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LOCAL GOVERNMENT ACT 2000

Debate on

**The Local Authorities (Executive Arrangements) (Access to
Information) (England) Regulations 2000, S.I. 2000 No. 3272**

Briefing Access to Information

8 February 2001

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Introduction

This briefing sets out our concerns on public access to papers and meetings of local authority executives, explaining the substantial weaknesses in the Regulations made under section 22 of the Local Government Act 2000.¹

The Regulations provide for the rights of the public, press and non-executive councillors to information concerning decisions of local authorities which have adopted ‘executive arrangements’.

They require greater advance availability than at present of papers relating to ‘key decisions’, when they do not disclose certain categories of exempt information, a helpful provision.

However, in an important respect they fail to implement the assurances given by the Government to the House of Lords when it considered Commons amendments to the Bill on 24 July 2000. Contrary to Lord Whitty’s assurances, they fail to require executives to meet in public when discussing ‘key decisions’ which will then be taken by individuals. Only those ‘key decisions’ which will be taken by executives collectively must be discussed in public. There remain additional serious concerns that the Regulations will increase secrecy in local government if adopted in their present form:

- **Authorities are given substantial discretion to determine what constitutes a ‘key decision’.** Decisions deemed *not* to be key decisions can be taken in private without prior notice and reports do not have to be publicly available in advance. There is no minimum standard of openness which would apply to all councils.
- **The provisions on advance access to reports relating to forthcoming key decisions of individual executive members or officers which will not be collectively discussed are flawed.** No appeals mechanism exists in the Regulations to challenge the executive’s opinion that the reports are exempt. This is *carte blanche* to suppress embarrassing information.

We therefore believe these Regulations need to be significantly improved and the Government should give a firm date by which they will be revised. Alterations to the Guidance, while desirable and helpful, will not suffice.

¹ Statutory Instrument 2000 No. 3272, The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000

Open meetings of the Executive

Will discussion of 'key decisions' to be taken by individuals be open?

We are concerned that, in spite of giving the appearance of listening to the many organisations who expressed concerns about the failure of the Act to require executives to meet in public, the government has failed to ensure that the Regulations deliver on ministers' assurances. This failure will permit authorities who wish to meet in secret to take advantage of loopholes in the Regulations.

At the end of the passage of the Bill, in July 2000, it was thought that agreement had been reached that Executives were to be required to meet in public when discussing or deciding non-exempt, non-confidential key decisions, except with the newly created exemption of political advisers' advice.²

During the debates on the Bill, peers and MPs on all sides had expressed the concern that the new arrangements would permit many more issues to be discussed and decided in secret than at present. The government accepted that Executives should have to meet in public when taking 'key decisions' - subject to the existing reasons for excluding the public and press.³ The government further accepted that if the public were not just to be witness to a 'rubber-stamping' meeting, where decisions were formalised in public but had been discussed (and to all intents and purposes decided) in secret, that the Regulations should also ensure that discussion by an Executive of key decisions should take place in public. However, a remaining concern was that under the new arrangements many more decisions would not be taken by meetings of the Executive but by individual members of the Executive or officers of the authority. In response to those concerns the minister, Lord Whitty, said:

"We will ensure that our intention for open meetings cannot be subverted by an executive separating a pertinent discussion about a key decision from the meeting where it collectively agrees that decision or through its scheme for delegating formal decision-taking to an individual member of the executive or an officer of the authority. The principle is clear. Where executives meet formally to discuss key decisions, they should do so in public regardless of who will formally take the decision."⁴

Unfortunately, the Regulations do not deliver on the minister's promise. Regulation 7 only requires meetings of an Executive (or its committees) to be in public when

² Regulation 7 and Regulation 21(1)

³ Part VA and Schedule 12A of the Local Government Act 1972

⁴ *Hansard*, House of Lords, 24 July 2000, columns 59-60

discussing a decision which will be taken at a future meeting of a “decision making body”.⁵ **Discussions by an Executive of decisions which will be taken by an individual are therefore outside the scope of the open meetings requirements.** The Guidance on the Regulations does not provide much reassurance, stating only that:

“Local authorities should not undermine the intention for open meetings, for example through inappropriate delegation to individual members or officers.”⁶

A bland statement that authorities should not undermine the intention for open meetings fails to address the issue. The law will allow private discussion by a meeting of an Executive if the decision is to be taken by an individual. The Regulations fail to comply with the principle set out by Lord Whitty that where “executives meet formally to discuss key decisions, they should do in public regardless of who will formally take the decision”.

⁵ Regulations 7(1)(b)(i) and 7(1)(c)(i). Regulation 2 and Section 11 of the Local Government Act 2000 make clear that a ‘decision making body’ cannot be interpreted as meaning an individual member of the Executive.

⁶ Local Government Act 2000: Guidance to English Local Authorities, 19/12/2000, paragraph 7.37

What are ‘key decisions’?

The definition of a ‘key decision’ has become the pivotal issue in the debate on openness of local authorities. Only where ‘key decisions’ are discussed will meetings of an executive have to be open to the public, or decisions to be taken by an officer or individual executive member appear on the authority’s ‘forward plan’. Other decisions will not be subject to anywhere near the same degree of openness, which includes advance access to the papers relating to the decision. We believe a substantial step backwards into secrecy will occur if the Government does not set national minimum standards of openness for local government.

‘Key decisions’ are defined in the Regulations in two parts.⁷ The first part states that a decision likely involve ‘significant’ expenditure or savings in relation to the budget for a council service becomes a ‘key decision’.

The Regulations and Guidance leave it entirely in the hands of local authorities themselves to decide the level of expenditure (or saving) which will provide the threshold for a ‘key decision’. This will lead to substantial arbitrary variations between authorities, with those less keen on scrutiny deliberately choosing high threshold figures. A decision to spend, say, £20,000 might be considered the threshold for a ‘key decision’ by one authority whereas it might be set at £100,000 by the adjacent authority - even in relation to provision of a similar service. **The requirement in the statutory guidance for authorities to “ensure that there is a consistency of openness between neighbouring local authorities at the same tier”⁸ is meaningless and unenforceable: no mechanism is provided for ensuring compliance with this requirement.**

Authorities may choose high figures not because they want to operate in secret but because of the perceived extra ‘bureaucracy’ of advance notification of key decisions on forward plans. It is likely that an institutional interest in minimising the extra work in consultation and making available papers required by key decisions will lead to officers and members of the majority group deciding on a high financial threshold.

⁷ A ‘key decision’ is defined in Regulation 8 as -

⁸ - (1) In these regulations a "key decision" means an executive decision which, is likely -
(a) to result in the local authority incurring expenditure which is, or the making of savings which are, significant having regard to the local authority's budget for the service or function to which the decision relates; or
(b) to be significant in terms of its effects on communities living or working in an area comprising two or more wards or electoral divisions in the area of the local authority.
(2) In accordance with section 38 of the 2000 Act, in determining the meaning of "significant" for the purposes of paragraph (1) regard shall be had to any guidance for the time being issued by the Secretary of State.

⁸ Local Government Act 2000: Guidance to English Local Authorities, 19/12/2000, paragraph 7.18

The second element of the definition of a key decision is whether it is likely to be “significant in terms of its effects on communities living or working in an area comprising two or more wards or electoral divisions in the area of the local authority”. The Guidance states:

“In broad terms, a key decision for the purposes of this test should be regarded as something which under traditional arrangements would have been referred to a committee or sub-committee of the council for decision, rather than being delegated to officers.”⁹

This does little to help, as authorities vary substantially in what they delegate to officers and what they retain for elected members to decide. An authority with a history of delegating a great deal of responsibility to officers will tend, under this advice, to be less open than an authority in which members have kept more decision making within the ambit of committees.

The critical failing of the definition is that a decision which significantly affects people in one ward will not be a key decision. We cannot see the sense of this. The Guidance itself highlights the arbitrary nature of the Regulation by saying that the reference to “two or more wards” in the definition can be ignored in rural areas where there are “very large” wards. There, the authority “may wish to consider” specifying as a ‘key decision’ anything which would have a “significant impact on one ward”.¹⁰ The decision on what is ‘significant’ will largely be a subjective one.

If the decision-taker or officer comes to the view that it fails both the financial threshold and ‘significant effects’ tests then it will merely be an ‘executive decision’. Under the Regulations there are *no* requirements for advance notice or publication of papers which are just ‘executive decisions’. However, without any requirement for advance notice for such decisions, it will be extremely difficult for the public, press or backbench councillor to challenge the issue of whether something is ‘key’ or not before being decided.

In the unlikely event they do somehow find out about it, the two routes open to them are political pressure or judicial review. An executive with a politically contentious matter to resolve will resist the political pressure. After the event it may possibly face a scrutiny committee investigation into how the decision was not viewed as having ‘significant’ effects. Judicial review is a remedy beyond most people’s financial reach and requires the complainant to show that the view that the forthcoming decision was not ‘key’ under the second limb of the definition was *Wednesbury* unreasonable. The result will be that in most cases authorities will be able to operate without fear of prior challenge by anyone.

The effect of this combination of local discretion and loose definition is that the public are unlikely to become aware of many decisions affecting them until after they have been made.

⁹ Local Government Act 2000: Guidance to English Local Authorities, 19/12/2000, paragraph 7.20

¹⁰ Local Government Act 2000: Guidance to English Local Authorities, 19/12/2000, paragraph 7.21

Those who disagree with the decision then face an uphill struggle to persuade a scrutiny committee to review the decision before the matter will possibly be referred back to the executive for reconsideration. All of which takes more time, effort and resources - and leads to greater public disenchantment with the council's decision making process - than if the executive had been required to be more open in the first place.

A stricter definition of key decisions would be beneficial in several ways. It would require sharper analysis by the council officers and politicians considering the matter, better quality decision making and, if not public consensus as to the decision eventually reached, better public understanding of the constraints within which the council was operating. The more rigorous requirements for public consultation on key decisions would hopefully stimulate greater public involvement in local democratic processes.

Who should determine the financial threshold for key decisions?

The Campaign believes that citizens' rights should not vary across the country. The level of openness of local authority decision making should, as far as possible, be the subject of national standards, not local discretion.

Central government should set specific and demanding financial thresholds above which determination of a matter becomes a key decision. The definition of the threshold should require determination of whether a decision is 'key' to be made by reference to:

- (a) a small percentage of the budget for the function or service to which the decision relates, or**
 - (b) an absolute cash figure,**
- whichever is the lower.**

The Government should set the percentage and the absolute cash figure. It may wish to set different absolute figures for different tiers of local government which could be periodically updated by order, or annually in line with inflation. The percentages should apply across the board.

A weaker alternative to central government determining national standards of openness in absolute terms would be for the regulations to permit authorities to set the level within a relatively narrow band of percentages. The Government would set a minimum percentage level across the country with local choice (and accountability) for each council when deciding for itself what value to choose within that band.

In addition, two other changes to the definition should be made. The arbitrary reference to 'two or more wards' in the second test should be amended, so that the criterion would then read, "to be significant in terms of its effects on communities living or working in

the area comprising one or more wards or electoral divisions in the area of the local authority”. The revised definition should also require that a decision by an Executive to propose to the full council that changes are made to existing policy or established practice should be a key decision. The public and non-executive councillors are entitled to know if the Executive is developing proposals which would lead to a change in council policy.

Finally, in terms of ‘key decisions’, the requirements for meetings of the Executive to be held in public should not distinguish between discussion of a key decision and other ‘executive decisions’. Regulation 7 implies that the public have right to see and hear discussion of important matters at a meeting of the Executive, but can be thrown out for lesser matters - regardless of whether the subject matter is legitimately exempt. If an Executive is meeting formally to consider key and non-key matters on the same occasion it should not exclude the public merely because some items are ‘key’ and others not.

Access to documents relating to forthcoming key decisions

Exempt reports - who decides?

At present the initial opinion of the author of the report as to whether publication would disclose ‘confidential’ or ‘exempt’ material¹¹ can be challenged by a councillor present at the committee meeting considering the item. If the meeting decides to, it can consider ‘exempt’ material in public. This provides an opportunity for councillors to challenge any spurious attempts to take decisions in secret. Under the new arrangements set out in the Regulations this will no longer be possible. Attempts to take or discuss decisions dealing with exempt material in secret by a meeting of the Executive will still be challengeable by councillors who are members of the Executive, although in single-party Executives this is extremely unlikely.

However, where a forthcoming key decision is to be taken by an individual member of the Executive or an officer, there is absolutely no provision in the Regulations for challenging their opinion that the reports relating to the decision contain exempt matter or the advice of a political adviser. This is carte blanche to suppress embarrassing information. The claim for exemption may well be legitimate, but there is no means to tell beforehand. Even after the decision only exempt material relating to “an action or decision that he is reviewing or scrutinising; or which is relevant to any review contained in any programme of work” of the scrutiny committee will be available to a non-executive councillor.¹² Political advice will still be exempt, even if that is the only written material underpinning the decision. **The Regulations should be revised in order to provide some mechanism, possibly the scrutiny committee, to arbitrate disputes over claims for exemption from disclosure obligations.**

¹¹ Within the terms of Part VA and Schedule 12A of the Local Government Act 1972

¹² Regulation 18(2)