

# TONBRIDGE & MALLING BOROUGH COUNCIL

## CABINET

10 October 2012

### Report of the Chief Solicitor & Monitoring Officer

#### Part 1- Public

#### Executive Non Key Decisions

### **1 THE LOCAL AUTHORITIES (EXECUTIVE ARRANGEMENTS) (MEETINGS AND ACCESS TO INFORMATION) (ENGLAND) REGULATIONS 2012**

#### **1.1 Introduction**

1.1.1 On 10 August 2012 the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 were made. The regulations came into force on 10 September 2012, and introduce new requirements relating to the day to day business of local authorities operating under executive arrangements.

1.1.2 This report explains the new provisions, and their implications for Tonbridge and Malling Borough Council.

#### **1.2 Overview**

1.2.2 The regulations revoke and replace the previous access to information regulations, introduced in 2000, and make changes to the law with regard to public access to meetings of the Cabinet, access to information and the recording of executive decisions. The effect of the new regulations can be summarised as follows –

- There is a presumption in the regulations that executive meetings will be open to the public. This includes not only meetings of the Cabinet itself, but also its committees, area committees and joint committees (where all members of the joint committee are executive members)
- The regulations introduce new notice requirements in relation to private meetings. At least 28 days notice must be given where a meeting of the executive is to be held in private, including a statement of the reasons why it is intended to do so. The public will then be able to make representations to the Council as to why they consider the meeting should be held in public.
- Key decisions will no longer have to be published within a 'Forward Plan', although there will continue to be a requirement for Key Decisions to be advertised at least 28 days in advance of them being taken.

- New requirements are introduced relating to the declaration and recording of conflicts of interest when taking executive decisions.
- Executive decisions taken by officers will now have to be recorded in a written statement
- Additional rights are provided for local authority members, and members of overview and scrutiny committees, to access documents relating to executive business.

1.2.3 The Secretary of State has said that he has made these changes in the interests of openness and transparency. In his press notice he said

"Every decision a council takes has a major impact on the lives of local people so it is crucial that whenever it takes a significant decision about local budgets that affect local communities whether it is in a full council meeting or in a unheard of sub-committee it has got to be taken in the full glare of all the press and any of the public.

"Margaret Thatcher was first to pry open the doors of Town Hall transparency. Fifty years on we are modernising those pioneering principles so that every kind of modern journalists can go through those doors - be it from the daily reporter, the hyper-local news website or the armchair activist and concerned citizen blogger - councils can no longer continue to persist with a digital divide."

1.2.4 On the face of them these regulations are significant in their effect, although the drafting is not entirely clear. The principal changes are considered further in the following paragraphs of this report.

### **1.3 Private meetings of the Executive**

1.3.1 It will 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 will be familiar) of excluding the press and public when confidential or exempt items of business are to be discussed.

1.3.2 For Tonbridge and Malling, these new provisions will only affect the Cabinet itself, as there are no committees of the Cabinet established within the constitution, nor area committees/ joint committees (where all the members of the joint committee are Cabinet members).

## **1.4 Notice of private meetings**

- 1.4.1 The new regulations impose a new process of giving advance notice of an executive meeting (or any part of) which is to be held in private. The requirement is to give 28 days clear notice of any such meeting, with a requirement to publish a further notice at least 5 clear days before the meeting. The purpose of such a notice is to enable the public to make representations as whether the meeting (or part of it) should be held in public. If these notice requirements cannot be met, the press and public may only be excluded if the consent of the Chairman of the Overview and Scrutiny Committee is obtained.
- 1.4.2 In practical terms, this means that advance notice will need to be given of any report to Cabinet that contains confidential or exempt information, and is to be considered in private (i.e. 'Part 2 items').
- 1.4.3 This leaves a significant question mark over what should happen in the event that, during the course of a Cabinet meeting, it becomes apparent that confidential legal advice is needed. Read literally, the regulations require that the item in question would need to be deferred to another meeting unless the consent of the chairman of the overview and scrutiny committee can be obtained at the relevant point in the meeting. Whilst it is not anticipated that the need to obtain the urgent consent of the chairman of overview and scrutiny would be a regular occurrence, arrangements will therefore need to be in place for the chairman to be available on the telephone, just in case.

## **1.5 The Forward Plan**

- 1.5.1 The old style Forward Plan of Key Decisions is gone, and the phrase 'Forward Plan' is no longer used in the regulations. The regulations instead refer to the publishing of 'a document' at least 28 days before an executive meeting identifying which Key Decisions are to be made at the meeting and containing prescribed information. It is no longer the specific obligation of the Leader to publish this document but a Key Decision cannot be taken 'until a document has been published'. It is proposed to now call this document 'Notice of forthcoming key decisions'.
- 1.5.2 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 key decision taken since the submission of the last report, where the making of the decision was agreed as urgent under the special urgency procedure. The Leader 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.

## **1.6 Recording of executive decisions**

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

- 1.6.2 Regulation 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 an ‘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.
- 1.6.3 The concern is that officers will have to make and publish written statements for every decision which falls within the remit of an ‘executive decision’. Under the previous regulations officers only had to record ‘Key Decisions’.
- 1.6.4 Members will be aware that a large number of executive functions are delegated to officers to discharge. Indeed, the vast majority of functions delegated to officers within our constitution are executive functions, and would now appear to be caught by the new requirements. This may well be an unintended consequence, as it is at odds with the policy of the DCLG to reduce the regulatory burden on local authorities.
- 1.6.5 The concern across local government is such that the District Council’s network has written to DCLG complaining that there has been no formal consultation exercise undertaken in connection 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, with 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 a level of service. There are hundreds if not thousands of such decisions made every week in a 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 years’.
- 1.6.6 The Local Government Lawyer has reported that DCLG’s response to this was to the effect that the regulations do not apply to officer decisions, but only to Cabinet decisions. This is clearly an incorrect interpretation of the regulations.
- 1.6.7 The Association of Council Secretaries and Solicitors (ACSeS) is seeking an early meeting with DCLG officials to discuss options for addressing these new requirements. In the meantime, specialist lawyers in the local government field

have been attempting to interpret the regulations so as to make them workable. In the view of Clive Sheldon QC, a distinction may be drawn between decisions which are 'closely' connected to the discharge of an executive function and those which are only 'remotely' connected. Mr Sheldon QC considers it would be appropriate for Councils to adopt the former definition, and it would not therefore be necessary to record purely administrative decisions such as purchasing stationery for use in connection with the discharge of an executive function. However, this still leaves a significant number of other decisions which fall to be recorded and published under the new requirements.

- 1.6.8 It is hoped that the DCLG will recognise the legitimate concerns that have been raised and respond with amendments to the legislation. Unless and until that happens, the unfortunate reality is that consideration will have to be given as to how we can reasonably meet the new requirements. I shall therefore work with Management Team and other senior officers to identify those types of officer decisions that are covered by the new requirements, and will be recorded/ published on a routine basis. I shall report back to members on the outcome of this exercise in due course.

## **1.7 Other changes**

- 1.7.1 The regime for the inspection of documents has also changed. Information that previously had to be made available for inspection must now also be placed on the website. For the first time, background papers must be published on the website as a matter of course (Regulation 15). This is likely to add to the administrative burden.
- 1.7.2 The additional rights of access to documents for members of a local authority have also changed. Documents within the control of the Cabinet 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. In reality, this change won't affect the practice at Tonbridge and Malling as all members have previously been allowed access to documents/ information to be considered by the Cabinet, as a matter of course.
- 1.7.3 Where a member of an overview and scrutiny committee requests a copy of a document which is in the possession or control of the Cabinet, there is now a requirement to provide it within 10 clear days of the date of the request.

## **1.8 Financial and Value for Money Considerations**

- 1.8.1 On the present drafting of the regulations, it is inevitable that the administrative burden on the Council will significantly increase. I shall work with senior colleagues to examine whether it is possible to interpret the requirements of the regulations in such a way as to reduce this burden, but unless the DCLG are persuaded to amend the legislation it is likely that the new requirements will impact upon the capacity and efficiency of officers.

## 1.9 Recommendations

1.9.1 It is **RECOMMENDED** that

- (a) The Monitoring Officer review the access to information procedure rules in part 4 of the constitution to give effect to the provisions of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, and thereafter submit revisions to the Constitution to Council for approval;
- (b) The Monitoring Officer write to the Secretary of State for Communities and Local Government to express the concerns set out in this report, and request that the regulations be amended to reduce the administrative burden on local authorities.
- (c) The Monitoring Officer report back to Cabinet on the outcome of the review of the new requirements relating to the publication of executive decisions.

Background papers:

contact: Adrian Stanfield

Nil

Adrian Stanfield  
Chief Solicitor and Monitoring Officer

<b>Screening for equality impacts:</b>		
<b>Question</b>	<b>Answer</b>	<b>Explanation of impacts</b>
a. Does the decision being made or recommended through this paper have potential to cause adverse impact or discriminate against different groups in the community?	No	Rights are extended
b. Does the decision being made or recommended through this paper make a positive contribution to promoting equality?	No	Apply equally to all sectors of community.
c. What steps are you taking to mitigate, reduce, avoid or minimise the impacts identified above?		

*In submitting this report, the Chief Officer doing so is confirming that they have given due regard to the equality impacts of the decision being considered, as noted in the table above.*