

IN A MATTER OF THE LOCAL GOVERNMENT ACT 1972

THE APPLICATION OF SECTION 100B AND SCHEDULE 12 OF THE LOCAL GOVERNMENT ACT 1972 AS AMENDED IN RESPECT OF THE PROVISION OF SUMMONSES TO COUNCIL AND OTHER AGENDA BY ELECTRONIC MEANS

ADVICE

Introduction

1. I am instructed to advise Epping Forest District Council (“the Council”) on a variety of issues relating to the requirements for the provision of documents such as agendas and reports to Council members prior to relevant meetings. I am particularly instructed to advise on the following issues:
 - 1.1. whether the Council’s current arrangements comply with the requirements of the Local Government Act 1972 (“LGA”) and other relevant legislation;
 - 1.2. whether moving to either of the below methods of delivery would comply with the requirements of the LGA (and other relevant legislation):
 - 1.2.1. wholly electronic notification and delivery methods; or
 - 1.2.2. part electronic notification and delivery methods (by way of a summary front sheet agenda and not full reports);
 - 1.3. whether a Council member opting out of the physical delivery of agendas is able to do so legally;
 - 1.4. whether a Council member can insist upon physical delivery;

1.5. generally.

Summary of advice

2. Adopting the same structure as in the paragraph above, it is my advice that:

2.1. the Council's current practice is lawful and compliant with the provisions of the LGA and other relevant legislation – indeed, the Council's current practice exceeds that which is required by law (specifically with regard to the provision of minutes and reports);

2.2. in relation to the proposed change in practice:

2.2.1. wholly electronic notification and service would not be lawful, because paragraph 4 of schedule 12 of the LGA requires hard copies of summonses to be posted to members of the full Council before the full Council meets and, effectively, this applies likewise to committee and subcommittee meetings;

2.2.2. the service on members by post (or similar means) at their usual residence of hard copy summonses and agendas (which specify in sufficient detail the proposed business to be transacted at the meeting) will suffice in law as valid service; all other documents, including reports, supporting guidance and minutes may be sent or accessed electronically. It appears that it is not custom to send summonses in relation to committees or subcommittees (and that sufficiently detailed agenda will suffice) but the better practice will be for the adoption of a practice which is consistent with full Council meetings. Only members of the relevant committees need be notified by post in this way;

2.3. a Council member may not lawfully opt out of all hard copy deliveries, because of the risk that any meeting he or she attends, or does not attend when expected, being deemed invalid for reasons ancillary to the lack of

proper service of a summons specifying the business to be transacted at the meeting;

- 2.4. a Council member may not rely upon the legislation to insist upon physical delivery of any document other than the summons (or in the case of a committee or subcommittee, an agenda) specifying the business to be transacted at the meeting (and complying with the usual formal requirements).

Legal framework

3. Paragraph 4 of Schedule 12 of the LGA provides:

(1) Meetings of a principal council shall be held at such place, either within or without their area, as they may direct.

(2) Three clear days at least before a meeting of a principal council—

(a) notice of the time and place of the intended meeting shall be published at the council's offices, and where the meeting is called by members of the council the notice shall be signed by those members and shall specify the business proposed to be transacted thereat; and

(b) a summons to attend the meeting, specifying the business proposed to be transacted thereat, and signed by the proper officer of the council, shall, subject to sub-paragraph (3) below, be left at or sent by post to the usual place of residence of every member of the council.

(3) If a member of a principal council gives notice in writing to the proper officer of the council that he desires summonses to attend meetings of the council to be sent to him at some address specified in the notice other than his place of residence, any summons addressed to him and left at or sent by post to that address shall be deemed sufficient service of the summons.

(4) Want of service of a summons on any member of a principal council shall not affect the validity of a meeting of the council.

(5) Except in the case of business required by or under this or any other Act to be transacted at the annual meeting of a principal council and other business brought before that meeting as a matter of urgency in accordance with the council's standing orders, no business shall be transacted at a meeting of the council other than that specified in the summons relating thereto.

4. By section 100B of the LGA (as amended by the Local Authorities (Access to Meetings and Documents) (Period of Notice) (England) Order 2002) an item of business may not be considered at the meeting if the agenda and relevant reports are not available for inspection by members of the public at least five clear days before the meeting. In practice, therefore, the summons (incorporating the agenda) is required to be sent to members five clear days before the meeting.
5. The relevant parts of of section 100B of the LGA are as follows:

100B - Access to agenda and connected reports.

(1) Copies of the agenda for a meeting of a principal council and, subject to subsection (2) below, copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below.

(2) If the proper officer thinks fit, there may be excluded from the copies of reports provided in pursuance of subsection (1) above the whole of any report which, or any part which, relates only to items during which, in his opinion, the meeting is likely not to be open to the public.

(3) Any document which is required by subsection (1) above to be open to inspection shall be so open at least five clear days before the meeting, except that—

(a) where the meeting is convened at shorter notice, the copies of the agenda and reports shall be open to inspection from the time the meeting is convened, and

(b) where an item is added to an agenda copies of which are open to inspection by the public, copies of the item (or of the revised agenda), and the copies of any report for the meeting relating to the item, shall be open to inspection from the time the item is added to the agenda;

but nothing in this subsection requires copies of any agenda, item or report to be open to inspection by the public until copies are available to members of the council.

(4) An item of business may not be considered at a meeting of a principal council unless either—

(a) a copy of the agenda including the item (or a copy of the item) is open to inspection by members of the public in pursuance of subsection (1) above for at least five clear days before the meeting or, where the meeting is convened at shorter notice, from the time the meeting is convened; or

(b) by reason of special circumstances, which shall be specified in the minutes, the chairman of the meeting is of the opinion that the item should be considered at the meeting as a matter of urgency.

...

6. Section 100F of the LGA provides:

100F - Additional rights of access to documents for members of principal councils.

(1) Any document which is in the possession or under the control of a principal council and contains material relating to any business to be transacted at a meeting of the council or a committee or sub-committee of the council shall, subject to subsections (2) to (2E) below, be open to inspection by any member of the council.

(2) In relation to a principal council in England, subsection (1) above does not require the document to be open to inspection if it appears to the proper officer that it discloses exempt information.

7. Section 101 of the LGA provides as follows:

101 - Arrangements for discharge of functions by local authorities.

(1) Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions—

(a) by a committee, a sub-committee or an officer of the authority

8. Section 102 of the LGA provides as follows:

102 - Appointment of committees.

(1) For the purpose of discharging any functions in pursuance of arrangements made under section 101 above [or [section 53 of the Children Act 1989] 2] 1—

(a) a local authority may appoint a committee of the authority; or

(b) two or more local authorities may appoint a joint committee of those authorities; or

(c) any such committee may appoint one or more sub-committees.

9. By way of interpretation, section 270 of the LGA provides:

...“local authority” means a county council, a district council, a London borough council or a parish council...

“principal area” means a non-metropolitan county, a district or a London borough...

“principal council” means a council elected for a principal area; ...

10. Section 7 of the Interpretation Act 1978 provides:

Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Application of the legislation: decided cases.

11. There are no reported cases dealing with the application of paragraph 4 of Schedule 12 of the LGA. But section 100B of the LGA (which deals with public access to agenda and reports) has been specifically considered in two cases.

12. In R v Swansea City Council (ex p. Elitestone Ltd) (1993) 66 P. & C.R. 422, a decision had been made by a “three man sub-committee” in circumstances where the previous “three clear days” (now “five clear days”) rule had not been adhered to. In that case, the challenge turned on the fact that there had been no public display of the agenda for the required pre-meeting period. The case involved determination of the following issues:

12.1. how to calculate clear days;

12.2. whether a sub-committee was a meeting of the principal council for the purposes of section 100B(1); and

12.3. the consequences of non compliance with the “three clear days” rule.

13. As to the first issue, the meaning of three (or five) clear days is of three (or five) periods of 24 hours running from midnight to midnight and not including the weekend unless in relation to inspection of agendas and reports and council offices are open on those days. This interpretation would apply likewise to the time limits under paragraph 4 of Schedule 12 of the LGA.

14. As to the second, more significant issue, the Court of Appeal did not provide a considered judgment on the point because “it is agreed that the meeting of the [sub-committee] was by a statutory route, a meeting of the principal council” – albeit that the statutory route was not enumerated, but it is consistent with the powers of delegation set out in the extracts from sections 101 and 102 of the LGA above. It is, in any event, strong persuasive authority that meetings of committees and sub-committees are meetings of the principal council, and therefore that the requirements in paragraph 4 of Schedule 12 of the LGA will need to be complied with in relation to such meetings of the Council.

15. Further support for the “*agreement*” reached before the Court of Appeal in Elitestone is found in Knowles on Local Authority Meetings (5th ed) which states as follows at paragraphs 10.9 *et seq*:

Convening committee meetings

Notice, summons and agenda

10.7 *There is now less difference than formerly between the legal requirements as to the notice and summons in the case of committees and subcommittees, and those of the full council. Public notice of the meeting of every committee and subcommittee of a principal council must be given and the agenda and accompanying reports (excluding any reports or parts of reports for items of business during which the meeting is likely to be closed to the public) made available for public inspection at least five days before a meeting or, if the meeting is convened at shorter notice, then as soon as it is convened ... all that has been said earlier ... about the giving of public notice of a council meeting and its agenda and the making available of agenda papers and reports applies equally to committees and subcommittees of principal councils.*

...

10.9 *There is no common form of summons or agenda for a committee or subcommittee meeting. Many authorities omit any formal words of summons i.e. an agenda is despatched to those entitled to attend headed merely with the name of the committee or subcommittee and the date, time and place of the meeting.*

10.10 *The agenda may also need to be sent to certain councillors other than those appointed to the committee or subcommittee according to local practice, e.g. to ward members with an interest in certain of the items on the agenda or to councillors claiming a 'need to know'¹ or to substitute members where such an arrangement exists.*

¹ Consistent with the principle set out in *R v. Hackney London Borough Council ex parte Gamper* [1985] 1 W.L.R. 1229 that a councillor's right of access to meetings, whether of council committees or sub-committees, like his right of access to documents, depended on whether he had a 'need to know' in order to carry out properly his duties as a councillor and

16. In summary, both Elitestone and the authors of *Knowles* confirm that the procedures for full council meetings apply likewise to committees and subcommittees (save in the latter two cases that the only members who require notification in accordance with the statutory requirements are those who are members of the committee or in respect of whom some special arrangement applies).
17. As to the third issue, again, no detailed analysis of the consequences of non-compliance was provided by the Court of Appeal; it was simply stated that “*section 100B(4) was not satisfied with the consequence that the decision of [the sub-committee] was procedurally irregular and had no effect in law*”.
18. However, it is important to distinguish section 100B from paragraph 4 of Schedule 12 of the LGA, in that the latter (but not the former) includes the specific statutory provision that “[w]ant of service of a summons on any member of a principal council shall not affect the validity of a meeting of the council ...”. On this analysis, it appears that failure to comply with the requirements of public access will prove fatal to a decision of the Council, but failure to comply with the procedural requirements with regard to the provision of summonses to members will not necessarily affect the validity of the meeting of the Council.
19. But this does not mean that care does not need to be taken to ensure that there is no defect of service in respect of members. At common law a failure to serve a summons upon every member entitled to attend a public assembly invalidates the meeting where such summons is required (*Kynaston v. Shrewsbury Corporation* (1736) 2 Stra 1051). Although paragraph 4(4) of schedule 12 of the LGA overrides the common law position, it is expected that the courts would construe the service provision strictly; want of service on a substantial number of councillors or wilful failure or neglect to summons members could potentially affect the validity of a meeting on some wider basis which is not specifically confined simply to the defect in the formal service requirements. For example,

there was no logical reason to distinguish between a councillor's right of access to documents and his right of access to meetings.

members may argue that the failure to comply with the formal service requirements resulted in them not being aware that specific business was to be transacted at a meeting and, for that reason, they did not consider that it was necessary to attend (when they would have done had they known the true position). Any such challenge will likely descend into an examination of the factual circumstances in any particular case, giving rise to the risk of prolonged consideration (whether in the courts or otherwise) and inconsistency.

20. The second authority which addresses section 100B of the LGA is Regina (Technoprint plc and another) v. Leeds City Council [2009] EWHC 3220 (Admin). The issue concerned whether a lawful decision had been made to adopt to the council's scheme of delegation in circumstances where it was alleged that the report detailing the proposed new scheme of delegation had not been provided to council members before or at the time of the annual meeting, in breach of section 100B of the LGA. Wyn Williams J stated as follows

There had been no suggestion that the agenda had been published less than five clear days before 19 May 2003. The Director of Legal and Democratic Services report had not become available either to members of the council or to the public scrutiny prior to the five-day timescale specified in section 100B(1) and (3) of the 1972 Act. That did not necessarily constitute a breach of subsections (1) and (3). The requirement that reports should be made available for public scrutiny at least five clear days before the relevant meeting was subject to the provision in subsection (3) that reports need not be made available for inspection by the public until copies were available to members of the council. There was no requirement that the reports be made available to members of the council at least five clear days before the relevant meeting.

21. This conclusion is consistent with the limited, but obligatory, requirement of paragraph 4(2) of schedule 12 of the LGA i.e. that there is no requirement to serve reports five clear days prior to the relevant meeting.

Current practice

22. In accordance with my instructions, the Council presently adopts the following practice:

22.1. notices of meetings (by which I understand to include summonses and agendas, together with a series of attached reports giving full details of all matters under consideration) are sent in hard copy with five clear days notice to all councillors in relation to all meetings of Council, meetings of the Cabinet and meetings of the Overview and Scrutiny Committee;

22.2. hard copy agendas (which I understand not to include a specific summons, but to comprise the agenda and relevant reports) of all other Council body meetings (such as committees, sub-committees and scrutiny panels) are sent only to the members of those bodies, again with five clear days notice;

22.3. non-members of the Council bodies referred to in paragraph 22.2 above receive electronic notification when the agendas of those other Council body meetings are published online via the Council's Committee Management System ("CMS") – non-members can then either print the agenda (and the relevant reports) or obtain a copy from the limited stock kept at the Council offices. I do not know how soon before the meeting an agenda might be published online via CMS, but I assume that it is at least five clear days before the relevant meeting;

22.4. minutes of all Council body meetings are notified on publication to all members by CMS and a hard copy is usually included in the agenda of the next meeting of the respective Council body.

Intended practice

23. In accordance with my instructions, I am informed that the Council wish to adopt the following practice:

23.1. to cease all hard copy document service;

23.2. to notify members of and publish summons and agendas exclusively via CMS and/or tablets.

Lawful requirements in respect of Council meetings

24. For the reasons I have already set out above (and save in minor respects) there is no distinction in the practice which may be lawfully adopted as between meetings of the full Council and meetings of the Council's committees and subcommittees.

Full Council

25. In the case of full Council meetings the following requirements apply:

25.1. five clear days before the meeting a hard copy summons must be sent to every member of the Council to attend a full Council meeting at their usual residence (or left at such residence);

25.2. the summons (of the documents sent with it) must specify the business to be transacted at the meeting;

25.3. the summons must be signed by a proper officer of the Council (i.e. the officer appointed for that purpose by the Council, although the signature may be a facsimile);

25.4. the summons must give the date, time and place of the meeting.

26. It is perhaps otiose to observe that the summons is a formal document and must set out expressly that the member is summonsed to the meeting.

27. The more significant issue concerns the requirement to “*specify the business to be transacted at the meeting*”. Potentially, this could be achieved by sending a hardcopy of the agenda; but the agenda must be sufficiently detailed to specify the business to be transacted at the meeting. This means that those who are summoned to the meeting or are entitled to be present can judge from the agenda whether the business warrants their attendance or not. It follows that the meeting cannot stray beyond or go outside of the business mentioned in the agenda. It also follows that it will not be sufficient to include an item on the agenda that, for example, says in effect “*To receive the report of ... committee*” unless the report itself is circulated to the councillors (and such circulation would need to be by post, consistent with the requirement imposed by paragraph 4(b) of schedule 12 of the LGA).

28. The summons and agenda could be combined in one document, such as to satisfy all of the criteria set out in paragraph 25 above; that being the case, it would not be necessary to provide hard copies by post of previous minutes or relevant reports or guidance/advice (such as generally appears to be the case at pages 2 to 8 of most of the agendas sent with my instructions). These supplementary documents could be distributed or accessed electronically; and presumably the location of this supplementary information could be specified in the summons.

29. As noted above, a council meeting may not consider matters which are not set out on the summons/agenda. By section 100B(4) of the LGA, an agenda must be available for inspection by members of the public at the Council offices five clear days before the meeting and matters not set out on that agenda may not be considered at that meeting unless added as urgent business by the chairman. Similarly, paragraph 4(5) of schedule 12 of the LGA specifically provides that except for urgent business and the matters required to be considered at the annual meeting, no business may be transacted at the meeting other than as set out in the summons.

30. Council members may give notice to the proper officer of their wish for the summons to be sent to an address specified in the notice other than their normal residence; any such notice needs to be in writing and the effect is to

make delivery to the new specified address a valid place of service for the summons. The context of this part of paragraph 4 schedule 2 of the LGA makes it clear that this must be a postal address rather than via electronic communication such as an email address.

Operation in respect of non-full Council meetings

31. As indicated above, the widely accepted position is that that the meeting of a committee or subcommittee is a meeting of the principal council; and it follows that the rules for convening such meetings should be consistent. I therefore advise that committee meetings should be convened in a similar fashion to the mechanism for convening meetings of the full Council (as set out in paragraph 25 above) but subject to the following minor variations:

31.1. it appears that no specific form of summons is required; but it would be sensible to adopt a similar form to that used for convening full Council meetings;

31.2. the key requirement is to send copies of the agenda specifying the business to be transacted at the meeting to members of the relevant committee; albeit that those with a special interest in the issues before the committee may also need to be sent a copy of the agenda.

32. Consistent with the position in relation to full Council meetings, copies of previous minutes, reports and guidance can be sent or accessed electronically.

Conclusions

33. It is my opinion that the only document that the Council is required in law to serve in hard copy is a summons to attend a full Council meeting; but it must specify in sufficient detail the business to be transacted at the meeting. This is required to be sent to all members in the form set out above in paragraph 25 above. This is the minimum required and no more is required. The extent of the detail required in the summons (or agenda) will depend upon the

circumstances of the case i.e. the extent of the business to be transacted at the meeting. But it should be sufficient in detail to enable the member to make an informed decision as to whether to attend the meeting. The fact that the members are directed to online resources, such as reports or guidance, will generally be sufficient to address cases where there may be doubt about the degree of detail in the agenda; but open-ended and unspecific agenda items should be avoided.

34. All other documents including reports, previous minutes and plans etc are not required in law to be delivered physically and may be sent electronically, including via CMS.
35. Any move to full electronic service would not be lawful, on the basis that members of the Council would not have been validly summoned. Whilst the defect in the summons would not itself directly invalidate the decision of the Council or its committee, it may do so indirectly (or at least provide an arguable basis for challenge).
36. In order to achieve a streamlined delivery service and reduce costs as much as possible, I would advise that a short-form summons together with a reasonably detailed agenda should be sent to members in advance of each meeting. This summons should formally summon each member of the Council to a full Council meeting and set out in sufficient detail the business to be considered at the meeting, as well as the date, time and location and the signature of the proper officer. This would satisfy the requirements of the legislation and allow one or two sheets of paper to be posted to each councillor, rather than large bundles as is presently the case.
37. There is certainly no requirement to deliver such hard copies by messenger. As the Interpretation Act makes clear, sending by post suffices as good service.
38. Summons/agendas and attached reports are required to be available for inspection at the Council's offices by members of the public (and indeed by

members of the Council) five clear working days in advance of the meeting, so these will still need to be produced in the same form as presently.

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Mark Watson
Chambers of Stephen Hockman QC and Peter Harrison QC
6 Pump Court
Temple
EC4Y 7AR