

**Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Lothian Valuation Joint Board, 17a South Gyle Crescent, Edinburgh on 17 and 19 May and at Mezzo Suite, Usher Hall, Lothian Road, Edinburgh on 8 June 2017.**

**Panel Members:** Mr Kevin Dunion, OBE, Chair of the Hearing Panel  
Mr Michael McCormick  
Mrs Julie Ward

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 references LA/E/1737 & 1751, (“the complaints”) concerning an alleged contravention of the Councillors’ Code of Conduct (“the Code”) by Councillor Cameron Rose and former Councillor Jeremy Balfour (“the Respondents”).

The CESPLS was represented by Mr Ranald Macpherson, Solicitor Advocate. Councillor Rose was represented by Mr Eric Scott, solicitor. Mr Balfour represented himself.

**COMPLAINT**

Two complaints were received by the CESPLS about the alleged conduct of the Respondents. Following an investigation, the CESPLS referred the complaint to the Standards Commission for Scotland.

The substance of the allegations were that the Respondents had contravened the Councillors’ Code of Conduct and, in particular, the provisions that obliged councillors to respect Council Employees and to treat them with courtesy at all times; and also the provisions which indicate that Councillors and Officers should work within an environment of mutual trust and respect and should avoid public criticism. Essentially, the complaint alleged that the Respondents behaved in a disrespectful manner towards officers by publicly identifying them in the context of inferred misconduct.

The CESPLS investigated the complaint and concluded that the Respondent had breached paragraphs 3.3, 3.5 and paragraph 20 of Annex C of the Code of Conduct (the Code).

The relevant provisions were:

*Relationship with Council Employees (including those employed by contractors providing services to the Council)*

*3.3 You must respect all Council employees and the role they play, and treat them with courtesy at all times. It is expected that employees will show the same consideration in return.*

*3.5 You must follow the Protocol for Relations between Councillors and Employees attached at Annex C. A breach of the Protocol will be considered as a breach of this Code.*

**ANNEX C: PROTOCOL FOR RELATIONS BETWEEN COUNCILLORS AND EMPLOYEES IN SCOTTISH COUNCILS**

**Public comment**

*20. Councillors should not raise matters relating to the conduct or capability of employees in public. Employees must accord to councillors the respect and courtesy due to them in their various roles. There are provisions in the Code of Conduct for Employees about speaking in public and employees should observe them.*

The CESPLS submitted a report to the Standards Commission on 27 January 2017 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 Respondents signed a Joint Statement of Facts on 17 May 2017, which outlined the parts of the CESPLS's Report that were agreed.

The Hearing Panel noted the complaints concerned a meeting of Edinburgh Council's Governance, Risk and Best Value Committee (the Committee) on 5 March 2015. The meeting agenda included consideration of a report in respect of the Cameron House Community Centre (Cameron House). A new facility for Cameron House had been built as part of the Council's Capital Investment Programme, but there had been issues with the construction and problems had continued after the building had been completed. The Hearing Panel noted that the Council instructed independent consultants to undertake a review of the issues involved in the building project. A technical report produced by the independent consultants had included criticism of the Council's project management processes.

The Committee meeting on 5 March 2015 was chaired by one of the Respondents, Mr Balfour. The second Respondent, Councillor Rose, was present as a local member in relation to the Cameron House item. The Committee heard a deputation from the Chairperson of Cameron House's Management Committee, who was concerned that, in their report, the independent consultants had indicated they had been unable to conduct a full review due to documents being unavailable and also because a number of Council staff involved in the project had left the Council. The Chairperson indicated she understood, however, that a number of the staff involved were still employed by the Council and she considered the individuals concerned should be held accountable for their role in the project and its failings.

Later and separately Councillor Rose made his own submissions, in his capacity as the local elected member, on issues relating to Cameron House.

The Hearing Panel watched a recording of the meeting of 5 March 2015. It noted that, after the deputations had concluded a discussion took place involving Committee members and senior Council staff. In the course of this, Mr Balfour asked a senior official for confirmation that five staff members who were involved in the project were still employed by the Council. He then asked Councillor Rose whether he had the names of the individuals available and, if so, to provide them without any other comment. Councillor Rose had proceeded to list the five names.

The substance of the allegations was, essentially, that the Respondents showed an absence of respect and courtesy towards the five individuals by publicly identifying them in the context of implied mismanagement of the project and that they had, therefore, contravened the Code.

### **Evidence Led at the Hearing**

As noted above, the CESPLS's representative led a recording of the meeting of the Committee on 5 March 2015.

The Hearing Panel then heard from witnesses led on behalf of the Respondents.

#### **The Chairperson of the Cameron House Community Centre's Management Committee:**

The Chairperson outlined the difficulties experienced by Cameron House as a result of issues with the building project. She advised that Councillor Rose had arranged for her to appear before the Committee on 5 March 2015 so that she could outline the Management Committee's concerns about the way the project had been handled. The Chairperson indicated that her aim had been to persuade the Committee that a further investigation into the matter was necessary and was also in the public interest.

The Chairperson confirmed that statements she made to the Committee that those involved 'may well be working in different posts but they must be held accountable for their lack of professionalism', that 'their delay in following up poor workmanship' and who should 'still be held responsible for the negligence', in regard to the project were all references to Council employees. The Chairperson confirmed that she had provided Councillor Rose with a list of individuals who had been involved in the project and were still employed by the Council.

**Edinburgh Council's Corporate Governance Manager:** The Corporate Governance Manager advised that, in his previous role, he had been Clerk to the Committee at its meeting on 5 March 2015. The Corporate Governance Manager confirmed that the Committee's remit was to undertake an audit and scrutiny role across the Council as a whole to ensure it achieved best value and satisfactory service levels. The Committee performed an independent scrutiny role on services provided, and major projects undertaken, by the Council.

The Corporate Governance Manager confirmed that the Council's Director of Children and Families had indicated, when asked at the meeting, that she could not confirm whether or not five individuals involved in managing the Cameron House project were still employed by the Council. The Corporate Governance Manager advised that while the Director was giving her answer, Mr Balfour had asked him whether the individuals could be named. His advice to Mr Balfour had been that they could be named, but that no comment could be made about their performance or conduct. The Corporate Governance Manager indicated he considered there had been a lack of clarity at the meeting about whether the individuals were still employed or not. He confirmed that his advice had been given 'in the moment', but that he was fully aware of the provisions of the Code as part of his role had been to train elected members on its provisions.

**Former Director of Corporate Governance:** The former Director of Corporate Governance confirmed that he had attended the Committee meeting on 5 March 2015 in that capacity. He had also been the Council's Monitoring Officer at the time. The former Director of Corporate Governance advised that his understanding was that the individuals had been named in the context of supporting the deputation's position that it was still worth investigating the project's alleged failings as there were still staff employed by the Council who could provide insight and evidence into what had happened.

The former Director of Corporate Governance recalled the Council's Acting Director of Corporate Property had advised the Committee that none of the staff involved in the project were employed in his department but that he understood two other members of staff were still employed in the Children and Families Department. The former Director of Corporate Governance considered that there was confusion about whether the two individuals the Acting Director of Corporate Property was referring to were ones who worked at Cameron House, as opposed to being individuals who had been involved in the project management. The former Director of Corporate Governance indicated he considered that matters were further confused by the Director of Children and Families subsequently advising the Committee that she did not know, or could not advise, the Committee as to whether any of the key staff were still employed in her Department.

The former Director of Corporate Governance recalled that Mr Balfour had then stated that, having taken advice from the Committee Clerk, he considered the individuals involved in the project who were still employed could be named. The former Director of Corporate Governance advised that he had been concerned by this but had been pleased to note that Mr Balfour had indicated that while they could be named, no further comment should be made. The former Director of Corporate Governance indicated he had checked with the Clerk who confirmed he had indeed given such advice. The former Director of Corporate Governance advised that he had chosen not to intervene at that point as he considered that while naming the individuals was close to the line, in doing so the Respondents had not impugned them and were not, therefore, contravening the provisions of the Code. The former Director of Corporate Governance indicated this was still his view although he fully accepted whether there had been a contravention of the Code was a decision for the Hearing Panel to make.

The former Director of Corporate Governance advised that there was an unwritten rule or general understanding that staff below the level of Heads of Service were not usually named and were referred to in meetings and in publicly available documentation by their job titles only. The former Director of Corporate Governance confirmed that, after the meeting, an approach had been made to the Chief Executive on behalf of the individuals named. He understood the individuals were concerned their names had been publicly read out in a critical context. The former Director of Corporate Governance advised that his understanding was that the Chief Executive had decided that, in light of these concerns, the part of the webcast where the names were read out should be muted on the webcast.

The former Director of Corporate Governance further confirmed that as a result of the decision by the Committee that there should be further investigations into the Cameron House project; an internal audit report had been commissioned. Following the findings in this, external auditors had been instructed to prepare a further report. The external audit

report had found wrongdoing and at least one count of maladministration by the Council. The former Director of Corporate Governance advised he had attended the meeting at Cameron House at which senior Council officials had tendered unreserved apologies to its Management Committee.

**Councillor Rose:** Councillor Rose advised he had been a councillor for the past 10 years and had just been re-elected. He advised he considered scrutiny to be an essential part of his role in terms of his duties to his constituents and to the Council itself.

Councillor Rose indicated that Cameron House was located in his ward and, as such, he took turns with the other elected members of the ward to attend its Management Committee meetings. Councillor Rose stated that his aim, in making representations to the Committee on 5 March 2015, was to persuade it that further investigations into the Cameron House project were warranted as the independent consultants' report had only covered technical issues and, in addition, there had been a suggestion in the report that its principal limitations were that staff involved in the project were no longer employed by the Council and relevant documentary evidence was no longer available. Councillor Rose contended that he was conscious the Committee would not want to spend public funds on further enquiries if there was no prospect of anything of value being uncovered; for example, if there was no one left at the Council who had first-hand knowledge of the project.

Councillor Rose indicated that his impression was that after answers from the Council's Acting Director of Corporate Property and its Director of Children and Families, there had been confusion amongst the Committee as to whether any of the staff involved in the project were still employed. Councillor Rose advised he knew that five of them were, as the Chairperson of the Management Committee had given him a list of their names. Councillor Rose advised that his intention was not to imply those on the list were accountable for any failings in the project but, instead, was simply to persuade the Committee of the value of making further enquiries. Councillor Rose indicated that he had been concerned the Committee would choose not to direct that further investigations be undertaken particularly after the Director of Children and Families had indicated she considered the independent consultants' report had detailed the failings in the project management and she did not understand why another explanation was being sought.

Councillor Rose accepted that, in her submissions to the committee, the Chairperson of the Management Committee had been referring to the conduct and capability of staff involved in the project and had confirmed that five individuals were still employed by the Council. Councillor Rose advised, however, that he was concerned about the weight the committee would attach to her statement in this regard and that, in any event, any clarity she had provided had been undermined by the later responses from the Acting Director of Corporate Property and Director of Children and Families.

In response to a question about why he had not simply handed the Director of Children and Families the list of names when she had indicated to the Committee that she did not know if the staff were still employed in her department, Councillor Rose indicated that he did not think he had had an opportunity to do so given it had been a fast moving situation and given he had not been present as a member of the Committee. He contended that he had only stated the names after being specifically asked to do so by the Convener and that he had

listed the individuals without any comment and without expressing any criticism of them. Councillor Rose advised he knew of some of the individuals on the list but only had sketchy knowledge of their positions and / or seniority.

**Mr Balfour:** Mr Balfour advised he had been a councillor from November 2010 to May 2017. He had been Convener of the Governance Risk and Best Value Committee for five years. Mr Balfour confirmed the Committee had been established to improve the Council's scrutiny arrangements and to ensure there was proper accountability. This remit had been formulated against a backdrop of criticism by Audit Scotland regarding scrutiny levels applied by elected members and public concern relating to the Edinburgh Tram project and statutory repairs scheme. It had been agreed from the outset that the Committee would operate in the most open and transparent manner and, where possible, would ensure its discussions were held in public.

Mr Balfour confirmed he had read a redacted version of the independent consultants' report and had met Councillor Rose shortly before the meeting on 5 March 2015 was due to start. Councillor Rose had advised him that he thought further investigations should be undertaken in respect of the Cameron House project as the focus of the independent consultants' report had only been on technical issues. Councillor Rose had indicated that he had a list of the names of five members of staff involved in the project who were still employed by the Council. Mr Balfour confirmed that he had not seen the list but Councillor Rose had mentioned one name, who he knew was a Deputy Director of the Children and Families Department.

Mr Balfour confirmed it had never been his intention for the names to have been read out. He simply wanted to persuade the Committee and also the then Monitoring Officer that the matter was serious so that further investigations into the way the project had been handled were required. Mr Balfour advised that he initially thought that the evidence provided by the deputation at the Committee would be sufficient to persuade its Members that further investigations were required. However, two Committee Members had then asked questions about whether any staff involved in the project were still employed. This had indicated to him that the question of whether anyone was still employed by the Council and, therefore, whether it was worth pursuing further investigations was clearly of significance to the Committee. Mr Balfour noted that while the Chairperson of the Management Committee had confirmed that some staff involved in the project were still employed by the Council. He contended, however, that the Committee would not always give evidence provided by deputations as much weight as they would to answers provided by senior officers.

Mr Balfour advised that his perception was that the Committee was still confused as to whether any individuals were still employed by the Council. It was this perception, along with his knowledge that the Deputy Director of Children and Families had been involved in the project, that led him to ask the Director of Children and Families to confirm there were some staff involved were still employed. Mr Balfour confirmed he considered the Director of Children and Families would have been in the best position to provide an answer as she had already confirmed she had been briefed on the Cameron House project before the meeting and she also should have known who was in her department. Mr Balfour indicated he was therefore surprised that the Director of Children and Families indicated she did not know if anyone was still employed. He formed the impression from this, and from her

previous answer to the effect that she did not know why a further explanation around the failings was being sought, that she did not want the matter to be investigated further.

Mr Balfour stated that while the Director of Children and Families was giving her answer to the effect that she did not know if anyone was still employed, he turned to the Committee Clerk and asked whether the names could be read out if no imputation was made. Mr Balfour noted that he was content with the advice that the names could be read out as, while he was aware that complying with the Code was his personal responsibility, he had confidence that the Clerk was an expert on the Code. Mr Balfour indicated that he considered the advice was appropriate given that the former Director of Corporate Governance and former Head of Legal, who were both present, had not intervened.

Mr Balfour contended he had deliberately asked Councillor Rose to read out the names 'without comment' as he was conscious that he did not know the level of seniority of four of the officers on the list. In addition, Mr Balfour stated that he was aware that the Code prohibited councillors from raising issues about the conduct or performance of employees in public and he wanted to avoid any imputation arising from the names being read out and / or any implication the individuals had been guilty of any failings. Mr Balfour advised that if the Director of Children and Families had instead confirmed that some officers involved in the project were still employed by the Council, he would not have asked for the names to be read out as it is likely such an answer would have been sufficient to persuade the Committee that further evidence could be obtained as part of any further investigations.

Mr Balfour advised that he considered that if the names had not been read out, it was unlikely the former Director of Corporate Governance would have pursued the matter as vigorously as he did. It was this pursuit that led to the further reports, the finding of maladministration and the full and unreserved apology being proffered to the Cameron House Management Committee.

Mr Balfour advised he was also conscious of the need to ensure that proceedings at the Committee were as open and transparent as possible. He did not think that passing the list of names to an officer would have been sufficiently transparent. Mr Balfour acknowledged that, in his evidence as part of the deputation before the names had been read out, Councillor Rose had mentioned accountability. However, his request for Councillor Rose to read out the names had not been made in this context, but instead had been made in the narrower context of senior officers having been unable to provide clarity as to whether members of staff involved in the project were still employed after the evidence from the deputation had concluded.

Mr Balfour indicated that he appreciated, from the fact that a subsequent complaint was made, that the individuals involved were concerned that they were being associated with any failings in the project management. However, this was not his intention at the time; he had simply wanted factual confirmation that there were people involved in the project who were still employed by the Council. Mr Balfour contended that if councillors had to consider the potential reaction of employees every time accountability was mentioned, they would not be able to undertake their scrutiny role.

Mr Balfour advised he had not moved the matter to a 'B item' to be discussed in private as he did not think this was necessary, given he was only asking for the names. Mr Balfour stated that, had any failings on the part of officers been uncovered in subsequent investigations, the Committee could have held discussions about the further reports in private. The former Director of Corporate Governance's subsequent report on the Cameron House project had, in fact, been considered by the Committee at a 'B' item. Mr Balfour advised that generally the Committee only moved items from the 'A' to the 'B' agenda following advice from officers to do so. No such advice had been given in this case.

### **Submissions made by the CESPLS's Representative**

The CESPLS's representative noted that the first sentence of paragraph 20 of Annex C of the Code prohibited councillors from raising matters relating to the conduct or capability of employees in public. The CESPLS's representative argued that the first sentence of paragraph 20 of Annex C stood alone; meaning that if it was found that matters relating to the conduct or capability of employees had been raised in public then a finding of a breach of the Code must follow. The CESPLS's representative argued that there was no doubt that the Cameron House project was a matter of public concern and, as such, elected members were fully entitled to scrutinise it. The CESPLS's representative contended that the respondents were entitled to question whether anyone could be held accountable for any failings or potential failings identified in a project. However, where the line in terms of breaching the Code had been crossed was the point at which the Respondents had named individual members of staff.

The CESPLS's representative indicated that the Committee had already received answers, from both Councillor Rose and the Chairperson of the Management Committee, as to the question of whether any individuals involved in the project were still employed before the individual names had been publicly read out. Therefore, there was no need for them to have been revealed. The CESPLS's representative indicated that while he accepted the evidence given by the Acting Director of Corporate Property had not been entirely clear, in her answer the Director of Children and Families had referred to the list held by Councillor Rose. It was plausible, therefore, that she was indicating she did not know who was on the list, as opposed to that she did not know if any individuals were still employed. The CESPLS's representative contended that any confusion could have been quickly and easily rectified by passing her the list, without any necessity to read out the names. The CESPLS's representative questioned why naming the individuals was considered a more plausible option and how it could be argued that doing so was more likely to persuade the Committee and former Director of Corporate Governance that further investigations were required. He argued that, even if it was accepted there was some confusion at the meeting, mentioning the individuals' roles or job titles would have been sufficient to demonstrate that they were still employed. The Hearing Panel further noted that the CESPLS's representative conceded, however, that the individuals may have still been readily identifiable if their position was sufficiently senior, even if only their roles or job titles had been read out. In any event, the CESPLS's representative contended there was no other evidence to demonstrate that the Committee was not minded to ask for further investigations or any basis for suggesting it would not have done so had the names had been kept private.



The CESPLS's representative asked the Hearing Panel to note that other Committee members present had clearly demonstrated they were aware of the need to avoid raising the issue of the conduct or performance of officers in public. For example, when an elected member had asked the Chairperson of the Management Committee whether she knew the names of employees who were still in place, he specifically indicated he did not want her to repeat the names but to simply provide confirmation. In addition, another elected member had stated, later in the meeting, that he was 'distinctly uncomfortable with the naming of names earlier'.

The CESPLS's representative accepted that neither Respondent had criticised officers directly. However, they had named the individuals in the context of a discussion around accountability for alleged failings. Breaches of the Code were not determined by intent, but by conduct alone. The CESPLS's representative argued that the intent to secure further investigations by demonstrating these would be worthwhile, and the fact that the subsequent findings proved these investigations had been valuable, did not alter the fact that the Code had been breached.

The CESPLS's representative advised that the Local Government Act 1973 provides that the public can be excluded from council meetings and the matter in question considered under a 'B' agenda item, if it is exempt information. Types of exempt information listed in the Act include information in respect of employees. Therefore, it would have been open to Mr Balfour as Convener, to have moved the discussion to a 'B' item if he wished the names to be made known to the Committee.

The CESPLS's representative argued that while the Cameron House project was clearly a matter of public concern, the fact was that the names of individual officers were read out in circumstances where they could be connected to opprobrium (even if it was accepted the names were read out to clarify a factual point only). The CESPLS's representative argued that in doing so, without any apparent regard or consideration having been given to the potential impact, the Respondents had failed to treat the individuals concerned with courtesy and respect and had both, therefore, breached paragraph 3.3 of the Code.

The CESPLS's representative contended that Councillor Rose had been raising matters relating to the conduct and capability of employees and their potential accountability. He then proceeded to name individuals. The CESPLS's representative argued that whether or not they were accountable, or should have been held as being so, was irrelevant. The fact that Councillor Rose raised issues of accountability, and then named individuals, amounted to a breach of paragraph 20 of Annex C.

Turning to Mr Balfour, the CESPLS's representative noted that he had not himself raised any issues of opprobrium or any matters relating to the conduct and capability of individuals. However, it was his actions that caused the names to be read out and he had done so in the context of a discussion about conduct and capability of individuals and their potential accountability. The CESPLS's representative argued that the fact that Mr Balfour told Councillor Rose to make no comment when reading out the names demonstrated that he was aware there was a possibility of opprobrium being attached to them.

The CESPLS's representative noted that if the Hearing Panel found the Respondents to have breached the Code, it would then need to apply the Human Rights Act 1998 and determine whether any restrictions the Code sought to impose on the right to free speech under Article 10(1) of the ECHR were necessary under Article 10(2).

The CESPLS's representative noted that the Courts had determined that politicians have enhanced protection in terms of their right to freedom of expression. Enhanced protection had been held not to be limited to expressions of or critiques of political views, but instead the Court had determined it extends to all matters of public administration and public concern, including comments about the adequacy or inadequacy of performance of public duties by others. The CESPLS's representative advised that Article 10(2) expressly recognised a restriction could be imposed 'for the protection of the reputation or rights of others'. While the right to impose a restriction on the freedom of expression had been given a narrow construction by the Courts, it was recognised that protecting public servants was a legitimate aim of any such a restriction.

The CESPLS's representative drew the Hearing Panel's attention to the following authorities:

*Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin): The Court recognised the enhanced protection for politicians applies to all levels of politics, including local. The Court noted that the right to freedom of expression was not absolute but that any restriction was required to respond to a 'pressing social need', to be for relevant and sufficient reasons, and to be proportionate to the legitimate aim being pursued. However, that margin must be construed narrowly in this context as there was little scope under Article 10(2) for restrictions on political speech or on debate on questions of public interest.

The CESPLS's representative argued that paragraph 20 of Annex C seemed, on the face of it, to be a wide restriction but in actual fact it did not restrict the right to criticise officers, it instead simply reflected the private employment rights of public officials by indicating that matters relating to their conduct and capability should be dealt with in a private, as opposed to public, forum. The protection of officers was, therefore, a legitimate and appropriate aim in order to ensure mutual trust and confidence between councillors and officers. The CESPLS's representative noted that in the *Heesom* case, the Court recognised that local government could not 'sensibly function' without such a mutual bond of trust and confidence. The Court had further recognised that it was in the public interest that officers were not subjected to unwarranted comments that prevented them from performing their duties in conditions free from perturbation.

*Pederson v Denmark* (2004) 42 EHRR 24: The European Court of Human Rights (EHRR) recognised that, in considering whether a restriction on freedom of expression was legitimate, consideration should be given to whether or not there were sufficient other opportunities to achieve an objective.

The CESPLS's representative argued that, in the case before the Hearing Panel, the Respondents had other opportunities to achieve their objective and, as such, the protection afforded to officers under paragraph 20 of Annex C was a legitimate restriction.

*Guja v Moldova (2011) 53 EHRR 16*: The EHRR found that the signalling or disclosure of wrongdoing by an officer should be made in the first place to the individual's superior or other competent authority or body and that the question of whether there was any other effective means of remedying the wrongdoing should be considered before information was disclosed in public. The EHRR further found that the public interest in particular information could sometimes be so strong as to override even a legally imposed duty of confidence.

The CESPLS's representative argued that the evidence demonstrated the Respondents had other means to remedy the issue; namely to simply disclose the information to the Director of Children and Families so that she could have answered the question about whether any individuals were still employed in her department fully and properly. Alternatively, the job titles of the individuals concerned could have been disclosed instead of their names. The CESPLS's representative noted that there was public interest in the Cameron House project but argued that a discussion could have been held about accountability without individual names being disclosed. There was no public interest in disclosing the names.

In summary, the CESPLS's representative argued that the protection afforded by paragraph 20 of Annex C was proportionate and was not outweighed by any right to enhanced protection of freedom of expression under Article 10.

#### Submissions made by Councillor Rose's Representative

Councillor Rose's representative drew the Hearing Panel's attention to paragraph 1.6 of the Code, which directs councillors to seek advice from senior Council employees if they are uncertain about how the rules apply. He further asked the Hearing Panel to note the key principles in the Code and specifically the principle of duty, which places an obligation on councillors to represent the interests of the Council and their constituents; the principle of selflessness, which obliges them to act in the public interest; the principle of openness, which provides that information should only be restricted when the wider public interest demands; and also the principle of accountability and stewardship, which obliges councillors to ensure their Council uses its resources prudently. Councillor Rose's representative indicated that these key principles set the context in which the rest of the Code was to be interpreted and understood.

Councillor Rose's representative agreed that only the first sentence of paragraph 20 of Annex C was relevant. However, he contended that CESPLS's representative's interpretation that no matters whatsoever that related to the conduct and capability of employees could be raised in public was far too wide and would lead to absurd results such as councillors being in breach of the Code if they were asked to praise staff or award performance related prizes in public. Instead, Councillor Rose's representative argued that the provision was clearly only designed to address situations where elected members criticised officers in public and, in doing so, brought the Council into disrepute.

Councillor Rose's representative noted that the reason given for the conclusion in the CESPLS's report that there had been a breach of paragraph 3.3 of the Code was that the individuals were publicly named in the context of inferred misconduct, without having been given prior notice or any opportunity for rebuttal. Councillor Rose's representative advised that neither Respondent had gone into the meeting intending to name the individuals, so

this finding failed to take account of the factual matrix in which the naming had taken place. Councillor Rose's representative reiterated that Councillor Rose had not intended to reveal the names at the meeting and had only done so when it became apparent the answers from the senior officers present had caused confusion. Councillor Rose's representative argued that there was no evidence of any disrespect or discourtesy being shown.

Councillor Rose's representative argued that the Committee's purpose was to scrutinise and, therefore, its remit included dealing with issues concerning potential maladministration or failings on the part of the Council or its officers. Mr Balfour, as Convener, had an obligation to ensure the Committee was conducted in the most open and transparent way. Councillor Rose's representative noted that the Cameron House project was clearly a matter of public interest. He argued that if Councillor Rose had refused Mr Balfour's request to read out the names or if he had instead passed the list to the Director of Children and Families or anyone else to read privately, his actions could easily have been perceived as being deliberately secretive.

Councillor Rose's representative indicated that it was clear that the Chairperson of the Management Committee's aim was to ensure those involved in the project were held accountable for any failings. However, Councillor Rose had a different agenda, which was to ensure that further and wider ranging investigations were undertaken. Councillor Rose's representative argued that the CESPLS had allowed an inference to be attributed to Councillor Rose from what the Chairperson had said in her submissions to the Committee. This was unwarranted given that, in actual fact, Councillor Rose had only mentioned that accountability was a key thing to be considered and that some officers still employed by the Council had been 'significantly involved' in the project. If inferences were taken from comments made by others, councillors undertaking scrutiny roles at meetings would be placed in a difficult position and may not be able to advance issues properly if adverse comments had been made on the matter by others.

Councillor Rose's representative accepted that there was an overlap between Councillor Rose's aims and those of the Chairperson of the Management Committee, as demonstrated by the fact Councillor Rose had repeated what her concerns were in his own submissions to the Committee. However, Councillor Rose had only done so in the context of describing why further enquiries were required and the matters that required investigating.

Councillor Rose's representative contended that Councillor Rose had not commented on the conduct or capability of any officers but had instead simply provided confirmation, by way of their names, that some individuals involved in the project were still employed by the Council. His decision to do so had been vindicated by the fact that the further investigations undertaken had uncovered serious issues and indeed had led to a finding of maladministration. There had not, therefore, been any breach of the Code.

Councillor Rose's representative noted, however, that if the Hearing Panel did not agree with his position that there had not been a breach of the Code, his secondary position was that any statements made by Councillor Rose at the meeting attracted the enhanced protection of freedom of expression under Article 10.

The CESPLS's representative drew the Hearing Panel's attention to the following authorities:

*Janowski v Poland (1999) 29 EHRR 705*: The EHRR considered rights of public servants and their entitlement to protection but noted they are subject to the wider limits of acceptable criticism meaning such criticism could be harsh or expressed in strong form. Public servants can expect criticism at higher level than the public but not quite same level as politicians. They can expect protection if there is a pressing social need, but such protection must be relevant and sufficient.

Councillor Rose's representative argued that the matters raised at the meeting were of public concern and that any officers concerned could expect a degree of criticism. Councillor Rose had not been abusive or offensive to officers and instead had only named those involved in the project who were still employed by the Council.

*R (Calver) v Adjudication Panel for Wales (2012) EWHC 11172*: This case outlined the order a Tribunal would require to adopt when considering Article 10, which was firstly whether there had been a breach of the Code; secondly, if so, whether the finding of a breach and the imposition of a sanction was a limitation of the right to freedom of expression afforded by Article 10; and thirdly, if so, whether the restriction involved was one that was justified by Article 10(2). The Court noted if that if the conduct in question is less egregious, it is more difficult to justify any restriction. The Court further noted that 'political expression' had to be interpreted widely and it included open discussion on political issues. There was no distinction between political discussion and discussion of matters of public concern.

Councillor Rose's representative argued that, in this case, the conduct in question could never be described as egregious. In addition, he noted it was not in dispute that the Cameron House project was a matter of public concern.

*Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin)*: The Court recognised that politicians have an enhanced protection in respect of political expression and that political expression in itself is a broad concept. The Court further held that public servants are subject to wider levels of acceptable criticism than other members of the public when matters of public concern are being discussed. The need to protect officers when imposing a restriction, in terms of Article 10(2), on freedom of expression must be weighed up against a politician's right to enhanced protection.

Councillor Rose's representative argued that in this case, Councillor Rose's behaviour was warranted given he was pursuing his duty to scrutinise the Council's actions and decisions. He should be afforded the enhanced protection.

### **Submissions made by Mr Balfour**

Mr Balfour indicated he had not breached the Code. However, if the Panel disagreed, he wished to rely on the enhanced protection of freedom of expression afforded by Article 10 for the reasons outlined by Councillor Rose's representative.

Mr Balfour noted that two other councillors at the meeting had asked whether individuals involved in the Cameron House project were still employed but had made it clear that the individuals were not to be named. Mr Balfour argued, however, that the difference

between their position and his was that he had had the advantage of seeking advice from the Clerk about whether the individuals could be named.

Mr Balfour confirmed that his aim, in convening the Committee was to ensure it was conducted in the most open and transparent manner. The provisions of both the Code and the Local Government Act 1973 made it clear this was the appropriate approach.

Mr Balfour asked the Hearing Panel to note the evidence provided to the effect the Committee had been confused as to whether any individuals involved in the project were still employed by the Council. Mr Balfour advised that for him, the crucial moments in the Committee meeting had been when the Director of Children and Families had indicated she saw no reasons for further enquiries and had then indicated she could not confirm whether any individuals involved in the project were still employed. Mr Balfour reiterated that his aim had been to persuade the Committee and the then Monitoring Officer to take the matter seriously and initiate further enquiries. Mr Balfour advised that it was only after the Director of Children and Families had failed to provide clarity that he felt he had to ask Councillor Rose to read out the names. Mr Balfour stated that after he had done so, matters were essentially out of his hands. While he did not consider that Councillor Rose, in reading out the names, had breached the Code, the fact that he had done so was outwith Mr Balfour's control. Mr Balfour indicated the way he had framed his request to Councillor Rose and, specifically, his direction that the names should be read without any comment, had made it clear that no view was being taken in respect of the individuals involved in terms of any of the potential failings in the management of the project.

Mr Balfour asked the Hearing Panel to note that, both having had time to reflect on the matter, the Committee Clerk had given evidence to the effect that his advice would still have been the same and the former Director of Corporate Governance had indicated he still would not have intervened. Mr Balfour pointed out that paragraph 1.6 of the Code obliged councillors to seek advice if they were unsure about any provisions in the Code. He had done so and had followed the advice he had received. Mr Balfour indicated that the fact he had sought advice demonstrated he was aware of the provisions of the Code and was taking his obligations under it seriously.

Mr Balfour contended that interpreting the first sentence of paragraph 20 of Annex C to mean that councillors could not publicly raise any matters relating to the conduct or capability of employees whatsoever was absurd. For example, it was normal for councillors to take part in award ceremonies where officers' conduct or capability was praised. To interpret the provision that widely would mean no councillor would be able to congratulate or give praise / recognition to any member of staff. In addition, any councillor undertaking a scrutiny role would be concerned about being challenged on that ground even if they had sought and accepted the advice of officers. This would mean they would be unable to undertake such a scrutiny role at all.

Mr Balfour advised that, in any event, he had not implied any individual was at fault. He had added a caveat to his request to Councillor Rose to make it clear that no implication could be drawn from the naming of the individuals concerned. Mr Balfour confirmed that, with the exception of one individual, he had no idea of the seniority of the individuals involved. However, the Code did not make any distinction, in any event, between different levels of

officers. Mr Balfour noted that if Councillor Rose had been wrong and the individuals he had named had not been involved in the project and/or not still been employed, there would have been the opportunity to put this on public record at a later Committee meeting.

## **DECISION**

### **Decision Making**

The Hearing Panel considered all of the evidence including the evidence led and submissions made orally at the Hearing.

In reaching its decision, the Hearing Panel took the following approach. Firstly, it considered whether the facts found led it to conclude, on the balance of probabilities, that the Respondents had failed to comply with the Councillors' Code of Conduct. Secondly, if so, it would then consider whether such a finding in itself was *prima facie* a breach of the right to freedom of expression under Article 10 of the European Convention on Human Rights (as incorporated in the Human Rights Act 1998). Thirdly, if so, the Hearing Panel would proceed to consider whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society (in particular for this case for the protection of the reputation or rights of others).

### **Stage 1 Decision: Councillor Rose**

The Hearing Panel accepted Councillor Rose's evidence that, in making representations to the Committee, his aim had been to persuade both the Committee, and the then Monitoring Officer who was present, that further investigations into the Cameron House project were warranted. The Hearing Panel accepted that this was a legitimate aim and formed part of an elected member's scrutiny role.

The Hearing Panel further accepted Councillor Rose's contention that he was concerned the Committee would not make recommendations as to further enquiries and reports if there was no prospect of anything of value being uncovered; for example, if there was no one left at the Council who had first-hand knowledge of the project.

The Hearing Panel noted that when two senior officers present had been asked by members of the Committee to confirm whether staff involved in the managing the Cameron House project were still employed by the Council, they had not done so. One of the officers had also indicated she did not consider there was any merit in looking for further explanations for the failings in the project management process. The Committee heard evidence from other officers present and from both the Respondents that, following this, there was a degree of confusion and a lack of clarity amongst those present as to whether any individuals involved in the project management were still employed by the Council or not.

The Hearing Panel further accepted that Councillor Rose may not have attended the meeting with the intention of reading out the list of names. The Hearing Panel noted that Councillor Rose had not read the list of names out in his initial representations to the Committee and had only done so in response to a direct request from Mr Balfour. It was not

in dispute that in making the request, Mr Balfour confirmed he had received advice from the Committee Clerk that it would be acceptable to read out the names, if no comment as to conduct or performance was made. It was also not in dispute that neither the Council's Monitoring Officer nor the Head of Legal, who were both in attendance, had intervened when Councillor Rose proceeded to read out the names.

The Hearing Panel noted, however, that during the meeting, other elected members, had pointed out that the names of the individuals involved in the project should not be read out in public. The Hearing Panel considered this should have put Councillor Rose on notice that it might not be appropriate to disclose the names, and he should have come to his own view as to whether he might be in breach of the Code.

The Hearing Panel accepted that Councillor Rose did not comment directly on the performance of the five individuals whose names he had read out. However, the Hearing Panel noted he had disclosed the names knowing that the submissions made by the Chairperson of Cameron House's Management Committee had alleged there had been mismanagement, serious failings and a lack of professionalism on the part of Council officers involved in the project. The Chairperson had also made it clear that she wished those in senior positions who had been involved with the project and were still employed by the Council to be held accountable for what she described as 'negligence' in respect of the management of the project.

The Hearing Panel noted that Councillor Rose had earlier recalled and summarised the issues and failings identified by the Chairperson in his own submission to the Committee. The Hearing Panel noted that Councillor Rose advised the Committee that he had a list of names and he also took the view that there was a question of accountability to consider. In the circumstances, the Hearing Panel was satisfied that when Councillor Rose subsequently read out the list of names of individuals he understood were still employed by the Council it was done in the context of a discussion of failings in performance and, therefore, their conduct and capability. The Hearing Panel considered that, while Councillor Rose had not directly stated the five individuals concerned were accountable, the clear inference or insinuation that could be drawn from the reading out of the names was that they may have had some responsibility for any failures in respect of the Council's management of the project.

The Hearing Panel was therefore satisfied that, on balance, Councillor Rose had raised matters concerning the conduct and capability of the five individuals. The Hearing Panel considered that, in doing so in a public forum (where the meeting was the subject of a simultaneous webcast), and knowing that the individuals had no notice that they could be named and no opportunity to defend themselves, Councillor Rose had failed to treat the officers concerned with courtesy and respect.

The Hearing Panel felt this was further evidenced by the fact that there was no suggestion that Councillor Rose had taken steps to satisfy himself as to the seniority of the individuals involved. He had, therefore, given no consideration to the appropriateness or otherwise of naming more junior officers. The Hearing Panel took the view that Councillor Rose had not taken sufficient account of the potential impact that the reading out of the individuals'



names may have had on their reputations, given the context in which he had done so and the potential insinuation they may have been responsible for serious failings.

The Hearing Panel was satisfied that the Cameron House project was a matter of public concern and, as such, elected members were fully entitled to scrutinise the Council's management of it. The Hearing Panel considered that Councillor Rose was entitled to question whether anyone could be held accountable for any failings or potential failings identified in the project. The Panel recognised that he had read out the names only at the invitation of the Committee Chair, Mr Balfour. However, the Hearing Panel considered that he had a number of options open to him. He could have declined, and instead passed the list of names of individuals thought to be involved in the project to the two officers and asked them to clarify their answers. Alternatively, he could have asked Mr Balfour to move to a 'B item' and to continue any discussions in private. He could also have made it clear when introducing the names that he did not wish to imply that the named officers were responsible for the poor practice described earlier in the meeting.

The Hearing Panel considered it was the personal responsibility of Councillor Rose to be aware of, and comply with, the provisions in the Councillors' Code of Conduct.

In terms of the first stage of the test, the Hearing Panel found as follows:

1. The Councillors' Code of Conduct applied to Councillor Rose.
2. The Hearing Panel's view was that, on balance, Councillor Rose's behaviour amounted to a contravention of paragraphs 3.3, 3.5 and paragraph 20 of Annex C of the Councillors' Code of Conduct. However, before coming to a finding on the matter, the Hearing Panel noted that it would have to consider the provisions of Article 10, which it proceeded to do, as set out in Stage 2 and 3 below.

### **Stage 1 Decision: Mr Balfour**

The Hearing Panel accepted that Mr Balfour's aim had also been to persuade both the Committee and the Monitoring Officer that further investigations into the Cameron House project were warranted. The Hearing Panel again accepted that this was a legitimate aim and formed part of an elected member's scrutiny role. The Hearing Panel heard that, as a consequence of the Governance, Risk and Best Value Committee's recommendations, further investigation and reports had eventually resulted in a finding of maladministration on the part of the Council and the provision of a full and unreserved apology to the Cameron House Management Committee.

The Hearing Panel noted Mr Balfour's evidence that he had only asked Councillor Rose to read out the list of names when it had become apparent that those present were confused as to whether any individuals involved in the project were still employed by the Council. The Hearing Panel accepted that before doing so, Mr Balfour had asked the Committee Clerk for advice about whether or not the names could be read out and that he had followed the advice provided. The Hearing Panel noted that the Committee Clerk had been asked to provide the advice on the spot and had not, therefore, had the opportunity to give the matter careful consideration before answering. However, the Hearing Panel heard

evidence from the Clerk that, having now had time to reflect on the matter, his advice would nevertheless have been the same. The Hearing Panel also heard evidence from the former Monitoring Officer that he could have intervened to prevent the names being read out. However, he had not done so as he had also been of the view that the reading out of the names, without any imputation, would not amount to a breach of the Code.

The Hearing Panel was satisfied that Mr Balfour did not directly criticise any of the individuals involved and did not mention any names himself. In asking Councillor Rose to read the list of names, Mr Balfour had been careful to indicate he should just provide the names and to make no comment. This, and the fact that he had sought advice, demonstrated that Mr Balfour was aware of the provisions of the Code and was taking his responsibilities under it seriously.

However, the Hearing Panel was of the view that Mr Balfour asked for the names to be read out in the context of an overall discussion about accountability for potential failures in the management of the project. The Hearing Panel considered that Mr Balfour would, or should, have been aware that the clear inference or insinuation that could be drawn from the reading out of the names was that they may have had some responsibility for any failures in respect of the Council's management of the project. The Hearing Panel was, therefore, satisfied on balance that Mr Balfour had raised matters in public concerning the conduct and capability of the five individuals.

The Hearing Panel noted that while ultimately it was Councillor Rose's decision to read out the names and that he could have chosen not to do so, it considered the fact that Mr Balfour had asked him to do so in the context of potential accountability demonstrated a lack of courtesy and respect to the individuals concerned.

The Hearing Panel noted that Mr Balfour had confirmed that he only knew the identity of one of the officers and his role within the Council. The failure by Mr Balfour to take steps to satisfy himself as to the seniority of the other individuals involved and to give any consideration to the impact that the reading of their names may have had on them was indicative of a lack of courtesy and respect.

The Hearing Panel noted that Mr Balfour had confirmed that his aim, in chairing the Committee, was to ensure it was conducted in the most open and transparent manner possible, which is why he did not consider passing a list or moving into a private session was appropriate. However, the Hearing Panel considered he may have been able to elicit confirmation from the senior officer that staff were still employed other than by causing the names to be read out. As Committee Chair, Mr Balfour could also have made clear that the purpose of reading out the names was to confirm there were staff members available who could assist with further investigation and not to associate them personally with any conduct or capability concerns.

Despite the advice given by the Clerk, the Hearing Panel considered it was the personal responsibility of Mr Balfour to be aware of, and comply with, the provisions in the Councillors' Code of Conduct.

In terms of the first stage of the test, the Hearing Panel found as follows:

1. The Councillors' Code of Conduct applied to Mr Balfour at the time of the events in question.
2. The Hearing Panel's view was that, on balance, Mr Balfour's behaviour amounted to a contravention of paragraphs 3.3, 3.5 and paragraph 20 of Annex C of the Councillors' Code of Conduct. However, before coming to a finding on the matter, the Hearing Panel noted that it would have to consider the provisions of Article 10, which it proceeded to do, as set out in Stage 2 and 3 below.

### **Stage 2: Is the finding a breach of Article 10?**

The question which then arose was whether the findings that the Respondents had failed to comply with the provisions of the Code is *prima facie* a breach of their right to freedom of expression under Article 10 of the European Convention on Human Rights. In coming to a view the Hearing Panel firstly considered whether the identification of the individuals amounted to political expression.

It noted that the Courts had interpreted the term 'political expression' widely and had found there was no distinction between political discussion and discussion of matters of public concern. The Hearing Panel noted that the comments were made in the course of a meeting of a Council committee which was charged with providing oversight of governance, risk and best value of a local authority. It was not in dispute, and indeed agreed, that it was clear the Cameron House project was a matter of public concern. Therefore, the comments amounted to political expression.

The Hearing Panel further acknowledged that the Courts recognised that there was an enhanced protection of freedom of expression for politicians, which applied to all levels of politics, including local. In this case, the Hearing Panel was satisfied that the Respondents, as local politicians taking part in a discussion on a matter of public concern, should be afforded the enhanced protection under Article 10.

### **Stage 3: Is the restriction involved by the finding justified by Article 10(2)?**

The Hearing Panel then proceeded to consider whether the restriction involved by the finding that the Code had been breached was justified by Article 10(2), which allows restrictions that are necessary in a democratic society for the protection of the reputation or rights of others.

The Hearing Panel was of the view that the intention of the provisions in paragraph 3.3 and paragraph 20 of Annex C of the Code, and the imposition of any sanction if a breach of them was found, was to protect officers from offensive, abusive and defamatory remarks. The Hearing Panel further agreed with the CESPLS's representative that the intention was also to ensure officers were free from undue perturbation so they could perform their duties. The aim was also to protect the mutual bond of trust and confidence between elected members and officers, to enable local government to function effectively.

The Hearing Panel noted that the Courts have found that the right to freedom of expression is not absolute but that any restriction imposed on the right is required to respond to a 'pressing social need'; to be for relevant and sufficient reasons; and to be proportionate to the legitimate aim being pursued. The Courts have indicated that the margin for discretion is narrow in the context of the enhanced protection afforded to politicians, as there is little scope under article 10(2) for restrictions on debates on matters of public interest.

The Hearing Panel noted the Courts have further held that public servants are subject to wider levels of acceptable criticism than other members of the public when matters of public concern are being discussed. The need to protect public servants when imposing a restriction, in terms of Article 10(2), on freedom of expression must be weighed up against a politician's right to enhanced protection.

The Hearing Panel noted therefore it was required to undertake a balancing exercise, weighing the enhanced protection to freedom of expression enjoyed by the Respondents against any restriction imposed by the application of the Code and imposition of any sanction.

In reaching an evaluative judgment, the Hearing Panel took into account the CESPLS's representative's arguments that while the provisions in the Code seemed, on the face of it, to impose a wide restriction, this did not restrict the right of councillors to scrutinise officers, but merely indicated that matters relating to the conduct and capability of officers should be dealt with in a private forum. This and the requirement to treat officials with respect and courtesy were, therefore, legitimate and appropriate aims that were necessary and proportionate in order to ensure mutual trust and confidence between councillors and officers. The Courts had held that protecting public servants was a legitimate aim of such a restriction as local government could not 'sensibly function' without such a mutual bond of trust and confidence.

The Hearing Panel also took into account Councillor Rose's representative's arguments, which were also adopted by Mr Balfour, that Courts had found that the requirement to protect officers from critical comment must be weighed against the interest of open discussion of matters of public concern. If the relevant comment was made by a politician in political expression, the enhanced protection given to his right to freedom of expression must also be given due weight. Councillor Rose's representative argued that the provisions in the Code preventing comment on an officer's conduct or capability were clearly only designed to address situations where elected members criticised officers in public and, in doing so, brought the Council into disrepute. Councillor Rose's representative further argued that the Courts had held that the more egregious the conduct in question, the easier it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction was required. In this case, he argued, the conduct in question could never be described as egregious.

The Hearing Panel considered whether the objective of any sanction to be imposed as a result of a breach of the Code being found could be achieved by means that were less interfering of the Respondents' rights to enhanced protection of freedom of expression. The Hearing Panel also considered whether any finding or breach which resulted in a

sanction would have a disproportionate effect. It further reflected on whether any benefit of the restriction outweighed any impact on the right to enhanced protection.

The Hearing Panel determined that the identification of the individuals had taken place in the context of a discussion on a matter of public interest. As such, the Hearing Panel considered there was limited scope under article 10(2) for a restriction on the debate.

The Hearing Panel considered that in their respective capacities as the Chair of the Committee and as an elected member representing his constituents' interests, both Respondents were entitled to form political judgements, on the day. They felt their sought-after outcome, which was the Committee agreeing to recommend further in depth enquiries into the mismanagement of the project, was being jeopardised by the unwillingness or inability of senior officials to confirm that staff were still employed who could assist in establishing why any failings occurred and who may be responsible. The Hearing Panel further considered that the Respondents were entitled to the political view that the Committee's deliberations had to be done in the most open and transparent manner, especially given the complaint by the Cameron House Management Committee's representative that they had been excluded from decision making and from the Turner Townsend enquiry. The Hearing Panel noted that the Respondents had considered that other alternatives to publicly reading out the names such as moving the discussion to a 'B' agenda item and holding it in private or passing the list of names would have excluded the deputation, and the public from hearing the Committee's deliberations and the information put before it.

The Hearing Panel found that the Respondents had legitimate grounds for concern about the project and for taking the view that the Council Committee would not commission further reports without being convinced there were still officials employed by the Council who could assist with inquiries. The rationale for identifying staff was that it was for that purpose.

The Hearing Panel considered it was obliged to weigh the requirement to protect officers from adverse inferences regarding their conduct or capability against the interest of open discussion of matters of public concern, such as the Cameron House project. This was especially relevant where, as in this case, the Respondents' comments constituted political expression and they were, therefore, entitled to the enhanced protection given their right of freedom of expression.

The Hearing Panel did not consider that applying a sanction for the revealing of the names would be meeting a pressing social need given that it had not been accompanied by any specific allegations from either Respondent that the individuals concerned had been responsible for any failings in respect of the project. While the Hearing Panel accepted that it was necessary to protect officers from offensive, abusive and defamatory remarks, it was satisfied that no such remarks had been made in this case. While a clear inference could be drawn from the reading out of the names was that the individuals concerned may have had some responsibility for any failures in respect of the Council's management of the project, the Hearing Panel found that neither Respondent had specifically commented on the conduct or capability of any of the officers concerned. The Hearing Panel considered, therefore, that the Respondents' conduct was not egregious.

The Hearing Panel was further of the view that the naming of the individuals was not calculated to affect them in the performance of their duties. As the reading of their names, whilst unexpected and unwelcome, was not undertaken in a context that was accusatory, far less offensive, abusive or defamatory, it should not have affected their ability to carry out their functions.

The Hearing Panel also considered the Respondents' responsibilities to maintain the mutual bond of trust and confidence between elected members and officers and concluded that, although the introduction of the individuals' names at a meeting where the delivery of a project was being criticised was to be regretted, there was no specific allegation that any of the named members of council staff had been responsible for any of the particular failings in the project. As such this did not constitute the exceptional circumstances that would justify inhibiting the Respondents' rights of freedom of expression.

The Hearing Panel's view was that the imposition of a restriction in the circumstances would be disproportionate as it could inappropriately inhibit the Respondents' ability to undertake their scrutiny role effectively if they were at risk of sanction on the basis of an inference being drawn.

In the particular circumstances of this case, the Hearing Panel took the view that, as local politicians taking part in a discussion on matter of public concern, the Respondents should be afforded the enhanced protection of freedom of expression under Article 10 of the ECHR. The Hearing Panel also found that the Respondents' right to this enhanced protection when performing their scrutiny role in an open and transparent way was not outweighed by the benefit of protecting officers from the potential inference that they had been involved in any of the alleged failings.

The Hearing Panel acknowledged that conducting the balancing exercise in this case had been difficult. However, having given careful consideration to the particular facts and specific circumstances of the case, it concluded that whilst it was regrettable that the five officers were named, this did not constitute a breach of the Councillors' Code of Conduct in light of the application of the enhanced protection enjoyed by the Respondents, Councillor Rose and Mr Balfour, to the right to freedom of expression.

**Date:** 15 June 2017



**Professor Kevin Dunion OBE,  
Chair of the Hearing Panel**