
REPORT 1
(1215/52/01/1M)

IMPLICATIONS FOR COUNCIL ARISING FROM THE UNAUTHORISED RELEASE OF PUBLIC EXCLUDED INFORMATION

1. Purpose of Report

The purpose of this report is to summarise the risks and implications arising from the unauthorised release of public excluded information, in response to a request from Councillor Armstrong on 12 February 2007.

2. Recommendations

It is recommended that the Subcommittee:

- 1. Receive the information;*
- 2. Note the risks and implications posed by the release of confidential information;*
- 3. Agree to the City Secretary reviewing the need for a process for decommissioning Public Excluded reports and the subsequent communication that a Public Excluded report has been decommissioned to Elected Members;*
- 4. Note that the audit programme includes two audits on this topic*
- 5. Forward the report of the City Secretary to the Strategy and Policy Committee for consideration by all Elected Members.*

3. Background

On 12 February 2007, Councillor Armstrong requested under Standard Order 148 that a report be prepared for consideration by the Audit and Risk Management Subcommittee (ARMS) at its next meeting on 2 March 2007, on the implications for Council arising from the unauthorised release of public excluded information. The Chair of ARMS, Councillor McKinnon, requested on 23 February 2007 under Standing Orders that the report be delayed until this (8 June 2007) ARMS meeting.

4 Discussion

The attached report by the City Secretary (refer Appendix One) addresses the matters raised by Councillor Armstrong. This report summarises the risks and implications outlined in the City Secretary's report arising from the unauthorised release of public excluded information.

4.1 Why is this issue important?

The City Secretary's report acts as a useful reminder to Elected Members and should be forwarded to the Strategy and Policy Committee for discussion by all Elected Members.

This issue is important because the Local Government Official Information and Meetings Act ("LGOIMA" or the "Act") specifically states that local authorities should operate under the principle that information shall be made available unless there is good reason for withholding it.

The Act's purpose is to provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities. By doing this local authorities should therefore enable *more effective participation* by the public in the actions and decisions of local authorities and *promote the accountability* of local authority members and officials.

Governance describes the process of decision-making and the process by which decisions are implemented (or not implemented). However, there are times that to ensure good governance, meetings and discussions need to be held in a confidential setting to ensure that resources are managed and privacy is protected in the best interests of the City. As the City Secretary points out in his report, holding public excluded discussions and having public excluded reports is allowed for under the Act.

4.2 Processes for managing public excluded/official information

The Council has appropriate procedures and standards in place to safeguard against abuse of the Public Excluded process and/or reasons for withholding provisions of the ACT. The City Secretary outlines the process in his report for resolving to make a report Public Excluded.

Prior to the report reaching this stage, the report will have been subject to a peer review process by officers, and where necessary, legal review. Report authors and their managers are responsible for assessing whether, and if appropriate proposing that, a report be considered in a public excluded session of a Council, committee or subcommittee meeting. They make their judgement in relation to the principles and provisions contained in LGOIMA. The City Secretary highlights that the use of Public Excluded has not been excessive over the past two to three years

Few Councils have a dedicated Issues Resolution Office (IRO) like Wellington City Council, which has a specific responsibility for the LGOIMA and the Privacy Act. IRO is also the owner of the "Information Requests Standard" that sets out the policies and processes staff must follow when dealing with information requests, and regularly provides training and advice to staff throughout the Council.

4.3 Role of Risk Assurance

Over the past two years, Risk Assurance has been developing a Council-wide risk profile. Included on this risk profile are information-related risks such as the lack of transparency in decision-making and inappropriate release of information. In developing its new three year audit programme, Risk Assurance has proposed a number of audits related to these risks, including an audit of the Council's LGOIMA process and a review of the Public Excluded process.

4.4 Implications

The City Secretary highlights a number of implications arising from the unauthorised release of public excluded information.

Impact on governance

Arguably the most important implication centres on the governance role that Elected Members have. Issues such as the loss of trust and confidence leading to decisions being made by Officers to limit information provided to Elected Members, or not providing information at all, changing the way reports are written etc, in order to protect the interests of Council. This could lead to Elected Members (and external Committee members) not being able to properly fulfil their governance duties and/or lead to poor decision making.

Exposure to loss of revenue/additional costs

Unauthorised release of Public Excluded information can jeopardise sensitive or commercial contract negotiations. It can expose the Council to higher prices or lower revenue if other parties know Council's limits or exposures. This in turn means that ratepayers could be affected by higher rates if Council misses out on revenue or ends up payer higher costs. In addition, external parties affected by unauthorised disclosures may be in a position to take civil action against Council.

Privacy

As the City Secretary states, a number of reports are classified as public excluded to protect the privacy of people, such as the chief executive, and board members of Council Controlled Organisations CCOs). If such people became aware that information about them, provided to officers on an understanding of confidentiality, had been disclosed without authorisation, this would lessen their trust and confidence in the Council. In the long term, it may affect the Council's ability to attract and retain the sorts of skilled people that are required to fill these positions.

Personal liability

Under section 43(1) of the Local Government Act 2002 members are indemnified by the local authority of which they are a member for costs and damages for any civil liability arising from any action brought by a third party if the member was *acting in good faith* and in pursuance (or intended pursuance) of the responsibilities or powers of the local authority. It is therefore implicit that where a member has not acted "in good faith and in pursuance (or intended pursuance) of the responsibilities or powers" of Council, they are not indemnified and therefore can be personally liable if unsuccessful in an action by a third party, or potentially by Council.

4.5 Changes to existing processes

One of the concerns expressed by several Elected Members is how can they know when a Public Excluded report is no longer public excluded. At present, a decision is made on an individual report at the time a request, normally under LGOIMA, is made for that report. In discussions with the City Secretary, it was considered that it is the communication to all Elected Members when a Public Excluded status report is “decommissioned” that needs to be improved. The City Secretary, in conjunction with IRO, will establish a process to ensure that appropriate communication occurs in future.

5. Conclusion

At times, the aim of open availability conflicts with the governance role of Elected Members (and external members of Committees) and therefore the careful use of Public Excluded process can help guide the Council through that conflict.

Wellington City Council has well established policies and processes for dealing with official information and could further add to these procedures by establishing a “decommissioning” process for Public Excluded reports and the subsequent communication thereof to Elected Members.

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Supporting Information

1) Strategic Fit/Strategic Outcome

This project supports Key Achievement Area 9 Governance and Citizen Information: As per the Annual Plan, Governance and Citizen Information includes all those activities that make the Council accountable to the people of Wellington and ensure the smooth running of the city. That includes all meetings of the Council and its committees.

2) LTCCP/Annual Plan reference and long term financial impact

Relates to C534: Committee and Council process

3) Treaty of Waitangi considerations

There are no Treaty of Waitangi implications

4) Decision-Making

This is not a significant decision

5) Consultation

a) General Consultation

Not required

b) Consultation with Maori

Not required

6) Legal Implications

The report by the City Secretary has been discussed with Council's legal advisors.

7) Consistency with existing policy

This report is consistent with existing Wellington City Council policy

APPENDIX ONE

MANAGEMENT OF CONFIDENTIAL INFORMATION

1.1 Introduction

This report sets out:

- the definition of official information
- a brief discussion of the law relating to official information
- what is meant by confidential or public excluded information
- the systems and processes Wellington City Council (“the Council”) has in place for the management of confidential and public excluded information
- implications (including financial, legal, reputational and those relating to public confidence) for the Council arising from the unauthorised release of confidential or public excluded information
- the actions the Council can take following the unauthorised release of confidential or public excluded information.

1.2 Official Information

Official information means any information held by a local authority. Sections 2(3) and 2(4) of the Local Government Official Information and Meetings Act 1987 (LGOIMA or “the Act”) state:

Subject to subsection (4) of this section, information that is held by an officer or employee or member of a local authority in that person's capacity as such an officer or employee or member or in that person's capacity as a statutory officer shall be deemed to be held by the local authority of which that person is an officer or employee or member.

Nothing in subsection (3) of this section applies in respect of any information that any officer or employee or member of a local authority would not hold but for that person's membership of, or connection with, a body other than a local authority, except where that membership or connection is in that person's capacity as such an officer or employee or member of that local authority or as a statutory officer.]

The term “information” is not further defined in the Act.

In short, then, any information that an elected member or an officer creates or receives while wearing that “official hat” (as opposed to when they are a private citizen, say, writing an email to their bank manager about their mortgage, or to their cousin about an upcoming wedding) is official information. As such, it does not matter where such information is created or stored (e.g. at a personal residence, on a privately-owned computer); it is still official information if the link can be made between that information and the official role of the person who created or is storing it. If the person who created the information is no longer an elected member or an officer, the information remains official information.

1.3 Official Information and the Law

The management of official information by local authorities is subject to LGOIMA. LGOIMA is an Act:

“to make official information held by local authorities more freely available, to provide for proper access by each person to official information relating to that person which is held by local authorities, to provide for the admission of the public to meetings of local authorities, to protect official information held by local authorities and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy, and to establish procedures for the achievement of those purposes.”

The purposes of the Act are (section 4):

- (a) To provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order—
 - (i) To enable more effective participation by the public in the actions and decisions of local authorities; and*
 - (ii) To promote the accountability of local authority members and officials,—*
*and thereby to enhance respect for the law and to promote good local government in New Zealand:**
- (b) To provide for proper access by each person to official information relating to that person:*
- (c) To protect official information and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy.*

The Act also sets out, in section 5, the principle of availability:

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

Under the Act, therefore, official information must be made available unless there is a valid reason for withholding it. In the absence of a compelling reason for privacy (and that does not include “but we’d be embarrassed if this got out”), best practice methods lean toward providing the requested information to assure transparency. By the same token, if a decision has been made (e.g. by Council resolution) that some information will be treated as confidential or public excluded, then there are clearly strong and valid reasons why that is the case, and those must be respected at all times.

The Act sets out conclusive and other reasons for withholding official information (that is, to keep it confidential to the council).

Section 6 states:

Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section [5](#) of this Act, if the making available of that information would be likely—

(a) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(b) To endanger the safety of any person.

Section 7 states:

Other reasons for withholding official information

(1) Where this section applies, good reason for withholding official information exists, for the purpose of section [5](#) of this Act, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

(2) Subject to sections [6](#), [8](#), and [17](#) of this Act, this section applies if, and only if, the withholding of the information is necessary to—

(a) Protect the privacy of natural persons, including that of deceased natural persons; or

(b) Protect information where the making available of the information—

(i) Would disclose a trade secret; or

(ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or

[(ba) In the case only of an application for a resource consent, or water conservation order, or a requirement for a designation or heritage order, under the [Resource Management Act 1991](#), to avoid serious offence to tikanga Maori, or to avoid the disclosure of the location of waahi tapu; or]

(c) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—

- (i) *Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or*
 - (ii) *Would be likely otherwise to damage the public interest; or*
- (d) *Avoid prejudice to measures protecting the health or safety of members of the public; or*
- (e) *Avoid prejudice to measures that prevent or mitigate material loss to members of the public; or*
- (f) *Maintain the effective conduct of public affairs through—*
- (i) *The free and frank expression of opinions by or between or to members or officers or employees of any local authority, or any persons to whom section 2(5) of this Act applies, in the course of their duty; or*
 - (ii) *The protection of such members, officers, employees, and persons from improper pressure or harassment; or*
- (g) *Maintain legal professional privilege; or*
- (h) *Enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities; or*
- (i) *Enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or*
- (j) *Prevent the disclosure or use of official information for improper gain or improper advantage.*

The “good reasons” set out in section 7, therefore, relate mainly to the protection of the privacy or interests of other parties who would be affected by the disclosure of information, or where the information in question should remain confidential to protect commercial interests. It is these reasons that are most commonly used in Council reports or briefings as the reasons why information should be treated as confidential or public excluded.

Statutory Responsibility for the Authorised Release of Official Information

Section 13 of the Act makes it clear that it is the chief executive of the local authority, or an officer of that local authority authorised by the chief executive, who shall make any decision in relation to a request for any specified official information. Thus, for example, if the Council has decided (e.g. by resolution passed at a committee of Council) to treat some information as confidential or public excluded and the media subsequently ask for a copy of it, it is the chief executive (or a duly authorised officer) who must make a decision on whether to release that information or not. Elected

members have no formal role in the decision-making process, and cannot decide that that information is now able to be released.

1.4 Confidential and Public Excluded Information – What Is It?

Information is shared and discussed in a number of forums at the Council – formal Council, committee and subcommittee meetings; at workshops; at briefings; at elected member sessions; in meetings between officers and elected members; over the telephone; by email or letter; and so on. In all cases, it is possible that some or all of the information that is shared and discussed could be confidential. The venue or medium does not impose any limit on this.

If an officer is providing information to an elected member, and it is confidential, then there is an obligation on the officer to make that clear to the elected member. By the same token, if an elected member wishes to pass information on to another party who is not an officer or fellow elected member, and they are unsure as to whether it is confidential or not, they are under an obligation to check with the provider of the information that it is permissible to make it publicly available.

It should be noted that confidential or public excluded information remains just that until the Chief Executive (or another officer with delegated authority) makes a decision, usually in response to a request for that information, that the information can be made publicly available (see above under **Statutory Responsibility for the Authorised Release of Official Information**). Information may be five or ten or more years old, and still be confidential or public excluded.

Confidential Information

The Act does not specifically refer to confidential information. Confidential information includes information that officers have judged there is good reason to withhold under section 6 and 7 (see above) of the Act. It is the term usually used to describe information that is meant for the eyes and information of elected members and officers only, but is not in the form of an official Council, committee or subcommittee report where there has been a formal resolution made to treat the report as “public excluded” (see below).

For example, if a chief executive sent a memo to all elected members for their information, setting out some financial parameters within which he or she was negotiating the sale of an asset, and made it clear that that information was confidential, then that would fit the definition of confidential information. As such, the chief executive would have an expectation that that memo would only be seen by and discussed with other elected members and officers. It is important to note that that memo is also official information, and as such, could be requested under the Act by a member of the public or the media. Any request would be dealt with under the provisions of the Act.

Again, if a mayor wished to brief all elected members on progress with the selection and recruitment of a chief executive for the local authority, he or she may ask for the

room to be cleared of all members of the public, and even officers, make it clear that what he or she is about to say is confidential, and then brief them on progress. Again, the mayor would have an expectation that what he or she said would be treated as for the information of elected members only.

Public Excluded Information

Public excluded information is information contained in a report (or in the minutes reporting on the discussion of that report) that has been the subject of a formal resolution by Council, a committee or a subcommittee, that that report should be withheld from the public. Public excluded information is a subset of confidential information.

The Act does specifically refer to public excluded information. Section 46A(1) of the Act states:

Subject to subsections (6) to (10) of this section, any member of the public may, without payment of a fee, inspect, during normal office hours, within a period of at least two working days before every meeting, all agendas and associated reports circulated to members of the local authority and relating to that meeting.

This section sets out the principle that Council, committee and subcommittee agendas and associated reports should be publicly available. However, there is a qualification to this. Sections 46A(8) and (9) state:

The chief executive may exclude from the reports made available under subsection (1) of this section, reports or items from reports that he or she reasonably expects the meeting to discuss with the public excluded.

The chief executive shall indicate on each agenda the items that he or she reasonably expects the meeting to discuss with the public excluded.

In process terms, in order for such a report to be discussed without the public being present, a Council, committee or subcommittee meeting needs to resolve to do so. Section 48 states (in part):

(1) Subject to subsection (3) of this section, a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on one or more of the following grounds:

- (a) That the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist,—*
 - (i) Where the local authority is named or specified in Schedule 1 to this Act, under section 6 or section 7 (except section 7(2)(f)(i)) of this Act.*

A local authority may, therefore, resolve to exclude the public from all or part of a meeting only if one of the grounds specified in section 48(1) is fulfilled. Every resolution to exclude the public must be in the specified form and give the reason for exclusion. The resolution must be put while the meeting is open to the public. Specified non-members with particular knowledge of the matter warranting discussion in public excluded may remain after the public has been excluded. This is the process elected members and officers will be familiar with at Wellington City Council.

Again, as with confidential information, a public excluded report (or the associated minutes) is official information and as such, could be requested under the Act by a member of the public or the media. Any request would be dealt with under the provisions of the Act.

It should be noted that if Council, or a committee or subcommittee resolves not to exclude the public, then officers may well seek to the agreement of the body to have the report withdrawn (rather than discussed in open session), as to discuss it in public may expose the Council to breach of contract/breach of confidence actions.

1.5 Management of Confidential and Public Excluded Information

The Council has clear procedures for the management of confidential and public excluded information.

Codes of Conduct

The Code of Conduct for employees makes it clear that disclosing confidential information without authority is misconduct, will be investigated and disciplinary action (and possibly dismissal) may result.

The Code of Conduct for elected members states:

Confidential Information

In the course of their duties members will receive information that they need to treat as confidential. Confidential information includes information that officers have judged there is good reason to withhold under sections 6 and 7 of the Local Government Official Information and Meetings Act 1987. This will often be information that is either commercially sensitive or is personal to a particular individual or organisation. The Chief Executive is responsible for release of this information under the Local Government Official Information and Meetings Act 1987.

Elected members should be aware that failure to observe confidentiality will impede the performance of council by inhibiting information flows and undermining public confidence in the council. Failure to observe these provisions may also expose council to prosecution under the Privacy Act 1993 and/or civil litigation.

Information Requests Standard

Council officers are also required to follow the Information Requests Standard (IRS). The IRS sets out the policy and processes that officers are required to follow when responding to requests for official information. The Standard ensures the principle of availability is followed, while at the same time ensuring information is withheld for the appropriate statutory reasons.

As noted above, confidential or public excluded information remains just that until the Chief Executive (or another officer with delegated authority) makes a decision, usually in response to a request for that information, that the information can be made publicly available (see above under **Statutory Responsibility for the Authorised Release of Official Information**).

Role of Officers

Report authors and their managers are responsible for assessing whether, and if appropriate proposing that, a report be considered in a public excluded session of a Council, committee or subcommittee meeting. They make their judgement in relation to the principles and provisions contained in LGOIMA. Report authors take steps to ensure that as much as possible, reports are able to be considered in open sessions of meetings (e.g. a report may be divided into two parts, with one being open and the other public excluded).

In addition to this, for all reports that are to be placed on the agendas of meetings of the Strategy and Policy Committee, and Council, the Chief Operating Officer and City Secretary consider whether report authors and their managers have made a correct decision in proposing that a report be considered in a public excluded session of the meeting. If necessary, they will discuss the reasons behind this with the officers concerned, and may decide in consultation with them to change a report's classification. For all other committees and subcommittees, one of the Council's Directors is responsible for ensuring that a report has been correctly classified in terms of the principles and provisions of the Act. As a final check, the Democratic Services Business Unit ensures that all proposed public excluded reports meet the notification requirements as set out in the Act.

It should be noted that the public excluded provisions of the Act are used relatively sparingly at Wellington City Council. In the 2004/05 year, 13% of all reports to Council, and its committees and subcommittees were public excluded. In the 2005/06 year, 16% of reports were public excluded. For the 2006/07 year, the figure to date is 16%. However, these figures are influenced by the fact that a significant number of public excluded reports appear on the agendas of two specialist governance bodies – the Performance Review Committee (PRC) and the Audit and Risk Management Subcommittee (ARMS). The nature of the work of these two bodies means that, more often than not, many of the reports they consider have to be treated as public excluded. By contrast, Council's busiest governance body is the Strategy and Policy Committee (where most policy, projects and plans are considered), and for the 2006/07 year to date (that is, nine months), only 10 reports (out of 127) have been treated as public excluded.

1.6 Implications for the Council Arising from the Unauthorised Release of Confidential Information

There are four ways in which confidential or public excluded information can be released without authorisation:

Released by an officer by accident (e.g. sending the public excluded version of an agenda to a member of the public by mistake)	Released by an elected member by accident (e.g. leaving a copy of a public excluded agenda behind in a meeting room after the meeting has finished)
Released by an officer on purpose (e.g. giving a copy of a public excluded report to a member of the public)	Released by an elected member on purpose (e.g. giving a copy of a public excluded report to a journalist)

While the circumstances are different (accidental versus deliberate release), the result is the same, in that the information has made its way to people or organisations who, for good public policy reasons, are not meant to have it. However, the consequences, in terms of any resulting internal processes or civil action, can be very different.

There are a number of serious implications which may arise from the unauthorised release of confidential or public excluded information.

Privacy

A number of reports are classified as public excluded to protect the privacy of people, such as the chief executive, and board members of Council Controlled Organisations (CCOs). If such people became aware that information about them, provided to officers on an understanding of confidentiality, had been disclosed without authorisation, this would lessen their trust and confidence in the Council. In the long term, it may affect the Council's ability to attract and retain the sorts of skilled people that are required to fill these positions. Depending on the nature of the information that has been disclosed, there is also the possibility that the Council may be exposed to action under the Privacy Act 1993.

Financial and Legal

A significant amount of confidential information or public excluded reports relate to financial or commercial dealings. For example, reports or memos are prepared and circulated to elected members on the proposed sale of council assets, often setting out the range within which negotiations will be held with prospective purchasers. If this information is disclosed without proper authorisation, it will impact on the ability of council officers to negotiate the best price possible for the asset. As such, it may well be the case that the Council does not receive as much money as it could have from the sale process.

Third parties also provide the Council with confidential financial information relating to their own business dealings and financial position, to enable officers to make a judgement as to the viability of concluding a commercial negotiation with such parties. If that information is then disclosed without authorisation, not only will the Council's reputation suffer, but also any current or future negotiations may be put at risk.

It should also be noted that, depending on the nature of the agreement entered into relating to the supply of that information, the affected party may also have recourse to legal action for breach of contract or breach of confidence.

Trust and Confidence Between Officers and Elected Members

The relationship between officers and elected members (and indeed between officers and officers) is based, to a significant degree, on trust. For example, if the chief executive cannot trust another officer to maintain confidentiality in relation to information that may be provided to them, then trust breaks down, and it would be expected that the chief executive would no longer provide the officer with an opportunity to read or hear about that information.

By the same token, if past experience suggests to an officer that, in relation to a sensitive issue, his or her advice on that issue has been released without authorisation by an elected member, then that officer will need to make a judgement as to what is in the best interests of the Council, and that may mean not providing a briefing, a memo, or other information on that issue to all elected members. It is not appropriate to single out one or a number of elected members and not provide the information to them, as all elected members are entitled to the same information. In addition, it may well be the case that, while there are views as to who may have disclosed the information, there is no firm evidence of that.

The situation described here is grave, but there is anecdotal evidence of such a situation being reached at other councils. It suggests a breakdown in trust and confidence between officers and elected members at a council, and that is cause for considerable concern. The implications are that elected members will carry out their governance responsibilities without some of the information and knowledge that they would normally have. Officers would not relish working in such an environment, but their duty to act in the best interests of the council would force them to this position.

Even if a decision was made to provide information to elected members (such as a public excluded report for a committee meeting), it may be the case that the advice contained in that report would not be as comprehensive or as candid as it may have been in the past, reflecting a risk assessment by officers as to whether they consider the report may be released without authorisation or not. Again, the implications of this are that elected members will carry out their governance and decision-making responsibilities without the degree of knowledge and understanding that they may have had in the past.

1.7 Actions Taken in Relation to the Unauthorised Release of Official Information

As noted above, the Code of Conduct for employees makes it clear that disclosing confidential information without authority is misconduct, will be investigated and disciplinary action (and possibly dismissal) may result.

The unauthorised release of confidential information by an elected member is a breach of the Code of Conduct for elected members. Any alleged breach will be investigated in line with the provisions of the Code, to determine:

- whether a breach has occurred
- if a breach has occurred, who is responsible for that breach
- whether there are any extenuating circumstances that need to be considered in relation to the breach (e.g. a genuine misunderstanding over whether some information was confidential or not).

It should be noted that it is not always possible to ascertain beyond all reasonable doubt who was responsible for the unauthorised disclosure of information. If it has been provided direct to a journalist, for example, it is extremely unlikely that a journalist will reveal who gave them the confidential or public excluded information. If the mayor and/or chief executive is unable to identify the source of an unauthorised disclosure of information to their satisfaction, then it would be expected that no further action in relation to any individual would be able to be taken.

The *Compliance and Review* section of the Code of Conduct sets out the following in relation to breaches:

Breaches of statutory provisions

Where there are statutory provisions:

- *breaches relating to members' interests render members liable for prosecution by the Auditor-General under the Local Authorities (Member's Interests) Act 1968*
- *breaches which result in the council suffering financial loss or damage may be reported on by the Auditor-General under the Local Government Act 2002, which may result in the member having to make good the loss or damage*
- *breaches relating to the commission of a criminal offence may leave the elected member liable for criminal prosecution.*

Breaches of non-statutory provisions

Any alleged breach by a member of the provisions of the code for which there is not a process and penalty provided elsewhere shall be reported in a timely manner to the Mayor in the first instance. The Mayor, in concert with the Chief Executive (where appropriate), shall consider each allegation in a manner that is fair to all parties involved in the allegation, including ensuring that due process is respected. This will include ensuring that members named in an allegation are given an

opportunity to consider and respond to that allegation. If, following the opportunity to respond to the allegation, it is considered that an allegation of a breach of the code is well-founded, the Mayor shall inform the member concerned and take any appropriate lawful action, such as censure.

Any alleged breach by the Mayor shall be reported in a timely manner to the Chief Executive, who shall consider and deal with the allegation, seeking advice as appropriate. The Chief Executive shall consider each allegation in a manner that is fair to all parties involved in the allegation, including ensuring that due process is respected. This will include ensuring that the Mayor is given an opportunity to consider and respond to that allegation.

If an alleged breach is considered to be of a serious enough nature, or if there is an allegation of repeated breaches of the code, the Mayor (or in the case of an alleged breach by the Mayor, the Chief Executive) may instead refer the matter to council. Council will be asked to consider and determine whether a breach of the code has occurred and, if so, what consequences for the elected member should arise from that breach. In completing a report to Council, fairness to all parties involved, and due process, will be respected, including ensuring the member named in the allegation is advised of the allegation and given an opportunity to consider and respond to it before the matter is considered by council. Council's consideration of the matter will comply with statutory requirements relating to matters such as personal privacy, or confidentiality of information.

The non-legal action the mayor, or Council, can take in relation to a proven breach of the Code of Conduct through the unauthorised release of confidential information by an elected member, is somewhat limited. Censure is one option, and has been used in the past. A request that a member apologise for such a breach of the Code is another option that has been used.

A member may, by Council resolution, be removed from a committee or subcommittee that he or she is a member of, and where he or she has been found to be disclosing confidential material contained in the reports going to that committee or subcommittee. However, under Standing Orders, a member is entitled to attend any meeting of a committee or subcommittee whether or not they are a member of that committee or subcommittee.

A member who has in the past disclosed information without authorisation may be restricted from a briefing being given by the mayor or chief executive. Members only have rights of attendance at formal Council, committee and subcommittee meetings (and workshops). At all other forums – such as briefing sessions – it is up to the chair or organiser of the forum to determine attendance.

Councils can attempt to restrict the provision of certain confidential information to an elected member, on the grounds that he or she has a track record of disclosing similar information without authorisation. This is problematic, as existing case law makes it clear that elected members have certain rights to information:

“... a councillor has a right to inspect all documents in possession of the Council so far as this is reasonably necessary to enable the councillor to perform his duties as a member of the Council.” **R v Clerk to Lancashire Police Committee (1980) 2 All ER 353**

There are no sanctions provided by legislation where it is an elected member that has released confidential information without authorisation. However, while any action in response to such a breach of the Code of Conduct would need to be taken under the *Compliance and Review* section of the Code, any action in the Courts would not be limited by this provision.

Under section 43(1) of the Local Government Act 2002 members are indemnified by the local authority of which they are a member for:

costs and damages for any civil liability arising from any action brought by a third party if the member was acting in good faith and in pursuance (or intended pursuance) of the responsibilities or powers of the local authority.

It is therefore implicit that where a member has not acted “in good faith and in pursuance (or intended pursuance) of the responsibilities or powers” of Council, they are not indemnified and therefore can be liable if unsuccessful in an action by a third party, or potentially by Council.

The Council, or a third party, would also have available to them a civil claim for breach of confidentiality against the member. The Courts recognise the right of action on policy grounds on equitable principles. The elements of this action are set out in *Coco v AN Clark (Engineers) Limited* as:

- the information itself must have the necessary quality of confidence about it
- the information must have been communicated in circumstances importing an obligation of confidence, and
- there must have been an unauthorised use of that information to the detriment of the person entitled to the benefit of the confidence.

This test would certainly be satisfied in the case of a member disclosing that information.

There is significant case law to show that the appropriate remedy sought in this type of case would be either damages or recompense for the monetary loss.