

**Report of the Director of Resources**

**Report to Executive Board**

**Date: 14 December 2011**

**Subject: Calls for publication of employee register of interests**

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<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: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

**Summary of main issues**

1. A scrutiny inquiry is calling for publication of part of the employees' register of interests for some employees.
2. The Chief Officer, Human Resources has plans in place to comply with the recommendations one and two set out in the inquiry report, in so far as she can legally do so.
3. The Head of Governance Services will implement, in respect of recommendation three, changes to the report template as directed by the Executive Board and will endeavour to communicate these to enable early adoption by report authors.
4. The Head of Scrutiny Support and Member Development will also, at the direction of the Executive Board, arrange for the consideration of recommendation three by the Joint Plans Panel and the Licensing Committee.
5. The Head of Internal Audit will consider the most effective way of obtaining assurances that Directors are managing employee interests appropriately.

**Recommendations**

6. Executive Board are asked to adopt the proposals set out in this report.

## **1 Purpose of this report**

- 1.1 This report advises Executive Board of the results of a recent Scrutiny Inquiry into the publication of employee interests and the actions proposed as a result.

## **2 Background information**

- 2.1 For a considerable number of years some Scrutiny Boards and the Standards Committee have expressed an interest in the officer register of interests.
- 2.2 Members have noted the differences between the legal and local frameworks for Member interests and the interests of officers, particularly in regard to the requirement to publish Member interests and the absence of a similar requirement for officers.
- 2.3 For some time, it has been the position of officers appearing before those committees to explain that although there are differences between the two frameworks, there is a legal basis for treating the interests differently.
- 2.4 In particular much of the data collected in officer declaration of interest constitutes “personal data” or “sensitive personal data” within the context of data protection legislation and hence is protected from disclosure. For Members this protection is then overruled by legislation which requires publication.
- 2.5 In June 2011 the Information Commissioner handed down a decision in a matter involving Bolton MBC, which provides that certain types of officer interests for “senior staff” may be published. Bolton MBC has appealed against this decision and the result of that appeal is still pending.
- 2.6 The Scrutiny Board (Resources and Council Services) has recently finalised an inquiry into employees’ declarations of interests and made four recommendations.
- 2.7 The Director of Resources has put forward proposals in this report to respond to the Scrutiny Board recommendations.
- 2.8 Both the Information Commissioner’s decision and the Inquiry report are attached for the information of Members.

## **3 Main issues**

### **3.1 Scrutiny Board Recommendations**

- 3.1.1 The scrutiny inquiry report has four recommendations which can be summarised as:

One: Officers to establish, through negotiating appropriate changes to the Employee Code of Conduct, a publicised officer register of interests, with first publication of the register to take place as soon as possible after the ‘Bolton’ appeal has been determined. The information to be publicised, and the posts to be considered, should be based on the Bolton Council ruling, subject to officers being given the opportunity to explain any particular prejudice they might suffer as a result of publication.

Two: That, subject to the above, we work towards a publication scheme which includes “high risk” posts and other groups of staff where there is a specific justification for publication based on their particular duties.

Three: That reports to Council Committees require report authors, and those in whose name the report is written, to declare any interests they may have which may be relevant to the reports subject matter. Those officers presenting or commenting on a report in a formal meeting should also declare any interests in the same fashion that elected Members do.

Four: That internal audit obtains assurances that Directors are managing officer interests appropriately and report their findings back to Scrutiny Board.

A full copy of the inquiry report is attached as Appendix 1.

### **3.2 Scope of interests which it may now be possible to publicise**

3.2.1 The Information Commissioner’s decision notice (Appendix 2) in the Bolton case, whilst specifically couched in the terms of Bolton MBC’s employee’s register of interests, makes a clear distinction between business and personal interests.

3.2.2 The Information Commissioner has ruled that an employee’s business interests can be disclosed but specifically **excluded** disclosure of other categories of personal information. Specifically the Commissioner set out that Bolton MBC should release:

- Names
- Department
- Section
- Name and address and nature of additional business, or other employment
- Name and address of Company, firm or other body or individual of whom consultancy is undertaken and nature of the consultancy with an indication of frequency or volume of such work.
- Name and address and nature of business of each company or other body of which you are a Director, with an indication of whether it is in a paid or unpaid capacity.
- Name and address and nature of business of each firm with which you are a partner
- Name and address and nature of business of each company in which you hold shares [the Chief Officer HR intends to use a form of words to limit this requirement to exclude small shareholdings in large companies, e.g. banks.]
- Name and address of the organisation to whom you are engaged on a retainer basis and nature of the retainer

3.2.3 The intention is to publish all declared business interests for the relevant senior staff. Directors will continue to be accountable – as they are for all declared interests whether or not they are published – for ensuring that appropriate steps are taken to ensure that employees’ decision making and advice is not compromised or open to challenge on the basis of perceived conflicts of interests.

For example, someone who owns a company which provides service X should clearly be excused from any involvement in procuring a company to do X. Conversely, someone with £20 of shares in a multinational energy company is

unlikely to be seriously swayed in their assessment of who to purchase the council's electricity from.

3.2.4 This council's register of interests is not currently aligned to collect this information. Some is collected under different headings (which may include data which is not to be released) and other elements are not specifically requested at all. The Chief Officer Human Resources will ensure that the necessary changes are incorporated in the proposed review of the Employee Code of Conduct to ensure that the information to be released is collected and is clearly differentiated from other information.

### **3.3 Scope of officers whose business interests it may now be possible to publicise**

3.3.1 The Information Commissioner decision refers only to "senior" officers, noting: "...these Officers concerned are senior officers who are responsible for taking decisions which affect the community, and are responsible for budgets and the spending of public money."

3.3.2 In response to the first Scrutiny Board recommendation it is proposed to extend compulsory publication of business interests to two groups of staff:

- The top three tiers of management
- All posts which have significant decision-making powers

3.3.3 The top three tiers of management are:

- the Chief Executive
- posts which report to the Chief Executive (other than administrative posts); and
- posts which report to posts (other than administrative posts) which report to the Chief Executive

3.3.4 Posts with significant decision-making powers may be defined to include:

- Any post to which the constitution delegates authority to make Key decisions under an Executive function, or decisions of a comparable level under a Council function
- Any post to which a sub-delegation scheme delegates authority to make Key decisions under an Executive function, or decisions of a comparable level under a Council function

3.3.5 The two categories almost certainly overlap, however it is simpler to identify the first group, and it is proposed to bring this process and then add in the second category at a later stage. In addition, the publication process will need to include an "appeal" process whereby employees have the opportunity to explain any particular prejudice they might suffer as a result of publication.

3.3.6 Once complete, this would, in effect, become the list of "high risk" posts, thus complying with the second scrutiny board recommendation.

3.3.7 However, it is important to note that this would not comprise the 2135 posts referred to in the attached scrutiny report as this list currently includes a number of relatively junior posts. For clarity, the "high risk" posts would be renamed, an alternative designation of "posts with significant decision-making powers" may be used.

- 3.3.8 This would ensure that the proposed actions were in accordance with the Bolton ruling as it currently stands, be consistent with data protection law and remove the risk of legal challenge from staff *currently* listed as high risk but clearly not “senior” by any definition.
- 3.3.9 It is also worth noting that Under the Code of Practice on Local Authority Accounting the Council’s accounts are required to disclose any significant payments between the Council and any organisation or individual over which the Council’s key management personnel have a degree of control or influence. For Leeds City Council the term key management personnel has been defined as members of the Corporate Leadership Team.

### **3.4 Current status of the Commissioner’s decision**

- 3.4.1 The Information Commissioner’s decision has been appealed by Bolton MBC. It was anticipated that the appeal would be heard in October 2011, however Bolton MBC are unable to advise us when a decision will be made public. It is possible, therefore, that the basis for publishing even this element of the register for this element of employees may be overturned.

### **3.5 Practicalities of implementing recommendations**

- 3.5.1 Introducing rules making the publication of certain interests for some officers will require amendments to the employee code of conduct.
- 3.5.2 The employee code of conduct is also part of the terms and conditions of employment, and changes must be negotiated with the trade unions. These changes can be included in a review of the code which is currently in hand.
- 3.5.3 It is not possible to commit to a timescale at this point due to the uncertainties surrounding the Bolton appeal and the length of time required for discussions with the trade unions. However, all preparatory work will be undertaken once the Executive Board decision has been taken.
- 3.5.4 Recommendation three concerns the arrangements by which report authors, and officers whose name the reports have been written, might record the considerations that have been made, to determine whether or not they might have interests in the matter which is the subject of the report.
- 3.5.5 The Head of Governance Services considers that this requirement could be incorporated into the recently introduced report template (specifically section 4 dealing with Corporate Considerations) adopted by Executive Board, Scrutiny Boards, and by some Council Committees.
- 3.5.6 However, because of the quasi judicial functions of the Plans Panels and the Licensing Committee, the recently introduced template was not adopted by these Committees. The Executive Board therefore may feel it appropriate to invite both the Licensing Committee and the Joint Plans Panel to consider this recommendation within their respective remits.
- 3.5.7 Further to this, recommendation three stipulates that the requirement for report authors, etc., to declare any interests relating to reports to Council Committees. Executive Board are asked to consider whether this requirement to extended to all Key, Major and Significant Operations decisions taken by employees.

- 3.5.8 Internal audit will need to consider the most effective way of obtaining assurances that Directors are managing officer interests appropriately. This will consist of placing reliance upon the governance arrangements in place, as well as compliance testing.

## **4 Corporate Considerations**

### **4.1 Consultation and Engagement**

- 4.1.1 This report is based upon interaction with the Standards Committee, and the Scrutiny Boards for Environment and Neighbourhoods, City Development and Resources & Council Services.
- 4.1.2 This report sets out proposals for consultation with the trade unions in regard to recommendations one and two.
- 4.1.3 The matters set out in the recommendations relate to internal matters and do not require consultation with the wider Leeds community.

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

- 4.2.1 An Equality, Diversity, Cohesion and Integration Screening has been undertaken. There are no issues identified in connection with this report.
- 4.2.2 Any changes to the employee code of conduct will be subject to their own Equality, Diversity, Cohesion and Integration Screening and/or assessment.

### **4.3 Council Policies and City Priorities**

- 4.3.1 The employee code of conduct is part of the council's constitution, but may be amended under delegated authority by the Director of Resources. The Director has sub-delegated this authority to the Chief Officer, Human Resources to maintain consistency with terms and conditions of employment.
- 4.3.2 If the scope of publicising declarations were to be made contingent on delegations and sub-delegations it would be necessary to review all sub-delegation schemes to ensure there is sufficient clarity as to both (a) the posts referred to, and (b) the scope of their delegated authorities, to allow a list of posts in scope to be developed.

### **4.4 Resources and Value for Money**

- 4.4.1 The proposals will require maintenance of two separate lists in regard to the register of interests: (1) posts for which an annual return is proactively sought and (2) posts with significant delegated decision-making authority. It is anticipated that there is sufficient capacity within the HR Service to maintain two lists.
- 4.4.2 These categories are similar to, and may cause confusion with, the rules for identifying politically restricted posts, however, it is not possible to simply designate all politically restricted posts as "senior", as some demonstrably non-senior posts would be caught in scope (for example, lower graded communications staff and political assistants).

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

- 4.5.1 Even if these proposals for “compulsory” publication of some interests for some staff were included in a negotiated employee code of conduct, it would be necessary to allow individuals to request that their details be withheld where publication would be an unwarranted intrusion into the private lives of the employees concerned.
- 4.5.2 Personal data is acknowledged to fall within the protection of the right to respect for private and family life under Article 8 of the Human Rights Act 1998, and it would be unlawful for the Council to act in a way which was incompatible with that Convention rights. The Council would need to demonstrate that a decision to publish was lawful, and in particular that in doing so there was no breach of the Article 8 rights. Article 8.2 provides permits an interference on certain specified grounds, where this is both “necessary” and “proportionate”.

In certain cases, it may be possible to argue that any interference with an employee’s right to respect for their private and family life was outweighed by the “protection of the rights and freedoms of others” in the sense that there is a public entitlement to a politically neutral and otherwise unbiased officer corps.

However, it is considered that in the same way as under the data protection rules, the automatic publishing of all of the information in all declarations would be a breach of the Article 8 rights. In a similar way, if the Council limited disclosures in accordance with the Bolton decision mentioned above, it is likely this will also amount to a permitted interference with the Article 8 rights.

- 4.5.3 If the Council wished to exceed the Bolton decision by making disclosures of further categories of information collected from other groups of staff it would need to have a specific justification based on the particular roles of the individual employees concerned. Plainly, if sensitive personal data were concerned, then the Council’s justification for publication would need to be significantly stronger, and it is likely that publication could only be justified in exceptional circumstances.
- 4.5.4 This report carries a security classification of “not protected”.

## **4.6 Risk Management**

- 4.6.1 If the position in the Bolton ruling is confirmed, we may be asked to provide the information outlined under Freedom of Information legislation. Doing so would be legal – as there would be a legislative requirement to do so – but may cause discontent as it may be seen as a breach of the current employee code, and hence of the local terms and conditions of service.
- 4.6.2 Conversely, going beyond the scope of publication set out in the Bolton ruling without specific justification as mentioned above would, if it is confirmed, open the council to legal challenge and the possibility of significant fines. The Information Commissioner has recently fined a number of local authority’s amounts greater than £100,000 for significant breaches of data protection legislation.

## **5 Conclusions**

- 5.1 The Chief Officer, Human Resources has plans in place to comply with the recommendations one and two set out in the inquiry report, in so far as she can legally do so.
- 5.2 The Head of Governance Services will implement, in respect of recommendation three, changes to the report template as directed by the Executive Board and will endeavour to communicate these to enable early adoption by report authors.
- 5.3 The Head of Scrutiny Support and Member Development will also, at the direction of the Executive Board, arrange for the consideration of recommendation three by the Joint Plans Panel and the Licensing Committee.
- 5.4 The Head of Internal Audit will consider the most effective way of obtaining assurances that Directors are managing employee interests appropriately.

## **6 Recommendations**

- 6.1 Executive Board are asked to adopt the proposals set out in this report.

## **7 Background documents**

- 7.1 Information Commissioner's decision notice, ref FS50359348
- 7.2 Scrutiny Inquiry Final report Employees' Declaration of Interest dated 3 October 2011
- 7.3 Employee register of interests