

# Sandwell Metropolitan Borough Council

## Guidance to Officers Appointed to on Outside Bodies

- 1 This guidance sets out the main issues which you, as an Officer, should consider when appointed by the Council to serve on an outside body. In the context of this guidance, an outside body covers organisations such as Trusts, Voluntary Bodies, Charities, Community Associations, Companies etc.
- 2 Senior Officers, from time to time, can be asked to serve on an Outside Body. This is a legitimate part of a senior officer's role. An appointed officer on an external body will be able to use their knowledge and skills to assist the organisation to which they are appointed.
- 3 Councils are increasingly working in partnership with external organisations. This means that it is important that everyone is clear exactly what the role of officers appointed to these bodies is. Questions of accountability and governance are likely to arise particularly as more funding may be channelled through the council to these outside bodies.
- 4 Membership of an outside body brings into play different considerations to those which relate to your role as an officer. As a member of an outside body you will have different duties, obligations and liabilities depending upon the type of organisation involved. There will also be times when your responsibilities as an officer and your obligations to the outside body are pulling in different directions and this guidance seeks to help with these difficult situations.
- 5 If you have any queries on this guidance or on anything which relates to your involvement on an outside body, please do contact the Monitoring Officer for help and advice.

### Things to consider before appointment

- 6 Appointment to an outside body can take various forms, and before taking up active membership it is always sensible to establish exactly in what capacity you are being appointed. This may be either:
  - As a member of the management committee, board of directors or committee of trustees of the outside body. Here you will not only be representing the interests of the council but you will also have duties to the outside body and a role in its governance. You will have detailed responsibilities which are outlined further in this guidance (See section on Directors Duties); or
  - As a member of an outside body where you represent the council's position as a 'member' of the outside body but take no part in its management or governance other than to attend and vote at annual or general meetings. Here you will be mainly concerned with representing the council and will not have responsibilities for governance of the body.
- 7 It is important to make this distinction as it can affect what you need to do in terms of registration and declaration of interests – this is dealt with further below.

## 8 Other issues to think about before accepting an appointment are

- Will you have sufficient time to dedicate to what the outside body will need of you? This is important as many outside bodies will be companies or trusts which bring legal responsibilities to those who agree to serve on them and the law is unsympathetic to people who don't, for example, spot forthcoming financial problems. Saying that you were too busy to read papers or to get to meetings is no excuse if the body gets into financial difficulties and creditors look to all the directors to ask why no action was taken to avoid the situation.
- Will your membership of this body cause such conflicts and difficulties in relation to your officer role on the council that you could add more value to the work of the body by declining the invitation to serve on their board? Sometimes outside bodies feel that having a senior officer as, say, a Trustee, will ensure that the officer is able to "go in to bat" for them in council discussions on grants and budgets. The exact opposite may happen – because of the involvement and the need to avoid conflicts (see below) the officer may not be able to get involved in certain issues relating to the outside body at all.

## Matters to Check – Questions to Ask

### 9 Other important things to check and clarify in relation to an appointment to an outside body are as follows:

#### 9.1 What is the nature of the organisation?

Organisations can take many forms and it is important to be clear exactly what the organisation is as this will affect your role on it and also the potential risks of being involved. This is dealt with further below.

One of the most important things is to find out if the organisation is a separate legal organisation (i.e. a body which has an identity of its own such as a company) or whether it is simply a group of people coming together with a common purpose (an unincorporated organisation). An unincorporated organisation generally poses the biggest risk to those involved in it because if something goes wrong, personal legal action can be taken against everyone managing it.

If the organisation has a formal legal constitution and set up, find out exactly what this is.

For example, is it a company, and if so what type of company is it? It could be a company limited by shares (usually where it is of a commercial nature and is trading in some way) or a company limited by guarantee (usually where it is a community body and often a charity).

You can tell if the outside body is a company by checking on its letterhead/paperwork – the company number should be stated there.

Is the body a charity? Charitable status brings tax and other benefits but also places important additional responsibilities on people involved in it. You can check if the body is a charity by looking for the number on its letterhead/paperwork. This shows it is registered with the Charity Commissioners.

The body might be a Trust of some kind – this places certain responsibilities on the Trustees of the organisation. Confusingly some companies might have "Trust" in their name so it is important to ask questions and be clear as to they type of organisation you are being asked to/are considering joining.

There are lots of other types of outside bodies, for example governing bodies of educational institutions and boards of Industrial and Provident Societies (most registered social landlords/Housing Associations are IPSs). If you have any queries, ask the Secretary or Clerk of the body itself and speak to the Council's Monitoring Officer.

#### **9.2 In what capacity am I being asked to serve on the outside body?**

As stated above, it is important to be clear whether you are being asked to play an important role in the running of the body (e.g. as a Director of the company or as a charitable trustee) or are you simply being invited to join a general membership with no specific overall responsibilities.

One way of checking this is to look carefully at anything you are asked to sign when appointed. If you are being asked to become a company director you will have to sign a form which will be registered at Companies House. Similarly if you are becoming a charitable trustee, there will be formal papers to sign.

#### **9.3 Do I know exactly what the organisation has been set up to do?**

Ask for a copy of the body's governing instrument (this may be a trust deed, a constitution or memorandum and articles of association). It is important that all organisations keep within their legal powers and work to achieve the objectives for which they have been set up – you will not be able to check this unless you have seen the details of this.

#### **9.4 Do I understand the governance of the organisation?**

Make sure you know who else is on the board/trust. Also make sure you know who the Secretary or Clerk is – they will be an important person to get information from and to go to for advice, Ask for copies of the minutes of recent meetings and make sure you understand how the decision making of the body works.

Also check if you have been supplied with a copy of any code of conduct to which you might be subject as a member of the body.

#### **9.5 Do I know what the financial position of the organisation is?**

One of the main areas of risk for appointees on outside bodies is the financial stability and health of the organisation. Make sure you have seen, and if necessary got advice on, the last annual report and accounts. Check that the body receives regular reports on the financial position and also make sure the body looks regularly at any risks and the steps being taken to address them.

You should also check whether the body has insurance in place which covers your role on the body – not all organisations do this but it helps address any personal risk you might run in taking part in the outside body.

**10** Once you have checked exactly what your role on the body will be and what it does, the key issues to be considered are

- The application of the rules relating to officer interests and conflicts
- The primary duty to act in the interests of the outside body;
- Duties as a company director (if applicable);

- Duties as a charity trustee (if applicable);
- Liabilities in respect of unincorporated organisations;
- Conflict with your role as an officer.

## **Disclosure of Interests by Officers**

- 11** Section 117 of the Local Government Act 1972 requires an officer to disclose to the employing authority any pecuniary interest, direct or indirect, which he / she has in any contract or other matter in which the employing authority is concerned. There is now no definition of what constitutes a pecuniary interest (as the definition was repealed when the Members' Code was introduced in 2001). If you are to receive financial payment for your activities as a Director/Trustee of an outside body (unlikely to be the case) or if your salary is increased to cover additional duties, you clearly have a direct pecuniary interest in anything which relates to the outside body. But even if you are not paid as a director, a pecuniary interest could include the simple fact that you are a Director/Trustee and the outside body's financial position is potentially affected by any decision made by the council in relation to it.
- 12** Failure to disclose such an interest to your council is not only a disciplinary but also a criminal offence so you need to ensure that, even though it is here the council which has asked you to undertake this role, that you have properly recorded it with the Monitoring Officer.
- 13** The following paragraphs look at what you must do if you are appointed to an outside body i.e. what responsibilities you owe to that body. This guidance concentrates on three main types of body which are the ones you are most often likely to come across -
- Limited Company
  - Charitable Trust
  - Unincorporated Association

### **Limited Company**

- 14** If the outside body to which you are appointed is a limited company, it is likely that you will be appointed as a company director. You will need to complete a form giving your details for filing in the Register of Companies at Companies House. The secretary of the body should assist you with this.
- 15** A company has a separate legal personality to its shareholders (also described as company members or subscribers). One of the main advantages of acting through a limited company is that shareholders can claim the benefit of limited liability. In the case of a company limited by shares this means that they will not be liable for the debts of the company if the company makes losses over and above the amount which they have pledged to pay the company for their shares. In a company limited by guarantee this means that the shareholders 'guarantee' to contribute a specified sum if called upon to do so (usually a nominal amount of £1) in the event that the company goes into insolvent liquidation.
- 16** Duties of company directors are not the same as your responsibilities as an officer of the council. These duties can be summarised as follows:
- A duty to the company, not to the individual shareholders or members, to act honestly and in good faith and in the best interests of the company as a whole. Directors are,

therefore, in a similar position to trustees who must take proper care of the assets of the company.

- A general duty of care and skill to the company. A director is not deemed to be an expert, but is expected to use due diligence and to obtain expert advice if necessary.
- The director is under a duty to exercise independent judgement, though it is permissible for him to take into account the interests of the third party which he represents (such as the council). In such a case, you must disclose that position and tread a fine line between the interests of the company and the party represented. You cannot vote simply in accordance with the council mandate: to do so would be a breach of your duty to the company.
- There may be actual or potential conflicts between the interests of the council and the interests of the company. For example, the company might be inflating a bid for a council grant. In such rare circumstances, the only proper way for the conflict to be resolved is for the officer to resign from the company.
- Directors are not allowed to make a private profit from their position. You must therefore disclose any interests you or your family have in relation to the company's contracts. Whether they are then allowed to vote will depend upon the company's Articles of Association.
- Directors must ensure compliance with the Companies Acts in relation to the keeping of accounts and that the relevant returns are made to the Registrar of Companies. Failure to do so incurs fines and persistent default can lead to disqualification as a director.
- You should also ensure compliance with other legislation such as health and safety and equalities legislation if the company employs staff or employs contractors to undertake works.

**17** If you are in breach of any of the duties imposed on you as a director, you may be personally liable to reimburse to the company any profits made / losses incurred as a result (although this liability may be excused if you acted honestly and reasonably).

**18** You need to be particularly careful when acting as a company director if there is any prospect of the company becoming insolvent i.e. not having sufficient assets to pay its debts. The duties of directors of insolvent or foreseeably insolvent companies are not the same as those of solvent ones. The interests of the creditors become paramount ahead of any duties to shareholders. When a company becomes insolvent, directors may incur personal liability in certain circumstances. A director may be found to have been involved in wrongful trading if he / she knows or ought to know that the company is likely to go into insolvent liquidation and he / she fails to take action to minimise the company's losses. A director may be found guilty of fraudulent trading (a criminal offence) if he /she allows the company to trade with an intent to defraud creditors.

**19** If you become a company director there are some useful guidance documents to assist you on the websites of the Institute of Directors and Companies House as follows

[www.iod.com](http://www.iod.com)  
[www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)

## **Charitable Trustees**

- 20** Those who are responsible for the control and administration of a charity are referred to as trustees, even where the organisation is a company limited by guarantee, though they are not strictly trustees. A number of publications are available on the Charity Commission's Website at: [www.charitycommission.gov.uk](http://www.charitycommission.gov.uk). and you should look particularly at Publication CC3 - "Responsibility of Charity Trustees" which is a useful reference document. A charity may also be unincorporated (see below).
- 21** The duties of charity trustees can be summarised as follows:
- Trustees must take care to act in accordance with the charity's trust deed or governing document and to protect the charity's assets i.e. act to ensure that the people the trust is held for benefit. They are also responsible for compliance with the Charities' Acts and the Trustee Act 2000.
  - Trustees must not make a private profit from their position. They must also perform their duty with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals and in relation to investment matters.
  - Charitable trustees must ensure that the information relating to the trust and trustees is registered with the Charity Commissioners and that annual accounts and returns are completed and sent.
  - If charitable income exceeds £10,000, the letters, adverts, cheques etc must bear a statement that the organisation is a registered charity.
  - Trustees are under a duty to ensure compliance with all relevant legislation, for example, in relation to tax and health and safety.

## **Unincorporated Organisations**

- 22** Groups that are not limited companies or another form of separate legal body may be "unincorporated associations" which have no separate identity from their members/owners. The rules governing the members/owners' duties and liabilities will (or should) be set out in a constitution, which is simply an agreement between members as to how the organisation will operate. Usually the constitution will provide for a Management Committee to be responsible for the everyday running of the organisation. Management Committee members must act within the constitution and must take reasonable care when exercising their powers.
- 23** If you become involved in the administration of an unincorporated body, you need to be aware that, as the body has no separate corporate status, any liabilities will fall upon the members personally. This means that if something goes wrong and the organisation is sued, the members/owners personal assets are at risk – they cannot stand behind a company or other body which gives them some protection.
- 24** You need to be very careful about the risk of personal liability and the extent to which this has been covered by insurance arrangements (either arranged by the organisation itself or by the Council or by indemnities - see below).

## **Conflicts of interests and bias**

- 25** Your terms and conditions of employment with the council refers to the avoidance of conflicts i.e. circumstances where your personal interests or involvement might be in conflict with your role as an officer. JNC Terms provide that "He or she shall not subordinate his or her duty (as an employee of the council to his or her private interests or put himself or herself in a position where his or her duty and private interests conflict."
- 26** Accordingly, since some conflict of interest is inevitable, the officer can only continue to act as an officer on this matter if the authority specifically approves such continued involvement. You should therefore ensure that, even though the Council has asked you to be involved in the outside body, that this matter is formally recorded on the your personnel file with a record of the Council's approval for the your continued involvement.
- 27** Officers are often asked to serve on outside bodies in which the Council has an interest (perhaps as a part owner of a Joint Venture Company or as the giver of major grant funding) because there is a view that this will "represent and protect" the Council's interest.
- 28** However, it is important to be clear that when acting on the outside body you owe your duty to that body. For example, as a company director you are required by Section 172 of the Companies Act 2006 to promote the best interests of the company and that duty cannot be waived by the company. You will also be under a duty under Section 175 to avoid conflicts of interest (although that can be waived by the company).
- 29** This means that it is not accurate to describe the role of the Council appointed Director or trustee on an outside body as "protecting the Council's interests".
- 30** Therefore, whenever there is an issue on which the outside body and the Council hold different views (which could well be the case from time to time) the Director will be in a very difficult position - indeed virtually impossible to reconcile.
- 31** Care must therefore be taken as to who is best placed to serve on the specific outside body - It is perfectly possible for the Council to appoint an officer as a director/trustee to bring relevant expertise and knowledge to the running of the organisation and also have an inside track on what is going on in the company. Many authorities and outside bodies work effectively in this way. But whoever is appointed cannot be a "representative" of the Council and the Council should state that in making the appointment, it recognises that the officer must, when acting as a director/trustee of the outside body act in the best interests of the company.
- 32** It should therefore be the position that any officer asked to participate in an outside body as part of their duties should not be an officer who will have significant involvement with the outside body wearing the "council hat" e.g. as major client for the delivery of services or as decision maker on grants.

## **Confidentiality**

- 33** You are likely to receive confidential information both in your capacity as an officer of the council and as a member or member / trustee / officer / director of the outside body.

- 34** If you are given confidential information as an officer of the council, you would be in breach of your contract of employment if you disclosed that information outside the Council except in the following very limited circumstances –
- Where the person to whom the information belongs agrees to disclosure;
  - Where you are required by law to disclose it, for example by an order of a court of law;
  - To take legal advice on the confidentiality of the information; or
  - Where the disclosure is made in accordance with the Council's Whistle-Blowing Code
- 35** If you disclose confidential information which you have received as a trustee of a charity or as a director of a company, you can be removed from that position and will be personally liable to the charity or the company for any loss which you have caused.
- 36** If you receive confidential information as an officer of the council which would benefit or disadvantage an outside body of which you are a member / trustee / officer / director, or if you receive confidential information as a member / trustee / officer / director of an outside body and that information would benefit or disadvantage the Council, that is clear evidence that there is a serious conflict of interest between those positions. Unless the outside body has acknowledged that you are there as a representative of the Council and will be reporting back to the Council, you should certainly not participate in any decisions where you have such relevant confidential information, and you should seriously question whether you can reasonably continue to hold both posts.

### **Gifts and Hospitality**

- 37** As an officer of the council, you must not receive any side benefit, and must disclose to the authority any gift or hospitality which you receive as a consequence of being an officer of the council. Whilst gifts and hospitality of relatively small value are normally not a problem, but can give rise to an impression that you may be open to improper influence, especially when they come from someone who has business with the Council, such as a contractor, someone who is bidding for a contract, or applying for planning permission. If you accept a gift or hospitality as an inducement or reward from anything that you do as an officer of the council, knowing that to be improper, it can amount to the criminal offence of corruption.
- 38** As a trustee of a charity or a director of a company, you must not obtain any private benefit in connection with your position other than any proper salary or allowances received from the charity or the company. If you do receive such a gift or hospitality, you will have to disclose it to the charity or company, and may be liable to the charity or the company for any such private benefit.
- 39** If you receive any gift or hospitality in your role as a member / trustee / officer / director of an outside body which you have been appointed by the Council, strictly you receive that gift or hospitality as a member / trustee / officer / director of that outside body and not as an officer of the council, but the council requires you to disclose any significant gift or other benefit which you receive in consequence of an outside appointment.

### **Indemnities**

- 40** If you agree to act as a member / trustee / officer / director of an outside body, you can incur personal liability, as described in this advice note. The real danger areas are –
- as a director of a company which becomes insolvent;
  - as a member of an unincorporated association; or



- if you fail to apply yourself as a trustee of a charity.

A company can take out insurance to cover any liabilities which its directors incur (except for criminal conduct). A charity and an unincorporated association normally cannot take out such insurance. So, if you are appointed to an outside body, you should ask them whether they have insurance to cover any liabilities which you might incur.

- 41** It is possible in some circumstances for the council to indemnify you in respect of any liabilities which you may incur in acting on behalf of the council on an outside body (other than liabilities arising from criminal activity on your part). If the council did so indemnify you, you would still be personally liable, but the council would then re-imburse any losses which you suffered. The council can then insure its liability to re-imburse you, or can provide you with insurance so that you can reclaim any losses which you suffer from the insurer. The council currently does not provide such an indemnity or insurance but may consider requests for such an indemnity or insurance on a case to case basis. Please speak to the Monitoring Officer if you have any cause for concern that an outside body with whom you are involved is getting into difficulty or you have any indication that you might be getting involved in potential personal liability.

### **Involvement and Reporting**

- 42** Officers appointed to an outside body should ensure that they take a proper role in the management and governance of that body. This will include attending meetings regularly and being familiar with issues relating to that body.
- 43** It is recommended that an officer appointed as the Council's representative should consider the need to make reports to the Council on the progress being made by that body and on any issues which the Council should consider.

### **Further Advice**

- 44** Relationships between the Council, outside bodies and the Council's representative can be complex. In any case of dispute or difficulty, advice should be sought from the Clerk or Secretary of the organisation, who can then take advice from professional advisors where necessary.
- 45** If you are concerned about the position you are finding yourself in as an officer on an outside body, please do contact the Monitoring Officer for further advice.