

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online on Thursday 22, October 2020.

Panel Members: Mr Mike McCormick, Chair of the Hearing Panel
Mrs Tricia Stewart
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/AC/2276, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Marie Boulton (the Respondent).

The case against the Respondent was presented by Mr Martin Campbell, Director of Investigations and Solicitor to the Ethical Standards Commissioner. The Respondent was represented by Mr Duncan Love, 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 8 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 she had contravened paragraphs 3.16 and 3.17. The relevant provisions were:

3.16 Council proceedings and printed material are generally open to the public. This should be the basis on which you normally work but there may be times when you will be required to treat discussions, documents or other information relating to or held by the Council in a confidential manner, in which case you must observe such requirements for confidentiality.

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.

Preliminary Matters

The Respondent's representative advised the Hearing Panel that he wished to lodge four documents as further productions for the Respondent. The Respondent's representative explained that these had just been discovered the previous night. During his explanation of why he wished to introduce these productions, the Respondent's representative intimated that, on reflection, he did not require one of the items as its content was available in other papers already submitted. The Respondent's representative further advised that as his position was that one of the documents demonstrated that the Council's leaders had begun a public discussion on 1 February 2019 about there being a budget deficit of between £40 million and £50 million, he was seeking an adjournment on the grounds that it was no longer in the public interest and proportionate to hold a Hearing. In pursuance of this, the Respondent's representative asked the Panel to refer the case back to the Standards Commission to review its decision, made under Section 16 of the 2000 Act, to hold a Hearing.

The ESC's representative advised that he considered it would be unfair for the Panel to allow the new documents to be admitted on the day of the Hearing. The ESC's representative explained that this was because the documents were not 'new', they had simply not been identified previously by the Respondent and her representative as being relevant. The ESC's representative argued, in any event, that the fact that the Council's leaders may have initiated a public discussion on the budget deficit on 1 February 2019 was not a material matter, given this was after the alleged disclosure of confidential information about the matter by the Respondent on 24 January 2019. The ESC's representative pointed out that it was not known if the Council leaders initiated the discussion as part of a communication strategy put in place to deal with the disclosure. This was a matter the ESC could have explored through the interviewing of witnesses, had proper notice of the proposed production been provided.

Having adjourned to consider the matters raised, the Panel refused the request to admit the further productions on the grounds that admitting them would be unfair to the ESC's representative, who had not had the opportunity to review them in advance of the Hearing. The Panel noted that the Respondent had been notified, on 10 June 2020, of the decision to hold the Hearing and had advised, at an early stage of the adjudication process and that she had secured legal representation. It was also noted that the Respondent and her solicitor had participated in an online pre-Hearing meeting on 7 August 2020 during which it was confirmed that the Respondent had received a copy of the Hearing Rules and Procedures, which include reference to the requirement for productions to be submitted no later than seven days before a Hearing. The Panel further noted that, following a request made by the Respondent at the pre-Hearing meeting, the Hearing that had been scheduled to take place on 8 September 2020 had been adjourned to give her more time to prepare and to address pressing Council related duties. The Panel was of the view that the Respondent had, therefore, been afforded sufficient time to identify and submit evidence in support of her case. The Panel was satisfied that the documents the Respondent's representative wished to submit were available and could have been lodged at an earlier stage and, as such, did not amount to 'new' information.

The Panel further refused the request to adjourn the case, so that it could be referred back to the Standards Commission to review its decision to hold a Hearing. The Panel did not consider the documents the Respondent wished to be lodged amounted to new and material information, that had emerged, that could lead the Standards Commission to determine that the reasons for holding a Hearing no longer applied. This was because the Panel was satisfied that the evidence had been available for some time and, while it could be relevant to the questions of whether and when the information the Respondent had disclosed was in the public domain, these were arguments, already supported by documentary productions, relating to the merits of the case that were in dispute. As such, the Panel was of the view that it remained in the public interest and proportionate for the arguments to be aired at a Hearing, and allow a decision on breach to be made.

Evidence Presented at the Hearing

Joint Statement of Facts

The Panel noted the terms of a joint statement of facts agreed between the ESC's and Respondent's representatives. The Hearing Panel noted, in particular, that it was not in dispute that, on 16 January 2019, the Respondent was sent papers labelled "Aberdeen City Council Preparation of Budget 2019/20 Councillor Pack" ("the budget pack"), ahead of the Council's budget meeting, which took place on 5 March 2019. Each page of this budget pack contained a header, in blue, with the text "CONFIDENTIAL". The Panel noted that the covering sheet contained text, in red, to the effect that the folder contained confidential information that "must not" be disclosed to any third party. The text further noted that disclosure of any of the contents of the folder to any third party could amount to a breach of the Councillors' Code of Conduct and the Market Abuse Regulations. The Panel further noted that under the 'staffing' section of the contents page of the budget pack there was a note, also in red, reiterating that the contents were confidential and should not be shared, disclosed or discussed with anyone outside CMT (being the Corporate Management Team).

The Panel noted that the overview section of the budget pack referred to a budget gap of £45 million, relating to rising costs and falling service income. The Panel noted, however, that the covering sheet to the folder advised councillors that further information continued to be provided and, as such, “uncertainty remains”.

The Panel noted that it was also not in dispute that the Respondent attended a public meeting of Cults, Bielside and Milltimber Community Council on 24 January 2019, in her capacity as an Aberdeen City councillor. The Panel noted that it was agreed that, amongst other matters and in response to members of the community council raising issues within the ward which required funding, the Respondent provided a verbal report on savings the Council was having to make in the following year to address a budget gap. The Panel noted that it was not in dispute that while the Respondent did not intend to disclose the figure of £45 million, she had done so under scrutiny from the Community Council members.

Submissions made by the ESC’s Representative

The ESC’s representative advised the approved minutes of the Community Council meeting record under the heading ‘Report from City Councillors’, that the Respondent had discussed the “Council’s financial position”, and had “briefed members on the budgetary challenges facing the Council”. The minutes further noted that a journalist from the *Evening Express* newspaper had been present.

The ESC’s representative advised that, following the meeting, the *Evening Express* published an article reporting on the meeting, in which the Respondent was directly quoted as having stated that the Council was “looking at having to save £45 million over the next year”. The ESC’s representative noted that, the following day, the *Press and Journal* newspaper reported that the Respondent had revealed that the Council could be facing cuts of £45 million over the following financial year.

The ESC’s representative advised that while it was accepted that the Respondent had not intended to disclose that there would be a budget deficit of £45 million, she should not have done so as the figure was unconfirmed and confidential at the time of the Community Council meeting on 24 January 2019. The ESC’s representative argued that the Respondent knew the sum was unconfirmed at the time she had disclosed it, which was evidenced by the fact that when she advised the Council’s co-leaders and its Monitoring Officer, in an email the following day, that the *Evening Express* was running a story about the Council’s budget gap, she reiterated that she had only stated at the meeting that the sum “COULD” be in the region of £45 million. The Respondent had further advised, in the email, that she had told the journalist from the *Evening Express* that the figure was still to be confirmed.

The ESC’s representative advised that the value of the budget gap, as included in the budget pack, was confidential at the time of the Community Council meeting. The ESC’s representative noted that the budget pack had clearly been marked as confidential and argued that it was evident from this, and the fact that the sum was unconfirmed that, it was not to be disclosed. The ESC’s representative noted that the Respondent’s contention was that not everything in the budget pack could be, or was, confidential and that the £45 million figure had not explicitly been labelled as such. The ESC’s representative argued, however, that it would be a disproportionate use of resources to expect Council officers to label every item in the pack. The ESC’s representative drew the Panel’s attention to the text on the cover sheet of the pack, advised that it was confidential and that disclosure of any of the contents of the folder to any third party could amount to a breach of the Councillors’ Code of Conduct and the Market Abuse Regulations.

The ESC’s representative noted that the Respondent further contended that the information about the budget gap was already in the public domain at the time she had disclosed the figure and had produced a letter from a firm of Chartered Accountants in support of this position. The ESC’s representative noted, however, that in order to calculate the budget gap, the Chartered Accountants had been obliged to examine dense financial information, from different sources that had been placed in the public domain over a substantial period of time. The ESC’s representative argued, therefore, that the fact they had to undertake such an exercise demonstrated that the sum was not readily available or accessible to the public. The ESC’s

representative noted that if the sum had already been in the public domain, it was unlikely that the Respondent's disclosure of it at the Community Council meeting would have led to the press coverage that ensued.

The ESC's representative argued that there were legitimate reasons why the Council wished to keep the information confidential until the budget meeting. This was because of the sensitivity of the information, given that the deficit could potentially lead to cuts in services, with its associated impact on residents and employees. In addition, the sum was not confirmed, and the Council had not yet fulfilled its reporting obligations in respect of the London Stock Exchange. The ESC's representative contended that disclosing the information before the budget meeting had the potential, therefore, to damage the integrity of the budget process and the standing of the Council. The ESC's representative noted that the confidentiality of the information was simply a matter of timing and that there was no question that the Council was trying to avoid media scrutiny. Instead, it was attempting to ensure that information about the budget gap remained confidential until such time as the budget process had concluded and the Council had reported the figure to the London Stock Exchange. The ESC's representative contended, therefore, that in disclosing the sum at the Community Council meeting before the process had ended and the report had been made to the London Stock Exchange, the Respondent had contravened paragraphs 3.16 and 3.17 of the Code.

Respondent's Evidence

The Respondent confirmed that she had disclosed the potential budget gap of £45 million at the Community Council meeting on 24 January 2019, when attending in her capacity as a councillor for Lower Deeside. The Respondent advised, however, that reference in the minute of the meeting to her having "briefed members on the budgetary challenges facing the Council" was somewhat misleading in that she had not chosen to deliberately disclose the sum. Instead, she had done so to try to ensure the community council members in attendance were aware of the budgetary constraints facing the Council. The Respondent further advised that she had done so in an attempt to urge members to prioritise the areas where expenditure might be required and to encourage attendance at a forthcoming meeting the Council had arranged to discuss funding matters with its stakeholders, which was scheduled to take place on 1 February 2019. The Respondent noted that stakeholders were being encouraged to attend the meeting so that they understood the funding challenge facing the Council and would then support any request it made, to the Scottish Government, for additional funding.

The Respondent advised that she had not considered, from the budget pack, that the sum of £45 million was confidential. This was because the warning on the front cover of the pack merely stated that it *contained* confidential information and that disclosing its contents *could* be a breach. The Respondent advised that she had understood this to mean that she was not to disclose information about specific budget lines and associated savings that would be required in certain areas, rather than the overall sum of the budget deficit, given the potential impact on staff and service users. The Respondent advised this understanding was based on her previous experiences and because there had been an extra warning about confidentiality before the 'Staffing' heading. In addition, the Respondent noted that some elements of the pack, such as a document issued by COSLA, were already in the public domain.

The Respondent advised that the Council's stakeholder meeting on 1 February 2019 had been arranged, with invitations issued, before the Community Council meeting on 24 January 2019. The meeting had been arranged so that the Council's co-leaders, Chief Executive and Chief Finance Officer could discuss the funding gap. The Respondent contended that this demonstrated that the information about the deficit was not, nor intended to be, confidential.

The Respondent advised, in any event, that she had been of the belief the figure of £45 million was already in the public domain. The Respondent drew the Panel's attention to the letter prepared for her by the Chartered Accountants, outlining its view that a figure of £44.34 million could be calculable from the following three sources of publicly available information:

- The Council's general fund revenue budget 2018/19 to 2022/23, which had been issued on 6 March 2018. This dealt with the expected cumulative shortfall covering the years 2018/2019 to 2022/2023. Column 2 of a table in the document entitled 'General Fund Revenue Budget 5 Year Position' revealed an expected shortfall of £30.94 million.
- A briefing note on the Scottish Government's Finance Settlement for 2019/20, which had been issued on 18 December 2018. This stated that the Council's Funding would be some £9.8 million lower than 2018/2019 and which would need to be added to the projected deficit of £30.94 million.
- The Scottish Government's Local Government Finance Circular No8/2018, which was issued in December 2018, confirmed that councils could increase council tax by up to 3% in 2019/20. The chartered Accountants had noted that if no increase was implemented, there would be a further shortfall of approximately £3.6 million.

The Respondent advised that she accepted that when she had disclosed the sum it was unconfirmed as the Scottish Government's Finance Settlement for 2019/20 had been delayed and was not known until 21 February 2019. The Respondent advised, however, that the figure did not change between 24 January 2019 (being the date she disclosed it) and 21 February 2019 and the fact it was unconfirmed was why she had stated at the meeting that the sum was "around" £45 million.

In response to cross-examination, the Respondent further accepted that while the stakeholder meeting had been arranged before she had disclosed the sum, it had taken place afterwards. The Respondent accepted that there was a possibility that the co-leaders and senior officers would have had to disclose more information about the budget than they had intended, at the meeting, following the publishing in the newspapers of her having disclosed the £45 million sum.

In response to questions from the Panel, the Respondent advised that she was unsure as to why her disclosure that the deficit would be £45 million made the headlines of local newspapers if the sum had already been in the public domain. The Respondent advised that the reason she had declined to confirm the sum when asked to do so by journalists after the Community Council meeting was not because she considered it to be confidential, but instead was because finance was not part of her portfolio and she did not want to undermine what was going to be said at the stakeholder event. The Respondent further advised that she could not recall exactly what level of budget shortfall was discussed at the stakeholder meeting on 1 February 2019, given this had taken place over a year and a half ago. She also acknowledged that the level of Council Tax to be applied, and therefore its potential impact on the budget was not known on the date of the Community Council meeting.

Submissions made on behalf of the Respondent

The Respondent's representative argued that as the warning on the front cover referred to the budget pack 'containing' confidential information, it was reasonable for the Respondent to have assumed that not everything within it was to be classified and treated as such. The Respondent's representative reiterated that some of the information it contained was clearly already in the public domain, such as a letter from COSLA to the Scottish Government.

The Respondent's representative confirmed that the Respondent had not intentionally disclosed any confidential information and, instead, had simply been responding to scrutiny at the meeting from members of the Community Council and providing information about the estimated budget gap, in order to manage their expectations about potential expenditure in the following financial year. The Respondent had not expanded upon her comments or provided any statement to the press.

The Respondent's representative advised that, the Respondent had, in any event, subsequently considered that the information that the budget gap could be in the region of £45 million was already in the public domain. The Respondent's representative noted that while the Council tax had not been set at the time of the Community Council meeting, it would have been relatively easy for someone who was interested to

ascertain what this was likely to be and the revenue it would generate. The Respondent's representative accepted that, in order to calculate the figure, different sources of information would be required. The Respondent's representative noted, however, that these were all in the public domain and that calculating the sum was a relatively simple arithmetical exercise.

The Respondent's representative indicated that some of the information used to calculate the budget deficit was still to be confirmed at the time of the disclosure by the Respondent. The Respondent's representative noted that this continued to be the case when the matter was discussed at the stakeholder meeting on 1 February 2019 and, indeed, when the budget position was reported to the London Stock Exchange on 26 February 2019. The Respondent's representative suggested that as the exact deficit was unconfirmed, it could not have been a breach of confidentiality to reveal the £45m figure when the Respondent mentioned it on 24 January 2019.

The Respondent's representative highlighted that there had been no trading against the Aberdeen City Council bond since 2016 and therefore no financial consequences as a result of the disclosure of the £45m figure by the Respondent.

The Respondent's representative contended, therefore, that the Respondent had not disclosed confidential information in breach of the Code.

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 Boulton at the time of the events in question.
2. The Respondent had breached paragraphs 3.16 and 3.17 of the Code.

Reasons for Decision

The Hearing Panel noted that the approved Minutes of the Cults, Bielside and Milltimber Community Council Meeting on 24 January 2019 refer to the Respondent as a councillor, and summarise her contribution under a section entitled 'Report from City Councillors'. The Panel was satisfied, therefore, that the Respondent was acting in her role as a councillor when she attended the meeting and, as such, the Code applied.

The Panel was further satisfied, from the note on the front page of the budget pack and the markings on all other pages, that its contents were confidential and were to remain so until the budget discussion on 5 March 2019. The Panel accepted the Respondent's position that certain matters in the budget pack were already in the public domain. The Panel considered, however, that it was evident that the budget gap of £45 million was an essential element of the matters to be discussed at the forthcoming budget meeting on 5 March 2019. As such, the Panel was of the view that this sum should be kept confidential. The Panel considered that the fact that a further confidential warning had been marked on the pack next to the 'Staffing' heading was only intended to serve as a reminder, or emphasis, in respect of a particularly sensitive area of the pack, and did not dilute the requirement not to disclose other confidential information it contained. The Panel considered that this additional warning could not reasonably be taken as giving any impression that other parts of the pack were not confidential. The Panel considered this was particularly the case given the further confidential warning next to the 'Staffing' heading stated, "I must reiterate the point of confidentiality, it may be possible to identify individuals from the lists included in this section, the pack is confidential and as such cannot be shared disclosed or discussed with anyone outside CMT". The Panel was satisfied that it was evident from the wording of the warning that it was only a reminder and that other parts of the pack should be kept confidential.

The Panel noted that sometimes confidentiality is a matter of timing, in that information may eventually be released into the public domain. In this case, the Panel considered that while information that there was a budget gap was in the public domain at the time of the Community Council meeting, it was not satisfied the figure of £45 million was readily accessible and identifiable. This was because the documents identified by the Chartered Accountants to work out what information was in the public domain had been collated from different sources which had been released over a nine-month period. The Panel considered that while a firm of Chartered Accountants, who were specialists in interpreting numbers, may have been able to identify and calculate the budget deficit from the sources used, it was not satisfied that members of the public would have been able to do so readily and without assistance. The Panel noted, in particular, that:

- the expected shortfall sum of £30.94 million was just one figure contained in a table in the document disclosing the Council's general fund revenue budget from 2018/19 to 2022/23 that had been made public in March 2018; and
- the funding reduction figure of £9.8 million was only mentioned in the three-page briefing note on the Scottish Government's Finance Settlement for 2019/20, issued on 18 December 2018.

The Panel noted even if a member of the public had located the documents and information used by the Chartered accountants to determine the budget gap, the calculable figure from this was £44.34 million, as opposed to the £45 million as disclosed by the Respondent.

In addition, the Panel noted that while the Scottish Government's Local Government Finance Circular issued in December 2018 confirmed that councils could increase council tax by up to 3% in 2019/20, anyone relying on it to work out the exact amount of Aberdeen City Council's deficit would have to know exactly what percentage increase would be applied and the impact of this in terms of revenue generated. The Panel further noted that that Chartered Accountants stated in their letter that they had understood "it was common knowledge between Councillors and Officials that a 1% rise in the Council Tax would equate to circa £1.2 million of additional revenue meaning that if no increase was implemented, there would be a further shortfall of c£3.6 million". The Panel considered that the fact that this may have been common knowledge amongst elected members and officers, did not mean it was known, or easily accessible, to the public at large. The Panel noted, in any event, that as the Council tax was not due to be set until the budget meeting on 5 March 2019, the implications of the settlement and amount of revenue to be generated could not be determined with certainty before that date.

While the Panel accepted that the Council's budget was a matter of public interest, and was to be discussed at a stakeholder meeting on 1 February 2019, it did not consider that the fact that this meeting was to take place meant that the Respondent was entitled to disclose the estimated shortfall figure from a set of papers marked as confidential at a preceding Community Council meeting. The Panel noted that no evidence had been led about the extent of information on the budget gap that was, or would have been, discussed at the stakeholder meeting, had the Respondent not released this figure at the preceding Community Council meeting. The Panel was of the view that it was entirely possible that the Council's co-leaders and senior officers would have had to disclose more information about the budget deficit than they had intended, at the meeting, after the newspapers had published the £45 million figure disclosed by the Respondent.

The Panel was further of the view that the fact that the figure was unconfirmed at the time of the Community Council meeting did not mean it was not confidential. The Panel considered that it would have been perfectly legitimate for the Council to have sought to keep the figure confidential until it was confirmed and discussed by elected members at the budget meeting on 5 March 2019, in order to avoid causing any undue concern or speculation on the part of those who would be affected by any potential expenditure and savings decisions arising as a result of the budget deficit.

The Panel concluded that the Respondent's actions, in disclosing confidential information at the Community Council meeting on 24 January 2019, amounted to a contravention of paragraphs 3.16 and 3.17 of the Code.

Evidence in Mitigation

The Respondent's representative advised that the Respondent had been a councillor for some 13 years and had an unblemished record. The Respondent's representative advised that she took her role as an elected member very seriously, as evidenced by the fact that she had been the Council's Deputy Leader between 2012 and 2017. The Respondent's representative noted that the Respondent worked hard to serve her community and, in doing so, was the Convener of the Council's Licensing Board and its Planning Committee.

The Respondent's representative emphasised that the disclosure had been inadvertent. The Respondent's representative noted that the Respondent had not disclosed the information for any political or personal reason, but rather with the intention of trying to manage the Community Council Members' expectations about potential expenditure in the following year and to encourage attendance at the planned stakeholder meeting on 1 February 2019. The Respondent's representative reiterated that the Respondent had not known that any members of the press were present at the community council meeting in question and that she had not disclosed the sum to seek publicity or draw attention to herself or the budget deficit. The Respondent's representative noted that the Respondent had reported the incident to the Council's Monitoring Officer shortly after it occurred and had apologised for the situation.

SANCTION

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

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, the Hearing Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes. The Panel heard that the Respondent had been a councillor for some 13 years, with an unblemished record. The Panel further heard that the Respondent took her position as a councillor very seriously and that she worked hard to serve her community. The Panel noted that the Respondent had accepted additional responsibilities as the Convener of the Council's Licensing Board and its Planning Committee.

The Panel emphasised, however, that the requirement for councillors to maintain confidentiality is a fundamental requirement of the Code. A failure to do so can damage the reputation and integrity of a Council and, further, can impede discussion and decision-making. The Panel agreed that it is legitimate and important for officers to be able to consult, in confidence, with elected members in respect of a council's finance and budget, in order to manage internal and external communications, and avoid causing any undue concern or alarm to those potentially affected (staff and service users) before expenditure and any savings options are finalised. The Panel found that the Respondent had failed to maintain confidentiality as required by the Code.

The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction. This was because the Panel had no reason to doubt the Respondent's position that the disclosure was unintentional and that it had not been made for personal or party-political reasons. The Panel further noted that the contravention had been a one-off incident and that the Respondent had herself highlighted the circumstances to the Council's co-leaders and Monitoring Officer shortly afterwards.

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: 28 October 2020



**Mr Michael McCormick
Chair of the Hearing Panel**