

Southwark Pension Fund

Breaches of the Law Policy

Introduction

The Southwark Pension Fund (the Fund) seeks to conduct its affairs in a responsible manner, to ensure that all its activities are open and effectively managed, and that the Fund's integrity and principles of public interest disclosure are sustained.

This document and its appendices sets out the Fund's policy and procedures for identifying, monitoring compliance with, and where appropriate reporting breaches of, the law as required in the Pensions Act 2004 (the Act) and detailed in the Pensions Regulator's (tPR) Code of Practice no 14 - Governance and administration of public service pension schemes (the Code).

The following appendices accompany this Breaches Policy and guidance:

- **Appendix 1:** The legal requirement to report a breach.
- **Appendix 2:** When a breach may be considered material and how to make a submission to tPR
- **Appendix 3:** Example breaches applying tPR Traffic Light System.
- **Appendix 4:** Breaches Reporting Form

The identification, management and reporting of material breaches to tPR is a requirement of the Code and failure to report a breach without a reasonable excuse is a civil offence that can result in civil penalties. However, in addition to a regulatory requirement, the reporting of breaches is a crucial tool in risk management and provides the opportunity for the Fund to review and improve processes to ensure the breach is not repeated.

Breaches of the Law Policy

Definition of a Breach

A breach of the law is:

- When a legal duty, relevant to the administration of the local government pension scheme, has not and/or is not being complied with.

It can encompass many aspects of the management and administration of the scheme, including failure:

- To comply with overriding local government legislation.
- To comply with anything required under applicable statutory guidance or codes of practice.
- To comply with Fund policies and procedures (e.g. Investment Strategy Statement, Funding Strategy Statement, Administration Strategy or Communications Policy).
- To maintain accurate records.
- To act on any fraudulent act or omission that is identified.
- Of an employer to pay over member and employer contributions on time.
- To pay member benefits either accurately or in a timely manner.
- To issue annual benefit statements on time or non-compliance with the Regulator's Code of Practice No 14.

The legal requirement to report a breach is set out in Appendix 1.

Responsibility for Reporting a Breach

The following have a responsibility to report breaches under section 70 of the Pensions Act 2004:

- Any person who is involved in the administration of the scheme such as officers of the council.
- Members of the Pensions Advisory Panel.
- Members of the Local Pension Board.
- All participating employers in the scheme.
- Professional advisers: including auditors, actuaries, legal advisers and fund managers.
- Any other person otherwise involved in advising the managers of the scheme.

Individuals are required to take a pro-active approach to the identification, management and reporting of all breaches that have occurred, or are likely to occur.

Reporting of a Breach

Responsibility for the management and execution of the breaches policy rests with the Responsible Officer. The Responsible Officer for the Southwark Pension Fund is the Strategic Director of Finance and Governance

The Responsible Officer will be responsible for recording and monitoring breaches and likely breaches as follows:

- Record all identified breaches and likely breaches of which they are aware in a Fund breaches log.
- Investigate the circumstances of all reported breaches and likely breaches.
- Ensure, where necessary that an action plan is put in place and acted on to correct the identified breach and to ensure further breaches of a similar nature do not reoccur.
- Report all breaches to the next scheduled meeting of the Pensions Advisory Panel and Local Pension Board.
- Ensure that a suitable record of all material breaches experienced in the reporting period is included within the annual report.
- Report all materially significant breaches to tPR as soon as practicable but not later than 30 days after becoming aware of the breach.

The Responsible Officer will determine whether any breach or likely breach is materially significant, having regard to the guidance set out in tPR Codes of Practice and after consultation with the Director of Law and Democracy.

Where uncertainty exists as to the materiality of any identified breach the Responsible Officer will be required to informally notify tPR of the issue and the steps being taken to resolve the issue.

An individual who identifies a breach or suspected breach should report this to the Responsible Officer in the first instance. If the suspected breach relates to potential theft, fraud or other serious offences where discussion may alert those implicated or impede the actions of the police or a regulatory authority, an individual should contact tPR directly and at the earliest opportunity.

Appendix 2 sets out the process by which an individual should assess whether to report a suspected breach and the method by which this should be reported.

Pensions Regulator Involvement

Breaches of the law that affect pension schemes should be considered for reporting to tPR if it is considered that the breach is likely to be of material significance to tPR.

A material breach must be notified to tPR as soon as is reasonably practicable and no later than one month after becoming aware of the breach or likely breach.

Where it is considered that a breach is of such significance that tPR is required to intervene as a matter of urgency (for example, serious fraud) the matter should be brought to the attention of tPR immediately.

Not all breaches identified will need to be reported to tPR. Where prompt and effective action is taken to investigate and correct the breach and its causes and, where appropriate, notify any affected members, tPR will not normally consider this to be materially significant.

Whistleblowing

It is a statutory duty to report breaches of the law. In rare cases this may involve a duty to whistle blow on the part of an employee of the Fund. The duty to report does not override any other duties a Reporter may have, such as confidentiality, but that this duty to confidentiality is not breached by reporting to tPR. The Fund will ensure it adheres to the requirements of the Employment Rights Act 1996 in protecting an employee making a whistleblowing disclosure to tPR.

The duty to report, however, does not override 'legal privilege', so oral and written communications between the Fund, Pensions Advisory Panel or Local Pension Board and a professional legal adviser do not have to be disclosed.

Training

The Fund will ensure that all those with a duty to report breaches are trained as to their responsibilities and the process by which breaches should be reported.

Appendix 1

The legal requirement to report a breach

Breaches of the law which affect pension schemes should be considered for reporting to the Pensions Regulator.

The decision whether to report requires two key judgements:

- Is there reasonable cause to believe there has been a breach of the law?
- If so, is the breach likely to be of material significance to the Pensions Regulator?

The requirement to report breaches of the law arises when there is a duty:

- Imposed by or by virtue of an enactment or rule of law; and
- Relevant to the administration of a scheme.

1. Imposed by or by virtue of an enactment or rule of law

'Enactment' covers Acts of Parliament and regulations or statutory instruments. For example, the Pensions Act 2004 is an enactment as are regulations made under that Act:

Pensions Act 2004 (70 (2)):

“(2) Where the person has reasonable cause to believe that -

(a) A duty which is relevant to the administration of the scheme in question, and is imposed by or by virtue of an enactment or rule of law, has not been or is not being complied with, and

(b) The failure to comply is likely to be of material significance to the Regulator in the exercise of its functions,

- he must give a written report of the matter to the Regulator as soon as reasonably practicable.”

Breaches of criminal law, such as an offence of dishonesty under the Theft Act, would also come within the term enactment.

'Rule of law' covers law laid down by decisions of the courts. It would, for example, include trust law and common law.

When considering breaches of trust law, reporters should bear in mind the basic principle that the Pension Fund is holding property on behalf of others. The Pension Fund should act in good faith and within the terms of the LGPS Regulations for the benefit of all of the beneficiaries of the scheme. If the Fund fails to do so, it is in breach of law. A very basic rule of thumb in considering whether an action or failure to act is, or may be, a breach is if the Pension Fund has acted in a way, which would appear unfair or wrong to a reasonable and objective person.

2. Relevant to the administration of the scheme'

In view of its statutory objectives, the Pensions Regulator interprets 'administration' widely in the context of the need to report breaches. It is much wider than just those tasks normally associated with the administrative function such as keeping records, dealing with membership movements, calculating benefits and preparing accounts, though all these are included within it. The Pensions Regulator interprets administration to include such matters as the consideration of funding in defined benefit schemes, investment policy and investment management, as well as the custody of invested assets; indeed anything which could potentially affect members' benefits or the ability of members and others to access information to which they are entitled.

There are two key judgements required:

1. First, does the reporter have reasonable cause to believe there has been a breach of the law?
2. If so, then, secondly, does the reporter believe the breach is likely to be of material significance to the Pensions Regulator?

Having a reasonable cause to believe that a breach has occurred means more than merely having a suspicion that cannot be substantiated.

Where the reporter does not know the facts or events around the suspected breach, it will usually be appropriate to check with the Responsible Officer, or with others who are in a position to confirm what has happened. However, it would not be appropriate to check with the Responsible Officer or others in cases of theft, or if the reporter is concerned that a fraud or other serious offence might have been committed and discussion with those persons might alert those implicated or impede the actions of the police or a regulatory authority.

If the reporter is unclear about the relevant legal provision, they should clarify their understanding of the law to the extent necessary to form a view.

In establishing that there is reasonable cause to believe that a breach has occurred, it is not necessary for a reporter to gather all the evidence which tPR would require before taking legal action.

Appendix 2

When a breach may be considered material and how to make a submission to tPR

The Pensions Regulator (tPR) has produced guidance to assist schemes in identifying the severity of a breach and whether it should then be reported. When determining materiality of any breach or likely breach Reporters will in all cases consider the following:

- **Cause.**
- **Effect.**
- **Reaction; and**
- **Wider implications.**

Cause

The breach is likely to be of material significance to tPR 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.

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.

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.

Effect

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 tPR:

- Local Pension Board members not having the appropriate degree of knowledge and understanding, which may result in pension boards not fulfilling their roles, the scheme not being properly governed and administered and/or scheme managers breaching other legal requirements.
- Pension Advisory Panel or Local Pension 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 scheme managers breaching legal requirements.

- Adequate internal controls not being established and operated, which may lead to schemes not being run in accordance with their scheme regulations and other legal requirements, risks not being properly identified and managed and/or the right money not being paid to or by the scheme 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.
- Any misappropriation of assets of the scheme or risk of this, which may result in scheme assets not being safeguarded, and
- Any other breach which may result in the Southwark Pension Fund being poorly governed, managed or administered.

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.

Reaction

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

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, or
- Fail to notify affected scheme members where it would have been appropriate to do so.

Wider Implications

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.

If it is unclear as to whether the breach or likely breach is significant, in the first instance full details should always be reported to the Responsible Officer to determine the appropriate course of action.

It should be noted that failure to report a significant breach or likely breach is likely, in itself, to be a significant breach (examples of tPR “Traffic Light” framework are included as appendix 3).

The Responsible Officer will use tPR “traffic light” framework as a means of identifying whether any breach is to be considered as materially significant and so reported to tPR.

Any failure of a scheme employer to pass over employee contributions that are considered to be of material significance must be reported to tPR immediately.

In order to determine whether failure to pay over employee contributions is materially significant or not the Fund will seek from the employer:

- The cause and circumstances of the payment failure.
- What action the employer has taken as a result of the payment failure, and
- The wider implications or impact of the payment failure.

Where a payment plan is agreed with the employer to recover outstanding contributions and it is being adhered to or there are circumstances of infrequent one-off late payments or administrative failures the late payment will not be considered to be of material significance.

All incidences resulting from the unwillingness or inability of the employer to pay over the employee contributions, dishonesty, fraudulent behaviour or misuse of employee contributions, poor administrative procedures or the failure to pay over employee contributions within 90 days from the due date will be considered to be of material significance and reported to tPR.

Once a breach or likely breach has been identified, regardless of whether it needs to be reported to tPR, the Responsible Officer, must review the circumstances of the breach in order to understand why it occurred, the consequences of the breach and agree the corrective measures required to prevent re-occurrence, including an action plan where necessary. All breaches must be recorded in the Fund’s breaches log.

Submitting a report to tPR

Reports must be submitted in writing and can be sent by post or electronically, including by email or by fax. Wherever possible reporters should use the standard format available via the Exchange online service on the regulator’s website:

<http://www.thepensionsregulator.gov.uk/trustees/exchange.aspx>

The report should be dated and include as a minimum:

- Full name of the scheme.
- 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 scheme.

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 scheme.
- The contact details of the scheme manager (if different to the scheme address).
- The pension scheme's registry number (if available), and
- Whether the concern has been reported before.

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.

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 tPR has received their report.

tPR 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.

Reporters should provide further information or reports of further breaches if this may help the regulator to exercise its functions. tPR may make contact to request further information.

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.

In cases of immediate risk to the scheme, 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 tPR to the breach.

Appendix 3

Example Breaches Applying tPR Traffic Light System

tPR “traffic light” framework

tPR provides a “traffic light” system of categorising an identified breach:

Green – not caused by dishonesty, poor governance or a deliberate contravention of the law and its effect is not significant and a plan is in place to rectify the situation. In such cases the breach does not have to be reported to tPR, but should be recorded in the Fund’s breaches log.

Amber – does not fall easily into either green or red and requires further investigation in order to determine what action to take. Consideration of other recorded breaches may also be relevant in determining the most appropriate course of action. The will need to decide whether to informally alert tPR to the likely breach, formally reporting the breach if it is subsequently decided to categorise the breach as red.

Red - caused by dishonesty, poor governance or a deliberate contravention of the law and having a significant impact, even where a plan is in place to rectify the situation. The Fund or local pension board must report all such breaches to tPR in all cases.

Appendix 4 Breaches Reporting Form.

Reporter name	
Reporter position	
Telephone contact	
Email address	
Address	
Date of suspected breach	
Description of suspected breach and why you consider it to be a breach (please provide all relevant details)	
Signed	
Date of submission	
Report no. (internal use)	