

STANDARDS HEARINGS – PUBLIC OR PRIVATE?

Background

There have been a number of cases recently where standards committees have resolved that a hearing will be held in private leading to criticism in the media – see, for example, the series of press cuttings regarding an ongoing case at Oxford City Council on the 'local news stories' pages.

This article sets out the legal framework and looks at the wider context of balancing protection of information against the public right to know. We also provide a handy checklist to use to help you decide where the balance might lie.

Any standards committee set up in order to discharge functions under the Localism Act is an 'ordinary committee' of the authority. That means the same rules apply to it as apply to all other committees of the authority which do not have specific statutory rules applying to them. (An example of a 'statutory committee' was a standards committee under the previous framework as such a committee was mandatory by law and certain rules relating to its constitution, including access to information provisions, had been specified by law).

As an 'ordinary committee' there are two particular rules which apply. The first is that the committee must reflect the political balance of the council as a whole unless the council as a body has resolved to waive that requirement (the so-called 'proportionality rules').

The second is that the committee is subject to local government access to information provisions. These are procedural rules set out in law which say that a committee must meet in public but that certain items can be taken in closed session if the information is covered by one or more category of 'exempt information'.

If information is deemed to be 'exempt information' the committee must vote on whether the matter be dealt with in private and can decide in actual fact still to hold the meeting in public if they believe it is nevertheless in the public interest to do so.

Most people on the face of it would expect matters to be heard in public as hearing a case against an elected member would be considered to be in the public interest, particularly if you believe that the major sanction against any councillor found guilty of wrongdoing is the court of public opinion or the ballot box. How can the public be expected to make an informed decision if they have not been presented with all the evidence?

Transparency is seen as one of the key elements of the framework by Government, and more generally transparency is seen as essential to enhancing public confidence in standards in public life. The Committee on Standards in Public Life's recent review of promoting best practice placed great emphasis on openness. It felt that greater transparency, partly through enhanced media scrutiny, had both decreased the likelihood of poor behaviour and increased the chances of it being detected when it does occur.

You would therefore expect a high threshold to be placed on when a standards issue is dealt with in private – for example, there is a real risk to somebody involved were certain information to come into the public domain, or information disclosed could prejudice other matters.

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However, anecdotal evidence is showing that a larger than expected number of standards cases appear to be being heard behind closed doors, and it certainly seems to be a higher proportion than was previously the case.

This may be because there are other rules which relate to a public meeting which may discourage open meetings in such cases. These concern the making public of papers beforehand.

Unless an item has been classified as 'exempt information' relevant papers have to be made available in advance. There is an exemption for 'urgent matters' but those rules are unlikely to apply in these circumstances.

Thus, if a standards committee has decided its hearing will be in public, five days' notice must be given that the meeting will take place, the agenda and papers must also be available five days in advance and the public and press have a right to attend the meeting.

The concern has been that this means all the papers relating to the hearing will be in the public domain in advance of 'the case being heard' and there is a risk of trial by media or information being placed online with a particular spin on it.

This is how the process differs from a court hearing. While court hearings are in public and able to be reported upon, the court does not release papers in advance and matters are considered 'sub judice' until the case is being heard.

This presents a real dilemma for councils. On the one hand there should be a strong presumption towards transparency to avoid any allegations of a 'cover up'; on the other hand, the process needs to be fair to the parties involved and matters not pre-judged in the public sphere.

Factors to consider

It is our view that the presumption should always be to hold a hearing in public unless there is overwhelming reason not to. This would be particularly so where the 'proportionality rules' have been maintained for the standards committee and it therefore has a majority of 'ruling party members' on it.

To hold a hearing in private does risk the perception that the matter has not been handled fairly and that there has been some sort of cover-up taking place. It is more likely to lead to adverse media coverage detrimental to the reputation of the council as a whole.

That said, there is clearly a risk, with papers being available in advance, that you can lose control of the agenda and find yourself as an authority having to deal with media comment and speculation in advance of any hearing.

It is our experience that councils have traditionally not thought through a media strategy in advance of standards hearings, though they often will when other contentious matters are being discussed by the council.

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To help you think the process through, we therefore propose you go through the following steps once an investigation has been completed and a hearing is being scheduled.

1. Consider whether any of the matters to be discussed should genuinely be heard in private as to consider them in public would be against the wider public interest. A list of 'exempt categories' is attached at the end.
2. Even if you do consider there genuinely is 'exempt information' does this mean that the whole hearing should be conducted in private and papers withheld? For example, if it relates to one particular witness or touches on details of a contract, can that information be redacted or that particular part of the hearing be heard in closed session?
3. If the meeting is to be open, think about any media strategy. Is the case likely to attract a lot of interest? For many cases, advance notice is unlikely to be an issue anyway as they may be relatively low-profile or non-contentious and warrant no more than a brief mention.
4. If you think there is likely to be greater media interest than simply reporting the fact of the hearing in advance, and you worry that there may be 'unhelpful' comments made, you should consider briefing local journalists in advance and seeking to manage what they could reasonably publish in advance without compromising the fairness of the proceedings. Most journalists will be well used to such discussions, provided they feel they are being treated fairly and not being asked to cover things up.
5. This is only likely to work where you already have relatively cordial arrangements with the local media. This may not always be the case, and the process of the local standards framework may not be understood. You may therefore wish to think about briefing local journalists about the process even where you have no 'live' cases so they understand in advance how the system works and how checks and balances are built in to ensure the process is fair for all. Your Independent Person may be a useful person to involve as a guarantor of fair play.
6. You are less likely to be able to have such a managed relationship with individual bloggers etc. But our experience tells us that they may anyway be less likely to draw general public attention in the same way as local papers too, and if they are hostile are likely to be hostile and speculate regardless of whether papers are open or closed. Again, the risk of a closed meeting is that it is more likely to feed suspicions. You will never be able fully to control all content in today's electronic world, and in extreme cases, there are still laws relating to defamation.

Our conclusions are that the purpose of any standards framework is about demonstrating that an organisation, and individuals within that organisation, are acting appropriately and, when they step out of line, are dealt with effectively. Transparency is a key element in demonstrating that and an open process should therefore be encouraged, except in the most exceptional circumstances. There are problems about the way the statutory rules on access to papers interplay with the concept of a fair hearing, but this process can be managed through a more proactive approach to communications.

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