



The Campaign for Freedom of Information

Briefing Note on local government openness and the recently proposed changes

Introduction

This paper deals with rights of access to information held by local authorities in England and Wales. The government has claimed that the draft Local Government (Organisation & Standards) Bill (the LG Bill) and the draft Freedom of Information Bill (the FoI Bill) will increase the openness and accountability of public authorities.¹ However, the Campaign for Freedom of Information has serious concerns regarding their effect on the openness and transparency of local authorities. Both draft Bills have been subject to scrutiny by select committees in the Commons and Lords, which have suggested significant improvements.²

Current openness provisions

The primary statute governing access to local authority information is the Local Government Act 1972.³ This provides that meetings of a local authority, its committees and sub-committees shall be open to the public unless material defined as "confidential" or "exempt" would be disclosed. Councils must not disclose "confidential" information, but may use their discretion as to whether the meeting should be closed to the public if information defined as "exempt"⁴ would be disclosed. The minutes of the closed part of the meeting must still provide a "reasonably fair and coherent" record of the proceedings.

The public are entitled to the agendas, minutes and papers of meetings of the Council which are held in public.⁵ The Act is therefore primarily a right of access to meetings, and the right to see the papers is dependent on the meeting being open to the public. The Act also provides some access to the "background papers" relating to reports. Papers, agendas and minutes of meetings must generally be available three clear days prior to the date of the meeting.

It is therefore a far from perfect right of access to information. There is no

right of access to information about matters which have not gone to a committee for decision, or to matters where decisions have been delegated to an officer.

There are other statutes which require openness from local authorities in other areas, such as access to the Council's invoices and receipts at the time of the annual audit,⁶ access for individuals to their housing, social work and school records,⁷ and environmental information,⁸ but they will not be affected by the draft LG bill.

Loss of openness under the draft LG bill

As described above, most existing rights to see papers apply only to matters dealt with at a meeting of the Council open to the public. However, the new decision-making structures proposed in the draft LG bill will not be required to meet in public. Existing rights to information may therefore be lost.

The full Council will still meet in public, as may the scrutiny committees, but many of the authority's decisions may now be taken by either an elected Mayor with 'executive councillors' for certain portfolios, or by a Mayor with an appointed 'Council Manager', or by a council leader with executive 'cabinet' councillors. Since these structures propose that individual 'executive councillors' or mayors will take decisions outside the structure of the 1972 Act (not in a meeting of the full Council or a committee or sub-committee) the openness requirements of that Act will not apply.

This is contrary to the government's stated intentions for its proposed reforms - openness and accountability.⁹ The white paper proposed that authorities should provide records of decisions, and the facts and analysis underpinning them, once a decision has been taken.¹⁰ However, this important provision does not appear in the draft LG bill itself which contains no specific requirements relating to the disclosure of information by the new structures. Many witnesses to the select committee questioned whether the new structures would be sufficiently open. They were critical of the fact that the bill will, crucially, remove rights of access to the facts and analysis *prior* to a decision being taken.

The Local Government Ombudsman for Wales criticised this aspect of the bill, saying, "One of the features of the current system which is fairly unique is that the public have access to agendas and reports to committees in advance of a meeting and certainly, in so far as openness is an important contribution towards good conduct, then *I think that in so far as papers for meetings of the executive will not be available in advance, that will be a diminution of the current rules on openness.*"¹¹ He went on to say that "an adequate audit trail of reports and minutes and agendas and so forth will be

crucial to openness, and from a practical point of view, crucial to an investigation should there be questions raised." He concluded that the lack of adequate records of the decision making process was a symptom of "arbitrary decision making". [12](#)

Solutions

The select committee recommended the following substantial changes, to which the government has not so far responded:

- Agendas and background papers of the new executive decision-making structures should be published in advance;[13](#)
- every step in the decision making process should be documented and made public;[14](#)
- reasons for decisions, together with factual and analytical material, should also be published;[15](#)
- officer's advice to the mayor or executive councillors should be published.[16](#)

We make a number of further suggestions. The first would be to extend the period of availability of papers to be relied on by the Mayor or councillors *before* taking decisions. The current '3 clear days' rule has proved insufficient for members of the public who wish to contribute to a forthcoming decision. Often the chair of a meeting also exercises their discretion to accept reports with less than the 3 days notice.[17](#) This reduces the opportunity for the public to comment and gives officers and committee chairs disproportionate influence. The Campaign would like to see a longer statutory period for the advance publication of papers.

Second, officers should also be obliged to list, in the report itself, the background papers relied on; the present arrangements do not require this and permit information to be hidden behind what the *officer* considers relevant to their report.[18](#) No right of appeal to a third party against the officer's 'opinion' currently exists.

Finally, in the spirit of the 'Modernising Government' programme, local authorities could be required to place copies of all these materials on their websites. Information technologies can enhance access to publicly held information, and can be especially beneficial in rural areas where it may otherwise be difficult to physically inspect documents.

The draft Freedom of Information bill

Although the government has stated that local government will have to comply with the Freedom of Information (FOI) Act, the draft FOI bill is presently so weak that it is unlikely to remedy to the significant limitations in the draft LG bill. A number of clauses in particular are likely to cause serious problems to people seeking local authority information:

- The bill does not give the Information Commissioner (who will enforce the Act) the power to order the release of exempt information in the public interest. Public authorities, not the Information Commissioner, will have the last word on whether disclosure is in the public interest. This is in stark contrast to the Irish FOI Act, of 1997, which gives their Commissioner the power to order disclosure in the public interest. Two UK select committees recommended that the UK Commissioner have the same power.¹⁹ But the government has rejected this approach, insisting that the Commissioner should only be able to *recommend* disclosure and that it should be free to ignore the recommendations.
 - Clause 28 allows authorities to withhold information if in their "reasonable opinion" disclosure would inhibit the free and frank provision of advice or the exchange of views for the purposes of deliberation, or would prejudice "the effective conduct of public affairs."²⁰ The most damaging aspect of this provision is that giving legal weight to the 'opinion' of an authority means most decisions could not be challenged by the Commissioner. Even without the "reasonable opinion" test the exemption itself would still be too broad to be acceptable.
 - Clause 25 allows authorities to refuse access to information gathered during an investigation which could result in proceedings for an offence. The information would be exempt even if it would not harm the authority's law enforcement functions or the possibility of a fair trial. Reports could continue to be withheld even after it had been decided not to prosecute. This will permit substantial secrecy about investigations varying from environmental health and trading standards to houses in multiple occupation and planning control.
 - Clause 34 permits an authority to withhold information if its disclosure would prejudice the commercial interests of any person, including the authority holding it.²¹ Given the increasing commercialisation of public sector services and the growth of contracting out, this exemption could apply to large swathes of information relating to public expenditure, contractor performance and penalty clauses in contracts.
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Endnotes

1. The draft Local Government (Organisation & Standards) Bill was published as an annex to the consultation paper *Local Leadership, Local Choice*, Cm 4298, March 1999. The draft Freedom of Information Bill was published as an annex to the consultation paper *Freedom of Information*, Cm 4355, May 1999.
2. Joint Committee on the draft Local Government (Organisation & Standards) Bill, HC 542-I & II, Select Committee on Public Administration, 3rd Report 1998-99, Freedom of Information Draft Bill, HC 570-I, Report from the Select Committee appointed to consider the draft Freedom of Information Bill, 1998-99, HL 97
3. This was amended by the Local Government (Access to Information) Act 1985, which inserted a new Part VA, increasing the public's right to attend meetings and see documents.
4. The definitions can be found in Schedule 12A of the Act.
5. The Act also extends to committees and sub-committees of Councils.
6. Local Government Finance Act 1982
7. Access to Personal Files Act 1987 and Data Protection Acts 1984 and 1998
8. Environment and Safety Information Act 1988, Environmental Information Regulations 1992
9. "Modern councils succeed when they put people first, when they work and take decisions in a culture of openness and accountability to local people. They succeed when there is trust between them and their local community." Cm 4298, para 1.3
10. Cm 4298, para 3.59-3.65 includes the following statements:
"The key principles to underpin the legislation are that:
 - as a minimum, the provisions on access to information will need to comply with legislation on the freedom of information;
 - an executive must ensure that a record of all decisions taken and the reasons for those decisions is produced, and that record, along with factual and background papers (excluding information which currently would not be made public, e.g. "exempt information" in Schedule 12A of the Local Government Act 1972) relating to those decisions, must be made public;
 - once a decision is taken by an individual, the record of that decision, including the reasons, and (if they have not already been provided) any papers containing the analysis and facts relating to the decision, must be made public and available to all councillors (subject to current legislation on access to information);..."
11. HC 542-II, Q454. Mr Elwyn Moseley, Commissioner for Local Administration in Wales. Emphasis added.
12. HC 542-II, Q455.
13. HC 542-I, paragraph 176.
14. HC542-I paragraph 113: "We recommend that a framework of principles governing the recording of decisions of the executive be inserted on the face of the bill, including: the prior consultation of officers; recording by officers; and the availability of factual and analytical material supporting each decision. Material recorded should, in the case of planning decisions, include records of any contact, whether formal or informal, between applicants or their agents and officers or councillors.

In the interest of openness, which we consider further below, such decisions and material should be published."

15. HC 542-I paragraph 177: "Earlier in our report, we considered the question of recording of decisions. We reiterate our recommendation that when executive decisions are recorded and published, the reasons for these decisions, together with factual and analytical material supporting them, should be published."
 16. HC542-I paragraph 178 : "The White Paper, but not the Bill, addresses the question of whether the advice of officers to the executive should be made public, saying "publishing the advice from officers would ensure greater accountability for political decisions". On the other hand, some argue that the position of officers would become difficult when it was clear to the public that their professional advice was not being followed on a major issue. The government is inclined to make this information public too, alongside factual material. While noting that such publication is at variance with the practice followed in the Civil Service, we believe that the government should follow its inclination and recommend that (with the exception proposed in the White Paper regarding political advice) the advice of officers should be published when it relates to a decision."
 17. Section 100B(4) allows the chairman of the meeting allow items to be considered without having been available in advance for 3 clear days "as a matter of urgency" if there are "special circumstances".
 18. Section 100D(1)-(5)
 19. HC 570-I, paragraphs 41-44, HL 97, paragraph 21
 20. Clause 28(3)(a)-(c)
 21. Clause 34(2)
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