

QUESTIONS TO THE MONITORING OFFICER – Scrutiny Committee 15th February 2021

At the last meeting of the Scrutiny Committee 18th January 2020 Cllr Deed gave an undertaking, as Leader of the Council, that the forthcoming 3RDL Business Plan would be the subject of pre-scrutiny by this Committee at today's meeting. He gave a further undertaking that the Business Plan would return to Cabinet on 18th February for further consideration before proceeding to Full Council on 24th February for decision.

In accordance with Legislation covering how the business of Local Government is to be conducted, (see note below) the Cabinet Report on the 3RDL Business Plan was published publicly a week before Cabinet on 4th February together with the Plan itself being circulated to Members only. The recommendation contained within the Report was that Cabinet "recommend" the Business Plan. This was consistent both with Cllr Deed's undertaking to Scrutiny Committee and also with the formal MDDC notice of key decisions for that meeting which stated that the Cabinet would be asked to "consider" the Business Plan.

The Report and its recommendation remained unchanged prior to the meeting of Cabinet on 4th February, and during the meeting until the item was called for discussion. After the agenda item had been called, the Leader announced that the recommendation in the Report was to be changed very significantly. He then removed the word "recommends" contained in the Report's recommendation and replaced it with the word "approves".

This amendment immediately changed the entire purpose both of the report itself and of the consequences of the subsequent Cabinet decision, as the Cabinet proceeded to approve the 3RDL Business Plan and significant loan amounts.

Questions

- 1. The change of one word in the Report's recommendation entirely changed the purpose of the report. It effectively became a new report. Is it lawful and/or constitutional for a report to be considered by Cabinet without prior notice?**

Reply of the Monitoring Officer:

It is not unusual for the Council, the Cabinet or a Committee to adopt on the day an entirely different course of action to that which is recommended in a report. It will depend on the facts in each case. A number of considerations also have to be kept in mind, including being clear on the reasons for the decision and factors taken into account.

I am not persuaded that the changing of the recommendation in this way introduces a wholly new matter to an item already on the agenda, such that it was no longer the same (or substantially the same) report. The report was about the business plan and whether it should be approved. It remained such a report and its purpose did not change, notwithstanding the recommendation as published and the resolution on the day.

I therefore do not agree that this was a new report of which notice had not been given. I have no information before me to indicate that the decision was either unlawful or contravened a specific provision in the Constitution.

GB Response 3/3/21. I am not questioning Cabinet’s right to choose a different course of action to the one recommended in any report, nor am I questioning Cabinet’s right to make decisions. I am questioning the right of the Leader (in this case) or any other member of Cabinet, to fundamentally change the purpose of a report to Cabinet without notice and before any discussion has taken place. This change was made, only after the item had been called, by changing the recommendation in the report from a Recommendation to one of Approval. In this context the fact that the rest of the report remained unchanged is irrelevant.

This is not a matter of semantics. The law stipulates that both MDDC members and the public should be given notice both of forthcoming reports requiring decision and of reports that are being considered at the Cabinet’s next meeting. This is fundamental importance in the democratic process. A report destined for Cabinet approval means something entirely different to both the public and to MDDC members than one that is being considered only for Cabinet recommendation. As I understand it a decision to “Approve” is a Key Decision whereas a decision to “Recommend” is not.

On the matter of the Leader misleading the Scrutiny Committee by promising pre-scrutiny of this report, I am pleased to see that you appear to have taken this issues seriously. What happened was clearly corrosive of trust between at least some members of the Scrutiny Committee and the Executive.

Further reply of the Monitoring Officer:

The Cabinet would not be recommending the Business Plan to any other part of the Council, as it is a Cabinet function for it alone. If the Cabinet had wished to consult Scrutiny, it could simply have deferred a decision – and it would not at any point have been making a decision to recommend. Had any Member proceeded to propose the recommendation as drafted, I would have stepped in – indeed, I was going to anyway.

I do not consider that the recommendation as drafted in any way altered the purpose of the report (namely to consider the Business Plan and approve it), nor did it alter the decision to be made by Cabinet and by Cabinet alone. The only issue for me is when it took the decision and whether it was entitled to do so at that point. Taking the report as a whole and the entry in the Forward Plan, it was clear that Cabinet was being asked whether it wished to approve the Business Plan (in line with the Shareholder Agreement) and to include the various sums in the budget and related documents cited. I can see no point in a recommendation (even if it were permissible) that purported to recommended the business plan elsewhere, yet approved the budgetary elements regardless.

In addition to the statutory requirements, I am satisfied that the requirements of Rule 13 of the Access to Information Rules in the Constitution were satisfied in this instance.

Having regard to -

- the report itself and its purpose,
- the agenda item and the Forward Plan entry
- compliance with Rule 13 of the Access to Information Rules
- the responsibility for the function (with Cabinet)

I do not consider that the decision taken on 4 February 2021 was either unlawful or outwith the Constitution.

2. Is it lawful and/or constitutional for a key decision to be made on a report to Cabinet without prior notice of its intention to consider making one?

Reply of the Monitoring Officer:

My answer relates to the requirements relating to key decisions, rather than the publication of agendas and reports (question 1).

The notice of a key decision was published in the Forward Plan from December 2020 onwards. The Forward Plan consistently stated that the decision would be taken on 4 February 2021. As Members will be aware, decisions can be put back in the Forward Plan and this frequently happens. In effect therefore, a notification in the Forward Plan is a statement of the earliest date a decision will be taken, rather than a commitment that it will be taken on that date.

The required notice has been given in accordance with legislation and the Constitution.

3. Was the decision by Cabinet on 4th February to approve the 3RDL Business Plan and agree significant loans lawful and/or constitutional?

The events that are described above, point to a strong possibility that the Leader of the Council set out to deliberately mislead the Scrutiny Committee, the wider MDDC membership and also members of the public about the purpose and intent of the 3RDL Business Plan report to Cabinet on 4th February. This could be seen as part of an attempt to avoid scrutiny of the 3RDL Business Plan and to push through Cabinet approval at the earliest opportunity.

Reply of the Monitoring Officer:

Other than the questions raised in 1 and 2 above which I have already answered, I am unclear whether another basis for the decision being unlawful or unconstitutional is being asserted here – and the specific reasons why that might be the case.

Question

Given the prima facie evidence that the Leader misled Scrutiny Committee, the wider MDDC membership and the Public, will the Monitoring Officer carry out an investigation into the matter of possible misconduct?

In this context I would refer her to the Nolan principles of Integrity, Accountability, Openness and Honesty to which one might also add Leadership.

Reply of the Monitoring Officer:

The Monitoring Officer deals with all complaints against councillors in accordance with the adopted processes set out in the Constitution. The Monitoring Officer does not comment publicly on complaints made against named councillors unless and until the matter reaches the hearing stage and that hearing/decision is in public.

Note: The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012

This covers publication/notification requirements for Key Decisions and the requirement to prepublish agendas and reports. **No new/amended items allowed without notice **prior to the start of the meeting**.**

Comment of the Monitoring Officer:

I have highlighted this sentence, because it is not strictly correct. Subject to certain procedures being followed and in exceptional cases, new items can be brought forward after the agenda has been published. On the issue of amendments to reports on existing items, it will depend on how substantial/extensive that amendment is. Each case will be fact specific.