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## HEALTH AND SAFETY COMMISSION

### Open Commission meetings - principles for closed sessions and papers

#### A Paper by Susan Mawer, Head of Secretariat

Cleared by Jonathan Rees on 15 February 2005

#### Issue

1. The criteria for when Commission papers and sessions should be closed and related handling issues.

#### Timing

2. Routine

#### Recommendation

3. That you agree the proposals in paragraphs 6 – 12.

#### Background

4. The Commission will have a closed session at the end of its open meetings for issues it would not be in the public interest to discuss in open session. The paper sets out the broad criteria for assessing what should be dealt with this way, and how agendas should be handled.
5. Commission papers will be given a Freedom of Information (FOI) status in the same way as was done under the Government Code of Practice on Openness. It should be noted that:
  - We can still receive a FOI request for information that has been removed from a paper, and such a request would have to be assessed individually.
  - Technically the Commission can publish as little or as much of a paper as it wants. Although officials will use the FOI criteria to decide whether information should be excluded, it is anticipated that the Commission will want to be as open as possible and make some information proactively available which could be legally excluded under FOI.

#### Argument

##### Closed papers

6. When deciding whether a paper or part of it should be closed, officials will need to consider the application of the exemptions found in Part II FoIA. Eight (8) of these exemptions are absolute. Where an "absolute" exemption applies the public interest test

under the FoIA does not fall to be considered. The remaining exemptions are subject to an assessment of the balance of the public interest both for and against disclosure and are known as "qualified" exemptions. The exemptions most likely to be relevant to Commission proceedings are the following:

- section 24: National security;
- section 27: International relations - consideration of the tactics of the UK's negotiating position in the EU;
- section 30: Investigations and proceedings conducted by public authorities - when disclosure or discussion would or would be likely to prejudice investigations or prosecutions;
- section 31: Law enforcement - information which would or would be likely to prejudice various matters including the prevention or detection of crime or the administration of justice;
- section 40: Personal information ("absolute" in part);
- section 41: Information provided in confidence ("absolute" exemption);
- section 42: Legal professional privilege - the Government has a working assumption that legal advice will not be disclosed. While there may be a rare case where the public interest would require disclosure of legal advice it will normally be the case that the public interest factors in maintaining the exemption will outweigh any public interest in releasing the information. Were legal advice to be disclosed as a matter of course it would have a significant potential to prejudice the government's (and indeed the Commission and Executive's) ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither is in the public interest;
- section 43: Commercial interests; and
- section 44: Prohibitions on disclosure ("absolute" exemption) - this exemption *must* be applied where disclosure would be prohibited by or under any enactment (e.g. as contravening the Human Rights Act 1998 or the Data Protection Act 1998), is incompatible with any Community obligation, or would constitute or be punishable as a contempt of court.

The two sections where more difficult judgements may have to be made are:

- S35: Formulation of Government Policy and
- S36: Prejudice to Effective Conduct of Public Affairs

#### S35: Formulation of Government Policy

7. It is anticipated that the Commission will want to have open discussion and papers on issues involving formulation of government policy where these are unlikely to cause harm or prejudice or restrict Ministerial space for consideration of policy – in other words routine and or non-contentious issues. The Minister has accepted that the Commission will openly discuss the advice which they will be giving to Ministers where there are no sensitivities.

An example of the process could be:

- Initial think piece exploring new ideas – closed
- Firmed up ideas and proposed consultation – open

- Report back on consultation – open
- Split views from consultation; significant interested parties – paper and decision discussion closed – until Ministerial agreement obtained.

### S36: Prejudice to Effective Conduct of Public Affairs

8. This is likely to be used infrequently. It can only be used if it has been agreed by a qualified person, which for HSC/E is the Chair and the DG.

### Closed sessions and handling of agendas

9. Having identified whether a paper or part of it should be closed, and given the reason and FOI reference at the top of the paper, officials will advise the Secretariat whether the paper should be discussed in closed session. To ensure Commissioners and Ministers have time to comment on the proposed handling before the agenda is made public, they will be sent a draft agenda 15 working days before the meeting. This will allow five days in which the Minister and HSC can raise any concerns and the Chair, in consultation with HSC, to agree the final agenda.

An agenda will be then be placed on HSE's website which lists the open items only. Alternatively the agenda could list the closed items for discussion. We would welcome your views on your preferred approach.

10. When deciding if the paper should be heard in closed session, officials should bear in mind:

- where the closed parts of the paper are not substantial or essential to the discussion and it would be possible for the Commission to discuss the issues without reference to the closed parts, the discussion should be open;
- if only one element of a substantial paper needs to be discussed in closed session, the rest of the paper should be dealt with in open session.

11. If an issue is raised during an open discussion which Commission members consider would be better dealt with in closed session the Chair has the discretion to refer it to the end of the meeting.

### Minutes

12. Currently minutes are made available on the web site once formally cleared by the Commission at the subsequent meeting. This will continue. Normally it is possible to draft the minutes in such a way that they are fully open, but there may be occasions when it will be necessary to exempt some sections.

### **Consultation**

13. Legal Adviser's Office, DWP Private Office, Mike Tonge FOI Decision Maker.

### **Presentation**

14. Clarity on criteria for decisions should assist open meetings to run smoothly and help HSC to be seen as an open and transparent organisation.

**Financial/Resource Implications for HSE**

15. No additional costs

**Action**

16. HSC is asked to agree the proposals in paragraphs 6-12.