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## SECTION 16 DECISION-MAKING PROCESS

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### 1. INTRODUCTION

- 1.1 Section 16 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 outlines the options available to the Standards Commission on receipt of a referral report from the Ethical Standards Commissioner (ESC). The Standards Commission has published a policy outlining how it makes decisions on the options available under Section 16, and the factors it will consider when doing so. The Section 16 Policy can be found at:  
<https://www.standardscommissionscotland.org.uk/cases>.
- 1.2 This process document aims to support the Section 16 Policy, and to ensure transparency, by identifying the various scenarios that could arise and outlining the steps that will be taken by the Standards Commission in its decision-making process in respect of each one.
- 1.3 This process document also helps to keep fairness at the forefront of the Standards Commission's decision-making by ensuring the expectations of all parties to a complaint are managed, and that clear and unambiguous reasons are provided for decisions made in respect of any of the scenarios detailed in this document.
- 1.4 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.

- 1.5 The ESC will make it clear to the Respondent and Complainer that the Standards Commission is responsible for making the final disposal decision on all issues of complaint and that it may well reach a different conclusion on some or all of the issues of complaint outlined in the ESC's report.

### 2. SCENARIO A: STANDARDS COMMISSION AGREES WITH ESC NO BREACH CONCLUSION AND DECIDES TO 'DO NEITHER'

- 2.1 This is the scenario where, following investigation, the ESC refers a report to the Standards Commission outlining their conclusion that they do not consider there has been a breach of the applicable Code of Conduct in respect of any of the issues of complaint they have identified. The ESC's report and any other information supplied will be considered by Standards Commission Members. If Members are content that they have sufficient information to decide whether a Hearing should be held; and

- are not satisfied, on the face of it, that any of the alleged conduct would amount to a breach of the Code, even if established, or
  - are satisfied, on the face of it, that some of the alleged conduct could amount to a breach of the Code, if established, but are not satisfied that it is proportionate and in the public interest to hold a Hearing,
- they will decide to 'do neither' under Section 16.

2.2 Members will advise the Executive Team accordingly. The Executive Team will then prepare a written decision outlining the reasons why Members have decided to 'do neither' and take no action on the complaint. It should be noted that these reasons could differ from, or be in addition to, any conclusions and reasoning provided by the ESC in their report. Neither the Respondent nor Complainer will be named in the written decision.

2.3 The draft decision will then be sent to one Member (selected on a rota basis, depending on availability) to review and approve.

2.4 The Standards Commission will send the approved decision to the councillor or member, the ESC, the Council or Devolved Public Body Chief Executive and any Complainer, before the case is closed. The Standards Commission will publish the approved decision on its website.

### **3. SCENARIO B: STANDARDS COMMISSION DECIDES TO HOLD A HEARING WHERE ESC HAS CONCLUDED ALL ISSUES OF COMPLAINT COULD AMOUNT TO A BREACH OF THE CODE**

3.1 This is the scenario where, following investigation, the ESC refers a report to the Standards Commission outlining their conclusion that they:

- consider there has been a breach of the Code in respect of all issues of complaint; or
- consider that, when taken together as a course of conduct, all issues of complaint could amount to a breach of the Code.

3.2 The ESC's report and any other information supplied will be considered by Standards Commission Members. If Members are content that they:

- have sufficient information to decide whether a Hearing should be held; and
  - are satisfied that, on the face of it, any of the alleged conduct could amount to a breach of the Code, if established, and
  - for the reasons outlined in the Section 16 Policy, consider it is in the public interest and proportionate to do so,
- they will decide, under Section 16, to hold a Hearing.

3.3 Members will advise the Executive Team accordingly. The Executive Team will then send correspondence to the councillor or member, the ESC, the Council or Devolved Public Body Chief Executive and any Complainer notifying them that a Hearing is to be held. The Standards Commission will outline brief reasons for its decision to hold a Hearing in the correspondence. The Standards Commission will also publish a notification of the Hearing on its website.

### **4. SCENARIO C: STANDARDS COMMISSION DECIDES TO 'DO NEITHER' WHERE ESC HAS CONCLUDED SOME OR ALL OF COMPLAINT COULD AMOUNT TO A BREACH OF THE CODE**

4.1 The Standards Commission may choose to 'do neither' on all aspects of the complaint even in cases where the ESC concludes that, on the face of it, some or all of the complaint could amount to a breach of the Code.

- 4.2 This is the scenario where Members conclude that they have sufficient information to make a decision and, for the reasons outlined in the Section 16 Policy, consider that it is not in the public interest or proportionate to hold a Hearing. If so, Members will decide to 'do neither'. A decision by Members to 'do neither' can mean that no decision has been taken, or will be taken, as to whether a breach of the Code has occurred.
- 4.3 Members will advise the Executive Team accordingly. The Executive Team will then prepare a written decision outlining the reasons why Members consider it is not proportionate or in the public interest to hold a Hearing. If applicable, the decision may additionally state why Members are not satisfied, on the face of it, that any of the alleged conduct would amount to a breach of the Code, even if established. It should be noted that these reasons could differ from, or be in addition to, any conclusions and reasoning provided by the ESC in their report. Neither the Respondent nor Complainer will be named in the written decision.
- 4.4 The draft decision will then be sent to one Member (selected on a rota basis, depending on availability) to review and approve.
- 4.5 The Standards Commission will send the approved decision to the councillor or member, the ESC, the Council or Devolved Public Body Chief Executive and any Complainer, before the case is closed. The Standards Commission will publish the approved decision on its website.
- 4.6 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 the Code and / or suggest that the councillor or member undertake training on provisions in the Code. The Standards Commission may include information to this effect in its published decision.
- 5. SCENARIO D: STANDARDS COMMISSION DECIDES TO HOLD A HEARING WHERE ESC HAS CONCLUDED ONLY SOME OF THE ISSUES OF COMPLAINT COULD AMOUNT TO A BREACH OF THE CODE**
- 5.1 This is the scenario where, following investigation, the ESC refers a report to the Standards Commission outlining their conclusion that they:
- consider there has been a breach of the Code in respect of some of these issues of complaint; and
  - do not consider there has been a breach of the Code in respect of the remaining issues of complaint.
- 5.2 The ESC's report and any other information supplied will be considered by Standards Commission Members. If Members are content that they:
- have sufficient information to decide whether a Hearing should be held;
  - are satisfied, on the face of it, that any of the alleged conduct could amount to a breach of the Code, if established;
  - for the reasons outlined in the Section 16 Policy, consider it is in the public interest and proportionate to do so,
- they will decide, under Section 16, to hold a Hearing.
- 5.3 The Executive Team will then send correspondence to the councillor or member, the ESC, the Council or Devolved Public Body Chief Executive and any Complainer notifying them that a Hearing is to be held. The Standards Commission will outline brief reasons for its decision to hold a Hearing in the correspondence. The Standards Commission will also publish a notification of the Hearing on its website.

- 5.4 Members will identify the issues it wishes to consider at the Hearing. The Executive Team will notify the parties accordingly in its correspondence.
- 5.5 If Members are not satisfied, on the face of it, that any remaining issues of complaint would amount to a breach of the Code, even if established, they will decide to ‘do neither’, under Section 16, in respect of those issues. The Executive Team will include, in the Hearing notification letter, reasoning as to why these issues will not be considered at the Hearing.
- 5.6 The Standards Commission will explain why it decided to ‘do neither’ on some issues of complaint in its final written decision (published following the conclusion of the Hearing).

## **6. SCENARIO E: STANDARDS COMMISSION DECIDES TO HOLD A HEARING FOR REASONS THAT DIFFER FROM THE ESC’S CONCLUSIONS**

- 6.1 This is the scenario where, following investigation, the ESC refers a report to the Standards Commission outlining their conclusion that they do not consider there has been a breach of the Code in respect of any or all issues of complaint, and the Standards Commission nevertheless decides to hold a Hearing to adjudicate on some or all of the issues of complaint.
- 6.2 The ESC’s report and any other information supplied will be considered by Standards Commission Members. If Members are content that they:
- have sufficient information to decide whether a Hearing should be held;
  - are satisfied that it cannot be said that, on the face of it, the alleged conduct could not amount to a breach of the Code, if established (regardless of any contrary conclusion reached by the ESC); and
  - for the reasons outlined in the Section 16 Policy, consider it is in the public interest and proportionate to do so,
- they will decide, under Section 16, to hold a Hearing.
- 6.3 If Members decide to ‘do neither’ in respect of any remaining issues of complaint, the Standards Commission will follow the steps outlined under paragraphs 5.5 to 5.7 above.
- 6.4 In making such a decision, the Standards Commission will be mindful of the need to be fair to the Respondent and to ensure that they are provided with clear and unambiguous information as to:
- which issues are to be considered at the Hearing; and
  - the reasons why the Standards Commission considers any such issues, if established, could amount to a breach of the Code.
- 6.5 In providing reasons, the Standards Commission will seek to assist the Respondent by ensuring they are aware of the case they may have to answer, so that they can make an informed decision about what matters they may wish to lead evidence on and / or make submissions about at the Hearing.
- 6.6 The Standards Commission will outline, in its notification of Hearing correspondence, why it considers it is proportionate and in the public interest to hold a Hearing.
- 6.7 Once the Hearing Panel is selected, the Standards Commission will send the parties correspondence outlining why the Standards Commission was not satisfied, on the face of it,

with the ESC's conclusions. In doing so, the Standards Commission will make reference to one or more of the following (as applicable and agreed by the Panel):

- Why it does not necessarily agree with some aspects of the ESC's factual findings as outlined in the report.
- Why it considers a Hearing is necessary to establish any factual matters to the requisite standard of proof (being the balance of probabilities).
- The reasons why it considers that the factual findings could amount to a breach of the Code and why it does not necessarily accept the ESC's conclusions in this regard.
- The provision or provisions of the Code that the conduct could have breached (if these are different to any identified by the Complainer or ESC).
- Why it considers that one or more of the issues of complaint, when considered together, could potentially amount to a breach of the Code.
- The reasons why it considers that the protection of freedom of expression afforded by Article 10 of the European Convention on Human Rights may not apply or prevent a finding of breach being made at a Hearing and a sanction being applied.

6.8 The Standards Commission will explain, in its correspondence to the Respondent, how the case against them will be presented at the Hearing (see Section 9 below).

6.9 The Standards Commission will advise both the Respondent and ESC, at the earliest opportunity, of the Panel's intention to:

- cite witnesses (and the general subject matter of their evidence); and / or
- seek any documentary evidence (and what this is),

over and above the witnesses to be called by either the Respondent or ESC or documents included in the productions. The Standards Commission may decide to adjourn the Hearing at the request of the Respondent, the ESC, or of its own volition, should it consider it fair to do so (for example, if the Respondent requires more time to prepare their case in light of any witnesses cited by the Standards Commission or any documents produced).

## **7. SCENARIO F: STANDARDS COMMISSION DECIDES TO HOLD A HEARING WHERE ESC HAS NOT REACHED A CONCLUSION ON WHETHER SOME OR ALL OF COMPLAINT COULD AMOUNT TO A BREACH OF THE CODE**

7.1 This is the scenario where, following investigation, the ESC refers a report to the Standards Commission outlining the outcome of their investigation but advising that they have been unable to reach a conclusion as to whether there has been a breach of the Code in respect of any or all issues of complaint.

7.2 The ESC's report and any other information supplied will be considered by Standards Commission Members. If Members are content that they have sufficient information to make a decision under Section 16 on all the issues of complaint, they will proceed to do so, and:

- If Members decide to 'do neither' on all issues of complaint, the procedure as outlined under paragraphs 2.2 to 2.4 above will be followed; or
- If Members decide to hold a Hearing on some or all of the issues, the procedures under paragraphs 6.2 to 6.9 above will be followed.

## **8. FURTHER INVESTIGATION**

8.1 This is the scenario where, having reviewed a report from the ESC, Standards Commission Members are not content that they have sufficient information to make a decision under Section 16 on one or more of the issues of complaint.

- 8.2 In this scenario, the Standards Commission will not decide to hold a Hearing, or take no action on any part of the complaint (regardless of whether Members are satisfied they have sufficient information to be able to do so on some issues). Instead, the Standards Commission will direct the ESC to carry out further investigation.
- 8.3 Where the Standards Commission directs the ESC to carry out further investigation, it will write to the ESC to confirm this decision and to explain why it has been made.
- 8.4 The Standards Commission will advise the Respondent and Complainer of its decision to direct more investigation be undertaken and will explain the reasons as to why.
- 8.5 The Standards Commission will use this option if it is not satisfied that:
- all material facts have been explored sufficiently;
  - sufficient 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; and / or
  - all aspects of the complaint that could amount to a breach of the Code have been investigated and covered in the report.

## 9. PRESENTATION OF CASE AT A HEARING

- 9.1 The Standards Commission requires the ESC (or any appointed representative) to present the findings of their investigation at the Hearing, regardless of any conclusion reached.
- 9.2 If applicable, the Standards Commission also expects the ESC to make submissions as to why they consider there has, on the face of it, been a breach of the Code. The Standards Commission will not, however, require the ESC to make such submissions in respect of any issues due to be considered on which they:
- did not reach a conclusion (i.e. Scenario F); or
  - were unable to recommend that a formal finding of a breach of the Code can be made (i.e. Scenario E).
- 9.3 The Hearing Panel may, however, question any witnesses, ESC and Respondent on both the factual basis of any issues that fall within the scope of the two bullet points listed at 9.2 above, and the Respondent on whether they could amount to a breach of the Code. The Hearing Panel will only question the witnesses, ESC and Respondent on matters that have already been made known to the Respondent.
- 9.4 The Respondent will be entitled to cross-examine any witnesses the Standards Commission has cited.

## 10. SECTION 16 DECISION-MAKING

- 10.1 Standards Commission Members will normally reach Section 16 decisions by consensus. Decisions will only be taken by majority in cases where sufficient time has been spent fully deliberating all issues and discussing any areas of disagreement, and where it has become apparent that nothing new can be added to the debate. A vote will not be taken purely to expedite matters. It should be noted that 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.

- 10.2 A paper outlining how Hearing Panels of the Standards Commission make decisions (in terms of by consensus or majority) on whether there has been a breach of the Code by the Respondent and, if so, what sanction should be imposed, can be found at:  
<https://www.standardscommissionscotland.org.uk/cases/hearing-rules>.

