Local Authorities (Executive Arrangements) (Meetings and Access to Information) Regulations 2012

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This briefing, the twentieth in the Policy Briefing series, provides a brief analysis of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) Regulations 2012 (SI 2089).

These regulations were laid in Parliament on 20 August 2012 and came into force on 10 September 2012. They amend the legal position relating to access to information, revoking existing regulations from 2000, 2002 and 2006. They also provide for enhanced powers for overview and scrutiny members.

These regulations apply to authorities operating executive arrangements only. Committee system authorities are not covered. The regulations do not apply in Wales.

This briefing should not be interpreted as providing formal guidance or legal advice. Officers and councillors in English local authorities affected by these regulations should seek the advice of their Monitoring Officer before taking action based on anything within this briefing.

As in previous publications we describe sections of the regulations as "clauses" rather than using the more common "regulation" (ie, "clause 8" rather than "Regulation 8") in order to avoid confusion.

Note: nothing in this briefing should be construed as providing legal advice. Those planning the implementation of the regulations locally should consider this guide as supplementary to the advice given by their Monitoring Officer.

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1. Summary of the regulations

1.1 The LGiU produced a short news article based on the press release issued by DCLG when the Regulations were laid in Parliament, which can be found at http://www.lgiu.org.uk/2012/08/23/pickles-invites-bloggers-deeper-into-the-town-hall/, The Regulations are also explained in their Explanatory Notes, which can be found at the back of the PDF version: http://www.legislation.gov.uk/uksi/2012/2089/pdfs/uksi_20122089_en.pdf. DCLG issued a press release at the time of the Regulations' publication (http://www.communities.gov.uk/news/newsroom/2204300) although this press release does not accurately represent the content of the Regulations.

Part 1: General

1.2 This Part of the Regulations sets out provisions around interpretation, particularly on the definition of "decision-making bodies", which are Cabinet, committees of cabinet, joint committees, and sub-committees of joint committees. Informal boards, "policy development groups" of Cabinet, or other bodies are not covered.

Part 2: Admission of public to meetings of local authority executives and their committees

1.3 This Part brings in a new presumption of openness for decision-making meetings, saying that meetings of "decision-making bodies" must be held in public (clause 4(1)). The public can be excluded but only where exempt or confidential would be disclosed (further to Schedule 12A), or where a "lawful power is used to exclude a member or members of the public in order to maintain orderly conduct or prevent misbehaviour" (clause 4(2)).

1.4 Once a meeting is open to the public, other than the right to close it to prevent disorder, a decision cannot be made to go into private session (clause 4(4)). (This will still permit an authority to specify that part of the agenda should be dealt with under Part II – all it means is that this decision must be made beforehand, and be clearly reflected on the agenda, rather than a decision being made at the meeting itself). Clause 4(5) makes provision for facilities to be provided to those attending the meeting for the purpose of reporting the proceedings. An expanded definition of "newspapers" and media outlets under clause 2 means that this entitles bloggers and others to "live tweet" and to record meetings.

1.5 Where it is proposed to hold a meeting of a decision-making body in private there is a detailed procedure to be followed (clause 5). It should be pointed out that private meetings of decision-making bodies cover formally-convened meetings only. Briefing sessions at which cabinet members are present, for example, are excluded.

1.6 The procedure is as follows:

- At least 28 days[1] before the private meeting, the decision-making body must public a notice of its intention to hold the meeting (including a statement of reasons);
- At least 5 clear days before the private meeting, the body must publish a further notice of its intention to hold the meeting, which again restates the reasons for doing so alongside any representations it might have received to the contrary;
- Where a meeting needs to be held sooner the meeting may be held in private only where agreement has been reached from **the relevant overview and scrutiny committee chair** (or, if there is 'no such person' (eg under a committee system with no OSCs), the chairman of the authority, or if this isn't possible either the vice-chairman. The relevant OSC chair will, in the case of cabinet, usually be the chair of the 'main' OSC, or the "corporate resources" OSC, or something similar. It should be noted that this person will usually be of the same party as the ruling group;
- Under these urgency procedures, once agreement from the relevant person has been obtained a notice setting out the reasons why the meeting is urgent and cannot be deferred must be published.

1.7 Clause 6 sets out the procedures prior to public meetings of decision-making bodies – largely a restatement of the requirements of the 1972 Act. However, clause 6(2) says that an item may only be considered if it is on the agenda (as circulated five clear days before, or more recently if urgency provisions applied).

1.8 The agenda, and all public reports, must be available to the council's offices and on its website, other than when part or the whole meeting will be held in private (clause 7(2)). The usual timescales apply. Reports must be made available at the meeting; confidential reports are to be marked "not for publication".

Part 3: Key decisions

1.9 Key decisions are executive decisions which are "likely":

- "to result in the relevant local authority incurring expenditure which is, or the making of savings which are, significant having regard to the relevant local authority's budget for the service or function to which the decision relates" (clause 8(1)) or

[1] This probably means 28 days, not 28 working days, reflecting existing practice for longer time periods in legislation, and the fact that under other local government legislation the "clear days" requirement is clearly defined as being something different.

- "to be significant in terms of its effects on communities living or working in any area comprising two or more wards or electoral divisions in the area of the relevant local authority" (clause 8(2))

1.10 There are powers for the Secretary of State to define the word "significant" in guidance. Current local government practice in terms of expenditure is £100,000 or more, but in relation to 'effects on communities' the meaning is less tangible.

1.11 Clause 9 on "publicity for key decisions" sets out provisions on forward plans, which amends slightly the current position (removing, for example, the requirement for a rolling 3-monthly FP). Authorities will have to provide slightly more detail on their FP than they do at the moment, particularly in relation to background papers. Where publication of a key decision in the FP is not possible the decision may only be made where the chairman of the relevant OSC (or "if there is no such person" each member of that OSC) has been informed of the decision by the proper officer, where a notice has been published and where five days have elapsed. This should also set out the reasons for urgency (clause 10). Special urgency procedures are provided in clause 11 for circumstances where adherence to clause 10 is impractical.

Part 4: Recording of executive decisions

1.12 The Regulations will require that all executive decisions made at a meeting of a decision-making body be set out in a separate written statement (clause 12), setting out:

- The date the decision was made;
- The reasons for the decision;
- Any alternative options considered and rejected at the meeting (not necessarily in the life of the development of the policy);
- A record of any conflicts of interest declared by a member of the body, and any relevant dispensation granted by the head of paid service in this regard.

1.13 This represents an expansion and standardisation of the way that cabinet decisions are currently recorded – individual authorities currently have slightly different ways of doing it, with decisions made at a cabinet meeting being recorded differently to those made by an individual cabinet member.

1.14 Under clause 13 the same provisions will apply to individual cabinet member decisions. Clause 13(4) applies provisions over written records to officer-level decisions. Both ADSO and ACSeS have raised significant concerns over this part of the Regulations, as they purport to require standardised records to be made of a large class of officer-level decisions (for example, even minor operational decisions or comparatively small or routine expenditure). It seems likely that merely

"administrative" decisions are not included under this head, but that more important decisions will be. DCLG have advised that it will be down to the Monitoring Officers of individual authorities to make a judgment as to whether the line should be drawn[2]. We cover this issue in more depth below.

Part 5: Additional rights of access

1.15 Clause 16 states that any document in the position of the executive of the authority, and that contains material related to business to be transacted at a **public meeting** (our emphasis) must be available for inspection by any member, at least five clear days before the meeting in question (clause 16(2)) except where urgency provisions apply. However, under clause 16(6) exempt information is excluded, except under paragraphs 3 and 6 of Schedule 12A – that is, information relating to the business or financial affairs of any person (including the authority) and proposals to impose requirements on a person or issue orders or directions.

1.16 Clause 16(3) requires that information relating to business transacted at a **private meeting** (our emphasis) should be made available to any member of the authority "when the meeting concludes" (ie immediately following the meeting), "or where an executive decision is made by an individual member or an officer immediately after the decision has been made". The Schedule 12A provisions will apply to this information too.

1.17 Under clause 17, members of OSCs have additional information rights. Such members should be provided with any information relating to a decision-making body of that authority as soon as reasonably practicable following a meeting and in any event no more than 10 days later.

1.18 Clause 17(3) provides a right for OSC members to access exempt or confidential information, where it relates to an action or decision that the member is reviewing or scrutinising or a review in the scrutiny work programme.

1.18 Where the executive refuses to give information to an OSC member further to the above, reasons must be given (clause 17(4)).

1.19 Clause 18 sets out a process whereby an OSC can challenge a decision of the executive not to classify a certain decision as "key". If a challenge is made the executive must make a report "to the relevant local authority" (presumably, to full council) setting out the decision, the reasons for the decision, the decision-maker and the reasons why the decision was not "key".

[2] Speaking at a meeting of the Counties and Unitaries Network on 28 September 2012

1.20 Under clause 19 the executive or mayor must submit a report to full council setting out all executive decisions taken under urgency provisions since the submission of the last report. At least one of such reports must be issued annually.

Part 6: General information provisions

1.21 This Part sets out some general exceptions (including exceptions to the regulations where information is provided to decision-making bodies by political advisers). Clause 21(7) states that background papers for decisions must be retained for four years following the decision. Clause 22 sets out a new criminal offence for any person breaching the terms of clause 7, 14 or 15, for which the penalty on conviction in a magistrate's court will be a small fine.

2. General analysis

2.1 The clauses on private meetings might initially be seen as having the most potential to affect the way that business is transacted in local authorities, but in fact will not significantly change current practice.

2.2 One reading of the regulations is that the definition "meeting of a decision-making body" includes private Cabinet briefing sessions or other informal meetings where an informal body or informally convened meeting, bringing together the same membership as Cabinet, discuss council decisions.

2.3 A second reading of the regulations is that the definition "meeting of a decision-making body" relates solely to meetings of formal Cabinet itself. This is because any informal meetings are, by virtue of their informality, not covered by the regulations as they do not legally exist.

2.4 We consider that the second of these two readings is the legally correct one, and the interpretation that Monitoring Officers will be using in implementing these regulations. This does not, regrettably, help in tackling the often opaque way – through private briefings, meetings and boards removed from public scrutiny and non-executive accountability – that decisions are made in local authorities.

2.5 The powers to inspect documents – backed up with potential criminal sanctions – are aimed at ensuring that members of the authority and members of the public can have easy access to background papers, and that key decisions are made in a consistent and understandable way. The changes to the law regarding forward plans are relatively minor but may help to provide more context to decisions when they are made.

2.6 Particular concern has been raised about the requirement for councils to record officer decisions under the regs. In a response to the MJ on this issue further to a public request for clarification from the District

Councils Network, DCLG erroneously insisted that the regulations do not apply to officer decisions, but they clearly do, and the precise scope of provisions on those decisions is highly opaque. As we have set out, a pragmatic approach suggests a demarcation between “executive” decisions on the one hand and “administrative” decisions on the other. We understand that this distinction is supported by case law. It seems likely that most authorities will take a restricted approach to this requirement, perhaps publishing only a strict subset of delegated decision. Council constitutions will need to be amended to reflect whatever approach the authority plans to take.

2.7 The feature of the Regulations most prominently reported in the trade press was the right of bloggers and citizen journalists to report from meetings, and to record them. While many authorities already provide these facilities, some have sought to prevent those in the public gallery from tweeting meetings, or from recording them on their own equipment. It appears that such restrictions will now have to end – at least insofar as Cabinet meetings go. That said, the use of the word “report” on the regulations might be interpreted restrictively to suggest that real-time recording or broadcasting of proceedings is still not permitted. However, the regulations (certainly seen alongside their explanatory notes) do not support such an interpretation.

3. Implications for scrutiny

3.1 The Regulations give greater powers to scrutiny members to access council information – particularly information which is exempt or confidential. We have always said that, ideally, a positive working relationship between scrutiny and the executive will mean that information sharing will be a matter of fact and practice. However, there will be situations – and there have been in the past – where disagreements have arisen about the provision of information. We are aware of at least two instances where overview and scrutiny chair have resorted to the Freedom of Information Act to get hold of council data relating to a decision, or a policy. The Regulations will make this unnecessary, but may also require embedding within the O&S rules of procedure within authorities so that it is clear how they will apply locally.

3.2. The Regulations also give powers to O&S chairs to “approve” urgent executive decisions. Authorities might need to think about how this works in practice. In many councils this backstop might cause concern (eg, where the O&S chair is from the minority party). Chairs will need to use their discretion under the Regulations to approve, or not approve, such urgency requests carefully. Rules of procedure should not, however, seek to “design away” this backstop by purporting to limit its use. Arguably, it should provide a catalyst for executives to think about the current use and misuse of urgency powers.

3.3 Steps that can be taken by O&S now to follow on from these Regulations might be:

- To seek clarity on the arrangements relating to Part II discussions at cabinet, and the precise nature of the urgency provisions by which an overview and scrutiny chair will need to approve a closed session where fewer than 28 days notice are given;
- To make recommendations on the recording of proceedings by bloggers (and live-tweeting), potentially providing for a mechanism whereby people not present at the meeting can still interact and engage with proceedings where relevant and appropriate;
- To clarify, with the monitoring officer, how notifications of key decisions / background papers will be provided by O&S, and how officers will decide what information constitutes a "background paper" for the purposes of the Regulations;
- To take the opportunity to revisit scrutiny's relationship with the executive more generally, and to see if any further steps can be taken towards transparency in decision-making, over and above what is prescribed in the Regulations.

Centre for Public Scrutiny
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