

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held in the Townhouse, Aberdeen City Council on 11 February 2015, and 15 - 16 April 2015

Panel Members: Mr Ian Gordon, OBE, QPM, Chair of the Hearing Panel
Mr Matt Smith, OBE
Mrs Lindsey Gallanders

The Hearing arose in respect of a Report by Mr Bill Thomson, the Commissioner for Ethical Standards in Public Life in Scotland (“the CESPLS”) further to complaint numbers LA/AC/1520, 1521, 1523, 1524, 1529, 1532-35, 1537-1609, 1611 and 1613 (“the Complaint”) concerning an alleged contravention of the Councillors’ Code of Conduct (“the Code”) by Councillors Barney Crockett, Neil Cooney, Fraser Forsyth, Ross Grant, Jenny Laing, Ross Thomson and Willie Young of Aberdeen City Council.

The CESPLS, Mr Bill Thomson, was represented by Mr Alan Cowan of Simpson & Marwick Solicitors and was also accompanied by Mr David Sillars, the Senior Investigating Officer in the case. The Respondents attended the Hearing and Ms Frances Randle of Steel & Shamash Solicitors, represented Councillors Crockett, Cooney, Grant, Laing and Young. Councillors Thomson and Forsyth represented themselves.

The Complaint

A number of complaints (84 in total) were submitted to the CESPLS, the substance of which were that following a decision of the Urgent Business Committee (UBC) on 11 March 2014 a letter, signed by the then Leader of the Council – Councillor Crockett, providing broad budgetary information and setting out a number of policy initiatives against which proposed expenditure had been set, was enclosed with the Council Tax bills issued by the Council. The letter contained the following statement:

“The Council’s position is clear, as we agreed at our meeting in December last year we recognise that Aberdeen is stronger now and will be stronger in the future – economically, politically, and socially – as a partner within the United Kingdom.”

The complainants alleged that the generation and distribution of this letter contravened the key principles of Duty and Leadership set out in section 2, and paragraph 3.16 of the Code (‘Use of Council Facilities’).

The CESPLS, however, found the Respondents had not breached the key principles of Duty and Leadership as those principles, as stated within the Code, are for guidance purposes only, therefore a contravention would not in itself constitute evidence of a breach of the Code.

At the conclusion of the investigation into the complaints, the CESPLS reported to the Standards Commission for Scotland ('the Standards Commission') that he had determined the matter complained about was a contravention of paragraph 3.16 of the Code and referred the matter to the Standards Commission for consideration and decision.

The relevant provision of the Code is:

Paragraph 3.16 of the Code states:

'Use of Council Facilities

3.16 The Council will normally provide facilities to assist councillors in carrying out their duties as councillors or as holders of a particular office within the Council. This may involve access to secretarial assistance, stationery and equipment such as telephones, fax machines and computers. Such facilities must only be used in carrying out Council duties in accordance with your relevant Council's information technology, communications and member support policies or for incidental personal use as authorised by your Council and not related in any way to party political or campaigning activities. Where the Council recognises party political groups, assistance to such groups is appropriate in relation to Council matters but must not extend to political parties more generally and you should be aware of and ensure the Council complies with the statutory rules governing local authority publicity.

Joint Statement of Facts

The CESPLS and the Respondents provided a Joint Statement of Facts signed on 6 February 2015 by the Respondents' Representative and on 9 February 2015 by the CESPLS.

Decision

The Hearing Panel considered all of the evidence, including submissions given in writing and orally at the Hearing and, having applied the civil standard of proof, 'on the balance of probabilities', the Panel found as follows:

1. The Councillors' Code of Conduct applied to the Respondents.
2. The Panel determined that based on all of the evidence before it, the Respondents had not breached section 3.16 of the Code.

The reasons for the Hearing Panel's decision include:

1. The submission by the parties of an agreed Joint Statement of Facts.

2. The complaints related only to the content of paragraph one of the letter signed by Councillor Crockett. The decision for the Panel was therefore confined to whether or not the inclusion of this paragraph breached the Code.
3. The Panel heard evidence there had been some discussion about the letter, by the Chief Executive Officer (CEO) and the Head of Service (HofS) of the Chief Executive Officer's Department, with Councillors Crockett and Young prior to its publication. The CEO said she had requested legal advice from the Head of Legal and Democratic Services (the Monitoring Officer - MO). This discussion with the CEO had been at two routine weekly meetings on 24 February and 3 March 2014; there had not been a specific meeting called by the CEO to discuss this particular issue. The Panel also heard that the CEO and the MO had not met to discuss the legal aspects of the letter; communication between the two appeared to have been through the HofS.
4. To assist their decision making, the Panel considered a timeline where events occurred on the following dates in the following order:
 - 14 August 2012: "Smarter City" programme approved by Aberdeen City Council
 - 18 December 2013: Aberdeen City Council approved a motion which included a statement that the Council:
"Notes Scotland's future will be determined by a public referendum on 18 September 2014.
Notes the Smarter Aberdeen vision adopted by Council, which recognises that Aberdeen is stronger now and will grow even stronger in the future – economically, politically, and socially – as a partner within the United Kingdom."
 - Around 24 February 2014 - Councillor Young drafted the letter
 - 24 February 2014: draft letter given to HofS who forwarded a copy to the MO for legal advice
 - 24 February 2014: CEO, HofS, Councillors Crockett and Young attended a weekly meeting where the letter was discussed
 - 3 March 2014: CEO, HofS, Councillors Crockett and Young attended a weekly meeting where the letter was discussed
 - 3 March 2014: the letter was printed by the Council
 - 6 March 2014: Councillor Young released the letter to the local media
 - 10 March 2014: Director of Corporate Governance (DCG) acting in absence of CEO, Councillors Crockett and Young attended a weekly meeting
 - 10 March 2014: at around 5pm Councillor Crockett received the MO's written legal advice
 - 10 March 2014: evening meeting of the Labour Group
 - 11 March 2014: Councillor Young received independent legal advice
 - 11 March 2014: pre-meeting of the seven respondents attending the Urgent Business Committee (UBC) meeting
 - 11 March 2014: UBC meeting, heard a motion on the letter
 - 18 September 2014: Referendum held

5. The MO gave evidence that she discussed with the matter by telephone/email with the HofS and did not speak directly to the CEO. She believed the CEO was being copied in to the communications. The request for legal advice came from the HofS but the MO did not compile written legal advice until 10 March 2014. The CEO said she believed that she had received a copy of that advice. The Panel did not hear evidence from the HofS. On a matter of such importance for the Council's reputation and acknowledging the CEO's statement that there were other important events taking place at that time, the Panel found it surprising there had been no direct communication between the CEO and her Legal Adviser, the MO.
6. The MO had concerns about the wording of paragraph one of the letter stemming from Section 2 of the Local Government Act 1986, which deals with the prohibition of political publicity. The legal advice set out the risks attached to the publication of the letter and stated:

"this could be viewed as breaching the statutory provision".

The MO said that her:

"position (on the matter) is re-enforced by the Standards Commission for Scotland's Councillors' Code of Conduct".

On her view of possible risk of legal challenge/action following the publication of the letter, the Panel heard that the MO thought a referral to the Standards Commission (via the CESPLS):

"is far more likely to occur".

The MO cited an earlier case, in Falkirk, where a breach of Section 3.16 of the Code had been determined. The Panel, however, accepted the view of the Respondents that the facts of the Falkirk case were completely different so it was not relevant to this matter.
7. The Panel heard from Councillor Young that in one of the meetings with senior council officers, the HofS had proposed the following be added to the letter:

"as we agreed at our meeting in December last year".

This was in order to demonstrate that the statement in the letter reflected Council policy passed on 18 December 2013. The Panel noted this evidence had not been confirmed by other witnesses but had also not been challenged.
8. In evidence, the CEO said she had made her concerns about the wording of the letter clear to Councillors Crockett and Young. She had not sought a specific meeting to address the issue of the letter as she had done so in her weekly meetings with them. By the conclusion of her second and last meeting with Councillors Crockett and Young, the CEO had only received verbal legal advice; she had not seen the MO's written legal advice on the letter. The CEO acknowledged that she could have raised her concerns earlier than she did. The CEO was out of Scotland for a number of days after 3 March 2014. She accepted that during this time she had a telephone conversation with Councillor Crockett but could not recall if the letter was mentioned or not. Councillors Crockett and Young disputed

the evidence of the CEO and claimed the issue was not initially raised in the manner suggested by the CEO. It was only when the letter later came into the public domain that she expressed her concern about the impact the letter may have. Councillor Crockett stated that during his telephone conversation with the CEO, she did not mention the letter. The Panel preferred the account given by Councillors Crockett and Young to that of the CEO. The Panel would have expected the CEO to have sought to have received the MO's written advice at an earlier date and to have raised the issue with Councillor Crockett during their telephone call if her concerns had not been addressed.

9. The existence of the letter came into the public domain in the week beginning 4 March 2014. Councillor McCaig, Leader of the Scottish National Party (SNP) Group in the Council, put a motion forward to the effect that the letter drafted by Councillor Young should not be promulgated. This motion was put on the agenda of the Urgent Business Committee (UBC) scheduled for 11 March 2014. The seven respondents represented the Council's Administration on the UBC. There were six other members of the UBC.
10. The Panel had concerns about the advice given by officers to Councillors Crockett and Young and, in particular, the timing of the written legal advice. The issue first came to light on 24 February yet written legal advice was only delivered to Councillor Crockett (Chair of the UBC) on 10 March 2014, the evening before the Committee was to meet. Consequently little time was available for all UBC members to consider that advice. At a meeting of the Labour Group that evening, Councillor Crockett shared the advice with Councillor Young who then gave a verbal summary to the Group. Councillor Young thought the advice flawed; he gave evidence that the legal advice referred to the first draft of the letter, which did not include the amendment:
"as we agreed at our meeting in December last year".
He offered, and it was agreed by the Group, to seek independent legal advice. This was not obtained until the morning of the UBC, when it was given to a pre-meeting of the seven respondents.
11. Councillor Young received separate and verbal legal advice from two independent firms of solicitors. He stated this advice was contradictory to the legal advice from the MO in that it did not consider that publication of the letter would be a breach of the Code. Councillor Young gave a verbal account of the legal advice to the pre-meeting of the UBC. Whilst the Panel accepted that independent legal advice was obtained by Councillor Young and verbally summarised to his colleagues, that independent legal advice was not produced in evidence so there was no opportunity for the Panel to assess its content.
12. The Panel heard that in order to keep to the timetable for the issuing of the Council Tax letters, council officers agreed to the letter being printed. This was done by 3 March 2014, before the Respondents had seen any written legal advice.

The CEO said the decision was taken to proceed with the printing of the letter before the legal advice was produced for reasons of “efficiency”.

13. The CEO and the MO had expressed their concern over the letter but there was no evidence of any consideration, by the CEO or the MO, of the option to take legal action at an early stage to stop publication of the letter. This option was available under Section 5 of the Local Government Act 1986 to protect the Council had either officer thought the Respondents were acting illegally.
14. The Panel heard evidence from five of the Respondents (Councillors Crockett, Cooney, Grant, Laing and Young), where all indicated that they considered the legal advice provided by the MO was not conclusive and they did not see it as prescriptive and preventing them publishing the letter. The other two Respondents (Councillors Thomson and Forsyth) did not give evidence but submitted that they agreed with what their colleagues said concerning the legal advice.
15. At the UBC, six members of the Committee, Councillors McCaig, Dickson, Noble, Kiddie, Dunbar and Yuill, left the meeting in protest that the legal advice was to be given in private. The Panel heard that it was the general practice in Aberdeen City Council for legal advice to be given in private. This action caused some confusion as to procedure but the council officers present advised the Councillors who remained that the meeting should continue in line with Standing Orders as it still had to determine the motion raised by Councillor McCaig, despite the fact that he was no longer present. The written legal advice was given to the remaining members who then had the opportunity to read and so consider that advice. The Panel heard no evidence from those members of the UBC who had left the UBC, therefore it was unaware if in fact they had had sight of the legal advice before taking their action. However, the Panel heard evidence that the MO did not give any verbal clarification of the advice nor did the Respondents request any. Consequently there was no challenge to the decision to proceed with the letter from officers of the Council or those Members who had left the UBC.
16. The Panel carefully considered the role undertaken by each of the Respondents both individually and as a Committee of the Council. They had not received the legal advice timeously. Those Respondents in the Labour Group were given a verbal summary of that advice during their Group meeting on 10 March; they agreed to seek independent legal advice. The two Respondents who were not members of the Labour Group received verbal summaries of both the MO’s advice and the independent legal advice at the pre-meeting of the UBC. The Panel considered this late submission of advice was not in accord with the level of concern expressed by officers about the letter.
17. The Panel further noted that the Respondents had acted in accordance with Section 1.6 of the Guidance to the Code, which states:

“No written information can provide for all circumstances and if you are uncertain about how the rules apply, you should seek advice from senior Council employees. You may also choose to consult your own legal advisers, and on detailed financial and commercial matters, to seek advice from other relevant professionals”.

The Panel was satisfied that the Respondents were aware of their personal responsibility to comply with the Code. It was satisfied they were acting in their capacity as councillors in a properly constituted council committee. The use of officers’ time and council resources was legitimate and in furtherance of council business. There was no additional expenditure to that required for the normal circulation of the annual letter with the Council Tax bills.

18. The Panel agreed with the conclusion of the CESPL that:

“The events complained of do not in themselves constitute a ‘campaign’”.

The Referendum could not be defined in terms of a traditional party political matter. While there were two sides to the debate, both represented a mixture of political parties and many who had no political allegiance. Indeed, within political parties there were differences of opinion.

19. Complaints about the letter had also been made to Audit Scotland. It observed that the paragraph in the letter was an accurate statement of Council Policy but noted the letter only referred to one out of eleven ‘vision statements’. Audit Scotland expressed no dissatisfaction with the publication of the letter.

20. The Panel considered in some detail the application of the Code in these circumstances:

- It accepted that paragraph one of the letter was a restatement of existing Council policy as agreed in December 2013.
- It accepted that the letter had been amended to reflect that policy on the advice of the HofS.
- It considered the definitions set out in Section 2 of the Local Government Act 1986, as amended, and in particular section 2(2)(a). The Panel concluded that the paragraph in the letter did not refer:
“To a political party or to persons identified with a political party or promotes or opposes a point of view on a question of political controversy which is identified as the view of one political party and not another”.
- If the paragraph was to be taken to refer to the Referendum Campaign, this was multi party as opposed to one party and not directly “party political” in the sense of the Act. The Panel did not find the paragraph to be “party political” as defined. In any event, at the time of publication, the referendum was some 6 months away.
- The paragraph did not set out any support for any campaign, nor did it call for support for any campaign nor did it identify any follow up action to be taken. The Panel heard no evidence that the publication of the letter led to any later activity in this area. This paragraph was a statement of published fact from an earlier decision of the Council.

21. The Panel concluded that the actions of the Respondents did not constitute a breach by having regard to the provisions of Section 3.16 of the Code and Section 2 of the Local Government Act 1986, as amended, which defines party political or campaigning activities. Section 2 is embedded in the Guidance to the Code and therefore states how the term “party political or campaigning activities” in Section 3.16 of the Code should be interpreted. The Panel was satisfied that the letter could not be regarded as being designed to affect public support for a political party.
22. The Act gives guidance on whether such material falls to be prohibited by having regard to the style of the material and the timing and circumstances of its publication. In this case, there was a history in the Council of the annual publication of such a letter, in that style, to accompany Council Tax payment notices.

For these reasons the Hearing Panel decided that the Respondents had not breached Paragraph 3.16 of the Councillors’ Code of Conduct.

Date: 6 May 2015



Ian A Gordon, OBE QPM
Chair of the Hearing Panel