

SALC/SCAPTC LEGAL UPDATE 26/27 FEBRUARY 2010

IAN DAVISON AND ANNE BOTT

CODE OF CONDUCT

Introduction

1. Every Town and Parish Council has, since 2002, adopted a formal Code of Conduct for Councillors. This is a legal requirement and the Code is in a standard form as laid down by the Local Government Act 2000. The Code was revised, following public consultation, in 2006, and a revised Code was published in May 2007. There is now one code for County, District, Borough and Town and Parish Councils.
2. The Code governs the behaviour of a Councillor and on accepting office every Councillor has agreed to abide by the Code.
3. A copy of the Code should have been supplied to every Councillor on taking office and must be carefully read as a Councillor is assumed to have both read and understood the Code.
4. The Code applies whenever the Councillor acts in an official capacity, including whenever the Councillor conducts the business of the Council, or acts or claims to act, or gives the impression that the Councillor is acting, in an official capacity or as a representative of the Council
5. The Code of Conduct applies when representing the Council on an outside body, even if that body does not have to comply with the Code.

Principles

6. The Code refers to the ten general principles governing the conduct of Councillors. Whilst these principles are not statutory, and a breach of them is not automatically a breach of the Code, a failure to observe them may amount to a breach of the Code of Conduct, depending upon the circumstances of the case.
7. A table of these Principles is annexed.

General Obligations

8. There are a number of general obligations under the Code of Conduct which if not complied with, are normally breaches of the Code
9. These obligations include:
 - (a) Treating others with respect
 - (b) Not doing anything which may cause the Council to breach any equality laws
 - (c) Not bullying any person including other Councillors, Council officers or members of the public
 - (d) Not intimidating or attempt to intimidate any person who is or is likely to be a complainant, a witness or involved in the administration of any investigation or proceedings relating to a failure to comply with the Code of Conduct
 - (e) Not compromising, or attempt to compromise, the impartiality of anyone who works for or on behalf of the Council
 - (f) Not disclosing confidential information, or information which the Councillor believes to be of a confidential nature except in limited circumstances
 - (g) Not preventing anyone getting information that they are entitled to by law
 - (h) Not bring the office of Councillor or the Council into disrepute while acting in an official capacity or at any time through criminal activity that leads to a criminal conviction
 - (i) Not using, or attempt to use, a position improperly to the advantage or disadvantage of yourself or anyone else
 - (j) Only using or authorising the use of the resources of the Council in accordance with its requirements
 - (k) Making sure that you use the Council's resources for proper purposes only. It is not appropriate to use, or authorise others to use, the resources for political purposes, including party political purposes
10. There can be an additional provision (Paragraph 7) which obliges a Councillor to take advice from the

Clerk or the Monitoring Officer, particularly in respect of the declaration of personal or prejudicial interests. This is however not mandatory and only applies if specifically adopted by the Council.

Register of Interests

11. The provisions of Local Government Act 2000 have been used to impose the preparation and maintenance of a Register of Interests on Town and Parish Councils. The provisions previously applied mainly to District and County Councils but were extended to Town and Parish Councils, in an only slightly modified form, in 2002.
12. A Councillor must complete the Register of Interests within 28 days of election or cooption. It is not possible to refuse to complete the Register and remain a Councillor. Any change in an interest must be notified within 28 days of the change.
13. The Register must include the name of the Councillor's employer, details of property owned in the Town or Parish and business interests in the Town or Parish, together with details of any organisations in which a position, as opposed to mere membership, is held.
14. Membership of charities or bodies whose purposes include the influence of public opinion also has to be registered. Some interests can be registered as public service interests. These are interests which arise from service on another public body and the new category is designed to enable Councillors who sit on more than one public body to take part in discussions.
15. The Register is a public document, available for public inspection within the Town or Parish and must be updated as necessary. The original is maintained by the Monitoring Officer for the District or Borough Council.

Declarations of Interest

16. This is one of the most difficult areas for Councillors and Councils, and gives rise to complaints by members of the public on a regular basis. Most Town and Parish Councils represent a comparatively small and well defined area and by the very nature of the organisation most Councillors will have knowledge of parishioners or properties within that area, and this gives rise to many difficulties.
17. There are two types of interest which have to be declared

Personal Interest

18. An interest is personal when
 - (a) **it is an interest which must be registered or**
 - (b) **it is an interest, not on the register, but where the well being or financial position of you, members of your family, or people with whom you have a close association, is likely to be affected by the business of your Council more than it would affect the majority of inhabitants of the Council's area (or ward where the area is warded)**
19. The interest must be declared before the start of the discussion, but under the revised Code, if the interest arises from the membership of another body to which the Councillor was appointed by the Council, it need only be declared before speaking on the matter. The Councillor who has a personal interest can remain in the meeting, continue to take part in the discussion, and vote.

Prejudicial Interest

20. An interest is prejudicial when
 - (a) **it is a personal interest**
 - (b) **it does not fall within an exempt category (e.g. setting the precept or allowances, housing if you are a tenant of the Council,)**
 - (c) **it affects your financial interests or relates to a licensing or regulatory matter**
 - (d) **a member of the public, who knows the relevant facts, would reasonably think that your personal interest is so significant that it is likely to prejudice your judgment of the public interest**
21. In deciding whether an interest is prejudicial, the mere existence of local knowledge, or connections within the local community, are not normally sufficient to meet the test. There must be a financial interest and some factor which might positively harm the Councillor's ability to judge the public interest objectively.
22. Unless the Council has adopted the relevant part of the Code (Paragraph 12(2)) after the declaration of a prejudicial interest, the Councillor has to withdraw from the meeting, and take no part in the discussion. If the relevant part has been adopted and the Council allows members of the public to make representations, give evidence or answer questions, the Councillor can remain in the meeting

and have the same rights as a member of the public, but must then leave when the matter is discussed by the Council or a decision taken. The Councillor has no greater rights than a member of the public if he or she has a prejudicial interest, and to the extent that he has to leave the meeting room, less rights. The Councillor cannot remain in the public gallery or in the meeting room.

23. There are a limited number of exceptions to the rule that a Councillor with a prejudicial interest cannot take part in the discussion and vote, and these are set out in the Code of Conduct. These mainly relate to membership of outside bodies, and in the exceptional circumstances of there being no quorum without the participation of the Councillor. A dispensation of the local Standards Committee has to be obtained in advance.

Failure to comply with the Code

24. If a Councillor fails to declare either a personal or a prejudicial interest, or declares an incorrect interest, it is a breach of the Code, and can be the subject of a complaint to the local Standards Committee.
25. There is no power for the Council itself to over ride a decision taken by a Councillor with regard to the nature of the interest, but any person, including a fellow Councillor can make a complaint if they consider that an interest has not been declared. It is not a sufficient excuse that the Councillor considered the nature of the interest and came to the wrong conclusion.

Enforcement of the Code of Members' Conduct - general

26. The Local Government Act 2000 created the Standards Board for England. The Act provided that this body was to have a central role in enforcing the ethical framework introduced by the Local Government Act and for supervising arrangements for the investigation of breaches of the Code of Conduct in County, District and London Borough Councils and certain other bodies including Town and Parish Councils.
27. The Board considered that it brought valuable benefits to the Town and Parish Council sector, including reduced scope for corruption and greater respect for such Councils in the mind of the public.
28. The 2000 Act provided that the Standards Board would appoint an Ethical Standards Officer who would carry out investigations into alleged breaches of the code of conduct. The position has now changed, and the Board (now renamed Standards for England) is now primarily a strategic regulator. The Local Government and Public Involvement in Health Act 2007 has radically changed the procedure for investigation into breaches of the Code.

Monitoring Officers

29. Monitoring Officers are officers of the County or District Council, and normally have another position with the legal or administration section of the Council. The provisions of the 2000 Act enabled Monitoring Officers to conduct investigations in respect of matters referred to them, and gave them responsibility for the adoption of codes of conduct and the maintenance of the register of members' interests.
30. The Monitoring Officer is the principal advisor to the Standards Committee and has responsibility for undertaking local investigations and "other action", e.g. training, at the direction of the Standards Committee's assessment sub-committee.

Local Standards Committees

31. These are committees of the District or Borough Council created to deal with complaints. In the case of Parish and Town Council matters they must have a Parish or Town Council representative, and they have an independent chairman.
32. A Standards Committee has several functions which include educational and monitoring standards of behaviour. So far as the enforcement of standards is concerned they work through a minimum of three sub-committees: an assessment sub-committee which assesses complaints to determine whether there is prima facie case, a review sub-committee which can review a decision to take no action and a determination sub0committee which holds disciplinary hearings.

Complaints

33. All complaints are made direct to the Local Standards Committee's assessment sub-committee which

- will decide how complaints should be handled.
34. Standards for England has however stated that whilst it will have a strategic role it will reserve the right to investigate serious allegations. This power is used in important cases.
 35. On receipt of a complaint, the Local Standards Committee must take one of three possible courses of action.
 - (a) Refer the matter to the Monitoring Officer for investigation or other action
 - (b) Refer the matter to the Standards Board because of the seriousness of the allegation
 - (c) Decide that no action be taken
 36. The local Monitoring Officers will conduct the investigations and will undertake "other action", although they do have the power to delegate such function.

Procedure

37. Originally all complaints are investigated in the same manner, and there was no light touch for Town and Parish Councils nor were the complaints investigated in a different manner if they were comparatively minor.
38. The Regulations dealing with investigation follow the following basic rules namely:
39. As regards the complaint
 - (a) it must be in writing
 - (b) it must concern a member of the local authority
 - (c) it must relate to something that happened after the Code of Conduct came into effect
 - (d) it must be about something covered by the Code
40. If the complaint satisfies the above it must also satisfy one of the following:-
 - (a) if serious enough, if proved, to justify the range of sanctions available
 - (b) it is part of a series of less serious misconduct which is unreasonably disrupting the business of the authority and there is no other avenue left to deal with it short of investigation
41. It is unlikely to be referred if it:
 - (a) is malicious or relatively minor
 - (b) a similar complaint has already been investigated and there is nothing further to be gained by seeking the sanctions available
 - (c) the complaint relates to private life and is unlikely to affect fitness for public office
 - (d) it appears that the grievance is about dissatisfaction with a council decision
 - (e) there is insufficient information available
42. Monitoring Officers can take action other than investigation to resolve local problems, such as training and guidance and getting Councillors to meet and work out their problems together. This is now quite common where there is evidence of difficulties within the Council.

The investigation

43. In an investigation the Monitoring Officer has a right to all information that he requires, and will conduct interviews and obtain information from other sources. He or she has very wide legal powers to obtain information. If in the course of investigation the Monitoring Officer finds evidence of other breaches he or she may refer these other breaches back to the local Standards Committee
44. The guidelines state that the Councillor, will during the investigation, have an opportunity to comment upon the allegations. In fact, this opportunity may come quite far into the investigation. At the close of the interviews and information gathering the Monitoring Officer will prepare a draft Report which will then be put to the Councillor for his comments. This is, in the view of the Board, "during the course of investigation". If no comments are made, the Report stands. There are tight time limits for responses.
45. If the Monitoring Officer finds that there is no case to answer, the Councillor is not likely to object. If the complaint it is not dismissed, the findings of the Report must be considered very carefully. The Report generally contains what are described as "findings of fact".
46. If the Officer considers that there has been a breach of the Code of Conduct, the matter will be referred to the local Standards Committee, or it may be referred to the First Tier Tribunal (Local Government Standards, England) for England if the case is sufficiently serious

Standards Committees and First Tier Tribunal (Local Government Standards, England)

47. The Standards Committees and the First Tier Tribunal (Local Government Standards, England) have a number of penalties at its disposal including the power to suspend a member for up to six months or one year (Tribunal) or disqualify him or her (Tribunal) from standing as a member for up to five years. The lowest penalty is a reprimand
48. They hold formal hearings which are in essence disciplinary proceedings of an inquisitorial nature. They assess the facts on the basis of the Monitoring Officer's report upon which they place great reliance, and any evidence produced on behalf of the Councillor. The Councillor should seriously consider being represented by an experienced lawyer as well.
49. Our experience shows that it cannot be expected that the Committee or Panel will regard the matter as so trivial that no penalty need be imposed.
50. The Tribunal also acts as an appellate body in relation to local standards committees.

Publicity

51. Even if the finding is that there is no case to answer or no breach, a summary of the case is published on the district council's website. The only cases which do not appear on the website are where there is no investigation.
52. Other cases are published in detail on the website and, where a hearing takes place, a report will often be published in the local newspaper

Practical points

53. It is clear that in an investigation considerable reliance is placed upon Minutes of meetings, and not just those minutes relating to the events complained about. The general course of conduct of the Councillor is also considered. It is very important that the Minutes of Council and other meetings are accurate, and therefore every Councillor should ensure that they are checked. If an interest is declared make sure that it is correctly recorded.
54. Standards for England states that if a Councillor has a prejudicial interest, it is necessary to state the nature of that interest when declaring it. It is not sufficient, in its view, merely for the Councillor to state that he has such an interest and leave the room. He must state the general nature of the interest
55. Be particularly careful when relatives serve on other bodies or committees, and be certain to declare the correct interest
56. Standards for England considers that any action which is taken by a Councillor comes within its remit. Councillors have to be very careful in considering the capacity in which they take any action, and it is possible that even saying that you are not acting as a Councillor is insufficient
57. Council decisions involving money are particularly sensitive, and many alleged breaches of the Code of Conduct involve such things as grant applications.

What to do?

58. When notified that the local Standards Committee is going to conduct an investigation, take legal advice on your rights and obligations. Do not treat the matter lightly.
59. The Monitoring Officer or his or her Investing Officer will want to get at the truth and will take an independent line. It is important to be candid and helpful. Make sure that the Monitoring Officer/Investigating Officer is given all the relevant material. A failure to co-operate can lead to further complaint.
60. Take advice about what to do when a request is made for an interview. Make sure that the interview is at a time convenient to you and when you can concentrate of the questions.
61. Take particular care about the text of the draft Report.
62. If a report is referred to the local Standards Committee or the First Tier Tribunal (Local Government Standards, England) for a hearing, take advice and consider being represented. Expect to be professionally cross examined, although questioning is the prerogative of the Tribunal and to have to justify and explain your actions and decisions.
63. If you choose not to be represented, liaise closely with the Monitoring Officer or the First Tier Tribunal (Local Government Standards, England) about the arrangements for the hearing, including the use of written evidence at the hearing and the attitude of the Committee or the Panel to late evidence. In our experience oral evidence is preferred.

Costs and indemnity

64. Since the 2004 a Parish or Town Council has had the power to indemnify a Councillor against the costs of any investigation, report, reference, adjudication or other proceedings in relation to the Code of Conduct. This indemnity can include the cost of insurance cover.
65. There is no power for costs to be given against any complainant.
66. If the Member is found to have breached the Code, or admits a breach, the indemnifying Council is entitled to recover the costs from the member. If the member refuses to pay the amount can be recovered as a civil debt.

Conclusion

67. Every Councillor needs to be fully aware of the Code of Conduct and understand that it is being strongly applied.
68. In particular both the Standards Committee and the First Tier Tribunal (Local Government Standards, England) regard a failure to declare a prejudicial interest as a serious breach of the Code of Conduct. Standards for England has recently issued guidance on personal and prejudicial interests in cases where there is membership of more than one body. This guidance highlights the difficulty that a Councillor may experience.

Links

<http://www.standardsforengland.gov.uk/Guidance/TheCodeofConduct/Guidance/Onlineguides/>
<http://www.standardsforengland.gov.uk/Guidance/TheCodeofConduct/Guidance/Onlineguides/>

VILLAGE GREENS

69. Town and Village Greens developed under customary law as areas of land where local people indulged in lawful sports and pastimes. These might include organised or ad-hoc games, picnics, fetes and similar activities.
70. Section 15 of the Commons Act 2006 changes the legal definition of a town or village green and sets out the qualifying circumstances in which land may be newly registered. Essentially anyone can apply to have land registered as a green if it has been used by local people for recreation 'as of right' (i.e. without permission, force or secrecy) for at least 20 years. Please see DEFRA [factsheet](#) (PDF 39KB) on the registration of new town or village greens.
71. Section 15 came into force throughout England on 6 April 2007 and makes the following changes to the existing law relating to the registration of new greens:
 - it provides a period of grace after use of land by local people 'as of right' has been ended by the landowner, when an application to register it as a green can still be made (under the old legislation, an application had to be made immediately after use 'as of right' had been ended);
 - it ensures that, where a landowner grants permission for use of his land when there has already been 20 years' use 'as of right', the use continues to be regarded 'as of right' (so there is no time limit for an application for registration, unless the landowner takes other steps to challenge use);
 - any period of statutory closure (*e.g.* during a foot-and-mouth disease outbreak) is to be disregarded when deciding whether there has been 20 years' use 'as of right'; and
 - it allows a landowner voluntarily to register his land as a green: please also see DEFRA [guidance note on the voluntary dedication of land](#).

Points to note

Definition

72. The definition of a village green has attracted the attention of the highest judicial authorities and there is no fixed definition other than the statutory currently found in s 15 of the Commons Act 2006. This provides that a village green may be registered where a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years and they continue to do so at the time of

application. The notion of “as of right” represents an unresolved legal conundrum. In order for an application to proceed the public must not have used the land by force or secretly or by the permission of the owner. Use by the owner, or by a third party with its express permission, to which the public defers will displace any suggestion that the use is of right as will overt actions by the owner e.g. closing the ground by gates or erecting signs. The perception of the owner, acting reasonably, is key.

73. Buildings are incompatible with village green status.

The effect of designation

74. The effect of designation can be dramatic. It is unconditional and permanent.

75. **S 29 of the Commons Act 1876 provides**

“... An encroachment on or enclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve of the [Enclosure Act 1857](#),”

76. This provision has been construed as preventing any works on a village green other than small scale ancillary development.

77. It means that the most of those open space powers described would be denied to the Council, a point which applicants for village green status fail to recognise.

78. Many of the supporters of an application would consider it laughable if told that it would not be possible in the future for the usual incidents of public recreation grounds to be provided and that no future development, however, desirable and beneficial to the community and unrelated to the use of that land for public recreation would be allowed.

79. A Council should be aware that even if there little or no risk of someone seeking to enforce the criminal law with respect to incompatible work or activities, they remain illegal and expenditure on such work or activity would be unlawful.

Restrictive covenants

80. There are often misconceptions relating to restrictive covenants.

81. They are enforceable between the original parties in contract and they can be enforceable by successors of covenantee if there is land to be benefited.

82. The Council may be regarded as the original covenantor as it stands in the shoes of the original parish council.

Statutory purpose

83. The statutory purpose for which the land should be but often is not specified.

84. Byelaws made pursuant to s 8(1) of the Local Government Act 1894 relates to land held under s 164 of the Public Health Act 1875.

85. The 1875 Act is one of the principal powers under which land is held for recreational purposes and empowers a local authority, including a parish council, to lay out, improve, manage and make byelaws to regulate open spaces.

86. Unlike the Open Spaces Act 1906, the 1875 Act does not impose any trusts.

87. Open Spaces Act 1906 (power to acquire, lay out and regulate open spaces and disused burial grounds).

88. The full range of open space powers under the 1875 or 1906 Acts, s 44 of the Public Health Acts Amendment Act 1890 (temporary closures, pleasure boats), ss 76, 77 of the Public Health Acts Amendment Act 1907 (regulations seats, notices, pavilions and staff), s 144 (encouragement of visitors) and 145 (provision of entertainment including temporary closure of and charging for entertainments on recreation grounds) of the Local Government Act 1972 and s 19 of the Local Government (Miscellaneous Provisions) Act 1976 (provision of recreational facilities).

89. The byelaws permit land to be set aside from general public use for organised team games.
90. An authority's powers to appropriate and dispose of the land under ss 126 and 127 of the Local Government Act 1972 are available.
91. Significance of buildings and other development e.g. public toilets, council offices, garages and sheds, car parks, equipped play areas.
92. Significance of notices indicating ownership or controls over use or access or display of byelaws at the land.
93. Note the use for organised sport regulated by letting agreements for e.g. cricket, football and stoolball.
94. It can expect (as can the hirers and the public) that the use to be made by the hirers will exclude the public from those areas when in use.
95. The absence of village green status does not mean that the open space will cease to be public open space.

Links

- <http://www.defra.gov.uk/rural/protected/commonland/tvg.htm>
<http://www.defra.gov.uk/rural/protected/commonland/guidance.htm#4>
<http://www.defra.gov.uk/rural/documents/protected/common-land/tvg-factsheet.pdf>
<http://www.sussexalc.org.uk/legaltopicnote/SALC-LegalTopicNote-2009-03-04-58.pdf>

SNOW, ICE AND GRITTING

Grit bins

96. No duty to provide grit bins and in principle the fact that someone has carried out gritting does not impose upon that person any liabilities but, having regard to what I say about occupiers' liability, a failure to grit or salt might incur liabilities.

Highways including footways and footpaths

97. Highway authorities have an absolute duty to maintain highways (s 41 of the Highways Act 1980). This is subject to a special statutory defence of taking reasonable steps to deal with the disrepair.
98. Under s 41 as originally enacted and at common law there was no obligation on a highway authority to keep a highway free from snow and ice or to treat snow and ice. The position was modified in 2003 and a highway authority is under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice. This is not an absolute duty and is different in nature and extent.
99. Parish councils, however, are not under an s 41 duty although they have power to maintain certain highways. Having regard to the common law and legislative history, a parish council cannot be under a higher duty than a highway authority to take precautions against or to remedy the effects of snow or ice or to provide grit or salt.
100. A parish council is under no duty to clear snow and ice from the highway or to provide grit and salt and does not assume legal liability if it provides grit or salt (provided it does not cause an obstruction on the highway or commits a regulatory offence under the Highways Act 1980).

Other land

101. So far as other (non-highway) land is concerned different considerations apply.
102. A parish council's obligations in respect of land it occupies are regulated by the law on occupiers' liability.
103. In summary, an occupier's duty is to ensure that its lawful visitors are reasonably safe for the purposes for which they are invited to be there.
104. Recent case law evinces a more rational approach to risks attaching to occupiers and acceptance of risk by lawful visitors than has hitherto been the case.
105. A parish council should take a reasonable view of its occupation of land; equally members of the public are expected to take care of themselves.

Health and safety

106. Parish councils should be alive to their duties under s 3 of the Health and Safety at Work Etc Act 1974 to conduct their business in such a way as to ensure as far as is reasonably practicable, that persons not in their employment who may be affected thereby are not thereby exposed to risks to their health and safety.
107. Essentially this is a statutory formulation of the law of negligence. I am not aware that taking precautions against or remedying the effects of snow and ice has led to a breach of the 1974 Act.

CLOSED CHURCHYARDS

108. S 215(2) imposes an obligation on a parish council to maintain a closed churchyard. The duty is circumscribed and is defined by s 215(1) to keep [the closed churchyard] in decent order and its walls and fences in good repair. There is clearly a difference between “decent order” and “good repair”.
109. The statute and the limited case law establish the following principles:
- the parish council does not become the owner of the churchyard
 - responsibility for memorials lies with the owner of the memorial and where he or she cannot be found the church authorities
 - it is the limited responsibility to maintain in its two forms which transfers
 - the responsibility relates only to the churchyard and not to the church or its appurtenances
 - the obligation certainly includes the clearance of “all rubbish, muck, thorns, briars, shrubs and anything else that may annoy parishioners when they come into it ...”
 - the Church of England’s legal view is the obligation includes the maintenance and repair of the paths and gates, and also the renewal of a gate when, according to the ordinary rules of good management, it should be replaced
 - any significant work requires a faculty from the bishop
 - the obligation to keep in decent order includes a requirement to maintain the safety of memorials laid flat
 - the appearance of the churchyard is a factor
 - the duty to maintain does not require a parish council to undertake works of restoration of memorials
 - the church authorities retain all rights and liabilities as owner and occupier
 - “decent” might be construed as “becoming” or “seemly”
 - in exercising any of its powers a parish council must take reasonable care
 - the exercise of powers may require planning permission or listed building consent
 - the powers of a local authority in relation to closed churchyards are clearly intended to be different from those exercisable with respect to burial grounds or closed churchyards designated open spaces under ss 9-16 of the Open Spaces Act 1906.
110. My view is that discharge of a parish council’s obligation to keep in decent order should have regard to the principles of occupiers’ liability but is not subject to the 1957 Act as such in respect of closed churchyards. It follows that a parish council may wish to salt those paths which are habitually used by the public for public purposes but would not attract liability for not doing so: see s 111 of Local Government Act 1972 and s 2 of the Local Government Act 2000 (eligible councils).
111. So far as the general obligation to keep in decent order is concerned, a parish council is not obliged to make good (other than to ensure the reasonable safety users) or to improve or restore. It may, of course, choose to do more: s 111 of the Local Government Act 1972 and s 2 of the Local Government Act 2000 (eligible councils).
112. Different considerations apply to the repair of walls and fences where the obligation is to maintain in good repair. This is potentially onerous and means that the walls and fences must be kept in a state reasonably sufficient to fulfil the purposes for which they were provided e.g. as a support or a means of enclosure and having regard to the requirements of good property management. Again, a parish council may go beyond its statutory duty.

113. The advice is based on an interpretation of s 215 of the Local Government Act 1972 and does not take account of any rights and liabilities acquired under contractual arrangements.

Links

<http://www.sussexalc.org.uk/legaltopicnote/SALC-LegalTopicNote-2009-03-04-67.pdf>

VILLAGE HALLS AND RECREATIONAL GROUNDS TRUSTEES AND PARISH COUNCILS

Functional and financial split

114. There must be an organisational and financial split between the parish council and the charity. The respective accounting rules require it.
115. Organisationally, the two bodies must be separated. The role of the parish council is limited to two principal functions: to act as custodian trustee and can be the appointor of the managing trustees. Each body is responsible for the conduct of its organisation and for accounting for and being accountable for its activities.
116. The proceedings of the parish council are governed by the Local Government Acts and the procedural, financial and contract standing orders made under them and those of the charity are governed by the charitable scheme and the Charities Acts and regulations.

Council officers

117. Officers of the Council may act as staff of the charity or provide services to it but in doing so are governed by the charitable rules relating to such employment or engagement. Staff must be aware of the potential for (legitimate) conflict, just as any member or officer acting as a trustee would be bound by the trust law and could act only in the interests of the trust.

Support to the charity

118. The way in which the Council may give support to the charity could depend on the Council's being an eligible Council and acting as such.

S 137 of the Local Government Act 1972

119. If the Council were not an eligible council, then its scope for support to the charity is essentially limited to financial support e.g. under s 137(3) (a) of the Local Government Act 1972 (and the constraints on the exercise of that power) or s 19 of the Local Government (Miscellaneous Provisions) Act 1976.
120. Such support could cover payment for services e.g. of the time of a Council officer acting as clerk or treasurer.

Eligible councils

121. The position of an eligible council is significantly different. Not only can an eligible council make financial assistance available (without the s 137(4) cap), it can have recourse to the well-being powers in s 2 of the Local Government Act 2000. The well-being powers are not wholly unfettered and must be exercised having regard to District Council's and County Council's sustainable community strategies. They can comprise the provision of professional and other services to the charity either free or at a cost and such services could include accounting, clerking or technical services. The Council should always be aware of its fiduciary duty to its taxpayers.

Documentation of arrangements

122. Whatever route or combination of routes are chosen, the process and the deal done should be approved and documented. I would not envisage that the contract or service level agreement would need to be elaborate but each party should remember that it could sue and be sued on the terms.

Separating the Council's and the charity's finances

123. With respect to financial separation different financial considerations and rules apply to the Council and the charity and that is the case even if there is an overlap of administration.
124. Separate bank accounts are required and income and expenditure attributable to each body must be processed through the relevant bank account. It is not enough to keep separate memorandum accounts within the Council's accounting systems.
125. It will be necessary for the charity to create a receipts and expenditure account for the charity, authorise and open a bank account and make arrangements for the authorisation and processing of its services, supplies and works and the relevant income and expenditure.
126. The Council for its part must separate out the income and expenditure properly attributable to the charity and authorise and transfer the requisite balance to the charity's bank account.
127. It may be, of course, that any such account may already bear a theoretical deficit the Council will, subject to grant accounting, have to agree a grant now or an advance on the grant if none has been already agreed.
128. Not only must income and expenditure streams be kept separate but you need to be aware of the differing taxation regimes.
129. Beware if the charity's funds have been mixed with those of the Council's then the charity's income and expenditure has been wrongly treated for VAT purposes and this clearly and urgently must be rectified.
130. The position may have been different had the Council been a sole trustee.
131. The charity's activities being generally exempt in VAT terms mean that the charity cannot recover its input tax. A further implication is NNDR. A charity is entitled to 80% mandatory relief and should be looking for 20% discretionary relief from the billing authority. The Council is not entitled to such relief, although it may qualify for small business relief.
132. Grants by the Council to the charity should be clearly authorised and identified. It may be that the level may equate to the deficit on the charity's year's activities but because of the requirement for separation of bank accounts the figure cannot just be an entry in the Council's accounts.
133. Moreover, the charity and the Council should be aware of the reporting requirements in s 137A of the Local Government Act 1972 which continues to apply to grants to charitable bodies (whether or not a Council is an eligible council).

Particular points

134. Note the following points:
 - the accounts and finances and procedures of the Council and the charity must be separated at the earliest opportunity for the current year, otherwise the auditor will, I suspect, qualify accounts;
 - the decision-making processes of the Council and of the trustees must be separated and administered separately not only because of the legal and accounting rules but to demonstrate transparency in the public interest;
 - the administration of the Council and the charity must be separated to the extent that the tasks are separately indefinable and the right rules applied;
 - quality status requires unqualified accounts. It also demands adequate internal controls and internal audit, both of which have failed, to date, to pick up the deficiency and could necessitate a review not only to satisfy the Council but also the external auditors and the County Accreditation Panel;
 - eligible status requires proper record keeping of s 2 activities which connote both the financial assistance and the provision of services;
 - a separation of the activities and the opening and operation of separate bank accounts would appear to remove the risk of qualification of the Council's accounts on those grounds;
 - the making of financial assistance by the Council to the charity engages the reporting arrangements of s 137A. However, it is good practice for a Council and sound financial stewardship to lay down proper application procedures, grant making criteria, conditions for the expenditure of funds and reporting

back requirements. I should add that I do not consider, by analogy with the Local Government Act 1988 Part II, that grant conditions could require the charity to take its services from the Council;

- there is much merit in documenting the contract between the Council and the charity for administrative/ professional/ technical services and the authority therefor. Both parties need to demonstrate a proper audit trail and value for money.

Links

<http://www.sussexalc.org.uk/legaltopicnote/SALC-LegalTopicNote-2009-03-04-23.pdf>

<http://www.sussexalc.org.uk/legaltopicnote/SALC-LegalTopicNote-2009-03-04-30.pdf>

FREEDOM OF INFORMATION AND DATA PROTECTION - E-MAIL MANAGEMENT

The status of e-mails

135. E-mails should be regarded as written documents for the purposes of production, use, retention and disclosure. They are not to be treated as different from paper documents.

Production and use

136. Members and officers should:

- Use personal and professional courtesy and considerations in e-mail.
- Always use appropriate language, remembering that misunderstandings frequently arise through the use of e-mail which offends others without intending to.
- Comply, not only with any specific policies on e-mail or any Member/Officer protocol or any local instructions about external or internal communications, but also with the rules of common courtesy and the law when using e-mail.
- If offended by the content or tone of an incoming message get a second opinion to check out their interpretation and make sure the response is objective.
- Always respect the privacy of others, remembering that e-mail can be just as intrusive as unsolicited 'phone calls or letters.
- Respect the confidentiality of information encountered inadvertently in e-mail or other records.
- Check with the sender if there is any doubt about the authenticity of a message.
- Only copy correspondence between an individual Member and an officer to other Members when appropriate and necessary
- Make explicit where correspondence has been copied to others
- Ensure that e-mails which create obligations or give instructions on behalf of the Council are never sent out under the name of a Member.
- Be alive to the Code of Members' Conduct especially with regard to treating others with respect.

137. Members and officers should not:

- Send unnecessary e-mails, remembering someone else will have to read and respond.
- Include anything in an e-mail that would not be put in a letter.
- Use code or jargon which might be misunderstood or unknown to the receiver.
- Use e-mail which breaches codes of common courtesy or decency (such as harassment, copyright violations, unsolicited e-mails or other material).
- Seek out, use, or disclose personal or confidential information unless specifically authorised to do so.
- Knowingly restrict or interfere with others' access to and use of e-mail.
- Send "Junk e-mail" or chain messages.
- Use e-mail to give the impression that the sender represents the Council (unless authorised to do so).

Management

138. A Council will want to bear in mind the following points about the active management of documents including e-mails:

- The principles underlying records management – creation, retention, identification, and retrieval of records – apply equally to both electronic and paper records.
- There is a need to manage business records in electronic form, and detail and monitor procedures for e-mail, documents and other information held on shared and personal hard drives.
- There should be regular review procedures relating to information held in deleted files and back-up systems, particularly for keeping track of what information is held in this way.
- Information located in desktop recycle bins is clearly subject to the FOIA as this continues to be held and is easily accessible. Once deleted from the recycle bin the information will also continue to be held unless the electronic record is completely erased from the computer system.
- Information in a deleted file or in a back-up, whether a server, disc or tape, may be regarded as being held by a public authority for the purposes of the FOIA depending on the particular circumstances of the individual case.
- If the information is contained within a record that is, as a result of retention and destruction policies, due to be destroyed within 20 days of receiving a Freedom of Information request, a Council does not have to release the information. However, as a matter of good practice, it is worth considering delaying destruction until the Council has disclosed the information or, if not disclosed, until the complaint and appeal provisions of the FOIA are exhausted.
- If a Council cannot delay the destruction, under the duty to offer advice and assistance the Council should identify whether another authority holds the information and inform the applicant of this or offer to provide similar or related information if this is appropriate.
- All recorded information held by a public authority is subject to the FOIA. No distinction is made between information held by an authority in its main office, in other locations, or on its behalf by an off-site storage firm. This means that the procedures and policies on location and retrieval of information will apply in the same way. Similar procedures should also be in place between the authority and its information systems provider for information kept electronically that is not easily accessible directly by staff of the authority.

Retention

139. E-mails like other documents and files to which they might be attached should be retained in accordance with a Council's documents and records retention policy. The policy should also detail the criteria for and the arrangements for the disposal of documents that have passed the requirement for retention. A policy entails an assessment of the nature of the storage and the security arrangements and the length of time for which the documents are to be held and the method of disposal.
140. The nature of the storage will depend on the importance and sensitivity of the information held, the durability of the medium and the need for and facilities for access.
141. Security arrangements will be determined by the importance and sensitivity of the information and any restrictions on or rights of access to the material. For example, personal information must be kept in accordance with the Data Protection Act 1998 but must be disclosable in response to data subject requests.
142. The need for and the quality of the back up and disaster recovery procedures must respect the importance and sensitivity of the material.
143. The length of time for which documents are retainable is governed by the time during which legal proceedings may be brought, statutory requirements or sound management.
144. Most legal proceedings are governed by 'the Limitation Acts'. The Acts (notably the Limitation Act 1980) state that legal claims may not be commenced after a specified period. The specified period varies, depending on the type of claim in question. The table below sets out the limitation periods for the different categories of claim. The reference to 'category' in the table refers to claims brought in respect of that category.

Category	Limitation Period
Negligence (and other 'Torts')	6 years
Defamation	1 year
Contract	6 years (12 years if under seal)
Leases	Throughout the terms plus 12 years
Sums recoverable by statute	6 years
Personal Injury	3 years
To Recover Land	12 years
Rent	6 years
Breach of Trust	None

145. Certain statutory provisions require the retention of documents for certain periods including:

DOCUMENT	MINIMUM RETENTION PERIOD	REASON
Minute books	Indefinite	Archive
Scales of fees and charges	5 years	Management
Receipt and payment account(s)	Indefinite	Archive
Receipt books of all kinds	6 years	VAT
Bank statements, including deposit/savings accounts	Last completed audit year	Audit
Bank paying-in books	Last completed audit year	Audit
Cheque book stubs	Last completed audit year	Audit
Quotations and tenders	12 years/indefinite	Limitation
Paid invoices	6 years	VAT
Paid cheques	6 years	Limitation
VAT records	6 years	VAT
Petty cash, postage and telephone books	6 years	Tax, VAT,
Timesheets	Last completed audit year	Audit
Wages books	12 years	Pensions
Insurance policies	While valid	Management
Certificates for Insurance against liability for employees	40 years from date on which insurance commenced or was renewed	The Employers' Liability (Compulsory Insurance) Regulations 1998 (SI. 2753), Management.
Investments	Indefinite	Audit, Management
Title deeds, leases, agreements, contracts	Indefinite	Audit, Management
Members allowances register	6 years	Tax,
For Halls, Centre, Recreation Grounds _ application to hire	6 years	VAT

<ul style="list-style-type: none"> _ lettings diaries _ copies of bills to hires _ record of tickets issued 		
For Allotments <ul style="list-style-type: none"> _ register and plans 	Indefinite	Audit, Management
For Burial Grounds <ul style="list-style-type: none"> _ register of fees collected _ register of burials _ register of purchased graves _ register/plan of grave spaces _ register of memorials _ applications for interment _ applications for right to erect memorials _ disposal certificates _ copy certificates of grant of exclusive right of burial 	Indefinite	Archives, Local Authorities Cemeteries Order 1977/204

146. The retention of personal information is subject to the Data Protection Act 1998's data protection principles.
147. The retention of certain non personal data may be regulated by the Council's publication scheme under the Freedom of Information Act 2000.
148. The retention policy must also include the criteria for and the arrangements for the disposal of documents e.g. by destruction or transfer to an archive. The nature of disposal will depend on the sensitivity of the material.

Disclosure

149. Documents generally and e-mails in particular are publicly disclosable under and in accordance with the Freedom of Information Act 2000 (and the Council's publication scheme), the Data Protection Act 1998, Environmental Information Regulations 2004/3391 and access to information.
150. Information held (and this includes e-mails) should always be regarded as disclosable unless there are sound legal reasons founded in the statutory framework which justifies their withholding, e.g. that it is properly exempt under the Freedom of Information Act 2000, or it is personal data not disclosable other than to a data subject under the Data Protection Act 1998 or it is subject to an obligation of confidentiality.
151. So far as access to information is concerned, a Council's policy on sharing or giving information to Members should be as open as possible.
152. Members may request the Clerk to provide them with such information, explanation and advice about the Council's functions as they may reasonably need to assist them in discharging their role as Members. This may range from a request for general information about some aspect of a service's activities to a request for specific information on behalf of a parishioner.
153. Where such information is requested on behalf of a third party, it shall only be requested if it is capable of being in the public domain: i.e. it is not confidential, data protected or subject to exemptions from disclosure under the Local Government Act 1972 Part 5A (access to information) and equivalent legislation, the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.

154. Any Council information provided to a Member must only be used by the Member for the purpose for which it was provided, i.e. in connection with the proper performance of the Member's duties as a Member of the Council.

Links

See also

- http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/ico_parish_councils_final.pdf
- http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/foi_hints_for_practitioners_handing_foi_and_eir_requests_2008_final.pdf
- http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_8_-_records_management_faqs_v2.pdf

CONTACTS AT HEDLEYS

Alison Bartle-Tubbs – Local Government a.bartle-tubbs@hedleys-solicitors.co.uk

Anne Bott – Local Government a.bott@hedleys-solicitors.co.uk

Ian Davison – Local Government i.davison@hedleys-solicitors.co.uk

Kate Jackson – Employment k.jackson@hedleys-solicitors.co.uk

Roger Taylor – Senior Partner Local Government r.taylor@hedleys-solicitors.co.uk

Hedleys Solicitors LLP is a Limited Liability Partnership Registered in England No OC310564

Registered office at 6 Bishopsmead Parade, East Horsley, Surrey, KT24 6SR

Hedleys Solicitors LLP is regulated by the Solicitors Regulation Authority reference no.420576

01403 284567

reception@hedleys-solicitors.co.uk