

Appendix 8

How to Make a Complaint Against a Moray Councillor



This document explains how you can make a complaint against a Moray Councillor. Complaints may be made by members of the public, Council staff or by Councillors.

Nothing in this document affects your right to make a complaint to the Commissioner for Ethical Standards in Public Life in Scotland (~~formerly the~~ Public Standards Commissioner) at any stage. Their address is:

Commissioner for Ethical Standards in Public Life in Scotland
~~Public Standards Commissioner for Scotland~~
39 Drumsheugh Gardens
EDINBURGH
EH3 7SW

Tel: 0300 011 0550

~~Fax: 0131 220 5419~~

Web: www.ethicalstandards.org.uk

investigations@ethicalstandards.org.uk

Section 1 Preliminary Stage — For Complaints by Elected Members Only

Section 2 Informal Resolution Stage – This stage will be used by Members of the Public and Council employees. It is also the second stage for Complaints by Councillors ~~and Council Employees~~.

SECTION 1

Where any Councillor is alleged to have breached the Councillors Code of Conduct ("the Code of Conduct") the following procedure will apply. The procedure is in two stages with the aim of achieving a satisfactory outcome for all involved – Preliminary Stage and Informal Resolution Stage, but at any point the complaint may be referred to the Public Standards Commissioner.

PRELIMINARY STAGE

The Preliminary Stage should be used for complaints by a Councillor against a councillor or a Council Employee and only if this fails to produce a satisfactory outcome should the Informal Resolution Stage be invoked. Complaints by employees and members of the public will proceed directly to the Informal Resolution stage.

PRELIMINARY STAGE

1. The Complainer who alleges the breach of Code of Conduct will discuss the issue with the Councillor who is alleged to be in breach of the Code of Conduct ~~(the Defendant)~~. Both parties should seek to resolve the complaint at this stage. The Monitoring Officer will on request provide relevant information about the Code of Conduct but shall not at this stage take a view on whether a breach has occurred.
2. If the Complainer is not willing to speak to the Councillor who is the subject of the complaint ~~Defendant~~ directly, he/she will approach the Complainer's his/her political Group Leader or, in the case of a Council employee, a line manager who will assist in attempting to resolve ~~ing~~ the issue informally through discussion either directly with both parties separately ~~/or together~~ or indirectly by discussion between the relevant Group Leaders.
3. If the political Group Leader is the subject of the allegation, the Convener or Leader of the Council will assist the Complainer in attempting to achieve a resolution of the complaint. If the Convener or the Leader of the Council is the subject of the allegation, the Convener/Leader of the Council ~~Depute Convener~~ (whoever is not the subject of the allegation) will try to resolve the issue in accordance with para 2 above.
4. If either party is not satisfied with the outcome of the meeting with the political Group Leader or line manager in terms of paragraph 2 above, he/she will raise the matter with either the Convener or the Leader of the Council (if they are not the subject of the complaint) who will seek to resolve the matter.
5. If the Complainer is not satisfied after the Preliminary Stage, he/she may proceed to the informal resolution stage (Section 2). The Preliminary Stage should be completed within no more than 15 working days of the issue which is the subject of the complaint arising.

SECTION 2

INFORMAL RESOLUTION STAGE

The Informal Resolution Stage is the first stage for complaints by members of the public and Council employees, and the second stage for complaints by a Councillor ~~or Council Employee~~

~~INFORMAL RESOLUTION STAGE~~

How to make a complaint

1. Any complaint about the conduct of a Councillor should be sent in writing to the Head of Legal and Democratic Services as Monitoring Officer (the HLDS). The complaint must also include the following details:-
 - (a) The name and address of Complainer
 - (b) The name of the Councillor against whom the complaint is being made~~Defendant~~
 - (c) The nature of the misconduct alleged
 - (d) The part of the Councillors Code of Conduct ("the Code of Conduct) which is alleged to have been breached. The Code of Conduct may be viewed _____ at <http://www.standardscommissionscotland.org.uk/content/codes-conduct>~~{insert web address}~~
 - (e) Any supporting evidence
 - (f) Reference to whether- the Preliminary Stage has been completed and if not, an explanation as to why this stage has been bypassed for all complaints by Councillors~~except those by a member of the public,~~

[NOTE: At this stage the Monitoring Officer is required to advise the Chief Executive ~~and Section 95 Officer~~ that a complaint has been made].

E~~Prima facie~~ evidence of alleged criminal offence

2. If at any stage during the course of the complaints procedure evidence that a criminal offence may have been committed comes to the attention of the HLDS, the police may be informed. In that event, the complaints procedure will be suspended until after the outcome of any police investigation or criminal prosecution.

Acknowledgement of Complaint

3. The HLDS shall record the date of receipt of every valid complaint; shall issue an acknowledgement of receipt to the complainer within 5 working days with ~~and shall send~~ a copy of the complaints procedure ~~to him/her~~. The HLDS

shall advise the Complainer that the full details of his/her complaint will be sent to the CouncillorDefendant. The HLDS may seek clarification from the complainer in relation to any aspect of the complaint. This should be provided by the complainer within no more than 5 working days. The date of receipt of such clarification shall then be deemed to be the date of receipt of the complaint.

Intimation of the Complaint to the Councillor

4. Within 5 working days of the date of receipt of the complaint ~~(or as soon as possible thereafter)~~, the HLDS shall intimate the complaint to the CouncillorDefendant. The CouncillorDefendant shall be informed of the following:-

- (a) Identity of the complainer;
- (b) The exact nature of the complaint;
- (c) The provisions of the Code of Conduct which he/she is alleged to have contravened.

The CouncillorDefendant shall be sent a copy of the complaints procedure.

5. Before processing the complaint the HLDS requires to be satisfied that the preliminary stage has been exhausted and/or was not appropriate.

- ~~6.~~
6. The HLDS may arrange for such investigation(s) to be carried out as he/she considers appropriate, in order to clarify or resolve the complaint. This will include taking a statement from the Councillor detailing their response to the complaint. That statement, once approved by the councillor, will be issued to the Complainer.

- ~~7.~~
7. In the event that the HLDS determines that the complaint is without any meritinvalid, he/she will advise the parties accordingly and give his/her reasoning, making specific reference to the right of the complainer to refer the matter on to the Commissioner for Ethical Standards in Public Life in ScotlandPublic Standards Commissioner. A local decision that a complaint is without any merit will be issued within no more than 15 working days after the date of receipt of the complaint (or as soon as possible thereafter).

Mediation Meeting

7. Where a complaint is accepted as potentially of some merit followingvalid and has been investigation on by/on behalf of ed by the HLDS, the parties and HLDS will be invited to attend an informal mediation meeting, facilitated by the Chief Executive ~~and HLDS~~. to be held no later than 25 working days after the date of receipt of the complaint (or as soon as possible thereafter). (Note: This meeting is intended to allow parties to explore the possibility of a mutually satisfactory resolution. It is described as a mediation only in terms of the common usage of that word and it should not be inferred that formal

mediation practice will be followed as this is not the case.) At the ~~mediation~~ meeting parties will discuss the results of the HLDS's investigation with a view to agreeing a mutually satisfactory resolution to the complaint. That may involve a number of outcomes including withdrawal of the complaint or the issuing of an apology.

Acceptance of Complaint

8. In the event that the ~~Councillor~~Defendant accepts that the complaint is well founded and the complainer is satisfied with the outcome ~~then agreed or determined by the Chief Executive and HLDS~~, the HLDS shall be entitled to treat the matter as resolved. If the complainer is not satisfied with the outcome following stage 7, or indeed at any stage of the process, he/she may refer the complaint to the Commissioner for Ethical Standards in Public Life in Scotland~~Public Standards Commissioner~~.



GUIDANCE FOR COUNCILLORS AND OFFICIALS SERVING ON OUTSIDE BODIES

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1. AIM OF GUIDANCE

- 1.1 Councillors may become involved in different types of outside bodies such as sports clubs, housing associations, community organisations, trusts, volunteer groups, limited companies etc. The aim of this guidance is to set out the duties owed by Councillors to these outside bodies and to assist Councillors in balancing the separate and sometimes competing interests that they may encounter whilst serving on outside bodies. Help is always available from the Legal Services Section where Councillors have any questions about their position.

2. CONFLICTS OF INTEREST

2.1 General

In some cases the Council appoints a Councillor to serve as its representative on the outside body. In other cases, the Councillor may have been appointed

independently of any Council involvement. The duties which Councillors owe to outside bodies are detailed in Part 3 below. Sometimes these duties will conflict with their duties to the Council. **In general the Councillor's primary duty is owed to the outside body.**

2.2 Registration of interest

A Councillor's involvement in an outside body will mean that the Councillor should **register** their involvement under Part 4 of the Model Code of Conduct introduced by the Ethical Standards in Public Life etc (Scotland) Act 2000 (the "Model Code") which states:

4.22 Councillors may also have significant non-financial interests and it is equally important that relevant interests such as membership or holding office in public bodies, companies, clubs, societies and organisations such as trades unions and voluntary organisations, are registered as described. In this context, non-financial interests are those which members of the public might reasonably think could influence your actions, speeches or votes in the Council which could include appointments to committees or memberships of other organisations.

Page 42 of the November 2011 issue of the Standards Commission Guidance on the Code of Conduct contains further information. In particular, it is each Councillors personal responsibility to ensure that his/her Register of Interests is updated timeously i.e. within one month of a change of circumstances.

It should also be borne in mind that the Specific Exclusions in the Code of Conduct which cover certain outside bodies can only be relied upon if the Councillor has been nominated/ appointed/had their appointment approved by the Council and that interest has been registered.

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2.3 Declaration of interest

When

- an issue regarding the outside body is considered by the Council or a committee, or
- where the affairs or an issue regarding the Council is considered by the outside body then a Councillor should consider **declaring an interest**.

Clause 5.8 of the Model Code states:

5.8 As a councillor you will serve on other bodies as a result of express nomination or appointment by your Council or otherwise by virtue of being a councillor. Your membership of statutory Joint Boards or Joint Committees which are composed exclusively of Councillors does not raise any issue of declaration of interest in regard to Council business. In relation to service on the boards and management committees of limited liability companies, public bodies, societies and other organisations, you must decide, in the particular circumstances surrounding any matter, whether to declare a non-financial interest. Only if you believe that, in the particular circumstances, the nature of

the interest is so remote or without significance, should it not be declared. You must always remember the public interest points towards transparency and, in particular, a possible divergence of interest between the Council and another body. Keep particularly in mind the advice in paragraphs 3.18 and 3.19 of this Code about your legal responsibilities to any limited liability company of which you are a director.

It is a matter for the individual judgement of a Councillor whether they decide to declare an interest. The following may assist Councillors in coming to a decision:

- If they represent the outside body in an executive capacity then the case for declaring an interest is far stronger than if they are an **ordinary** member.
- They should always consider the **public perception** of their position: would a member of the public, with knowledge of the relevant facts, reasonably regard the interest as so significant that it is likely to prejudice the Councillor's discussion or decision making in their role as a Councillor? The safest option will always be to declare the interest
- The case for disclosure is always stronger when Councillors are considering a **planning application** or making any other quasi judicial decision. **The Specific Exclusions will not usually apply to quasi-judicial matters.**
- There is no need to declare an interest where Councillors serve on a statutory joint board etc. composed only of elected Councillors.
- **Advice** may always be sought from the appropriate Council officials.

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It is always open to a Councillor to declare an interest and/or withdraw even if the Code indicates that they may not have to – the decision is a personal one.

2.4 Discussion and voting

Where an interest has been declared unless the Code of Conduct directs otherwise, it is again a matter for the individual judgement of a Councillor as to whether they participate in a discussion/vote on the particular item of business at a meeting of the Council/a Council committee or an outside body. Councillors should be aware however, that in most cases, a decision to declare an interest will lead to a presumption that the Councillor should also withdraw from the meeting unless a specific exclusion applies.

Provided Members are sensitive to the possibility of conflicts of interest, there is no reason why they should not express a "Council" view when acting on an outside body. They should, however, make it clear that they do not represent the Council on the outside body, and so cannot bind the Council by what they say. In many cases Councillors will be able to act as valuable links between outside bodies and the Council.

2.5 Irreconcilable Conflict

As a general rule, if a Councillor is involved in an outside body in an **executive capacity** (i.e. as a Director, Trustee or member of the body's Management Committee) their primary duty will be to the outside body. If there is a major dispute between the Council and the outside body then the Councillor may be placed in an untenable situation. Before deciding on a course of action the Councillor should seek the advice of Council officials. In some circumstances it may be possible that a Councillor may find that they are unable adequately to carry out their responsibilities properly both as an elected Member of the Council and as a member or director of the outside body. This situation however is very rare and should not discourage elected Members from being prepared to participate in the management and running of outside organisations. Membership of outside bodies assists with open and accountable government.

3. DUTIES AND LIABILITIES OWED TO OUTSIDE BODIES

3.1 **Clause of the Code of Conduct states:**

Appointments to Partner Organisations

3.17 You may be appointed or nominated by the Council as a member of another body or organisation. If so, you will be bound by the rules of conduct of these organisations and your responsibility for any actions taken by you as a member of such an organisation will be to the organisation in question. You must also continue to observe the rules of this Code in carrying out the duties of that body.

3.18 If you become a director of a company as a nominee of the Council you will assume personal responsibilities under the Companies Acts. It is possible that a conflict of interest may arise for you as between the company and the Council. In such cases it is your responsibility to take advice on your responsibilities to the Council and to the company. This will include questions of declarations of interest.

3.2 **Constitution of outside bodies:**

The following table shows the type of outside bodies a councillor is likely to be involved in and summarises how each type of outside body is set up and managed:

Type of Body	Governing Document	Management	Type of Councillor Involvement	Usual Types of Organisation
Trust / Charitable Trust	Trust Deed	Management by a Board of Trustees	Trustee	Educational Trusts, Golf Courses, Common Good type land holdings
Company	Memorandum	Board of	Usually as	Charitable

Limited Guarantee	by	and Articles of Association	Directors and Members Meetings	Director but sometimes as ordinary member	Organisations (eg Moray Leisure Centre, Housing Associations, Community Associations)
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Company Limited Shares	by	Memorandum and Articles of Association	Board of Directors and Members Meetings	Usually as Director but sometimes as ordinary member/ Shareholder	Commercial organisations (eg Moray Microbiological Laboratory)
Statutory Joint Board	or	Constitution	Committee meetings	As a member	eg Joint Valuation Board
Unincorporated Association		Constitution	Meeting of Members/ Management Committee	Ordinary Member or Member of Management Committee	Community Associations, Village Halls

The Duties and Liabilities of a Councillor sitting on each of these bodies are detailed below with a brief description of the legal structure of each body.

3.3 Trusts

- 3.3.1 A Trust consists of property or assets which are administered by Trustees for the benefit of beneficiaries.
- 3.3.2 There are many Trusts set up to benefit a wider group of people and (depending on the purpose for which the Trust is set up in the first place) these Trusts may be charitable. These are the sort of Trusts with which Councillors are likely to be involved.
- 3.3.3 Whether or not it is charitable, a Trust is usually set up by an individual or a group of people, giving property to named Trustees on certain specific conditions. The gift and conditions are usually set out in a document known as a Trust Deed.
- 3.3.4 The Trust Deed may also give the Trustees, and others, certain power such as the appointment or replacement of Trustees or the investment of funds etc. These powers could include the power on the part of the Council to appoint Trustees to act as the Council's representatives.
- 3.3.5 This type of organisation may arise where an individual gifts land for the benefit of the community such as a public park. The land would be given to named Trustees to hold the ground for the benefit of the community, and the Trustees would then administer the land in accordance with the terms set out in the Trust Deed.

Trustees Duties

3.3.6 Trustees have the following duties:-

- a duty to act in accordance with the Trust Deed and protect the trust assets
- a duty to comply with all legislation affecting the Trust including charity legislation if the trust is a charitable trust
- a duty not to make a private profit from the position
- a duty to act with the standard of care which an ordinary, prudent person would show (higher standards of care are required of professionals in relation to areas within their professional knowledge)

3.3.7 Trustees Liabilities

3.3.8 Trustees have the following liabilities:-

- To make good any deficiency where Trust property has been used for a Trustee's own purposes or for purposes not in accordance with the purposes of the Trust.
- Personal liability for losses or claims where a Trustee has acted outside the scope of the Trust deed.
- Personal liability where the Trustee has not shown the required standard of care.

3.3.9 Unlike a limited company, a Trust has no separate identity from the Trustees. Trustees are therefore personally liable for losses on contracts or claims by third parties, although Trustees are entitled to an indemnity from the Trust assets provided they act properly in incurring the liability.

3.3.10 Trustees may remain personally liable even though they have retired (e.g. if they have entered into a contract on behalf of the Trust) and should therefore seek an indemnity from their successors.

Trustees of Registered Charitable Trusts

Trustees of registered charitable trusts are subject to various duties and liabilities under the general law including:

- a duty to ensure (where the Trust is a charity) that this is registered with the Scottish Charities Regulator and that annual accounts and returns are completed and sent.
- Trustees may be liable to fines if they do not comply with the duty to make returns.

There are however additional duties and liabilities in terms of the Charities and Trustee Investment (Scotland) Act 2005:

Trustees must ensure that the charity complies with the 2005 Act. Any breach of these duties will be treated as misconduct in the administration of the charity entitling OSCR to invoke its powers under Section 31 of the 2005 Act. These include powers to suspend the trustees, to direct the charity to cease representing itself as a charity or as a Scottish charity, to restrict the transactions which may be entered into, or the nature or amount of payments which may be made in the administration of the charity without OSCR's consent and to direct any third party holding property on behalf of the charity not to part with it without OSCR's consent.

3.4 Limited Company

3.4.1 Limited Companies are often created to make the administration of an organisation easier. Companies are separate legal entities which can enter into contracts and employ staff. They can also sue and be sued and this can protect the members of the company from individual, personal liability. (as detailed below, however, Directors can still incur some personal liability).

3.4.2 The most common forms of company which Councillors are involved in are:-

- Companies limited by share
- Companies limited by guarantee

Companies Limited by Shares

3.4.3 Councillors are less likely to be nominated to a company limited by shares in the normal course of Council business. This type of company will have a share capital and the company allocates the shares to its member (shareholders). In the event that the company is wound up, each shareholder is liable to pay the amount equivalent to the nominal value of his or her shareholding e.g. if a shareholder holds 100 £1 shares in the company they would have to pay £100 in the event of winding up, even though the value of the shares may be e.g. £6 on the open market. In return for this, shareholders share the ownership of the company and its profits. This is normally done by the company paying a dividend to its shareholders. The dividend is usually declared on the basis of an amount of money per share held. In this type of company the day to day management of the company is usually vested in the Directors. The members ultimately control the company by electing the Directors and deciding major issues at general meetings.

3.4.4 Most local companies are companies limited by shares, paying dividends to their shareholders (members).

Companies Limited by Guarantee

3.4.5 Companies limited by guarantee also have members who control the activities of the company in the same way as above (i.e. electing Directors and making decisions in general meetings). However, these companies do not normally seek to make a profit, and do not therefore pay dividends to their members. In

the event of the company being wound up the members guarantee to make a payment to the level of their guarantee (also this is usually a nominal sum of e.g. £1). This type of company is more commonly used for voluntary and public bodies, especially where charitable status is sought (a company limited by shares cannot normally fulfil the criteria for registration as a charity).

General Company Matters

- 3.4.6 Where companies are limited by shares or limited by guarantee, the company is controlled by reference to its "constitution" which is contained in the Memorandum and Articles of Association. These documents are registered with Companies House and set out the powers of the company and the rules by which it is to be managed.
- 3.4.7 Any act carried out by the company that is outside the powers set out in the Memorandum will be unlawful and a Director involved in such an Act may be personally liable for any resulting losses.
- 3.4.8 The Articles of Association will usually provide for the business of the company to be decided by the Members of the company acting in general meeting. At such meetings the Members generally elect a Board of Directors who then deal with the day to day management of the company. In some cases the Articles may provide for the Board to elect further Directors, in certain specified circumstances.
- 3.4.9 In some situations, the Council nominates Councillors to act as "observers" on the Board of Directors of a company. Although such observers would not be classed as Directors for most purposes, Councillors should be aware that if an observer's involvement increases, to such an extent that it could be said that there is an active engagement in the management of the company, they may be deemed to be a "shadow director" which may entail liability for losses etc.
- 3.4.10 Once elected to the Board, a Director has a number of duties and liabilities under general company law. The fact that a Director is appointed to the Board as a representative of the Council does not diminish his duties. The Director will be an agent of the company, whose prime duties and responsibilities are as follows:-

Director's Duties

1. A "fiduciary" duty to the company (not individual shareholders) to act honestly and in good faith and in the best interest of the company as a whole. This duty is similar to that owed by Councillors to Moray constituents.
2. A duty to act in accordance with the company's constitution

3. A general duty to take reasonable care and skill in acting in the company's affairs including seeking professional advice when this is necessary.
4. A duty to exercise independent judgement when dealing with the company's affairs, rather than acting in accordance with a direction from another body represented by the Director (such as the Council in the case of a Director nominated by the Council). A Director representing another body may take into account the views of that body but cannot allow them to rule against the company's best interest.
5. A duty to avoid conflicts of interest. The interests of the Council and the company may conflict, but the Director's primary duty is to the company and not the other organisation he / she is representing.
6. A duty not to make a private profit from their position. Directors must therefore disclose any interest they or their family may have in relation to the company's contracts and only take further part in the discussions to the extent which the governing Articles permit.
7. A duty to ensure that the legislation contained in the Companies Acts is complied with e.g. submission of accounts. Failure to do so can lead to disqualification as a Director. These duties are normally undertaken by the company secretary.
8. A duty to have regard to the likely consequences of any decision on the company's long term interests, the interest of the company's employees, and to have a regard to the impact of the company's operations on the community and the environment.
9. A duty to act fairly between members of the company
10. A duty to not accept a benefit from a third party conferred by reason of his being a director or his doing or not doing anything as Director

Director's Liabilities

Personal liability will arise in the following circumstances:

1. Liability to third parties where a company acts outside of its powers, and the Director knowingly causes or permits the company to so act.
2. Liability to members of the company for breach of trust, if he / she misapplies the money or property of the company. Directors may also be liable if they fail to take action to prevent the breach of a co-Director of which they are aware.
3. Liability to the company for any losses sustained where a Director abuses their position in some way, or fails to act in the best interest of the company.

4. Liability for losses caused by a Director who fails to exercise the requisite level of skill and care (and fails to seek appropriate advice).
5. Liability to contribute towards the company's assets where a Director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, but allows the company to continue to trade. This is called Wrongful Trading. A Director should alert his fellow Directors and the company's auditors where they are concerned about the company's position and seek advice as necessary.
6. Liability for Fraudulent Trading i.e. where a company deals with the intent of defrauding creditors or others. As well as a fine a Director may be disqualified from acting as a Director in another company.
7. Liability to pay damages where the Director deals with an individual or another company, who/which believes that the Director is authorised to so act, when in fact they have no such power.

3.4.11 Councillors who are Directors of companies to which they have been nominated by the Council are also under the following obligations:-

- (a) to ensure that the remuneration they receive from the company should not exceed prescribed limits, and should be registered and declared;
- (b) to give information to Councillors about their activities as required by the Council (apart from confidential information); and
- (c) to cease to be a Director immediately upon disqualification as a Councillor.

3.5 Unincorporated Associations

- 3.5.1 "Unincorporated Associations" cover a wide range of bodies. Unlike companies, they have no separate legal identity. They consist of a group of people who have come together for a common purpose and agreed to work together under a common set of rules. The rules often take the form of a written constitution, which will set out in detail how the organisation is to operate. In joining a group each member agrees to abide by the constitution.
- 3.5.2 Normally, the constitution will provide for the election by the members of a management committee which will be responsible for the everyday running of the organisation. The constitution may also provide members to have annual general meetings to deal with business such as the accounts, appointment of the management committee etc.
- 3.5.3 Depending on the purpose for which the association is formed and the rules governing it, an association may be charitable and therefore require to register as a charity.

- 3.5.4 Because an association is not a separate legal entity, it cannot hold property in its own name. Any property which the association controls will have to be vested in an individual or individuals who are usually called the Trustees of the Association. They will usually hold the assets subject to the direction of the members, or (more usually) the management committee.

Duties

1. The members of the management committee, and the Trustees appointed to hold any assets for the association, must act within the constitution and must take reasonable care in exercising their powers.

Liabilities

1. The management committee members are liable for the acts or omissions or the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall. Management committee members can ask all of the members of the association to indemnify them for the shortfall in relation to a particular obligation. It is possible (subject to rules in the constitution) for insurance to be taken out to cover Trustees and members of the management committee for the liability. Because the Council cannot arrange this insurance, Councillors who are Trustees or management committee members should satisfy themselves that the Trust has adequate insurance to cover them.
2. Where members have acted outside their authority they may be liable to the members and any third party affected by their actions, for any losses sustained.

4. DECISION MAKING ON OUTSIDE BODIES

In carrying out their duties as a Trustee, Director or Management Committee Member, Councillors must take decisions without being influenced by the fact that they are a Councillor. Their primary duty in acting as a representative making management decisions for the outside body is to make these decisions in the interests of that organisation. Councillors should always ensure that their fellow Directors/Trustees are aware of the fact they are Councillors.

Councillors may take account of the wishes of the Council when dealing directly with the affairs of the outside body, but this must come after the best interests of the outside body. Accordingly, Councillors should not take decisions for the outside body simply on the basis of the Council's wishes. They should properly consider all the relevant issues, including the Council's views and take a reasoned decision in the best interests of the organisation.

5. INSURANCE ISSUES WITH OUTSIDE BODIES

Because Councillors and officials who serve as Directors of companies or in other decision making capacities on outside bodies, serve the particular body rather than the Council, the Council cannot indemnify them against any claims brought against them personally. Where there is any possibility of legal liability therefore the company or outside body should put in place appropriate insurance cover to cover its Directors, officers, members etc.

The Council's insurance cover will extend to Councillors and Council officials assisting outside organisations as advisors or observers, either facilitating exchanges of views or information as an extension of their Council duties or otherwise representing the Council, but the Council's insurance cover does not extend to indemnify Councillors and officials who serve in an executive capacity on an outside body. Councillors and officials should be clear that if they serve on an outside body as decision makers they do so in a personal capacity. Outside bodies on which Councillors or officials serve therefore should have their own insurance cover.

- **PROTOCOL ON CONSULTATION, ACCESS TO INFORMATION AND COUNCILLOR INVOLVEMENT IN COUNCIL BUSINESS BETWEEN COUNCILLORS AND OFFICERS IN MORAY COUNCIL**

1.0 Introduction

- 1.1 The Councillors Code of Conduct includes a protocol at ANNEX C governing the relations between councillors and employees in Scottish councils. The protocol refers to Council rules concerning consultation and member involvement, which, in the case of the Moray Council, have not been committed to paper. This protocol summarises the Council's position
- 1.2 The purpose of the protocol is to assist Councillors and officers of the Council in relation to a Councillor's representative role. While the protocol is to a large extent no more than a written statement of current practice and convention, in some respects, it seeks to promote greater clarity and certainty.
- 1.3 This protocol also seeks to reflect the principles underlying the respective Codes of Conduct, which apply to Councillors and officers. The shared object of these codes is to enhance and maintain the integrity (real and perceived) of local government and they therefore demand very high standards of personal conduct.
- 1.4 **No written information can provide for all circumstances and if Councillors and officers are uncertain about how the protocol applies they should seek advice from senior Council employees.**

2.0 Councillors' access to information and to Council documents

- 2.1 Councillors are free to approach any Council Directorate/Department to provide them with such information, explanation and advice (about that Directorate's/ Department's functions) as they may reasonably need in order to assist them in discharging their role as members of the Council. This can range from a request for general information about some aspect of a Directorate/ Department's activities to a request for specific information on behalf of a constituent. Such approaches should normally be directed to the Chief Officer or another senior officer of the Directorate/ Department concerned.
- 2.2 As regards the legal rights of Councillors to inspect Council documents, these are covered partly by statute and partly by the common law.
- 2.3 Councillors have a statutory right to inspect any Council document, which contains material relating to any business, which is to be transacted at a Council, Committee or Sub-Committee meeting. This right applies irrespective of whether the Councillor is a member of the Committee or Sub-Committee concerned and extends not only to reports, which are to be submitted to the meeting, but also to any relevant background papers. This right does not however apply to documents relating to items, which may appear in the confidential section of the agenda for meetings. The items in question are those which contain exempt information relating to Councillors, employees, occupiers of Council property, applicants for grants and other services, the care of children, contract and industrial relations negotiations, advice from Counsel and criminal investigations (**See the Appendix attached**).
- 2.4 The common law right of Councillors is much broader and is based on the principle that any Councillor has a prima facie right to inspect Council documents so far as his/her access to the document is reasonably necessary to enable the ~~member~~ Councillor properly to perform his/her duties as a member of the Council. This

- principle is commonly referred to as the "need to know" principle.
- 2.5** The exercise of this common law right depends therefore upon the Councillor's ability to demonstrate that he/she has the necessary "need to know". In this respect a Councillor has no right to "a roving commission" to go and examine documents of the Council. Mere curiosity is not sufficient. The crucial question is the determination of the "need to know." This question must initially be determined by the particular ~~Chief Legal Officer~~Head of Legal and Democratic Services whose Department holds the document in question (with advice from the ~~Chief Legal Officer~~Head of Legal and Democratic Services). In the event of dispute, the question falls to be determined by the relevant Committee — i.e. the Committee in connection with whose functions the document is held.
- 2.6** In some circumstances (e.g. a Committee member wishing to inspect documents relating to the functions of that Committee) a Councillor's "need to know" will normally be presumed. In other circumstances (e.g. a Councillor wishing to inspect documents which contain personal information about third parties) a Councillor will normally be expected to justify the request in specific terms.
- 2.7** Whilst the term "Council document" is very broad and includes for example, any document produced with Council resources, it is accepted by convention that a member of one party group will not have a "need to know", and therefore a right to inspect, a document which forms part of the internal workings of another party group.
- 2.8** Further and more detailed advice regarding Councillors' rights to inspect Council documents may be obtained from the ~~Chief Legal Officer~~Head of Legal and Democratic Services as Monitoring Officer.
- 2.9** Finally, any Council information provided to a Councillor must only be used by the Councillor for the purpose for which it was provided e.g. in connection with the proper performance of the Councillor's duties as a member of the Council or in the exercise of a statutory right. This point is emphasised in the Councillor's Code of Conduct in the following terms:
As a councillor, "you will often receive information of a private nature which is not yet public or which perhaps would not be intended to be public..... Such information is, however, for your own personal use as a Councillor and must not be disclosed or in any way used for personal or party political advantage or in such a way as to discredit the Council. This will also apply in instances where you hold the personal view that such information should be publicly available." (Para 3.~~16~~15 of the Code)
- 2.10** Instances of apparent abuse of the process of Councillors obtaining access to information and to Council documents shall, in the first instance, be dealt with informally by early discussions between the Convener, the Chief Executive, the Monitoring Officer and the Councillor(s) concerned to try to settle the matter informally by every means available.

3.0 Confidentiality of reports

- 3.1** All Chief Officers have a duty to satisfy themselves that Committee reports to which they are signatories are only classified as 'exempt information' when the statutory criteria for confidentiality are met. The Chief Executive and the Chief Legal Officer have an overriding responsibility to determine this compliance. Proper training on the criteria for confidentiality will be provided for appropriate officers and for all members of the Council.

- 3.2 Once a report has been issued within the confidential section of the agenda for a meeting and until a Committee decides that it should not be discussed in the absence of the press and public a Councillor must respect the confidentiality of the report and not disclose it to a third party.
- 3.3 Councillors will often receive information of a private nature, which is not yet, public or which perhaps would not be intended to be public. There are provisions in legislation on the categories of confidential and exempt information (see 2.0 above) and Councillors must always respect and comply with the requirement to keep such information private. Legislation gives Councillors certain rights to obtain information not otherwise available to the public and Councillors are entitled to exercise these rights where the information is necessary to carry out Council duties (see 2.0 above). Such information is, however, for a Councillor's individual use as a Councillor and must not be disclosed or in any way used for personal or party political advantage or in such a way as to discredit the Council. This will also apply in instances where a Councillor holds the personal view that such information should be publicly available.
- 3.4 It does not however follow that all the contents of the report must be regarded as secret. It may only be certain items of information or terms of negotiations that justify the inclusion of that report within the confidential section: other aspects may already be within the public domain or otherwise outside the definition of 'exempt'. A member may accordingly refer to these aspects in discussions with third parties but must exercise proper care and judgement not to reveal those elements of the paper which are protected but it will always be prudent for that member to consult the Chief Legal Officer before doing so.
- 3.5 Information as to the proceedings at any meeting from which the public and press are excluded by reason of the confidentiality of the report(s) discussed at the meeting shall not be given to representatives of the press or to any other person except by the Chair of the meeting or by a person authorised by the Chair so to do. Upon information being given in this way other members of the Council are entitled to speak on the matter but only to the extent that information has been provided by the Chair or person so authorised.

4.0 Officer/Chairman relationships

- 4.1 It is clearly important that there should be a close working relationship between a Chairman of a Committee, a Vice Chairman appointed by a Committee and a Chief Officer or other senior officer(s) of any Directorate/Department who report to that Committee or Councillors. However, such relationships should never be allowed to become so close, or appear to be so close, as to bring into question the officers' ability to deal impartially with other Councillors and other party groups
- 4.2 Whilst the Chairman of a Committee may be consulted in drawing up the agenda for a forthcoming meeting, it must be recognised that in some situations a Chief Officer will be under a duty to submit a report on a particular matter. Similarly, a Chief Officer will always be fully responsible for the contents of any report submitted in his/her name. Any issues arising between a Chairman and a Chief Officer in this area should be referred to the Chief Executive for resolution in conjunction with the Leader of the Council.
- 4.3 Finally, it must be remembered that officers within a Directorate/Department are accountable to their Chief Officer and that whilst officers should always seek to assist a Chairman (or indeed any member), they must not, in so doing, go beyond

the bounds of whatever authority they have been given by their Chief Officer.

5.0 Correspondence

- 5.1 The protocol for relations between councillors and employees in Scottish councils specifies that correspondence between an individual Councillor and an officer should not normally be copied (by the officer) to any other Councillor. Where exceptionally it is necessary to copy the correspondence to another Councillor, this should be made clear to the original Councillor. In other words, a system of "silent copies" must not be employed.
- 5.2 Official letters on behalf of the Council should normally be sent out over the name of the appropriate officer, rather than over the name of a Councillor. It may be appropriate in certain circumstances (e.g. representations to a Scottish Executive Minister) for a letter to appear over the name of a Councillor, but this should be the exception rather than the norm. Letters, which for example, create obligations or give instructions on behalf of the Council, should never be sent out over the name of a Councillor.

6.0 Involvement of local Councillors

- 6.1 Whenever a public meeting is organised by the Council to consider a local issue, all the Councillors representing the Ward or Wards affected should as a matter of course be invited to attend the meeting. Similarly, whenever the Council undertakes any form of consultative exercise on a local issue, the local Councillor(s) should be notified at the outset of the exercise. [Further information is available in the Multi Member Ward Guidance prepared for members and officers.](#)
- 6.2 Officers must at all times keep Councillors informed about issues which affect their wards or bodies on which they represent the Authority. Officers must also be alert to advise Councillors at the earliest possible stage of relevant developments or proposals. Over and above this general responsibility a Chief Officer will:
 - notify a Councillor that a report on any such matter is being tabled or discussed as soon as the decision to place that item on the agenda of a Committee is taken;
 - ensure that this report is sent to the Councillor as soon as it is published.
- 6.3 In using authority delegated to them, officers must consult local members if they consider that a proposed decision or action is of a non-routine nature and is likely to significantly affect directly the ward interests of a local member(s). This does not apply to proposed decisions or actions that have a general affect throughout Moray, or are of a routine nature covered by the Council's Scheme of Delegation.

7.0 Attendance by Councillors at meeting arranged by officers

- 7.1 Within the Council, Councillors are free at any time to meet officers to discuss all aspects of the Authority's business and to ask officers to set up local meetings to resolve specific issues arising in their divisions.
- 7.2 From time to time Committees will also resolve that Councillor level meetings will take place with other local authorities or outside bodies. Once convened the appropriate officers will be in attendance. Conversely, members of the public or representatives of external organisations will occasionally ask to meet the Chairman and members of a Committee. One or more suitably briefed officers will normally be present but if the Chairman decides that the meeting should take place

without officers in attendance he/she should explain the reasons for that decision to the relevant Chief Officer in advance of the meeting.

- 7.3** Additionally, the officers will arrange many meetings with colleagues or third parties to discharge the routine business of the Council or to action its decisions. The convention is that Councillors will not be present at these meetings but will be advised either informally or through reports to committees, of any relevant discussions and/or outcome.

8.0 Breaches of the guidance

- 8.1** Specific breaches of this guidance may ultimately be the subject of either grievance or disciplinary procedures and the deliberations of the Standards Commission but potential problems may be resolved by early discussion between a Councillor and a Chief Officer or, if necessary, between a Leader of a Party Group and the Chief Executive. More general concerns about relationships between Councillors and Officers or perceived breaches of this guidance or the principles embodied in the Councillor's Code of Conduct can be discussed with ~~the Independent Chairman of the Council's Standards Committee or~~ the Monitoring Officer and the complaints protocol "How to Complain about a Moray Councillor" would apply to this process.-

PARAGRAPH INFO	
Paragraph 1	Information relating to staffing matters
Paragraph 2	Information relating to any particular occupier or former occupier of, or applicant for, accommodation provided by or at the expense of the Authority
Paragraph 3	Information relating to any particular applicant for, or recipient or former recipient of, any service provided by the Authority
Paragraph 4	Information relating to any applicant or recipient of any financial assistance provided by the Authority
Paragraph 5	Information relating to the adoption, care, fostering or education of any particular child or relating to the supervision or residence of any particular child in accordance with a supervision requirement
Paragraph 6	Information relating to the financial or business affairs of any particular person(s)
Paragraph 7	Information relating to the financial or business affairs of any particular person(s) for any of the matters referred to in section 27(1) of the Social Work (Scotland) Act 1968
Paragraph 8	Information on the amount of any expenditure proposed to be incurred by the Authority
Paragraphs 8 and 9	Information on proposed terms and/or expenditure to be incurred by the Authority
Paragraph 9	Information on terms proposed or to be proposed by or to the Authority
Paragraph 10	Information relating to the identity of the Authority as the person offering any particular tender for a contract
Paragraph 11	Information relating to any consultations or negotiations in connection with any labour relations
Paragraph 12	Information relating to instructions to counsel and any opinion of counsel and any advice received, information obtained or action to be taken in connection with any legal proceedings
Paragraph 13	Information, which if disclosed to the public, would reveal that the Authority proposes, for the purposes of consultation, make an order or direction under any enactment which might allow an individual or organisation to defeat the purpose of the notice or order
Paragraph 14	Information relating to any action taken in connection with the prevention, investigation or prosecution of crime
Paragraph 15	Information relating to the identity of a protected informant

PROTOCOL ON ARRANGEMENTS FOR ACCESS TO COUNCIL FACILITIES AND/OR STAFF BY MSPs/MPs/MEPs OR CANDIDATES

1. Introduction

- 1.1 This protocol sets out arrangements to be followed when dealing with requests for visits to Council facilities or access to Council staff by MSPs, MPs and MEPs or candidates. It is not intended to regulate routine access to premises or officers by elected members. That is governed by the Protocol on Consultation, Access to Information, and Councillor Involvement in Council Business between Councillors and Officers In Moray Council.

2. Requests for Access

- 2.1 All requests should be addressed to the Chief Executive stating the name of the person they wish to visit and the reason for the visit. The Chief Executive, after consultation with appropriate Elected Members, such as the Convener, Depute Convener and Group Leaders will then either grant authorisation for the visit or otherwise make alternative arrangements. A response to the request will be given within ten working days, unless the request is of an urgent nature. All requests will be logged with a note of the outcome. The Public Relations Officer will be notified in all cases in order that relevant briefings and publicity can be organised.
- 2.2 There will be no difference in the procedures followed for Councillors, Constituency MSPs, List MSPs, MPs and MEPs.
- 2.3 Requests for visits by Elected Members should be co-ordinated and logged through the Chief Executive's office as above. This will give consistency to the process and reduce the potential for confusion.

3. Conclusion

- 3.1 By following this protocol, the Council will ensure consistency of approach so that equal treatment is given to all. There may be individual exceptions (for example by reason of urgency) requiring an alternative process and these will be identified on a case by case basis.