

REPORT TO: POLICY & RESOURCES COMMITTEE - 25 JUNE 2012

REPORT ON: FOLLOWING THE PUBLIC POUND

REPORT BY: DIRECTOR OF CORPORATE SERVICES

REPORT NO: 187-2012

1 PURPOSE OF REPORT

- 1.1 To update the Council's Guidance on Funding External Bodies and Following the Public Pound.

2 RECOMMENDATIONS

- 2.1 The Committee approves the updated guidance and associated appendices.

3 FINANCIAL IMPLICATIONS

- 3.1 None.

4 BACKGROUND

- 4.1 The original guidance on Following the Public Pound was approved by the Finance Committee on 14 June 1999. Amendments to the guidelines were subsequently approved in 2006. Since 2009 the Council has been updating these guidelines on an annual basis to ensure they are up to date.

5 ANNUAL REVIEW FOR 2012

- 5.1 This report updates the guidelines. It is noted that during the year Audit Scotland published "Arms length External Organisations : are you getting it right?" and this report takes cognisance of its contents.
- 5.2 Representation on the board of third parties is continually a source of debate when following the Public Pound is discussed. Having given careful consideration to this matter the Council believes its interests are best served by employing a mix of officers and Elected Members at board level, taking into account the individual circumstances prevailing and the risk to which the Council may be exposed.
- 5.3 The Council is currently undertaking a review of the performance of Third Party Organisations. In particular, the issue of how best Third Party performance may be reported to the Council is being considered. It is intended that any changes will take effect in the next financial year.
- 5.4 The Council is committed to the ongoing training of both officers and Elected Members to ensure that they carry out their duties efficiently and effectively when on the boards of Third Party Organisations.

6 POLICY IMPLICATIONS

- 6.1 This report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management.

There are no major issues.

7 CONCLUSION

- 7.1 The Council complies with the Guidance on Funding External Bodies and Following the Public Pound.

8 CONSULTATION

- 8.1 The Chief Executive and the Head of Democratic and Legal Services have been consulted on the content of this report.

9 BACKGROUND PAPERS

- 9.1 Arm's-length External Organisations : are you getting it right? - Audit Scotland Report 290/2011 Following the Public Pound.

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18 JUNE 2012



GUIDANCE ON FUNDING EXTERNAL BODIES AND
FOLLOWING THE PUBLIC POUND

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Appendix

- A Proforma for details of Bodies/Projects falling within the scope of Funding External Bodies and Following the Public Pound
- B Summary of insurance details for bodies/projects falling within the scope of Funding External Bodies and Following the Public Pound (position as at May 2012)

Introduction

For a number of years there have been concerns about the increasing use by Councils of companies, trusts and other arms-length bodies. These concerns are derived from the basic premise that where public funds are utilised there is an expectation of a high degree of control and accountability.

In order to address this matter, the Accounts Commission and COSLA published a Code of Guidance on Funding External Bodies and Following the Public Pound. In this guidance the approach adopted is based on self regulation by Councils and monitoring through the external audit process. The guidance lays out the principles of best practice in establishing relationships with companies, trusts and other bodies where there is a substantial funding relationship with the Council.

It is, however, recognised by the Accounts Commission and COSLA that it will be for each Council to address the issues which are dealt with in the Code in light of its own particular circumstances. This procedural guidance has therefore been drafted to reflect the operation of Funding External Bodies and Following the Public Pound by Dundee City Council.

1 Overview of Principles of Best Practice

The Accounts Commission/COSLA Code of Guidance on Funding External Bodies and Following the Public Pound outlined certain key requirements. The five main areas are summarised below:

- i To identify all arrangements where a substantial funding relationship exists. In broad terms this is considered to be the case where Council expenditure is equal to the product of at least £1 on the Council Tax. For the City Council in the 2011/12 financial year this represents funding of £60,000 or greater.

Note: When interpreting "substantial", regard should be taken of the significance of the funding in relation to the Department's budget and its significance in relation to the budget of the external body. The term funding is intended to include all resources which the Council transfers to the body.

- ii To determine the areas to be included in the specification when a financial commitment is entered into.
- iii To determine the monitoring arrangements required for each body where there is a significant funding relationship. In practice the detailed requirements will vary depending on the level of contribution. However, certain basic elements will be common to all.
- iv To report to the appropriate Council Committee on an annual basis covering such areas as financial and performance information.
- v To give proper advice to members and officers involved in external bodies on their responsibilities to the Council and to the body. This will include the periodic review of "Companies, Trusts and other Outside Organisations, Guidance to Elected Members and Officers".

2 **Areas to be considered for inclusion within a formal agreement with an External Body**

A formal agreement should be entered into with each body where there is deemed to be a substantial funding relationship. In drafting this document consideration must be given to various aspects of the arrangement to ensure that all relevant areas are covered. The headings below summarise the key themes which should be included along with examples of the types of areas to be covered.

i **Expectation of the use of funding**

- General statement of aims and goals of the body
- Annual plans of the body
- Targets, including timescales which require to be achieved by the body
- Any specific conditions and/or reporting requirements

ii **Council Representation of Elected Members and Officers**

- Level of representation from the Council ie Elected Members and/or Officers
- Name, designation/status within the body eg A Smith, Director of the Board

iii **Financial regime**

- Extent of financial commitment by the Council
- Nature of financial relationship eg loan, grant, shareholding
- Criteria for making and receiving payments
- Details of any transfer of assets and destination of such assets
- Accounting and reporting procedures to be adopted
- Council policies to be adhered to by the body eg purchasing policy
- Council's exit strategy
- Formal risk assessment where financial contribution is in excess of £100,000
- Formal option appraisal process to determine the optimum type of organisation where the financial contribution is in excess of £100,000
- The Council's criteria and arrangements for terminating the funding agreement with the body
- Procedures to be put in place to alert the Council should any problem arise between formal monitoring stages

iv **Accounting, reporting and audit requirements**

- Minimum standard of management arrangements and accounts required by the Council
- Responsibility and accountability of the Management Committee of the body
- Access to records and accounts of the body by Council representatives
- Access to records and accounts of the body by Council's Internal and External Auditors as defined in the Service Level Agreement
- Arrangements for accessing the External Auditor of the body

v **Financial and performance monitoring requirements**

- Proposed methods of measurement for inclusion in the relevant Service Level Agreement
- Frequency of monitoring reports to the Council on such areas as income, expenditure, profitability, liquidity, cash flow and other financial matters
- Reporting of achievement of targets by the body
- Details of the annual budget and comparison with actual spend
- Methodology of the reporting of future plans of the body
- Notification to the Council of criteria which may trigger a review eg change of lead personnel in the external body.
- Details of the reporting requirements for Council Committees

Note: A Council Officer who is designated to act in a supervisory or monitoring role or assigned a similar capacity should be briefed on their responsibility and of the relevant monitoring procedures.

vi **Expectation in terms of employment and other practices**

- Policy regarding Equal Opportunities
- Recruitment and Selection Policies and Procedures
- Policies regarding Conditions of Employment.

vii **Other practices**

- Any other relevant information, eg insurance arrangements.

viii **Complaints**

- Procedures for the Council to obtain information in respect of complaints made to the body.

viii **Policy Implications**

- Agreement to support the Council's policies on Sustainability, Strategic Environmental Assessment, Anti-Poverty Equality Impact Assessment and Risk Management.

3 Reporting Funding Arrangements to Committee

- i Where a new funding arrangement is entered into, a report may be required to be submitted to the relevant committee for approval. This report should provide a summary of the proposed agreement including details of the reason for the funding, value, accountability and monitoring procedures. Below are summarised the criteria to be applied to decide whether or not the funding arrangement has to be reported to Committee:

Assessment of Arrangement	Reporting Requirements
Falls within the definition of substantial funding arrangement (Refer 1i)	Requires to be reported
Does not fall within the definition of substantial funding arrangement	Report optional. As part of the decision whether or not to report consideration should be given to the possible impact of the funding on the Council
Funding £5,000 or less	No report required

- Notes:
- a If there is uncertainty as to whether or not to report a funding arrangement, advice should be sought from the Head of Corporate Finance.
 - b A copy of the finalised Committee Reports should be forwarded, for information, to Rod McKay, Principal Accountant (Best Value/Performance Review).
 - c A report for funding arrangements entered into prior to the implementation of these procedures is not required. However, all such funding arrangements must continue to be monitored in accordance with the foregoing guidance.

- ii An Annual Report should be prepared and submitted to the appropriate Committee detailing financial and performance information relating to bodies which are being substantially funded by the Council. The timing of such reports will vary depending on each body's financial year end, but should take place after audited accounts are available. In order to minimise the delay in this process every effort should be made to ensure audited accounts are received timeously.
- iii All departments should review the reporting arrangements for ALEO's for both financial and non-financial information. Any changes following this review should be incorporated in future Service Level Agreements.

4 **Corporate Services Department Monitoring Arrangements**

Below are outlined the monitoring arrangements which are to be undertaken by the Corporate Department.

- i A pro-forma detailing the previous years arrangements will be issued as part of the Council's annual budget cycle. The purpose of this exercise is to update the information held to reflect the current arrangements which require to be monitored. Attached in Appendix A is a copy of the pro-forma and guidance notes on the completion of the pro-forma.
- ii If any significant events, which may affect funding arrangements, occur during the financial year, these must be formally notified immediately to Rod McKay, Principal Accountant (Best Value/Performance Review).
- iii As part of the City Council's Annual Audit Plan such arrangements will be included and will be subject to periodic review.

5 **Roles & Responsibilities of Council Elected Members and Officers**

It is essential that proper advice, particularly in relation to legal and insurance requirements, should be given to Elected Members and Council officers who are involved in external bodies regarding their responsibilities to the Council and to the body. Such advice is critical because the legal duties owed by members or officers to the outside bodies they may sit on can obviously give rise to confusion of roles, conflicts of interests and place additional difficult obligations on them.

Detailed below is the guidance which has been prepared by the City Council for such representatives. Clarification of specific queries regarding roles and responsibilities should be sought from the appropriate department.

The insurance cover available to members and officers involved in external bodies via the Council's own insurance cover, reflects the legal position as far as the ability of Councils to provide indemnities to such members and officers. Legal opinion appears agreed that authorities can provide an indemnity to individual members and employees in limited circumstances only. Those circumstances are:

- i Where an individual acts solely on behalf of his or her authority, within the terms of reference laid down by the authority and solely in pursuance of the local authority's statutory powers.
- ii Where an individual acts solely in an advisory capacity in connection with the local authority's functions.
- iii Where the individual occupies an observational role on the board or committee of an outside organisation, representing the local authority's interests (rather than in a decision-making capacity).
- iv Where the individual acts on behalf of a joint committee established by two or more local authorities.

Accordingly, the Council's official indemnity policy covers elected members or officers when they act in a purely advisory capacity in connection with the Council's functions on outside bodies' board/committee meetings.

Where the individual acts in a decision-making/executive capacity or in any respects outside the four categories specified above, no Council cover would be in place and the external organisation would have the responsibility for ensuring appropriate insurance for all of their activities exist. Accordingly, those officers and members who are appointed to outside bodies as Directors, trustees, office bearers, etc should make sure that appropriate insurance cover is in place and should ask to see the policy documents.

This is important because the potential for civil or even criminal liability that flow from sitting on outside bodies as "Council representatives" is great. Should those bodies be companies, limited or otherwise, then the Companies Acts impose legal obligations. Directors also owe fiduciary duties to the company itself, they have a duty to disclose personal interests and a duty to exercise care and skill in their dealings with company matters as a whole and particularly where third parties are involved. Should the company find itself trading while insolvent, then the potential liabilities of directors are very considerable indeed. Representatives on bodies which are not companies such as Trusts or Management Committees of voluntary organisations also have responsibilities which, although not so precise, are nonetheless extensive and could lead to substantial claims being made against them.

For information, the Corporate Services Department's Insurance and Risk Management Section maintain a database of the relevant organisations' insurance details. The position as at May 2012 is detailed in Appendix B. Clearly this is the position at a particular point in time and may be subject to amendment in the future. Further guidance for individual members or officers can be sought from Graeme Mackenzie, Risk and Business Continuity Manager (extension 3301).

FUNDING EXTERNAL BODIES AND FOLLOWING THE PUBLIC POUND

DEPARTMENT:

DEPARTMENTAL CONTACT:

FINANCIAL YEAR:



<i>Body/Project</i>	Council Funding			Legal Constitution	Representatives/ Observers	Monitoring Arrangements			<u>Other Comments</u>
	£	As a % of Total Funding	Type			Audited Accounts		Other	
						Available	Reviewed		

7

GUIDANCE NOTES ON COMPLETION OF PRO-FORMA

Body/Project Name of body/project

Council Funding

£ Monetary amount of Council Funding

As a % of Total Funding Council contribution expressed as a percentage of total funding of body/project

Type Categorisation of funding provided by Council eg Revenue Grant, Capital Grant, in kind support, Loans, Service Agreement

Legal Constitution Classification of legal constitution eg Company Limited by Guarantee, Registered Charity, Statutory Body, Trust

Representatives on Body Name of representative and position/role
eg Councillor Smith, Director
A N Other, Monitoring Officer
A Jones, Lead Officer

Monitoring Arrangements

Audited Accounts Position regarding audited accounts ie whether or not they are made available and reviewed

Other Details of other monitoring arrangements pertaining to the project eg under review, monthly management meetings, monthly statistics, attend board meetings, service level agreement

Other Comments Details of any other specific parts of relevance with regard to the body/project eg partnership with SET and Chamber of Commerce

APPENDIX B

<u>Company Name</u>	<u>PL Indemnity Limit</u>	<u>EL Indemnity Limit</u>	<u>PI Indemnity Limit</u>	<u>CAR Indemnity Limit</u>	<u>Directors & Officers</u>
	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>	<u>£</u>
Dundee Ice Arena	10m	10m			1m
Dundee City Developments	5m				1m
Dundee Repertory Theatre	5m	10m			0.5m
Dundee Contemporary Arts	2m	10m			1m
DERL Ltd	50m				1m
Dundee Citizens Advice	5m	10m	5m		
Visit Scotland	5m	10m	0.25m		0.25m
Dundee Women's Aid	5m	10m			
Dundee Cyrenians	2m	10m	1m		
Leisure and Culture Dundee	30m	30m	5m		2m
Dundee Industrial Heritage Ltd	5m	10m	1m		2m

COMPANIES, TRUSTS AND OTHER
OUTSIDE ORGANISATIONS
GUIDANCE TO ELECTED MEMBERS
AND OFFICERS

Background

It is becoming increasingly common for Elected Members and Officers of Local Authorities to be appointed or nominated by their Council as a member of the governing body of an outside body or organisation, principally as Directors of Companies and Trustees of Trusts.

Dundee City Council must ensure that members and officers are properly advised of their responsibilities to both the Council and the Company or Trust in these circumstances. Advice on this subject was previously given in "Guidance on Funding External Bodies and Following the Public Pound" which was issued by the Director of Finance in 2000. This document expands on that advice, takes account of the new Ethical Standards regime and will be updated and reissued annually.

Elected Members and the Code of Conduct for Councillors

The Code of Conduct for Councillors says:-

"Appointments to Partner Organisations

- 3.17 You may be appointed or nominated by the Council as a member of another body or organisation. If so, you will be bound by the rules of conduct of these organisations and your responsibility for any actions taken by you as a member of such an organisation will be to the organisation in question. You must also continue to observe the rules of this code in carrying out the duties of that body.
- 3.18 If you become a director of a company as a nominee of the Council you will assume personal responsibilities under the Companies Acts. It is possible that a conflict of interest may arise for you as between the company and the Council. In such cases it is your responsibility to take advice on your responsibilities to the Council and to the company. This will include questions of declarations of interest."

Section 4 of the Code of Conduct then requires Councillors to register interests such as holding office in companies and Section 5 of the Code of Conduct gives detailed guidance on the declaration of interests.

The Standards Commission also issued a Guidance Note dated 31 March 2003 in which they indicated that there are circumstances where the Code may prohibit Councillors from participating in discussion and voting on certain matters within the Council Chamber due to certain financial or non financial interests but it may be in the public interest to allow such participation. The Commission therefore issued general dispensations in a Dispensations Note dated 31 March 2003 in respect of Councillors who are members of certain outside bodies, including companies.

The Council issued Guidance for the Elected Members to enable Elected Members to comply with these rules and dispensations and a copy is attached at Appendix 1. If you are an elected member also attached is a note of the outside bodies on which you represent the Council.

Officers and the National Code of Conduct for Local Government Employees in Scotland

The National Code of Conduct for Local Government Employees in Scotland was produced by COSLA. It states that, as far as possible, officers should comply with the Code when they are appointed as a representative of the Council on any organisation, trust or company.

Companies - Directors' Duties

In guidance such as this it is only possible to set down those duties in general terms. If you have any queries about how they apply in a given situation you should seek advice from the Company Secretary.

To whom are the duties owed?

The Companies Act 2006 explicitly retains the common law position that the duties are owed to the company rather than to individual shareholders. A director must act in a way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole.

The Statutory Duties

Seven statutory duties are set out within the Companies Act 2006, these are:-

- **the duty to act within powers.** Directors must observe any limitations on their powers contained in the Companies Act and the Company's Memorandum and Articles of Association.
- **the duty to promote the success of the company.**
- **the duty to exercise independent judgement.**
- **the duty to exercise reasonable care, skill and diligence.** Directors are not liable for errors of judgement and are entitled to rely upon the advice of an independent outsider and on some occasions they may be considered negligent if they proceed to decision without first obtaining expert (for example, legal) advice. Such an outsider must however be qualified to give such advice and, upon receipt of such advice, directors must themselves exercise their own judgement.
- **the duty to avoid conflicts of interest.** Directors must not put themselves in a position where there is a conflict (actual or potential) between their personal interests and their duties to the company and between their duty to the company and the duty owed to another person. There are specific rules regarding contracts with a company, declarations of interest, loans and other similar transactions, payment of compensation for loss of office and property transactions.
- **the duty not to accept benefits from third parties.** Directors must not make secret profits for themselves from the use of the company's assets, information and opportunities.
- **the duty to declare an interest in a proposed transaction or arrangement with the company.** There are various legal remedies available to the company and its shareholders (if there are any) if Directors are in breach of their duties, including actions for damages for loss suffered by the company, and there are statutory penalties for breach of some duties.

Duties owed to Outsiders

1. Generally Directors are not personally liable for contracts they make on behalf of the company unless they expressly accept personal liability.
2. Directors who are in default are made personally liable to outsiders in certain situations by statute, for example in the winding up of the company where there has been wrongful trading or where a person acts as a Director in breach of a disqualification order.
3. Where the company is negligent and an outsider suffers harm or loss the Director may be liable if he authorised, directed or procured the negligent act. When the Director's acts have caused the company to be liable the person suffering harm or loss may be able to sue the Director personally.
4. Directors may be punished for contempt of court committed by the company.
5. Directors may be punished in the criminal courts for non-payment of social security contributions payable by the company and those deducted from an employee's pay.
6. Directors may be personally liable to pay a penalty imposed for fraudulent concealment of the company's liability to pay VAT.

Alternate Directors

A company's Articles of Association may allow a Director to appoint an "Alternate Director" to act in his or her place. The circumstances in which Alternate Directors may be appointed and the precise duties which may be delegated to them may be governed by the Articles of Association. In performing his or her functions as such the Alternate Director is required to fulfil the same responsibilities and the same duties as the Director appointing him or her.

Shadow Directors

The term "Shadow Directors" is used in some statutes to regulate the responsibility of Directors. In the Companies Act 2006 a Shadow Director is defined as a person in accordance with whose directions or instructions the Directors of the company are accustomed to act. The Companies Act 2006 provides that some duties of Directors are also binding on those who are merely Shadow Directors, the hidden controllers of a company.

Council Directors appointed Ex-Officio

As stated above, Directors are under a duty to act in the best interests of the company and promote the interests of the company, including the company's members and employees. Where a course of action is in the best interests of the company and the Council the Director can clearly support it. However where a course of action is in the best interests of the company but is not in the interests of the Council the Directors must still support it on behalf of the company.

Offences

The normal law applies to actings of Directors but there are a number of specialities when you are dealing with the Director of a company.

- **Insider Dealing** - it is an offence to use inside information for profit. Directors are deemed to observe the confidentiality of company matters and not to use inside information either for their own or for a third party's benefit.
- **Making a False, Misleading or Deceptive Statement** - Directors should ensure that all information which is published by the company to which they are party is not misleading, false or deceptive for the purpose of inducing another person to declare or dispose of any investment or refrain from so doing.
- **Fraud** - Directors should not make any false representations to or on behalf of the Company nor fail to disclose matters where there is a legal duty to disclose them.
- **Fraudulent Trading or Wrongful Trading** - the Companies Act 2006 imposes criminal liability for fraudulent trading. A Director can be fined or imprisoned where a Director is knowingly party to the carrying on of the business of the company with intent to defraud creditors of the company or creditors of any other person for any fraudulent purpose. There is however a defence to this that the Director took every step with a view to minimising the potential loss of the company's creditors.
- **The Corporate Manslaughter and Corporate Homicide Act 2007** - Where there has been a gross breach of a duty of care which has led to the death of a person then the organisation, in this case the company, could be charged with corporate homicide in Scotland. Although Directors themselves would not be charged with this offence the gross breach of duty which led to the conviction could be the acting of any one in senior management which would include a Director. Were a company to be found guilty of corporate homicide and to be fined as a result of a Director's actions then the company may wish to recover the money from the errant Director.

- **The Bribery Act 2010** - This is designed to combat bribery and corruption in the public and private sector and will mean that any incorporated organisation could be liable to severe penalties if they fail to implement adequate procedures to prevent bribes being paid on their behalf. The main purpose of the Bribery Act 2010 is to make it a criminal offence for an individual or commercial organisation to offer or accept a bribe to bring about new business or reward the improper performance of a function or activity. The Act covers four bribery offences:

- Bribery – the offering, promising or giving of an advantage.
- Being bribed – requesting, agreeing to receive or accepting an advantage.
- Bribing a foreign public official.
- A “corporate offence”, where a commercial organisation fails to prevent persons performing services on its behalf from committing bribery.

The corporate offence will apply to incorporated companies and partnerships that carry on a business in the UK.

Trusts

The duties of a trustee differ from those of a director. Again in Guidance such as this it is only possible to set out these duties in general terms. If you have any queries about how they apply in a given situation you should therefore seek advice from the Trust's Solicitors.

A trustee's duties include the following:-

- 1 To meet together to administer the Trust.
- 2 To take reasonable steps to ascertain the Trust estate and the purposes of the Trust.
- 3 To use the Trust property for the benefit of the beneficiaries. In practice this means that where a course of action is in the best interests of the Trust beneficiaries and the Council the Trustee can support it. Where a course of action is in the best interests of the Trust beneficiaries but is not in the best interests of the Council the Trustee must still support it.
- 4 To keep the Trust estate under their control. Trust monies and assets must be held separate from personal assets.
- 5 To keep accounts of the Trust estate to show the Trust income and to whom any payments have been made.
- 6 To balance the interests of all classes of beneficiaries.
- 7 To be responsible for the tax affairs of the Trust.
- 8 To avoid conflicts of interest.

Insurance

When Elected Members and/or Officers are appointed to External Bodies they must satisfy themselves that the External Body has effected insurance which will cover their involvement with the External Body. This is not something the Council is permitted to organise on behalf of individuals although the Council's Risk and Business Continuity Manager will be happy to assist Elected Members and Officers with any general queries they may have.

The Council

Where a matter is to be considered by the Council and that matter could be seen as linked to the interests of a body to which an Elected Member has been nominated or appointed by the Council the Elected Member must consider his position carefully. The Chief Executive and Head of Democratic and Legal Services will be happy to advise if that is felt appropriate or necessary.

Where an Officer feels that there is a conflict between his duty to the outside organisation and his duty to the Council he should ensure that he does not advise the Council, Elected Members or other officers on the matter in question but should arrange for another officer in his Department to provide the necessary advice. He should not discuss the matter with that other officer nor seek to influence that other officer's advice so that the advice given is and is seen to be independent and solely in the Council's interests.

Conclusion

It is extremely important that Elected Members and Officers are clear about their responsibilities to both the Council and Outside Organisations to which they have been nominated or appointed by the Council. Following this Guidance will help with that. If, however, any queries arise they should be taken up immediately with the Outside Organisation's legal advisers and/or the Chief Executive and Head of Democratic and Legal Services as appropriate.