

Sandwell Metropolitan Borough Council

How the Monitoring Officer carries out their duties

A Protocol on the Discharge of the Functions of the Monitoring Officer

Sandwell Council has designated its Director of Law and Governance as the authority's Monitoring Officer.

The Monitoring Officer is responsible for ensuring that the authority and its members act lawfully, do not cause maladministration, and comply with the Code of Conduct for Members. They are the primary source of advice to the authority on law, and to members on their legal obligations including the requirements of the Code of Conduct for Members.

They also have specific duties, such as implementing the Arrangements for dealing with standards allegations under the Localism Act 2011.

There may be conflict between their roles as adviser and as Director of Law and Governance responsible for implementing decisions of the authority and the fact that, on occasion, they have to act as “adjudicator”.

The purpose of this paper is to enable members to make best use of the Monitoring Officer's ability to provide them with practical advice on legality and conduct, by setting out how the Monitoring Officer will carry out their functions.

1 Introduction

- (a) The authority recognises that an effective Monitoring Officer, positively engaged in the discharge of the authority's business, is essential to the effective running and sound corporate governance of the authority.
- (b) The law requires the authority to appoint one of its officers as the authority's Monitoring Officer¹, and gives the Monitoring Officer personal responsibility –
 - (i) to report on actual and anticipated illegality within the authority;

¹ Section 5(1), Local Government and Housing Act 1989

- (ii) to report cases where the Ombudsman has found maladministration on the part of the authority;
 - (iii) to maintain the Register of Members' Interests;
 - (iv) to determine whether the disclosure of information would inhibit the effective discharge of the authority's business under the Freedom of Information Act.
- (c) The authority has decided to extend the functions of its Monitoring Officer beyond these "statutory functions", and the full list of his/her functions is set out in Paragraph 4, below.
- (d) The law does not prescribe exactly how the Monitoring Officer is to carry out these functions. So this Protocol describes the manner in which the authority expects them to discharge these functions, and how it expects its officers and members to co-operate with the Monitoring Officer in order to enable them to discharge these functions effectively.

2 Appointment

- (a) The Monitoring Officer is an officer of the authority, designated as Monitoring Officer by the Council. Because the role often requires consideration of legal issues, the authority has designated the Director of Law and Governance as Monitoring Officer.
- (b) Where the Monitoring Officer leaves the employment of the authority, they automatically cease to be Monitoring Officer. The authority may appoint an officer as Interim Monitoring Officer pending a permanent appointment.

3 A Personal Responsibility

- (a) The Monitoring Officer is required to carry out the statutory functions personally, except that –
 - (i) they nominate a member of their staff as Deputy Monitoring Officer, with power to act as Monitoring Officer where they are unable to act as a result of absence or illness; and

- (ii) in respect of the implementation of the Arrangements for dealing with standards allegations under the Localism Act 2011, they may arrange for any person to perform functions such as the conduct of investigations.
- (b) Whilst the statutory functions are personal to the Monitoring Officer, they may arrange for any member of their staff to assist them in the discharge of any of the non-statutory functions.

4 Functions

The Monitoring Officer's functions are set out in Appendix One.

5 Advice, Decision or Both?

The Monitoring Officer's responsibilities fall into three distinct categories:

- (a) Advice:

In a number of instances, the Monitoring Officer acts as adviser, to the authority or to individual members. For example, a member may seek advice as to whether they have a Disclosable Pecuniary interest in a matter which is coming before a Committee, or whether they need to register an interest. In such cases, the Monitoring Officer will provide such advice, but must ultimately leave the individual member to take their own decision as to their conduct in the light of that advice.

- (b) Decisions

In other cases, where the proposal, action or omission would cause the authority to act unlawfully, the Monitoring Officer may be required to take a decision as to whether there is or would be any illegality on the part of the authority, or of any member or officer of the authority, and to decide whether they are required to make a statutory report to the authority which can have the effect of suspending the implementation of the action or decision until their report has been considered.

(c) Overlaps

These categories are not necessarily mutually exclusive. In some instances, the conduct of a member or members may give rise to both a failure to comply with the Code of Conduct for members, and give rise to an illegality on the part of the authority. In such overlap cases, the Monitoring Officer would advise the member concerned about the requirements of the Code, but may also need to inform the member of the actions which they are required to take as Monitoring Officer to address the illegality in the decision-making process. However, a decision is not invalidated just because of something that occurred in the process of making the decision involved a failure to comply with the Code.

6 Seeking the Advice of the Monitoring Officer

- (a) It is recognised that the Monitoring Officer will be most effective if they are able to advise on any issue at an early stage of policy formulation or implementation. Accordingly, officers and members of the authority should routinely inform and consult the Monitoring Officer in respect of new policy proposals and action programmes.
- (b) Advice on legality and maladministration
 - (i) Members and officers of the authority may consult the Monitoring Officer in confidence in respect of any proposal, decision or omission.
 - (ii) Wherever possible, the Monitoring Officer will seek to avoid any illegality or maladministration by identifying alternative and legitimate means of achieving the objective of the proposal, decision, act or omission, or by rectifying any deficiency.

- (iii) The Monitoring Officer will only need to make a public report on the matter if the proposed decision, act or omission were, in their opinion, unlawful and the officer or member concerned subsequently took any action to progress that proposal, decision or omission, despite having been advised to the contrary by the Monitoring Officer;
 - (iv) Where the Monitoring Officer is consulted by a member in respect of possible illegality or maladministration in any proposal, action or omission of the authority (as opposed to any proposal, action or omission of the member making the enquiry) the Monitoring Officer shall advise the relevant Cabinet Member that they have been so consulted and of the advice which they have given.
- (c) Advice on the Code of Conduct
- (i) The Monitoring Officer is the primary source of advice for all members on the Code of Conduct for Members and on local protocols.
 - (ii) Any member, irrespective of political party, can seek the confidential advice of the Monitoring Officer as to their own position. Where they are consulted, and subject to any conflict of interest with the authority, the Monitoring Officer will seek to provide prompt advice to the member concerned as to whether their action or proposed action constitutes a failure to comply with the Code of Conduct or a local protocol and what may be necessary to comply with the Code or protocol. Where they are so consulted by a member about the member's own conduct, the Monitoring Officer will not disclose the fact of consultation or the advice given except with the consent of the member or unless required to do so by law.

- (iii) Any member, irrespective of political party, may seek the advice of the Monitoring Officer as to whether the actions of another member of the Council would amount to a failure to comply with the Code of Conduct. Members are encouraged to consult the Monitoring Officer before considering whether to make a complaint. Where they are so consulted, the Monitoring Officer may make enquiry of the member(s) in respect of whom the enquiry is made before providing such advice, and shall provide them with a copy of any advice provided to the member making the enquiry.

7 Investigation

(a) Preventative investigation

On the principle that prevention is better than cure, the authority expects the Monitoring Officer to investigate matters which give them concern as to possible illegality, maladministration or breach of the Code of Conduct for Members.

Specifically, this arises where the Monitoring Officer receives a complaint or information which raises the possibility that a proposal, action or omission of the Council or any Committee, Sub-Committee or Joint Committee of the authority, the Cabinet or any member or officer of the authority is or would be unlawful, or give rise to maladministration and injustice, or amount to a failure to observe the Code of Conduct for Members. In such cases, the authority expects that they will investigate the matter and determine whether the proposal, action or omission actually is or would be unlawful, or give rise to maladministration and injustice, or amount to a failure to observe the Code of Conduct for Members, and take appropriate action, as set out below.

(b) Breach of the Code of Conduct

Member's complaints about failure to comply with the Code of Conduct for Members shall be dealt with under the approved Arrangements for dealing with standards allegations under the Localism Act 2011.

(c) Established procedures

Where the Monitoring Officer receives a complaint that a proposal, action or omission is unlawful or constitutes maladministration, and the authority already operates an appeal or other mechanism for resolving such matters (for example in respect of school transport appeals, staff grievance complaints or claims against the authority which are covered by insurance), the Monitoring Officer may deal with the matter by ensuring that it is dealt with by that existing mechanism. They may also intervene in such processes to identify whether that the particular matter potentially gives rise to illegality or maladministration and injustice, and to ensure the satisfactory resolution of the issue.

(d) Illegality

In cases where the Monitoring Officer determines that the proposal, act or omission is not unlawful, they shall advise any member or officer concerned of their determination. Where they determine that the proposal, action or omission is, or would be, unlawful, they shall wherever possible seek to agree an alternative and lawful course of action. They shall then advise the complainant (if any) of their determination and of any agreed alternative course of action, which may include an offer in settlement of any injustice suffered by any person, and/or them making a statutory report.

(e) Maladministration

Where the Monitoring Officer determines upon investigation that a proposal, act or omission has not caused or would not give rise to maladministration and injustice, they shall respond to the complainant (if any) and advise any member or officer concerned of their determination.

Where he/she determines that the proposal, act or omission has caused or would give rise to maladministration and injustice, they shall advise any member or officer concerned of their determination and seek to agree an alternative lawful course of action. They shall then advise the complainant (if any) of their determination and of any agreed alternative course of action, and/or an offer in settlement of any injustice suffered by any person.

8 Local Resolution

Where the Monitoring Officer receives a complaint of illegality, maladministration or failure to observe the Code of Conduct for Members or a local protocol adopted by the authority, they shall in appropriate cases seek to resolve the matter amicably to the satisfaction of the complainant, by securing that any illegality, failure of process or breach of code is as far as possible rectified, that the complainant is informed of the rectification, with or without a compensation payment and/or apology. However, it is recognised that the Monitoring Officer may determine that the matter is incapable of local resolution, or is of such seriousness that a statutory report is the only appropriate response.

9 Reporting

(a) Illegality

Where the Monitoring Officer is of the opinion that an unlawful action or omission has already occurred, or where the Council or any Committee, Sub-Committee or Joint Committee of the authority, the Cabinet or any member or officer of the authority seek to progress an unlawful proposal, action or omission, the Monitoring Officer shall consult as far as practicable with the Chief Executive and the Chief Finance Officer, and shall then determine whether to make a formal report under Section 5 of the Local Government and Housing Act 1989.

In appropriate cases, and to secure the rapid resolution of a potential reportable incident or avoid a separate statutory report, the Monitoring Officer shall be entitled to add their written advice to the report on the matter by any other officer of the authority, and/or to provide oral advice at any meeting of the authority.

(b) Maladministration

Where the Monitoring Officer is of the opinion that maladministration and injustice has already occurred, or where the Council or any Committee, Sub-Committee or Joint Committee of the authority, the Cabinet or any member or officer of the authority seek to progress a proposal, action or omission which would give rise to maladministration and injustice, the Monitoring Officer shall consult as far as practicable with the Chief Executive and the Chief Finance Officer, and shall then determine whether to make a written report to the decision-taker or decision-making body.

In appropriate cases, and to secure the rapid resolution of a potential reportable incident or avoid a separate statutory report, the Monitoring Officer shall be entitled to add their written advice to the report on the matter by any other officer of the authority, or to provide oral advice at any meeting of the authority.

(c) Failure to observe the Code of Conduct for Members

Where the Monitoring Officer is of the opinion that the action or proposed action of a member amounts to a failure to comply with the Code of Conduct for Members, they will deal with the complaint in accordance with the Arrangements for dealing with Standards Allegations under the Localism Act 2011.

10 Advice to Individual Members

Wherever possible, the Monitoring Officer will provide advice to individual members to support them in the discharge of their responsibilities as a Councillor. They will not provide advice to a political group or party, or to a member making enquiry on behalf of a political group or party.

The Monitoring Officer is employed by the authority and owes their primary responsibility to the authority, rather than to any individual member or group of members. Accordingly, when they are of the opinion that providing advice to a member or group of members on a matter is incompatible with their role as adviser to the authority or any action which they may have to take on behalf of the authority, they may decline to provide such advice, but may, at their discretion and where there is a clear benefit to the authority, secure that such advice is provided from an independent source at the expense of the authority.

11 Monitoring and Upholding the Constitution

(a) Monitoring and Reviewing the Constitution

- (i) The Monitoring Officer will monitor and review, on a regular basis and probably once a year, the effectiveness and operation of this Constitution so as to ensure that the aims and principles of the Constitution are given full effect and that the Constitution enables the authority to discharge its functions effectively.

- (ii) In order to conduct such monitoring and review, the Monitoring Officer may:
 - A consult any members and/or officers, and other organisations and persons having dealings with the authority
 - B observe meetings of members and/or officers at any level
 - C undertake an audit trail of a sample of decisions
 - D record and analyse issues raised with him/her by Members, Officers, the public and other relevant stakeholders
 - E compare practices in this authority with those in other comparable authorities, or national examples of best practice
 - F consider any relevant reports and recommendations of the District Auditor and other regulatory agencies.
 - (iii) The Monitoring Officer shall consult the Chief Executive and the Chief Finance Officer annually, or more frequently if appropriate, highlighting areas where there is potential to improve the Constitution or the effectiveness of the Constitution, before determining whether to report to the authority on any changes necessary for this purpose.
- (b) Keeping the Constitution up to date
- (i) The Monitoring Officer shall maintain an up to date copy of the Constitution and ensure that it is accessible to members, officers and members of the public;
 - (ii) The Monitoring Officer shall make such amendments to the Constitution as are necessary to reflect changes of fact and law, and decisions of the Council or the Cabinet of the authority, advising members of any such changes made.

(c) Interpreting the Constitution

- (i) The Monitoring Officer shall be responsible for advising on the interpretation of the Constitution.
- (ii) In particular, the Monitoring Officer shall determine whether a proposed decision is contrary to or not wholly in accordance with the policy framework or the approved budget, and whether a proposal is sufficiently urgent to merit the use of urgency executive decision-making procedures.

12 Resources

The authority is required to provide the Monitoring Officer with the resources which the Monitoring Officer considers are necessary to enable them to perform their statutory duties.

For the purpose of carrying out these functions, the Monitoring Officer shall be provided with the following resources:

- (a) The right of access to all documents and information held by or on behalf of the authority. For the purpose of clarification, this right does not extend to documents and information held by or on behalf of any political party represented on the Council;
- (b) The right of access to any meetings of members or officers (or both) of the authority, whether or not such meetings include any other persons. For the purpose of clarification, this right does not extend to any meetings held by or on behalf of any political party represented on the Council;
- (c) The right to require any officer or member of the authority, or any contractor of the authority, to provide an explanation of any matter under investigation;
- (d) A right to report to the Council, the Ethical Standards and Member Development Committee, and to the Cabinet, including a right to present a written report and to attend and advise verbally;

- (e) The right to require the assistance of any officer of the authority or to appoint any other person to carry out or assist in carrying out an investigation and to delegate to that officer or person any of the powers of the post of Monitoring Officer;
- (f) A power to agree a local resolution to any complaint of maladministration or of breach of the authority's Code of Conduct for Members, in consultation as far as appropriate or practicable with the Chief Executive and the Chief Finance Officer, including power to agree with the relevant Director a compensation payment of up to £2,000 in any one case.
- (g) The right of access to the Head of Paid Service and to the Chief Finance Officer (the said three statutory officers shall meet at least quarterly to consider matters of common interest pursuant to their statutory roles);
- (h) The right, after consultation with the Head of Paid Service and the Chief Finance Officer so far as practicable, to notify the Police, the authority's auditors and other regulatory agencies of their concerns in respect of any matter and to provide them with information and documents in order to assist them with their statutory functions;
- (i) The right to obtain legal advice at the authority's expense, either internally or from an independent external solicitor or barrister, on any matter, and sufficient financial resource to enable them to do so;

13 “Monitoring Officer” or “Chief Legal Officer”

The Monitoring Officer will use the style of “Monitoring Officer” as opposed to “Director of Law and Governance” where, in their opinion, it is appropriate to do so in connection with their statutory functions.

Appendix One

The Functions of the Monitoring Officer

The functions of the Monitoring Officer are as follows.

The “statutory functions” are in italics. All other functions are “non-statutory functions”:

- 1 *To report to the Council and to the Cabinet in any case where they are of the opinion that any proposal, decision or omission by the Council or any Committee, Sub-Committee or Joint Committee of the authority, the Cabinet or any member or officer of the authority has given rise to or is likely to or would give rise to any illegality*²;
- 2 *To report to the Council or the Cabinet in any case where the Ombudsman, after investigation, has reported that any proposal, decision or omission by the Council or any Committee, Sub-Committee or Joint Committee of the authority, the Cabinet or any member or officer of the authority has given rise to maladministration or injustice*³;
- 3 *To maintain the Register of Members' Interests*⁴;
- 4 *To administer complaints of member misconduct pursuant to the Localism Act 2011 and in accordance with the Arrangements adopted by the Authority.*
- 5 *To determine whether the disclosure of information by the authority in response to a request under the Freedom of Information Act would, or would be likely to, prejudice the effective conduct of public affairs*⁵;

² Section 5(2)(a), Local Government and Housing Act 1989 (amended by Local Public Involvement Act 2007)

³ Section 5(2)(b) and 5(2A), Local Government and Housing Act 1989 (amended by Local Public Involvement Act 2007)

⁴ Localism Act 2011

⁵ The Monitoring Officer is designated as the “qualified person” for the purpose of Section 36 of the Freedom of Information Act 2000

- 6 To investigate any proposal, decision or omission by the Council or any Committee, Sub-Committee or Joint Committee of the authority, the Cabinet or any member or officer of the authority which they have reason to believe may have given rise to or is likely to or would give rise to
 - 6.1 illegality
 - 6.2 maladministration
 - 6.3 failure to observe the Members' Code of Conduct
- 7 To act as the principal adviser to the authority's Ethical Standards and Member Development Committee;
- 8 To provide advice to members on the Code of Conduct for Members and local protocols adopted by the authority;
- 9 To monitor and uphold the authority's Constitution;
- 10 To secure the lawfulness and fairness of decision-making, including advising on whether a decision or proposed decision is an executive or non-executive decision, and whether it is contrary to or not in accordance with the authority's approved budget and policy framework;
- 11 To act as the proper officer for the preparation, publication and retention of records of decisions taken by or on behalf of the Council and the Cabinet;
- 12 Responsibility for co-ordinating Ombudsman matters and whistleblowing functions of the Authority;
- 13 Appointment as *Proper Officer for the Data Protection Act 2018, the Freedom of Information Act 2000 and the Regulation of Investigatory Powers Act 2001*;
- 14 To consult regularly with the Chief Executive, the Chief Finance Officer, Assistant Chief Executive and the Chief Internal Auditor to identify areas where the probity of the authority can be improved or better protected, and to take appropriate actions;

- 15 To investigate any application for a dispensation and to report and recommend to the Ethical Standards and Member Development Committee except where such dispensations are delegated to the Monitoring Officer by the Council;
- 16 To secure that members of the authority are fully aware of their obligations in respect of probity, particularly under the Code of Conduct for Members and any local protocols adopted by the authority;
- 17 To advise on politically-restricted posts under the Local Government and Housing Act 1989;
- 18 To report to the Cabinet and to the Council on the resources which they require for the discharge of their functions;
19. To report regularly to the Ethical Standards and Member Development Committee on the performance of their functions insofar as they are relevant to the Committee's Terms of Reference.