

**SLOUGH BOROUGH COUNCIL**

**REPORT TO:** Council **DATE:** 27<sup>th</sup> September 2016

**CONTACT OFFICER:** Mrs A Healy, Head of Legal Services  
**(For all Enquiries)** (01753) 875035

**WARD(S):** All

**PART I**  
**FOR CONSIDERATION**

**RESPONSE TO STATUTORY REPORT OF MONITORING OFFICER ON PROPOSED RE-DESIGNATION OF THE MONITORING OFFICER ROLE**

1. **Purpose of Report**

To respond to item 7 on the Council agenda, namely the ‘Statutory Report of the Council’s Monitoring Officer – Report on proposed unlawful re-designation of the Monitoring Officer role’.

2. **Recommendation**

The Council is requested to note the advice contained in this report in relation to their consideration of item 7 of the agenda.

3. **The Slough Joint Wellbeing Strategy, the JSNA and the Five Year Plan**

3a. **Slough Joint Wellbeing Strategy Priorities**

n/a

3b. **Five Year Plan Outcomes**

n/a

4. **Other Implications**

(a) Financial

There are no direct financial implications arising from the contents this report.

(b) Risk Management

<i>Recommendation</i>	<i>Risk/Threat/Opportunity</i>	<i>Mitigation(s)</i>
<i>The report at item 7 fails to identify risks arising from the report and how they can be mitigated</i>	<i>Threat to the reputation of the office of monitoring officer</i>	<i>The Council has offered to investigate the allegations contained in the Statutory Report. This has been rejected.</i>
	<i>Basis of the instructions on which Statutory Report was issued</i>	<i>The instructions upon which legal advice was requested has been requested but the request has been refused by the Monitoring Officer</i>

	<i>The legal advice received by the Monitoring Officer to support his report</i>	<i>The legal advice upon which the MO report was issued has been requested but the request has been refused by the Monitoring Officer</i>
<i>Council has sought external legal advice on the ability of the Council to re-designate the role of MO</i>		<i>Both the DMO and the Head of Legal Services have sought independent external legal advice on the ability of the Council to re-designate the role of its MO</i>

(c) Human Rights Act and Other Legal Implications

- i. There are no human rights implications arising from the contents of this report.
- ii. Section 5 of the Local Government and Housing Act 1989 requires the Monitoring Officer to prepare a report to the Council if it appears to the Monitoring Officer that any proposal, decision or omission by the Council (or any Committee, Sub-Committee or Joint Committee) or any Council office holder or employee has given rise to, would give rise to, or is likely to give rise to a contravention of any enactment or rule of law or any Code of Conduct or Code of Practice made or approved by or under an enactment (or maladministration, but that is not relevant here).
- iii. Subsection 2(B) prevents a Monitoring Officer from presenting such a report to the Council if it relates to a proposal, decision or omission of the Executive. Any report in respect of such a proposal or action should be made to the Executive.
- iv. A Council has the right to designate whomever it wishes as its Monitoring Officer and has a right to change its mind. At Slough the Monitoring Officer duties do not form part of a substantive role and the appointment can be terminated on 3 months' written notice in accordance with terms agreed by the Council's Chief Executive and the Monitoring Officer on the 30.11.2015.
- v. A Monitoring Officer cannot be dismissed lawfully without following the procedure in the Local Authorities (Standing Orders) Regulations 2001 as amended. Dismissal does not include removal of a designation. This is

apparent for example from part 2 of schedule 1 of the 2001 Regulations: “1(A) *Where a Committee, Sub-Committee or officer is discharging, on behalf of the Authority, the function of the dismissal of an officer designated as... the Authority’s Monitoring Officer, the Authority must approve that dismissal before notice is given to that person.*”

- vi. “Disciplinary action” in relation to a member of staff of a local authority means any action occasioned by alleged misconduct which, if proved, would according to the usual practices of the Authority, be recorded on the member of staff’s personal file, and includes any proposal for dismissal of a member of staff for any reason other than redundancy, permanent ill health or infirmity of mind or body, but does not include failure to renew a contract of employment for a fixed term unless the Authority has undertaken to renew such a contract.
- vii. The 2001 Regulations, as amended, only apply if alleged misconduct is to be investigated and disciplinary action taken against a Monitoring Officer. This is not the case in this instance, and therefore the 2001 Regulations do not apply as no disciplinary action is being taken as no misconduct has been alleged.
- viii. The Section 5 Report quotes advice from Peter Oldham QC, but it is not clear whether this advice was sought before or after the Leader sent his email of 6 September (Annex 10) and the Interim Chief Executive sent his email of 9 September (Annex 12), both of which are annexed to the Monitoring Officer’s report. Mr Oldham’s advice is confined to “*the circumstances described to me*” but there is no explanation of those circumstances and the Monitoring Officer has refused to disclose the instructions issued to Mr Oldham, the date of those instructions or the full legal advice he says he has received and therefore the Council’s lawyers are unable to comment on the advice or its context.
- ix. Similarly, the advice from Weightmans LLP which has been referred in the report as Annex 15 is predicated on the basis that they are not aware of the Leader’s reasons for the recommendations he is making to the Council to re-designate the role. They consider that the reasons “are clearly disciplinary in nature” and therefore are seeking to avoid the requirements of the regulations and disciplinary processes. It is agreed that if this were the case it would

amount to an improper purpose. They make no reference to a draft Section 5 Report.

- x. However, there is no evidence that the Leader was contemplating or that the Council is taking any form of disciplinary action. Indeed the email correspondence annexed to the Monitoring Officer's report goes to quite some lengths to say it was not.
- xi. The Section 5 Report directly affects the Monitoring Officer's own personal interests. Section 5.7 of the Local Government and Housing Act 1989 provides that the duties of the Monitoring Officer under s5 must be performed personally. The Monitoring Officer's report should have drawn attention to his personal interest but mentioned section 5.7 to explain his action.

(d) Equalities Impact Assessment

There are no equalities implications arising from the contents of this report.

(e) Workforce

There are no workforce implications arising from the contents of this report.

5. **Supporting Information**

- 5.1 Mr Gurpreet Anand was appointed as Assistant Director, Procurement and Commercial Services on 1 October 2015. There is no reference in the contract/statement of him acting as Monitoring Officer. Mr Anand was designated as Monitoring Officer by Council on 24 November 2015 with effect from 25 November 2015. The Council and Mr Anand signed terms on the designation of the role of Monitoring Officer, which enabled either party to terminate the arrangement on 3 months notice on either side.
- 5.2 Therefore, para 1.9 of his report namely, that the 'power to re-designate must be done for valid reasons', is not accepted, although it is accepted that no local authority power should ever be exercised for capricious reasons. No evidence has been presented of capricious reasons. All that is said is by the Monitoring Officer is that he was unaware of what he had done wrong. However, Annex 2 to the Monitoring Officer's report sets out the reasons, namely "...one of the conclusions from that investigation is there is a failure on your part to investigate satisfactorily the original whistleblowing complaint of the 4<sup>th</sup> July which was sent to you. The

concerns go beyond delay in investigating ....Your role as Monitoring Officer puts you at the heart of maintaining standards of integrity and public confidence...I am not satisfied that that you have fulfilled your duties in this regard and this puts both you and the reputation of the Council at risk”. It is unclear why this clear statement of concerns left the Monitoring Officer unclear as to why the role should be re-designated and that there was no intention to take or even to consider any disciplinary action. Subsequent correspondence at Annexes 4,6,8 and 10 again provided further re-assurance.

5.3 The Local Authorities (Standing Orders) Regulations 2001 (“2001 Regulations”) provide for a particular process for the dismissal of or taking of disciplinary action against certain defined officers, which include a Monitoring Officer.. However, in the current case the 2001 Regulations do not apply. This is because the Regulations apply to a dismissal only. Although the term is not defined in the Regulations, it would in fact mean the termination of Mr Anand’s entire employment with the Council, that is as Assistant Director rather than just the removal of a designation from him and its transfer to someone else. The definition of dismissal is found in Section 95, Employment Rights Act 1996 which states that an employee is dismissed by his employer if:

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice), he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*
- (b) the employee terminates the contract under which he is employed (with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct).*

5.4 Disciplinary means any action occasioned by alleged misconduct which, if proved, would, according to the usual practice of the authority, be recorded on the member of staff’s personal file. That means warnings or any similar disciplinary sanctions. It includes any proposal for dismissal of a member of staff for any conduct or capability-related reason. The action (i.e. the removal of the designation) is not something that would be recorded on the member of staff’s personal file in a disciplinary context.

5.5 Annex 2, Annex 4, Annex 6, Annex 8, Annex 10, evidence that there was no intention by the Leader at any time to take any form of disciplinary action. The

Annexes referred to also show there was no intention to avoid the statutory procedures and protections available to a Monitoring Officer by failing to take disciplinary action. There is no evidence presented by the Statutory Report that confirms the contents of para 1.10 of his report, as such it is not accepted.

- 5.6 In the circumstances in which the Council found itself since the summer, it had become apparent that Mr Anand's lack of previous experience in the role of Monitoring Officer or any other investigatory or regulatory role, raised doubts as to his ability to fulfil the Monitoring Officer role to the standard required. The correspondence from the Leader refers to 'concerns' and these were in the nature of concerns about the Monitoring Officer's capability and qualifications to carry out the role, in particular as he is not a qualified lawyer.
- 5.7 The actions that the Council is proposing item 8 of the Council's Agenda is designation of the current Deputy Monitoring Officer as the Council's Monitoring Officer. The statutory report was bought not because the Executive attempted to remove the designation of Monitoring Officer, but because the Interim Chief Executive confirmed on the 9<sup>th</sup> September 2016, that a report would be going to Full Council.
- 5.8 There is a conflict of interest that the Monitoring Officer has not addressed in his report to explain why he bought a statutory report in his own name in relation to his interests. The failure to identify and address this personal interest element in the report may be considered an example of the Monitoring Officer's lack of experience of the requirements of the role.
- 5.9 The question within the report which Members might consider it legitimate to consider is whether the Leader's reasons for wishing to remove the Monitoring Officer role from the Assistant Director Procurement and Commercial Services were because he considered the Monitoring Officer could be guilty of misconduct. If so, the Council would be avoiding the protections offered under the regulations to a Monitoring Officer accused of misconduct. However, the evidence in the Annexes to the Monitoring Officer's report **shows evidence** this **not** to be the case<sup>1</sup>.
- 5.10 The Monitoring Officer, as with any employee of the Council will be familiar with the terms and ethos of the Code of Conduct that applies to employees. The Code requires that in carrying out duties, employees are expected to promote the highest standards in public life, but also harmonious working relationships and the

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<sup>1</sup> Typographical error amended following original publication

Council's values and priorities, and that the Council's success is dependent upon public confidence in its employees. The fundamental implied duties of every employee include duties of service, competence, care (to take reasonable care in the performance of your duties) obedience to reasonable instructions and loyalty (including fidelity, confidentiality, trust and cooperation). The Monitoring Officer is bound by his duties as an employee as well as his duties as Monitoring Officer, which are set out at Article 12 of the Constitution and in the Monitoring Officer protocol.

## 6. **Comments of Other Committees**

n/a

## 7. **Conclusion**

7.1 In light of all the facts and circumstances, the advice of this report is that the Council is able to re-designate the role of Monitoring Officer.:

7.2 In relation to the Section 5 Reports' recommendations and Agenda item 8:

7.2.1 if Council considers a lawyer is the most the appropriate officer to be the Council's Monitoring Officer then it should reject the Monitoring Officer's Recommendation 12.1;

7.2.2 Recommendation 12.2 asks Council to note the legal advice received by the Monitoring Officer contained in his report. The Council's professional advisers have not seen the instructions or the full advice provided by Weightmans and Peter Oldman QC, therefore it is difficult for Council to note advice it has not seen or been able to consider within its full context.

7.2.3 Council is asked not to implement any proposal the subject of the report for a day (Recommendation 12.3),this is provided for in any event by the recommendations contained in Agenda item 8 at recommendation 2(a)

## 8. **Background Papers**

'1' - Local Authorities (Standing Orders) Regulations 2001 as amended

'2' - Employment paperwork for Assistant Director, Procurement & Commercial Services and acceptance of Monitoring Officer Role and allowance

'3' -Item 7 and 8 of Agenda for Council of 27.9.2016