

REPORTS TO COUNCIL MEETINGS - PUBLIC OR PRIVATE?

1 Introduction

- 1.1 The council must conduct its meetings in public unless there is a legal reason allowing a report to be taken in private. The council cannot make up its own rules, or just decide to exclude the public without a valid legal reason.
- 1.2 That is a legal requirement for meetings of council, committees and sub-committees¹. It has been incorporated into the council's Standing Orders². It has been extended there to cover PDSP meetings as well³.
- 1.3 Dealing with something in private means that the papers are not available to the public beforehand, and that members of the public cannot be present at the meeting while that report is being considered.
- 1.4 Even where it is legally possible to go ahead in private the aim should still be to deal with as much as possible in public. The council's values include being honest, open and accountable. The default position is "public" - the public has a right to know what the council is doing at its meetings.
- 1.5 The final decision is made at the meeting itself, by the members. Officers can only make recommendations, give advice and follow the correct procedures before that decision is taken.

2 The legal tests

- 2.1 The legal rules are based on the information that might be disclosed if the public were to be allowed access to the report and/or to the meeting.
- 2.2 It is not just about the information in the report itself. The report might be written carefully so that no offending information is included. However, if there is a chance that information covered by these rules will still come out during the meeting then the public may be validly denied access.
- 2.3 There are two types of information that trigger the rules about going into a private session - "confidential information" and "exempt information". The phrase "private information" is not part of the legal rules.

3 Confidential information

- 3.1 There are two types of confidential information:-
 - information received from the government which they insist when they send it must be kept private
 - information which cannot be made public because of a legal rule or a court order
- 3.2 If confidential information is involved then the report must be kept private and the public must be excluded. The legislation says "shall", not "may".

¹ Local Government (Scotland) Act 1973, sections 50A to 50K

² Standing Order 24 (1) and (2)

³ Standing Order 50(4) and (5)

- 3.3 This kind of information hardly ever comes up in council reports. It is exceedingly rare.

4 Exempt information

- 4.1 There are 15 kinds of exempt information⁴. Most of them have some conditions attached before they can apply⁵. The categories and conditions are shown in the table at the end of this guidance, along with some examples.
- 4.2 If any of the categories of exempt information is involved then the conditions need to be checked to make sure they are satisfied.
- 4.3 If so, then the report may be kept private and the public may be excluded, as opposed to “shall”. That decision is for the members to make at the meeting.
- 4.4 This type of information is much more common than confidential information, but the overall proportion of reports which are taken in private is still very low.

5 Before the meeting

- 5.1 The decision about taking a report forward as a private item is for the Chief Executive in his role as Clerk to the Council. In practice, he delegates those decisions to Committee Officers. The officer writing a report cannot make that decision. Other senior officers cannot make that decision.
- 5.2 If you think your report should be taken in private then check the legal reasons and information in this guidance (see Appendix). If you still think that it should be a private report then speak to Committee Services. They will let you know if there is a good reason for going ahead in private. If there is an argument about it then the Chief Solicitor or the Governance Manager will decide.
- 5.3 If a report is going to go forward as a private item then add a data label accordingly and send it to Committee Services in the usual way. They will deal with it from there.
- 5.4 They will include the title of the report in the agenda, usually at the end.
- 5.5 The agenda will be marked to show that officers think it should be taken in private. It will also identify the legal reason for them coming to that conclusion.
- 5.6 The report will not be circulated with the rest of the reports. It will not be made public before the meeting. It will be sent to members separately by email. It will include a covering sheet explaining why it has been designated as potentially private business. It will be prepared and sent on yellow paper to differentiate it from the other meeting papers.
- 5.9 It might be possible to publish part of the report before the meeting. For example, the main report could be written so that it can be made public with the exempt information kept in an appendix. That means the public are given as much information as possible rather than keeping it all from them. They will still be

⁴ Local Government (Scotland) Act 1973, Schedule 7A, Part I, Paragraphs 1 -15

⁵ Local Government (Scotland) Act 1973, Schedule 7A, Part II, Paragraphs 1 - 6

excluded from the meeting for the whole item of business but they will know some of what is going on beforehand.

6 At the meeting

- 6.1 When a report concerning confidential information comes up on the agenda the Chair will inform members that the report must be taken in private. Officers may be asked to explain and give advice. Members will always accept the advice and agree to proceed in private.
- 6.2 When a report concerning exempt information comes up on the agenda the Chair will ask members to agree that the report should be taken in private. Officers may be asked to explain and give advice. Members will almost always accept the advice and agree to proceed in private. If they do not all agree one way or the other then a vote may be needed so that a decision is properly made.
- 6.3 If the decision is "private" then Committee Officers will ensure that anyone not entitled to be present leaves the meeting. The report is then dealt with under the usual procedures.
- 6.4 If there is more business to come after it then the public can come back into the meeting room for that part of the meeting.

7 After the meeting

- 7.1 Even though a report was taken in private at the meeting the public is still entitled to know what happened. That is done by writing the minute of the meeting so that the public know what the report was about and what decision was taken but are not told any of the information that led to the private session. Committee Officers may discuss with you exactly what can safely be included in the minute.
- 7.2 The report may have to be made publicly available after the meeting even though it was taken in private at the meeting. That is because once the meeting is over freedom of information legislation takes over. There may still be a good reason not to disclose the report or parts of it. However, after the meeting that is decided under FOISA/EIRS rules and not the rules that apply to private business before and at the meeting.

8 Elected members

- 8.1 Members are in a slightly different position to members of the public. Even though they are not on the committee concerned they might still have a right to see the private report. That depends on the category of exempt information involved - that additional right does not always apply.
- 8.2 If members ask for a copy of a private report and they are not on that particular committee then you should take advice before making a decision.

APPENDIX

Para.	Concerning ...	Subject to ...	Examples
1	Particular former, present or potential future council employee or office-holder	Only in that capacity	Employee appeals Senior Officer appointments
2	Particular former, present or potential future occupier of accommodation provided or paid for by the council	Only in that capacity	Homeless appeals Social Work Complaints Reviews
3	Particular former, present or potential future recipient of a council service	Only in that capacity	Civic licensing applications Disabled parking spaces
4	Particular former present or potential future recipient of financial assistance from the council	Only in that capacity	Social Work Complaints Reviews Access fund grants
5	Adoption, care, fostering, education, supervision requirement or residence for a particular child	None	Social Work Complaints Reviews Significant case reviews
6	Financial or business affairs of a particular person other than the council	Unless it requires to be registered under the Companies Acts and similar registration regimes	BIDS levy appeals Sale or lease of land
7	Reports and supervision of a particular person on release from prison	None	Social Work Complaints Reviews Significant case reviews
8	Cost to be incurred by the council under a contract for the acquisition of a particular property, goods or services	Only if disclosure may give someone an advantage over the council or others	Appointing a preferred bidder Negotiations for sale or purchase of property

9	Terms proposed by or to the council in purchase or sale of property, goods or services	Only if disclosure would prejudice the council in the negotiations	Conditions in a negotiated procedure Proposed terms for land acquisition
10	Identity of the council as the person offering a tender for supply of goods or services	None	Council tendering for work (former CCT regime)
11	Labour relations consultations or negotiations with council employees	Only if disclosure would prejudice the council in those consultations or negotiations	Settling equal pay claims Avoidance of disputes procedures
12	Legal advice or information in relation to council business or legal proceedings	None	Settling equal pay claims Land ownership/boundary dispute
13	Intention to give a statutory notice or order or declaration	Only if disclosure would allow the subject of the order to defeat the purpose	Planning enforcement notice Trading standards enforcement action
14	Prevention, investigation or prosecution of crime	None	ASBO cases Disciplinary action involving criminal behaviour
15	Identity of a protected informant	None	ASBO complaint Trading standards complaint

CONTACTS

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(CS contacts updated 19/5/20)