice examples included in the guidance will need to show a wide range of indicative thresholds to take account of the full scope of local authorities' services and functions, the different nature of the various service and function budgets within each authority.
- 4.16 Not only would there seem to be a case for different thresholds for different services, but equally different thresholds for different kinds of budget head. For example, a budget head where its approval by the council in effect gives approval to a specific purchase or purchases might need a very different threshold than a budget head of similar quantum but which provides provision in relation to which there remained wide spending discretion. This is illustrated in the examples below.

*Example 1*

**4.17 Decisions where the likely expenditure or savings resulting from decisions made by executives are not clear-cut (nor is the decision likely to be defined as key by the second test - having a significant impact locally).**

4.18 For example, an executive might want to decide to make some minor improvements to the way in which the authority processes housing benefit claims. They might have a number of alternative proposals that might achieve this, from which they need to choose a preferred option. If a single financial threshold were set for the administration of housing benefit, some options are likely to incur expenditure or savings above the financial threshold set for the service, and others below. If there were a single simplistic threshold, the executive would need to consider whether it expects its decision to fall above the financial threshold set by the authority, and therefore to be a key decision.

*Example 2*

**4.19 Decisions made by executives which merely implement aspects of decisions which have already been agreed by the full council.**

4.20 A full council is responsible for the adoption or approval of the local authority's budget and any plan or strategy for the control of the authority's borrowing or capital

expenditure (the capital plan). In approving the budget, a council is likely to approve expenditure on specific schemes over the coming year. The executive will, for almost all functions, be responsible for implementing the local authority's policies and for spending the budget in accordance with the authority's policy framework and financial rules and regulations. If a single simplistic financial threshold were set, it may take some decisions in doing so which, though above the financial threshold, result wholly from the programme of work approved by the full council as part of the budget. The executive would in such circumstances be implementing a decision already made by the full council over which it has little or no discretion, rather than taking a key decision.

4.21 For example, the full council might decide to approve expenditure for a new community centre as part of the authority's budget. The executive may need to decide to go ahead with commissioning preliminary work on the new centre before letting the main works contract. Although this decision is above the relevant threshold defining a decision as key, it is within the budget the full council has approved and a direct consequence of the council's decision. The executive has little choice but to go ahead, and it might be argued that decision should not be key. Councils may therefore decide to define thresholds in ways in which decisions such as these would not be defined as key decisions. The later decision to award the main contract does involve significant discretion on the part of the executive, and so should and would be key. A further example supporting the case for different thresholds for different budget heads is given in paragraph 4.14 above.

### *Example 3*

#### **4.22 Decisions relating to funding to which pre-conditions have been attached.**

4.23 For example, some regeneration funding is given to local authorities by central government with specific conditions attached to how it should be spent, and the period during which any spending can take place. If there were a specified financial threshold, the executive's discretion to decide how the money should be spent is likely to be very limited even though the amount might fall above the relevant financial threshold. This points to a threshold to this budget head being equal to the amount of grant provided for the specific scheme.

### *Example 4*

#### **4.24 Decisions relating to the efficient administration of an authority's finances.**

4.25 Chief Finance Officers (CFOs) in many authorities routinely place large sums of money on deposit overnight as a means of managing council budgets effectively. These sums are often likely to be above the relevant service threshold for a decision to be key, but it would clearly be impractical to require CFOs to give notice on the forward plan every time they intend to carry out this administrative procedure.

4.26 The Government welcomes views on the best approach to specifying indicative financial thresholds in guidance. It is aware that some local authorities are considering appropriate thresholds above which an executive decision should be a key decision. It is keen to disseminate best practice to all local authorities nationally, and welcomes any examples of good practice which local authorities have adopted and which are proving to work well.

4.27 The Government seeks views on the definition of appropriate thresholds. In particular:

- the form that indicative thresholds for local authorities' service and function budgets might take, including any examples of good practice; and
- how the guidance might best be framed to ensure that, taking into account the need to ensure consistency between authorities of the same type and size, thresholds can be described which will include sufficient flexibility to be able to suit local circumstances and arrangements.

**Department of the Environment, Transport and the Regions  
April 2001**

## SCHEDULE 12 A

## ACCESS TO INFORMATION

## PART I

## DESCRIPTION OF EXEMPT INFORMATION

1. Information relating to a particular employee, former employee, or applicant to become an employee of, or a particular office-holder, former office-holder or applicant to become an officer holder under, the authority.
2. Information relating to a particular employee, former employee or applicant to become an employee of, or a particular officer, former officer or applicant to become an officer appointed by -
  - (a) a magistrates' court committee, within the meaning of [section 27 of the Justices of the Peace Act 1997]; or
  - (b) a probation committee [within the meaning of the probation Service Act 1993].
3. Information relating to any particular occupier or former occupier of, or applicant for, accommodation provided by or at the expense of the authority.
4. Information relating to any particular applicant for, or recipient or former recipient of, any service provided by the authority.
5. Information relating to any particular applicant for, or recipient or former recipient of, any financial assistance provided by the authority.
6. Information relating to the adoption, care, fostering or education of any particular child.
7. Information relating to the financial or business affairs of any particular person (other than the authority).
8. The amount of any expenditure proposed to be incurred by the authority under any particular contract for the acquisition or disposal of property or the supply of goods or services.
9. Any terms proposed or to be proposed by, or to the authority in the course of negotiations for a contract for the acquisition or disposal of property or the supply of goods or services.
10. The identity of the authority (as well as of any other person, by virtue of paragraph 7 above) as the person offering any particular tender for a contract for the supply of goods or services.
11. Information relating to any consultations or negotiations, or contemplated consultations or negotiations, in connection with any labour relations matters arising between the authority or a Minister of the Crown and employees of, or office-holders under, the authority.
12. Any instructions to counsel and any opinion of counsel (whether or not in connection with any proceedings) and any advice received, information obtained or action to be taken in connection with -
  - a) any legal proceedings by or against the authority, or
  - b) the determination of any matter, affecting the authority.
13. Information which, if disclose to the public, would reveal that the authority proposes -
  - a) to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or
  - b) to make an order or direction under any enactment.
14. Any action taken or to be taken in connection with the prevention, investigation or prosecution of a crime.
15. The identity of a protected informant.

## PART II

### QUALIFICATIONS

1. Information relating to a person of a description specified in any of paragraphs 1 to 5 of Part I above is not exempt information by virtue of that paragraph unless it relates to an individual of that description in the capacity indicated by the description.
2. Information falling within paragraph 7 of Part I above is not exempt information by virtue of that paragraph if it is required to be registered under -
  - a) the Companies Act 1985;
  - b) the Friendly Societies Act 1974;
  - c) the Industrial and Provident Societies Act 1965 to 1978;
  - d) the Building Societies Act 1962; or
  - e) the Charities Act 1960.
3. Information falling within paragraph 8 of Part I above is exempt information if and so long as disclosure to the public of the amount there referred to would be likely to give an advantage to a person entering into, or seeking to enter into a contract with the authority in respect of property, goods or services, whether the advantage would arise as against the authority or as against other persons.
4. Information falling within paragraph 9 of Part I above is exempt if and so long as disclosure to the public of the terms would prejudice the authority in those or any other negotiations concerning the property or goods or services.
5. Information falling within paragraph 11 of Part I above is exempt if and so long as disclosure to the public of the information would prejudice the authority in those or any other consultations or negotiations in connection with a labour relations matter arising as mentioned in that paragraph.
6. Information falling within paragraph 13 of Part I above is exempt if and so long as disclosure to the public might afford the opportunity to a person affected by the notice, order or direction to defeat the purpose or one of the purposes for which the notice, order or direction is to be given or made.
7. Information falling within any paragraph of Part I above is not exempt information by virtue of that paragraph if it relates to proposed development for which the local planning authority can grant itself planning permission pursuant to regulation 3 of the Town and Country Planning General Regulations 1992 (S.I. 1992 No. 1492).

## PART III

### INTERPRETATION

1. -(1) In this Schedule -
  - "child" means a person under the age of eighteen years and any person who has attained that age and -
    - a) is registered as a pupil at a school; or
    - b) is the subject of a care order, within the meaning of [section 31 of the Children Act 1989];
  - "disposal" in relation to property, includes the granting of an interest in or right over it;
  - "employee" means a person employed under a contract of service;
  - "financial or business affairs" includes contemplated, as well as past or current activities;
  - "labour relations matter" means -

**Proposed Revisions to Schedule 12 A**

<b>In Schedule 12A at...</b>	<b>Delete the following reference</b>	<b>Insert the following reference</b>
<p><b>PART I DESCRIPTION OF EXEMPT INFORMATION PARAGRAPH 2)</b></p>	<p>Information relating to a particular employee, former employee or applicant to become an employee of, or a particular officer, former officer or applicant to become an officer appointed by -</p> <ul style="list-style-type: none"> <li>(a) a magistrates' court committee, within the meaning of section 27 of the Justices of the Peace Act 1997; or</li> <li>(b) a probation committee within the meaning of the probation Service Act 1993.</li> </ul>	<p>Information relating to a particular employee, former employee or applicant to become an employee of, or a particular officer, former officer or applicant to become an officer appointed by -</p> <ul style="list-style-type: none"> <li>(a) a magistrates' court committee, within the meaning of section 27 of the Justices of the Peace Act 1997 (as amended by the Access to justice Act 1999); or</li> <li>(b) a probation committee within the meaning of the Criminal Justice and Court Services Act 2000.</li> </ul>
<p><b>PART I DESCRIPTION OF EXEMPT INFORMATION PARAGRAPH 6)</b></p>	<p>Information relating to the adoption, care, fostering or education of any particular child.</p>	<p>Information relating to any child receiving services from a local authority under the Children Act 1989 or relating to the adoption or education of any particular child.</p>
<p><b>PART II QUALIFICATIONS PARAGRAPH 2)</b></p>	<p>Information falling within paragraph 7 of Part I above is not exempt information by virtue of that paragraph if it is required to be registered under -</p> <ul style="list-style-type: none"> <li>a) the Companies Act 1985;</li> <li>b) the Friendly Societies Act 1974;</li> <li>c) the Industrial and Provident Societies Act 1965 to 1978;</li> <li>d) the Building Societies Act 1962; or</li> <li>e) the Charities Act 1960.</li> </ul>	<p>Information falling within paragraph 7 of Part I above is not exempt information by virtue of that paragraph if it is required to be registered under -</p> <ul style="list-style-type: none"> <li>a) the Companies Act 1985;</li> <li>b) the Friendly Societies Acts 1974 and 1982;</li> <li>c) the Industrial and Provident Societies Act 1965 to 1978;</li> <li>d) the Building Societies Act 1986; or</li> <li>e) the Charities Act 1993.</li> </ul>

## Proposed Revisions to Schedule 12 A

In Schedule 12A at...	Delete the following reference	Insert the following reference
<b>PART II QUALIFICATIONS NEW PARAGRAPH 8)</b>	Not applicable	Information falling within any paragraph of Part I above is not exempt information by virtue of that paragraph if that information is required to have been made available to the public by virtue of any other law.
<b>PART III INTERPRETATION PARAGRAPH 1)</b>	"labour relations matter" means - any of the matters specified in paragraphs (a) to (g) of section 29(1) of the Trade Union and Labour Relations Act 1974 (matters which may be the subject of a trade dispute within the meaning of the Act); or	"labour relations matter" means - any of the matters specified in paragraphs (a) to (g) of section 29(1) of the Trade Union and Labour Relations Act 1974 (as amended by the Trade Union and Labour relations (Consolidation) Act 1992) (matters which may be the subject of a trade dispute within the meaning of the Act); or
<b>PART III INTERPRETATION NEW ENTRY UNDER PARAGRAPH 1)</b>	Not applicable	"person" for the purposes of the proposed revision the word person includes both incorporated and unincorporated associations of persons and as such an unincorporated charity can be included as coming within the definition of person as well as a company



An Illustrative Example of Good Practice under Schedule 12 A

Council <sup>XXX</sup> is accepting tenders for a \$25m building works contract. There are six bids to consider. It is known that if the details of the value of any of the bids were made public the council would be encouraging re-tendering. This might put the council at a disadvantage in future negotiations. The value and financial details of any accepted bid would be made public in the council's audit.

- (1) The officer writing the report makes a decision as to whether or not the report includes exempt information from the premise that information should be in the public domain where possible.
- (2) The officer writing the report honestly believes that if the report included the precise financial details of all the bids, the council would be at a disadvantage in future negotiations on the building work and it could invite possible re-tendering to the detriment of the six bidders. However, the decision to accept a bid and the non-monetary value of the proposals in the bids should be discussed in public.
- (3) The report is written with the financial quotes for the bids covered in a separate Part II report and other details relating to the six bids included in the public report to be discussed by the relevant committee in public. In order to compare the bids in a meaningful way the public report includes a list of the bids in order of cost to the council or lists the costs by reference to a broad scale of estimates.
- (4) The report is checked by senior officers who confirm or not that the report contains exempt information. Their decision is also made with the presumption that information should be in the public domain where possible. The report will probably also be passed to the leader of the council or chair of the relevant committee who will assess the report in the same manner.
- (5) The officer's contact details are made available, as is the committee's agenda and the public part of the report, at least three clear days before the meeting. The justification for making part of the report exempt are also included in the public report. In this case part of this report is exempt because it contains information described in paragraph 9 of Schedule 12 A of the Local Government Act 1972, terms proposed or to be proposed by, or to the authority in the course of negotiations for a contract for the acquisition or disposal of property or the supply of goods or services, which is exempt if and so long as disclosure to the public of the terms would prejudice the authority in those or any other negotiations concerning the property or goods or services.
- (6) The council committee discussing Part II of the report makes the decision on whether to discuss Part II of the report in private from the premise that information should be in the public domain where possible.

## An Illustrative Example of Bad Practice under Schedule 12A

Council "Y"<sup>20</sup> is conducting an annual review of the rents paid by tenants in council properties. Approval of the report will be essential for setting the council's budget. The issue is potentially politically sensitive because of local elections due in the following month.

- (1) The officer writing the report works on a basis that a report should be considered in private if it falls within Schedule 12 A.
- (2) The officer is aware that the issue of increasing the rent of council tenants will be politically sensitive in the run up to the local elections and is also aware that this in itself is by no means an exempt category in Schedule 12 A. The officer honestly drafts the report including the relevant information on the basis that the report should be considered in public unless it includes information which falls fairly and squarely within Schedule 12 A.
- (3) The report is written including proposals for percentage increases in rates for each of the properties rented by the council. Reference is not made to individuals renting these properties. Disclosure to the public of the contents of the report would not in the author's opinion involve making public exempt information as described in Schedule 12 A. The officer puts the report forward to be published and to be considered in public at the next meeting of the policy and resources committee.
- (4) Those checking the report confirm whether or not the report contains exempt information. Their decision is made with the presumption that information which is "potentially embarrassing" or "financially revealing" should not be in the public domain. They determine that the report should be exempt and considered by the committee in private. No consideration is given by those checking the report to producing a separate report containing the exempt information.
- (5) The justification for making the entire report exempt is published in the agenda for the policy and resources committees three days before the committees next meeting. The report is very liberally interpreted as exempt because it contains information described in paragraph 4 of Schedule 12 A of the Local Government Act 1972 as information relating to any particular applicant for, or recipient or former recipient of, any service provided by the authority.
- (6) The policy and resources committee chooses to discuss the report in private.