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## **MONITORING OFFICER PROTOCOL**

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### **1.0 THE MONITORING OFFICER**

1.1 The Monitoring Officer is responsible for ensuring that the Council and its Members act lawfully, do not cause maladministration, and comply with the Code of Conduct for Members. The Monitoring Officer is the Council's primary source of advice on all legal issues, and to Members on their legal obligations, but he/she also has specific statutory duties, such as investigating complaints of Member misconduct and making public report to the Council in cases of illegality. There is an inherent potential conflict between the Monitoring Officer role as a Legal Advisor and the fact that, on occasion, he/she may have to comply with statutory duties in respect of illegality. The purpose of this protocol is to enable Members to make 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 his/her functions.

### **2.0 INTRODUCTION**

2.1 The Council recognises that an effective Monitoring Officer, positively engaged in the discharge of the Council's business, is essential to the effective running and sound corporate governance of the Council.

2.2 Section 5(1) Local Government and Housing Act 1989 requires the Council to appoint an Officer as the Council's Monitoring Officer and gives that Officer personal responsibility:-

- to report on actual, and anticipated, illegality within the Councils;
- to report cases where the Ombudsman has found maladministration on the part of the Council;
- to maintain the Register of Members' Interests; and
- to administer, assess and investigate complaints of Members' misconduct.

2.3 The Council has extended the functions of its Monitoring Officer beyond these 'statutory functions' above, and their functions are set out in paragraph 5 below.

2.4 The law does not prescribe exactly how the Monitoring Officer is to carry out these functions. Therefore, this protocol describes the manner in which the Council expects the Monitoring Officer to discharge these functions and how it expects Officers and Members to co-operate with the Monitoring Officer in order to enable him/her to discharge these functions effectively.

### **3.0 APPOINTMENT**

- 3.1 The Monitoring Officer is appointed by Council and is the Council's Senior Legal Officer and Solicitor to the Council.
- 3.2 The Monitoring Officer is employed by Adur District Council but also seconded to Worthing Borough Council to enable him/her to act as Monitoring Officer for both Adur District Council and Worthing Borough Council.
- 3.3 Where the Monitoring Officer leaves the employment of Adur District Council, he/she automatically ceases to be the Monitoring Officer for both Councils. The Council may appoint an Officer as Interim Monitoring Officer, pending a permanent appointment.

### **4.0 PERSONAL RESPONSIBILITY**

- 4.1 The Monitoring Officer is required to carry out the statutory functions of their post personally, with the exception that:-
- the Monitoring Officer will nominate a member of staff as Deputy Monitoring Officer, with power to act as Monitoring Officer where he/she is unable to act as a result of absence or illness; and
  - in respect of the obligations relating to alleged breaches of the Members' Code of Conduct, the Monitoring Officer may arrange for any person to perform all or any of his/her functions, for example by delegating internally or by instructing an external lawyer to conduct a particular investigation.
- 4.2 Whilst the statutory functions are personal to the Monitoring Officer, he/she may arrange for any member of staff to assist him/her in the discharge of any non-statutory functions.

### **5.0 FUNCTIONS**

The functions of the Monitoring Officer are as follows:-

#### **5.1 Statutory Functions**

- 5.1.1 To report to the Council in any case where he/she is of the opinion that any proposal, decision or omission by the Council or any of its Committees, Sub-Committees or Joint Committees, or any Member or Officer of the Council, has given rise to, or is likely to give rise to any illegality, in accordance with Section 5(2)(a) Local Government and Housing Act 1989.
- 5.1.2 To report to the Council 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 Council,

or any Member or Officer of the Council has given rise to maladministration or injustice, in accordance with Section 5(2)(b) Local Government and Housing Act 1989.

5.1.3 To maintain the Register of Members' Interests in accordance with Section 81(1) Local Government Act 2000.

5.1.4 To administer, assess and investigate complaints referred to him of allegations of breach of the Members' Code of Conduct, in accordance with the Localism Act 2011.

## **5.2 Non-Statutory Functions**

5.2.1 To investigate any proposal, decision or omission by the Council or any of its Committees, Sub-Committees or Joint Committees, or any Member or Officer of the Council, which he/she has reason to believe may have given rise to, or is likely to, or would give rise to:-

- illegality;
- maladministration;
- failure to observe the Members' Code of Conduct.

5.2.2 To act as the Principal Legal Advisor to the Councils' Joint Governance Committee.

5.2.3 To act as Principal Advisor to the Sub-Committees of the Councils' Joint Governance Committee when dealing with allegations of breach of the Members' Code of Conduct.

5.2.4 To provide advice to Members on the Code of Conduct for Members and local protocols adopted by the Council.

5.2.5 To monitor and uphold the Constitution.

5.2.6 Responsibility for the managing of complaints from the Commissioner for Local Administration in England and whistleblowing functions of the Council.

5.2.7 Appointment as Proper Officer for the Data Protection Act 1998, the Freedom of Information Act 2000 and the Regulation of Investigatory Powers Act 2001.

5.2.8 To consult regularly with the Chief Executive, the Chief Finance Officer and Internal Audit to identify areas where the probity of the Council can be improved or better protected and to take appropriate actions.

5.2.9 To investigate any application for dispensation from a Member and to report and recommend to the Councils' Joint Governance Committee as appropriate.

5.2.10 To ensure that Members of the Council 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 Council.

5.2.11 To report to the Councils' Joint Governance Committee, and to the Council, on the resources which he/she requires for the discharge of his/her functions.

5.2.12 To report to the Councils' Joint Governance Committee on the performance of his/her functions and to make any recommendations which would better enable those functions to be performed.

## **6.0 ADVICE AND DECISIONS**

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

### **6.1.1 Advice**

In a number of instances the Monitoring Officer acts as advisor to the Council, or to individual Members. For example, a Member may seek advice as to whether they have a disclosable pecuniary interest in a matter coming before a Committee. In such cases, the Monitoring Officer will provide such advice, but ultimately it is for the individual Member to take his/her own decision as to his/her conduct in the light of that advice. Where a Member's enquiry discloses a wider issue, the Monitoring Officer may decide that it is appropriate to make recommendations to the Council, in order to avoid a repetition of such difficulties.

### **6.1.2 Decisions**

In other cases, where the proposal, action or omission would cause the Council to act unlawfully, the Monitoring Officer may be required by statute to take a decision as to whether there is, or would be, any illegality on the part of the Council, or of any Member or Officer of the Council, and to decide whether he/she is required by statute to make a report to the Council which would have the effect of suspending the implementation of the action, or decision, until the report has been considered.

### **6.1.3 Advice and Decision**

The categories of advice and decisions are not mutually exclusive. In some instances the conduct of a Member could for example give rise to both a failure to comply with the Code of Conduct for Members and an illegality on the part of the Councils. In some cases the Monitoring Officer may be obliged to advise a Member whilst also being required to take action as Monitoring Officer to address an illegality.

## **7.0 SEEKING THE ADVICE OF THE MONITORING OFFICER**

7.1 It is recognised that the Monitoring Officer will be most effective if he/she is able to advise on any issue at an early stage of policy formulation or implementation. Accordingly, Officers and Members of the Council should

routinely inform and consult the Monitoring Officer in respect of new policy proposals and action programmes.

## **7.2 Advice on legality and maladministration**

- 7.2.1 Members and Officers of the Council may consult the Monitoring Officer in confidence in respect of any proposal, decision or omission.
- 7.2.2 Wherever possible, the Monitoring Officer will seek to avoid any illegality or maladministration by identifying alternative or legitimate means of achieving the objective of the proposal, decision, act or omission or by rectifying any deficiency.
- 7.2.3 The Monitoring Officer will only need to make a report public on the matter if the proposed decision, act or omission were, in his/her 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.
- 7.2.4 Where the Monitoring Officer is consulted by a Member in respect of possible illegality or maladministration in any proposal, action or omission of the Council (as opposed to of the Member making the enquiry) the Monitoring Officer shall advise the Council's Political Group Leaders and the relevant Committee Chairman that he/she has been so consulted and the advice which he/she has given.

## **7.3 Advice on the Code of Conduct**

- 7.3.1 The Monitoring Officer is the primary source of advice for all Members on the Code of Conduct for Members and on local protocols.
- 7.3.2 Any Member, irrespective of political party, can seek the confidential advice of the Monitoring Officer as to his/her own position. Where the Monitoring Officer is so consulted, and subject to any conflict of interest with the Council, they will seek to provide prompt advice to the Member concerned as to whether, in their opinion, the action or proposed action would constitute a failure to comply with the Members' Code of Conduct. Where he/she is so consulted by a Member about their own conduct, the Monitoring Officer will not disclose the fact of consultation or the advice given unless required to do so by law or as part of an investigation into an alleged breach of the Members' Code of Conduct.
- 7.3.3 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. Such enquiry should be made in writing to ensure that advice is given on the correct details. Members are encouraged to consult the Monitoring Officer before considering whether to make a formal complaint of an alleged breach of the Code. The Monitoring Officer may make enquiry of the Member in respect of whom the enquiry is made before providing such advice.

## **8.0 INVESTIGATION**

### **8.1 Preventative Investigation**

Prevention is better than cure and the Council expects the Monitoring Officer to investigate matters which give him/her concern as to possible illegality, maladministration or breach of the Code of Conduct for Members. This would arise when the Monitoring Officer receives information which raises the possibility that a proposal, action or omission of the Council or any of its Committees, Sub-Committees or Joint Committees, or any Member or Officer of the Council, is or would be unlawful, or give rise to maladministration and injustice, or amount to a breach of the Code of Conduct for Members. In such cases, the Council expects the Monitoring Officer to investigate the matter and determine whether the proposal, action or omission, actually is or would be unlawful, or give rise to maladministration or injustice, or amount to a failure to observe the Code of Conduct for Members, and to take the appropriate action.

- 8.2 Where the Monitoring Officer determines that the proposal, action or omission is, or would be, a failure to comply with the Code of Conduct for Members, he/she shall advise the relevant Member accordingly. If appropriate, the Monitoring Officer could carry out an assessment of the matter, investigate as appropriate and bring the matter to the attention of the Councils' Joint Governance Committee in accordance with the Standards Procedure Rules.

### **8.3 Established Procedures**

Where the Monitoring Officer receives a complaint that a proposal, action or omission is unlawful or constitutes maladministration, and the Council already operates an appeal process for resolving such matters, the Monitoring Officer may deal with the matter by ensuring that the established procedure is followed. He/she may also intervene in such procedure to identify that the particular matter potentially gives rise to illegality or maladministration and injustice.

- 8.4 In cases where the Monitoring Officer determines that the proposal, act or omission is not unlawful, he/she shall advise any Member or Officer concerned of his/her determination. Where the Monitoring Officer determines that the proposal, action or omission is, or would be, unlawful, he/she shall, where possible, seek to agree an alternative and lawful course of action. The Monitoring Officer will then advise the complainant of their determination and of any agreed alternative course of action, which could include an offer in settlement of any injustice suffered by any person and/or the Monitoring Officer making a statutory report.

### **8.5 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, he/she shall respond to the complainant and advise any Member or Officer concerned of the determination.

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

## **8.6 Failure to observe the Code of Conduct for Members**

The Monitoring Officer will deal with assessments and determinations of allegations of failure to observe the Code of Conduct for Members in accordance with the Standards Procedure Rules in Part 4 and the Code of Conduct for Members.

## **9.0 LOCAL RESOLUTION**

9.1 Where the Monitoring Officer receives a complaint of illegality, maladministration or failure to observe the Code of Conduct for Members, he/she shall, if appropriate, seek to resolve the matter amicably by ensuring the situation is as far as possible rectified, informing the complainant of the resolution and dealing with any potential compensation payment or apology. However, it is recognised that the Monitoring Officer may determine that the matter is not appropriate for local resolution or incapable of being so resolved, or is of such seriousness that a statutory report is the only appropriate response.

## **10.0 REPORTING**

### **10.1 Illegality**

Where the Monitoring Officer is of the opinion that an unlawful action or omission has already occurred, or that the Council, its Committees, Sub-Committees or Joint Committees, or any Member or Officer seeks 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 (Section 151 Officer), prior to determining whether to make a formal report under Section 5 of the Local Government and Housing Act 1989.

To avoid a separate statutory report, the Monitoring Officer shall be entitled, if they wish, to add their written advice to the report on the matter by any other Officer of the Council, and/or to provide oral advice at any meeting of the Council.

## **10.2 Maladministration**

Where the Monitoring Officer is of the opinion that maladministration and injustice have already occurred, or where the Council or any Committees, Sub-Committees, or Joint Committees of the Council, or any Member or Officer of the Council, 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 (Section 151 Officer) before determining whether to make a written report to the decision-maker. The Monitoring Officer shall be entitled to add his/her written advice to the report on the matter by any other Officer of the Council, and/or to provide oral advice at any meeting of the Council.

## **10.3 Failure to observe the Code of Conduct for Members**

The Monitoring Officer will deal with allegations of failure to observe the Code of Conduct for Members in accordance with the Council's Code of Conduct for Members and the Standards Procedure Rules.

## **11.0 ADVICE TO INDIVIDUAL MEMBERS**

11.1 Wherever possible, the Monitoring Officer will provide advice to individual Members to support them in the discharge of their responsibilities as a Councillor. The Monitoring Officer will not however provide advice to a political group or party or to a Member making an enquiry on their behalf.

11.2 The Monitoring Officer is employed by the Council and owes his/her primary responsibility to the Council, rather than to any individual Member or group of Members. Consequently, where the Monitoring Officer considers that providing advice to a Member on a matter which is incompatible with their role as advisor to the Council, or any action they may have to take on behalf of the Council, the Monitoring Officer may decline to provide such advice but could, at their discretion, secure such advice from an independent source at the Council's expense.

## **12.0 MONITORING AND INTERPRETING THE CONSTITUTION**

12.1 The Monitoring Officer will monitor, and review on a regular basis, the effectiveness and operation of the Council's Constitution so as to ensure that the aims and principles of the Constitution are given full effect and that the Constitution enables the Council to discharge its functions effectively.

12.2 In order to conduct such monitoring and review, the Monitoring Officer may:-

- consult any Member and/or Officers and other organisations and persons having dealings with the Council;
- observe meetings of Members and/or Officers at any level;



- undertake an audit trail of a sample of decisions;
- record and analyse issues raised with him/her by Members, Officers, the public and other relevant stakeholders;
- compare practices in this Council with those in other comparable authorities, or national examples of best practice; and
- consider any relevant reports and recommendations of the District Auditor and other regulatory agencies.

12.3 The Monitoring Officer shall consult the Chief Executive and the Chief Finance Officer periodically, highlighting areas where there is potential to improve the Constitution or its effectiveness, before determining whether to report to the Council on any necessary changes.

12.4 The Monitoring Officer will maintain an up-to-date copy of the Constitution and ensure that it is accessible to Members, Officers and the public and will make such amendments to the Constitution as are necessary to reflect changes of fact and law and decisions of the Council. The Council shall retain the power and responsibility to consider and determine policy changes to the Constitution.

12.5 The Monitoring Officer shall be responsible for advising on the interpretation of the Constitution and in particular, shall determine whether a proposed decision is contrary to the policy framework or the approved budget and whether a proposal is sufficiently urgent to merit the use of the statutory urgency provisions or the Chief Executive's urgency powers.

### **13.0 RESOURCES**

13.1 The Council is required by statute to provide the Monitoring Officer with the resources which he/she considers are necessary for the fulfilment of his/her statutory duties.

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

- the right of access to all documents and information held by or on behalf of the Council;
- the right of access to any meetings of Members or Officers of the Council, although this does not extend to any meetings held by any political party or group;
- the right to require any Officer or Member of the Council to provide an explanation of any matter under investigation;

- a right to report to the Council, the Joint Governance Committee and to the Executive, including a right to present a written report and to attend and advise verbally;
- the right to require the assistance of any Officer of the Council and to delegate to that Officer any other powers of the post of Monitoring Officer;
- a power to agree a local resolution of any complaint of maladministration or breach of the Council's Code of Conduct for Members, in consultation with the Chief Executive and Chief Finance Officer, including the power to agree a compensation payment of up to £5,000 in any particular case, and subject to subsequent report to the Joint Governance Committee for information;
- the right of access to the Chief Executive and the Chief Finance Officer;
- the right after consultation with the Chief Executive and the Chief Finance Officer, to notify the Police, the Council's auditors and other regulatory agencies of his/her concerns in respect of any matter and to provide them with information and documents in order to assist them with their statutory functions;
- the right to obtain legal advice at the Council's expense, whether internally or from an independent external solicitor or barrister, on any matter and to be provided with sufficient financial resource to enable him/her to do so.