
SECTION 16 POLICY

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) regarding a complaint about a breach of the Councillors' Code of Conduct or a Code of Conduct for members of a devolved public body.

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, meaning that 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. It will provide reasons in cases where it has chosen to do so.

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 incapacitated or seriously unwell in the long-term;
- 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 applicable Code and it would be in the public interest and proportionate to hold a Hearing;
- 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 it 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 have been identified in the same referral 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 at: <https://www.standardscommissionscotland.org.uk/cases>.

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 a Hearing should be held. The Standards Commission may choose to exercise its discretion under Section 16(a) and direct the ESC to carry out further investigation in any of 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.
 - If it 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 of the Code.
 - If it 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 advise of its decision and reasoning. 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 direct further investigation and reasoning within seven days of reviewing the report.

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 whether it is in the public interest to hold a Hearing, 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 any of the questions, and the factors outlined later in this policy, will vary according to the facts and merits of each individual case.

- What is the impact or consequence, or the potential impact or consequence of any alleged breach of the Code?
- Will holding a Hearing (and the associated publicity) promote the provisions of the Codes of Conduct and the ethical standards framework?
- Could a decision not to hold a Hearing 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 meet the required standards of conduct; and
- 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 may want a Hearing about their conduct to be held in order for their position and version of events to be explained and 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. In doing so, it may consider the following questions to be relevant to the case under consideration. They are not exhaustive, however, and may not be relevant in every case. The weight to be attached to any of the questions will again vary according to the facts and merits of each individual case:

- Is the alleged breach insignificant with little or no practical consequence?
- Is the alleged breach of a technical, minor nature only and, if so, has a full admission of the contravention been proffered by the councillor or member?
- Is there 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. The Standards Commission further notes, however, that this consideration must be balanced against the requirement to provide an incentive to comply with the Codes of Conduct and the fact that a sanction cannot be imposed on a councillor or member who has contravened the Code unless a Hearing is held.

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 a restriction on a councillor or member's right to freedom of expression under Article 10 might be justified 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 cases where a breach of the respect, courtesy, bullying and harassment or confidentiality provisions in the Code is alleged.

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 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 be in the public interest or proportionate to 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 unlikely, in any event, that a restriction could be justified.
- 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 a restriction on the Respondent's right to freedom of expression under Article 10 could be justified. If the Standards Commission considers such a restriction could be justified, it will proceed to consider other public interest and proportionality issues as outlined above.
- 4.7 If there is any uncertainty as to whether a restriction on the Respondent's right to freedom of expression under Article 10 could be justified (for example, if it is unclear if any remarks concerned matters of public interest, or whether they should be considered gratuitous, offensive or excessive), 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 formal decision is taken, or will be taken, as to whether a breach of the Code has occurred in respect of that complaint or that specific issue of complaint.
- 5.2 The Standards Commission may decide that it is not in the public interest to hold a Hearing, or direct further investigation, to determine whether there has been a breach in cases where:
- it is satisfied that the impact or consequences of the alleged breach were short-lived and insignificant; and
 - the alleged breach was rectified without delay, with any appropriate apology proffered promptly.
- 5.3 The Standards Commission may decide that it is not proportionate to hold a Hearing, or direct further investigation, to determine whether there has been a breach in cases where:
- 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 on all aspects of the referral, the Standards Commission will write to the councillor or member, the ESC, the Chief Executive of the respective Council or Devolved Public Body and the Complainer to advise of its decision and reasons. The Standards Commission will publish a written decision on its website outlining its reasoning before closing the case. Neither the Respondent nor Complainer will be named in the decision.

- 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 the Code and / or advise the councillor or member to undertake training on specific provisions. The Standards Commission may include information to this effect in its published decision.

