

**Decision of the Hearing Panel of the Standards Commission for
Scotland following the Hearing held in the Maitlandfield House
Hotel, Haddington on 14 & 15 January 2015**

Panel Members: Mrs Julie Ward, 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 number LA/EL/1494 ("the Complaint") concerning an alleged contravention of the Councillors' Code of Conduct ("the Code") by Councillor Fraser McAllister ("the Respondent") of East Lothian Council.

Mr Thomson, the CESPLS, was accompanied by Mr Iain McLeod, the Investigating Officer. The Respondent attended the Hearing and was unrepresented.

The Complaint

The Complainant was Councillor Andrew Forrest of East Lothian Council. The substance of the allegation was that the Respondent had contravened the Councillors' Code of Conduct in particular paragraph 5.7 of the Code which deals with declaration of non-financial interests.

The Complainant alleged that at a meeting of the Musselburgh Common Good Fund Committee a grant application, submitted by the Hollies Day Centre in Musselburgh, was considered. The complaint refers to a meeting on 9 February 2013 but it is clear from the minutes submitted with the complaint that the date in the complaint should have stated 9 August 2013. At a previous meeting of the Musselburgh Common Good Fund Committee on 26 March 2013, during consideration of an item relating to a grant application by the Hollies Day Centre, the Respondent had declared an interest as a member of the Hollies Day Centre Management Committee. At the meeting on 9 August 2013 the Respondent participated in the discussion and voted to approve a grant application for the Hollies Day Centre without making any declaration of interest. This was despite being asked three times by another councillor attending the meeting if he was going to declare an interest in the matter relating to the Hollies Day Centre whilst also being informed by another councillor at the same meeting that his entitlement to participate in the discussion, and voting on this item had been checked out and agreed. This resulted in the application for the grant being approved by 3 votes to 2.

The CESPLS investigated the complaint and concluded the Respondent failed to comply with requirements of the Councillors' Code of Conduct and had breached paragraph 5.7 of the Code.

The relevant provision is:

Your Non-Financial Interests

5.7 You must declare, if it is known to you, any NON-FINANCIAL INTEREST if:-

- (i) that interest has been registered under category eight (Non-Financial Interests) of Section 4 of the Code; or
- (ii) that interest would fall within the terms of the objective test.

There is no need to declare:-

- (i) an interest where a general exclusion applies, but an interest where a specific exclusion applies must be declared; or

- (ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

You must withdraw from the meeting room until discussion of and voting on the relevant item where you have a declarable interest is concluded other than in the following circumstances.

There is no need to withdraw in the case of:-

- (i) an interest covered by a general exclusion or a specific exclusion; or
- (ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

The CESPLS submitted a Report to the Standards Commission on 20 October 2014 in accordance with section 14.2 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended.

Joint Statement of Facts

The CESPLS and the Respondent provided a Joint Statement of Facts signed on 18 December 2014 by the Respondent and on 23 December 2014 by the CESPLS, in respect of facts that were agreed and facts that were in dispute. The Respondent, however, signed this document 'without prejudice'.

Part 1 of the CESPLS Report was agreed.

Part 2 of the CESPLS Report was agreed, subject to the following comment by the Respondent which is noted but not agreed by the CESPLS.

"2.2 there is no mention in the legal opinion of Corporate Legal Advisor, Morag Ferguson (sought and got) where she states (10 April 2013) that "I wouldn't think your interest in the Hollies was of a sufficiently significant nature to merit a declaration". This is a definitive, unambiguous statement and central to the accusation, as such it should have appeared at this point, in full, referenced and in quotations; it is quite remiss to exclude it."

Part 3 of the CESPLS Report was agreed.

Part 4 of the CESPLS Report was agreed subject to the following comment by the Respondent which is noted but not agreed by the CESPLS.

"4.6 This report is erroneous in stating I did not take part in the discussion at the first meeting held in March 2013 however it is correct to report that I did not vote. The report is also erroneous in reporting a decision to award a further £5,000 was to be regarded as fresh application, although this (sic) moderated by 4.8. Essentially, the second £5,000 was agreed in principle on two conditions. Firstly, that a part funding application to the Bank of Scotland was successful and secondly, that a set of audited annual accounts was to be received and approved."

Appendices A – G in the CESPLS Report contains true copies of the documents which they purport to be; which copies may be treated as equivalent to the oral evidence of their authors.

Evidence presented at the Hearing

CESPLS

1. The CESPLS outlined the facts and presented his case as set out in his Report to the effect that at meetings of the Musselburgh Common Good Fund Committee when an

application for grant funding was being considered for the Hollies Day Centre Councillor McAllister:

- a) on 23 March 2013 declared a non-financial interest and remained in the room; and
 - b) on 9 August 2013 failed to declare a non-financial interest, remained in the room and participated in the voting on a grant which resulted in a decision being made to award the grant. The CESPLS indicated that the Respondent now accepted that he did not declare an interest.
2. The CESPLS informed the Panel that the Respondent had registered his non-financial interest in the Hollies Day Centre in his Register of Interests.
 3. The CESPLS also led evidence to demonstrate that the Musselburgh Common Good Fund operated under a properly constituted Scheme of Administration established in 2007 by the local authority and updated in 2012. He further indicated that regardless of this, paragraph 5.4 of the Code states that 'Much of the content of the rules set out in this section of the Code refers to Council or Committee meetings. The principles relating to declaration of interests are not confined to such meetings'.
 4. The CESPLS made his case that the Respondent's interest in the Hollies Day Centre was not remote or without significance in relation to the objective test stated at paragraph 5.3 of the Code. The CESPLS determined that the interest was significant, the grant was sizeable and the Respondent had threatened to go to the press if it was not awarded.
 5. The CESPLS led one witness, Ms Morag Ferguson, Corporate Legal Services Manager, Legal Procurement, and Deputy Monitoring Officer of East Lothian Council. Ms Ferguson confirmed that the Musselburgh Common Good Fund was formally constituted. She also stated that the Respondent had undergone training on the Code on two occasions. During an email exchange between the witness and the Respondent between 5 and 10 April 2013 the Respondent had asked for guidance in relation to declaration of interests. This was as a result of an email sent from the witness to all councillors regarding a report going to a Cabinet Meeting on 9 April 2013. The witness gave evidence that the advice she provided in relation to the Cabinet Meeting was specifically in relation to only that meeting and did not apply to any other meeting. The Respondent did not have a voting right at the Cabinet Meeting. Ms Ferguson also indicated that regardless of advice given it was always the responsibility of the councillor to decide on the appropriate action.

The CESPLS asked the Hearing Panel to adopt the findings and conclusions contained in the Report.

The Respondent

1. The Respondent outlined the facts and presented his case. His opening statement outlined several points in relation to meetings of the Musselburgh Common Good Fund Committee:-
 - he acted in compliance with the 9 principles of the Code.
 - he sought and got advice although took full responsibility for his own actions.
 - he admitted that he had made an error thinking the Hollies Day Centre was part of a specific exemption.
 - he no longer believed that he had in fact declared an interest at the meeting on 9 August 2013.
 - he did not believe he had breached the Code and considered that where there was a convergence of committees there should be no need to declare an interest as no conflict exists.
 - he felt that when making a declaration it was not always necessarily a conflict and the key word in the objective test was 'significant'.
 - he advised that another Councillor on the Musselburgh Common Good Fund Committee behaved as he did i.e. stayed in the room and voted.
 - he indicated that the Musselburgh Common Good Fund Committee was not fully adopted by the Council's Standing Orders until 2013.
 - he felt the 9 August 2013 meeting was a continuation of the 23 March 2013 meeting in relation to the Hollies Day Centre grant application and although Councillor Caldwell asked him to declare an interest on 3 occasions he did not wish to take this particular advice based on past experience.

- his Group Leader had advised him that he did not need to declare an interest and he valued his knowledge.
- he advised that there was no Chair or Deputy Chair at the 9 August 2013 meeting.
2. The Respondent led eight witnesses, namely, Mrs Shannon (Hollies Day Centre), Mrs Proudfoot (Hollies Day Centre), Councillor Williamson, Councillor Currie, Mrs MacIver (East Lothian Council), Mrs McAlpine (previously Hollies Day Centre), Councillor Forrest and Councillor McNeill.
 3. Mrs Shannon outlined the services provided to the community by the Hollies Day Centre, some of the funding arrangements and the necessity of the funding for the improvement required to the toilets within the facility.
 4. Mrs Proudfoot outlined the services provided to the community by the Hollies Day Centre, the significant fund raising activity that she had successfully led and the necessity of the funding for the improvement required to the toilets within the facility.
 5. Councillor Williamson indicated that over time there had been different practices adopted by councillors in relation to the processes applied when declaring interests at meetings. He gave evidence in relation to the changes over time to the Scheme of Administration for the Musselburgh Common Good Fund. He was unable to recall if the Respondent had ever declared an interest and stayed in the meeting but did recall that the Respondent had declared an interest at the meeting on 23 March 2013. He said he felt that advice on declaration of interests had changed and that on occasions in the past councillors had declared an interest and stayed in the meeting.
 6. Councillor Currie indicated that there had been changes to the Scheme of Administration over time for the Musselburgh Common Good Fund Committee. He outlined his view that transparency was important and that the Musselburgh Common Good Fund Committee was dealing with everything in private which was something 'out of the ark'. He said that at almost every meeting there were numerous declarations and it was rare for anyone to leave the room. Since 2012, however, the advice was clear that if the interest was significant you had to declare and go. He claimed to have spoken to the Deputy Monitoring Officer and her opinion was that the interest of Councillor McAllister in the Hollies Day Centre was not significant. He disputed that this advice was specifically in relation to the Council's Cabinet Meeting on 9 April 2013. He agreed that section 5.4 of the Code stated that declaration of interests were not confined to Council or Committee meetings and applied to other formal or informal meetings. Furthermore, Councillor Currie expressed his opinion that a decision needed to be made, given the long time it had taken this application to be determined.
 7. Mrs MacIver, a Senior Accountant with the Council, indicated that her role in the Musselburgh Common Good Fund Committee was as an accountant and not that of a clerk. She gave evidence that in a 10 year period she could recall 3 grant applications being considered for the Hollies Day Centre. She confirmed that the time taken to consider the last application had been unusually protracted and that the applicant had written to the Chief Executive of the Council.
 8. Mrs McAlpine gave evidence that she had resigned from the board of the Hollies Day Centre on 31 December 2013. She said that she had provided minutes of the Hollies Day Centre Management Committee to Councillor Caldwell after he had asked her for them.
 9. Councillor Forrest gave evidence that in the past he had declared an interest but stayed in the room. He said that Councillor Knox was the only councillor who had regularly left the room after making a declaration. He confirmed that since January 2014 he had always left the room after making a declaration.
 10. Councillor McNeill's memory of declaration of interests was 'if in doubt don't do anything that would damage you'. He outlined changes over time to the Scheme of Administration of the Musselburgh Common Good Fund Committee.

Decision

The Hearing Panel considered all of the evidence, the submissions given in writing and orally at the Hearing and found as follows:

1. The Councillors' Code of Conduct applied to the Respondent
2. The Panel determined that based on the balance of probabilities, the Respondent had breached section 5.7 of the Code.

The reasons for the Hearing Panel's decision include:

1. Councillor McAllister had registered his non-financial interest as a member of the Hollies Day Centre Management Committee in his Register of Interests. At meetings of the Musselburgh Common Good Fund Committee when an application for grant funding was being considered for the Hollies Day Centre Councillor McAllister had:
 - a. on 23 March 2013 declared a non-financial interest and remained in the meeting; and
 - b. on 9 August 2013 failed to declare a non-financial interest, remained in the meeting and participated in the voting on the grant application. This resulted in a decision being made to award the grant.
2. As a Member of the of the Hollies Day Centre Management Committee, the Hearing Panel concluded that his actions failed to comply with the objective test which provides:

'You may feel able to state truthfully that an interest would not influence your role as a councillor in discussion or decision making. You must, however, always comply with the objective test ("the objective test") which is whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a councillor'

For these reasons the Hearing Panel concluded that the Respondent had breached Paragraph 5.7, of the Councillors' Code of Conduct.

The Panel heard a statement in mitigation from Councillor McAllister before adjourning to consider sanction.

Sanction

The decision of the Hearing Panel was to censure Councillor McAllister.

This sanction was made under the terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(a).

Reasons for Sanction

In reaching their decision, the Hearing Panel took the following considerations into account:

1. Councillor McAllister had breached the Councillors' Code of Conduct
2. In mitigation the Panel took into account that the Respondent had sought advice and the breach may not have been intentional. The Panel were not, however, persuaded by the argument that the advice given by the Deputy Monitoring Officer in relation to the Cabinet meeting on 9 April 2013 was generic advice and that advice was, in their view, specifically in relation to that particular meeting of the Cabinet.
3. When the breach of the Councillors' Code of Conduct occurred, Councillor McAllister was a relatively new councillor. He had, however, attended two training sessions on the Councillors' Code of Conduct.
4. The Panel considered that there was confusion in relation to some advice given by East Lothian Council in particular in relation to paragraphs 5.8 and 5.9 of the Code. From the evidence given it was clear that there was an inconsistency in the practices being applied by individual councillors when declaring an interest, however, this may have been addressed with the passage of time. The Chair of the Hearing Panel stressed, however, that it was the personal responsibility of every councillor to comply with the Code.

5. The Panel considered that the Musselburgh Common Good Fund operated under a proper Scheme of Administration and, even if that had not been the case, it considered the principles relating to declaration of interests as stated in paragraph 5.4 of the Code are not confined to Council or Committee meetings.
6. On the matter of whether or not the grant application submitted by the Hollies Day Centre and considered at Musselburgh Common Good Fund Committee meeting on the 9 August 2013, was a continuation from an application discussed on 26 March 2013, the Panel determined that this was irrelevant in relation to whether or not a breach of the Code had occurred.
7. The Panel recognised Councillors McAllister's commitment to public life in general and his support for the work of the Hollies Day Centre.
8. Councillor McAllister had fully co-operated during the hearing process.

Standards Commission for Scotland Post Hearing Recommendation

The Hearing Panel recommend that East Lothian Council review the support provided to councillors in understanding the requirements of the Code and in particular the council advice in relation to paragraphs 5.8 (service on other bodies) and 5.9 (private and personal interests)

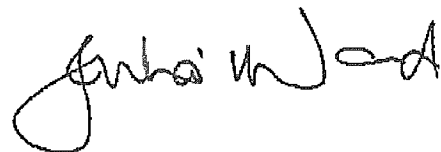
The Council should also review the actions of councillors in particular in relation to declaration of interests to ensure that the actions are in compliance with the Code.

Councillor McAllister should undertake further training in the Code.

Right of Appeal

The attention of the Respondent was drawn to section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended, which detailed the right of appeal in respect of this Decision.

Date: 21 January 2015



Mrs Julie Ward
Chair of the Hearing Panel