

## The Elbow's Guide to Confidentiality

This **short guide** is an opinion piece has been written to help you generate some of the questions you need to be asking about **confidentiality** – what it is, when it applies and why it matters. This is not a guide to GDPR but the principles of GDPR must be applied to all of our governance activities.

The guide has relevance for both governors and trustees.

Confidentiality is more than just a '*rubber stamping*' exercise, more than just keeping minutes on a confidential file and more than something we all nod through at the beginning of a board meeting. It should be used with caution and not for keeping things quiet.

Governing boards eg those with a governance responsibility such as the trust board in a Multi Academy Trust, Local Governing Boards or committees thereof, are corporate bodies and therefore no individual governor has any special powers, except for the chair of governors who may act on behalf of the boards (see Chair's Power to Act). Decisions made by governors and trustees are reached by a majority of governors present at the meeting sometimes by voting but always after discussion.

Much of the material that governors and trustees receive as part of their role and subsequently 'hold' is potentially in the public domain eg board minutes, either because the material has to be made available on the school website or it could

be subject to disclosure under the Freedom of Information legislation. Some of it is confidential and should always be treated as such.

There are some useful documents referenced throughout either as footnotes or at the end of the guide.

### What is confidentiality?

Let's start with some of the statutory guidance<sup>1</sup> around confidentiality. Government guidance for maintained schools for example states the governing board may exclude any material relating to

*(a) a named person who works, or who it is proposed should work, at the school;*

*(b) a named pupil at, or candidate for admission to, the school; or*

*(c) any other matter that, by reason of its nature, the governing body is satisfied should remain confidential.*

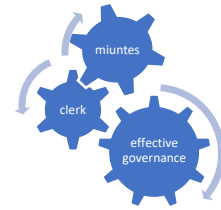
The guidance clearly states that the governing board must, *as soon as reasonably practicable, make available for inspection by any interested person, a copy of the agenda for every meeting; the signed minutes of every such meeting; and any report or other paper considered at any such meeting.*

In addition to this there is clear guidance on what maintained schools and academies must publish on line. This does change but at the time of writing this information could be found at

<https://www.gov.uk/guidance/what-maintained-schools-must-publish-online>

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<sup>1</sup> The School Governance (Roles, Procedures and Allowances) (England) Regulations 2013



<https://www.gov.uk/guidance/what-academies-free-schools-and-colleges-should-publish-online>

## Principles of Confidentiality

The principles of confidentiality rest upon how we fulfil our first core function of governance and how we as governors and trustees foster the trust and goodwill that goes hand in hand with effective and ethical leadership. We need to encourage openness whilst at the same time balancing the need for confidentiality as the situation under discussion requires. This is not always easy. It is acknowledged that those governors and trustees with children attending and family members working in the school or academy sometimes find this difficult. It is worth remembering that the board is a corporate entity and we are bound by the decisions it makes collectively even if we do not always agree.

Confidentiality applies to all governors including staff governors as well as to Associate Members.

## Nolan principles

There are some questions we could ask ourselves about the Nolan Principles which set the context for our decision making. You may have other questions.

*Selflessness – do we govern with the best intentions? What is our purpose?*

*Integrity – do we do the best we can do?*

*Objectivity – are we aware of what influences us?*

*Accountability – our second core function but what does it really mean and feel like?*

*Openness – are we as democratic as we say we are? Do we understand confidentiality and when it does and doesn't apply?*

*Honesty – this is not just about our third core function.*

*Leadership – do we understand good leadership?*

All schools should have the highest regard for transparency and integrity and should be as open as possible about why they made the decisions that they made. Clear minutes are essential to good decision making.

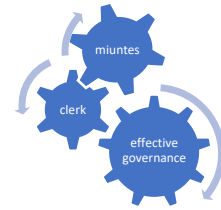
## Code of Conduct

Every board should be ensuring that governors and trustees sign a code of conduct every year and that they actually read it before they sign it; because once a board has agreed something is confidential it is the responsibility of each governor to respect that decision. This code should explicitly refer to confidentiality.

## Minutes

Governing board meeting agendas, both full board and committees, should be in two parts with confidential items clearly identified. These are sometimes called Part One and Part Two and there should be clear iteration between the two.

If you in an Multi Academy Trust you will need to be aware of your Scheme of Delegation but as governance responsibility sits at trust board level there is a very high likelihood that they will require full oversight of all your minutes including confidential matters.



Part 2 minutes should be used appropriately. Ofsted may wish to see these if the need arises.

The Freedom of Information Act 2000 gives rights of public access to information held by public authorities including schools. Guidance is available [here](#) and this document from the Information Commissioners Office is well worth a read. You must release minutes under the provisions of FOI Act unless any of the stated provisions apply, you cannot not release them because you don't want to.

As stated earlier most minutes must be made available to any interested person and many schools have a copy for inspection in the reception area or in a file you can look at on request. Some schools publish them on the website but this is not mandatory. Apart from the 3 matters listed on page one above there may be other matters that the governing board consider should remain confidential. Some boards keep conversations about the academy discussions confidential until options are agreed or restructures are costed. The clerk should be able to advise you.

Confidential minutes should only be shared with those who need to see them – the rule of common sense applies. The governance regulations give guidance on who should withdraw from a meeting and when and therefore it applies that the minutes pertaining to that withdrawal should not be shared with them. This is outlined in Regulation 16<sup>2</sup>.

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<http://www.legislation.gov.uk/ukxi/2013/1624/regulation/16/made>

In an academy you will need to read your Scheme of Delegation and/or Articles of Association. These rules apply to committee meetings as well.

All non-confidential minutes should be shared with the board.

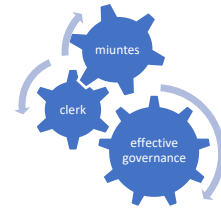
It is your responsibility to ensure that you do not allow confidential material and minutes to 'fall into the wrong hands'. Governors and trustees are now being encouraged to use school email addresses, use cloud-based storage systems, reduce what is printed out and to encrypt material as appropriate. This complies both with GDPR and with the need to act with caution about sensitive material.

The ESFA<sup>3</sup> may on occasion require urgent information from a trust, usually as a result of requests requiring the ESFA to fulfil its duties to provide information to the Secretary of State. The Governance Handbook 2017 states that in such circumstances the ESFA *will act reasonably in its requests for information and will have regard to the costs and timescales of providing the information, and where appropriate to its confidentiality*. This is the only reference to confidentiality in the Governance Handbook.

### **Storage of confidential minutes**

These should be kept separate from the minutes and are often printed on different coloured paper. If filed these must be at least password protected with access limited to those who need it.

<sup>3</sup> Education and Skills Funding Agency



## Meetings

Governing boards meetings are not open to the general public, and those who are not governors or trustees the headteacher or CEO, leaders presenting reports eg School Business Managers or SEN leads, the COO and CFO<sup>4</sup> in an academy, those in attendance by invitation eg observers such as NLG<sup>5</sup>, or the clerk cannot attend unless specifically invited. The clerk will need to ensure that they are clear as to who can vote on decisions if there are many people in the meeting. There may be times when observers are asked to leave a meeting – this is not a personal reflection on them but is in fact to ensure transparency – ie only those with governing responsibility are making the decisions.

Associate Members may also be excluded from any part of the meeting which concerns an individual be it pupil or staff – this can include senior leaders. This is clearly stated in the 2013 governance regulations (see footnote 2). Governors or others with a pecuniary interest in any matter should leave the meeting. This is why having a clear and up to date register of business and pecuniary interests is so important. Your clerk will be able to advise.

Most of what is said and discussed at a meeting is not recorded in the minutes because unless otherwise stipulated minutes are not verbatim records of the discussion. Governors and trustees need to be able to ruminate and consider the matters in front of them without fear.

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<sup>4</sup> Chief Operating Officer and Chief Finance Officer

## Chair's Actions

Some chairs and headteachers meet regularly to discuss a variety of issues. Sometimes there is no agenda to these meetings and they are not usually clerked although there may be notes of the discussion. Chair's actions are sometimes confused with Chair's Powers to Act which are allowed under Regulation 8 of the 2013 Governance Regulations and are for urgent matters. These meetings are often confidential one to one conversations but should not take the place of board decisions.

Powers to Act should also not be used to make routine decisions outside of board meetings; eg to make decisions which would normally be made by the board. Some decisions cannot be made by the chair; for example they cannot be delegated to one person and these are covered under Regulation 19 and include

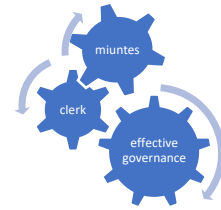
- approval of the budget and
- the suspension of governors

If you are on a board and the chair routinely makes decisions outside of the board you are perfectly entitled to seek clarification.

That said some chairs never use Chair's Powers to Act.

In an academy it is advisable to check your Articles of Association. The model AoA published by the DfE states at Article 105 that *the trustees may delegate any of their*

<sup>5</sup> National Leaders of Governance sometimes observe meetings as part of an External Review of Governance.



*powers or functions (including the power to sub-delegate) to any Trustee, committee including any Local Governing Body the [Chief Executive Officer/Principal or any other holder of an executive office. Any such delegation shall be made in writing and subject to any conditions the Trustees may impose and may be revoked or altered. It goes on where any power or function of the Trustees is sub-delegated by any person to whom it has been delegated, that person must inform the Trustees as soon as reasonably practicable which powers and functions have been further delegated and to whom, and any such sub-delegation shall be made subject to any conditions the Trustees may impose, and may be revoked or altered by the Trustees. Again there needs to be transparency.*

### **Post and Correspondence**

Governors sometimes receive written communication eg letters. These should not be opened by school staff. This would protect the writer in the event of a complaint. The contact details – usually an email address for the chair – should be published on the website. These should be school email addresses and not personal ones.

Emails – it is essential that you only send emails to those you intend to send them to, that you use bcc with caution and that you remain respectful at all times. Your emails may be subject to FoI requests.

### **Whistleblowing**

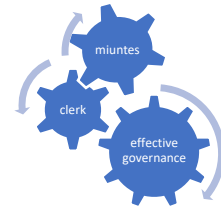
In a maintained school governing boards are responsible for agreeing and establishing the school's whistleblowing procedure. The DfE recommend that they should base your whistleblowing procedure on the relevant local authority's procedure.

The DfE recommend that *you should appoint at least one member of staff and at least one governor who other members of staff can contact if they wish to report concerns. Your governing body minutes should include a record of:*

- *your school's whistleblowing arrangements,*
- *the people in and outside the school that staff members should report concerns to.*

Further information from the DfE can be found [here](#). Whistleblowing is not something to be entered into lightly but that should not detract from the occasions when whistleblowing might be an appropriate course of action. It is also something which you may wish to keep confidential.

Governors and trustees need to be aware that personal grievances (eg bullying, harassment, discrimination) aren't covered by whistleblowing law, unless your particular case is in the public interest. These should be reported under the school's grievance policy and the board/governor/chair should seek the



necessary advice if needed. Sometimes staff talk to governors in confidence – remember that you may not be able to keep these confidences.

The board should ensure that the Whistleblowing Policy is up to date.

### Records Management

Some useful questions for governors and trustees which are not operational include

- Are records routinely archived when no longer in use – do governors ensure that information is secure and disposed of securely ie are they thinking about the confidentiality of the governance information they have?
- Does the School have a policy for managing both its physical and electronic records? Does this cover governance? Confidential minutes?
- Is there a records retention and disposal schedule in place and are records (both physical and electronic) destroyed routinely in accordance with it? How long are minutes kept for?
- Are governors and trustees given advice on how to effectively manage their emails?

**Remember...**if in doubt seek advice from

- Your clerk
- Governor services
- Governance professionals within an academy trust

If you leave the board then you may still be bound to keep matters confidential. Again, this depends on the issue. If you have signed the code of conduct then whilst you remain a governor or trustee you are bound by the expectations contained within the code.

Please note that this guide is a starting point for your questions and discussions as The Elbow does not have a legal background merely a keen in interest in transparency in decision making.

*Thank you for reading*

### References

[Academy Model Memorandum and Articles of Association](#)

[Education and Skills Funding Agency](#)

[Governance Handbook January 2017](#)

[Information Commissioners Office - GDPR](#)

[The 7 Principles of Public Life - Nolan Principles](#)

### About The Elbow

The Clerk's Elbow is a National Leader of Governance, chair of governors, academy trustee, and Independent Clerk in the primary sector and has over 15 years of governance experience. She [blogs](#) and [writes](#) regularly on clerking and governance and all points in between.

She also tweets a lot mostly as @dogpaws23.

The Elbow Guides are a personal opinion and should be treated as such.