

CONFIDENTIALITY AND DECLARATIONS OF INTEREST

Introduction

This leaflet is intended to provide some general guidelines on how to deal with issues of confidentiality and declarations of interest. It is not intended to provide the answer to every situation but it is hoped that it will provide the answer to most common issues and help governing bodies in these difficult and sometimes tricky areas.

Confidentiality

When the question of confidential information enters the realm of governing body or committee meetings it frequently causes confusion or concern. Questions of what is confidential information; how it should be treated and who is entitled to participate in discussions and see the minutes are often raised. The issues have become even more confusing with the introduction of the Freedom of Information and Data Protection legislation.

Confidential is defined in the dictionary as information spoken, written or given in confidence; secret; private. The legal concept of confidentiality, however, is not straightforward. To ascertain whether information has the 'quality of confidence' the circumstances under which the information is imparted need to be considered, also the detail of the information itself and the possible consequences of its disclosure.

After establishing what is to be treated as confidential, a dispute may still arise particularly in relation to business interests. If the governors wrongly decide that something is not confidential when it is, then, in extreme cases, apart from embarrassment, there could be a court action for damages for breach of confidence. In circumstances where there is doubt then governing bodies are recommended to defer the item and seek legal advice from the LA.

There are times when matters must be treated as confidential by the governing body e.g. matters concerning specific members of staff. Governing Bodies should give careful consideration to whether the information has the 'quality of confidence' before designating it as confidential. Declaring a matter as confidential should not be used merely as an excuse to avoid a potentially embarrassing matter coming into the public domain.

Agenda for governing body and committee meetings

All governing bodies and committees have, from time to time, to deal with confidential matters and it is good practice and helpful to governors (and others) to know when confidential items are to be considered. This should be done by clearly marking on the agenda those items, if known, that are to be treated as such. The agenda should also be structured to ensure that confidential items are dealt with at the end, or at least in a block together, so that any governor, who might have a declarable interest in the item, and visitors at the meeting know that they will have to withdraw from the meeting when that item is reached. Clearly this is not always practicable because confidential matters can arise during the consideration of any matter. In these

situations discussion should be halted and visitors and anyone who may have a declarable interest in the matter should leave the meeting whilst the matter is considered. This should be clearly recorded in the minutes e.g.

“21/05 - During consideration of this item a confidential matter arose in connection with the award of a previous contract. Before the consideration of or discussion on the confidential matter XXX (name of governor declaring interest) declared an interest in the matter because of (specify nature of interest) and left the meeting (together with (name any visitor(s))) and accordingly took no part in the consideration of or voting on that matter”

The decision, if any, on the confidential matter should then be recorded in the confidential part of the minutes as in the following example:

“Arising from consideration of Minute 21/05 above the governing body noted the action being taken to pursue a claim for compensation and the legal advice received in that respect.

Resolved: That the position be noted.”

(Also, see the paragraph hereunder headed “Minutes of meetings of the governing body and committees”)

Reports

The issue of confidentiality is not always recognised in the preparation of reports to be submitted to governing bodies (or committees). An example of this might be the headteachers report which may contain information on a whole range of school related issues including staffing which might be confidential. Ideally this report should be prepared in two parts i.e. non-confidential part and a confidential part. The confidential part could be printed on coloured paper to clearly identify that it is to be treated as confidential. Authors of reports should always consider whether any part of their report contains information that the governing body might treat as confidential and deal with it accordingly.

Governing Body and Committee meetings

Meetings of the governing body and its committees are not open to the public as of right. The governing body may allow people who are not members of the governing body to attend meeting(s). Visitors should be asked to leave the meeting when confidential issues arise or immediately prior to them being discussed. If not already clearly marked on the agenda, governing bodies and committees should determine at the beginning of a meeting what items are to be treated as confidential and this must be recorded in the minutes. A standard form of minute is as follows:

“Confidential items

Resolved: That the matters recorded at minute(s) (insert minute number(s)) dealing with the following matters be treated as confidential

and excluded from the minutes to be made available for public inspection:

- a) Staffing;*
- b) Tenders for new extension”*

Such a resolution will automatically include any associated agenda papers.

It is good practice to clearly identify confidential minutes and associated papers so that they are not accidentally made available for public inspection. A simple way of doing this is for confidential minutes (and reports) to be printed on coloured paper.

Matters that are generally regarded as confidential are as follows although this list is not meant to be exhaustive:

- those concerning a named person who works, or it is proposed should work, at the school;
- a named pupil at, or candidate for admission to, the school;
- courses of action that might lead to redundancies, disciplinary action or dismissal;
- consideration of legal advice, of estimates or tenders for work or supplies or valuations;
- proposals to suspend or remove governors;
- formal complaints – depending on the nature of the complaint;
- matters regarded by the LA as being confidential;
- Any other matter which, by reason of its nature, the Governing Body is satisfied should remain confidential.

When dealing with confidential personal information governors need to be careful about why information needs to be shared, what information needs to be shared and with whom.

Occasionally the governing body may receive correspondence that the writer may ask to be treated as confidential. Such a request is not, in itself, sufficient reason for the matter to be treated as confidential. This is very important in the case of complaints where the reading out of the letter may compromise the ability of the governing body to deal with the issue in accordance with the school's complaint policy. Careful consideration should be given to the content of the letter to ascertain whether it contains confidential information and, if so, should be treated as confidential. If, after careful consideration there is doubt about whether the letter should be treated as confidential then it is good practice to consult with the writer to discuss the matter prior to making a formal decision about how it is to be treated. If the Chair considers that the matter should not be treated as confidential then the writer should be given the opportunity to withdraw the correspondence. The final decision on whether any matter should be treated as confidential is with the governing body.

Occasionally a governing body may have to deal with a written report containing confidential and very sensitive issues which, if made public by accident or design, would cause considerable embarrassment at the very least or severely compromise the governing body and the school. In such a case the governing body might take a view that the report should be handed

out at the meeting and that governors be given good and sufficient time to read it before giving consideration to it. After considering the report it would be appropriate to gather in all copies of it thus reducing the possibility that a copy might be left inadvertently where it can be read by others.

After any confidential matters have been discussed all governors are still bound by the rules of confidentiality and must not discuss the matter outside of the governing body meeting.

Minutes of meetings of the governing body and committees

The distribution of minutes to governors, and who has the right to see what, is probably the one issue that causes more confusion and concern than others. For example there are many occasions when governors have to declare a pecuniary or other interest in the proceedings and have to leave the room and take no part in the consideration of or voting on that particular item. The question then arises as to whether that governor is entitled to have a full copy of the minutes including the record of the decision on the matter in which he/she has declared an interest.

The position is that **all governors** are entitled to have a full copy of the minutes of the meeting and this includes those minutes dealing with confidential issues. As mentioned above all governors, including those who have declared an interest in a matter are bound by the rules of confidentiality. They are also bound not to seek to take advantage of privileged information that they may obtain from confidential minutes. The main issue is that governors declaring an interest must leave the room whilst the confidential item is under consideration and that they do not take part in the consideration of or voting on that item.

In writing the minutes of a confidential discussion the clerk to the governing body or committee has an important role. Whilst the pre-ambule may be brief the resolution must be clear and unambiguous. If this approach is taken then the confidentiality of the consideration of the matter is retained and will provide no detailed information other than the decision.

An example of this might be the situation whereby the governing body has sought tenders from say 6 firms for the supply and installation of sports equipment. In these circumstances the minute might record the matter as follows:

“Confidential minute of a meeting of the Anywhere School Governing Body held on 20th June 2005.

Supply and installation of sports equipment

18/05 - Further to Minute Gov 10/05 (2nd May, 2005), the Headteacher submitted a report setting out details of 6 tenders received for the supply and installation of sports equipment. The Governing Body noted that the tenders had been checked for accuracy and that the lowest tender, submitted by Hurdles

Sports Equipment Ltd in the sum of £9,536 was within the budget allocation.

Resolved:

That the tender submitted by Hurdles Sports Equipment Ltd in the sum of £9,536 for the supply and installation of sports equipment be accepted

Whilst the above preserves the confidentiality of the information discussed there is merit in at least advising the public through the minutes of all the matters discussed at the meeting. This can be done by adopting the standard practice in local authorities by producing two sets of minutes that deal with the confidential matter. The first set is available for public inspection and records the matter discussed without disclosing the “confidential” information. An example of this approach is:

First minute for public information:

“Staff Salary Grading

A number of matters relating to staff salary grading were agreed”

Second minute - remains confidential:

“Staff Salary Grading

The Governing Body considered a report from the Headteacher making recommendations about staff salary grading.

Resolved: That the following staff be awarded an additional salary point w.e.f. 1st September 2005:

(list of staff)”

Standing Orders and Code of Practice

Some governing bodies have taken the step of enshrining good practice through the adoption of Standing Orders that deal with the procedural workings of the governing body including confidential matters, declarations of interest and the conduct of all members of the governing body. In addition some governing bodies have also adopted a Code of Practice which embodies the principles and procedures of the governing body. Further information and guidance can be obtained from the Governor Support and Communications Team.

Slander and libel

To utter slander or issue a libellous statement is a matter for serious concern and one that may be actionable in law. The declaration that a matter is confidential does not absolve governing bodies and individual governors from the need to have regard to the law on slander or libel. For example a discussion on a confidential matter and in private session, does not carry with

it a qualified privilege (a right to express a view without fear of prosecution). If potentially slanderous statements are made whilst discussing a matter then great care needs to be taken by the clerk to ensure that such statements are not repeated in the minutes because the clerk could then be responsible for libel.

Freedom of Information Act and Data Protection Act

From 1 January 2005 the Freedom of Information Act 2000 (FOIA) came fully into force and there is a legal right for any person to ask a school for access to information held by that school. This is in addition to pre-existing rights to information about individuals under the Data Protection Act.

The FOIA presumes openness but it recognises the need to protect sensitive information in certain circumstances and provides for exemptions. Even where certain exemptions apply, information must still be released if it is in the public interest to do so.

When in receipt of a request pursuant to FOIA or the Data Protection Act governing bodies must be careful and should seek advice from Governor Support if they are in doubt as to whether the information can be released.

Matters to be aware of and the most relevant exemptions are:

- The information has been provided in confidence;
- It is personal information;
- A commercial interest is involved;
- It would prejudice the efficient conduct of public affairs.

Declarations of Interest

Restrictions on participating in meetings and declarations of interest

The School Governance (Roles, Procedures, and Allowances) (England) Regulations 2013 – Regulation 16 and the Schedule to the Regulations specify the restrictions on persons taking part in proceedings of the governing body and its committees. The restrictions apply to all members of the governing body including the headteacher (if not a governor), associate members and the clerk(s) to the governing body and its committees.

In any circumstances where there might be a conflict between the interests of any of the above named and the interests of the governing body or; where a fair hearing is required and there is **any reasonable doubt** about their ability to act impartially in relation to any matter then that member of the governing body **must** declare the circumstances of the conflict or reason for his/her inability to act impartially and **leave the room** in which the meeting is being held and take no part in the consideration of or voting on the matter.

If the individual concerned is uncertain about whether or not they have an interest to declare then advice should be sought from the clerk **prior** to the

item being discussed by the governing body or committee. If the clerk is unable to assist then the most appropriate course of action is for the individual to declare their interest and leave the room and take no part in the consideration of or discussion on the matter. This course of action retains the integrity of both the governor and the governing body.

Very rarely, or occasionally where the position is not clear, a member of a governing body has a declarable interest but he/she fails to declare that interest. If the governing body suspects that is the case then the correct course of action is for the governor concerned to be asked if he/she has an interest. If the governor concerned does not then declare the interest or denies having an interest but the governing body persists in its belief that an interest exists then the matter should be put to a formal vote. The governor concerned should leave the room whilst the vote is taken. If the result of the formal vote is that the governing body determines that the governor has a declarable interest then the governor must leave the meeting and take no part in the consideration of or voting on the matter.

Similarly a governor may declare an interest in a matter but insists that there is no conflict and that he/she is allowed to participate in the consideration of and voting on the matter. The position is that it is for the governing body to determine whether the interest is such that there is a clear conflict. The governor should leave the room whilst the issue is considered and if the governing body formally resolves that there is a clear conflict of interest then the governor must leave the meeting and take no part in the consideration of or voting on the matter.

Interests that may lead to declarations having to be made

Individuals are best placed to know their responsibilities within the governing body and with other bodies and where these might conflict.

Conflicts of interest which might require an interest to be declared may arise from:

- Close links with, or interest in a particular organisation from which a request for a school facility is being considered; e.g. a request from a football club, of which a governor is a member, to use a playing field;
- A commercial or pecuniary interest in an organisation or issue which comes before the governing body e.g. where a member or the organisation with which a member of the governing body is involved may benefit financially, directly or indirectly, from a decision made by the governing body; e.g. a tender submitted by a local company, in which a governor is a partner, for the supply of stationery;
- A non-pecuniary interest where a member of a governing body has other interests that might be thought to influence them, either wittingly or unwittingly in the matter under consideration; e.g. membership of a national pressure group.
- Personal or family interest in an organisation, issue or individual which comes before the governing body with regard to both pecuniary and non-pecuniary (any benefit or favour 'in kind' including arising from membership of clubs or other organisations) interests e.g.

consideration of an application for a post at the school by a close relative of a governor.

In addition Regulations make the following provisions in relation to certain issues:-

- A person paid to work at the school is not regarded as having a pecuniary interest if his/her interest is no greater than that of other persons paid to work at the school; e.g. discussion of a whole school pay policy.
- A person must withdraw and not vote on his/her own appointment, re-appointment, suspension or removal as a governor, or as a chair, vice-chair or clerk of the governing body;
- A person paid to work at the school, other than the headteacher, must withdraw and cannot vote in relation to the pay or performance appraisal of any particular person working at the school. This does not affect general discussions about general policy;
- The headteacher must withdraw and cannot vote in relation to their own pay or performance appraisal.

Register of Business Interests

All members of a governing body are required to complete, on an annual basis, the Register of Business Interests. The Register lists, for each member of the governing body and the headteacher, any business interests that they or any member of their immediate family have. It should include all business interests such as directorships, share holdings and other appointments of influence within business or organisations that may have dealings with the school.

The Register is important and enables the Clerk and/or the governing body to determine those registered interests that individual members of the governing body have and anticipate possible conflicts of interest.

Register of Hospitality

The public may view the acceptance of gifts/hospitality by a member of a governing body with suspicion. Governors receiving gifts or hospitality must record the details in the Register of Gifts and Hospitality. It is considered prudent for a governor to tactfully refuse any personal gift to him/her or to a member of his/her family which is offered by, or is indirectly attributable to any person or body who has, or may have, dealings of any kind whatsoever with the school.

As an exception to the general requirement to record all gifts received, the following may be excluded:

- i) small gifts, often given by way of trade advertisements e.g. diaries, calendars or similar articles which may be used in the office;
- ii) small gifts of token value given at the conclusion of a courtesy visit.

Any other gift should be recorded e.g. gifts offered by public or voluntary bodies in recognition of some service rendered or a gift or bequest contained

in a deceased person's will. The recipient should record the details of the gift/hospitality. There is generally no cause for concern if another public body makes the offer of hospitality but all cases should be recorded.

Special caution should be exercised when a person or a body having or seeking business from the school offers the hospitality. In general such offers should be declined. If there is any doubt about whether a gift or hospitality may be accepted it should be politely and tactfully refused.

The register can be inspected by members of the governing body, the headteacher or representatives of the LEA and is available for checking purposes if allegations of non-disclosure of interests are made.

Declarations of Interest and minutes

It is essential that all declarations of interest are formally recorded in the minutes of the meeting. An example of how this might be done is given hereunder:-

21/05 - Declaration of Interest

"Prior to the consideration of the matter recorded at Minute XXX below Mr. H. Onest, declared an interest in the matter recorded in that minute because of his position as a member of staff and accordingly left the meeting and took no part in the consideration of or voting on that matter."

Equally once the matter has been dealt with the individual concerned must be invited to return to the meeting and this should also be recorded in the minutes.

Conclusion

Whilst this booklet has sought to dispel some of the mystique surrounding confidentiality and declarations of interest there will undoubtedly be occasions when further advice needs to be obtained. The Governance Support Unit is available to assist and can be contacted by telephone on 01609 – 532936.

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School Governance Unit,
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