

# **A Procedure for Reporting Breaches of the Law to the Pensions Regulator**

## **Greater Manchester Pension Fund**

**DRAFT**

## **1. INTRODUCTION**

- 1.1 In April 2015 the Pensions Regulator (the Regulator) published its Code of Practice no 14 (the Code) *Governance and administration of public service pension schemes*. This is not a statement of law of itself, but nonetheless it carries great weight and is made in accordance with Section 91(5) of the Pensions Act 2004: *Procedure for issue and publication of codes of practice*. In some respects it is like the Highway Code, in that some of its contents refer to statutory items, whilst others are advisory. The Courts however may also rely on the latter. In the same way, if determining whether any pensions related legal requirements have been met, a court or tribunal must take into account the Code.
- 1.2 There are many and various laws relating to the Local Government Pension Scheme, with many and various people having a statutory duty to report material breaches of the law to the Regulator. To assist, the Code states that a procedure should be established to ensure that those with a responsibility to make reports are able to meet their legal obligations. This document is that procedure, which relates to all of the Fund's areas of operation.
- 1.3 Much of the text herein is drawn from the Code itself. Where it has, the Regulator's copyright applies.
- 1.4 If you have any questions about this Procedure and:
- you are a member of the Pension Fund Management Panel, Advisory Panel, Local Board or you are an external adviser, please contact the Solicitor to the Fund;
  - you are an actuary, auditor or other external agent, please contact the Assistant Executive Director - Property, Local Investments, Accountancy and Legal;
  - you represent an employer, please contact the Pensions Policy Manager;
  - you are an officer of the Fund, and you work in Administration, please contact Compliance and Training. Otherwise please contact your Service Unit Manager or Assistant Executive Director.

## **2. IMPORTANT NOTE FOR TAMESIDE MBC COUNCILLORS AND EMPLOYEES**

- 2.1 This Procedure complements the Council's Whistleblowing Policy, which has been approved by the Public Concern at Work Organisation and as stated in that, if someone knows about wrongdoing and doesn't report it then the Council loses an opportunity to deal with a potentially damaging situation and gives rise to an even greater risk of financial loss, regulatory breach, higher insurance premiums and damaged reputation. The Council will not tolerate malpractice or wrongdoing and is determined that all instances of malpractice will be fully investigated and the appropriate action taken.
- 2.2 Any disclosures made by employees to the Council which are intended to shed light on fraud, corruption or malpractice are in general protected under the Public Interest Disclosure Act 1998. Any employee raising concerns through this Procedure will be protected from reprisals or victimisation, so long as the employee is not acting maliciously or for personal gain.
- 2.3 Internal systems and procedures must seek to prevent fraud but also protect individual councillors and employees against malicious or unfounded allegations of impropriety. Internal controls are the first line of defence against fraud and malpractice and national experience shows it is often the case that where fraud and malpractice does occur the controls were circumvented or ignored.
- 2.4 For a full copy of the Council's Whistleblowing Policy, please see the Council's intranet.

### **3. IMPORTANT NOTE FOR NON-TAMESIDE MBC PERSONNEL**

- 3.1 Tameside MBC, as a local authority, has a statutory obligation to have a statutory Monitoring Officer pursuant to Local Government and Housing Act 1989, as amended by Schedule 5 paragraph 24 of the Local Government Act 2000. The Monitoring Officer has a duty to write a report if he/she considers any proposal, decision, or omission made by or on behalf of the Council and/or Greater Manchester Pension Fund, is illegal or would be illegal. The duty is a personal duty, The duties of the Monitoring Officer cover all the Council's activities and thus include those of being the administering authority for the Fund. If you believe you have encountered something relating to the Fund, including employer activities, that you believe to be, or is likely to be, illegal, before you report this to the Pensions Regulator you should, in the first instance, raise the matter with the Council's Monitoring Officer. This person is Sandra Stewart, Solicitor to the Fund & Executive Director of Governance and Resources (Borough Solicitor), who may be contacted at Dukinfield Town Hall, King St, Dukinfield, Tameside, SK16 4LA.
- 3.2 The Pension Fund must also have a statutory Responsible Financial Officer - Section 151 of the Local Government Act 1972 requires every authority in England and Wales to "... make arrangements for the proper administration of their financial affairs and shall secure that one of their Officers has responsibility for the administration of those [financial] affairs". Again this is a statutory personal role with personal liability for failure to report any financial irregularities.
- 3.2 Consequently, there are two reasons for reporting potential breaches to the Solicitor. One is that the Regulator oversees only certain aspects of pensions legislation, with the list being provided in paragraph 12. The content of this legislation is complicated and thus the Solicitor will be able to advise on whether or not the matter in question falls within the Regulator's jurisdiction. Secondly, if there has been a breach, there may be important learning points for either the Council, employers or others involved with the administration of the Fund, which the Solicitor can pass on.

### **4. LEGAL REQUIREMENTS**

- 4.1 Certain people are required to report breaches of the law to the Regulator where they have reasonable cause to believe that:
- a legal duty which is relevant to the administration of the scheme has not been, or is not being, complied with;
  - the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions. [See paragraphs 20 to 24 for further details.]
- 4.2 The Regulator has wide-ranging powers but not universal jurisdiction. In particular, for it to issue a statutory enforcement notice, the pension legislation that must be in breach, or is likely to be in breach, is defined as:
- "any enactment contained in or made by virtue of:
- (a) the Pension Schemes Act 1993 (c. 48),
  - (b) Part 1 of the Pensions Act 1995 (c. 26), other than sections 62 to 66A of that Act (equal treatment),
  - (c) Part 1 or section 33 of the Welfare Reform and Pensions Act 1999 (c. 30),
  - (d) this Act [being the Pensions Act 2004],
  - (e) Section 5(4) (pension board: conflicts of interest and representation), 6 (pension board: information), 14 (information about benefits) or 16 (records) of the Public Service Pensions Act 2013,
  - (f) paragraph 2 of Schedule 18 to the Pensions Act 2014 (c.19), or
  - (g) the Pension Schemes Act 2015."

- 4.3 The Superannuation Act 1972, under which the LGPS Regulations are made, is not listed. Consequently the Regulator is only interested in a breach of the LGPSR if this leads to a breach of what is defined as pensions legislation. As an example, an employer has a statutory duty to provide a year-end return of pay and contributions in respect of all its active members. If it fails to do so it is in breach of the LGPSR but the Regulator has no jurisdiction. But under the Public Service Pensions Act 2013, which *is* listed, each administering authority must supply to each active and deferred member an annual benefits statement (ABS) by 31 August. Consequently if an employer fails to supply a year-end return that will prevent the administering authority producing ABSs by 31 August, the Regulator can issue what is called a third party notice to the employer, that directs that the employer "... takes such steps as are specified in the notice in order to remedy or prevent a recurrence of his failure".
- 4.4 People who are subject to the reporting requirement ('reporters') for public service pension schemes are:
- scheme managers (meaning, in the case of the GMPF, the Pension Fund Management Panel);
  - members of the pension board (meaning, in the case of the GMPF, the Local Board);
  - any person who is otherwise involved in the administration of the Fund (and thus members of the Advisory Panel and all of the Fund's officers);
  - employers, and any participating employer who becomes aware of a breach should consider their statutory duty to report, regardless of whether the breach relates to, or affects, members who are its employees or those of other employers;
  - professional advisers including auditors, actuaries, legal advisers and fund managers; and
  - any person who is otherwise involved in advising the managers of the scheme in relation to the scheme (and thus the Fund's three external advisers).

## **5. REASONABLE CAUSE**

- 5.1 Having 'reasonable cause' to believe that a breach has occurred means more than merely having a suspicion that cannot be substantiated.
- 5.2 Reporters should ensure that where a breach is suspected, they carry out checks to establish whether or not a breach has in fact occurred. For example, a member of a funded pension scheme may allege that there has been a misappropriation of scheme assets where they have seen in the annual accounts that the scheme's assets have fallen. However, the real reason for the apparent loss in value of scheme assets may be due to the behaviour of the stock market over the period. This would mean that there is not reasonable cause to believe that a breach has occurred.
- 5.3 Where the reporter does not know the facts or events around the suspected breach, it will usually be appropriate to consult the appropriate Assistant Executive Director, or Service Unit Manager, regarding what has happened. It would not be appropriate to check in cases of theft, suspected fraud or other serious offences where discussions might alert those implicated or impede the actions of the police or a regulatory authority. Under these circumstances the reporter should alert the Regulator without delay.
- 5.4 If the reporter is unclear about the relevant legal provision, they should clarify their understanding of the law with the Fund Solicitor to the extent necessary to form a view.
- 5.5 In establishing whether there is reasonable cause to believe that a breach has occurred, it is not necessary for a reporter to gather all the evidence which the Regulator may require before taking legal action. A delay in reporting may exacerbate or increase the risk of the breach.

## **6. MATERIAL SIGNIFICANCE**

- 6.1 In deciding whether a breach is likely to be of material significance to the Regulator, it would be advisable for the reporter to consider the:
- cause of the breach;
  - effect of the breach;
  - reaction to the breach; and
  - the wider implications of the breach.
- 6.2 When deciding whether to report those responsible, they should consider these points together. Reporters should take into account expert or professional advice, where appropriate, when deciding whether the breach is likely to be of material significance to the Regulator.
- 6.3 The breach is likely to be of material significance to the Regulator where it was caused by:
- dishonesty;
  - poor governance or administration;
  - slow or inappropriate decision making practices;
  - incomplete or inaccurate advice; or
  - acting (or failing to act) in deliberate contravention of the law.
- 6.4 When deciding whether a breach is of material significance, those responsible should consider other reported and unreported breaches of which they are aware. However, historical information should be considered with care, particularly if changes have been made to address previously identified problems.
- 6.5 A breach will not normally be materially significant if it has arisen from an isolated incident, for example resulting from teething problems with a new system or procedure, or from an unusual or unpredictable combination of circumstances. But in such a situation, it is also important to consider other aspects of the breach such as the effect it has had and to be aware that persistent isolated breaches could be indicative of wider scheme issues.

## **7. EFFECT OF THE BREACH**

- 7.1 Reporters need to consider the effects of any breach, but with the Regulator's role in relation to public service pension schemes and its statutory objectives in mind, the following matters in particular should be considered likely to be of material significance to the Regulator:
- Local Board members not having the appropriate degree of knowledge and understanding, which may result in the Board not fulfilling its role, the Fund not being properly governed and administered and/or the Pension Fund Management Panel breaching other legal requirements;
  - Local Board members having a conflict of interest, which may result in them being prejudiced in the way that they carry out their role, ineffective governance and administration of the scheme and/or the Pension Fund Management Panel breaching legal requirements;
  - adequate internal controls not being established and operated, which may lead to the Fund not being run in accordance with the Scheme's Regulations and other legal requirements, risks not being properly identified and managed and/or the right money not being paid to or by the Fund at the right time;
  - accurate information about benefits and Scheme administration not being provided to Scheme members and others, which may result in members not being able to effectively plan or make decisions about their retirement;
  - appropriate records not being maintained, which may result in member benefits being calculated incorrectly and/or not being paid to the right person at the right time;

- anyone involved with the administration or management of the Fund misappropriating any of its assets, or being likely to do so, which may result in assets not being safeguarded; and
- any other breach which may result in the Fund being poorly governed, managed or administered.

7.2 Reporters need to take care to consider the effects of the breach, including any other breaches occurring as a result of the initial breach and the effects of those resulting breaches.

## **8. REACTION TO THE BREACH**

8.1 Where prompt and effective action is taken to investigate and correct the breach and its causes and, where appropriate, notify any affected members, the Regulator will not normally consider this to be materially significant.

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

## **9. WIDER IMPLICATIONS OF THE BREACH**

9.1 Reporters should consider the wider implications of a breach when they assess which breaches are likely to be materially significant to the Regulator. For example, a breach is likely to be of material significance where the fact that the breach has occurred makes it appear more likely that other breaches will emerge in the future. This may be due to the scheme manager or pension board members having a lack of appropriate knowledge and understanding to fulfil their responsibilities or where other pension schemes may be affected. For instance, public service pension schemes administered by the same organisation may be detrimentally affected where a system failure has caused the breach to occur.

## **10. EXAMPLES OF BREACHES**

### **Example 1**

10.1 An employer is late in paying over employee and employer contributions, and so late that it is in breach of the statutory period for making such payments. It is contacted by officers from the administering authority, it immediately pays the moneys that are overdue, and it improves its procedures so that in future contributions are paid over on time. In this instance there has been a breach but members have not been adversely affected and the employer has put its house in order regarding future payments. The breach is therefore not material to the Regulator and need not be reported.

### **Example 2**

10.2 An employer is late in paying over employee and employer contributions, and so late that it is in breach of the statutory period for making such payments. It is also late in paying AVCs to the Prudential. It is contacted by officers from the administering authority, and it eventually pays the moneys that are overdue, including AVCs to the Prudential. This has happened before, with there being no evidence that the employer is putting its house in order. In this instance there has been a breach that *is* relevant to the Regulator, in part

because of the employer's repeated failures, and also because those members paying AVCs will typically be adversely affected by the delay in the investing of their AVCs.

- 10.3 Of note here is that the payment of contributions to the administering authority is covered by the Pensions Act 2004, which is part of the defined pensions legislation in which the Regulator is interested. Consequently not only may the Regulator issue an enforcement notice regarding non-payment, he can also apply Section 10 of the Pensions Act 2005. This enables him to apply a penalty of up to £5,000 upon an individual, and a penalty of up to £50,000 upon an organisation

### **Example 3**

- 10.4 An employer is late in submitting its statutory year-end return of pay and contributions in respect of each of its active members and as such it is in breach. Despite repeated reminders it still does not supply its year-end return. Because the administering authority does not have the year-end data it is unable to supply, by 31 August, annual benefit statements to the employer's members. In this instance there has been a breach which is relevant to the Regulator, in part because of the employer's failures, in part because of the enforced breach by the administering authority, and also because members are being denied their annual benefits statements.

### **Example 4**

- 10.5 A member of the Pension Fund Management Panel, who is also on the Property Working Group, owns a property. A report is made to the Property Working Group about a possible investment by the Fund, in the same area in which the member's property is situated. The member supports the investment but does not declare an interest and is later found to have materially benefitted when the Fund's investment proceeds. In this case a material breach has arisen, not because of the conflict of interest, but rather because the potential conflict was not raised.

### **Example 5**

- 10.6 A pension overpayment is discovered and thus the administering authority has failed to pay the right amounts to the right person at the right time. A breach has therefore occurred. The overpayment is however for a modest amount and the pensioner could not have known that (s)he was being overpaid. The overpayment is therefore waived. Checks are made to see if there any other similar cases. In this case there is no need to report the breach as it is not material.

## **11. SUBMITTING A REPORT TO THE REGULATOR**

- 11.1 Before you submit a report you should obtain clarification of the law around the suspected breach from the Solicitor.
- 11.2 The Fund Solicitor will clarify any facts, if required, and will consider in the round whether the Regulator would regard the breach as being material.
- 11.3 Some matters could be urgent, if for example a fraud is imminent, whilst others will be less so. Non-urgent but material breaches should be reported to the Regulator within 30 working days of them being confirmed, and breaches that are not material should be also be recorded within 30 days (see later).
- 11.4 Some breaches could be so serious that they must always be reported, for example a theft of funds by anyone involved with the administration or management of the Fund. It is difficult to be definitive about what constitutes a breach that must always be reported, but one test is: might it reasonably lead to a criminal prosecution or a serious loss in public confidence?

- 11.5 Any report that is made (which must be in writing and made as soon as reasonable practicable) should be dated and include as a minimum:
- full name of the Fund;
  - description of the breach or breaches;
  - any relevant dates;
  - name of the employer or scheme manager (where known);
  - name, position and contact details of the reporter; and
  - role of the reporter in relation to the Fund.
- 11.6 Additional information that would help the Regulator includes:
- the reason the breach is thought to be of material significance to the Regulator;
  - the address of the Fund;
  - the pension scheme's registry number (if available); and
  - whether the concern has been reported before.
- 11.7 Reporters should mark urgent reports as such and draw attention to matters they consider particularly serious. They can precede a written report with a telephone call, if appropriate.
- 11.8 Reporters should ensure they receive an acknowledgement for any report they send to the Regulator. Only when they receive an acknowledgement can the reporter be confident that the Regulator has received their report.
- 11.9 The Regulator will acknowledge all reports within five working days of receipt, however it will not generally keep a reporter informed of the steps taken in response to a report of a breach as there are restrictions on the information it can disclose.
- 11.10 The reporter should provide further information or reports of further breaches if this may help the Regulator to exercise its functions. The Regulator may make contact to request further information.
- 11.11 Breaches should be reported as soon as reasonably practicable, which will depend on the circumstances. In particular, the time taken should reflect the seriousness of the suspected breach.
- 11.12 In cases of immediate risk to the Fund, for instance, where there is any indication of dishonesty, the Regulator does not expect reporters to seek an explanation or to assess the effectiveness of proposed remedies. They should only make such immediate checks as are necessary. The more serious the potential breach and its consequences, the more urgently reporters should make these necessary checks. In cases of potential dishonesty the reporter should avoid, where possible, checks which might alert those implicated. In serious cases, reporters should use the quickest means possible to alert the Regulator to the breach.

## **12. RECORDING BREACHES THAT HAVE NOT BEEN REPORTED TO THE REGULATOR**

- 12.1 Breaches that are found not to be material to the Regulator must still be recorded. This is because, if similar breaches continue, then they become material. Recording all breaches also highlights where improvements are required, to try and prevent similar breaches.
- 12.2 Breaches that are not being reported should be recorded here: (being a link to an in-house spreadsheet designed to capture all the relevant data).



### **13. WHISTLEBLOWING PROTECTION AND CONFIDENTIALITY**

- 13.1 The Pensions Act 2004 makes clear that the statutory duty to report overrides any other duties a reporter may have such as confidentiality and that any such duty is not breached by making a report. The Regulator understands the potential impact of a report on relationships, for example, between an employee and their employer.
- 13.2 The statutory duty to report does not, however, override 'legal privilege'. This means that oral and written communications between a professional legal adviser and their client, or a person representing that client, while obtaining legal advice, do not have to be disclosed. Where appropriate a legal adviser will be able to provide further information on this.
- 13.3 The Regulator will do its best to protect a reporter's identity (if desired) and will not disclose the information except where lawfully required to do so. It will take all reasonable steps to maintain confidentiality, but it cannot give any categorical assurances as the circumstances may mean that disclosure of the reporter's identity becomes unavoidable in law. This includes circumstances where the Regulator is ordered by a court to disclose it.
- 13.4 The Employment Rights Act 1996 (ERA) provides protection for employees making a whistleblowing disclosure to the regulator. Consequently, where individuals employed by firms or another organisation having a statutory duty to report disagree with a decision not to report to the regulator, they may have protection under the ERA if they make an individual report in good faith. The Regulator expects such individual reports to be rare and confined to the most serious cases.