

PART 5 - CODES AND PROTOCOLS

PART 5G – GUIDANCE FOR COUNCILLORS APPOINTED TO REPRESENT THE COUNCIL ON OUTSIDE BODIES

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PART 5 - CODES AND PROTOCOLS

PART 5G – GUIDANCE FOR COUNCILLORS APPOINTED TO REPRESENT THE COUNCIL ON OUTSIDE BODIES

1 Introduction

- 1.1 The Council has produced this protocol to ensure that members and officers are aware of their obligations when representing the Council on outside bodies.
- 1.2 For the purposes of this protocol, "outside bodies" include: -
- Companies
 - Unincorporated associations
 - Charities
 - Other Public Authorities
- 1.3 This protocol does not offer guidance to members/officers who are representatives on school governing bodies.
- 1.4 This protocol is based upon legislation as well as guidance from a variety of sources, primarily: -
- The members Code of Conduct
 - Guidance from the Standards Board for England
 - The Local Government and Housing Act 1989
 - The Local Authorities (Companies) Order 1995
 - The Local Government Act 2000
 - The Local Government Association
- 1.5 The fundamental principles of this protocol are as follows:
- Members and officers will act according to the rules, constitutions and frameworks set by the relevant outside body and, where possible, with those of the Council.
 - Members and officers will make independent and personal judgements based on their duty of care to the outside body.
 - Members will report back, on their involvement with the outside body, at least annually, to the Council.
 - Members will comply with their obligations as far as they are applicable pursuant to the Code of Conduct.
 - Members and officers will take an active and informed role in the management of the outside body's affairs.
 - Membership of an outside body does not include representing a political party.

2 General Provisions

- 2.1 There are some general provisions which apply to members and officers who act in the role of company director, charity trustee or member of an unincorporated body.
- 2.1.1 Members and officers are under a duty to exercise independent judgement in the interests of the organisation in which they are involved. Whilst it is recognised that members and officers may have a commitment to representing the Council on the Outside Body, they must be aware that it is their responsibility to decide on what view to take on any question before that organisation. For example, an instruction from the Council to vote one way or the other would put the member or officer in breach of his/her duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them without applying one's own judgement.
- 2.1.2 Where a member or officer is involved in an outside organisation as a representative of the Council, he/she must declare that fact to the organisation.
- 2.1.3 Members/Officers must also ensure that avoidable loss is not incurred in managing the organisation concerned. They cannot avoid this responsibility by not reading the papers or failing to ask for the appropriate report. They will be expected to seek professional advice as appropriate.
- 2.2 Members and officers who represent the Council in such circumstances need to familiarise themselves with the duties they will assume and any potential liabilities they may face. It is essential that they are aware of how to deal with any conflicts of interest that may arise and they need to be sure that the proper procedures have been followed in respect of appointments to the relevant organisation.

3 Companies

- 3.1 Companies can be:-
- Limited by shares, usually operating a trade or business. They have shareholders and distribute profits to shareholders as dividends.
 - Limited by guarantee – or so called “not for profit” organisations, which have members rather than shareholders. This type of company may also be a charity.
- 3.2 Companies are separate legal entities which employ staff, enter into contracts and own land/property. The day to day business of a company is managed by its board of directors.
- 3.3 Companies offer limited liability. This means that the members or shareholders are usually not personally liable for the company's debts and liabilities, subject to limited exceptions.

- 3.4 The powers of the directors are usually set out in the company's Articles of Association. These are the rules that govern the internal management of the company.

3.5 Duties of a Company Director

- To act in good faith and in the best interests of the company when making decisions as a director. This means using your own, independent judgement and not automatically following the views and wishes of the Council (or, if you are a Councillor, your political group). When making decisions about the company the law also requires you to consider the interests of employees as well as the interests of members/shareholders. In certain cases you may find that the best interests of the company and the Council conflict. Guidance on conflicts of interest is included in this protocol.
- To exercise reasonable care and skill when making decisions as a director. A director requires no greater skill than might reasonably be expected of someone of that individual's particular knowledge and experience. Directors are not deemed to be experts but they are expected to use due diligence and to obtain expert advice if necessary. This is very similar to the Member/Officer relationship in terms of decision making and the provision and consideration of professional advice.
- A fiduciary duty to act honestly and in good faith and in the best interests of the company as a whole.
- To act in accordance with the company's memorandum and articles of association, plus any other rules, regulations or bylaws that the company may operate pursuant to. Members/Officers should ensure that they have an up to date copy of these documents and are aware of their contents.
- To inform the board of a company if you have any direct or indirect interest in a contract the company is considering, proposing or entering. This, for example, will include contracts between the company and the Council. These requirements are similar to those contained in the Code of Conduct governing the declaration of personal/prejudicial interests. In other words members must notify the other directors before the company makes a decision on the matter concerned and the member should not take part in any board discussions about the contract.
- Not to make a profit from their positions within the company. You must therefore declare any interests you have (or those of your family) in relation to the company's contracts. Permission to vote on a particular matter would depend on the articles of association.
- To comply with company law. Directors must ensure that the Companies Acts are complied with particularly in respect of the maintenance of accounts and the submission of statutory returns to the registrar of companies. Failure to do so incurs fines and persistent default can lead to disqualification as a director.

3.6 Liabilities as a Director

3.6.1 Members/Officers acting as company directors may be held personally responsible for the company's debts and liabilities if they:-

- Engage in wrongful trading, i.e. if you knowingly permit the company to continue to trade or incur liabilities when you know or ought to have known that the company is unable to pay its debts.

Accordingly, members/officers must ensure that they obtain regular information about the company's financial position. Advice on interpretation of financial information may be obtained from the company's chief financial officer or the Council itself. If you feel the company is unable to pay its debts you should notify the other directors as soon as possible. You should also consider whether to resign as a director. The Monitoring Officer will be able to advise you and you should seek their advice as soon as possible.

- Mis-apply or misuse the company's money or property.
- Fail to act in the best interests of the company or fail to act with the level of skill that could be reasonably expected of you, save and except where the Court is satisfied that you acted honestly and reasonably.
- Exceed the scope of any delegated authority you may have from the company. This is very similar to your position as a Member/Officer. Acting outside of the Council's powers can result in legal challenge.

3.6.2 If the number of Directors falls below 2 for more than six months or if you are sole director of a company you should notify the Monitoring Officer immediately as the Council will need to consider whether you should resign or whether the company should be wound up.

3.6.3 Failure to disclose a direct or indirect interest in a contract with the company could result in:-

- The imposition of a fine;
- The requirement to pay to the company any money you have received under the terms of the contract.

3.7 The Local Authorities (Companies) Order 1995

3.7.1 This Order sets out the rules concerning Councils' involvement in "regulated companies" which are subject to extensive controls.

3.7.2 Regulated companies are so defined if they are "controlled" or "influenced" by the Council. Influenced companies, under the effective control of the local authority, will be subject to capital finance regimes and special property controls.

3.7.3 Companies are local authority “influenced” if there is at least a 20% Council interest plus a business relationship with the company accounting for over 50% of the company’s turnover and/or the company is located on local authority land, leased or sold for less than the best price reasonably obtainable. Companies are local authority “controlled” if there is a local authority interest in excess of 50% and the minority interest is less than 20%.

3.7.4 In particular Regulated Companies are subject to the following requirements;

- Comply with limits placed on remuneration paid to Directors who are also members of an authority which is a shareholder;
- Ensure that Member Directors who become disqualified from membership of an authority are removed from the Board;

4 Conflicts of interest

4.1 Conflicts of interest may arise between the Council and a company. Even if the Council and the company have the same overall aims and objectives you cannot assume that their interests will always be the same. The legal position, and your obligations, remain the same even if the company has worthy objectives or is formed in response to a Council or government initiative.

4.2 Conflicts of interest may arise: -

- If the council is selling, donating or leasing land to the company.
- If the company and the council are negotiating a contract with each other.
- If the company is seeking funding from the council.
- If there is a dispute between the company and the council.
- If the company is tendering or negotiating to provide goods, services or works to the council.

4.3 Company law requires you to act in the best interests of the company but the Council will have nominated you as a director to represent or promote the Council's interests. Accordingly, if you are uncertain whether a conflict of interest exists you should seek advice from the Monitoring Officer as soon as possible.

4.4 If you think you have a conflict of interest you should: -

- Notify the Monitoring Officer (and your Line Manager, if you are an officer);
- Notify the company’s board of directors,
- Take no further part in the matter on behalf of the company.
- If you are an officer you must take no part in the matter on behalf of the council either. This includes not taking part in any officer/member discussions on the matter or representing the council at meetings

where the matter is discussed. You should declare an interest and leave the room whenever the matter is raised.

5 Charities

5.1 Charities may be created by registering any of the following with the Charity Commission.

- A Trust Deed – the Trustees become charity trustees
- A company limited by guarantee – the directors become charity trustees.
- An unincorporated association – the Management Committee become charity trustees

5.2 In order to qualify for a charitable status, the Commission must be satisfied that the organisation is operating for a charitable purpose. These are:

- The relief of poverty and human suffering
- The advancement of education
- The advancement of religion
- Another purpose for the benefit of the community

5.3 An organisation which operates for political purposes cannot qualify for charitable status.

5.4 The Duties of a Charity Trustee

5.4.1 Charity Trustees must:-

- Act strictly in accordance with the charity's constitution and rules.
- Act in the best interests of the charity.
- Manage the charity's affairs prudently
- Not derive any personal benefit or gain from the charity.
- Take proper professional advice on matters you are not competent to decide yourself.
- Ensure that the charity's bank accounts are operated by more than one person.
- Ensure the trustees have proper control of the charity's property and assets.
- Ensure that the charity keeps full and accurate accounting records.
- Spend charity income solely for the purposes set out in the charity's constitution.
- Ensure charity property is properly maintained and insured.

5.5 Personal Liability

5.5.1 Personal liability may be incurred if a trustee:

- Acts outside the scope of the trust deed
- Falls below the required standard of care

- Makes a personal profit from the trust assets

5.5.2 Personal liability to a third party may arise because a charitable trust, unlike a company, is not a separate legal entity.

6 Unincorporated Associations / Bodies

6.1 Organisations which are neither charities nor companies are referred to as unincorporated associations. They usually operate pursuant to a constitution or set of rules defining the organisation's responsibilities and those of its members.

6.2 The affairs of an unincorporated association are usually governed by a management committee in accordance with the organisation's constitution or agreed rules of procedure.

6.3 Unincorporated associations cannot do any of the following in their own name:

- Enter into contracts
- Own land
- Employ staff

6.4 Members of the organisation's management committee must act in accordance with its constitution and must take reasonable care in exercising the organisation's powers.

6.5 Generally, the members of the management committee are liable for the acts of the organisation but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall.

6.6 Members of a management committee will have personal liability if they act outside the authority given to them or if they do not comply with the relevant legal obligations.

7 Unincorporated associations – Duties

7.1 As a matter of good practice members/officers appointed to represent the Council on an unincorporated association (body or organisation) must:

- Act in the best interests of the association
- Use reasonable care and skill when involved in decision making on behalf of the association
- Act in accordance with the association's rules or constitution.

7.1.1 Members/officers are therefore encouraged to:

- Clarify the extent of any limits to their power to act on behalf of the Council

- Notify the Monitoring Officer if the association is proposing to take a course of action which is disadvantageous to the Council or which seems to involve considerable risk
- Ensure the association has clear rules and procedures for decision making, particularly for entering into contracts.

8 Other Public Authorities

8.1 Some members will be appointed to other public authorities, for example the Police Authority. Like the Council, these bodies are created by statute and have a range of powers and duties.

8.2 Members appointed to the following public authorities will be required to comply with that authority's code of conduct:

- Police Authority
- Fire Authority

8.3 Members of the Police or Fire Authority must comply with that authority's code of conduct whilst conducting the business of that authority.

8.4 Members representing the Council on a non Standards Board regulated body (e.g. a company, charity or association), must comply with the Council's code of conduct except where it conflicts with any legal obligations the other body or organisation is bound by. Such conflicts are, in the view of the Standards Board, unlikely to arise frequently.

9 The Members Code of Conduct

Duty to Observe the Code

9.1 Members are obliged to observe the provisions of the Code whenever they conduct the business of the authority including when they act as a representative of the authority¹ except and insofar as it conflicts with any other lawful obligations to which that body is subject². So the position is here is that a Member wouldn't be in breach of the Code in circumstances where they take action which would normally constitute a breach but they are legally obliged to act in that way as a result of their position within the outside body.

9.2 It isn't easy to imagine such circumstances but one example might be where an authority was proposing to take action which would have an extremely adverse effect on the financial wellbeing of a company on which a Member sat as a Director. If the Member was privy to the information concerning the authority's plans he may find himself in a position where he was compelled to disclose this potentially confidential information to the company due to his fiduciary duty to the company itself and duties arising under the companies

¹ Code of Conduct Para 1(1) (a) & (c)

² Ibid para 1(3)(b)

act to avoid trading when insolvent. This is an extreme example but one which could feasibly arise.

Personal and Prejudicial Interests

- 9.3 A Member must regard himself as having a personal interest in any matter if the matter relates to an interest in respect of which notification must be given under paragraph 15 of the Code. Paragraph 15 includes amongst other things the requirement that Members register their membership of or position of general control or management in any body to which they have been appointed or nominated by the authority as its representative³.
- 9.4 So this means that where a Member is appointed to the airport company, or indeed any outside body, they must, within 28 days, register this in the register of Member's interests and they must consider themselves as having a personal interest in any matter which relates to that interest⁴.
- 9.5 The Code requires that a Member with a personal interest in a matter who attends a meeting of the authority at which the matter is considered must disclose to that meeting the existence and nature of that interest at the commencement of that consideration, or when the interest becomes apparent⁵.
- 9.6 Where a Member has a personal interest in a matter they must also give consideration to whether this is also a prejudicial interest and the test for this is an objective one of whether a member of the public with knowledge of the relevant facts reasonably regard the interest as so significant that it is likely to prejudice the Member's judgement of the public interest⁶. However this is subject to the qualification in paragraph 10(2) of the Code, that

"A member **may** regard himself as not having a prejudicial interest in a matter if that matter relates to:

a) ...

c) a body to which he has been appointed or nominated by the authority as its representative".

It must be stressed that whilst this does not automatically exclude the interest from being a prejudicial interest it clearly envisages and provides for an additional level of discretion on the part of a Member in the context of interests arising from such appointments. The fact that such a provision is included in the regulations indicates that it was intended that a Member might treat an interest which would normally constitute a prejudicial interest, as not being such and thus not having the associated consequences of requiring the Member to absent themselves. The distinction here is that this provision introduces an element of subjectivity on the part of the Member where the

³ Para 15(a)

⁴ Para 8(1)

⁵ Para 9(1)

⁶ Para 10(1)

interest arises from their role as a councillor. The following is an extract from some guidance issued by the Standards Board in September 2002.

“...the member may regard himself as not having a prejudicial interest. Therefore the member can participate in debate and decision making.

However, given that the wording includes the term ‘may regard’, there is an indication that there will be some exceptional circumstances where it would be inappropriate for a member to take advantage of the paragraph 10 (2) exemption clause. For instance where the circumstances throw up a conflict of interest which is so clear that it would be practically impossible for the member to fulfil his obligation to act in the best interests of the local authority, if he were to take a decision.”⁷

9.7 Unfortunately, there is a dearth of guidance in this area as to the proper application of this provision either from the courts or from the Standards Board. However, it is clear that Members in this situation must carefully consider their position taking account of all the relevant circumstances and make a judgement as to whether it is appropriate for them to take advantage of this provision. The test of a prejudicial interest is relevant and the Member should ask themselves whether their interest in the matter is such that it would be likely to harm or impair their ability to judge the public interest. Ultimately the decision as to whether their judgement call is correct will lie with the Standards Committee or the Adjudication Panel who would hear any complaint of breach. However, I would suggest that the following guidelines might offer some assistance;

- I. The nature of the decision in question is relevant and I would suggest that the more direct the potential impact upon the wellbeing of the body in question the more likely it will be that the Member would not be entitled to utilise this provision. So for instance, if the debate concerned whether to award a grant to a body on which a Member was a Director I would suggest that the Member should give very careful consideration to the circumstances and only take part if, having considered those circumstances, they were absolutely confident that they could remain balanced in their judgement. (N.B. in certain cases it might be argued that the giving of the grant was akin to a contract in which case the Airports Act would preclude the councillor's involvement in any event).
- II. The nature of the appointment is also relevant in that where a position has little executive decision making power within the organisation, such as an observer role, then there is less danger that a member of the public would think that the interest is so significant that it would prejudice the Member's judgement. Conversely, where the position is at the heart of an organisation and is involved in executive decision making then a member of the public might reasonably assume that the Member's judgement was impacted upon to such an extent that it

⁷ SBE Bulletin September 2002 – FAQ's

would impair their ability to judge the public interest. However, account must be taken of the fact that the Member has no financial interest in the organisation and is only in the position as a representative of the authority.

- III. Lastly, I would suggest that the nature of the organisation itself and its relationship to the authority may be relevant. I would suggest that the more autonomous an organisation and the more commercial in nature then the less likely the member would be able to rely on paragraph 10(2) and continue to take part in any debate. So for instance in where an authority leased a theatre to a commercial theatre management company which invited the authority to appoint a Member onto its Board then I would suggest that it would be inadvisable for the member to take part in any items at meetings of the authority which concerned the theatre itself or the arrangements between the theatre and the authority. It would be different if the theatre company was a charity wholly owned by the authority.

9.8 The above is not an exhaustive list but intended to offer some suggestions as to the factors which Members should take into account when deciding whether to utilise the paragraph 10(2) exemption. The one thing which can be said with surety is that the only way to completely avoid the risk of breaching the Code in this respect is by adopting a very cautious approach and to not take part in any matter relating to a body in which you have any role.

9.9 Lastly, I would note that during the recent debate on the proposed changes to the Code of conduct the Standards Board has recognised the difficulty caused in trying to interpret this provision and it has proposed to introduce an amendment to the Code which would clarify the position and provide for Members to have an input into debates where there are potential conflicts arising from their appointment to other bodies, but then require them to leave the meeting whilst the vote is taken.

10 The Rule Against Bias

10.1 The legal rule against bias is divided into two distinct limbs 'actual' bias and 'apparent' bias but the underlying basis of both is that where bodies act in ways which affect the rights of individual citizens the procedure must be fair and seen to be fair. The first limb concerns the situation where a decision maker has some direct personal or financial interest in a matter. The second element, which has been applied more regularly in the context of local government decision making, was addressed by the House of Lords in the case of *Porter v Magill* [2002] and Lord Hope laid down the following legal test for determining whether a decision was tainted by the appearance of bias.

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

The test is an objective one in that it asks what the 'fair minded observer' would think as opposed to what the decision maker themselves might think.

- 10.2 There is line of cases which concern a species of bias commonly referred to as 'predetermination bias' which occurs where a decision making has a closed mind to a matter or they have already made their decision prior to the meeting at which a decision should in fact be taken. This could arise where a director had expressed very clear support for something at a meeting of the board and then took part in a meeting of the council where the same matter was being considered.

11 Indemnities

- 11.1 In the case of Outside Bodies that are not separate legal entities, the Council's Public and Employers liability policies extend to members and Officers provided that they are acting within the scope of their authority as representatives of the Council and are conducting activities approved by the Council. It is therefore essential that members and officers identify and clarify the extent of their individual responsibilities.
- 11.2 Outside Bodies that are legal entities in their own right (e.g. companies) must have appropriate insurance arrangements in place to indemnify the individuals concerned. It is therefore imperative that members and officers confirm that appropriate cover exists. If there is any doubt, advice should be obtained from the Monitoring Officer.
- 11.3 In the case of officers, an indemnity cannot extend to any deliberate wrong doing. In any event, an indemnity cannot cover an act which is outside the scope of an officer's employment or anything that is outside the legal powers of the Council.

12 The Register of Interests

- 12.1 Members are reminded that paragraph 15 of the code of conduct provides:

A member must provide written notification to the Council's Monitoring Officer of his/her membership of or position of general control of management in any:

- (a) body to which he/she has been appointed or nominated by the authority as its representative
- (b) public authority or body exercising functions of a public nature
- (c) company, industrial and provident society, charity or body directed to charitable purposes;
- (d) body whose principal purposes include the influence of public opinion or policy and
- (e) trade union or professional association

- 12.2 Paragraph 16 of the Code of Conduct provides that members must, within 28 days of becoming aware of any changes to their registered interests, provide notification to the Monitoring Officer of the change(s).
- 12.3 If, during the term of office of a member, he/she is nominated to represent the Council on an outside body/organisation, as described in paragraph 15 of the Code of Conduct, that member must notify the Monitoring Officer within 28 days. The same also applies if a member resigns or is otherwise disqualified from representing the Council on that particular body/organisation.

13 Reporting Arrangements

- 13.1 Members who represent the Council on outside bodies are required to submit a written report to either full council or Cabinet, depending upon which appointed them, at least annually, on the activities of the organisation.
- 13.3 Officers who represent the Council on outside bodies are required to report to the relevant Portfolio Holder(s).
- 13.4 The purpose of the reporting arrangements is to ensure that members are fully informed of the activities of the outside body or organisation concerned, the nature of the organisation's activities and the impact of such activities on the local community and Council service delivery.
- 13.5 Frequency of reporting will be annual, unless exceptional circumstances require a further report. Reports will be submitted in writing by the Elected Member/Officer and, so far as is reasonably practicable, limited to one side of A4.

14 Further Advice

- 14.1 Advice on the application of this protocol should be sought from the Monitoring Officer.