
Subject: THE LOCAL AUTHORITIES (EXECUTIVE ARRANGEMENTS) (MEETINGS AND ACCESS TO INFORMATION) (ENGLAND) REGULATIONS 2012

Meeting and Date: Governance Committee – 27 September 2012
Extraordinary Council – 3 October 2012

Report of: David Randall, Director of Governance and Monitoring Officer

Classification: Unrestricted

Purpose of the report: To advise of the coming into force of The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 and to ask the Council to make appropriate changes to the Council's Constitution

Recommendation:

- (1) That it be noted that the Access to Information Procedure Rules incorporated within the Council's Constitution will need to be amended.
- (2) That the Director of Governance be requested to submit a revised text for the Access to Information Procedure Rules to a future meeting of the Governance Committee and the Council.
- (3) The amendments to the Constitution set out in Appendix 1 relating to Strategic Management Team be adopted.

1. Summary

1.1 The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 came into force on 10 September 2012. These Regulations replace The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 and make changes to the law with regard to public access to meetings of the executive, access to information and the recording of executive decisions. It is necessary for the Council to amend its Constitution in order to bring it into line with the new legal requirements.

2. Introduction and Background

2.1 Those parts of the Council's Constitution which make provision for public access to meetings of the executive, access to information considered at those meetings and the recording of decisions, notably the Access to Information Procedure Rules give effect to the requirements of the Local Government Act 2000 and regulations made under it with regard to these matters. The government, at short notice and with limited consultation, has introduced new regulations which came into force on 10 September 2012.

2.2 The Secretary of State has said that he has made these changes in the interests of openness and transparency. The Government and Communities ('CLG') press release about the changes can be viewed at: <http://www.communities.gov.uk/news/newsroom/2204300>. Another view is that the

draftsmen of the regulations have (perhaps inadvertently) implemented nightmarish changes which will only serve to increase bureaucracy and provide to significantly slow down the decision making process without making the groundbreaking changes in terms of openness and transparency which the Secretary of State claims.

- 2.3 The regulations can be viewed at <http://www.legislation.gov.uk/ukxi/2012/2089/made>
- 2.4 On the face of them these regulations have significant effects although their drafting is not entirely clear. The principal changes are set out in the following paragraphs of this report.

3. **Private Meetings of the Executive**

- 3.1 The most significant change is that it is no longer possible for there to be private meetings of the executive as was permitted under the 'old' rules. All that will be possible is for there to be public meetings from which the press and public are excluded for items where confidential or 'exempt' information would otherwise be disclosed. The language of the new regulations is not particularly accessible but the parliamentary draftsmen appear to have conflated the concepts of meeting in private with the usual practice (with which members are well familiar) of excluding the press and public when confidential or exempt items of business are to be discussed. Further, there is now no concept of briefing meetings being necessary without the public being present which was an express feature of the earlier regulations.
- 3.2 Although this is a significant change in terms of the law there will be little or no practical impact arising from this change on Dover District Council. This is because the Council has rarely availed itself of the facility which was previously available to hold private meetings of the executive.
- 3.3 A number of authorities that have been in the practice of holding so called 'informal meetings of the executive' are having to fundamentally reassess the legality of continuing to do so. Such meetings have never been a feature of the governance arrangements of Dover District Council. The closest that this Council's governance arrangements get to such a meeting is the concept of the Strategic Management Team. However, this has never been an informal meeting of the executive in the sense that it has been in some other authorities. Rather, it has been an opportunity for the Leader and portfolio holders to meet with the Chief Executive, members of the Corporate Management Team and other supporting officers on an informal basis to discuss matters of common interest. It is considered that there is a continuing need for such a forum in the interests of the efficient and effective co-ordination of the authority's functions. In the light of the legislative changes it is thought appropriate to review the role of the Strategic Management Team lest there is any confusion as to its status. Appendix 1 sets out the constitutional changes which are necessary to abolish the Strategic Management Team and to replace it with a Leadership Forum the purpose of which will be to:
- facilitate discussions on general or particular issues or enable clarification of matters between Leader, the Chief Executive, members of the executive and members of the Corporate Management Team
 - assist in settling the Notice of Forthcoming Key Decisions.
 - assist in identifying items for consideration at future meetings of the Cabinet.

4. Notice of Meetings from which the Press and Public will be Excluded.

- 4.1 The new regulations impose a rather laborious process of giving advance notice of an executive meeting at which any confidential or exempt business will be discussed. The requirement is to give 28 clear days notice of any meeting at which such business will be discussed. This has to be repeated five clear days before the meeting and consideration has to be given to any public representations as to whether a particular part of the meeting will be held in public. If these requirements cannot be met and the matter is urgent, the press and public can still be excluded if, and only if, the prior consent of the appropriate Scrutiny Chairman is obtained. Apart from the lengthening of the decision making process another practical effect of this is that if a matter arises unexpectedly, where for example the executive may suddenly need to take legal advice during a meeting and wish to exclude the press and public, then it can only take such advice in private if it has the consent of the chairman of the appropriate Scrutiny Committee. If it fails to get such consent, the item must be deferred to another meeting. Therefore, there will need to be arrangements in place for that chairman to be available on the telephone, just in case.
- 4.2 The issue of 'clear days' has been the subject of debate amongst legal practitioners. The issue is where or not this means excluding Saturdays, Sundays and bank holidays. This is significant because the 28 days notice requirement for identifying confidential and exempt items turns into virtually six weeks if these days are excluded. For many years a convention or working practice of excluding Saturdays, Sundays and bank holidays has prevailed. This stems from a misunderstanding of the effect of an old 19th century case which, in any event, was decided at a time when, because offices were not open for business, documents could not be inspected. As most notices under the regulations now require documents to be posted on the Council's website it becomes arguable as to whether 'clear days' should still be regarded as excluding Saturdays, Sunday's and Bank Holidays. In an opinion recently obtained by the Association of Council Secretaries & Solicitors (ACSeS) from Mr Clive Sheldon QC, Mr Sheldon concludes that in the case of the 28 day period at least, Saturdays, Sundays and Bank Holidays can be included.

5. The Forward Plan

- 5.1 The old style Forward Plan of Key Decisions has gone. The phrase "Forward Plan" is no longer used in the regulations. The Regulations now just talk of publishing 'a document' at least a month before an executive meeting identifying which Key Decisions are to be made at that meeting and containing prescribed information. It is no longer the specific obligation of the Leader to publish this documents but a Key Decision cannot be taken "until a document has been published". It is proposed that this document is called a "Notice of Forthcoming Executive Decisions".
- 5.2 The regulations still make provision for Key Decisions to be taken which have not been included in the "Notice of Forthcoming Executive Decisions". As previously, these provisions are referred to as the "General Exception" and the "Special Urgency" procedure. There are however changes to the detail of the procedure which require the publishing of notices on the Council's website.
- 5.3 The regulations provide for the Leader to submit to the Council, at such intervals as the Council determines, a report containing details of each executive decision taken since the submission of the last report where the making of the decision was agreed as urgent under the special urgency procedure. That report must include particulars of each decision made and a summary of the matters in respect of which each decision was made. The Leader or elected mayor must submit at least one such

report annually. The previous regime required such a report to be submitted within a prescribed period of every 3 months.

6. Recording of Executive Decisions Made by Officers

6.1 Perhaps the most controversial amendment made by the regulations is that relating to decisions made by officers which are executive decisions.

6.2 Regulations 13(4) provides that "As soon as reasonably practicable after an officer has made a decision which is an executive decision, the officer must produce a written statement which must include" certain prescribed details. For these purposes "executive decision" means a decision made or to be made by a decision maker in connection with the discharge of a function which is the responsibility of the executive.

6.3 The concern is that officers will have to make written statements for every decision which they make in connection with the discharge of an executive. Under the previous regulations officers only had to record "Key Decisions".

6.4 The concern is such that the District Council's Network has written to DCLG complaining that there has been no formal consultation exercise undertaken in connections with the regulations and stating:

"It is with grave concern I bring to your attention the significant additional burden that will be placed on local authorities as a result of their passing. This seems to be totally at variance with the CLG's own campaign to reduce regulatory burdens on local authorities. Not all of the Regulations are inappropriate but Part 4 Regulation 13 will tie up local authorities in completely unnecessary processes and reduce efficiency.

This Regulation [Reg 13(4)] requires a record to be kept of every executive decision by an officer, which prescribed information to be kept. In essence this covers every single decision made (excluding non-executive functions such as personnel issues, elections and regulatory matters) including the purchase of paper clips or indeed the decision to write a letter in response to a complaint about the level of a service. There are hundreds if not thousands of such decisions made every week in every local authority. Authorities have standing orders that govern expenditure and contracts and officers work in that control framework. To create this additional burden coupled with the reduction in available funding will mean important business will not get done in a reasonable manner. This provision alone has the capacity to set local government efficiency back many years."

6.5 The Local Government Lawyer has reported that CLG's response to this was to the effect that the regulations do not apply to officer decisions but only to Cabinet decisions. This is patently and incorrect interpretation of the law.

6.6 The regulations are completely unworkable as drafted, as compliance will not be possible in all cases. Specialist lawyers in the local government field have been attempting to interpret the regulations so as to make them workable. In the opinion obtained from Clive Sheldon Q.C. by ACSeS, Mr Sheldon advises:

"It seems to me that the definition of an 'executive decision' is broad, as it is not confined to decisions that 'discharge . . . a function' of an executive, but include decisions *'in connection with the discharge'*.

The term 'in connection with' is a somewhat flexible one, as it could mean 'closely' connected to, or 'remotely' connected to, the discharge of an executive function. In my view, it would be appropriate for councils to adopt the former definition. It is unlikely to have been Parliament's intention that any decision taken by an individual officer that had any (however remote) connection with an executive function had to be explained in a written statement, and then made available for inspection by the public. This would impose a burden on councils without any obvious benefit.

Accordingly, I consider that purely administrative decisions – such as purchasing stationery for use in connection with the discharge of an executive function – would not need to be recorded under regulation 13. Such decisions are only tenuously connected with the discharge of the executive function.

Nevertheless, other decisions which may be fairly routine, but are closely connected to the functions of the executive will need to be recorded. I appreciate that this may be regarded by some as imposing a disproportionate burden on councils. If so, then it is something that ACSeS may wish to take up with the Department with a view to amending the 2012 Regulations at the first available opportunity.

- 6.7 It will be noted that in an attempt to read the regulations so as to make them more workable, counsel seeks to introduce a distinction between officer decisions which are 'closely' connected to the discharge of an executive function and those which are only 'remotely connected'. Although a valiant attempt, this distinction does not appear on the face of the regulations and, even if the argument is sustainable, it still leaves an impractical number of decisions to be recorded.
- 6.8 Only time will tell whether CLG eventually recognise the concerns that have been expressed and respond with amending legislation. Unless and until that happens however, members and officers will need to recognise that some degree of non-compliance is inevitable. In the meantime The Director of Governance and Monitoring Officer and the Solicitor to the Council will work with the Corporate Management Team and officers to identify on a risk assessed basis those types of officer decisions which will be recorded as a matter of course. Clearly, these will include "Key Decisions".

7. **Other Changes**

- 7.1 The regime for the inspection of documents following decisions is also changed. Information that merely had to be available previously, must now be on the website. Background papers must now be published on the website as a matter of course - Regulation 15. Compliance with this requirement may prove burdensome.
- 7.2 The additional rights of access to documents for members of local authority have also changed - see Regulation 16. Documents within the control of the executive which contain material relating to any business to be transacted at a public meeting must be available for inspection by all members at least 5 days before the meeting. Previously, they only had to be available when the meeting concludes. If it has not been possible to comply with the new rules, the document must be available within 24 hours of the meeting concluding.

7.3 Where a member of an overview and scrutiny committee requests a copy of a document which is in the possession or control of the executive, there is now a requirement to provide it within 10 clear days of the date of the request.

8. **Identification of Options**

8.1 The regulations represent the law of the land and the Council has no option other than to comply with them. The only element of 'choice' relates to the frequency with which the executive leader is required to report to the full council on the use of the special urgency procedure.

8.2 The Council will, in due course need to amend its Constitution to reflect the changes which are required by the regulations. Although work has commenced on this, the Director of Governance has not attempted to complete the task in time for this meeting of the Governance Committee. This is primarily because of the uncertainty which surrounds the interpretation of some of the regulations and the likely response of CLG. It is hoped that over the course of the coming weeks a national consensus of the interpretation and impact of the regulations will emerge and that DCLG will initiate a legislative response to the predicament in which it has placed local authorities. Notwithstanding that the required constitutional changes will not keep pace with the changes required by the regulations, the Council will of course comply with the regulations as if their requirements were set out in the Constitution itself.

9. **Evaluation of Options**

9.1 The Council has hitherto received reports of the use of the Special Urgency Procedure at three monthly intervals notice. This has proved workable and there is not obvious or compelling benefit in changing this.

10. **Resource Implications**

10.1 The Director of Governance and Monitoring Officer and the Solicitor to the council are working with the Corporate Management Team, colleagues within the County and professional bodies to examine whether it is possible to interpret the requirements of the regulations so as to enable the Council to operate within reasonable bounds. If these attempts fail a consequential growth in the number of democratic services officers can be anticipated.

11. **Appendices**

Appendix 1 – Amendments to the Constitution with regard to the Strategic Management Team.

12. **Background Papers**

None.

Contact Officer: Harvey Rudd, Solicitor to the Council

Amendments To The Constitution With Regard To The Strategic Management Team.

Note: Deleted Text is shown in 'strikethrough', thus: ~~Text~~
Added text is shown underlined, thus, Text

Amend Article 7 by deleting Article 7.09 as follows:

~~7.09~~ **Strategic Management Team**

~~Strategic Management Team comprises the Leader and the Cabinet and the Chief Executive and Corporate Management Team.~~

~~In exercising its leadership role, and as part of any effective working arrangements, it is necessary for the executive to meet from time to time with members of the Corporate Management Team outside formal meetings of the executive.~~

~~A Strategic Management Team has therefore been formed to enable regular and scheduled briefings to take place between members of the executive and Corporate Management Team. Also see Executive Procedure Rule 2.7.~~

Amend Article 12 as follows:

- (e) **Corporate Management Team.** The Corporate Management Team shall comprise the Chief Executive (and Head of Paid Service), Director of Governance, Director of Finance, Housing and Community, Director of Regeneration and Development and Director of Environment and Corporate Assets.

The Corporate Management Team is not a decision making body and its meetings will not be held in public

(f) **Leadership Forum**

The Leadership Forum comprises the Leader, the Chief Executive, members of the executive, members of the Corporate Management Team and supporting officers.

In exercising their respective leadership roles, and as part of any effective working arrangements, it is necessary for the Leader and the Chief Executive to meet informally from time to time with members of the executive and members of the Corporate Management Team.

A Leadership Forum will therefore be held to enable regular and scheduled discussions to take place between members of the executive and members of the Corporate Management Team.

The purpose of the Leadership Forum is therefore to

- facilitate discussions on general of particular issues or enable clarification of matters between Leader, the Chief Executive, members of the executive, members of the Corporate Management Team

- ~~_____ • _____ assist in settling the Notice of Forthcoming Key Decisions.~~
- ~~_____ • _____ assist in identifying items for consideration at future meetings of the Cabinet.~~

The Leadership Forum is not a decision making body and its meetings will not be held in public.

Amend the Leader and Executive Procedure rules by deleting rule 2.7

~~2.7~~ **Strategic Management Team**

- ~~_____ (a) _____ Article 7 includes a description of the Strategic Management Team.~~
- ~~_____ (b) _____ The purpose of the Strategic Management Team is to enable regular and scheduled briefings to take place between members of the executive and Corporate Management Team outside of formal meetings of the executive.~~
- ~~_____ (c) _____ The role of Strategic Management Team is therefore to
 - ~~_____ • _____ facilitate briefings or discussions on particular issues or enable clarification of matters between the Leader and Cabinet and Corporate Management Team~~
 - ~~_____ • _____ assist the Leader in settling the Forward Plan~~
 - ~~_____ • _____ assist the Leader in settling agendas for meetings of the Cabinet.~~~~
- ~~_____ (d) _____ Strategic Management Team is not able to make collective executive decisions. Such decisions can only be made by Cabinet or, where appointed, a committee of Cabinet.~~
- ~~_____ (e) _____ Meetings of Strategic Management team will not be held in public. However, Regulation 7 of the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 provides that if a meeting of members of the executive with officers present wishes to consider a key decision which the Forward Plan indicates will be taken by the executive within the next 28 days such a meeting can only take place in public.~~