

Decision of the Hearing Panel of the Standards Commission for Scotland, following the Hearing held at Municipal Buildings, Station Road, Dumbarton, on 14 September 2020.

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

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/WD/3016, concerning alleged contraventions of the Councillors' Code of Conduct (the Code) by Councillor James Bollan (the Respondent).

The ESC was represented by her Senior Investigating Officer, Mr Martin Campbell. The Respondent was represented by Mr Gordon Milligan, solicitor.

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 10 June 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 its paragraphs 3.3 and 3.17. 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.

Confidentiality Requirements

3.17 You will often receive information of a private nature which is not yet public or which perhaps would not be intended to be public. You must always respect and comply with the requirement to keep such information private, including information deemed to be confidential by statute. Legislation gives you certain rights to obtain information not otherwise available to the public and you are entitled to exercise these rights where the information is necessary to carry out Council duties. Such information is, however, for your use as a councillor and must not be disclosed or in any way used for personal or party political advantage or in such a way as to discredit the Council. This will also apply in instances where you hold the personal view that such information should be publicly available.

Evidence Presented at the Hearing

Joint Statement of Facts

The Hearing Panel noted the terms of a Joint Statement of Facts agreed between the representatives for the Commissioner for Ethical Standards and the Respondent. In particular, the Panel noted that the background to the complaint, as narrated in the ESC's report, was not in dispute and that it was accepted that a whistle-blowing complaint about how contracts within the Council were awarded had resulted in an investigation being undertaken by its Internal Audit Team.

The Panel noted that the internal audit report found no conclusive evidence that any council officer had received hospitality, as claimed by the whistle-blower. The report had, however, found various failings on the part of the Council and its officers. Following a disciplinary process, elected members (including the

Respondent) were provided a redacted copy of the Internal Audit report on 7 February 2019. The Panel noted that, at a meeting of the Council on 14 February 2019, the Respondent lodged a motion requesting that a less redacted version of the report be supplied, and for the matter to be referred to Audit Scotland. This was agreed unanimously and an investigation by Audit Scotland was then undertaken. Audit Scotland's findings were considered at a Special Council Meeting on 14 May 2019.

The Panel noted that the referral before it concerned two matters, the first being the Respondent's conduct during an exchange with the Council's Head of Internal Audit on 14 May 2019, just before the Special Council meeting. The Panel noted that the Respondent accepted that he had entered into an exchange with the Head of Internal Audit and had communicated with him in "robust terms". The Respondent further accepted that he had made a comment in relation to whether the Head of Internal Audit had been promoted.

The second part of the referral concerned information the Respondent disclosed at the Special Council meeting. The Panel noted that the Respondent accepted that he had referred to the name of an individual, company and contractor, despite this information having been redacted from the internal audit report being considered at the meeting.

Witness Evidence

The ESC's representative led evidence from four witnesses who had witnessed the exchange between the Respondent and the then Head of Internal Audit on 14 May 2019.

The then Head of Internal Audit advised that he had been a local government officer since 1990 (he has now retired). The then Head of Internal Audit stated that he had been in the room with other officers on 14 May 2019 and waiting for the Special Council meeting to start when he noticed the Respondent "eyeballing" him. The Respondent had then approached him in an "aggressive manner", while still staring at him. The then Head of Internal Audit stated that the Respondent had stopped directly in front of the table where he was sitting and had started asking him questions in a loud and challenging manner. This had included questioning whether he was senior enough to attend the meeting, given that the Chief Executive had said at the previous meeting (on 14 February 2019) that he was not sufficiently senior to attend Council meetings. The then Head of Internal Audit stated that the Respondent had then suggested that the Chief Executive was lying.

The then Head of Internal Audit advised that he had remained seated during the exchange and had tried to stay calm, in order to defuse the situation. The then Head of Internal Audit stated that the Council's Strategic Lead on Communications, Culture, Communities and Facilities intervened on his behalf and advised the Respondent that he had a different recollection of what the Chief Executive had said at the meeting on 14 February 2019. The then Head of Internal Audit advised the incident had ended after the Council's Strategic Director of Transformation and Public Service Reform turned around and asked the Respondent to desist. The incident had lasted about a minute.

The then Head of Internal Audit contended that he had never previously experienced behaviour of a similar nature from an elected member. He indicated that officers could expect to be challenged robustly at meetings by elected members but the then Head of Internal Audit stated that he considered the incident to be different, however, as it took place before the meeting had started. He stated that the manner in which the Respondent had behaved had left him both shocked and intimidated.

In response to cross-examination, the then Head of Internal Audit confirmed that, while he had become aware of the whistle-blower's complaint about the Council's tendering and contracting practices in March 2016, the internal audit report on the matter had not been sent to elected members until February 2019. The then Head of Internal Audit advised that, at the advice of the Council's legal officers, the report had been heavily redacted. The then Head of Internal Audit accepted that the issue was a matter of public concern and that it was legitimate for the Respondent to have had concerns both at the time taken to produce the internal audit report and the lack of substantive updates on progress before it was provided to elected members. The

then Head of Internal Audit stated, however, that he did not consider that this excused the Respondent's behaviour towards him.

In response to questions from the Panel, the then Head of Internal Audit confirmed that his investigation had found that the Council's procurement policies and procedures had regularly been breached in respect of the awarding of Roads and Greenspace contracts. He confirmed that while he had not attended the Council meeting on 14 February 2019, he had been aware of what had been discussed regarding his attendance at that meeting and including the decision to refer the matter to Audit Scotland for an external review, at the time of the incident on 14 May 2019.

The Council's Strategic Lead on Communications, Culture, Communities and Facilities stated that he had witnessed the exchange in question between the Respondent and the then Head of Internal Audit. The Strategic Lead on Communications, Culture, Communities and Facilities advised that the Respondent had stood directly in front of the then Head of Internal Audit and had questioned why he was at the meeting, given that the Chief Executive had said at the last meeting that he had not been senior enough to attend Council meetings. The Respondent had then questioned whether the Chief Executive had been lying. The Council's Strategic Lead on Communications, Culture, Communities and Facilities stated that the Respondent's tone, posture and demeanour were aggressive. It had been apparent that the Head of Internal Audit was intimidated as he had moved back in his chair, looked uncomfortable and had clearly not known how to respond.

The Council's Strategic Lead on Communications, Culture, Communities and Facilities advised that he had been surprised by the Respondent's conduct as it was very direct, confrontational and not how he would expect an elected member to behave. In particular, he had been surprised and concerned that the Respondent was alleging that the Chief Executive had lied. The Council's Strategic Lead on Communications, Culture, Communities and Facilities stated that, as a more senior officer, he had felt compelled to support his colleague and, as such, had intervened to advise the Respondent that his recollection was that the Chief Executive had simply said at the previous meeting that the Head of Internal Audit was not sufficiently senior as to be required to attend all Council meetings. The Council's Strategic Lead on Communications, Culture, Communities and Facilities contended that the Respondent had responded to his intervention by stating that he must be lying too. The Council's Strategic Lead on Communications, Culture, Communities and Facilities confirmed that the incident ended after the Council's Strategic Director of Transformation and Public Service Reform had turned around and spoken to the Respondent.

The Council's Strategic Lead on Resources stated that he had witnessed the incident and considered that the Respondent had been aggressive in his tone and demeanour towards the Head of Internal Audit. The Council's Strategic Lead on Resources stated that the Respondent had clearly been angry during the incident, which was out of character. The Council's Strategic Lead on Resources advised that his interpretation was that the Respondent's actions were the result of his unhappiness that the Head of Internal Audit had not been present at the previous meeting.

The Council's Strategic Lead on People and Technology stated that she had witnessed the Respondent approaching the Head of Internal Audit in a "visibly aggressive" and hostile manner. The Council's Strategic Lead on People and Technology indicated that, in her experience, this behaviour was out of character for the Respondent as he was usually pleasant to officers and not antagonistic or abrupt.

Submissions made by the ESC's Representative

The ESC's representative contended that all four witnesses had described the incident between the Respondent and the Head of Internal Audit in broadly similar terms, with all agreeing the Respondent had been aggressive. The ESC's representative noted that all four witnesses had given evidence in a measured and factual manner and argued that, as such, their accounts of the incident should be taken as being both credible and reliable. The ESC's representative argued that while councillors are expected to scrutinise and

challenge officers, they were obliged to do so in a courteous and respectful manner. The ESC's representative contended that, in this case, the Respondent had been aggressive and hostile and had caused the Head of Internal Audit to feel shocked and intimidated. The Respondent had, therefore, failed to treat the Head of Internal Audit with respect, as required by the Code.

Turning to the alleged breach of confidentiality, the ESC's representative advised that the Council's legal officers had sought fit to redact the name of any individual or company involved in the procurement or contracts from the internal audit report being considered at the Special Council meeting on 14 May 2019. The ESC's representative contended that it was evident from this that such information was confidential and not intended for the public domain. The ESC's representative noted that paragraph 3.17 of the Code specifically provides that councillors must not disclose confidential information even if they hold a personal view that such information should be publicly available. The ESC's representative argued, in any event, that there was no public interest reason to disclose the information as what was being scrutinised in the report was the Council's procurement procedures, contract management practices and how it spent the public funds available to it; not the conduct of any external individual or company. The ESC's representative accepted that while the name of the company and its directors were in the public domain, the fact that they were the recipients of Council contracts was not. The ESC's representative argued that the disclosure of the information by the Respondent could potentially have had a negative impact on those connected to the company.

Evidence from the Respondent

The Respondent advised he had been a councillor for some 34 years. He stated that he had first become aware of the whistle-blower's concerns in July 2016. The Respondent advised that he had thereafter advised the Head of Internal Audit who agreed to investigate the matter. The Respondent noted, however, that despite him seeking an update on progress on a number of occasions, and being advised by the Head of Internal Audit in January 2018 that the report had been sent to the Chief Executive, a (heavily redacted) version was not sent to elected members until February 2019. The Respondent advised that he had been very concerned and frustrated about the extraordinary length of time taken to investigate the matter and to produce the report, given the serious nature of the whistle-blower's allegations. The Respondent stated that he had also been very disappointed and disillusioned about the format of the report, when initially issued to councillors, as it had been redacted to such an unacceptable extent that, to him, it prevented proper scrutiny and informed decision-making. The Respondent advised that he had, therefore, lodged the motion requesting that a less redacted version of the report to be supplied and also for the matter to be referred to Audit Scotland. This had been agreed unanimously at the Council meeting on 14 February 2019.

The Respondent stated that he had been unhappy, disillusioned and frustrated that the Head of Internal Audit, as the author of the report being scrutinised, had not attended the meeting on 14 February 2019. The Respondent advised he would have expected the Head of Internal Audit to have been there to answer questions from elected members. The Respondent stated that the Head of Internal Audit's failure to attend meant that elected members were unable to undertake their scrutiny role effectively. The Respondent noted that the investigation by Audit Scotland had found that the Council's procurement policies and procedures had been breached regularly and that it had not demonstrated Best Value being achieved when procuring services in respect of some contracts. The Respondent explained that it was in this context he had approached the Head of Internal Audit before the Special Council Meeting on 14 May 2019.

The Respondent accepted that the Head of Internal Audit's description of the incident was broadly accurate. The Respondent explained that he had asked whether the Head of Internal Audit had been promoted as the Chief Executive had previously stated he was not senior enough to attend Council meetings. The Respondent advised that he had not intended to intimidate the Head of Internal Audit and apologised if he had done so.

In respect of the allegation that he had disclosed confidential information, the Respondent confirmed that he had mentioned the name of a director and the company on a number of occasions at the meeting on 14

May 2019, despite this information being redacted in the copy of the internal audit report provided to elected members, which was being considered. (The Respondent advised that an unredacted version of the report had come across his desk, although he declined to apprise the source of this). The Respondent advised that, in disclosing the information, he had been trying to act in the public interest as he believed the public had a right to know who had received the Council contracts in question. The Respondent argued that as the concerns about procurement and the award of contracts had been covered extensively in the local media, and all council employees knew the name of the individual and company in question, it was reasonable to assume the information was not confidential. The Respondent further advised that the name of the director and company were publicly available through Companies House and that as the company had dissolved in 2015, it was unlikely that any harm would be caused to it by the disclosure. He argued that the name of the company would have been on signposts or billboards at Council sites when work was being undertaken in respect of the contracts that had been awarded. The Respondent contended that while the Council's Monitoring Officer had warned him, at the meeting, that disclosing the information could be a breach of data protection law, he had not raised the possibility of it being a breach of the Code.

In cross-examination, the Respondent accepted that council officers should not be expected to put up with aggressive or intimidating behaviour. The Respondent denied, however, that the Head of Internal Audit had caught the brunt of his unhappiness and frustration about the length of time the investigation had taken and explained that, instead, he had simply been trying to elicit an answer as to why the Head of Internal Audit had not been present at the meeting on 14 February 2019. When no answer had been forthcoming, he had simply asked the same question again.

In response to questions from the Panel, the Respondent advised that it had not been apparent to him, at the time, that disclosing the name of the director and company at the meeting could be a breach of the Code. The Respondent stated that his overriding concern was the public interest and "so be it" if that had meant he would fall foul of the Code. The Respondent reiterated that he considered that the public had a right to know what had been going on. He further indicated that he had never said that the Chief Executive was a liar.

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 Bollan.
2. The Respondent had breached paragraphs 3.3 and 3.17 of the Code

Reasons for Decision

Having heard evidence from the then Head of Internal Audit and three other eye witnesses to the incident, the Panel was satisfied, on the balance of probabilities, that the Respondent was discourteous and disrespectful, both in tone and demeanour, to the then Head of Internal Audit during the exchange in question before the Special Council meeting on 14 May 2019. The Panel was further satisfied that the Respondent had made remarks to the effect that the Chief Executive had said, at the meeting on 14 February 2019, that the Head of Internal Audit was not senior enough to attend Council meetings. The Respondent had also questioned whether the Chief Executive had lied at the earlier meeting. The Panel noted that the then Head of Internal Audit and the three other witnesses gave evidence to the fact that the then Head of Internal Audit had been shocked and intimidated by the Respondent's behaviour.

The Panel found that the Respondent had behaved in an inappropriate and disrespectful manner towards the Head of Internal Audit by challenging him in a demeaning fashion in front of his colleagues. The Panel

accepted the evidence of witnesses that the Respondent had been standing directly in front of the then Head of Internal Audit and had been aggressive in both tone and manner when doing so. The Panel was of the view that while officers may be expected to face challenge (and that senior officers in particular may expect this to be of a robust nature), they are nevertheless entitled to be treated with courtesy and respect when undertaking their duties. The Panel noted that the Respondent accepted he had been frustrated in advance of the exchange. It further noted that the Respondent's manner and comments were perceived by the recipient, and others, as being, aggressive and demeaning. The Panel considered that a reasonable person would have concluded that such behaviour lacked courtesy and was disrespectful.

The Panel noted, however, that before coming to a final finding on the matter, it was obliged to consider the provisions of Article 10 of the European Convention on Human Rights, which concerns the right to freedom of expression. The Panel considered that as the Respondent's conduct towards the Head of Internal Audit was gratuitous and had taken place before the meeting was underway, the Respondent would not attract the enhanced protection of freedom of expression under Article 10 of the European Convention on Human Rights, which is afforded to politicians when making comments in a political context.

The Panel concluded, therefore, that the Respondent had contravened paragraph 3.3 of the Code in respect of the first aspect of the referral.

Turning to the second matter before it, the Panel noted that the Respondent accepted that, at the Special Council Meeting later that day, he had referred to the name of an individual, company and contractor who had been awarded Council contracts (being information the Council had redacted from the Internal Audit report under consideration). The Panel noted that the Respondent's position was that the name of the joint owner of the company in question was, and remains, publicly available online and that it had been in the public interest for the information to be disclosed, given public money was being spent.

The Panel noted that the Respondent had disclosed the information in the course of a public meeting. While the Respondent may have considered it was in the public interest for the information to be disclosed, the Panel was of the view that the fact that the information had been redacted from the report meant that it was apparent the information was confidential and was to be treated as such. The Panel accepted that while matters concerning the Council's approach to tendering and awarding contracts were clearly of public interest, it did not accept that disclosing the name of a private individual / contractor fell within that category. This was because the matters that were the subject of the meeting, being the internal investigation and Audit Scotland's report, concerned the way the Council had conducted itself and how it spent public funds. The Panel was satisfied that the company and its director were not the subject of the scrutiny and that the public disclosure of the name of the company and its director was not necessary in the circumstances.

The Panel noted that when questioned whether he was aware that his conduct could amount to a breach of the Code, the Respondent said this was not apparent at the time and that he was nevertheless of the view that the public interest overrode any other interest such as the Code of Conduct. Then Respondent had stated, therefore, that if he fell foul of the Code then "so be it". The Panel was satisfied, however, that it was evident from the transcript of the meeting of 14 May 2019 that both the Monitoring Officer and Chief Executive had indicated that disclosing the information was likely to be a breach of the Code. The Panel found that the Respondent had nevertheless proceeded to do so.

The Panel noted, in any event, that paragraph 3.17 of the Code expressly states that councillors should not disclose confidential information even in instances where they hold the personal view that such information should be publicly available. The Panel considered the fact that the name of the joint owner of the company in question was publicly available online was irrelevant, given that the information disclosed went further than that and extended to the fact that the company had been awarded Council contracts.

The Panel concluded, therefore, that the Respondent had also contravened paragraph 3.17 of the Code. The Panel noted that it had not heard any arguments to the effect that the Respondent would be afforded the enhanced protection of freedom of expression afforded by Article 10 at the meeting. The Panel was not satisfied, therefore, that it had before it any compelling public interest reasons as to why the disclosure of the name of the company and individual was necessary. The Panel further considered that there could have been negative consequences to the individual and anyone connected to the company in question. In the circumstances, the Panel determined that there were sufficient and relevant reasons to justify the interference to the Respondent's right to freedom of expression. It was satisfied that a finding of a breach and application of a sanction was proportionate in the circumstances.

Evidence in Mitigation

The Respondent's representative indicated that both incidents which were the subject of the breach finding had arisen as a result of the Respondent's strongly held belief that the Council was trying to avoid scrutiny of his legitimate concerns. The Respondent's representative noted the Respondent was particularly disillusioned and disappointed because, despite being aware of the whistle-blower's concerns for more than three years and despite the Respondent asking for updates, the first time that elected members were provided with a summary of the internal audit report and given the opportunity to scrutinise the matter was December 2018. The Respondent's representative noted, however, that Audit Scotland had later found that the summary presented had 'lacked the level of detail required by members for them to effectively scrutinise the issues identified'. The Respondent's representative advised that his concerns about the lack of detail in the summary had led the Respondent to lodge the motion that resulted in the internal audit report being issued to elected members and the matter being referred to Audit Scotland in February 2019. The Respondent's representative indicated that the Respondent was entirely frustrated by the time of the events in question on 14 May 2019. The Respondent's representative noted that the frustration was with the Council as a whole, rather than the then Head of Internal Audit as an individual, and that it was unfortunate that he may have been the recipient of a release of this. The Respondent's representative confirmed that the Respondent had apologised in his correspondence with the Standards Commission for making the Head of Internal Audit feel uncomfortable. The Respondent's representative asked the Panel to note the exchange had been a one-off incident.

Turning to the second issue, the Respondent's representative noted that neither the individual or company concerned had complained about the disclosure of their names. The Respondent's representative reiterated the Respondent had not had cause to think the disclosure would cause any harm, given the company had been dissolved well before the meeting on 14 May 2019.

SANCTION

The decision of the Hearing Panel is to suspend the Respondent, Councillor Bollan's entitlement to attend the next two ordinary meetings of West Dunbartonshire Council.

The decision is made in terms section 19(1)(b) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

Reasons for Sanction

In reaching its decision on sanction, the Hearing Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes. The Panel accepted that, by the time of the events in question, the Respondent was entirely frustrated by the length of time it had taken to investigate the whistle-blower's concerns (particularly in light of how serious these were), and the lack of explanation provided for the delay. It noted that the Respondent had offered an apology to the Standards Commission in respect of his conduct towards the then Head of Internal Audit, if after the matter had been referred to it.

The Panel considered, however, that the requirement for councillors to behave in a respectful manner towards officers and to maintain confidentiality are important parts of the Code, as a failure to do so can undermine the effective running of the Council. The Panel noted that councillors should be able to undertake their scrutiny role in a constructive, respectful, courteous and appropriate manner without resorting to personal attacks or being offensive or demeaning. In this case, the Respondent had failed to conduct himself in a courteous and respectful manner.

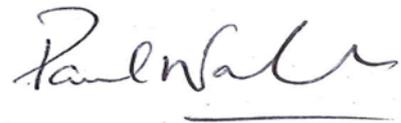
In respect of the breach of confidentiality, the Panel again accepted that the Respondent's conduct was borne of frustration and that he may have considered disclosing the information was in the public interest. The Panel considered, nonetheless, that it was clear the information was confidential. The Panel was further of the view that the Code made it clear that such information should not be disclosed, even if a councillor held a personal view that it was in the public interest to disclose it. The Panel considered, therefore, that the disclosure had not been inadvertent. The Panel was of the view that the deliberate nature of the second breach and the fact that there had been two contraventions (albeit in respect of different provisions in the Code), meant that a censure was not appropriate and that a suspension should be imposed.

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 personal benefit to the Respondent and the events in question had been confined to one day.

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: 17 September 2020



**Mr Paul Walker
Chair of the Hearing Panel**