

## Practice guide 9

# Engaging with partners

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This is one of a series of practice guides produced by the Centre for Public Scrutiny to assist those working in the overview and scrutiny functions of local authorities.

### What is this guide about?

This guide is about the way in which scrutiny councillors and officers can engage the council's partners. These could be council contractors, organisations with whom the council jointly commissions services, organisations that the council funds to deliver certain services by means of grant funding or service level agreements, or other bodies. A partner could be in the public, private or voluntary sectors.

The guide also looks at statutory powers available to scrutiny to investigate crime and disorder and health matters.

### Why is it important to consider scrutiny's powers in relation to partners?

It is becoming more difficult to separate "internal" council services from "external" issues involving partners. Every service that councils deliver will involve some engagement with such partners, whether this is in the form of co-operation, through joint or individual commissioning, or other arrangements. As such, there will be a partner dimension to every issue that scrutiny looks at.

### What are scrutiny's powers?

#### Statutory powers

Scrutiny has statutory powers to investigate the work of a range of partners.

Health – the Local Authority (Public Health, Health and Well-Being Boards and Health Scrutiny) Regulations 2013 set out the legal rights of scrutiny committees in relation to NHS bodies in England, which we cover in the context of powers around joint committees in [Guide 7](#). Health scrutiny committees may investigate any health related issue in their area, and have an obligation to invite interested parties when they choose to carry out such investigations. When they make recommendations to local NHS bodies, scrutiny committees have the right to require a response within 28 days. Scrutiny can carry out investigations on its own initiative, or at the suggestion of Local HealthWatch.

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The Regulations maintain the long-standing (since 2003) provisions around consultations carried out by NHS bodies around substantial developments or reconfigurations of local health services. Here, scrutiny has a number of additional powers – notably, the power to refer matters to the Secretary of State. This power sits with “the authority” under the Regulations rather than with a specific overview and scrutiny committee.

Guidance is expected which will expand on these powers but at the time of writing (May 2014) has not yet been published.

Community safety – under the **Police and Justice Act 2006**, a committee of the council designated as a community safety scrutiny committee has the power to ask local community safety partners for information, request that those partners attend meetings (given reasonable notice) and require that those partners consider recommendations submitted to them. Statutory guidance on these powers was issued in 2009 (<http://ow.ly/wPWAN>). Some councils, such as **Solihull** (<http://ow.ly/wPXFw>) have developed protocols to define the relationship better.

Flooding – following recommendations made by the Pitt Review (<http://ow.ly/wPWQ5>, <http://ow.ly/wPWXL>), scrutiny committees have a formal role with regard to flood risk management, which allows for the review and scrutiny of such functions carried out by upper tier authorities (**2000 Act, s9FH**).

Other partners – powers were given to scrutiny committees to hold a number of named partners to account in **Chapter 1 and Part 5 of the Local Government and Public Involvement in Health Act 2007**. The powers themselves can now be found in **section 9FF of the 2000 Act**. Scrutiny can ask these partners to attend meetings, can request information from them and can require them to “have regard to” their recommendations. There is no legal definition for “hav[ing] regard to”, but some councils – such as **Lincoln** (<http://ow.ly/wPXr6>) - have attempted to define it through scrutiny/partner protocols.

In some areas, councils have taken steps to come together to carry out work with partners cross-border, in a more co-ordinated way – for example, **Surrey** (<http://ow.ly/wPYem>).

### Contracting-out and commissioning

Scrutiny has a broader remit to engage with partners in relation to contracted out or commissioned services.

This is not specifically provided for in legislation. However, scrutiny will have taken an active role in holding to account the planning and delivery of a range of services now contracted out when they were delivered in house; they have a general responsibility, too, to hold to account those people who commission services, and manage contracts. Inevitably, this will involve substantial engagement with service providers – those partners actually delivering the service.

Engagement with partners in this context is lent additional complexity by the existence of contracts. These add uncertainty both in respect of negotiation over those contracts (which may be subject to commercial confidentiality, which we cover below) and in respect of the way those contracts are monitored. Council officers are likely to put in place detailed contract management and monitoring arrangements which they may claim are sufficient, making scrutiny’s role superfluous. The contrary

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argument is that scrutiny brings a different perspective to the contractor/provider relationship, that it can bring additional evidence to bear that can place the contract management arrangements in context (by listening to and understanding the experiences of local people) and that it can act as a “long stop” to identify and deal with any particularly intransigent issues that ordinary officer-led management systems are unable to tackle. **Wiltshire** (as described in our report “**Counting the cost, measuring the value**” (2012), <http://ow.ly/wPYzb>) has taken this approach in its own scrutiny of major contracts; other councils pursuing a commissioning approach to service delivery (such as **Richmond** - <http://ow.ly/wPYUU>) are planning to bolster their scrutiny arrangements in light of this.

**Section 100F(2A) of the Local Government Act 1972** gives councillors the right to access council papers which relate to contractual negotiations. This covers information which would otherwise be excluded under **paragraphs 3 and 6 of Schedule 12A to the Act** (Information relating to the financial or business affairs of any particular person (including the authority holding that information, and information which reveals that the authority proposes (a)to give under any enactment a notice under or by virtue of which requirements are imposed on a person; or (b)to make an order or direction under any enactment). This is not a blanket right, however, and the Monitoring Officer may still consider that such information is exempt.

The **Local Authorities (Executive Arrangements) (Access to Meetings and Information) (England) Regulations 2012** contains more information which further bolsters councillors’ rights in this area.

## **How can relationships be developed?**

### Initial discussions and attending meetings

Many partners will be unfamiliar with scrutiny and its processes. There may be some initial resistance to engagement – particular by those organisations over whom scrutiny has no formal powers. In particular, formal invitations to committee meetings may dissuade attendance at what might be interpreted as a forum for adversarial, party political debate. If a partner receives an invitation to attend a committee out of the blue, experience suggests that they will be unlikely to come – particularly given that scrutiny committees have only very limited powers to compel certain partners to attend meetings. You might consider:

- Talking to partners early to discuss the work programme (talking about topics you’re considering looking at, and thinking about how they can be cast so as to better complement partners’ own work);
  - Ensuring that partners understand the purpose of whatever meeting you’re inviting them to (and the overall purpose of the work on which you’re engaged, where the meeting is part of a wider scrutiny review), and what the next steps will be after the meeting;
  - Making sure (particularly with task and finish groups) that the scrutiny process is made more transparent for partners, by providing them with agendas and associated information well in advance;
  - Ensuring that partners know, in practice, what to expect when they attend a meeting – for example, an invitation to attend a task and finish group meeting may require you to approach this differently to your approach from when you invite people to a committee meeting;
  - Ensuring that unreasonable commitments are not expected of partners – for example, by carrying out more scrutiny work through the use of one-off “challenge panels” or “scrutiny days” rather
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than expecting partners to be able to support a detailed piece of ongoing work. **Hertfordshire** delivers its scrutiny work exclusively through this way of working;

- Understanding that the focus may have to be in using the meeting as an opportunity to help the partner in question with work they are undertaking. You will probably not be able to take as robust an approach with partners as you might with a council officer or Cabinet member;
- Recognising that the meeting is only the start of the process, and that further engagement may be necessary – particularly as you prepare recommendations. **Gloucestershire's** engaging with the Environment Agency over flooding scrutiny they carried out in 2007, and again in 2011, provides a good example of this in action;
- Using the experiences you've gathered from previous partner engagement (in particular, with NHS bodies) to guide your approach.

### Requesting evidence

Partners will expect to be told how information they provide will be used. Clarity in the objectives of work being undertaken will be vital – the clearer those objectives are the more confidence partners will have in the use of information.

Much information will be accessible through use of the powers in the Freedom of Information Act. However, we consider that use of FOIA would be unwise, where scrutiny is attempting to build up a positive working relationship with a partner. Engaging early and meaningfully will limit the need to resort to these kinds of measures.

### Making recommendations

Partners are under no compulsion to provide a detailed, specific response to scrutiny recommendations, in the same way that the Cabinet is. As such, liaison and dialogue will be especially important if you plan to make a recommendation to a partner.

Entering into these kinds of discussions at the outset can help to eliminate potential problems and misunderstandings further down the line. As a matter of course, it may make sense to share initial findings and draft recommendations with partners before they are finalised – with the understanding that they will be ultimately subject to scrutiny's own discretion.

## **What are some of the possible pitfalls, and their solutions?**

### Overreaching

It is possible for scrutiny to overreach its powers – to seek to make detailed recommendations on how a partner manages its own operational priorities, or seeking to exert its authority by requiring representatives to attend meetings, rather than this being the subject of discussion and agreement. This can be particularly tempting where scrutiny is investigating an issue of local contention where a partner has a high profile (such as local bus or train services, or flooding). For such matters, early planning and dialogue, to set out mutual expectations, will be critical.

### Confidentiality, commercial or otherwise

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Partners may cite the demands of commercial confidentiality ([Freedom of Information Act, s43](#), and see also Schedule 12A of the Local Government Act 1972) as a reason why scrutiny should not be able to engage at certain key points. This is likely to be a particular issue when a partner is in a traditional outsourcing contract or similar agreement with the authority, but it may also be a factor for other public sector partners, with whom the council may be engaged in jointly commissioning services.

There are three potential solutions to this problem.

- Focus scrutiny's involvement away from the most commercially sensitive times. So scrutiny's involvement is likely to add less value when the contract itself is being negotiated (as that process is heavily circumscribed by EU rules, in particular). Scrutiny will however add more value as specifications for contracts are being developed – at this point the nature of the contract itself will be far more open, and confidentiality issues are far less likely to arise. This is a particularly sensible point to engage when the council is proposing to enter into longer term, and more open, commissioning arrangements with partners. We published advice on commissioning in health in 2010 (<http://ow.ly/wQ2it>) – we have also published newer guidance for the position in health which reflects the structural changes in the NHS since April 2013 (<http://ow.ly/wQ2zY>). More general guidance on major contracts and commissioning can be found in a policy briefing we published in 2011 (<http://ow.ly/wQ2K9>).
- Ensure that, in future, contracts all include a standard clause entitling the council's scrutiny function to access to information, and access to representatives of the contractor/partner. This can apply both to the standard contracts, to service level agreements with other organisations, and more strategic partnerships with larger bodies such as the NHS.
- In certain circumstances you may be able to challenge the basis on which partners, or council officers, feel that information should be withheld on grounds of commercial confidentiality. It is important to remember that under the terms of the [Freedom of Information Act](#) the only information that can be withheld is that which specifically relates to such confidentiality issues, not the whole report in which that information is presented. The Ministry of Justice have published detailed guidance on the exemption for commercial confidentiality at <http://ow.ly/wQ2RR>.

### Complaints about resource commitment

There are two resource challenges:

- Resourcing for partners. Partners may feel unwilling to devote the time and resource necessary to provide evidence to scrutiny, and to attend meetings. This will be tied to a lack of understanding about the value that scrutiny can bring to their own work. Clear agreements about the way in which information will be shared between scrutiny and the partner involved, perhaps in the form of a protocol, may assist (we gave a couple of examples earlier). CfPS has also carried out work (<http://ow.ly/wQ3yf>) with a Foundation Trust to understanding the benefits of scrutiny;
  - Resourcing for scrutiny itself. With resources tightening, scrutiny practitioners may find the prospect of further engagement with partners challenging. However, as it becomes more difficult to differentiate internal services from external services, much scrutiny work which has historically been carried out exclusively with council officers and Cabinet members will need to involve partners to continue to be effective.
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