

## Report of the Director of Resources

### Report to the Scrutiny Board (Resources and Council Services)

Date: 27 April 2015

Subject: External publication of employee interests for High Risk posts

Are specific electoral Wards affected? If relevant, name(s) of Ward(s): n/a	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: n/a Appendix number: n/a	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

### Summary of main issues

Scrutiny Board (Resources and Council Services) of 24 November 2014 asked that we give some further assurances on officer declarations of interests. Specifically they also asked that the council considers:

- Governance on the release of information by officers to third parties.
- Options on how we might better manage situations where staff leave the Council and take up positions with employers where there may be conflicting interests between past and future roles, including exploring the use of restricted covenant agreements.

### Recommendations

It is recommended that the Scrutiny Board:

1. Consider and agree the suggestions that certain committees and meetings are appropriate for verbal declarations of interest by officers, (in addition to Planning decision meetings), and agree that this would be subject to Trade Unions consultation.
2. Note the contents of this report and agree the proposals regarding measures to limit risks where council staff take up employment with 'competitor' organisations.
3. Agree the proposals for communication of officer responsibility for handling confidential information, with an emphasis on release of information to ex council staff
4. Agree that breach of confidentiality cases arising are reported to Chief Officer HR.

## **Purpose of this report**

- 1.1 This report responds to the Scrutiny Board (Resources and Council Services) of 24 November 2014 request that we give consideration to the term 'senior officer' in the Register of Interest scheme.
- 1.2 It also suggests where officer declaration of pecuniary interests should be made at council committees.
- 1.3 The report considers the options for placing restrictions on future employment by considering restricted covenant agreements and other governance means to protect confidential information in the council being accessed by third parties.

## **2 Background information**

- 2.1 The Scrutiny Board (Resources and Council Services) in 24 November 2014 asked that the following points be explored regarding access to officers' declaration of interests and use of council information:
  - 2.1.1 Whether the definition for 'senior officer', currently set at Chief Officer level and above was appropriate, and whether less senior officers, also in a position of influence, should be within scope.
  - 2.1.2 The scope for adding to the 'Declaration of Disclosable Pecuniary Interests' by Members item on formal committee agendas to also include declarations of relevant interests by officers.
  - 2.1.3 The scope for introducing limitations regarding employees leaving the authority and moving into organisations which might have a financial and/or contractual relationship with the Council.
  - 2.1.4 The scope for strengthening the advice that former employees should not be afforded preferential access to information by former colleagues.

## **3 Main Issues**

### **3.1 Definition of role for declaration of interest**

- 3.1.1 In the Annual review of declaration of interests, consideration is given by Directors of the role undertaken not the grade, which should be the driving principle in declaration of interest.
- 3.1.2 There has been a Directorate review of all roles for declaration of interests as part of the current annual exercise. These new roles have now been identified and the declaration of interests forms were sent to all staff on the new lists during February 2015.

### **3.2 Disclosure of officers pecuniary interests on formal committee agendas.**

- 3.2.1 Extending the declaration of interests at committees to officers could be achieved by introducing this in formal items on Executive Board and in committees appointed

by full council. However this is subject to having first consulted with Trade Unions on this proposal.

3.2.2 Following TU consultation, the wording on the declaration of interest item on these agendas could be changed as follows to include officers:

**“Declaration of Interests**

Members and Officers presenting to or advising the committee are asked to disclose or draw attention to any disclosable pecuniary or other relevant interests for the purposes of Section 31 of the Localism Act 2011, paragraphs 13 – 16 of the Members’ Code of Conduct and the requirements set out in the Officers Code of Conduct.”

3.2.3 The specific Committees which would be included in the changes would be:

- Executive Board
- All Scrutiny Boards
- Standards and Conduct Committee
- Corporate Governance and Audit Committee
- General Purposes Committee
- Community Committees
- Health and Wellbeing Board
- Employment Committee
- Member Management Committee
- Licensing Committee
- Licensing Sub-Committee

### **3.3 Employment by competitor organisations**

3.3.1 Subject to the Board view that TU consultation is undertaken, consideration has been given to the introduction of ‘restrictive covenants’ for employees leaving the authority and moving into organisations which might have a financial/contractual relationship with the Council. A brief summary of the main points is provided at Appendix 1

3.3.2 We already have a confidentiality agreement and restriction on employment within Chief Executive and Director employment contracts. A restricted covenant agreement could be introduced for other new recruits as part of their contract when they join. Otherwise we would need a strategy with a relevant and proportionate requirement to amend existing contracts.

3.3.3 In introducing restrictive covenants we would need to consider what we are seeking to prevent and why. It may present challenges for this to be implemented where there are large numbers of staff working on multiple contractual matters with many external parties.

3.3.4 Remedies are difficult to achieve even in the private sector, and could incur significant costs. Competition may be a factor in our traded services, but this would apply to a minority of management roles. It is also necessary to recognise that with

Open Data requirements and public procurement practices large amounts of information is already in the public sphere.

3.3.5 Given these circumstances restrictive covenant agreements may be seen as a deterrent factor from using information on leaving the council, but if terms were breached it would be potentially difficult to enforce these. The introductions of these agreements in a contract may deter applicants from taking up job opportunities in the council as it may be seen as restrictive and anti-competitive to us as a potential employer, or as a sign of distrust.

3.3.6 Town planners are already bound by the RTPI (Royal Town Planning Institute) Code of Conduct which states that planners moving to private employment should not use information which was gained in their employment to benefit themselves or others unless the information was in the public domain.

3.3.7 Given this our proposals would be:

- Rely on general code of conduct in personal duty regarding release of confidential information gained while in employment.
- Consider option to have lengthier notice periods in circumstances where there is an overt risk of using information in new employment, by revising duties for the period of notice.
- In specific circumstances consider the use of compromise agreements to place restrictions on use of information.
- Stress Copyright Intellectual Property Rights (IPR) options.
- Overall do some more work with directorates to understand where there may be financial or contractual risks so there is a proportionate position.

### **3.4 Access to confidential information**

3.4.1 There was a concern raised by members that officers who have left the council are using their knowledge to access information, by directly contacting council staff who they know will have access to information. Although information may be available to former employees through Freedom of Information (FOI) or other access to data through the Leeds Council website, it was felt that these former employees were afforded preferential access to information by contacting people directly and informally.

3.4.2 There is an issue here as a member of the public would not normally be able to contact most of our officers as most officer telephone details are not publicly available. The Employee Code of Conduct is explicit in reminding officers of their duty and responsibility regarding confidentiality of information. An extract from the Code of Conduct for officers is provided at Appendix 2.

3.4.3 Our normal route to reinforce existing policy and procedures is to use our staff communication routes of Essentials and Insite to highlight the specific issue that we would wish to raise. A link would be provided to our Officers Code of Conduct with the theme to ensure that when discussing information it is clear that the person you are

speaking to is still an employee of the council. This can be achieved by only responding to current council e-mail addresses and telephone numbers.

3.4.4 Information Asset Owner training is going to be rolled out this year by the Information Governance team. This would give another opportunity to reinforce the messages of officer duty in handling confidential information. Each Information Asset Owner will be a Head of Service or Chief Officer and it will be their responsibility and duty to ensure officers in their services are made aware of their necessity to safeguard information. Specifically this can include:

- Circumstances where a personal friend wants a favour
- Appreciating that information is as much an asset as physical property
- Staff understanding what is confidential
- Building on what we already have done in terms of training.

#### **4 Consultation and Engagement**

4.1 There has been some consultation with Legal Services and Information Governance in reaching the conclusions of the report. Trade Union consultation would be required to introduce the changes to declaration of interest for officers at formal committees.

4.2 The option of using Restrictive Covenants would need further consultation with Officers and Trade Unions as it would be a change of contractual terms.

#### **5 Equality and Diversity / Cohesion and Integration**

5.2 There are no significant issues.

#### **6 Council policies and City Priorities**

6.1 The policy and procedure of handling confidential information is outlined in the existing policy as part of the officer code of conduct.

#### **7 Resources and value for money**

7.1 There are no resource issues in relation to accessing and keeping the register of interest. The use of Restricted Covenants could incur costs in the implementation and on appropriate legal advice.

#### **8 Legal Implications, Access to Information and Call In**

8.1 As stated at 7.1 there may be legal implications if Restrictive Covenants were considered and challenged.

8.2 The report outlines proposals on how to restrict access to council information by third parties, specifically former employees

#### **9 Risk Management**

9.3 There are no significant risks in the proposals and recommendations of the report

## **10 Conclusions**

- 10.1 The exercise for identifying roles for register of interests has now been completed and signed off by Directors.
- 10.2 Pecuniary interests declared by officers at the appropriate panels and committees will be introduced where deemed necessary, i.e. according to agenda items.
- 10.3 The use of restrictive covenants could not guarantee people using their knowledge and information gained in council service for their own personal gain. Unless the council can prove that it would damage a business interest, it would be difficult and expensive to pursue a remedy.
- 10.4 However there may be future consideration if the council is in a position of competitive trading, in which case the council could perhaps prove that there is damage to business and present a case for loss of earnings
- 10.5 We have policies in place already for handling confidential information, which will be reinforced with future training.

## **11 Recommendations**

It is recommended that the Scrutiny Board:

- 11.1 Consider and agree the suggestions that certain committees and meetings are appropriate for verbal declarations of interest by officers, (in addition to Planning decision meetings), and agree that this would be subject to Trade Unions consultation.
- 11.2 Note the contents of this report and agree the proposals regarding measures to limit risks where council staff take up employments with 'competitor' organisations.
- 11.3 Agree the proposals for communication of officer responsibility for handling confidential information, with an emphasis on release of information to ex council staff.
- 11.4 Agree that breach of confidentiality cases arising are reported to Chief Officer HR.

## **12 Background documents<sup>1</sup>**

None

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<sup>1</sup> The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.

## **This note summarises issues in using Restricted Covenant Agreements, covering main points.**

Signing up – choices

If you rely on one size fits all it is likely that they won't be enforceable. To be enforceable you must prove they are:

- Reasonable
- Necessary to protect legitimate business issues
- Of a duration no longer than necessary to protect these interests

### **Reasonableness**

A restriction preventing a worker from soliciting your business or clients is more likely to be imposed than one which simply prohibits contact with any customer or clients.

### **Legitimate Business Interests**

Working in an industry where they could damage your business by using information such as trade secrets, client databases, details of pricing structures, tendering strategies.

Essentially any information that could cause serious damage to your business if used to provide advantage to new employer. Also depends on reasonableness and time period – typically no more than 6 months.

### **Termination of contract**

If contract is terminated by employer, or by ELI etc, the restrictive covenant would be unlikely to be enforced. It normally only applies to resignations.

### **Deterrent factor**

### **3 types of common Restrictive Covenants**

#### **1. Non- compete**

This type prevents a person from directly competing or working for a competitor usually within a certain area and/or a certain timescale

#### **2. Non-dealing**

This type prevents a person from working for your customers, clients and suppliers for a specific period of time e.g. 6 months.

#### **3. Non – poaching**

This type prevents a person from enticing staff away from the business, again for a period of time e.g. 6 months

## **Confidential Information**

While there is no specific restrictive covenant that deals with confidential information, an employee is under an implied duty not to use confidential information following termination of employment whether by resignation or dismissal.

Confidential information is usually defined in a contract of employment but typically includes client information, customer accounts, price lists and quotes for tender.

However you can't prevent someone from using any skills or knowledge gained while working for you.

## **Remedies**

If you believe an employee has breached a restrictive covenant, you can seek an injunction, including an interlocutory injunction pending a full trial.

If at trial the court is satisfied that there is a serious question to be tried, will consider:

- Whether damages would be sufficient remedy (could employee pay?)
- Whether more harm will be done by granting or refusing injunction
- Any delay in making the application
- Conduct and dealing of the parties

When you claim damages you will need to show some loss resulting from the breach. Normally loss of profits on contracts or opportunities.

## **Confidentiality Clauses**

Confidentiality Clauses are governed by common law and specific obligations expressed in the contract. e.g. we have a clause in Adults Social Care specifically for information shared with Health Services. Common Law duty of fidelity states every employee is required to protect confidentiality of trade secrets (information which if used by a competitor could cause real and significant damage to the owner of the information, and which the owner has tried to keep secret) However mere confidential information is not protected after employment.



## Appendix 2

### **Honesty, Integrity and Openness (extract from Code of Conduct for Officers)**

- You must treat information with the appropriate level of confidentiality.
- You must work in the best interests of the council
- It is not appropriate for you to use your official position, or information you gain from work which is not available to other members of the public for personal gain or to the detriment of the council, or its policies.
- You must not misuse your official position or information acquired in the course of your employment to further your private interest or the interests of others
- You must ensure that public funds and assets, including information entrusted to you, are only used in a responsible and lawful manner
- You must use and share information appropriately having regard to your data protection obligations
- The law requires that certain types of information must be made available to councillors, auditors, government departments, service users and the public.
- The Council itself may decide to be open about other types of information.
- However, certain information must not be widely shared. You must be aware of which information you are authorised to release and to whom. If you have any doubts as to whether or not an item of information should be released, you should politely refuse to offer the information and refer the matter to your manager(s).
- Nothing in this code can be taken as overriding existing statutory or common law obligations to keep certain information confidential, or to divulge certain information.
- You must follow the council's Information Governance Rules. Your line manager should make you aware of the council's current Information Governance rules. Following those rules you should ensure that your behaviour complies with the Data Protection Act 1998 and the Freedom of Information Act 2000.
- You must treat information with the appropriate level of confidentiality
- Of particular note is information from councillors: If a councillor gives you information, or tells you something, which is not in the documents that the public would have access to, then you should not share that any further unless the councillor gives permission, or the law requires or allows you to share the information
- You must not engage in, or otherwise be involved in, any insider dealing
- You should not use any information obtained in the course of your employment (which has not been released to the public) for personal gain or benefit. You must also not pass on such information to other people for their personal gain.
- If you are in any doubt about who can be told information you should ask a senior employee in your department. Details of how to contact Internal Audit are set out in the employee code of conduct.
- If you ask Internal Audit for advice, then the information must not be disclosed unless they have agreed that it is safe to do so.