
SECTION 16 POLICY

1. INTRODUCTION

1.1 Section 16 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended, outlines the options available to the Standards Commission on receipt of a referral report from the Ethical Standards Commissioner (ESC).

1.2 The three options available under Section 16 are outlined below:

S.16 Action on receipt of reports

On receiving a report from the ESC, the Commission may—

- (a) direct the ESC to carry out further investigations;
- (b) hold a hearing; or
- (c) do neither,

and, where it acts under paragraph (a) or (b) above, may do so at any time.

1.3 The purpose of this policy is to outline the factors the Standards Commission will consider in making a determination under Section 16, in order to ensure transparency in its decision making.

1.4 The policy is intended as a guide and the list of considerations outlined below is not exhaustive. The decision will depend on the individual and particular circumstances of each case. The Standards Commission may exercise its discretion to invoke the different options under Section 16, for reasons other than those stated in this policy.

1.5 The Standards Commission can remake any determination it has made under Section 16 if new and material information comes to light. Examples of when it might do so are listed below. It should be noted, however, that these are illustrative and do not form an exhaustive list:

- having made a decision to hold a Hearing, the Standards Commission can later decide to take the option to 'do neither' under Section 16(c), if the Respondent passes away or there is evidence that they have become long-term incapacitated;
- having made a decision to direct that further investigation be undertaken under Section 16(a), the Standards Commission can later decide to hold a Hearing if it is satisfied that further investigation has been undertaken and that, on the face of it, there is now evidence of a possible breach of the Codes of Conduct;
- having made a decision to hold a Hearing, the Standards Commission can later decide to take the option to 'do neither' under Section 16(c), if new and material information emerges that leads the Standards Commission to determine that the reasons for holding a Hearing no longer apply (i.e. it is no longer in the public interest and proportionate to do so).

1.6 The Standards Commission may choose to make separate determinations under Section 16 in respect of different and individual issues of complaint that are referred to it in the same report

from the ESC. For example, if a report was received from the ESC listing three issues of complaint, the Standards Commission may choose to 'do neither' in respect of two issues and make a decision to hold a Hearing in respect of the third. More information on the different scenarios that may arise and the procedures that will be followed is contained in the Standards Commission's Section 16 Decision-Making Process document, which can be found on the website at: <https://www.standardscommissionscotland.org.uk/cases/hearing-rules>.

2. FURTHER INVESTIGATION

2.1 Following receipt of a report from the ESC, the Standards Commission will consider if it has sufficient information to enable it to decide whether or not a Hearing should be held. The Standards Commission may choose to invoke Section 16(a) and direct the ESC to carry out further investigation in the following circumstances:

- If it is unclear from the report as to what the ESC's findings or conclusions are, including which sections of the Code the ESC considers may have been breached and why; or
- If the Standards Commission considers there are any material facts that have not been sufficiently explored or that insufficient attempts have been made to obtain and analyse evidence that may have a direct bearing on the question of whether there has been a breach; or
- If the Standards Commission is not satisfied that all aspects of the complaint that could amount to a breach of the Code have been investigated and covered in the report.

2.2 Where the Standards Commission directs the ESC to carry out further investigation, it will write to the ESC within seven days of reviewing the report to confirm this decision and to explain the reasons behind it. The Standards Commission will ask the ESC to provide, within seven days of such notification, a timescale for the likely completion of the further investigation.

2.3 The Standards Commission will advise the Respondent and complainer of its decision to invoke Section 16(a) within seven days of reviewing the report and will explain the reasons behind it.

3. DECISION TO HOLD A HEARING

3.1 Where the Standards Commission concludes there is sufficient information to enable it to decide whether a Hearing should be held, it will proceed to make such a decision.

3.2 If, on the face of it, there is evidence of a breach of the Code, the Standards Commission will normally decide to hold a Hearing, in accordance with Section 16(b). In making such a decision, the Standards Commission will take into account:

- the public interest; and
- proportionality.

3.3 Public Interest:

In assessing the public interest, the Standards Commission will consider the following questions. These questions seek to provide guidance and clarity to the decision-making process. They are not exhaustive, however, and may not be relevant in every case. The weight to be attached to either of the questions, and the factors outlined later in this policy, will vary according to the facts and merits of each case.

- What is the impact / consequence or potential impact / consequence of any alleged breach?
- Will holding a Hearing (and the associated publicity) promote the provisions of the Codes of Conduct and the ethical standards framework?
- Will a decision not to hold a Hearing have the potential to undermine the ethical standards framework?

- 3.4 If the ESC is of the view that the investigation demonstrates there has been a breach of the Code, the Standards Commission will start from the position that it is likely to be in the public interest to hold a Hearing. This is because the Standards Commission considers the public are entitled to trust that those in public life will be meeting the highest standards of ethical behaviour and are entitled to expect that where it appears that a councillor or member of a devolved public body may have contravened their Code, their behaviour will be scrutinised at a Hearing. In addition, the Standards Commission notes that the councillor or member is entitled to be heard and / or represented at a Hearing and may therefore want one to be held in order to ensure their position and version of events is outlined in a public forum.
- 3.5 If the ESC has reached the view that there has not been a breach in respect of any or all the issues of complaint, the Standards Commission may nevertheless decide, having considered the questions at 3.3 above, that it is in the public interest to hold a Hearing. This is if the Standards Commission is of the view that, on the face of it, the facts or evidence as outlined by the ESC and described in their referral, potentially support a finding of a breach of the Code.
- 3.6 **Proportionality:**
The Standards Commission may also consider whether holding a Hearing or directing further investigation is proportionate to the likely outcome, and in so doing the following may be relevant to the case under consideration:
- Any alleged breach is insignificant with little or no practical consequence.
 - Any alleged breach is of a technical, minor nature only and a full admission of the contravention has been proffered by the councillor or member.
 - Whether there is evidence that the councillor or member is incapacitated to the extent they would be unlikely to be able to respond to the allegations and / or remain in office.
- 3.7 In assessing proportionality, the Standards Commission notes that it is important to ensure that neither the ethical standards framework, nor the Standards Commission, is brought into disrepute by the expenditure of public funds on unnecessary administrative or legal processes on cases that do not warrant such action.

4. ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- 4.1 The Standards Commission notes that decisions taken under Section 16 of the 2000 Act do not, in themselves, result in any restriction of the right to freedom of expression afforded by Article 10 of the European Convention on Human Rights (Article 10).
- 4.2 The Standards Commission recognises, nevertheless, that the question of whether Article 10 might afford protection could be relevant to both the questions of whether it is in the public interest and whether it is proportionate to hold a Hearing, in those cases alleging a breach of the respect, courtesy, bullying and harassment or confidentiality provisions in the applicable Code.
- 4.3 In such cases the Standards Commission will, at the Section 16 decision-making stage, firstly consider whether it is satisfied, on the face of it, that there could potentially be a breach of the Code.
- 4.4 If the Standards Commission does not consider, on the face of it, that a breach of the Code could be found at a Hearing because it is satisfied that the evidence found by the ESC contradicts the complaint or otherwise exonerates the Respondent, it will not in the public interest or proportionate hold a Hearing. In such a scenario, the Standards Commission will not proceed to consider Article 10 as there is no need to do so.

- 4.5 If the Standards Commission does not consider, on the face of it, that the alleged conduct, even if established, could amount to a breach of the Code because it is not satisfied it would meet the threshold of amounting to disrespect, discourtesy, bullying and harassment or a failure to maintain confidentiality, it will not be in the public interest or proportionate to hold a Hearing. The Standards Commission may, nevertheless, consider Article 10 and (if applicable) state that it is likely, in any event, that it would apply and provide protection.
- 4.6 If the Standards Commission considers, on the face of it, that the alleged conduct, if established, could potentially amount to a breach of the respect, courtesy, bullying and harassment or confidentiality provisions in the Code, it will consider whether the Respondent may benefit from any protection afforded under Article 10. If the Standards Commission considers the Respondent may benefit from such protection, it will proceed to consider other public interest and proportionality issues as outlined above.
- 4.7 If there is any uncertainty as to whether the Respondent should be afforded protection under Article 10 (for example, if it is unclear if any remarks concerned matters of public interest, or whether they should be considered gratuitous or offensive), and it is otherwise proportionate and in the public interest to do so, then the Standards Commission will hold a Hearing.

5. DECISION TO 'DO NEITHER' UNDER SECTION 16(C)

- 5.1 The Standards Commission may choose this option in respect of any or all the issues of complaint if it concludes that further information is not required and that it may not be in the public interest or proportionate to hold a Hearing. A decision by the Standards Commission to 'do neither' in respect of a complaint or a specific issue of complaint means that no decision has been taken, or will be taken, as to whether a breach of the Code has or has not occurred in respect of that complaint or that specific issue of complaint.
- 5.2 The Standards Commission may decide that there are no substantive public interest reasons for holding a Hearing, or directing further investigation, to determine whether there has been a breach because:
- It is satisfied that the impact or consequences of the alleged breach were short-lived and minor; and
 - the alleged breach was rectified without delay and any appropriate apology proffered promptly.
- 5.3 The Standards Commission may decide that it would not be proportionate to hold a Hearing, or direct further investigation, to determine whether there has been a breach because:
- It is not satisfied, on the face of it, that the alleged conduct would amount to a breach of the Code, even if established; or
 - It is satisfied that the alleged breach of the Code is minor, technical and inadvertent in nature and that there is evidence that the Respondent admits / accepts that their conduct could potentially amount to a breach.
- 5.4 When a decision to 'do neither' is made under Section 16(c), the Standards Commission will advise the councillor or member, the ESC, the Council or Devolved Public Body Chief Executive and the complainer in writing and provide an explanation, before the case on the complaint or specific issue of complaint is closed. The Standards Commission will publish a decision on its website outlining its reasoning.
- 5.5 Where it deems it appropriate to do so, the Standards Commission may also decide to issue a reminder to the councillor or member of their obligations under their respective Code of Conduct and /or advise the councillor or member to undertake training on their respective Code

of Conduct. The Standards Commission may include information to this effect in its published decision.



SECTION 16 POLICY – INDICATIVE MILESTONE DATES

Data control and version information				
Date	Action by	Version Updated	New Version number	Brief Description
27/07/16	LJ	N/A	V1.0	Implementation of Policy
06/03/2019	EM	V1.0	2019 V1.0	Change reference to CESPLS to read ESC
28/05/2020	LJ	V1.0	2020 V1.0	Amendments made after review to make it clear Standards Commission can remake a Section 16 decision if new and material information comes to light.
12/11/2020	LJ	2020 V1.0	2020 V2.0	Amendments made to reflect that the Standards Commission makes a Section 16 decision on all cases, whether the ESC has found a breach or not.
07/07/2021	JS	2020 V2.0	2021 V1.0	Policy amended to remove gender specific references.
29/07/2021	RW/LJ	2021 V1.0	2021 V2.0	Policy amended to expand on reasons for not holding a Hearing / doing neither.
08/11/2021	RW/LJ	2021 V2.0	2021 V3.0	Policy amended to make it clear Standards Commission can chose different section 16 options in respect of individual issues of complaint.
27/04/2022	LJ	2021 V3.0	2022 V1.0	Policy amended to outline the Standards Commission's approach in cases where Article 10 of the ECHR might apply.