

East Sussex Fire Authority



FIREFIGHTERS PENSION SCHEME (FPS) BREACHES OF LAW POLICY & GUIDANCE

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Breaches of Law Policy and Guidance

Cause

Is it of material significance?

Effect

What did the breach lead to?

Reaction

What has been done as a result of the breach?

Wider implications

Will other breaches emerge in the future as a result of this breach?

East Sussex Fire and Rescue Authority (i.e., the Authority) has a legal duty to report a breach of the law where it is likely to be of material significance to the regulator.

This document sets out the Authority's policy and procedures for identifying, monitoring 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).

This policy and all associated breach reporting documents, logs and templates can be accessed by the Responsible Officer and authorised individuals via the Pension Scheme Manager Portal.

The following appendices accompany this Breaches policy and guidance:

- **Appendix 1:** *When a breach may be considered material and how to make a submission to TPR*
- **Appendix 2:** *TPR's "TRAFFIC LIGHT" Framework*
- **Appendix 3:** *Breach Reporting Form*
- **Appendix 4:** *Breach Assessment Template*

Why have a Breaches Policy

- It is a crucial tool for the Authority in reducing risk and providing an early warning of possible malpractice;
- It provides an opportunity to learn from mistakes and review and improve processes in the areas where the breach occurred;
- It represents an important addition to the Authority's suite of policies that make up its risk framework.

The identification, management and reporting of material breaches to TPR is a requirement of the Code.

Failure to report a breach without a reasonable excuse is a civil offence that can result in civil penalties.

What is a breach

A breach of the law occurs when a legal duty which is relevant to the administration of the scheme has not been, or is not being complied with.

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

- to do anything required under overriding legislation, applicable statutory guidance or codes of practice;
- to maintain accurate records;
- to act on any fraudulent act or omission that is identified;
- of an employer to pay 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.

Non-compliance with the Firefighter's Pension Scheme (FPS) regulations can encompass many aspects of the management and administration of the scheme, including failure:

- to abide with the FPS Regulations;
- to comply with the Authority' policies and procedures.

It is important that the Responsible Officer (e.g., Pensions Advisor) is satisfied that a breach has actually occurred, rather than acting on a suspicion of such an event.

Who is responsible for reporting breaches

The following are responsibility to report breaches (known as Reporters):

- Members of the Local Pension Board;
- Any person who is otherwise involved in the administration of the scheme: including officers of the Pension Services Team;
- All participating employers in the scheme;
- Professional advisers;
- Any other person otherwise involved in advising the managers of the scheme.

Reporters 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.

When to report a suspected breach

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

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 a duty which is:

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

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 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,

they 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.

Relevant to the administration of the scheme

In view of its statutory objectives, TPR 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. TPR 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.

When to report a suspected breach – cont'd

There are two key judgements required:

- First, does the reporter have reasonable cause to believe there has been a breach of the law?
- If so, then, secondly, does the reporter believe the breach is likely to be of material significance to TPR?

Reasonable cause to believe

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.

Material significance to TPR

Breaches of the law which 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.

Where the breach was caused by:

- dishonesty;
- poor governance, inadequate controls resulting in deficient administration, or slow or inappropriate decision-making practices;
- incomplete or inaccurate advice; or
- acting (or failing to act) in deliberate contravention of the law,

the breach is likely to be of **material** significance to the Pensions Regulator.

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.

When to report a suspected breach – cont'd

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.

Further information on when a breach may be considered to be a material breach and how to make a submission to TPR can be found in Appendix 1.

Who to report a suspected breach to

All breaches or suspected breaches should be reported to the [Responsible Officer] in the first instance.

However, if the suspicion is around theft, fraud or other serious offences where discussions may alert those implicated or impede the actions of the policy or a regulatory authority, the *Reporter* should go to TPR directly and at the earliest opportunity.

Role of the Responsible Officer

The Responsible Officer is responsible for the management and execution of the breaches policy. The Responsible Officer for this Authority is the Pensions Advisor. If the Pensions Advisor leaves their role or the person responsible for the day to day management of the Authority's FPS changes, the person who assumes the role will become the Responsible Officer for this Authority.

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

- record all identified breaches and likely breaches of which they are aware in the Authority's pension 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 also ensure further breaches of a similar nature do not reoccur;
- report to the Local Pension Board;
- report all materially significant breaches identified to TPR as soon as practicable but not later than 30 days after becoming aware of the breach.

NOTE:

- all materially significant breaches will require reporting to TPR as soon as is practicable, but no later than within 30 days (if the next scheduled meeting of the Local Pension Board is in excess of 30 days the Responsible Officer will consult with the Chairman of the Local Pension Board within the 30 day period (verbally if necessary) prior to reporting to TPR; and after consultation with the Chief Fire Officer, Treasurer and Deputy Monitoring Officer.
- All other breaches to the next scheduled meeting of the Local Pension Board.

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 Chief Fire Officer, Treasurer, Deputy Monitoring Officer and Local Pension Board.

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.

How are records of breaches maintained

All breaches or suspected breaches will be recorded in the Authority's Breaches Log.

Responsible Officer will maintain the Authority's Breaches Log. The Authority's Breaches Log will include the following information:

- Date the breach or likely breach was identified
- Name of the employer (where appropriate)
- A description of the breach:
 - Cause
 - Effect
 - Reaction
 - Implications
- Whether the breach is considered to be red, amber or green with reference to TPR's traffic light system
- Whether the concern has been reported before
- Whether the suspected breach is considered materially significant to TPR and reasons for this consideration
- Date of report to TPR (if applicable)
- Recommended action to rectify the breach
- Evidence that these recommendations have been implemented
- Confirmation that the Head of Fire & Rescue, Director of Finance, Director of Legal, Cultural and Democratic Services and Local Pension Board have been consulted

Updates to the breaches log will be reported to the Local Pension Board at its next meeting.

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 Authority. The duty to report does not override any other duties a Reporter may have, such as confidentiality. Any such duty is not breached by reporting to TPR. Given the statutory duty that exists, in exercising this breaches policy the Authority 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 Authority and the Local Pension Board and a professional legal adviser do not have to be disclosed.

Training

The Responsible Officer will ensure that all Reporters, receive appropriate training on this policy as appropriate.



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Considerations

Policy

This policy is expected to be appropriate for the long-term. However we will review the Policy occasionally to ensure it remains up to date and meets the necessary regulatory requirements.

Objectives

This policy aims to ensure that the Authority reduces its risk and:

- serves as an early warning of possible malpractice;
- provides an opportunity to learn from mistakes and review and improve processes in the areas where the breach occurred;
- represents an important addition to the Authority's suite of policies that make up its risk framework.

Application

The Breaches of the Law Policy and Guidance applies to any management or administrative failures that relate to the Authority's FPS – see page 3. The Authority's Pension Advisers, Professional Support and Local Pension Board members are expected to demonstrate that they are aware of and understand the contents of this Policy.

Additional Information

If you need more information about the FPS, please refer to East Sussex Fire and Rescue's FPS portal via <https://www.esfrs.org/staff-area/pensions/firefighters-pension-scheme-portal/> or contact the Pension Scheme Administrators:

Orbis Business Services

County Hall

St Anne's Crescent

Lewes

East Sussex

BN7 1UE

[See a map of this address](#)

Phone: 01273 337450

Email: ESCC.pensions@sesharedservices.org.uk

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:

1. Cause;
2. Effect;
3. Reaction; and
4. Wider implications.

1. 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.

2. 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;

- 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 being likely to do so, which may result in scheme assets not being safeguarded; and
- Any other breach which may result in the East Sussex Firefighter's Pension Scheme 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.

3. 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.

4. 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.

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:

<https://www.thepensionsregulator.gov.uk/en/trustees/submit-reports-payments-and-requests-to-us/exchange-online-service>

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:

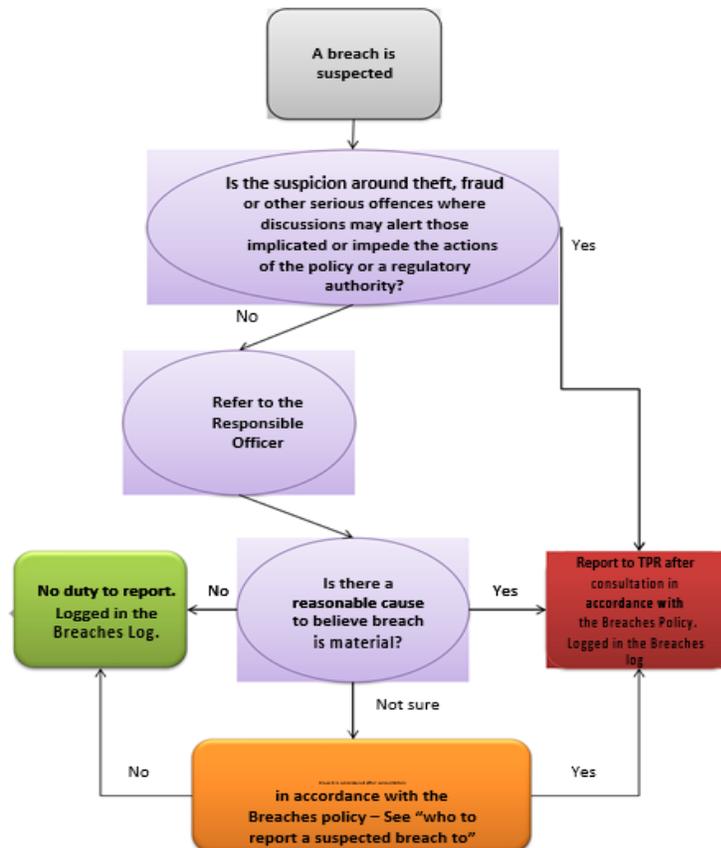
- The reason the breach is thought to be of material significance to the regulator;
- The address of the scheme;
- The contact details of the scheme manager (if different to the scheme address);
- The pension scheme's registry number (if available); and
- Whether the concern has been reported before.

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.

Reporting decision tree



TPR's "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 may not be reported to TPR, but should be recorded in the Authority'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 Authority or local pension board 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 Authority or local pension board must report all such breaches to TPR in all cases.

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. The Responsible Officer will use TPR's "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 employee contributions is materially significant or not the Authority 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 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 Authority's breaches log.

Breach Reporting Form

(Form to report a suspected breach to the Responsible Officer)

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 only	

Please submit this form to:

[The Responsible Officer]

Email:

Breach Assessment Template

Date of assessment

[Enter text about date of assessment and who assessment panel is]

Introduction

[Brief introduction to the breach being assessed]

Identified

[Enter text about how the breach was identified, for example it might be;

- Tracked from agenda
- Tracked from LGA bulletins / technical note
- Informed by scheme manager / Pensions administrator
- Something else]

Assessment

[Using the [TPR guidance](#) comment on the four areas and score red, amber or green]

	Cause	Effect	Reaction	Wider Implications
Red				
Amber				
Green				

Action

[Enter text about what the course of action is in response to the breach, including any timescales.]

History / Frequency

[Enter text about whether this is a breach that has occurred before and with what frequency.]

Decision

Report as material breach	
Recorded as breach	

Assessed by:**Date of assessment:****Board/Panel/PO Review:****Tabled at Board/Panel/PO Meeting:****Agreed by board/Panel/PO:**