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# Breaches Policy

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# REPORTING BREACHES OF THE LAW RELATED TO THE PENSION SCHEME

## Background

This document sets out the West Sussex Pension Fund's policy and procedure for identifying, reporting and managing breaches of the law and the responsibilities of those who become aware of any breach of law relating to the management and administration of the Fund.

The Responsible Officer (Head of Pensions) will be responsible for the management and effective application of this breaches policy.

This policy covers the responsibility of those persons who are involved in the management and administration of the Fund. It is based on the content of the Pension Regulator's Code of Practice. It does not cover the responsibility of other persons described in the Code of Practice. In particular it does not cover the responsibility of scheme employers.

Breaches of the law which affect pension schemes should be reported to the Pensions Regulator in accordance with its Code of Practice. Failure to report a material breach without reasonable excuse is a civil offence that can result in financial penalties.

Consideration of the implications of individual breaches also provide an opportunity to learn and to review and improve processes.

## What is a breach of the law

A breach of the law is an act or omission which is in contravention of a statutory provision or regulation or of any court order or of any policy requirement which is in place in accordance with legal and regulatory requirements. It can cover many aspects of the management and administration of the scheme, including failure:

- to do anything required under the LGPS Regulations.
- to do anything required under relevant legislation, statutory guidance or codes of practice.
- to act on evidence of a fraudulent act or omission.
- to make payments to the Fund or to any person in accordance with the Pension Fund policies and commitments to members.
- to provide information or maintain records in accordance with Regulations.

# The duty to report – officers elected members and ‘reporters’

All staff involved in the management or administration of the Fund are required to take a pro-active approach to the identification and reporting of all breaches that come to their attention as having occurred, or likely to occur. All staff should ensure that any identified breach is drawn to the attention of a senior officer (see ‘reporters’ below) or to the Responsible Officer.

Members of the Pensions Committee or of the Pensions Advisory Board may also become aware of a breach or potential breach and, if so, should draw this to the attention of one of the officers responsible for the management of the Pension Fund or the Responsible Officer. Members may reasonably require confirmation that the matter has been properly reported or attended to in accordance with this policy.

There should be no delay between the identification of a breach and its reporting in accordance with this policy. Action should be taken as quickly as is reasonably practicable. In most cases, this should be within 10 working days of the breach being identified. It is not necessary for the individual to carry out an investigation to verify any concerns or suspicions although a report should be based on a reasonable understanding of rules and requirements and the implications of the issue identified.

## Reporters

The Code of Practice identifies the following as Reporters:

- Scheme managers (in this case the Pensions Committee, the Executive Director of Finance and Support Services and the Executive Director of Law, Assurance and Insight).
- Members of the Pension Advisory Board
- The administrator of the Fund (in this case officers of the County Council who are involved in the administration of the Pension Fund)
- Scheme employers.
- Professional advisers (including the Fund actuary, benefit consultants, investment advisers, legal advisers).
- Third party providers (where so employed and, in this case Hampshire County Council’s Pensions Service).

Reporters are required to:

- identify and assess the severity of any breach or likely breach they become aware of.
- report all breaches or likely breaches to the Pension Regulator in accordance with this policy.
- in conjunction with relevant colleagues agree a proposed course of action to rectify the breach, obtaining appropriate legal or other advice as necessary.
- ensure that the appropriate corrective action is taken to rectify the cause of the breach or likely breach and to prevent it from reoccurring.
- co-operate with, and assist in, the reporting of breaches and likely breaches to the Regulator and in any requested report to the Pension Committee or Pension Advisory Board.

If a scheme or an individual is at risk, for example where there has been dishonesty, the reporter should not take any actions that may alert those implicated that a report has been made. Similarly, reporters should not delay their report to the Regulator, to check whether any proposed solutions will be effective.

## **The decision to report to the Pension Regulator**

Where anyone has reasonable cause to believe that a breach has occurred it should be notified to a Reporter or to the Responsible Officer. This should be done as soon as reasonably practicable.

The notification should be recorded, assessed and, where necessary, reported by the relevant Reporter or by the Responsible Officer.

Not every breach that is identified needs to be reported to the Regulator, only those where the Reporter or Responsible Officer has reasonable cause to believe a breach has occurred and that it is likely to be considered materially significant by the Regulator. Any report to the Regulator must take place as soon as reasonably practicable. In most cases, this should be within 10 working days of the breach being identified.

### **Reasonable cause to believe**

The Reporter suspecting that a breach may have occurred does not need to investigate the matter or secure all relevant evidence. They should however base their belief on an understanding of the relevant rule of law or regulatory provision and a reasonable checking of the information on which the concern is based so as to establish a basis for believing a breach has taken place.

## Materially significant

The reporter or the Responsible Officer will determine whether there has or may be a breach of the law and whether it is materially significant, having regard to the guidance set out in the Code of Practice and after consultation with such advisers they deem appropriate. This may include Legal Services, the other senior officers within the Pensions Fund and relevant external advisers.

To determine whether the breach is materially significant the reporter will consider:

- Cause – what led to the breach e.g. dishonesty, poor governance, incomplete or inaccurate information.
- Effect – what is the effect of the breach e.g. inaccurate records, incorrect payments, potential for further breaches occurring, risk of claim.
- Reaction – e.g. taking prompt, correct and effective action to respond to and resolve a breach or being slow or incomplete in responding.
- Wider implications – e.g. likely that other failings will emerge due to the issue identified or that other transactions or other employers or members may be affected.

Breaches can, using these factors then be categorised as:

- **Green** – not caused by dishonesty, poor governance or a deliberate contravention of the law and where its effect is not significant and there are no wider implications. A plan is put in place in a timely way to rectify the situation. In such cases the breach will not be reported to the Regulator but should be recorded in the Fund's breaches log.
- **Amber** – requires further advice or the gathering of additional information to determine whether it is significant, such as a need to be clear on the cause or the effect of the breach. This additional assessment should be undertaken promptly to determine whether the breach should be reported.
- **Red** – caused by dishonesty, poor governance or a deliberate contravention of the law or, even if not, it is likely to have a potentially significant impact for the Fund or its members, even where a plan is in place to rectify the situation. All such breaches must be reported to the Regulator without delay.

A breach is likely to be of concern and material significance to the Regulator where a breach has been identified and those involved:

- do not take prompt and effective action to remedy the breach and identify and tackle its cause in order to minimise risk of reoccurrence or

- are not pursuing corrective action to a proper conclusion or
- fail to notify affected scheme members where it would have been appropriate to do so.

Where uncertainty exists as to the materiality of any identified breach the Reporters will be required to notify the Regulator of the issue and the steps being taken to resolve it. They must respond to and act on any advice or instructions from the Pensions Regulator in response to the report of any breach.

## Action Plan

The Reporter or Responsible Officer will also ensure, where necessary, that an action plan is put in place and acted on to correct the identified breach and ensure further breaches of a similar nature do not reoccur.

The Responsible Officer will work with the Scheme Manager to identify any actions required to ensure there is no reoccurrence of the breach and to provide appropriate advice or training to any person with responsibility for the area of work affected.

The Scheme Manager will be responsible for ensuring that all actions planned are addressed and their successful implementation is evidenced and recorded.

The breach and the action plan shall be reported to the Pensions Committee and/or the Pensions Advisory Board.

## Whistleblowing

In rare cases reporting a breach internally or to the Pensions Regulator may involve a duty to whistle blow on the part of an officer of the Fund another person. The duty to report does not override any other duties a person may have, such as confidentiality, whether commercial or personal. Any such duty is not breached by reporting to the Regulator. Anyone who wishes to remain anonymous when reporting a breach internally can use the [Council's Whistleblowing policy](#) and seek advice or guidance in accordance with that policy. The Administering Authority will ensure it adheres to the requirements of the Employment Rights Act 1996 in protecting an employee making a whistleblowing disclosure to the Regulator as set out in the County Council's Whistleblowing Policy.

The duty to report, however, does not override 'legal privilege', so oral and written communications between the Fund and a professional legal adviser cannot be disclosed if they meet the principles of legal professional privilege. Advice from Legal Services must be obtained if there is any suggestion that legal privilege applies to the information identifying or dealing with the suspected breach.

## Reporting and recording arrangements

Breaches will be reported as soon as reasonably practicable.

The Fund will maintain a log of all breaches. This log will be reviewed on an on-going basis to determine any trends in the breaches that might indicate any serious failings or fraudulent behaviour.

Where several persons are aware of a breach or where additional advice is sought to determine the significance of a breach, those persons shall determine who shall be responsible for determining that it should be reported and for making the report. A report may be made collectively by those involved.

Where it is considered that a breach is of such significance that the Regulator is required to intervene as a matter of urgency (for example, serious fraud) the matter should be brought to the attention of the Regulator immediately (e.g. by calling them direct).

## **Failure to Report**

It should be noted that failure to report a significant breach or likely breach will be treated seriously and may lead to action being taken against the Fund managers or any reporter with knowledge of the breach. Action may include civil proceedings leading to a financial penalty.

# Appendix A – Example scenarios

## 1. Failure to enter employee into the scheme Scenario

It is discovered that a scheme employer has not entered an eligible employee into the LGPS on joining.

### Steps that might be taken

On the face of it a breach will have occurred, as the scheme employer has failed to do something they are required to do under the rule of the LGPS. Before deciding to report to the Pensions Regulator it is necessary to consider why this has happened and the steps that are being taken to either rectify the situation and/or ensure it is not repeated. This will include:

- Assessing whether failure relates to a specific employee or is it something more widespread.
- Remedying this particular situation immediately.
- Understanding if there have been personnel changes at the employer; has this resulted in teething problems during any hand-over?
- If necessary the Fund could provide training to the employer on its responsibilities to ensure there is no repeated failure.

### Materiality

When considering if the delay/failure is likely to be of “material significance” you could consider;

- Has the member been denied access to the scheme completely?
- Has the employer failed to respond to the Fund’s enquiries?
- Has the member not been given the opportunity to backdate entry to the scheme and pay arrears?
- Has the employer failed to put in place an immediate plan to remedy any further failures?
- Are more members affected, or is this a one-off?

**IF THE ANSWER TO ANY OF THE ABOVE IS “YES” THIS MAY IMPLY MATERIALITY AND MAY WARRANT REPORTING TO THE PENSIONS REGULATOR. IN ANY EVENT THE ISSUE SHOULD BE ADDED TO THE FUND’S BREACHES LOG.**

## 2. Late payment over of contributions Scenario

A scheme employer is late in paying over employee and employer contributions.

Where the payment failure is likely to be of material significance to the Pensions Regulator, a written report of the matter should be sent to them

Reports should be made to the Regulator within 14 days of the Pension Fund having reasonable cause to believe that a material payment failure exists. Members should be notified within 30 days of the report to the Regulator. When reporting to members, the Fund should provide payment information that will enable them to understand what has been paid to the scheme and by whom.

### Steps that might be taken

There could be many reasons for a delayed payment, so while a breach has clearly occurred it is important to understand the details behind the delay. To do this:

- Contact the employer to assess the reason for the delay.
- Investigate what went wrong.
- Ensure steps are put in place so as to avoid a repeat in future months.
- Record the outcome of your investigation.
- Make sure processes are assessed to ensure they pick up any potential fraud.

### Materiality

While the reason for the delay in paying over contributions might be entirely innocent, it is also possible something more sinister is at play and could be “materially significant”. Consider;

- Is the employer unwilling or unable to pay? e.g. due to insolvency.
- Is any dishonesty involved on the part of the employer?
- Is the employer seeking to avoid paying contributions?
- Does the employer have inadequate processes in place to recover contributions?
- Have contributions been outstanding for over 90 days since being identified?

**IF THE ANSWER TO ANY OF THE ABOVE IS “YES” THIS MAY IMPLY MATERIALITY AND MAY WARRANT REPORTING TO THE PENSIONS REGULATOR. IN ANY EVENT THE ISSUE SHOULD BE ADDED TO THE FUND’S BREACHES LOG.**

### 3. Late Submission of year-end data Scenario

A scheme employer is late in submitting year-end pay and contribution return in respect of active scheme members.

#### **Steps that might be taken**

On the face of it this is a breach, but the employer may not necessarily appreciate the significance. Things you might consider doing include:

- Contacting the employer to assess the reason for the non-submission.
- Investigating with the employer what went wrong.
- Putting in place steps to ensure no repeat.
- Recording your investigations.

#### **Materiality**

Is the delay/failure likely to be of “material significance”? Consider;

- Is the employer unwilling or unable to provide the required data? e.g. are its systems adequate.
- Has the employer failed to respond to the Fund’s enquiries?
- Will the delay impact the issue of annual benefit statements?

**IF THE ANSWER TO ANY OF THE ABOVE IS “YES” THIS MAY IMPLY MATERIALITY AND MAY WARRANT REPORTING TO THE PENSIONS REGULATOR. IN ANY EVENT THE ISSUE SHOULD BE ADDED TO THE FUND’S BREACHES LOG.**

## 4. Late issue of annual benefit statements Scenario

The Fund is late/fails to issue annual benefit statements to active and/or deferred scheme members within the statutory time limits.

### Steps that might be taken

Failure to issue annual benefit statements or delaying their issue is a clear breach. Before reporting to the Pensions Regulator:

- Assess whether failure relates to a specific employer or wider issues.
- If there have been system or scheme rule changes, determine whether teething problems have contributed to the delay/failure.
- Put in place steps to ensure statements are issued within a reasonable timescale.
- Put in place steps to ensure no repeat.
- Record the investigations.

### Materiality

Is the delay/failure likely to be of “material significance”? Consider;

- Is the breach resulting from employer failure to provide year-end data?
- Has the employer failed to respond to the Fund’s enquiries?
- Has there been a failure on the part of the Fund to have a proper plan in place for the ABS project?
- Has the Fund failed to put in place an immediate plan to remedy any delay/failure?
- Will the delay impact on the member’s actual benefits?

**IF THE ANSWER TO ANY OF THE ABOVE IS “YES” THIS MAY IMPLY MATERIALITY AND MAY WARRANT REPORTING TO THE PENSIONS REGULATOR. IN ANY EVENT THE ISSUE SHOULD BE ADDED TO THE FUND’S BREACHES LOG.**

## 5. Late notification of leaver/retirement details

### Scenario

A scheme employer fails to provide the Fund with the necessary leaver/retirement notifications.

### Steps that might be taken

On the face of it a breach will have occurred, as the scheme employer has failed to do something they are required to do under the LGPS Regulations. Before deciding to report to the Pensions Regulator it is necessary to consider why this has happened and the steps that are being taken to either rectify the situation and/or ensure it is not repeated.

- Assess whether failure relates to a specific employee or is it something more widespread.
- Remedy this particular situation immediately.
- If there have been personnel changes at the employer, has this resulted in teething problems during any hand-over.
- If necessary the Fund could provide training to the employer on its responsibilities to ensure there is no repeated failure.

### Materiality

Is the delay/failure likely to be of “material significance”? Consider;

- Has the employer failed to respond to the Fund’s enquiries?
- Has the failure delayed the assessment and notification/payment of retirement benefits?
- Has the scheme member been denied access to investment opportunities due to the failure?
- Has the failure led to financial hardship for the member?
- Has the Fund failed to put in place an immediate plan to remedy any delay/failure?

**IF THE ANSWER TO ANY OF THE ABOVE IS “YES” THIS MAY IMPLY MATERIALITY AND MAY WARRANT REPORTING TO THE PENSIONS REGULATOR. IN ANY EVENT THE ISSUE SHOULD BE ADDED TO THE FUND’S BREACHES LOG.**

## 6. Failure to declare potential conflict

### Scenario

A Pension Committee or Pension Board member fails to declare a potential conflict of interest in relation to an issue for discussion or decision, which has later come to light.

### Steps that might be taken

It is a requirement to declare conflicts of interest, so a breach will have occurred. Before deciding whether to report to the Pensions Regulator:

- Determine why the conflict of interest was not reported at the outset.
- Consider what impact it had on the eventual discussions or decision.
- Draw attention of all Committee and Board members to the Fund's conflicts of interest policy.
- Consider revisiting the discussion or decision, excluding the individual concerned.
- Remove the individual from the Pension Committee or Pension Board if considered their omission was of such significance as to lead to a loss of confidence in the public office.

### Materiality

Is the non-disclosure likely to be of "material significance"? Consider;

- Has the individual used the situation to their advantage?
- Has the individual had their judgement swayed by the apparent conflict of interest?
- Would the removal of the individual from the discussions/decision have altered the eventual outcome?
- Would the non-disclosure in this situation lead to a loss of confidence in the public office?

**IF THE ANSWER TO ANY OF THE ABOVE IS "YES" THIS MAY IMPLY MATERIALITY AND MAY WARRANT REPORTING TO THE PENSIONS REGULATOR. IN ANY EVENT THE ISSUE SHOULD BE ADDED TO THE FUND'S BREACHES LOG.**

## Appendix B – Breaches Template

- Date the breach or likely breach was identified.
- Name of the scheme.
- Type of Scheme e.g. Occupational, Public Service.
- Pension scheme registration (PSR) if known.
- Name and address of the employer (where appropriate).
- Name, position and contact details of the reporter.
- Role of the reporter in the scheme.
- Any relevant dates.
- A description of the breach, its cause and effect, including the reasons it is, or is not, believed to be of material significance.
- Whether the breach is considered to be red, amber or green.
- A description of the actions taken to rectify the breach.
- Whether the concern has been reported before, and
- A brief description of any longer term implications and actions required to prevent similar types of breaches reoccurring in the future.