

## **Protocol on Member / Officer Relations**

### **Introduction and Principles**

- 1.1 The purpose of this Protocol is to guide Members and Officers of the Council in their relations with one another in such a way as to ensure the smooth running of the Council.
- 1.2 Given the variety and complexity of such relations, this Protocol does not seek to be either prescriptive or comprehensive. It simply offers guidance on some of the issues which most commonly arise. It is hoped, however, that the approach which it adopts to these issues will serve as a guide to dealing with other circumstances.
- 1.3 This Protocol is to a large extent a written statement of current practice and convention. It seeks to promote greater clarity and certainty. If the Protocol is followed it should ensure that Members receive objective and impartial advice and that Officers are protected from accusations of bias and any undue influence from Members.
- 1.4 It also seeks to reflect the principles underlying the respective Codes of Conduct which apply to Members and Officers. The shared object of these codes is to enhance and maintain the integrity (real and perceived) of local government and the Codes, therefore, demand very high standards of personal conduct.
- 1.5 This Protocol is a local extension of the Members' and Employees' Codes of Conduct. Consequently, a breach of the provisions of this Protocol may also constitute a breach of those Codes.
- 1.6 This Protocol should be read in conjunction with the Members' and Employees' Codes of Local Government Conduct, the Council's Constitution and any guidance issued by the Governance Committee and/or Monitoring Officer.

### **Allegations of Member or Officer Misconduct: Responses by Members or Officers as Appropriate**

- 2.1 In a situation where a Member identifies that an Officer may have committed a breach of the Council's disciplinary rules and procedures, s/he shall draw the issue to the attention of the Chief Executive (Head of Paid Service) who, following consultation with the Service Director: Legal & Governance, will ensure that the appropriate action is taken.
- 2.2 In respect of an Officer who believes a Member has breached the Members' Code of Conduct, they should:
  - a. not offer any opinion or judgement upon that conduct to the Member;
  - b. they must advise the Monitoring Officer immediately of the circumstances, facts, their belief and the rationale behind it, including supplying all and any documentation; and
  - c. they should not comment further on the issue to any other Officer or Member without the prior consent of the Monitoring Officer.

These provisions are to protect both the Member and Officer, avoid Officers from becoming unduly involved in allegations of Member misconduct at an inappropriate

level and to ensure that any investigation that may need to be carried out by the Monitoring Officer or other agency, is not in any way fettered or damaged.

### **The Relationship: General Points**

- 3.1 Both Councillors and Officers are servants of the public and they are indispensable to one another. But their responsibilities are distinct. Councillors are responsible to the electorate and serve only so long as their term of office lasts. Officers are responsible to the Council. Their job is to give advice to Councillors and the Council, and to carry out the Council's work under the direction and control of the Council, the Executive, their committees and sub-committees.
- 3.2 At the heart of the Code, and this Protocol, is the importance of mutual respect. Member / Officer relationships are to be conducted in a positive and constructive way. Therefore, it is important that any dealings between Members and Officers should observe standards of courtesy and that neither party should seek to take unfair advantage of their position or seek to exert undue influence on the other party.
- 3.3 Inappropriate relationships can be inferred from language / style. To protect both Members and Officers, Officers should address Members as "Councillor XX / Mr or Madam Mayor / Sheriff" save where circumstances clearly indicate that a level of informality is appropriate, eg a one to one between a Service Director and their respective Cabinet Member.
- 3.4 A Member should not raise matters relating to the conduct or capability of an Officer in a manner that is incompatible with the objectives of this Protocol. This is a longstanding tradition in public service. An Officer has no means of responding to such criticisms in public. If a Member feels s/he has not been treated with proper respect, courtesy or has any concern about the conduct or capability of an Officer, and fails to resolve it through direct discussion with the Officer, s/he should raise the matter with the respective Service Director. The Service Director will then look into the facts and report back to the Member. If the Member continues to feel concern, then s/he should report the facts to the Director who heads the Directorate concerned, or if, after doing so, is still dissatisfied, should raise the issue with the Chief Executive who will look into the matter afresh. Any action taken against an Officer in respect of a complaint, will be in accordance with the provisions of the Council's Disciplinary Rules and Procedures.
- 3.5 An Officer should not raise with a Member matters relating to the conduct or capability of another Officer or to the internal management of a Section / Division / Directorate at or in a manner that is incompatible with the overall objectives of this Protocol.
- 3.6 Where an Officer feels that s/he has not been properly treated with respect and courtesy by a Member, s/he should raise the matter with his/her Service Director, Director or the Chief Executive as appropriate, especially if they do not feel able to discuss it directly with the Member concerned. In these circumstances the Service Director, Director or Chief Executive will take appropriate action either by approaching the individual Member and/or group leader or by referring the matter to the Service Director: Legal & Governance in the context of the Governance Committee considering the complaint.

## **The Relationship: Officer Support to Members: General Points**

- 4.1 Officers are responsible for day-to-day managerial and operational decisions within the authority and will provide support to both the Executive and all Councillors in their several areas.
- 4.2 Certain statutory officers – the Chief Executive, the Monitoring Officer and the Chief Financial Officer – have specific roles. These are addressed in the Constitution. Their roles need to be understood and respected by all Members.
- 4.3 The following key principles reflect the way in which the officer core generally relates to Members:
  - all officers are employed by, and accountable to the authority as a whole;
  - support from officers is needed for all the authority's functions including Full Council, Overview and Scrutiny, the Executive, individual Members representing their communities, etc;
  - day-to-day managerial and operational decisions should remain the responsibility of the Chief Executive and other officers;
  - the authority will seek to avoid potential conflicts of interest for officers arising from the separation of the Executive and Overview and Scrutiny role; and
  - all officers will be provided with training and development to help them support the various Member roles effectively and to understand the new structures.
- 4.4 On occasion, a decision may be reached which authorises named Officers to take action between meetings following consultation with a Member or Members. It must be recognised that it is the Officer, rather than the Member or Members, who takes the action and it is the Officer who is accountable for it.
- 4.5 It is important that all Members, in exercising their functions as a Councillor, take appropriate legal, financial and professional officer advice, particularly about contractual matters. In order to ensure the highest standards of conduct are maintained at all times in relation to this important area of the Council's functions, additional guidance on Best Practice for Member Conduct during a Procurement Exercise is laid out in Appendix D.
- 4.6 Generally, all Members – whether Executive or otherwise – should consider, when invited to / attending a meeting, whether or not minutes should be taken and/or an officer should be present. It is a matter for Members' judgement whether this is necessary / appropriate, but factors such as whether any commitment is likely to be given on behalf of the Council and/or whether any complex financial, legal or procurement issues may be discussed will be relevant in deciding that. In such situations, Members are generally recommended to have an officer present and to ensure that contemporaneous minutes are taken and, where appropriate, shared with the other parties present to ensure that an accurate record is maintained. It will, however, be a case of judgement on each and every occasion as to how and when this principle is applied.
- 4.7 Finally, it must be remembered that Officers within a Division or Directorate are accountable to their Service Director and Director and that whilst Officers should always seek to assist a Member, they must not, in so doing, go beyond the bounds of whatever authority they have been given by their Service Director or Director.

## **The Relationship: Officer Support: Members and Party Groups**

- 5.1 It must be recognised by all Officers and Members that in discharging their duties and responsibilities, Officers serve the Council as a whole and not any political group, combination of groups or any individual Member of the Council.
- 5.2 There is now statutory recognition for party groups and it is common practice for such groups to give preliminary consideration to matters of Council business in advance of such matters being considered by the relevant Council decision making body. Officers may properly be called upon to support and contribute to such deliberations by party groups but must at all times maintain political neutrality. All Officers must, in their dealings with political groups and individual Members, treat them in a fair and even-handed manner.
- 5.3 The support provided by Officers can take many forms. Whilst in practice such Officer support is likely to be in most demand from whichever party group is for the time being in control of the Council, such support is available to all party groups.
- 5.4 Certain points must, however, be clearly understood by all those participating in this type of process, Members and Officers alike. In particular:
  - 5.4.1 Officer support must not extend beyond providing information and advice in relation to matters of Council business. Officers must not be involved in advising on matters of party business. The observance of this distinction will be assisted if Officers are not present at meetings or parts of meetings, when matters of party business are to be discussed;
  - 5.4.2 party group meetings, whilst they form part of the preliminaries to Council decision making, are not empowered to make decisions on behalf of the Council. Conclusions reached at such meetings do not therefore rank as Council decisions and it is essential that they are not interpreted or acted upon as such; and
  - 5.4.3 similarly, where Officers provide information and advice to a party group meeting in relation to a matter of Council business, this cannot act as a substitute for providing all necessary information and advice to the relevant Committee or Sub-Committee when the matter in question is considered.
- 5.5 Special care needs to be exercised whenever Officers are involved in providing information and advice to a party group meeting which includes persons who are not Members of the Council. Such persons are not bound by the National Code of Local Government Conduct (in particular, the provisions concerning the declaration of interests and confidentiality) and for this and other reasons, Officers may not attend and/or give advice to such meetings.
- 5.6 Officers must respect the confidentiality of any party group discussions at which they are present in the sense that they should not relay the content of any such discussion to another party group.
- 5.7 Whilst any Member may ask a relevant Service Director, Director or the Chief Executive for written factual information about a Directorate or service, such requests must be reasonable and not seek information relating, for instance, to case work of a similar nature, eg Social Services, employment, etc. Requests will be met subject to any overriding legal considerations (which will be determined by the Service Director: Legal & Governance), or if the recipient of any request considers the cost of providing the information requested or the nature of the request to be unreasonable.

If a Member requesting such information is dissatisfied by such a response, s/he should raise the matter in the first place with the relevant Director, and if still dissatisfied should raise the matter with the Chief Executive who will discuss the issue with the relevant Group Leader(s).

- 5.8 Requests for information about generic group employee matters such as divisional structures, the overall cost of service provision for a group of employees etc should be considered in the normal way as set out above. Service Directors, Directors or the Chief Executive should ensure that any information supplied does not contain any personal information (within the meaning of the Data Protection Act 1998) relating to individual employees such as salary, grade, Trade Union affiliation etc.
- 5.9 Requests for personal information about specific employees or where the group of employees is so small that individual employees personal details are likely to be revealed should only be considered where a Member has a demonstrable need for such detailed personal information in order to carry out the business of the Council and they could not carry out that business without the information being supplied in a redacted form. Any such request must be accompanied by the Members reasons for requiring the information and must be forwarded to the Head of Strategic HR for determination (following consultation with the Council's Data Protection Officer and / or Monitoring Officer as appropriate).
- 5.10 All information held by the Council, in whatever form, is confidential to the Council unless and until such confidentiality is waived by the Proper Officer and subject to the requirements of the Data Protection Act 1998. Officers and elected Members are responsible for ensuring that personal information and data is only handled and processed in accordance with the provisions of the Act and to familiarise themselves with their obligations under the Act accordingly. Officers or Members who require advice or assistance in relation to their duties under the Data Protection Act 1998 should take advice from the Service Director: Legal & Governance or the Corporate Legal Team as appropriate.
- 5.11 In relation to budget proposals:
- a. the Administration shall be entitled to confidential information / discussions with Officers regarding options and proposals. These will remain confidential until determined by the Administration or until published in advance of Committee / Council meetings, whichever is the earlier; and
  - b. the opposition groups shall also be entitled to confidential information / discussions with Officers to enable them to formulate alternative budget proposals. These will remain confidential until determined by the respective opposition groups or until published in advance of Committee / Council meetings, whichever is the earlier.
- 5.12 As part of the Budget process, Officers may be called upon to give advice on budgetary proposals, wherever they may emanate from (once political confidentiality has been lifted). This is in addition to the "normal" rights that any member has to seek advice "in confidence" from Officers. In addition, Officers may feel it appropriate to offer advice to individuals, groups or all Members. In doing so, they should be aware of the need to remain impartial. It is appropriate and indeed, in certain circumstances, necessary that as a matter of professional judgement, if a proposed course of action is imprudent, that Officers should advise the Members of the Authority that this is so. It would, however, be for the Officer to decide how and when to do so, subject to the general rules outlined in paragraph 5.10 below. This is

without prejudice to issues of legality and financial administration which are covered by specific duties placed on the Chief Financial Officer and Monitoring Officer.

- 5.13 In view of the need to ensure that the professional integrity of Officers is not impugned, deliberately or inadvertently, the following principles will be applied (although they may be departed from by the Chief Executive, Monitoring Officer or Chief Financial Officer as and when appropriate given their specific statutory duties):
- a. any advice or information provided to any Member(s) in writing will be marked 'strictly confidential, signed and dated by the responsible Officer and shall follow the guidelines set out in Appendix B;
  - b. generally, such advice / information will be provided to the Group Leaders, unless there are over-riding considerations associated with the statutory responsibilities of the Head of Paid Service / Chief Financial Officer / Monitoring Officer which would warrant the advice being shared with all Members;
  - c. Group Leaders and Members who received such advice will treat such advice as strictly confidential to the Council and will ensure that, if such advice is further shared or disseminated within their groups, their groups understand that the advice is confidential to the Council and not to be disclosed further under any circumstances.
  - d. Officers will also provide, as appropriate, briefings for either Group Leaders and/or all Members as requested by the Group Leaders and/or determined by the Chief Executive, Chief Financial Officer and/or Monitoring Officer prior to the Budget on any particular issues or matters which those Officers, as a matter of professional judgement, consider should properly be drawn to Members' attention.

The over-riding obligation will be to ensure that the integrity of the administration of public affairs is maintained. The prime responsibility of Officers in the matter of any challengeable decision arises in advising Members of the Council before decisions are reached. It is incumbent, in these circumstances, for Councillors to be fully advised on the legal and financial consequences of any proposed course of action.

- 5.14 It must not be assumed by any party group or Member that any Officer is supportive of any policy or strategy developed because of that Officer's assistance in the formulation of that policy or strategy.
- 5.15 Any particular cases of difficulty or uncertainty in this area of Officer advice to party groups should be raised with the Chief Executive who will discuss them with the relevant group leader(s).

### **The Relationship: Officer Support: The Executive**

- 6.1 It is clearly important that there should be a close working relationship between Executive Members and the Officers who support and/or interact with them. However, such relationships should never be allowed to become so close, or appear to be so close, as to bring into question the Officer's ability to deal impartially with other Members and other party groups.
- 6.2 Whilst Executive Members will routinely be consulted as part of the process of drawing up proposals for consideration or the agenda for a forthcoming meeting, it must be recognised that in some situations an Officer will be under a professional duty to submit a report. Similarly, a Service Director or other senior Officer will always be fully responsible for the contents of any report submitted in his/her name.

This means that any such report will be amended only where the amendment reflects the professional judgement of the author of the report. This is to be distinguished from a situation where there is a value judgement to be made. Any issues arising between an Executive Member and a Service Director in this area should be referred to the Chief Executive for resolution in conjunction with the Leader of the Council.

- 6.3 The Executive and its members have wide ranging leadership roles. They will:
- lead the community planning process and the search for Best Value, with input and advice from Overview and Scrutiny Committees, area committees and any other persons as appropriate;
  - lead the preparation of the local authority's policies and budget;
  - take in-year decisions on resources and priorities, together with other stakeholders and partners in the local community, to deliver and implement the budget and policies decided by the Full Council; and
  - be the focus for forming partnerships with other local public, private, voluntary and community sector organisations to address local needs.
- 6.4 Where functions which are the responsibility of the Executive are delegated to Officers or other structures outside the Executive, the Executive will nevertheless remain accountable to the Council, through Overview and Scrutiny Committees, for the discharge of those functions. That is to say, the Executive will be held to account for both its decision to delegate a function and the way that the function is being carried out.
- 6.5 Under Executive Arrangements, individual Members of the Executive will, for the first time, be allowed to formally take decisions. The Executive and Cabinet members must satisfy themselves that they are clear what exactly they can and cannot do.
- 6.6 The Council has put in place mechanisms / protocols which ensure that (as with the Council, its Committees and Sub-Committees, and the Executive and its Committees) an individual Executive Member seeks advice from relevant Officers before taking a decision within her or his delegated authority. This includes taking legal advice, financial advice and professional officer advice (particularly about contractual matters) as well as consulting the Monitoring Officer where there is doubt about vires.
- 6.7 As a result of the particular issues arising during contractual discussions, particular guidance has been provided for all Members at Appendix D to this Officer / Member Protocol. Whilst this guidance is predominantly aimed at Executive Members, who will largely be the Members directly involved in discussions with potential tenderers / contractors / sub-contractors during the course of a procurement exercise, it is not exclusively aimed at Executive Members – it is specifically aimed at all Members, and for that reason, all Members should be aware that their conduct during a procurement exercise should follow the guidance in Appendix D.
- 6.8 Decisions taking by individual Members of the Executive give rise to legal and financial obligations in the same way as decisions taken collectively. Therefore, Members of the Executive should always be aware of legal and financial liabilities (consulting the Monitoring Officer and Chief Financial Officer as appropriate) which will arise from their decisions. To ensure effective leadership for the local authority and the communities it serves, there are arrangements to ensure co-ordination of and sharing responsibility for Executive decisions including those made by individuals.

- 6.9 Officers will continue to work for and serve the local authority as a whole. Nevertheless, as the majority of functions will be the responsibility of the Executive, it is likely that in practice many Officers will be working to the Executive for most of their time. The Executive must respect the political neutrality of the Officers. Officers must ensure that, even when they are predominantly supporting the Executive, that their political neutrality is not compromised.
- 6.10 In organising support for the Executive, there is a potential for tension between Chief Officers and Cabinet Members with portfolios. All Members and Officers need to be constantly aware of the possibility of such tensions arising and both Officers and Members need to work together to avoid such tensions and conflicts existing or being perceived.

### **The Relationship: Officer Support: Overview and Scrutiny**

- 7.1 Overview and Scrutiny is an important constituent part of effective democracy and the Council's constitutional arrangements. Officers have lead and significant role in making it effective. However, it is not Overview and Scrutiny's role to act as a Disciplinary tribunal in relation to the actions of Members or Officers. Neither is it the role of Officers to become involved in what would amount to disciplinary investigations on a Panel's behalf. This is the Chief Executive's function alone in relation to staff, the Monitoring Officer's and the Governance Committee as regards the conduct of Members. This means:
- Overview and Scrutiny's questioning should not be directed to the conduct of individuals, not in the sense of establishing the facts about what occurred in the making of decisions or implementing of Council policies, but with the implication of allocating criticism or blame;
  - in these circumstances, it is for the Chief Executive to institute a formal enquiry, and Overview and Scrutiny may ask (but not require) him to do so.
- 7.2 Overview and Scrutiny should not act as a "court of appeal" against decisions or to pursue complaints by individuals (Councillors, Officers or members of the public) as other procedures exist for this. These are internal, eg the Corporate Complaints Procedure, and external / statutory, eg Local Government Ombudsman or appeal to the Courts. That said,
- Overview and Scrutiny may investigate the manner in which decisions are made but should not pass judgements on the merits of a decision in individual cases;
  - they can comment, however, on the merits of a particular policy affecting individuals.
- 7.3 It would be unfair to invite someone to appear before a Panel without telling them in general terms what they will be asked, or not giving them adequate time to prepare. Overview and Scrutiny ought to provide written questions ("Indicative Topics") beforehand, so that the answers can form the basis of the questioning and discussion. In addition, speakers ought to be told the general line that further questioning is likely to take. Questioning should not stray outside the subject area that the Panel had previously indicated.
- 7.4 The Overview and Scrutiny Handbook contains guidelines as to the procedure at Evidence Meetings, and guidance for Members and Officers.
- 7.5 Overview and Scrutiny are, however, entitled to the following:



- a. the level and extent of questioning, and the depth to which Overview and Scrutiny Members may probe Officers is dependent upon the seniority of the Officers present – accordingly when calling Officers to give evidence, Members may wish to consider the level and nature of the Officer they wish to have before them in the light of the line of questioning they wish to follow;
- b. Officers may be asked to give a professional opinion, and Officers may be asked to give alternative options. Officers may not confine themselves solely to justifying either the position of or the advice that they gave to the Executive, although in giving options, it is to be expected that they will explain the rationale for the advice that they gave and if the advice given to the Executive reflects, in their professional opinion, the best option, to justify that;
- c. it is appropriate for Members of Overview and Scrutiny to ask Officers to explain and justify advice given to Members, whether on the Executive or otherwise, prior to decisions being taken, and to justify decisions Officers have taken under delegated powers.

#### 7.6 Officers are expected:

- a. to maintain political impartiality at all times when commenting on the Cabinet's / Council's policies and actions;
- b. to be prepared to explain and justify advice given to Members, including members of the Executive and the Council prior to decisions being taken and to justify decisions they themselves have taken under the Scheme of Delegation;
- c. to ensure that an Officer of sufficient seniority appears before the relevant meeting in the light of the indicative topics supplied by Overview and Scrutiny in advance;
- d. where requested to provide information to Scrutiny, eg on alternative options, to provide that information in as a comprehensive and timely fashion as if the request had come from the Executive.
- e. to respond to questions from Members in an open, constructive and helpful manner;
- f. not to mislead or be economical with the truth.

### **Support services to Members and Party Groups**

- 8.1 The only basis on which the Council can lawfully provide support services (eg, stationery, typing, printing, photo-copying, transport etc) to Members is to assist them in discharging their role as Members of the Council. Such support services must therefore only be used on Council business. They should never be used in connection with party political or campaigning activity or for private purposes.

### **Members' Access to Information and to Council Documents**

- 9.1 Members have the ability to ask for information pursuant to their legal rights to information. This right extends to such information, explanation and advice as they may reasonably need in order to assist them in discharging their role as a Member of the Council. This can range from a request for general information about some aspect of the Council's activities to a request for specific information on behalf of a constituent. Such approaches should normally be directed to the Service Director or another senior Officer of the Division concerned. Requests for employee related information (whether group of employees or individual employees) must be treated in accordance with paragraphs 5.8 – 5.10 above. In cases of doubt, Members should approach the Service Director: Legal & Governance for assistance.

- 9.2 As regards the legal rights of Members to inspect Council documents, these are covered partly by statute and partly by the common law.
- 9.3 Members will find set out in Appendix C guidance on their rights to obtain information. The law in this area is complex, legislation including the Access to Information provisions of the Local Government Act 1972, the Data Protection Act 1998 as well as the Local Government Act 2000 have all had an impact. However, the Freedom of Information Act 2000 will have an even greater impact, and could potentially provide Members with a single route through which to obtain information in support of their work, whatever their role within the authority. The guidance note set out in Appendix C maps the hierarchy of rights of Members to information, but should be read in combination with the contents of the Constitution, most particularly the Access to Information Procedure Rules which cover the statutory obligations of the authority in terms of information and its relationship with the decision-making process.
- 9.4 In relation to business of the Executive, by virtue of Regulation 16 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012:
- i. where there is a meeting (eg Cabinet) and there is a document which is in the possession / under the control of the Executive relating to the business to be conducted at that meeting, that document shall be available for inspection at least five clear days before that meeting;
  - ii. where the decision is made at a private meeting by a Cabinet Member or is a Key Decision delegated to an Officer, the document shall be available either after the meeting closes or when the decision is made;
  - iii. there are savings for exempt and confidential material and any document that contains advice provided by a political advisor or assistant.
- 9.5 Finally, any Council information provided to a Member is deemed to be information provided in confidence, is subject to the protections afforded by the Data Protection Act 1998 and must only be used by the Member for the purpose for which it was provided, ie in connection with the proper performance of the Member's duties as a Member of the Council. Therefore, for example, early drafts of Committee reports / briefing papers are not suitable for public disclosure and should not be used other than for the purpose for which they were supplied. This point is emphasised in paragraph 2(1)(d) of the Members' Code of Conduct:

## **"2. General Obligations**

- (1) When acting in your role as a member of the authority –
- a. ...;
  - b. ...
  - c. ...;
  - d. do not disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where—
    - i. you have the consent of a person authorised to give it;
    - ii. you are required by law to do so;
    - iii. the disclosure is made to a third party for the purpose of obtaining professional legal advice provided that the third party agrees not to disclose the information to any other person; or
    - iv. the disclosure is-
      - (aa) reasonable and in the public interest; and

- (bb) made in good faith and in compliance with the reasonable requirements of the authority; and
- (cc) you have consulted the Monitoring Officer prior to its release.

e. ...”

Failure to observe this obligation or disclosure of confidential information may amount to a breach of the Code of Conduct. Failure to safeguard and protect the confidentiality of personal information within the meaning of the Data Protection Act 1998 may result in prosecution of the Authority and / or any individual Officer or Member by the Information Commissioner and the imposition of significant monetary penalties.

- 9.6 Any Member request for personal information or personal data about an individual employee (rather than a general group of employees as a whole) should only be supplied where there is a demonstrable need for that Member to have the information at that level of detail in order to carry out their duties as a Member of the Council. Any such requests should be referred to and considered by the Head of Strategic HR who may, if necessary, refer the request to the Monitoring Officer.
- 9.7 In cases where such information is to be released, the Head of Strategic HR will specifically remind the Member that the information is confidential, subject to the protection of the Data Protection Act 1998 and confirm the necessary measures for handling that data in order to keep it confidential and ensure that it is not further disclosed to any other person or body either within or external to the Council.

## **Correspondence and Advice**

- 10.1 Members seeking advice from officers shall be entitled to assume that such advice is given under “Chatham House rules” in terms of disclosure to other Members, unless otherwise agreed with the officer(s) concerned.
- 10.2 Correspondence between an individual Member and an Officer should not normally be copied (by the Officer) to any other Member. In other words, a system of “silent copies” should not be employed.
- 10.3 Official letters on behalf of the Council should normally be sent in the name of the appropriate Officer, rather than in the name of a Member. It may be appropriate in certain limited circumstances (eg, representations to a Government Minister) for a letter to appear in the name of a Cabinet Member or the Leader or the Leaders of all political groups represented on the Council by agreement, but this should be the exception rather than the norm. Letters which, for example, create legal obligations or give instructions on behalf of the Council should never be sent out in the name of a Member, Executive or otherwise.
- 10.4 Correspondence received by Democratic Services from the public with a request that it is either copied to Members and/or forwarded to Members will, subject to any overriding legal considerations, be forwarded / copied.
- 10.5 Officers responding to members queries should do so in a timely manner, and in accordance with the agreed standards for replying to letters and emails from Members. Namely:
  - a. Members will receive an acknowledgement within two working days of the date of the enquiry, to include the name and contact details of the officer dealing with the enquiry (subject to leave, etc);

- b. a response will be given as soon as possible but not later than 10 working days of the date of the enquiry. If it is not possible to give a detailed response within 10 working days, the councillor should be informed within that period of the date by which they can expect to receive the information requested and be given a reason for the delay.

Democratic Services, provides an alternative route whereby Members may make enquiries or request information from officers within the authority. Any Member may pass an enquiry to Democratic Services who will then refer it to the appropriate officer and follow it up as necessary. Members can expect to be updated as to progress by the officer responsible for replying to the request.

## **Publicity and Press Releases**

- 11.1 Local authorities are accountable to their electorate. Accountability requires local understanding. This will be promoted by the Authority, explaining its objectives and policies to the electors and rate-payers. In recent years, all local authorities have increasingly used publicity to keep the public informed and to encourage public participation. Every Council needs to tell the public about the services it provides. Increasingly, local authorities see this task as an essential part of providing services. Good, effective publicity aimed to improve public awareness of a Council's activities is, in the words of the Government, to be welcomed.
- 11.2 Publicity is, however, a sensitive matter in any political environment because of the impact it can have. Expenditure on publicity can be significant. It is essential, therefore, to ensure that local authority decisions on publicity are properly made in accordance with clear principles of good practice. The Government has issued a Code of Recommended Practice on Local Authority Publicity. It is appended to this Officer / Member Protocol (Appendix A). The purpose of the Code is to set out such principles. The Code affects the conventions that should apply to all publicity at public expense and which traditionally have applied in both central and local government. The Code is issued under the provisions of the Local Government Act 1986 as amended by the Local Government Act 1988 which provides for the Secretary of State to issue Codes of Recommended Practice as regards the content, style, distribution and cost of local authority publicity, and such other matters as s/he thinks appropriate. That section requires that all local authorities shall have regard to the provisions of any such Code in coming to any decision on publicity.
- 11.3 Officers and Members of the Council will, therefore, in making decisions on publicity, take account of the provisions of this Code. If in doubt, Officers and/or Members should initially seek advice from the Communications Manager who will refer the matter to the Monitoring Officer, if necessary / appropriate. Particular care should be paid to any publicity used by the Council around the time of an election. Particular advice will be given on this by the Service Director: Legal & Governance as appropriate.

## **Involvement of Ward Councillors**

- 12.1 Whenever a public meeting is organised by the Council to consider a local issue, all the Members representing the Ward or Wards affected should as a matter of course, be invited to attend the meeting. Similarly, whenever the Council undertakes any form of consultative exercise on a local issue, the Ward Members should be notified at the outset of the exercise. More generally, Officers should consider whether other policy or briefing papers, or other topics being discussed with an Executive Member, should be discussed with relevant Ward Members. Officers should seek the views of the appropriate Executive Member(s) as to with whom and when this might be done.

## **Conclusion**

- 13.1 Mutual understanding, openness on these sorts of sensitive issues and basic respect are the greatest safeguard of the integrity of the Council, its Members and Officers.

## **Officer / Member Protocol**

- 14.1 This version was approved by the Council as part of the Constitution in May 2015.
- 14.2 Copies of the Protocol will be issued to all Members as part of the Constitution upon election.
- 14.3 Questions of interpretation of this Protocol will be determined by the Service Director: Legal & Governance.

## **Appendix A**

### **THE CODE OF RECOMMENDED PRACTICE ON LOCAL AUTHORITY PUBLICITY**

#### **Introduction**

1. This code applies to all local authorities in England specified in section 6 of the Local Government Act 1986 and to other authorities in England which have that provision applied to them by other legislation. Where the term “local authorities” is used in this code it should be taken as referring to both those categories of authority. References to “the Act” are to the Local Government Act 1986.
2. Local authorities are required by section 4(1) of the Act to have regard to the contents of this code in coming to any decision on publicity. Section 6 of the Act defines publicity as “any communication in whatever form, addressed to the public at large or a section of the public”. The code therefore applies in relation to all decisions by local authorities relating to paid advertising and leaflet campaigns, publication of free newspapers and newsheets and maintenance of websites – including the hosting of material which is created by third parties.
3. Nothing in this code overrides the prohibition by section 2 of the Act on the publication by local authorities of material which in whole or in part appears to be designed to affect public support for a political party. Paragraphs 21 to 24 offer some guidance for local authorities on the management of publicity which may contain or have links to party political material.

#### **Principles**

4. Publicity by local authorities should:-
  - be lawful
  - be cost-effective
  - be objective
  - be even-handed
  - be appropriate
  - have regard to equality and diversity
  - be issued with care during periods of heightened sensitivity

#### **Lawfulness**

5. Local authorities should ensure that publicity complies with all applicable statutory provisions. Paid-for advertising must comply with the Advertising Standards Authority’s Advertising Codes.
6. Part 3 of the Communications Act 2003 prohibits political advertising on television or radio. Local authorities must ensure that their publicity does not breach these restrictions.
7. Section 125 of the Political Parties, Elections and Referendums Act 2000 places a specific restriction on the publication by a local authority of material relating to a referendum under Part 7 of that Act, during the period of 28 days immediately before the referendum is held.
8. Regulation 5 of the Local Authorities (Conduct of Referendums) (England) Regulations 2007 (S.I. 2007/2089) prohibits local authorities from publishing material

in the 28 days immediately before a referendum which expresses support for, or opposition to a particular answer to a referendum question relating to the constitutional arrangements of the authority.

9. Regulation 15 of the Local Authorities (Referendums, Petitions and Directions) (England) Regulations 2000 (S.I. 2000/2852) prohibits local authorities from incurring expenditure to publish material which appears designed to influence people in deciding whether or not to sign a petition relating to the constitutional arrangements of the authority, or to assist others to publish such material.

### **Cost-effectiveness**

10. In relation to all publicity, local authorities should be able to confirm that consideration has been given to the value for money that is being achieved, including taking into account any loss of potential revenue arising from the use of local authority-owned facilities to host authority publicity.
11. In some circumstances it will be difficult to quantify value for money, for example where the publicity promotes a local amenity which is free to use. In such a case authorities should be able to show that they have given thought to alternative means of promoting the amenity and satisfied themselves that the means of publicity chosen is the most appropriate.
12. If another public authority, such as central government, has issued publicity on a particular topic, local authorities should incur expenditure on issuing publicity on the same matter only if they consider that additional value is achieved by the duplication of that publicity. Additional value might be achieved if locally produced publicity gives a local context to national issues.
13. The purchase of advertising space should not be used as a method of subsidising voluntary, public or commercial organisations.
14. Local authorities should consider whether it is appropriate to seek advice from economic analysts, public relations experts or other sources of expert advice before embarking on a publicity campaign involving very large expenditure.

### **Objectivity**

15. Local authorities should ensure that publicity relating to policies and proposals from central government is balanced and factually accurate. Such publicity may set out the local authority's views and reasons for holding those views, but should avoid anything likely to be perceived by readers as constituting a political statement, or being a commentary on contentious areas of public policy.
16. Any publicity describing the council's policies and aims should be as objective as possible, concentrating on the facts or explanation or both. Local authorities should not use public funds to mount publicity campaigns whose primary purpose is to persuade the public to hold a particular view on a question of policy. It is acceptable for local authority publicity to correct erroneous material which has been published by other parties, despite the fact that the material being corrected may have been published with the intention of influencing the public's opinions about the policies of the authority. Such publicity should seek to explain the facts in an objective manner.
17. Where paid-for advertising is used by local authorities, it should be clearly identified as being advertising. Paid-for advertising, including advertisements for the

recruitment of staff, should not be used in any publication owned or controlled by a political party.

18. Advertisements for the recruitment of staff should reflect the tradition of political impartiality of local authority employees and should not (except in the case of advertisements relating to the appointment of staff pursuant to section 9 of the Local Government and Housing Act 1989 (assistants for political groups)) refer to any political activities or affiliations of candidates.

### **Even-handedness**

19. Where local authority publicity addresses matters of political controversy it should seek to present the different positions in relation to the issue in question in a fair manner.
20. Other than in the circumstances described in paragraph 34 of this code, it is acceptable for local authorities to publicise the work done by individual members of the authority, and to present the views of those individuals on local issues. This might be appropriate, for example, when one councillor has been the “face” of a particular campaign. If views expressed by or attributed to individual councillors do not reflect the views of the local authority itself, such publicity should make this fact clear.
21. It is acceptable for local authorities to host publicity prepared by third parties – for example an authority may host a blog authored by members of the authority or a public forum on which members of the public may leave comments. Maintenance by a local authority of a website permitting the posting of material by third parties constitutes a continuing act of publication by that local authority which must accordingly have a system for moderating and removing any unacceptable material.
22. It is generally acceptable for local authorities to host publicity, such as a blog, which itself contains links to external sites over which the local authority has no control where the content of those sites would not itself comply with this code. This does not amount to giving assistance to any person for the publication of material which local authorities are not permitted to publish. However, particular care must be taken by local authorities during the period before elections and referendums to ensure that no breach of any legal restriction takes place. It may be necessary to suspend the hosting of material produced by third parties or public forums which contain links to impermissible material during such periods.
23. It is acceptable for publicity containing material prepared by third parties and hosted by local authorities to include logos of political parties or other organisations with which the third parties are associated.
24. It is acceptable for publicity produced or hosted by local authorities to include a logo associated with a particular member of the authority, such as a directly elected mayor, or leader of the authority. Publicity material produced by local authorities relating to a particular member must not seek to affect public support for that individual.
25. Where local authorities provide assistance to third parties to issue publicity they should ensure that the principles in this code are adhered to by the recipients of that assistance.



### **Appropriate use of publicity**

26. Local authorities should not incur any expenditure in retaining the services of lobbyists for the purpose of the publication of any material designed to influence public officials, Members of Parliament, political parties or the Government to take a particular view on any issue.
27. Local authorities should not incur expenditure on providing stands or displays at conferences of political parties for the purpose of publicity designed to influence members of political parties to take a particular view on any issue.
28. Local authorities should not publish or incur expenditure in commissioning in hard copy or on any website, newsletters, newssheets or similar communications which seek to emulate commercial newspapers in style or content. Where local authorities do commission or publish newsletters, newssheets or similar communications, they should not issue them more frequently than quarterly, apart from parish councils which should not issue them more frequently than monthly. Such communications should not include material other than information for the public about the business, services and amenities of the council or other local service providers.
29. Publicity about local authorities and the services they provide should be freely available to anyone who wishes to receive such information in a format readily accessible and understandable by the person making the request or by any particular group for which services are provided.
30. All local authority publicity should clearly and unambiguously identify itself as a product of the local authority. Printed material, including any newsletters, newssheets or similar publications published by the local authority, should do this on the front page of the publication.

### **Equality and diversity etc**

31. Publicity by local authorities may seek to influence (in accordance with the relevant law and in a way which they consider positive) the attitudes of local people or public behaviour in relation to matters of health, safety, crime prevention, race relations, equality, diversity and community issues.
32. Local authorities should consider how any publicity they issue can contribute to the promotion of any duties applicable to them in relation to the elimination of discrimination, the advancement of equality and the fostering of good relations. Care during periods of heightened sensitivity
33. Local authorities should pay particular regard to the legislation governing publicity during the period of heightened sensitivity before elections and referendums – see paragraphs 7 to 9 of this code. It may be necessary to suspend the hosting of material produced by third parties, or to close public forums during this period to avoid breaching any legal restrictions.
34. During the period between the notice of an election and the election itself, local authorities should not publish any publicity on controversial issues or report views or proposals in such a way that identifies them with any individual members or groups of members. Publicity relating to individuals involved directly in the election should not be published by local authorities during this period unless expressly authorised by or under statute. It is permissible for local authorities to publish factual information which identifies the names, wards and parties of candidates at elections.

35. In general, local authorities should not issue any publicity which seeks to influence voters. However this general principle is subject to any statutory provision which authorises expenditure being incurred on the publication of material designed to influence the public as to whether to support or oppose a question put at a referendum. It is acceptable to publish material relating to the subject matter of a referendum, for example to correct any factual inaccuracies which have appeared in publicity produced by third parties, so long as this is even-handed and objective and does not support or oppose any of the options which are the subject of the vote.

## **Appendix B**

### **Guidelines for Council-wide Briefing Notes**

1. This Guidance applies to briefing notes issued on a Council-wide basis associated with / during the Budget process.
2. All Officer advice should always take account of and follow the general guidance set out in this Officer / Member Protocol and the Council's Constitution.
3. Specific advice is contained in this Officer / Member Protocol as to Council-wide briefing notes issued as part of / during the Budget process at paragraphs 5.12 and 5.13 and this should be followed.
4. The content of any briefing notes issued on a Council-wide basis associated with / during the Budget process, should follow this guidance as to its contents:
  - a. Topic;
  - b. Provenance - who requested the note be produce (advice may be reactive or pro-active – so it may be an Officer decision that this advice was needed to be placed before Members – in which case state who made that decision;
  - c. What is the current Council policy?
  - d. What is professional officer advice – including what are the ramifications of the current Council policy and any possible / proposed changes to that?
  - e. Who is the author of the briefing note?
  - f. The note should be dated.
5. Any such Council-wide briefing notes associated with the Budget process should, if not written by the relevant Directors, be cleared with them as well as the Chief Financial Officer.
6. Before being issued, any Council-wide briefing notes associated with the Budget process should be cleared with the Chief Executive.

Members should be left in no doubt as the provenance of any Council-wide briefing notes associated with / issued during the Budget process, and should be clear what is Officer professional advice regarding the ramifications of policy options / decisions.

## Appendix C COUNCILLORS' ACCESS TO INFORMATION – A HIERARCHY OF RIGHTS

### Introduction

1. The rights of access to information by Councillors is a complex mix of legislation available to Councillors and the public alike, legislation specific to local government and “common law rights” given to Councillors by the Courts. This Guidance endeavours to provide some guidelines for Members through this “maze”. Members may also seek advice “in confidence” from the Service Director: Legal & Governance.
2. For general rights of access available to the public, please see the Access to Information Procedure Rules as set out in the Council's Constitution.

### What is the Hierarchy of Rights?

3. The law relevant to access to information by Councillors includes the following:
  - (1) **The Freedom of Information Act 2000.** This makes non-personal information freely available to all, with only limited exceptions.
  - (2) **The Data Protection Act 1998.** This relates to personal information, and generally makes this non-disclosable except in certain circumstances.
  - (3) Local Government Legislation
    - (a) **Access to Information provisions of the Local Govt Act 1972.** This gives the public access to Committee Minutes and Agenda, and to background material relevant to those documents.
    - (b)
      - (i) Other legislation (Local Government (Executive Arrangements) (Meetings and Access to Information) Regulations 2012)) ensures that Members are entitled to material relevant to public / private meetings of the Leader and Cabinet (and decision making by individual portfolio holders).
      - (ii) However, these rights do not apply to draft documents, to the advice of a political advisor or to most exempt / confidential information (unless such information is needed for the work of the Scrutiny Committee).
  - (4) (c) “Common Law Rights” (derived from Court judgements) give Members the right to inspect Council documents insofar as this is reasonably necessary to enable a Member to perform his/her duties as a Councillor – this is known as the “need to know” basis.
  - (d) However, Members do not have any right to “a roving commission” through Council documents – mere curiosity is not sufficient.

### Navigating the Hierarchy of Rights

#### Freedom of Information Act 2000

4. (1) (a) In broad terms, if the information being sought by a Member is non-personal, then the Freedom of Information Act 2000 allows access to most Council documentation<sup>1</sup>

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<sup>1</sup> Strictly speaking, if there are rights of access to information under other legislation, then the Freedom of Information Act 2000 does not apply. However, for the purposes of simplicity and to develop common access to information procedures for both Councillors and the public alike, this note assumes that Freedom of Information Act-like principles apply to Councillors as well as to members of the public. In this way, we can start with wide, general powers of access only narrow down into more specific powers when strictly necessary.

- (b) The first port of call for information under the Freedom of Information Act is the Council's Publication Scheme. This is located most conveniently on the Council's website <http://www.southampton.gov.uk/councilpartners/accesstoinfo/foi/publicationscheme/> and sets out most of the Council's published material. This information can be accessed and used without any further reference to the Council. The remainder of this note assumes that the information being sought by a Councillor is not available under the Publication Scheme.
- (2) The Freedom of Information Act would allow access to information about the construction of a new leisure facility (which is likely to be non-personal information) - but note the possible "block" to obtaining this information (see paragraphs 4(3) and (4) below) but could not be used to gain access to information about a named individual's record of housing waiting list applications – this latter is covered by the Data Protection Act 1998 (see Section 6 below).
- (3) In certain circumstances, access to documentation via the Freedom of Information Act can be "blocked", although most of the "blocks" are subject to a "public interest test". So, for example:-
  - (a) Releasing commercially sensitive information to a member of the public is not likely to be in the public interest.
  - (b) Whereas (subject to the usual rules of confidentiality), it is likely to be in the public interest to release such information to a Councillor.
- (4) Examples of blocks ("exemptions") under the Freedom of Information Act are:
  - (a) Work in progress (draft reports, for example) need not be disclosed.
  - (b) Information subject to a data-sharing protocol (eg. between all member organisations of the Crime and Disorder Partnership) should not be released until all organisations have each agreed to disclosure. This is to ensure that crime & disorder and fraud investigations are not prejudiced.
  - (c) Commercially sensitive information.
  - (d) Where, in the opinion of a designated officer (who is to be the Monitoring Officer) disclosure of information would or would likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs. This exemption is also subject to the public interest test.
- (5) If the rights outlined above are not sufficient to provide a Councillor with the information he needs, then it is necessary to navigate further down this hierarchy.

## **Data Protection Act 1998**

- 5.
  - (1) If the information sought by a Councillor relates to an identified living individual, then the Data Protection Act applies.
  - (2) There are 2 classes of Data Protection – "normal" personal information and "sensitive personal information". Sensitive personal information includes:-
    - (a) Racial or Ethnic Origin
    - (b) Religious beliefs
    - (c) Trade Union membership
    - (d) Physical or Mental health
    - (e) Actual or alleged criminal offences and criminal records

- (f) Sexual life
  - (g) Political opinions.
- (3) (a) Where “normal” personal information is involved, unless additional consent has been granted by the individual concerned, information about an individual can only be used for the purposes for which that information was obtained.
- (b) Councillors have the same rights as Council employees to access personal information.<sup>2</sup>
- (c) Putting the above together, a Councillor who needs to have information about a named individual’s housing waiting list application may do so. However (unless the individual concerned has given a specific or general consent) the same information could not be used for purposes concerned with (say) Council Tax or Housing Benefits.
- (4) (a) The Council has a duty to ensure that personal information disclosed to Members using the above procedures is used strictly for the purposes for which it is disclosed and that Members will keep the information secure and confidential (and then disposed of in a similarly careful manner).
- (b) Councillors must observe the Code of Conduct and all the provisions of the Constitution. Officers will automatically assume that Councillors will treat personal information in accordance with the previous paragraph.
- (5) (a) Where “sensitive” personal information is involved (see paragraph 5(2) above) then more rigorous procedures are necessary:-
  - (i) Either explicit consent of the person concerned must be obtained; or
  - (ii) If this is not practicable, Members must complete a form under the Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002.
- (b) Paragraphs 4(4), 5(3) and (4) above, of course, apply to “sensitive” personal information as they do to “normal” personal information.
- (6) If the rights outlined above are not sufficient to provide a Councillor with the information he needs, then it is necessary to navigate further down this hierarchy.

**Access to Information Provisions of the Local Government Act 1972 / Local Authorities (Executive Arrangements) (Meetings and Access to Information) Regulations 2012**

- 7. (1) In effect, the rights available to Councillors through the Freedom of Information Act and the Data Protection Act will begin to override both older legislation such as the Local Government Act 1972 and also older common law rights.<sup>3</sup>
- (2) (a) Where a Councillor cannot obtain the disclosure of information under the Freedom of Information Act (because, say, commercial confidentiality is too sensitive to permit it, or because of implications for fraud investigations) or the Data Protection Act (because a Councillor cannot establish a need to know the information, or because a Councillor wants to use the information in a context different to that for which the information was gathered) then the

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<sup>2</sup> and the Councillor concerned must have a “need to know”, and not just be “curious” – see paragraph 4(4) above.

<sup>3</sup> But see Footnote 1

information may still become available to Members at a later date via Committee agenda, and the right to see background material associated with such an agenda.

- (b) Once a matter has reached the stage where it is before a Committee / Cabinet, then members of that Committee / Cabinet would have a “need to know” all relevant information; and other Councillors would be able to use the usual Access to Information provisions.
- (3) (a) Councillors also have additional rights of access to material in the possession/control of the Leader and Cabinet (rather than Council officers) relating to public/private meetings of the Cabinet or to any decision taken by an individual portfolio holder.
- (b) However, the above rights do not apply to draft documents, to the advice of a political advisor or to most categories exempt/confidential information (unless the Scrutiny Committee require such exempt / confidential information as part of actions / decisions it is scrutinising).

## **General**

- 8. (1) Material from Legal Services (where Legal Services is providing legal advice to one of its in-house clients at the Council) may be non-disclosable due to legal professional privilege.
- (2) Information supplied under the Data Protection Act 1998 must not be used or disclosed for political purposes.
- (3) (a) Requests for Information under the control of Officers should normally be made to the relevant Service Director.
- (b) Requests for information under the control of the Leader and Cabinet should normally be made to the Leader and/or the relevant Portfolio Holder.
- (4) (a) Councillors must not put undue pressure on Officers to release information to which the Councillor is not entitled to have access.
- (b) Should a Service Director need advice as to whether information can be released to a Councillor s/he should contact the Service Director: Legal & Governance.
- (c) The additional access to information rights given to Councillors are to allow them to do their jobs as Councillors. Confidential or exempt information should only be used in appropriate circumstances, in accordance with the proper performance of their duties as Councillors. Information should only be passed between Councillors if both Councillors can demonstrate a “need to know”.
- (5) (a) Any complaints by a Councillor about the non-disclosure of information should be made in writing to the Service Director: Legal & Governance, whose decision shall be final as far as the Council is concerned.
- (b) However, if the Councillor remains dissatisfied, the Councillor may be able (under FOI) to refer the matter to the Information Commissioner.

**Appendix D**  
**BEST PRACTICE GUIDANCE ON CONDUCT FOR MEMBERS DURING A**  
**PROCUREMENT EXERCISE**

**A. BACKGROUND**

1. Under the City Council's Code of Conduct for Members, a Member must not, amongst other things, in his/her official capacity or any other circumstance, conduct him or herself in a manner which could reasonably be regarded as bringing his/her office or the authority into disrepute, nor do anything which compromises or which is likely to compromise the impartiality of those who work for, or on behalf of, the Council.
2. In the context of a procurement exercise, this would include taking any action which could, in the opinion of the Monitoring Officer or Chief Financial Officer, compromise the objective handling of the tendering processes and lead to (or likely to expose the Council to) a successful legal challenge.
3. Tendering procedures are highly complex and there are risks involved in the failure to comply with the UK and European legislation. This guidance is intended to assist in raising awareness of the risks and to ensure that proper procedures are in place to minimise such risks.

**B. LEGAL CONTEXT**

4. When awarding contracts, the City Council is subject to the requirements of administrative law, contractual law, EU requirements on non-discrimination and free movement of goods and services, general common law principles and the specific rules on public procurement discussed below.
5. The public procurement remedies procedures are based upon the provisions of the 'Remedies Directive' (Directive (EEC) 665/89), the provisions of which were implemented into UK law in the Works, Supplies and Services Regulations (the Regulations'). There is a general statutory obligation under the regulations for contracting authorities to comply with the public procurement rules. There are also specific provisions which establish the procedures for remedy where an aggrieved contractor, supplier or service provider suffers, or is at risk of suffering, some form of loss due to non-compliance by the contracting authority with the procurement rules.
6. Enforcement of the procurement rules operate both at the EU and at the national level. The national courts or tribunals in each member state are empowered to take measures to remedy any violation of the law and to compensate for loss. At the EU level, the Commission can commence proceedings against the national government concerned under the EC Treaty if any contracting authority breaches the rules. In the UK, the obligation to comply with the provisions of the Regulations in relation to contracts that fall within the ambit of those regulations is considered in law to be a 'duty' owed to providers.
7. Non-compliance with EU law is not a criminal offence, but it can give rise to a breach of statutory duty and will open the Council to a legal challenge by way of Judicial Review and/or claim for damages. If a Member's action(s) or inaction(s) have caused the same, the member may have acted beyond his/her powers and/or be in breach of the Code of Conduct for Members. In such event, the Monitoring Officer will refer the matter to the Governance Committee for determination by way of a written complaint against the relevant Member(s). Ultimate sanction is disqualification from office and/or civil action in damages.



8. If a corrupt practice or other criminal activity is alleged or discovered under the Prevention of Corruption Acts or Bribery Act 2010 against a Member or Officer, the Monitoring Officer will consider how the Police may be used to help safeguard and protect the interests of the Council.

### **C. BEST PRACTICE GUIDANCE**

9. In light of the inherent risks involved in a failure to comply with legal requirements affecting tendering procedures, Members / Officers should have regard to the following:

- 9.1 Communication (including any information, instruction, or response) from and to the City Council and Tenderers (or potential Tenderers or potential subcontractors to Tenderers) involved in a procurement process must be clear, duly recorded, appropriate and understood by the parties;
- 9.2 Tenderers / sub-contractors are always advised not to arrange or participate in any meeting(s) or other form of communication with any Member(s) or Officer(s) of the City Council that has not been arranged under and in accordance with any specific guidance/protocol issued in relation to the procurement process in question. As a general rule, where no such specific guidance/protocol has been issued, such meetings or other form of communication should not take place without the written consent of the Monitoring Officer and the Chief Financial Officer;
- 9.3 Where an existing supplier / sub-contractor to the City Council seeks a meeting or other form of communication with a Member - ostensibly about matters related only to the existing supply - and that existing supplier / subcontractor may potentially be or is, at that time, also a Tenderer / subcontractor in relation to either a planned / foreseen procurement process or an ongoing procurement process of which the Member ought reasonably to be aware of, the Member should decline to meet or otherwise ensure that a sufficiently senior officer is present at such meeting to safeguard the probity and propriety of the Council's actions or inactions;
- 9.4 Any meeting between any Tenderer / sub-contractors and a Member or Officer of the City Council, should be kept to an absolute minimum, as the risk of allegation(s) of fraud and/or corrupt practices is a high possibility and one to be avoided. Any meetings that do take place with Tenderers / subcontractors must be contemporaneously minuted / noted and, in the exceptional event that a one-to-one meeting does take place, the contemporaneous minutes / notes of the meeting must be provided to the Chief Financial Officer within three days of the meeting, for the file, so as to protect and safeguard the relevant Member / Officer from any unwarranted accusations; and
- 9.5 Confidential information relating to any Tenderer / sub-contractor (or prospective Tenderer or sub-contractor) must remain confidential, unless the Courts or the law orders otherwise. Where any Member or Officer is in any doubt about whether a meeting or other form of communication with a Tenderer / sub-contractor is appropriate or permitted, s/he should seek guidance from the Monitoring Officer and Chief Financial Officer.