

The CIPFA Disciplinary Scheme

GUIDANCE BY CIPFA COUNCIL: DUTY TO INFORM (BYE-LAW 32A)

May 2008

CIPFA, the Chartered Institute of Public Finance and Accountancy, is the professional body for people in public finance.

Our 14,000 members work throughout the public services, in national audit agencies, in major accountancy firms, and in other bodies where public money needs to be effectively and efficiently managed.

As the only UK professional accountancy body to specialise in public services, CIPFA's qualifications are the foundation for a career in public finance.

We also champion high performance in public services, translating our experience and insight into clear advice and practical services for our public sector clients.

Globally, CIPFA shows the way in public finance by standing up for sound public financial management and good governance around the world.

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INTRODUCTION

CIPFA exists to promote and encourage high standards in public finance and accountancy. The Institute's Bye-Laws are important in helping to maintain the reputation of, and the public's confidence in, the Institute, its Members and the accountancy profession. Bye-Law 32A is designed to ensure that these objectives continue to be achieved (see Appendix 1).

Bye-Law 32A requires every Member to provide such assistance, cooperation and information as the Institute may require in order to carry out the provisions of its Royal Charter, Bye-Laws and Regulations and to fulfil the aims of the Institute. Specifically, Members are required to:

- provide information relating to Membership, practice or employment reasonably required by the Institute;
- provide full and prompt co-operation in connection with any scheme concerning Members in public practice or in relation to any disciplinary investigation;
- bring facts and matters to the attention of the Institute which may necessitate disciplinary action against a Member; and
- comply with any further or additional duties to co-operate and inform issued by the Council of the Institute.

This guide is intended to provide guidance on the new duty to assist and co-operate with any investigation (whether relating to the particular Member or another Member of the Institute) and to provide information and bring to the attention of the Institute any facts or matters which may indicate that a Member has become liable to disciplinary action.

The guide will consider:

- The purpose of the Bye-Law
- When a report should be made and what should be reported
- Considerations where material to be disclosed to the Institute may be confidential

THE DUTY TO COOPERATE AND INFORM

The purpose of the duty to cooperate and inform

From time to time, CIPFA Members have considered it necessary to report misconduct by a fellow Member to the Institute, for example, where a fellow Member has committed a criminal offence or has been the subject of disciplinary proceedings by their employer. Such instances are rare and in the majority of cases Members have found that they are able to refer the Institute to publicly available information concerning their fellow Members' conduct. Occasionally, issues have arisen regarding disclosure to the Institute of confidential information.

The Institute considers that all Members should be made aware of their responsibilities in this respect and wishes to alert Members to some of the considerations that should inform their decision whether to report and considerations regarding disclosure of confidential information generally.

Although there may be a reluctance to report the misconduct of a colleague, it is important for Members to recognise that they have a duty to the Institute and to the public at large in order to maintain the integrity of and confidence in the Institute, its Members, and the profession. The duty to co-operate and inform is not intended to turn Members of the profession into investigators or guarantors of each other's standards. This can be appreciated by considering the following examples of matters which should be reported to the Institute by a Member:

- a serious default on the part of the individual Member or another Member
- any criminal conviction (other than a minor road traffic offence) imposed upon the individual Member or another Member in relation to which a sentence of imprisonment may be imposed
- any offence committed by the individual Member or another Member which constitutes dishonesty or fraud and which may have resulted in a finding or other determination in any civil/criminal proceedings
- any matter which is likely to discredit the individual Member, or another Member, the Employer, the Institute or the profession of accountancy

It can be seen that the above are serious incidents of misconduct. The Institute does not require Members to report those matters which may reasonably be considered to constitute minor shortcomings in conduct on the part of the individual Member or another Member.

The duty to co-operate and inform should not be interpreted in such a way as to discourage more junior Members of the Institute approaching more senior Members for professional guidance and advice, in appropriate cases, without fear that such an approach will lead to a report being made to the Institute.

When should a report be made

A report should be made when a Member has reasonable grounds to suspect that another Member may have committed professional misconduct. "Reasonable grounds" means something more than a mere suspicion, but it is not necessary for a Member to feel sure, or have proof, that misconduct has occurred.

Normally, a report should be made as soon as reasonably possible after the Member has reasonable grounds to suspect misconduct. Where the Member who may have committed misconduct is already under a related investigation (for example, by his or her employer), it may be reasonable to wait for the results of that investigation before making a report. Where misconduct may relate to professional competency, it will usually be reasonable to wait for the outcome of any period of mentoring, supervision, or training, if any has been put in place to address identified competency issues. However, Members should always consider whether there is an urgent need to make a report immediately to protect the public.

What should be reported

In making a report, a Member should pass onto the Institute all of his or her grounds for suspecting that misconduct may have taken place. For their own protection and in the interests of a fair investigation, Members are counselled against carrying out any investigations of their own before making a report, unless such investigations can be justified on some other basis. (For example, where a Member is instructed by his or her employer to investigate a matter, and in the course of that investigation possible misconduct is discovered.)

Members are also advised, again for their own protection and in the interests of a fair investigation, to limit disclosure, as far as possible, to factual matters, ideally as reported or evidenced from primary documentation, and to eliminate or minimise any comment of their own in any disclosure.

All Members should be aware that where the misconduct of another Member is reported under the duty to cooperate and inform, any statement which is made to the Institute is protected, for the purposes of the law of defamation, so long as it was made without "malice". This means that if any subsequent action for libel is brought by an aggrieved Member, the Member who made the statement will have a defence of "qualified privilege" provided that, when making the statement, he believed it to be true and he did not have an improper motive (for example, a personal dislike of the Member accused) in making the statement. This is one reason to restrict disclosure, so far as possible, to factual matters contained in primary documentation. And, while it may be necessary to disclose the fact that a report has been made to certain other parties (for example, the disclosing Member's employer) Members should strictly limit all such disclosures, as far as they are able.

Co-operation with existing investigations

Some of the considerations above will not apply where a Member is not initiating a report, but is simply responding to an enquiry from the Institute. In particular, the Member is clearly not responsible for the decision to investigate, and it will be unnecessary to consider whether the Member him or herself thinks there are reasonable grounds to suspect misconduct.

Confidentiality

In order to co-operate with and inform the Institute in accordance with Bye-Law 32A, a Member may be required to divulge information which has come into his possession as a result of professional and business relationships. Information acquired in this way will usually be confidential and a Member is generally under a legal and professional obligation to respect the confidentiality attaching to particular information and documents (see: section 140 of CIPFA's Code of Ethics for Professional Accountants).

However disclosure of confidential information may be appropriate and/or necessary where:

- it is required or authorised by law or
- it is authorised by the employer/client/other person.

Some examples of when a Member may be required by law to disclose confidential information are:

- in the course of legal proceedings
- in order to demonstrate to a public authority that there has been an infringement of the law

Subject to what is said below, in the absence of a legal or professional right or duty to disclose information, a Member should not disclose information without proper and specific authority since to do so would be a breach of confidence.

Therefore, in a case where a Member is not confident that disclosure of confidential information is permitted or required by law a Member should seek to obtain permission for disclosure by express consent from his employer/client or other person to whom the duty of confidence is owed.

A Member may disclose confidential information to the Institute in the absence of consent of the owner of the information, even in the absence of a requirement to disclose, if the disclosure can be justified as in the public interest. Matters which may be said to be in the public interest include those which:

- expose or detect a crime
- expose significant anti-social behaviour
- expose corruption/injustice
- protect the health and safety of individuals
- prevent individuals from being misled by some statement or action of an individual or organisation
- disclose information that enables individuals to make a significantly more informed decision about issues of public importance.

However in making a disclosure of confidential information without the consent of an employer/client/other person, a Member must ensure that he is acting reasonably and in good faith. It would be prudent for a Member, in this situation, to:

- make a limited disclosure to the Institute;
- ensure the Institute is aware of the confidential nature of the information;
- notify the Institute in writing that permission to make the disclosure has not been given;
- (unless there is good reason not to) inform the employer/client or other person in writing of the extent of the disclosure he proposes to make and the reason why he is disclosing the information;
- record details of the disclosure made.

It is then open to the Institute to seek permission from the employer/client/other person, and/or to take over communication with the information's owner from the Member.

In relying on the right to disclose without consent on the basis that it is in the public interest to do so, a Member should be aware that there is no definition of "public interest". In the absence of any such definition, a decision by a Member on whether to disclose confidential information should be considered on its own merits. In these circumstances it may be prudent for a Member to seek advice, for example, from a union, if the Member is a union Member, or from a solicitor. It is important in the context of their own professional and/or employment duties that Members disclosing confidential information without consent have an honest and reasonable belief that the disclosure is made in the public interest. Obtaining and acting upon appropriate advice is an important safeguard for Members in this position. A Member should record the basis upon which the decision to disclose in the public interest was made.

Members should also consider whether an implied consent to disclose exists. There may be an implied term in the contract between a Member and his client that the former is entitled to disclose to his professional body information which is confidential to the client, at least for legitimate disciplinary purposes. However any such implied term would not be sufficient to authorise the release of information/documents confidential to a third party. In these circumstances, a Member would have to obtain the consent of the owner of the information

to a release from the duty of confidentiality or would have to rely on some other exception to the duty of confidentiality being available.

Careful consideration should be given by the Member to whether the confidential information to be disclosed is covered by legal professional privilege (very generally, that it contains legal advice, or was prepared for use in litigation or proposed litigation). Similarly, documents written on a "without prejudice" basis, for example, to settle litigation, should be approached with great caution. Members are advised not to disclose such documents without consent, or without express legal advice that disclosure is permissible.

It will often be a difficult question, even where consent is not required, whether a Member should nevertheless inform his or her employer/client/other person that he or she is proposing to make a disclosure of confidential information. Although it may be considered good practice for a Member to inform the person to whom the obligation of confidentiality is owed that he is required or authorised by law to make a disclosure of confidential information to the Institute, a Member should consider the particular facts of the matter and the nature of the disclosure to be made. There may be circumstances in which it would be inappropriate for a Member to give advance notification to the owner of the confidential information that a disclosure of that information is to be made to a third party. A Member should also bear in mind the undesirability of publicising an allegation of misconduct more widely than is strictly necessary.

It may be that Members will find it advisable to bring the duty to cooperate and inform to the attention of their employers or clients, so that they are aware, in general terms, of the possibility of a disclosure being made in the future.

To summarise, therefore, these are the questions a Member should ask him/herself when considering whether to disclose information which has come into his/her possession as a result of professional and business relationships:

- What is the nature of the information I have? Is it confidential?
- Am I required or authorised by law to disclose the information?
- If there is no legal requirement upon me to disclose the information, do I have proper and specific authority from the person to whom the duty of confidentiality is owed to disclose?

- What if I cannot get permission to disclose the information? Can I justify disclosure on the basis that disclosure is in the public interest?
- If I make a disclosure without the consent of the person to whom the duty of confidentiality is owed, am I satisfied that I am acting reasonably and in good faith in making the disclosure?
- Is there any implied term in my retainer with my client that entitles me to disclose information which is confidential to the client to the Institute for disciplinary purposes?
- Am I satisfied that the confidential information is not protected from disclosure by legal professional privilege?
- Given the nature of the information, should I consider seeking professional advice to safeguard my position before disclosing?

FURTHER CONSIDERATIONS

Money Laundering legislation

Members should also be aware that the money laundering and drug trafficking provisions of the Proceeds of Crime Act 2002 have made considerable inroads into the duty of confidentiality. The 2002 Act has also created the offence of making a disclosure likely to prejudice a money laundering investigation being undertaken by law enforcement authorities, otherwise known as "tipping off". Members are reminded that the tipping off provisions relate to any person, including professional advisers and that they would be guilty of committing such an offence if they know or suspect that a disclosure falling within the 2002 Act has been made and they make a disclosure which is likely to prejudice any investigation which may be conducted following such a disclosure. If a Member has any concerns that any proposed disclosure is likely to constitute tipping off, it is strongly advisable to seek legal advice before making the disclosure.

Whistleblowing

Members are reminded that the Public Interest Disclosure Act 1998 provides a further measure of protection from dismissal and victimisation for reporting wrongdoing that they believe, in good faith, to be true. However in order to trigger the protection of the 1998 Act, the disclosure has to be a qualifying disclosure and show one or more of the following:

- that a criminal offence has been, is being or is likely to be committed
- that a person has failed, is failing or is likely to fail to comply with a legal obligation
- that a miscarriage of justice has occurred, is occurring or is likely to occur
- that the health or safety of an individual has been, is being or is likely to be endangered
- that the environment has been, is being or is likely to be damaged
- that information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

A protected disclosure can be made:

- in good faith to a Member's employer in accordance with the employer's whistleblowing procedures or to the person who does have legal responsibility if the disclosure relates to a matter for which the employer does not have legal responsibility
- to the organisation designated by the government for this purpose in relation to a particular type of disclosure. Designated organisations include the Audit Commission, the National Audit Office, Audit Scotland, the Wales Audit Office, the Northern Ireland Audit Office, Charity Commissioners for England and Wales and the Health and Safety Executive
- to some other person if, in addition to the tests for regulatory disclosure, such a disclosure is made in good faith, is reasonably believed by the Member to be substantially true, is not made for the purpose of personal gain and it is reasonable in all the circumstances of the case for the Member to make the disclosure. Such disclosures must also satisfy one of the following pre-conditions: the Member reasonably believed he would be victimised if he had raised the matter internally or with a prescribed regulator; there was no prescribed regulator and he reasonably believed the evidence was likely to be concealed or destroyed; a disclosure of substantially the same information to an employer or prescribed regulator had previously been raised or the concern was of an exceptionally serious nature. A Member would need to ensure that any report made to the Institute satisfies these disclosure criteria in order for the disclosure to be protected under the legislation.

Disclosures which in themselves constitute a criminal offence are not protected.

Members considering making a protected disclosure will obviously be concerned about the consequences such as dismissal from employment and subsequent costly legal proceedings. Before making any disclosure, it is advisable for Members to familiarise themselves with the protections within the 1998 Act. If a Member has any doubts as to whether the disclosure to be made qualifies for protection under the 1998 Act, then it is generally advisable to seek legal advice before making the disclosure. Disclosure in the course of obtaining legal advice is also protected by the Act.

CONSEQUENCES OF NOT REPORTING

Members who know of any actual or proposed misconduct, or who believe or who have reason to believe that any misconduct is likely to occur or is likely to have occurred, are under a duty to report the same promptly to the Institute. Failure to do so, may result in disciplinary action being taken against the particular Member. However, in considering whether to investigate a Member's failure to comply with this duty, the Investigations Committee will have regard to any mitigating factors such as the duty of confidentiality to which the Member may have been subject, to the promptness with which any report was made and to any other relevant factors.

CONFIDENTIAL HELPLINE

For a confidential discussion of any of the issues raised in this guidance, contact the Ethics Sounding Board by emailing ethics@cipfa.org. Please note that members of the Ethics Sounding Board act on a personal basis and are unable to give legal advice. However, conversations will be aimed at assisting members to explore the full range of options open to them and identifying appropriate sources of assistance and information.

BYE-LAW [32A]

Duty to cooperate and inform

- 32A Every Member (which for these purposes includes Members admitted pursuant to Bye-Laws 5 and 6), Affiliate member, Associate member and Registered Student shall provide such assistance, cooperation and information to the Institute as the Institute may require for the purpose of carrying out the provisions of the Royal Charter, Bye-Laws and Regulations of the Institute, or otherwise in pursuing the aims of the Institute, and such duty shall include but without limitation:
- (a) a duty to provide all information relative to his membership, practice or employment which the Institute may reasonably require for such purpose;
 - (b) a duty, where it is in the public interest to do so, to bring to the attention of the Institute any facts or matters which indicate that a Member, Affiliate member, Associate member or Registered Student may have become liable to disciplinary action;
 - (c) a duty to provide full and prompt cooperation in connection with any disciplinary investigation under Bye-Laws 23 and 25 or any inquiries under Bye-Law 28(B), whether such investigation or inquiry relates to the Member, Affiliate member, Associate member or Registered Student as the case may be or to any other Member, Affiliate member, Associate member or Registered Student;
 - (d) a duty to provide full and prompt cooperation in connection with any scheme pertaining to members in public practice under Bye-Law 25C;
 - (e) a duty to comply with any further or additional duties to cooperate and inform as may be set out in regulations and any guidance issued by the Council to the extent that any such regulations and/or guidance is not