

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on 16 December 2020.

Panel Members: Professor Kevin Dunion, Chair of the Hearing Panel
Ms Ashleigh Dunn
Mr Mike McCormick

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/Fi/3278, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Andy Heer (the Respondent).

The Ethical Standards Commissioner was represented by Dr Kirsty Hood, QC. The Respondent represented himself.

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 28 September 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 paragraph 3.19, which states:

Appointments to Partner Organisations

3.19 You may be appointed or nominated by the Council as a member of another body or organisation. If so, you will be bound by the rules of conduct of these organisations and your responsibility for any actions taken by you as a member of such an organisation will be to the organisation in question. You must also continue to observe the rules of this Code in carrying out the duties of that body.

Evidence Presented at the Hearing

Joint Statement of Facts

The Panel noted that a joint statement had been agreed between the parties and that the following facts were not in dispute:

- In June 2017, the Respondent was appointed as a Director of Sustainability Fife Ltd and by Fife Council to the Board of Fife Resource Solutions (FRS). Both the Council and Sustainability Fife Ltd are members of FRS, which is a limited liability partnership and arms-length external organisation that was established to provide recycling and waste disposal services on behalf of the Council.
- The complainer, Councillor Jan Wincott, is also a council appointee to the FRS Board and was elected as its Chair after the local government elections in May 2017. The third council appointee to the FRS Board, and its Vice-Chair, is Councillor David Barratt.
- Fife Council, Sustainability Fife Ltd and FRS are parties to a Members' Agreement dated 10 February 2014. The Agreement regulates the conduct of the affairs of FRS, its members and the relationship between its members.
- The Respondent and other FRS Board Members received training, in September 2017, on being members of an ALEO. Amongst other things, the training covered the principle of confidentiality as part of board life and the need to uphold the common law implied duty of confidentiality.

The Panel noted that it was agreed that:

- In March 2020 FRS closed 11 recycling centres in line with Government guidelines relating to the coronavirus pandemic.
- On 18 May 2020, the Respondent submitted a press statement he had prepared for the approval of Fife Council's Conservative Group Leader. At the time he submitted the statement, the Respondent had

received papers for a special meeting of the FRS Board that was to be held online on 20 May 2020. The statement was published on the Fife Conservative and Unionist Association's website on 20 May 2020, between approximately 8:10 and 9:20, and a link to it also appeared on the Fife Conservative Facebook page at the same time.

- The statement quoted the Respondent, in his capacity as the party's Environment Spokesperson, as stating that: there appeared to be a general consensus from everyone, apart from the Scottish Government, that recycling centres across Scotland could re-open on 1 June 2020; he had been told there would be an online booking system to prevent queues of vehicles, with police on duty to control traffic; and he had further been advised that, due to space constraints the centres would only be able to accept certain types of waste and staff would not be allowed to assist the public.
- The Respondent attended the online FRS Board meeting on 20 May 2020, chaired by the complainer, which had been convened so that matters concerning the reopening of recycling centres as outlined in a report prepared by FRS's Chief Operating Officer could be discussed. The meeting commenced at about 10:00 and concluded at approximately 11:00.
- Matters concerning the reopening of recycling centres and how to communicate about this with FRS staff, council staff and elected members, and the public were discussed at the meeting.

The Panel noted that it was further agreed that:

- At 12:30 on 20 May 2020, the Respondent posted a message on Facebook to a group called 'Kettle A Village Life', stating that he had just heard that the recycling centres at Lower Melville Wood (Ladybank) and Cupar were to be amongst the last to reopen, due to police concerns about queuing traffic. The Respondent stated that he had spoken to the Chief Operating Officer of FRS who had confirmed that it was aware of the gap in provisions in North East Fife and was looking for a suitable location for a pop-up site for people to take their waste. The Respondent further stated that FRS was looking at reinstating the bulky uplift service in this area and that there would be more information in the press early the following week about opening dates and times and how to book a slot.
- The Respondent's Facebook biography referred to him being a councillor.

Witness Evidence

The ESC's representative led evidence from three witnesses, being: the complainer, Councillor Wincott; the Vice Chair of FRS, Councillor Barratt; and FRS's Chief Operating Officer, Mr Robin Baird.

Councillor Wincott confirmed that she had been elected as Chair of FRS Board and had chaired the meeting on 20 May 2020. Councillor Wincott advised that all board members had been sent papers in advance of the meeting, in accordance with FRS's usual procedures. Councillor Wincott advised that papers for meetings were not marked as private or confidential. Councillor Wincott stated that there was no need to do so as the papers were used for board discussions only and all board meetings were held in private. Councillor Wincott stated that all FRS Board Members had received training when appointed, which had covered the requirement to act in the interests of FRS and board confidentiality.

Councillor Wincott advised that she had become aware of the Conservative Group's press statement shortly after the meeting on 20 May 2020 had ended. Councillor Wincott stated that the quotes attributed to the Respondent in the statement had accurately summed up the information outlined in the papers that had been discussed at the meeting, in respect of the proposed re-opening of the recycling centres. Councillor Wincott advised that there had been lengthy discussions at the meeting on 20 May 2020 about the importance of managing communications about any information concerning the proposed re-opening of the recycling centres. Councillor Wincott stated that it had been agreed that it was of paramount importance that the information should be disseminated to the Council's other elected members and to staff in the first instance, before it was made public. This was because the proposals needed to be approved by the Council and FRS Board Members had agreed that they needed to ensure staff who worked at the recycling sites were advised of which were to open and when. Councillor Wincott noted that the Scottish Government was also

still to confirm that travel to recycling centres was to be allowed. Councillor Wincott further noted that it was important for the Council's Communications Team to have time to put a strategy in place to ensure that there was full and accurate messaging about which centres were to re-open, what materials could be disposed of and how to access the sites.

Councillor Wincott advised that Councillor Barratt had specifically told other members, at the meeting, not to post information about the proposals on social media. Councillor Wincott advised that no one present had raised any concerns about this or had given any indication they did not understand the need to keep the information confidential. Councillor Wincott noted that the minutes of the meeting reflected the discussion about the importance of managing communications. Councillor Wincott accepted, however, that the Respondent had not attended a subsequent meeting, when the minutes were approved and, in response to a question from the Panel, advised that the Respondent had not been sent a copy of the minutes.

Councillor Wincott advised that she had been sent a screenshot of the Respondent's Facebook posting shortly after it had been published at approximately 12:30 on 20 May 2020. Councillor Wincott stated that the post contained information that had been discussed at the meeting earlier that day, which was to be the subject of the communications strategy. Councillor Wincott advised that she had been "flabbergasted", "disappointed" and "very shocked" to see the contents of the post, as she had been of the belief that all the FRS Board Members present at the meeting had agreed, and were behind, the decision about how communications about the proposed re-opening of the recycling centres were to be managed. Councillor Wincott advised that she had been concerned particularly about the impact on staff who worked at the centres, as she did not consider it was appropriate for them to learn via social media that they may or may not be required to return to work.

Councillor Wincott advised that she had expressed her disappointment to the Respondent and had suggested he resign from the Board of FRS. Councillor Wincott explained that the Respondent had asked to be able to present his position to the other members and, indeed, had done so at a meeting in June 2020. Councillor Wincott advised, however, that the other members had unanimously agreed with her view and, as a result, the Respondent had resigned.

Councillor Wincott noted that there had been a great deal of controversy surrounding the landfill site at Lower Melville Wood. Councillor Wincott advised that while the Respondent had raised the possibility of re-opening the recycling centre at the same site at the meeting on 20 May 2020, he had accepted the explanation provided by Mr Baird to the effect that the police had advised against this (due to concerns about safety as any queues of traffic to the centre could overflow on to an adjacent main road). Councillor Wincott stated, in any event, that she considered that any issues concerning the landfill site at Lower Melville Wood were separate and distinct from the proposals relating to the re-opening of the recycling centres across the whole local authority area.

In response to cross-examination by the Respondent, Councillor Wincott confirmed that while she had not attended a public meeting held in December 2019 about the landfill facility at Lower Melville Wood, she was aware that concerns had been raised and that officers of FRS had committed to improving its communication with the public about the site. Councillor Wincott further confirmed that the Respondent had been excluded from the FRS Board meeting immediately following the one held on 20 May 2020 and had not been sent the papers for it, including the minutes of the meeting on 20 May 2020, as she had been concerned that he would not keep these confidential.

Councillor Barratt confirmed he was also a council appointee to FRS and its Vice Chair. Councillor Barratt confirmed that training provided to all FRS Board Members had covered the requirement for them to treat items being discussed at meetings as confidential. Councillor Barratt further confirmed that FRS Board Members had been given training on their responsibilities as directors and board members. Councillor Barratt advised that there had been no need to mark the papers for the meeting on 20 May 2020 as confidential or

private as the FRS Board Members understood, both from the training and their experience of working as a Board, that they were to be treated as such.

Councillor Barratt stated that he had become aware of the press statement issued by the Conservative Group shortly after the meeting on 20 May 2020. Councillor Barratt advised that he considered the information contained in the quotes by the Respondent was not in the public domain and, instead, had come from the meeting papers.

Councillor Barratt confirmed that the re-opening of the recycling centres and a strategy for communicating about this had been discussed at the meeting on 20 May 2020. Councillor Barratt explained that as FRS still needed to discuss the proposals with both the Council and trade unions, and as it was apparent that any decision to keep some of the centres closed for the time-being was likely to be unpopular, he had made the point to other Board Members that all communications would require to be co-ordinated by the Council. This was to ensure that information was not disclosed in a piecemeal fashion and to allow a full explanation of the reasoning behind the decision to be provided. Councillor Barratt advised that not only had he specifically highlighted the need to keep the information confidential until a communications strategy was in place, but that he had also explained his reason for doing so was because he was aware of concerns that elected members were disclosing information about the Council's response to the Coronavirus pandemic to the press. Councillor Barratt stated that no objections to this had been raised at the meeting and, instead, everyone present had agreed there should be a co-ordinated communications strategy about the re-opening of the recycling centres. Councillor Barratt advised that there was no indication that this had not been understood by the Respondent or anyone else.

Councillor Barratt confirmed that as there had been no time to seek approval from the Council or implement the communications strategy, between the conclusion of the meeting and the publishing of the Facebook post by the Respondent, he had been shocked and dismayed to learn of its content. Councillor Barratt confirmed that the information supplied in the post had been discussed in the papers for, and at, the meeting earlier that day. Councillor Barratt advised that he considered that it was unfair for staff who worked at the recycling sites and, as such, would be directly affected by them, to have learned about the proposals from a social media post. Councillor Barratt further advised that he had found it frustrating that information had been disclosed to the public in one area at a time when he and other elected members were having to advise their constituents that they were unable to provide them with information as to when and how the centres might re-open.

Councillor Barratt advised that after being asked by Councillor Wincott, as Chair, to resign from the Board, the Respondent had made his case as to why he should not do so at a meeting in June 2020. Councillor Barratt confirmed, however, that the Respondent agreed to resign when the other FRS Board Members had expressed their frustration and disappointment at his actions and supported Councillor Wincott.

Mr Baird confirmed that he was FRS's Chief Operating Officer. Mr Baird confirmed that the training provided to all FRS Board Members had covered their duties to FRS as an entity, their responsibilities as both board members and directors, and confidentiality. Mr Baird advised that all Board Members understood that the meeting papers were of a confidential nature and were only to be discussed in the context of FRS Board meetings, which were held in private. Mr Baird advised that, in the three years he had been employed by FRS, there had been no other instance where papers or their contents had been disclosed.

Mr Baird advised that he was made aware of the contents of the press statement shortly after the meeting on 20 May 2020 had concluded. Mr Baird confirmed that he considered the information it contained, as disclosed by the Respondent, came from the meeting papers and was not, at the time, in the public domain. Mr Baird stated that a great deal of time had been devoted, at the meeting, to the need for there to be an effective communications strategy about the re-opening of the recycling centres. Mr Baird advised this was because it was agreed that information should not be disclosed to the public before Council approval had

been granted and before any staff potentially affected by the re-opening of the centres were informed. Mr Baird advised that, in addition, the Scottish Government was still to confirm that travel to recycling sites was permitted and he was also required, as part of its licensing conditions, to inform the Scottish Environment Protection Agency. Mr Baird explained that as there were also concerns about travel disruption, it had been agreed that no information would be disclosed to the public until such a time as a communications strategy was in place, that both the FRS and Council's websites had been updated and an online booking system had been established. Mr Baird advised that it had been agreed that it was essential to have a communications strategy in place to ensure there was accurate and consistent messaging about which centres were to re-open, what services were being provided and the rationale for these decisions.

Mr Baird noted that the Respondent's Facebook post had referred to a conversation the Respondent had supposedly had with him. Mr Baird advised that he had not spoken to the Respondent outside of the FRS Board meeting on 20 May 2020 regarding the information in the Facebook post. Mr Baird confirmed that the information disclosed in the post had been discussed at the meeting and was the subject of the communications strategy that was still to be implemented. Mr Baird advised that he had been surprised to learn of the post, as the importance of a co-ordinated communications strategy had been discussed and agreed at the meeting. Mr Baird stated that he had been contacted by the trade unions afterwards, as they had been concerned that their members had learned about the re-opening of the centres from a social media post, which had not provided any detail about whether their safety had been considered. Mr Baird noted that the publishing of the post before the FRS and Council's websites had been updated risked causing confusion. It also risked creating a perception that both organisations were failing to take action.

Mr Baird argued that any concerns about the landfill site at Lower Melville Wood were entirely distinct from the matters concerning the re-opening of the recycling centres that were discussed at the meeting on 20 May 2020. This was because while there was a recycling centre at the same location, it was a separate and distinct operation from the landfill site. Mr Baird noted, in any event, that the FRS Board discussion and the matters that were disclosed by the Respondent concerned all the recycling centres across Fife.

In response to cross-examination, Mr Baird confirmed that the Respondent had raised the question of whether the recycling centre at Lower Melville Wood would be re-opened at the meeting on 20 May 2020, but had accepted the proffered explanation as to why it would not be. Mr Baird further confirmed that FRS had considered potential 'pop-up' recycling centres to breach the gap in service provision while some of the centres remained closed, but that it had reached the conclusion that this was not a viable option, due to traffic management issues.

Submissions made by the ESC's Representative

The ESC's representative advised that she considered the Panel had sufficient evidence before it to conclude that the Respondent had been provided with training on the distinct role and responsibilities of being a member of FRS, as an arms length external organisation. The ESC's representative noted that as a board member and director of FRS, the Respondent had a duty to act in good faith to promote its success as an entity, irrespective of any other roles he held. The ESC's representative noted that the papers for the meeting on 20 May 2020 had been distributed to FRS Board Members for use at the meeting and argued it was evident from this that their contents were to be kept confidential. The ESC's representative noted that it was also evident, from the fact that they had called on the Respondent to resign from the Board, that the other board members understood that the contents of the meeting papers were not to be disclosed and, therefore, that there had been no need for them to have been marked as private or confidential.

The ESC's representative accepted that the minutes of the meeting on 20 May 2020 had not been sent to the Respondent but argued this was of no practical importance as they had only been introduced and included as evidence in the Hearing productions because they provided a contemporaneous account of what had been discussed at the meeting. The ESC's representative noted that the other FRS Board Members could have

asked for the minutes to be amended, before they had been ratified, if they had concerns they did not accurately reflect what had been discussed and agreed. They had not done so.

The ESC's representative contended that it was evident from the minutes and the accounts from the three witnesses, that matters concerning both the re-opening of the recycling centres and a strategy for communicating about this had been discussed at the meeting on 20 May 2020 (albeit it had been noted that implementation of some of the agreed proposals were contingent on approval from the Council and Scottish Government).

The ESC's representative drew the Panel's attention to a risk assessment prepared by FRS, dated 28 June 2020, in respect of the re-opening of the recycling centres. As this assessment included concerns relating to service users not understanding or being aware of the new restrictions that were to be put in place, the document stressed the importance of having structured communications in place to minimise or mitigate this risk of this happening. The ESC's representative contended that the risk assessment, minutes and witness accounts were all consistent with, and supported, the contention that it had been agreed at the meeting that having and implementing a coordinated communications strategy about the re-opening of some of the recycling centres was of particular importance.

The ESC's representative noted that the Respondent's position was that some, if not all, of the information he had disclosed in the press statement and Facebook post were already in the public domain. The ESC's representative noted that this was disputed by the witnesses, who had all confirmed that it had come from the meeting papers. The ESC's representative argued that the fact the Respondent had referred, in the quotes attributed to him in the press statement as having been 'told' or 'advised' about the information, supported the contention it had come from the meeting papers (as opposed to having already been in the public domain). Similarly, the ESC's representative contended that the Respondent's references, in the Facebook post, to him 'having just heard' and 'having just spoken to the Chief Operating Officer' demonstrated that he had come into possession of the information he was disclosing through his attendance at the meeting that day. The ESC's representative argued, therefore, that the information had not been in the public domain and, instead, had been acquired from the meeting papers and discussion. The ESC's representative further argued that the proposals should not have been disclosed, as they were confidential and contingent on approval from the Council and from the Scottish Government (in respect of the public being allowed to travel to recycling sites) being granted.

The ESC's representative contended that the Respondent's actions, in disclosing the information before the necessary approvals had been granted and before a communications strategy had been implemented not only had the potential to cause difficulties but had actually done so. The ESC's representative noted, in particular, that the question of which centres were and were not to open had a direct impact on the staff who worked at the recycling centres and argued it would have been concerning for both the staff and the trade unions to discover this from an unofficial source, with no associated information about any measures being taken to ensure their safety being provided. The ESC's representative noted that there was also an impact on other councillor members of the FRS Board, who had been obliged to keep the information confidential and to refuse to answer questions from their own constituents as to when any local centres might re-open.

The ESC's representative advised that the FRS Members' Agreement document outlines the "rules of conduct" of the organisation. The ESC's representative advised that clause 12.2 of this provides that "each member shall at all times show the utmost good faith to [FRS]", while clause 14.1 requires individual board members to act in a way which promotes the success of the organisation, irrespective of any other duties. The ESC's representative noted that as the Respondent was a Council appointed representative, he had a responsibility to procure the compliance of the Council, as a Member, with clause 12.2. This was in addition to his own personal responsibility as an individual, under clause 14.1.

In considering what amounted to ‘utmost good faith’, the ESC’s representative drew the Panel’s attention to the case of *Berkeley Community Villages Ltd & Anor v Pullen & Ors* [2007] EWHC 1330, which indicated the question was whether the individual in question had observed reasonable commercial standards of fair dealing and the required faithfulness to the agreed common purpose and consistency of the company. The ESC’s representative noted that while this was an English case, the approach had been adopted by Lord Glennie, when he referred to it in the Scottish case of *EDI Central Ltd v National Car Parks Ltd* [2010] CSOH 141.

The ESC’s representative contended that, when handling the papers and information he had received by virtue of his role as a Board Member of FRS, both before, during and after the meeting on 20 May 2020, the Respondent was exercising his functions as a Board Member. As such, he had a responsibility to be faithful to the agreed common purpose of FRS and to promote its success as an organisation. The ESC’s representative noted that it was not enough for the Respondent to say that he considered he was acting in good faith in the best interests of FRS when disclosing the information, if the evidence demonstrated that no other Board Member or director would have reasonably regarded his actions as being compatible with that aim. The ESC’s representative argued that the evidence did not support an assertion the Respondent had been acting in good faith in the best interests of FRS, given that he had disclosed the information in direct contradiction to the decision made at the meeting that it was only to be disseminated as part of an agreed and structured communications strategy. The ESC’s representative contended that the fact that the other board members were sufficiently concerned that they had called for the Respondent to resign, supported the argument that his conduct had not been compatible with what had been agreed as being the appropriate course of action, in the best interests of FRS. The ESC’s representative argued that any suggestion that disclosure of the information in a piecemeal manner was in the best interests of FRS, or was likely to promote its success, was simply not plausible given the various reasons outlined by the witnesses in respect of why communications about the re-opening of the recycling centres should be controlled.

The ESC’s representative contended the fact that the Respondent had disclosed the information in a press statement issued by the Conservative Group calling on the Scottish Government to take action or provide information, further demonstrated that he had not been acting in good faith in the best interests of FRS, but rather in the interests of his political party. The ESC’s representative argued the fact that, in the statement, the Respondent was referred to as the party’s Environment Spokesperson (as opposed to a Board Member of FRS), and the fact that he had not referred, in the Facebook post, to the FRS meeting or its decision-making supported the contention that he had disclosed the information in support of the interests of his party and / or his interests as a councillor. The ESC’s representative noted that, in his response to the complaint, the Respondent had sought to link his disclosure of the information about the recycling sites that were to re-open to the issue of public concern about a lack of transparency on the part of FRS in respect of the landfill site at Lower Melville Wood. The ESC’s representative argued this further demonstrated that the Respondent had placed constituency issues before the interests of FRS.

The Respondent’s Evidence and Submissions

The Respondent advised that he represented Howe of Fife and Tay Coast, being the largest ward in the Fife Council area. The Respondent advised that after being a member of Auchtermuchty and Strathmiglo Community Council for over 20 years, he had been elected as a local authority councillor in May 2012. The Respondent advised that he had only stood for election at the urging of his local community and had not done so for any political purposes. The Respondent stated that he was a full-time councillor and worked seven days a week to serve his constituents and local community.

The Respondent advised he had not been provided with a copy of the minutes of the FRS Board meeting on 20 May 2020 at any time while he was still a member and director of the organisation. The Respondent confirmed that Councillor Wincott had asked him to resign and had lodged a complaint with the ESC before he had been afforded the opportunity to speak to the other FRS Board Members about the events in question. The Respondent advised that it was not until a FRS Board meeting on 19 June 2020 that he had

been allowed to give his version of events. The Respondent confirmed that he had immediately resigned from FRS at that meeting when it had become apparent the others FRS Board Members wished him to do so. The Respondent stated that there was deep anger and resentment from local residents about how the landfill site at Lower Melville Wood was being managed and advised that he had joined the FRS Board to try to resolve these issues. The Respondent indicated that he was relieved to no longer be a Board Member of FRS as his resignation meant that he could now assist the local community without having to be an apologist for FRS or being fettered by his obligations to its board.

The Respondent contended that the information he had provided in the press statement and Facebook post was not confidential, as there had been a great deal of reporting in the press about the possibility of the recycling centres being re-opened and booking systems being used. This had resulted in widespread public speculation about how and when this would happen in Fife. The Respondent noted that reporting on issues about difficulties that had arisen when recycling centres in England had re-opened had further fuelled the public's interest in the matter.

The Respondent advised, in any event, that he believed he was acting in the best interests of FRS when disclosing the information in both the press statement and Facebook post. The Respondent explained this was because it had been agreed, at a public community meeting in December 2019, that FRS would be more transparent with local residents about the actions it was taking to resolve their concerns about the landfill site at Lower Melville Wood. The Respondent indicated that, in disclosing the information, he had simply been trying to forewarn local residents that the recycling centre located at the same site would not be re-opening on 1 June 2020, as they had expected and hoped.

In response to cross-examination, the Respondent confirmed that he had not shared information from FRS Board meeting papers routinely, as he understood the need to respect confidentiality. The Respondent explained that he had contributed to the press statement calling for more information about the re-opening of the recycling centres to be made public because he was aware that his constituents were angry about the lack of information and knew that he could not tell them what was going on. The Respondent accepted, however, that the press release outlined his political party's stance.

The Respondent further accepted that the references in the press statement to him having been 'told' about or 'advised' of certain information, and in the Facebook post to him 'having just heard' and 'having just spoken to the Chief Operating Officer', seemed to contradict his position that the information had been the subject of press reporting and was already in the public domain. The Respondent advised, however, that this was simply "careless phrasing" on his part - other local authorities were considering, for example, booking systems and traffic management issues and so he considered the information was already widely known.

The Respondent accepted that there had been a discussion at the FRS Board meeting on 20 May 2020 about the need to notify the Council of the proposals in respect of the re-opening of the recycling centres but advised his recollection was that this had centred on the process to be followed. The Respondent contended that he could not recall any emphasis on confidentiality, nor any discussion about a need to provide the Council's Communications Team with the information before it was disclosed more widely. The Respondent accepted, however, that he had not been asked to make the information public, via social media. The Respondent further accepted that he had not provided any information, in either the press statement or Facebook post, about any measures that were to be taken to ensure the centres could be re-opened safely.

In response to a question from the Panel, the Respondent confirmed that he had not expressed his view, at the meeting, that it was in FRS's best interests for the information that had been discussed to be released to the public immediately. The Respondent advised that he had simply not thought to do so. The Respondent confirmed that he had not alerted FRS to the fact that he intended to publish the Facebook post. The Respondent confirmed that his view had been that the public would be outraged at having to wait for an official press statement to be released and reiterated that, as such, he was simply trying to manage

expectations and let his community know that the local recycling site would not re-open on 1 June 2020 as expected. The Respondent reiterated his contention that, in doing so, he had acted in the best interests of FRS.

The Respondent raised a concern about the fact that while the complaint made to the ESC had concerned an alleged breach of the confidentiality requirements in the Code, the allegation as referred to the Standards Commission was that he had breached paragraph 3.19 (being an entirely separate and distinct provision). The Respondent also raised a concern that he had not been advised of the capacity in which Councillor Wincott had made the complaint.

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 Heer.
2. The Respondent had breached paragraph 3.19 of the Code.

Reasons for Decision

The Hearing Panel noted that the Respondent was quoted in the press statement as contributing to it in his capacity as his party's Environment Spokesperson. The Panel further noted that the Respondent's Facebook username was "Andy Heer" and that there was reference in the biography section of his page to his role as a Fife councillor. The Panel was satisfied, therefore, that the Respondent could reasonably be perceived as acting as councillor at the time he contributed to the press statement and published the Facebook post and, as such, the Code applied.

Having considered the evidence and submissions, the Panel was satisfied, on the balance of probabilities, that the information the Respondent disclosed in both the press statement and Facebook post had been included in the papers for, and thereafter discussed at, the FRS Board meeting on 20 May 2020. The Panel noted that while there may have been speculation in the press about the re-opening of recycling centres and how this could be managed, it did not accept that information about:

- the specific recycling centres in Fife that were to re-open;
- the fact that there would be an online booking system to access the centres;
- the centres only being able to accept certain types of waste; and
- that staff would not be allowed to assist the public

was already in the public domain at the time of the Respondent's disclosures.

The Panel was satisfied that training on their role and responsibilities, including the requirement to maintain confidentiality, had been provided to all FRS Board Members. The Panel noted that the Respondent accepted that he was aware that FRS meeting papers and Board discussions were private and were to be kept confidential and, further, that he was aware of the obligation on him to act in good faith in the best interests of FRS when acting in the capacity as a Member of its Board.

The Panel accepted the evidence from the three witnesses led by the ESC that it had been emphasised at the meeting on 20 May 2020 that the information about the re-opening of the recycling centres should be disclosed in a controlled manner, in agreement with the Council and other stakeholders, and not prior to a connected decision being made by the Scottish Government. The Panel agreed with the ESC's representative that the minutes of the meeting and the fact that other FRS Board Members had called on the Respondent to resign from the Board in light of the disclosures he had made supported this. The Panel was satisfied that the Respondent was aware, or should have been aware of, the decision that a coordinated communications strategy was to be created and implemented.

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, while the Panel accepted that the question of which re-cycling centres were to open was a matter of public interest, it did not consider the Respondent was entitled to disclose this information when he did. The Panel was satisfied, from the witness evidence and submissions made, that it had been made clear to FRS Members, at the meeting on 20 May 2020, that the information was not to be made public until such a time as the Council had agreed to the proposals and officers had been fully briefed, so that they could manage communications accordingly.

The Panel agreed that, in this case, it was legitimate for FRS to have decided that the information about the re-opening of the recycling centres was to be kept confidential until such a time as it had been able to obtain Council approval and ensure that information was provided to staff and the public in a controlled, uniform and comprehensive manner. The Panel noted that a failure to do so meant that it would have been more difficult for officers to manage internal and external communications effectively. The Panel agreed that a piecemeal disclosing of the information without a communications strategy being in place, a consultation with trade unions about safety being undertaken, adequate training being given to staff, and websites being updated could lead to public confidence in FRS and the Council being undermined.

The Panel noted that paragraph 3.19 of the Code provides that councillors appointed to partner organisations, such as FRS, are “bound by the rules of conduct” of such organisations. The Panel noted that the FRS Members’ Agreement document outlines the “rules of conduct” of the organisation. Clause 12.2 which provides that “each member shall at all times show the utmost good faith to [FRS].” Clause 14.1 of the FRS Agreement relates to conflicts of interest and requires individual board members to act in a way which promotes the success of the organisation, irrespective of any other duties.

The Panel was satisfied that when handling the papers and information he had received by virtue of his role as a Board Member of FRS, both before, during and after the meeting on 20 May 2020, the Respondent was exercising his functions as a Board Member and, as such, was obliged to act in accordance with its Members’ Agreement.

The Panel found that the Respondent, in disclosing the information, had failed to act in the best interests of Fife Resource Solutions and clauses 12.2 and 14.1 of its Members’ Agreement, as required by the Code. Given the Respondent had acted contrary to what had been agreed at the meeting and without having shared any intention to do so, the Panel was not satisfied that the Respondent had any reasonable ground for arguing he was acting in good faith in the best interests of FRS. Instead, the Panel considered that it was clear from the Respondent’s own evidence and submissions that he was trying to ensure that information about the re-opening of the recycling centres was made public. The Panel was of the view that as the press statement was released on behalf of the Conservative Group, it was evident that the Respondent’s contribution was intended to support his political party, rather than to promote the success of FRS. Similarly, the Panel considered that in disclosing information in the Facebook post, the Respondent’s aim had been to act in what he considered were the best interests of his constituents. The Panel did not consider that these perceived interests could be conflated with the best interests of FRS, given its aim of ensuring the information was disseminated in a controlled manner, after all necessary approvals had been obtained. The Panel concluded, therefore that the Respondent had breached paragraph 3.19 of the Code.

As an aside, the Panel noted that anyone can make a complaint to the ESC that a councillor has contravened the Code and there is no requirement for a complainer to outline the capacity in which they are doing so. The Panel noted, in any event, that there was no indication in the complaint form that the complainer, in this case, had made the complaint in any capacity other than that of an individual. The Panel noted that it was apparent, from the ESC’s report, that the complaint had been investigated and referred to the Standards Commission on that basis. The Panel noted that the Respondent had also complained about the fact that while the complaint made to the ESC had concerned an alleged breach of the confidentiality requirements in the Code (paragraphs 3.16 and 3.17), the allegation referred to the Standards Commission was that he had

breached paragraph 3.19. The Panel was satisfied that it was for the Standards Commission to consider the alleged contravention as referred by the ESC. The Panel was of the view, nevertheless, that it was entirely appropriate and competent, in terms of the 2000 Act, for the ESC to identify the provisions in the Code that she considered had been contravened, following investigation, regardless of whether these differed from any identified by the complainer.

Evidence in Mitigation

In mitigation, the Respondent reiterated that he retained the honest belief that he had been acting in good faith in the best interests of FRS when disclosing the information. The Respondent drew the Panel's attention to character references and testimonials submitted on his behalf.

SANCTION

The decision of the Hearing Panel was to suspend the Respondent, Councillor Heer's entitlement to attend all meetings of Fife Council, and all meetings of any other body on which he is a representative or nominee of the council, for January and February 2021.

The decision was made in terms sections 19(1)(b)(i) and 19(1)(b)(iii) 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 over eight years, having previously been a community councillor for over 20 years, and that he had an unblemished record. The Panel reviewed various character references submitted on behalf of the Respondent and noted that these indicated he took his position as a councillor very seriously and that he worked hard to assist his constituents and improve communities within his ward. The Panel noted that, as a result of him having disclosed the information, the Respondent was no longer a Director of Sustainability Fife Ltd or a member of the Board of FRS.

The Panel emphasised, however, that the requirement for councillors to abide by the rules of conduct of any partner organisations they are appointed to is an important requirement of the Code. This includes acting in good faith and refraining from disclosing confidential information. The Panel noted that a failure to do so can damage the reputation and integrity of a Council and, further, can impede discussions and decision-making at meetings of the partner organisation. The Panel was concerned that the Respondent did not seem to recognise that divulging confidential information was not in the best interest of FRS and was, therefore, a breach of his duty to act in good faith. Instead, the Respondent appeared to have chosen to act in the interests of his party and his role as a constituency representative.

The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction. While the Panel noted that the question of when the information was to be disclosed was simply one of timing and did not, therefore, accept the Respondent's argument that his overriding aim was to be transparent, it nevertheless noted that the contravention had been limited to the one incident.

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: 22 December 2020



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