

## **Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on Wednesday 8 July 2020.**

**Panel Members:** Ms Ashleigh Dunn, Chair of the Hearing Panel  
Professor Kevin Dunion  
Mr Paul Walker

The Hearing arose in respect of a Report referred by Ms Caroline Anderson, the Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/H/3003, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Allan Henderson (the Respondent).

The ESC was represented by Mr Martin Campbell, Director of Investigations and Solicitor to the Commissioner.

### **Referral**

Following an investigation into a complaint received about the conduct of the Respondent, the ESC referred a report to the Standards Commission for Scotland on 30 April 2020, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act), as amended.

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code and, in particular, that he had contravened paragraphs 5.3, 5.7 and 5.18(2)(ii). The relevant provisions are:

**5.3** *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.*

#### *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.*

#### *Definition of Exclusions*

**5.18** *The following paragraphs refer to General Exclusions and Specific Exclusions.*

##### *(2) The Specific Exclusions*

*The specific exclusions referred to in this Section of the Code are in relation to interests which a councillor may have:*

*(ii) as a member of a Regional Transport Partnership (RTP);*

*In relation to (ii), the exclusion applies to any councillor who is a member of a Regional Transport Partnership established under the Transport (Scotland) Act 2005 by virtue of having been appointed by their council. The exclusion enables such a councillor to take part in the consideration and discussion of, and to vote upon, a matter relating to that RTP or in relation to which the RTP has made a representation; provided that the councillor has declared his or her interest at all meetings where such matters are to be discussed. The exclusion includes quasi-judicial and regulatory matters except any quasi-judicial or regulatory matter on which the RTP has made an application to the council, has formally objected to an application made by another party, or is the subject of an order made or proposed to be made by the council.*

### **Evidence Presented at the Hearing**

#### **Joint Statement of Facts**

The Hearing Panel noted that a Joint Statement of Facts had been agreed between the ESC and the Respondent. The Hearing Panel noted that it was not in dispute that, at a meeting of Highland Council's Environment, Development and Infrastructure Committee on 16 May 2019, the Respondent moved, and voted in favour of, a motion to:

- approve £170,000 worth of additional funds for work relating to Skye Airport / Aerodrome; and
- for him, as Committee Chair, to write to the Transport Secretary on behalf of the Council and also on behalf of HITRANS (being the local regional transport partnership) requesting support.

The Panel noted that HITRANS was a member of a working group established for the purpose of developing Skye Aerodrome into an airport and that the Respondent had been Chair of HITRANS since June 2017. The Panel noted that the post was unremunerated. The Panel noted that it was not in dispute that the Respondent had not declared his interest in HITRANS at the meeting of the Environment, Development and Infrastructure Committee on 16 May 2019

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

The ESC's representative advised that the Respondent accepted that he had breached the Code and had apologised for doing so.

The ESC's representative noted that while councillors may be able state truthfully that an interest they had in a matter would not influence their discussion or decision-making, they must nevertheless comply with the objective test outlined in paragraph 5.3 of the Code. The ESC's representative argued that, in this case, having applied the objective test as required, the Respondent should have declared his interest in HITRANS. This was because a member of the public with knowledge of the relevant facts, being that:

- the Respondent was the chair of HITRANS; and
- that HITRANS was a member of the working group

would reasonably conclude the Respondent would be likely to support proposals to help fund the activities of a working group of which HITRANS was a member and, as such, that his interest could influence his discussion and decision-making on the matters under consideration.

The ESC's representative noted while there would be no need to withdraw in the case of an interest covered by a specific exclusion; paragraph 5.7 nevertheless requires councillors to declare any non-financial interests that would fall within the terms of the objective test. The ESC's representative noted that the specific exclusion at paragraph 5.18(2)(ii) allows any councillor who has been appointed by their Council to be a member of a regional transport partnership to take part in the consideration, discussions and voting on matters relating to that regional transport partnership, provided they declare their interest in it at the Council meeting in question. The ESC's representative advised, therefore, that in this case, the Respondent would have had to have declared the interest in the regional transport partnership in order to benefit from the

specific exclusion at paragraph 5.18(2)(ii). The ESC's representative argued, therefore, that the failure to do so amounted to a breach of the Code.

The ESC's representative nevertheless asked the Panel to note that:

- the fact that the Respondent was Chair of HITRANS was widely known;
- the funding approved by the committee would not benefit HITRANS; and
- that the Respondent was not the HITRANS representative on the Working Group.

The ESC's representative further asked the Panel to note that the Respondent's position as Chair of HITRANS was unremunerated and that there was no question of him having gained personally from the Environment, Development and Infrastructure Committee's decision.

### **Submissions made by the Respondent**

The Respondent advised that he considered that the ESC's representative's summary of the case was accurate and fair. The Respondent advised that while his position as Chair of HITRANS was known to all members of the Environment, Development and Infrastructure Committee, he nevertheless accepted that he was aware of the terms of the specific exclusion and that he should have formally declared an interest, in order to benefit from it. The Respondent apologised unreservedly for his failure to do so.

### **DECISION**

The Hearing Panel considered the submissions made both in writing and orally at the Hearing. It concluded that:

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Henderson.
2. The Respondent had breached paragraphs 5.3, 5.7 and 5.18(2)(ii) of the Code.

### **Reasons for Decision**

The Panel noted that paragraph 5.7 of the Code states that councillors must declare any non-financial interest even if the interest is not so remote or insignificant that it could not reasonably be taken to fall within the objective test. In this case, the Panel considered that, having applied the objective test under paragraph 5.3, the Respondent should have reached the view, in terms of paragraph 5.7, that his interest in HITRANS, as a member of the Working Group, would not be perceived as being so remote and insignificant that it could not influence him. This was because the Panel agreed with the ESC's representative that a member of the public would be reasonably entitled to conclude that, as Chair of HITRANS, the Respondent would be likely to support proposals to help fund the activities of a working group of which HITRANS was a member and, as such, his interest could influence his discussion and decision-making on the matters under consideration.

The Panel noted the terms of the specific exclusion under paragraph 5.18 of the Code that allowed councillors who were members of regional transport partnerships, such as HITRANS, to take part in the consideration and discussion of, and to vote upon, a matter relating to that regional transport partnership. The Panel noted however, that the specific exclusion only applies if the councillor declares his or her interest at all meetings where such matters are to be discussed. In this case, despite confirming to the Panel that he was aware of the specific exclusion, the Respondent failed to declare an interest at the Committee meeting on 16 May 2019 before taking part in the discussion and decision-making.

The Panel concluded, therefore, that the Respondent's failure to declare his interest in HITRANS at the meeting in question amounted to a contravention of paragraphs 5.3, 5.7 and 5.18 of the Code.

### **Evidence in Mitigation**

The Respondent advised that his failure to declare his interest in HITRANS at the Environment, Development and Infrastructure Committee on 16 May 2019 was simply an oversight. The Respondent explained that this had occurred largely because there had been a full agenda and a large amount of paperwork before the Committee on the date in question. The Respondent further advised that as matters before the Committee did not usually concern HITRANS, the need to declare an interest was not at the forefront of his mind.

The Respondent advised that he was embarrassed by his failure to declare an interest as required and apologised unreservedly to the complainer, Panel and ESC for the breach of the Code.

### **SANCTION**

The decision of the Hearing Panel was to censure the Respondent, Councillor Henderson.

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

### **Reasons for Sanction**

In reaching its decision on sanction, regarding the breach of paragraphs 5.3, 5.7 and 5.18 of the Code, the Hearing Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes and offered an unreserved apology in respect of the failure to declare the interest. The Panel accepted the Respondent's submission that the failure to comply with the Code was inadvertent and an oversight.

The Panel emphasised, however, that the requirement for councillors to declare certain interests is a fundamental requirement of the Code. A failure to do so removes the opportunity for openness and transparency in a councillor's role and denies members of the public the opportunity to consider whether a councillor's interests may or may not influence their discussion and decision-making. The Panel noted it was a councillor's personal responsibility to be aware of the provisions in the Code and to ensure that he or she complied with them.

The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction. This was because there was no evidence that the Respondent had attempted to conceal his interest or that there was any personal gain. The Panel further noted that while it had found that the Respondent had not declared the interest as required, had he done so, he would still have been allowed to take part in the discussion and decision-making under the specific exclusion in the Code for members of regional transport partnerships.

### **RIGHT OF APPEAL**

The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

**Date:** 13 July 2020



**Ms Ashleigh Dunn  
Chair of the Hearing Panel**