

Report of the Director of Resources

Report to the Executive Board

Date: 17 July 2013

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

Public access and access by Members, to the declared interests of employees in High Risk Posts has been discussed at a number of Scrutiny Boards particularly Resources and Council Services and Housing and Regeneration.

This has already resulted in the external publication of business interests only for the top three tiers of employees in the Council.

Public access to interests declared by officers has data protection implications. This report outlines the issues which will need to be considered before information on individual employees could be made available to the public, and in particular considers the circumstances in which it would be fair and lawful for the Council to disclose information about land ownerships, shares or involvement in companies.

The report also considers how we can provide a greater level of assurance that employees are declaring relevant interests and that Directors are reviewing and taking appropriate action as the need arises.

Recommendations

The Executive Board are asked to agree the proposals contained in this report.

1 Purpose of this report

- 1.1 This report proposes some practical steps that can be taken to arrange for Members to access the register of employee interests where they demonstrate a legitimate “need to know”.
- 1.2 The report also considers the arrangements that the Council could consider putting in place to make available to the public certain interests of employees who have relevant interests relating to their decision making or advisory role.
- 1.3 The report also considers how we can provide a greater level of assurance that employees are declaring relevant interests and that Directors are reviewing and taking appropriate action as the need arises.
- 1.4 This report also considers the recommendation by the Housing and Regeneration Scrutiny Board on 26 February 2013 that:
 - There should be ‘one rule for all’ in declaration of interests for both Members and council employees.
 - That planning officers should declare no interest on planning applications
 - That planning officers declare there has been no undue influence placed on them.
- 1.5 The proposals contained within the report have been prepared to ensure that we not only comply with the expectation of Members, and Members’ legal “need to know” rights, but also with the data protection principles in the Data Protection Act.
- 1.6 The Executive Board are asked to approve the proposed process in relation to Members’ access and consider issues about wider publication of employee interests.

2 Background information

- 2.1 Following a decision by the First Tier Tribunal (Information Rights) in relation to Bolton MBC a register of business interests declared by senior officers has been compiled and published externally.
- 2.2 These business interests for Senior Officer (defined as Chief Officer level and above), are now published on open data, which means the information is available to both Members and to members of the public without having to request permissions.
- 2.3 In addition to this the Council holds information on a wider range of interests declared by employees deemed to occupy ‘high risk posts’ in terms of their role in the council and their influence on decisions e.g. on property decisions and contracts.
- 2.4 Legal Services have advised that a Member might reasonably have a “need to know” about an officer’s interests in the following circumstances. Firstly where

the Member is part of a committee or other decision-making body, so that they can assure themselves there has been no bias in any reports or advice the decision-making body has received from the officer, or which the officer may have been in a position to influence. Secondly where an officer has taken or is about to take a delegated decision on a particular matter and the Member wishes to assure themselves there has been, or will be no bias in that officer's decision. For example, a Member who is on the Plans Panel would reasonably have a need to know about land ownerships (other than home address), involvement in companies, or shareholdings that an officer has declared if that officer was making recommendations to the Panel or was involved in formulating those recommendations, so that the Member, and the Panel could assure themselves that the recommendations made were objective and unbiased. In these circumstances, a Member's legal "need to know" rights trigger an exemption from the non-disclosure provisions in the Data Protection Act. However, the Council would still need to demonstrate compliance with one or other of the fair processing conditions, and the procedure outlined below is intended to ensure such compliance. In addition, fair processing notices would need to be given to employees in "high risk posts" explaining that disclosures may be made to Members, and the purpose of such disclosures.

2.5 Separate issues arise in relation to public access to officers' declarations of interests, and this report outlines those issues.

2.6 Directors are already accountable for checking declared officer interests and taking appropriate action. This report considers how we can provide a greater level of assurance that employees in high risk posts are declaring relevant interests and that appropriate action is being taken by Directorates.

3 Main issues

3.1 A number of options have been considered to provide Member access to the register of interests for employees in high risk posts. One option, considered and discounted, was to place a copy of the register in the Chief Executive suite with open access to Members. However this was discounted, as it would mean that the Council was in breach of the first data protection principle, that personal data shall be processed fairly and lawfully.

3.2 Following consultation with Legal Services it was decided that the most appropriate process would be to follow existing "Member need to know" protocols in the Council's Access to Information Rules, where the information was requested by Members from the relevant Director, with the Director taking advice from Legal Services in the event there is any doubt about whether a Member has demonstrated a "need to know", or in the event that the Director considered disclosure might be unwarranted in a particular case by reason of potential prejudice to the employee concerned.

3.3 In relation to disclosing any part of an employee's declaration of interests to the public, Legal Services have advised that the following principles need to be considered

- There is no presumption in favour of the release of personal data under the general obligations in the FOI Act, and there is no other separate legal obligation on the Council to make this information accessible to the public.
 - A person in public office or employment should expect their public actions and work duties to be subject to greater scrutiny than their private lives.
 - The individual's reasonable expectations as to privacy must be considered, and in considering whether expectations are reasonable, they must be seen within their context.
 - The Council would need to demonstrate compliance with one or other of the fair processing conditions relevant for processing any personal data (Schedule 2), and in addition (in the case of sensitive personal data) one or other of the conditions relevant for processing sensitive personal data (Schedule 3).
 - For the purposes of Schedule 2, even if the Council took steps to get the consent of individual officers to publication of their interests, it is unlikely that the Council could rely on this successfully in the event of a complaint to the Information Commissioner. This is due to the perceived inequality of bargaining power between employers and employees and the resultant lack of the "freely given" element of consent. The Council could seek to rely condition 6(1) of Schedule 2, namely that processing the data in this way is "necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed" except where this is unwarranted in any particular case by reason of prejudice to the privacy rights of the individual employees. The test required by this condition is a balance between the legitimate interests of those to whom the data would be disclosed (members of the public, their legitimate interests being in the transparency and accountability of decision-making), and prejudice to the rights, freedoms and legitimate interests of the data subject. However, because processing must be "necessary" to satisfy this condition, only where the former interests outweigh the latter should the personal data be disclosed.
 - The Council would need to consider whether overall, processing the personal data of employees in this way is "fair", and whether it is "lawful", in particular whether an appropriate balance has been struck between the need for transparent and unbiased decision-making, and the right of employees to respect for their private, and family lives, and their homes under the Human Rights Act.
 - The Council would need to give fair processing notices to the employees concerned, explaining that a disclosure was to be made, and the purpose of the disclosure.
- 3.4 For example, if it was considered that there was a particular risk of bias in planning or property decisions of the Council by reason of the ownership of land and property, or share ownership/involvement in companies by officers who take or influence those decisions or by officers who may write reports for Plans Panel, then the following steps will need to be taken

- It will be necessary to review the role of each high risk post to establish if they are in positions where they are involved in making decisions or making recommendation to decision makers on property or planning matters.
- It would also then be necessary to review their declared interests in land, property, shareholdings or involvement in companies for potential conflict, and to assess any prejudice to individual officers which might arise from publishing this information
- In the event where it was decided this information could be published an appeal process would have to be considered to ensure there was no prejudice to the employees concerned which would not have been apparent from the information in the declaration alone.

3.5 In considering the Scrutiny Board recommendation that there should be one rule for both members and employees in relation to declarations of interest, the following must be considered:

- Need to know – as in Para 3.3. and 3.4 there is an expectation that employees have a right to privacy unless it can be proved that there is a reasonable need to know information about their interests. The council has over 15,000 employees, and the significant majority have no direct influence on decision making on property and contracts etc. Therefore it could not reasonably be proved that there is a need to know the interests of all employees.
- Logistics of collecting the information. Even if it were the case that there was a need to know all employee interests, the logistics of collecting information on 15,000 employees and checking these through their management chain would be resource intensive, incur considerable cost and focus attention on collection of returns for large numbers of employees rather than a thorough review of relevant interests of employees in high risk posts.

3.6 A number of existing actions are already planned this year to ensure that we can provide a greater level of assurance that employees that are deemed high risk in terms of influence and decision making are declaring relevant interests and that Directors are reviewing and taking appropriate action as the need arises.

3.7 This includes a request that Directors report back on total response rates and actions taken where interests have been declared. This will be summarised in a report to be considered by the Deputy Chief Executive. It is also proposed to review the existing list of high risk posts to ensure it is still fit for purpose.

3.8 It will also include extending the number of employees who work in Planning who will be required to declare their interest, to recognise that it is not grade, but role that will dictate whether there is a need to know information on interests which could conflict, or be perceived to conflict with their role.

3.9 The Scrutiny Board (Housing & Regeneration) at its meeting on 26th February 2013 considered a report on decision-making in the planning process. It was agreed that in addition to the annual declaration of interests that Planning

Officers make, on an annual basis, the decision notice accompanying a planning application will also append a declaration of no interest, to be signed by the case officer and the Principal Planning Officer responsible for signing off the Delegated Decision.

- 3.10 The Chief Planning Officer has agreed that this procedure should be included in the planning application process.
- 3.11 The Board also recommended that, in addition to the above; officers should confirm that no undue pressure had been placed upon them in making their recommendation.
- 3.12 All the most contentious and significant applications are reported to the Plans Panel for decision and all planning decisions are subject to further checks and balances, including challenges to the process of making decisions under the City Council's formal complaints procedure and ultimately the Local Government Ombudsman. In exceptional circumstances, the Local Government Ombudsman is able to request a local authority to make compensatory payments and (rarely) to reconsider the application in order to resolve any defects or undue influence in the original decision-making process. Furthermore, the applicant has a right to submit an appeal against refusal of an application. This appeal is considered by a Planning Inspector appointed by the Secretary of State and is independent of City Council processes. Finally, there is scope for judicial review against any perverse decision. Again, this is available to members of the community and applicants.
- 3.13 In addition, if any officer considers themselves to be under undue pressure from a third party, the report will be compiled by a more senior officer who is remote from the influence alleged by the case officer. It is the responsibility of the case officer to indicate to his or her line manager if they consider that 'undue pressure' is being applied so that the application decision-making process can take place.
- 3.14 It is also difficult to define what might be considered to be 'undue influence'. In the eyes of one party, this might be seen as making appropriate representations. In another case, the actions might be considered inappropriate. It would be difficult to achieve a consistent definition and ensure that it is applied fairly. If a dispute arises that an inappropriate judgement has been made, it could prove complex to investigate and ultimately undermine and delay the decision-making process. In addition, any challenge of this nature is likely to prove difficult to substantiate and could result in complaints which will add to the pressure on staff. A delay in the determination of a planning application (beyond the statutory 13 week or 8 week period for determination) could result in an appeal to the Planning Inspectorate and to the decision being taken out of the Council's hands and possibly be the subject of a costs award. Finally, it is also possible that if an officer or outside party had deliberately exercised undue influence on an officer in order to further or protect a personal interest, this could be reported to the Police on the basis of a potential criminal offence of misconduct in public office.

- 3.15 The Chief Planning Officer considers that the essence of Scrutiny's proposal is satisfied in the ways described.

4 Consultation and Engagement

- 4.1 There has been considerable consultation and communication involved in gathering the data. However employees with information on the register of interests will need to be informed about how this data is shared if there is a change to the current process.
- 4.2 We have consulted with Bolton Council, who following the decision now make the information requested available, but do not publicise it on Open Data. The requirement from the tribunal was about making the information accessible in response to an FOI request.

5 Equality and Diversity / Cohesion and Integration

- 5.1 There are no significant issues.

6 Council policies and City Priorities

- 6.1 Although there is no change to policy there has been no pro-active publishing of officer interests previously, and therefore careful consideration needs to be given to the matters mentioned above, to ensure that any proposal is both necessary and proportionate. .

7 Resources and value for money

- 7.1 There are resource issues in relation to the time involved in keeping the register and in ensuring appropriate access to the register by Members, and in relation to ensuring appropriate wider publication of this information. .

8 Legal Implications, Access to Information and Call In

- 8.1 The report highlights the possible legal implications of accessing information and specifically data protection and human rights risks.
- 8.2 The Information Commission does not require councils to publish data including registers, only to publicise what registers it holds and how the information can be made available to the public. This is outlined in the Definition Document for Local Authorities.

9 Risk Management

- 9.1 If Members do not follow the constitution and gain open access to the officer register of interests, there would be a breach of the data protection principles and the Council would be open to claims from individuals whose personal information has been accessed. Likewise, if there was a general publication of all interests declared by all officers in "high risk" posts, there would be a breach of these principles. There would also be breaches of the Human Rights Act. In relation to serious breaches of the data protection principles the Information Commissioner can impose a monetary penalty on the Council up to £500k.

- 9.2 Individuals must be made aware if their information might be made available to Members or other people other than their Director or nominated deputy. Consideration should be given to giving the option to have their declarations made private or having an appeal mechanism to enable them to object to their declarations made available.

10 Conclusions

- 10.1 It is acknowledged that Members have a legitimate need to know information on employee interests in certain circumstances. A process is now suggested which can enable this while minimising risks on releasing information.
- 10.2 The constitution provides a mechanism for Members accessing Council information. All directors now hold a copy of the register of interests for the relevant officers in their directorate.
- 10.3 Accessing these records through the Access to Information Procedure Rules, as outlined above, provides a balance between transparency in decision making and respect of individual privacy, and contains sufficient safeguards in releasing the information.
- 10.4 The council, in pro-actively publishing the business interests of the top three tiers, is already going beyond what is required to satisfy the requirements of the Information Commissioner.
- 10.5 It is considered that the pro-active publishing of officer interests in accordance with the process outlined above may prove to be disproportionately intrusive to individual officers, and resource intensive for the organisation. Therefore, it is further proposed that the Council publicise the fact that it holds a register of interests for officers who hold posts deemed as 'high risk'. However, access to this would only be in response to an FOI request, and would be under the terms and exemptions outlined in the Freedom of Information Act.
- 10.6 It is considered that the proposals outlined in this report are the most appropriate response to the first Scrutiny Board recommendation of "one rule for all" in the declaration of interests for Members and Council employees.
- 10.7 The Chief Planning Officer will be implementing the second Scrutiny Board recommendation that planning officers should declare no interest in specific planning applications.
- 10.8 The Chief Planning Officer does not support the third recommendation that planning officers declare there has been no undue influence placed on them for the reasons set out in this report.

11 Recommendations

- 11.1 It is recommended that the Executive Board:
- Agree the proposals contained in this report

12 Background documents¹

12.1 None.

¹ 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.