

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on 18 January 2021.

Panel Members: Ms Ashleigh Dunn, Chair of the Hearing Panel
Mr Michael McCormick
Mrs Tricia Stewart

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/OI/3265, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor John Ross Scott (the Respondent).

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

Referral

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

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code and, in particular, that he had contravened paragraphs 3.1, 3.2, 3.16 and 3.17. The relevant provisions were:

General Conduct

3.1 The rules of good conduct in this section must be observed in all situations where you act as a councillor or are perceived as acting as a councillor, including representing the Council on official business and when using social media.

Relationship with other councillors and members of the public

3.2 You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor.

Confidentiality Requirements

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 expressed concerns that he was representing himself, whereas the ESC was being represented by a QC. The Chair confirmed that the Panel was aware of this and would ensure the Hearing was conducted fairly. The Respondent noted that he had wished to call a fourth witness but had been advised that he had missed the deadline for doing so. The Panel noted that the Respondent had only advised the Standards Commission of his wish to call the fourth witness on 6 January 2020, despite being asked to provide the names of all witnesses by 24 November 2020. The Panel had noted that as the fourth witness was a

councillor who had been to at least one of the briefings in question, there was no reason why the Respondent could not have identified him as a potential witness at an earlier stage. As such, the Panel had determined that, in the circumstances, it would not be fair to the ESC to allow him to appear at such short notice.

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:

- The Respondent administers and operates a Facebook page under an account entitled ‘Councillor John Ross Scott – Kirkwall East’.
- On 16 March 2020, the Respondent attended a briefing for elected members convened by the Council’s Senior Management Team to discuss the Council’s handling of the Coronavirus pandemic. Later that day, the Respondent published a post on his Facebook page containing information about the Council’s response to the pandemic and the briefing.
- The Respondent attended another briefing meeting for elected members regarding the Council’s handling of the Coronavirus pandemic on 23 March 2020. Later that day, the Respondent published a post on his Facebook page outlining the recommendations that had been approved at the meeting.

The Panel noted that it was agreed that:

- The Council’s Interim Chief Executive sent the Respondent an email on 24 March 2020 drawing his attention to the confidentiality requirements in the Code. The email stated that the Respondent was to refrain from attending member briefings, with immediate effect, until further notice.
- The Respondent sent the Interim Chief Executive an email in response, on 25 March 2020, in which he advised that he had removed references to the Council’s declaration of a Major Emergency and possibility of a reduction in bin collections and recycling (being two pieces of information shared at the briefing on 23 March 2020) from his Facebook post.
- The Respondent, Interim Chief Executive and Council’s Monitoring Officer had an online meeting on 15 April 2020 during which it was agreed that the Respondent could resume attendance at elected members’ briefing sessions, provided he ‘behaved’.
- On the morning of 20 April 2020, the Respondent attended a members’ briefing session where news of the passing of another Orkney Islands councillor the previous day was discussed. Early that afternoon, the Respondent published a post on his Facebook page in which he stated he was ‘saddened to learn of the death’ of the late councillor. The Respondent was contacted shortly afterwards, on the same day, by the late councillor’s son and daughter, separately. Both the son and daughter asked the Respondent to retract his post as they had not yet advised all close family members of the news. The late councillor’s daughter explained that they would prefer other family members to hear the news directly from them. The Respondent removed the post later that same afternoon.

Witness evidence on behalf of the ESC

The ESC’s representative led evidence from five witnesses, being: the Council’s Monitoring Officer, Mr Gavin Mitchell; the Council’s Interim Chief Executive, Mr John Mundell; the complainer and Council’s Convener, Councillor Harvey Johnston; the Council’s Leader, Councillor James Stockan; and Councillor Graham Sinclair.

Mr Mitchell advised that the Council’s Senior Management Team held briefing sessions, which were open to all councillors. Mr Mitchell advised that such briefing sessions had been held approximately once a week at the onset of the coronavirus pandemic in order for the Senior Management Team to provide elected members with information about, and seek their views on, the Council’s proposed response and the arrangements it was putting in place to provide services with as little disruption as possible. Mr Mitchell contended that the briefings were ‘strictly private’ in nature and that both Mr Mundell and Councillor Stockan had made it very clear that the information being disclosed at them was confidential. Mr Mitchell

advised that councillors had been left in no doubt that the information was not to be disclosed publicly. Mr Mitchell stated that while he had not attended the briefing on 16 March 2020, he was sure that the information the Respondent had relayed in his subsequent Facebook post that day had been disclosed at the meeting and was of a confidential nature.

Mr Mitchell confirmed that he had attended the 23 March 2020 briefing where information was provided to the effect that the Council was to declare a major emergency and the steps that would be taken in light of that decision. Mr Mitchell contended that it had been made very clear that the information disclosed at the briefing was to be kept confidential to enable the Council to make arrangements so that it could announce the decision without causing unnecessary alarm. Mr Mitchell advised that he had been made aware of the Respondent's Facebook post of 23 March 2020 the following day. Mr Mitchell contended that there "was no doubt whatsoever" that the post contained confidential information disclosed at the briefing, including bullet points stating that the Council was to declare a major emergency, that it was to set up a Humanitarian Assistance Centre, that preparations were being made to handle a large number of burials and that there may be a reduction in bin collections and recycling. Mr Mitchell advised that after Mr Mundell raised concerns with the Respondent about his post and the potential breach of confidentiality, in emails exchanged on 24 and 25 March 2020, the Respondent removed two of the bullet points from the post, concerning the declaration of a major emergency and refuse collections. Mr Mitchell stated that Mr Mundell advised the respondent, in the emails, that he was to refrain from attending any briefings, until further notice, as he could not be trusted not to disclose confidential information.

Mr Mitchell advised that he had attended an online meeting with the Respondent and Mr Mundell on 15 April 2020, at which the Respondent had apologised for disclosing confidential information and had undertaken not to do so in future. Mr Mitchell stated that Mr Mundell had agreed the Respondent could resume his attendance at the briefings on the basis of this undertaking and on the agreement that he would seek advice if he was in any doubt about whether information was confidential and / or sensitive. Mr Mitchell advised that it had been made clear to the Respondent that a complaint would be made to the ESC if there was any further unauthorised disclosures by the Respondent.

Mr Mitchell advised that an agenda had been produced for the briefing on 20 April 2020. Both this and the Outlook meeting marker had noted the briefing was 'confidential'. Mr Mitchell advised that elected members had been informed of the late councillor's passing at the briefing and had been advised that while the Council's Communications Team would be issuing a tribute, the councillor's family had asked that the news be kept private for the time being as they had not yet contacted all close family members.

In response to cross-examination, Mr Mitchell confirmed that no agendas had been prepared or minutes taken in respect of the briefings on 16 and 23 March 2020. Mr Mitchell explained that this was because no formal decisions were made at the briefings. Instead, they were intended to be private sessions where senior officers could share information and where elected members had a 'safe space' or forum to talk about matters without fear such discussions would enter the public domain. Mr Mitchell accepted that the Respondent's post of 16 March 2020 had not been raised in the email exchange of 24 and 25 March 2020 or at the meeting the Respondent had with Mr Mundell on 15 April 2020. Mr Mitchell advised, however, that he did not accept the Respondent's proposition that his post of 16 March 2020 had only contained his views. Mr Mitchell explained this was because the post clearly referred to information that had been imparted at the briefing, including that there would be no ban on travel in and out of Orkney and the cruise liners were to 'self-regulate' in terms of visits to the Islands, and that festivals such as the Norwegian Constitution day event on 17 May 2020 may be restricted. Mr Mitchell similarly rejected the Respondent's assertion that information in his post of 23 March 2020 related simply to the wider national picture and announcements already made by the UK or Scottish Governments. Mr Mitchell explained this was because some of the information and bullet points contained in the post, such as the establishment of a Humanitarian Assistance Centre and preparations for burials were Orkney specific. Mr Mitchell contended that it should have been

left to professionals in the Council's Communications Team to prepare professional public briefings about such matters, in order to avoid undue alarm.

Mr Mundell confirmed that he and other members of the Council's Senior Management Team provided private briefings to elected members, on an almost weekly basis, at the start of the pandemic, in order to ensure they were updated on the steps the Council was planning to take. Mr Mundell advised that he had made it clear at the start of each briefing that they were confidential in nature. Invitations and agendas were issued for subsequent briefings and were specifically marked as 'confidential'. Mr Mundell advised that the information being disclosed at the briefings was on decisions that were being made under the Civil Contingencies Act 2004 on highly sensitive matters. Mr Mundell contended that as the information concerned what was likely to happen, it was of the utmost importance that it was kept confidential until decisions had been made about when and how it was to be released via the most appropriate channels, following professional input from the Council's legal and communications teams.

Mr Mundell stated that he had intimated at the start of the briefing on 16 March 2020 that the information to be discussed was confidential. Mr Mundell advised that he was not aware of the Respondent's Facebook post that day until after the briefing on 23 March 2020. Mr Mundell advised that he had chaired the briefing on 23 March 2020 and had again reminded all present that it was confidential. Mr Mundell indicated that this was particularly the case as issues concerning the declaration of a major emergency, the potential for additional deaths and mortuary provision, how to assist the most vulnerable via a humanitarian centre, potential school closures and ferry arrangements were discussed. Mr Mundell noted that, as a category one responder, the Council had duties under the Civil Contingencies Act 2004 not just to assess risk and prepare plans, but also handle communications with the public about emergencies as sensitively as possible. Mr Mundell contended that the disclosure of the information by the Respondent had removed the Council's opportunity to do so. Mr Mundell advised that he had considered, therefore, that the Respondent's actions in posting a bullet point list of actions the Council was to take in respect of the matters discussed at the briefing was "totally and utterly inappropriate".

Mr Mundell confirmed that after he became aware of the post of 23 March, he had written to the Respondent reminding him of the confidentiality requirements in the Code and advising him that he could not be trusted with confidential information, and was not to attend elected member briefings until further notice. Mr Mundell confirmed that, in response, the Respondent had removed the two bullet points from the post and had apologised, but nevertheless had advised that he did not consider the remaining information disclosed was confidential. Mr Mundell indicated that both he and the Council's Leader, Councillor Stockan, offered the Respondent separate one on one briefings during the period when he was excluded to ensure he was kept up to date, albeit with only limited information being offered. Mr Mundell stated that he had agreed the Respondent could attend the full briefings again at their meeting on 15 April 2020 after the respondent had apologised, accepted he needed to change his approach and had undertaken to refrain from disclosing any further confidential information. Mr Mundell advised that the Respondent was told, at the meeting, to seek advice if he had any doubt about the nature of information being disclosed. Mr Mundell confirmed that no such advice had been sought.

Mr Mundell contended that Councillor Stockan had made it "explicitly clear", at the outset of the briefing on 20 April 2020, that information disclosed about the passing of the late councillor was to be kept confidential as not all close family members were aware of the news. Mr Mundell advised that it had been agreed that once confirmation had been received that all close relatives had been informed, the Council would draft and issue a tribute, in collaboration with the deceased councillor's family. Mr Mundell stated that, in light of this and the undertaking given at the meeting on 15 April 2020, his reaction to the Respondent's post of 20 April 2020 (referring to the councillor's passing) was one of "total and utter disbelief".

In response to cross-examination, Mr Mundell confirmed that there was no audit trail in the form of any formal agendas, notes or minutes of the briefings on 16 and 23 March 2020. Mr Mundell explained this was

because, at the time, the pandemic was a live and ongoing emergency situation and the Council was simply trying to ensure elected members were being provided with information about the proposed response. Mr Mundell accepted that not all of the Respondent's post of 16 March 2020 was alarming in nature, but argued that the information disclosed in it concerning business continuity, cruise vessels and ferry arrangements would have caused concern for individuals and businesses that were likely to be impacted. Mr Mundell accepted that he had not raised concerns about the post of 16 March 2020 with the Respondent in either the email exchange of 24 and 25 March 2020 or at their meeting on 15 April 2020. Mr Mundell agreed that some of the information disclosed by the Respondent in his post of 23 March 2020 concerned decisions and actions being taken by the UK and Scottish Governments but argued that other matters were Orkney specific, including information about specific schools that were to close, the opening and resourcing of a humanitarian centre and arrangements for excess deaths. Mr Mundell noted that the posting of incomplete information about these sensitive matters would be likely to lead to alarm and questions from the public. Mr Mundell noted that this, in turn, caused difficulties for officers (and frontline customer service staff in particular), given that the arrangements had not yet been finalised and disseminated. Mr Mundell confirmed that, since the complaint had been referred to the ESC, he had not been made aware of any other incidents or allegations in respect of the Respondent disclosing confidential information.

Councillor Johnston, the Council's Convener, confirmed that all elected members were invited to briefings at the start of the pandemic. Councillor Johnston advised that the briefings were "confidential, private sessions", where the senior management team provided information about the steps the Council was to take and arrangements it was putting in place to cope with, and provide services during, the pandemic. Councillor Johnston contended that Mr Mundell had made it clear, at the start of each briefing, that the information being provided was confidential. Councillor Johnston advised that other elected members had brought the Respondent's posts of 16 and 23 March 2020 to his attention in the days that followed their publication. Councillor Johnston explained he was concerned that the Respondent had put information, about steps to be taken, into the public domain before line managers had been told and given time to brief their staff and before the Communications Team had the chance to prepare press releases. Councillor Johnston noted, in particular, that the disclosures led to members of the public telephoning and asking questions, before frontline staff had been briefed and arrangements to manage the process had been put in place.

Councillor Johnston advised that after Councillor Stockan informed other elected members of the councillor's passing on 20 April 2020, Councillor Sinclair had advised that not all close family members had been told. Councillor Johnston stated that Councillor Sinclair had, therefore, asked everyone not to broadcast the news until he had received confirmation from the family that all close relatives had been informed and that authorisation had been given for the Council's tribute to be released to the press. Councillor Johnston advised that he was, therefore, "surprised" to learn that the Respondent had posted the news on Facebook before such confirmation had been received.

In response to cross-examination, Councillor Johnston confirmed that the briefings were intended to be a "safe space" for councillors to receive briefings and discuss matters in private. Councillor Johnston accepted that the post of 23 March 2020 had caused more concern than the one of 16 March 2020, as it contained very sensitive information on matters that were specific to Orkney. Councillor Johnston noted that while the Respondent had the opportunity to raise concerns at the briefings if he was worried about the timing or method, in terms of how the Council proposed to communicate about its response to the pandemic, and the actions it was to take, he had not done so. Councillor Johnston accepted that Councillor Stockan may have imparted the news about the councillor's passing at an elected members' meeting that took place in the morning before the briefing on 20 April 2020 but noted that, even if that had been the case, it had still been made clear the information was private and was not to be disclosed for the time being.

Councillor Johnston confirmed, in a response to a question from a Panel Member, who drew his attention to the email the Respondent had sent the deceased councillor's daughter (replying to her request that the post

be taken down), that he was surprised to note that the Respondent had stated that he wished the Council had indicated that the news was not yet public as that had simply not been the case.

Councillor Stockan, the Council's Leader, confirmed that the briefings were confidential and private as they were used by the senior management team to communicate with elected members about how the Council might respond and adapt its service provision in light of the pandemic. Councillor Stockan advised that elected members were "under no illusions" that information imparted at the briefings on 16 and 23 March 2020 was confidential as it concerned particularly sensitive matters such as how the Council might respond if there were excess deaths. As such, it had been important for the Council to ensure the information it provided to the public was correct and comprehensive, but was relayed in a manner intended to cause as minimum alarm as possible. Councillor Stockan advised that as another elected member had raised a concern about the timing of the release of information, an explanation had been provided about the importance of getting the messaging right.

Councillor Stockan advised that it was not clear, at the briefing on 20 April 2020, about whether all close relatives had been informed of the councillor's passing. As such, it had been agreed that Councillor Sinclair would seek confirmation from the family that all close relatives had been informed of the news before any communications on the subject were released or it was otherwise made public. Councillor Stockan advised that he had been concerned when he became aware of the Respondent's post of that day as no such confirmation had been obtained by that point.

In response to cross-examination, Councillor Stockan confirmed that the briefings were not intended to be political or policy-making meetings and, instead, were used as a means of keeping elected members informed and seeking their views about the proposed actions to be taken in response to the pandemic. Councillor Stockan advised that the mood amongst councillors at the time was sombre and one of shock, but that there was a clear agreement about the need to communicate clearly and accurately about the Council's response to the ongoing situation. Councillor Stockan contended that the publication of the Respondent's posts had removed the Council's ability to communicate proactively and, instead, officers had to react to questions arising from the disclosure of the information. Councillor Stockan advised that this had been particularly difficult given that the Respondent had inferred in the posts that he was providing information about the Council's position, when in fact some of the matters had not been finalised and some of the proposed actions might not be undertaken / were dependent on developments.

Councillor Stockan accepted that the information about the councillor's death may have been imparted at the meeting that took place on 20 April 2020 immediately before the briefing but contended, nevertheless, that it had been a collective decision to refrain from disclosing it further until confirmation from the family that all close relatives had been informed. In response to a question from a Panel Member, Councillor Stockan advised that he was also surprised that the Respondent had told the deceased councillor's daughter that no indication had been given by the Council that the news about her father's passing was not to be made public, as that had not been the case.

Councillor Sinclair confirmed that it was his understanding that the briefings were private and that information imparted or discussed during them was to be kept confidential. Councillor Sinclair advised that he had been told of the councillor's passing on 19 April 2020 that evening and that it had been made clear to him that day that the family had not yet managed to contact all of the late councillor's close family. Councillor Sinclair advised that he had imparted the news to the other ward councillor, Councillor Clackson, by email that evening. Councillor Sinclair indicated he was unsure of whether he advised all other elected members of the news at the meeting on 20 April 2020, or the subsequent briefing that day, but stated that, in any event, he had made it clear the information was not to be disclosed further as not all close family had been contacted. Councillor Sinclair advised that he phoned the family after the meeting and, while he was speaking with them, they indicated they had just seen, and were concerned about, a post on Radio Orkney's Facebook site about the late councillor's passing. Councillor Sinclair advised that he had immediately contacted the

Station Manager who had agreed to remove the post but had explained it had been lifted directly from the Respondent's Facebook page and had only been published on the assumption the news was public knowledge. Councillor Sinclair stated that he had been surprised and "absolutely mortified" by this turn of events.

In response to cross-examination, Councillor Sinclair confirmed that the Respondent had removed the post about the councillor's passing immediately after Councillor Sinclair had sent him an email asking him to do so on the basis that not all close relatives had been informed. Councillor Sinclair further confirmed that the Respondent had proffered an apology.

In response to a question from a Panel Member, Councillor Sinclair advised that he was also surprised that the Respondent had told the deceased councillor's daughter that no indication had been given by the Council that the news about her father's passing was not to be made public. Councillor Sinclair confirmed that he had indeed done so.

Submissions made by the ESC's Representative

The ESC's representative noted that all the witnesses, along with a further 14 councillors who had given evidence to the ESC during her investigation, confirmed that the briefings were confidential in nature. The ESC's representative advised that she considered the Panel had sufficient evidence before it to conclude that the Respondent was aware, or should have been aware, that was the case.

The ESC's representative noted that the Respondent's position was that some, if not all, of the information he had disclosed in Facebook posts of 16 and 23 March 2020 was already in the public domain or simply reflected announcements already made by the UK or Scottish Governments. The ESC's representative contended, however, that it was evident that Respondent's posts did not simply outline his views on the handling of the pandemic or information that was already in the public domain, but also imparted confidential information he had been told at the private briefings held earlier on both dates, in respect of matters specific to Orkney. The ESC's representative noted, in particular, that in his post of 23 March 2020, the Respondent referred, under the heading 'update briefing' to the briefing provided by 'lead officials' that morning and proceeded to list bullet points of what had been discussed. This included that:

- a humanitarian centre was to be established;
- certain named schools and cultural centres were to stay open;
- only essential works and local residents would be allowed to use specific ferry services; and
- specific arrangements were being put in place to deal with excessive amounts of burials.

The ESC's representative accepted that the Respondent had removed references to the Council's declaration of a major emergency and the possibility of a reduction in bin collections and recycling from his 23 March 2020 post, after an email exchange with the Interim Chief Executive over the following three days. The ESC's representative noted, however, that by then the information was already in the public domain as a result of the Respondent's actions. The ESC's representative contended, in any event, that the removal of the bullet points by the Respondent demonstrated that he accepted the information they contained should not have been disclosed.

The ESC's representative contended that it was clear from Mr Mundell's evidence that the Respondent's actions, in disclosing the information about the Council's response to the pandemic and actions it was proposing to take, before the relevant staff had been informed and 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 while the Respondent's argument was that he intended to show the Council was reacting and measures were being taken, the disclosure of the information was unhelpful as it interfered with the Council's attempts to release information proactively, in a controlled and sensitive manner, with a view to mitigate any undue alarm and anxiety. The ESC's representative argued that the

disclosure of the information by the Respondent, without any supporting commentary, not only would have caused alarm, but would also invite questions from the public, which Council staff would then have to address before they were fully prepared. The ESC's representative further argued that the Respondent should have been aware that information about the response to the pandemic was particularly sensitive and of the need to avoid causing any undue alarm or distress.

The ESC's representative noted that it was accepted that the Respondent was told, at his meeting with Mr Mundell and Mr Mitchell on 15 April 2020 that it was incumbent on him to seek advice if he was unsure if any information he wished to disclose or publish was confidential. The ESC's representative noted that the ban on the Respondent attending briefings had been lifted at the meeting, on the basis that he had undertaken not to disclose confidential information going forward. The ESC's representative advised that both the agenda and Outlook marker for the briefing on 20 April 2020 had noted the session was confidential and that this had further been stressed in the minute. The ESC's representative noted that all the witnesses had advised that they were under the clear understanding that the information of the councillor's passing, disclosed to members that day was not to be shared further, or disseminated, until confirmation had been obtained that all close family members were aware of the news. The ESC's representative accepted that after the deceased councillor's son and daughter contacted the Respondent and asked him to remove his post about their father's passing, he had done so. The ESC's representative noted, however, that in his response to the daughter, the Respondent accepted he had "jumped the gun" with his post. The ESC's representative argued that while the Respondent had advised the daughter that he wished the Council had made it clear the news was not to be made public for the time being, it was very evident from the witness evidence that this had indeed been discussed and agreed.

The ESC's representative advised that the Respondent had formerly been a journalist and held firm views about the need for transparency and the use of social media as a form of engagement. The ESC's representative noted that the Respondent had been motivated by an apparent desire, from his former career, to be the first to 'break a story'. The ESC's representative confirmed, however, that the Code made it explicitly clear that private and confidential information should not be disclosed, regardless of whether a councillor holds the personal view that it should be made public. The ESC's representative argued that, in disclosing confidential information about the Council's response to the pandemic, the Respondent contravened paragraphs 3.16 and 3.17. The ESC's representative referred the Panel to Charles Phipps, William Harman and Simon Teasdale: *Toulson & Phipps on Confidentiality* (UK: Sweet & Maxwell, 4th Edition, 2020) as an authority on confidentiality, which indicated that information in the public domain could still be confidential. It was only when it became so widely known that it was futile to try to protect it, that such information could no longer be described as confidential.

The ESC's representative noted that paragraphs 3.1 and 3.2 of the Code require elected members to observe the rules of good conduct and behave with courtesy and respect at all times when they are acting as councillors or when they could be perceived as acting as such, including while using social media. The ESC's representative argued that, in disclosing information about the councillor's passing, despite being fully aware that the family had asked for the news not to be disclosed until confirmation had been received that all close relatives had been informed, and despite knowing that the Council had agreed that it would not issue a press release on the subject until such a time, the Respondent had failed to give due regard to others and to treat the family with respect, as required by the Code.

The ESC's representative noted that, as a politician and when discussing matters of public interest, including both the pandemic and the passing of another local politician, the Respondent enjoyed an enhanced right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ESC's representative confirmed, however, that the right to freedom of expression was not absolute and could be qualified or limited by restrictions such as adherence to a Code and the imposition of a sanction if it were breached, for a number of reasons. These reasons included if a restriction was necessary in democratic society to preserve confidentiality so that officers are able to perform their duties, and it is necessary to

protect the mutual bond of trust and confidence between councillors and officers, to enable local government to function effectively. In this case, the ESC's representative contended that the restriction was necessary to enable officers to disclose sensitive information in a controlled manner to try and avoid causing undue alarm and also to enable the Council to show respect for the deceased councillor's family. The ESC's representative argued that there was no evidence that there was any overwhelming need for the Respondent to have disclosed the information, particularly in the circumstances where he had not raised any concerns about the timing of the Council's communications or sought any advice. The ESC's representative concluded, therefore, that an application of Article 10 of the ECHR did not prevent a finding of a breach of the Code.

Witness evidence on behalf of the Respondent

The Respondent gave evidence himself. The Respondent advised that in his previous career as a journalist and in former roles at Borders Council and the NHS, he had always been a champion of openness and accountability. The Respondent advised that, in some 35 years in public life, this was the first time he had been reported to the Standards Commission.

The Respondent advised that his post of 16 March 2020 was just intended as a normal opinion piece and that there had been no indication at the time that it contained any confidential information. The Respondent advised that another councillor had raised concerns, at the briefing on 23 March 2020, that the Council was not providing sufficient and timely information to the public about its response to the pandemic. The Respondent noted that both briefings had been held at a time of great uncertainty, where events were fast-moving. The Respondent accepted that it had been stated at the briefings that some information was private and had not yet been finalised, such as the location of the proposed humanitarian centre, but noted most of the content of his postings concerned actions that had been announced by the UK and Scottish Governments and was, therefore, already in the public domain. The Respondent advised that the briefings had not been publicised, with no agendas or minutes prepared and, as such, while he was aware that their purpose was to provide a safe discussion space, he had no indication they were considered confidential.

The Respondent stated that his recollection was that there had been a meeting followed by an elected members' briefing on 20 April 2020 and that the news of the councillor's passing had been imparted just before the start of the meeting. The Respondent maintained that it had not been clear to him that the information was private or to be kept confidential, although he accepted that the timing of his post had been a mistake. The Respondent advised that he knew the deceased councillor and his family well and that his sole intention had been to pay tribute to him. The Respondent advised that when he had gone to buy lunch that day, he had been approached by members of the public asking him to confirm the news and contended, therefore, that it had been apparent that "the whole town was talking about it". The Respondent confirmed that he had removed the post at approximately 3pm after the councillor's son and daughter had contacted him, thanking him for his words, but asking him to do so. The Respondent advised that the Council had posted its own tribute at approximately 8pm that day.

In response to cross-examination, the Respondent confirmed that he considered the Council should have adopted a different communication strategy in respect of how and when it imparted information about its response to the pandemic. The Respondent accepted, however, that he had not made this point at the briefings and, further, that such a strategy would be one for the Council, as a whole, to determine.

In response to questions from the Panel, the Respondent indicated that he had 'no idea' why he had removed his post of 16 March 2020. The Respondent confirmed that he had removed two bullet points from his post of 23 March 2020 as he accepted they contained information that was not yet in the public domain. The Respondent confirmed that he had not been trying to hide either post.

The Respondent led evidence from three witnesses, being the Council's Deputy Leader, Councillor Leslie Manson; Councillor Stephen Clackson and Councillor Steven Sankey.

Councillor Manson advised that he did not recall the briefing on 16 March 2020. Councillor Manson stated that it was at his instigation that the briefings were formalised, with agendas and minutes produced, in order to improve accountability and for auditing purposes. Councillor Manson confirmed that the briefings were intended as a 'safe space' for elected members to hold discussions, explore ideas and share information and that all present understood they were confidential.

In response to cross-examination, Councillor Manson confirmed that there was no uncertainty in terms of everyone understanding the briefings were of a confidential nature and that sensitive information disclosed at them should not be shared more widely.

Councillor Clackson advised that Councillor Sinclair had told him as a fellow ward member, by email on 19 April 2020, of the late councillor's death that day. Councillor Clackson advised that Councillor Sinclair had then informed other elected members at the meeting held before the briefing on 20 April 2020. Councillor Clackson confirmed that he had not seen the Respondent's post referring to the Councillor's passing, although he was later made aware of it. Councillor Clackson advised that he had never witnessed or heard of the Respondent being discourteous to anyone.

In response to questions from the Panel, Councillor Clackson confirmed the briefings were not formal or open to the public and that elected members could use them to provide a steer to officers. Councillor Clackson confirmed that, as such, it had been implicit that the information shared was confidential and should not be shared more widely. Councillor Clackson advised that this was now explicitly stated on agendas and at the outset of the briefings. Councillor Clackson advised that he considered that news of the councillor's passing was probably known publicly, to some extent, although he accepted mention had been made at the meeting that not all close family members had been informed of the news.

Councillor Sankey advised that he had attended the briefing on 16 March 2020 and recalled there had been a somewhat surreal feeling amongst elected members as they began to understand, and worry about, the magnitude of the pandemic and task facing the Council in responding to it. Councillor Sankey confirmed that no agendas or minutes were prepared for either the briefing on 16 or 23 March 2020.

Councillor Sankey confirmed that he learned of the death of the councillor, who he had known well, on 19 March 2020. Councillor Sankey advised that he had posted a short tribute, on his personal Facebook page, to the councillor that evening, but had removed this as soon as he had realised that the family had not yet been able to contact all close relatives to advise them of the news. Councillor Sankey advised that the news had been disclosed to all elected members at the meeting held first thing the following day. Councillor Sankey advised that he was concerned that the Respondent's actions in posting a tribute that day was before the Standards Commission as he did not consider it was a confidential matter or that the Council had any right to control when the news was disclosed.

In response to cross-examination, Councillor Sankey advised that the range of information supplied to elected members at the briefing sessions ranged from the mundane to that which was highly sensitive. Councillor Sankey confirmed, however, that he had understood information disclosed at them was not to be shared and that confidentiality reminders were provided. Councillor Sankey advised that he recalled that a discussion to the effect that the Council was to refrain from issuing a press release about the councillor's passing until confirmation that all close relatives had been informed was discussed at the meeting on 20 April 2020.

Submissions made by the Respondent

The Respondent contended that the information he had provided in the Facebook post of 16 March 2020 was not confidential. This was because it was an expression of his views as opposed to a description of information imparted at the briefing earlier that day. The Respondent argued that the fact that no mention of the post of 16 March 2020 was made in the correspondence he exchanged with the Chief Executive

demonstrated that no concerns had been raised about the post at the time and, therefore, while it had been included in the complaint, it was irrelevant and unimportant.

The Respondent argued that as there was no audit trail of either the briefing on 16 or 23 March 2020, with no intimation of them taking place or any minutes taken, there was no written evidence to demonstrate that they were held in private. The Respondent advised, in respect of the post of 23 March 2020, that he had simply been trying to ensure the facts about the response to the coronavirus pandemic were made known to the public in a calm, supportive and timeous manner. The Respondent advised that he wished to assure the public, at a deeply worrying time, that the council was taking the pandemic seriously, in order to stem any potential criticism that it was being slow to act. The Respondent accepted that the information in the post had been gleaned at the briefing earlier that day, but argued that only the two bullet points he had later removed contained information that could be deemed as being confidential. The Respondent advised that he had received a substantial amount of correspondence from members of the public who were desperate for news about what was to happen and how the Council was planning to respond to the pandemic, so many of them were relieved to see his post as it had meant that “at last they were being told something”. The Respondent asked the Panel to note that he had felt under pressure to provide information, and that if he had “overstepped the mark” he apologised for doing so.

The Respondent contended that there had been no indication at either the meeting or briefing on 20 April 2020 that the news of the late councillor’s death was not to be shared for the time being and, instead, it had only been mentioned as an addendum at the start of the meeting. The Respondent advised that it had been apparent to him, from meeting people when he went out to buy lunch after the briefing, that the news of the late councillor’s passing was already widely known. The Respondent contended that, as such, it was evident that the information was not of a confidential nature. The Respondent argued, in any event, that the Council had no right to restrict information about an individual’s passing or remit in determining when such news could be made public. The Respondent further argued that he was surprised that the issue of respect had been referred to the Standards Commission given both the late councillor’s son and daughter had thanked him for what he had written about their father.

In conclusion, the Respondent contended that the key principles of public life and, in particular, the need to act openly and to be accountable were of paramount importance to him. The Respondent advised that he considered there was clash between these and the requirement in the Code to maintain confidentiality, and indicated that, in his view, openness and transparency were of greater importance.

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 Scott.
2. The Respondent had breached paragraphs 3.1, 3.2, 3.16 and 3.17 of the Code.

Reasons for Decision

The Panel noted that paragraph 3.1 of the Code makes clear that section 3 of the Code applies in situations where the Respondent is acting as a councillor or could be perceived to be acting as such. The Panel noted it was not in dispute that the Respondent identified himself as a councillor on the Facebook page where he had published the posts of 16 and 23 March and 20 April 2020. The Panel was satisfied that the Respondent could reasonably be perceived to be acting in the capacity of a councillor at the time and, therefore, that the Code applied.

The Panel noted that paragraphs 3.16 and 3.17 of the Code provide that while council proceedings are usually open, there may be times when councillors will be required to treat discussions, documents or other information in a confidential manner, even in situations where they are of the view that such information should be publicly available. Paragraph 3.17 notes that councillors will often receive information of a private

nature which is not yet public or which perhaps would not be intended to be public. It states that they must always respect and comply with the requirement to keep such information private.

The Panel was satisfied that notable elements of the information disclosed in the Respondent's posts of both 16 and 23 March 2020 related to the Council's handling of the crisis and included information about actions and proposals that were Orkney specific and was not, therefore, information that had been previously announced by the UK or Scottish Governments and already in the public domain. In the post of 16 March 2020, this included information about whether there would be a ban on travel in and out of Orkney, that cruise liners were to 'self-regulate' in terms of visits to the Islands, and that certain events may be restricted. The Panel noted that, in the post of 23 March 2020, this included information about the Council's decision to declare a major emergency, that it was to set up a Humanitarian Assistance Centre, that preparations were being made to handle a large number of burials and that there may be a reduction in bin collections and recycling. The Panel considered that the Respondent's references, in both posts, to the briefings held earlier in the day demonstrated that he had not simply been stating his views, but rather was reporting and sharing what had been discussed and the information provided.

The Panel noted that sometimes confidentiality and privacy is a matter of timing, in that information may eventually be released into the public domain. In this case, while the Panel noted that the Respondent may have been trying to be open and transparent, so that members of the public were informed about decisions that had been and were to be made, it did not consider that he was entitled to disclose the information contained in his posts of 16 and 23 March 2020 when he did.

The Panel was satisfied, from the witness evidence and submissions made, that it was clear that the briefings were intended to be private and to act as a safe space for elected members to receive information and discuss ideas. The Panel was satisfied that, as such, it should have been evident that discussions and information provided at them was not to be disclosed, even if this had not been explicitly stated at each and every one. The Panel did not accept that the absence of any formal agendas or minutes had any impact on this, particularly given all the other councillor witnesses agreed that there was no doubt that the briefings were private.

The Panel agreed that there were legitimate reasons as to why the Senior Management Team would wish to ensure the information being shared at the briefings was kept confidential at that time, which included that proposals discussed may be adjusted or deferred prior to implementation, and the need to ensure that officers had sufficient time to prepare and manage communications to ensure that the Council's position and response were represented fully, and that messages were drafted in a way that provided some reassurance and did not cause undue fear or alarm. The Panel noted that there was no evidence or suggestion that the Respondent had taken issue with the Council's proposed approach at any of the briefings or that he had sought advice about whether any information he intended to disclose was confidential.

The Panel noted that, in disclosing the information in the manner he had, without any supporting commentary, the Respondent was likely to have encouraged interest and questions, some of which would have been directed towards officers. The Panel noted that this, in turn, would have resulted in officers having to take time to respond, as opposed to being able to impart information proactively.

Turning to the Facebook post of 20 April 2020, having considered all evidence and submissions, the Panel was satisfied, on the balance of probabilities, that it had been made clear to all elected members in attendance at the meeting and briefing held online that morning that the information about the passing of the councillor the previous day was private and was not to be shared until confirmation had been received that all close family members were aware of the news. While the Panel accepted that the Respondent understood some members of the public were already aware of the news, the Panel nevertheless considered that it should have been apparent from the discussion that the information was not to be disclosed for the time being. The Panel noted that Councillor Sankey had also posted a tribute, but noted that he had done so

before the meeting and briefing and, in any event, he had done so on a private Facebook page and had removed the post when he learned that not all close relatives had been informed of the news. The Panel further noted the respondent had argued that the Council had no role in determining whether the news was confidential. The Panel considered this to be irrelevant given there was no indication that the Council had made such a decision. The Panel was satisfied that, instead, Councillor Sinclair had indicated that the information was to be kept private until he had received confirmation from the family that all close relatives had been contacted. The Panel noted that there was no evidence or suggestions that anyone present had raised any concerns or objections and considered that, as such, the agreement to keep the information private was one that had been taken collectively.

The Panel concluded, therefore, that the Respondent had breached paragraphs 3.16 and 3.17 of the Code in respect of all three posts. In addition, the Panel agreed that in sharing the news of the late councillor's death, in the post of 20 April, despite the fact that it was made clear that there was a possibility that not all the family members were aware of the news and that confirmation of this was to be sought, the Respondent failed to show due regard for the family's feelings or wishes. The Panel concluded, therefore, that the Respondent failed to demonstrate courtesy and respect towards the late councillor's family and, as such, had also breached paragraphs 3.1 and 3.2 of the Code in respect of the Facebook post of 20 April 2020.

The Panel proceeded to consider whether such a finding in itself was prima facie a breach of the Respondent's right to freedom of expression under Article 10 of the ECHR and, if so, whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society.

The Panel accepted that the postings concerned matter of public concern and, as such, the Respondent benefitted from the enhanced protection of freedom of expression afforded to politicians under Article 10. The Hearing Panel concluded, however, that in this case, there was a need to preserve confidentiality so that officers were able to perform their duties and, further, to protect the mutual bond of trust and confidence between councillors and officers that enables local government to function effectively. As such, the Hearing Panel determined that the imposition of a restriction in the circumstances was relevant, sufficient and proportionate. The Hearing Panel concluded, therefore, that it was satisfied that a finding of breach, and subsequent application of a sanction, would not contravene Article 10.

As an aside, the Panel noted the Respondent had made a submission to the effect that he was being persecuted given that another elected member had released information from the meeting of 16 March 2020 on that date and given that Councillor Sankey had posted his tribute to the Councillor who had passed away on 19 April 2020, prior to the Council having completed the process to distribute its press release regarding the death. The Panel confirmed that its responsibility was to consider the case before it and could not consider whether other possible breaches of confidentiality may have occurred. The Panel noted that it was open to anyone to make a complaint and that it was legitimate and reasonable for them to do so if they considered that the Code may have been breached. Indeed, the Standards Commission would encourage anyone to do so, in order to ensure compliance with the Code and to help promote high ethical standards. The Panel confirmed that the motives of any complainer were irrelevant to the question of whether the Code had been breached.

Evidence in Mitigation

The Respondent advised that, in his 35 years in public life, he had never previously been reported to the Standards Commission. The Respondent stated that he respected the Standards Commission and accepted the Panel's decision that he had breached confidentiality in his Facebook posts of 16 and 23 March 2020. The Respondent explained, however, that he was experiencing personal difficulties and was struggling with an increased workload at the time, which included dealing with complaints and concerns from constituents who considered they were not being provided with adequate information about the Council's response to the pandemic.

The Respondent noted that the briefings on 16 and 23 March 2020 took place during a time of genuine fear amongst elected members and the community. The Respondent advised that he had simply been seeking to be open and transparent with the public by keeping them informed about developments. The Respondent argued that the majority of the information disclosed was already in the public domain and that no actual harm had resulted from his postings, which were factual in nature. The Respondent accepted, however, that he may have “inadvertently handicapped the efforts of staff to respond to the rapidly developing situation”.

The Respondent asked the Panel to note that both the deceased’s son and daughter had expressed gratitude for the wording of his tribute post of 20 April 2020, despite asking him to remove it for the time being. The Respondent argued that the content of the post and fact that he had removed it when asked to do so demonstrated that he had never intended to be discourteous and indicated that he was frustrated that both his colleagues and the Standards Commission had taken issue with the post. The Respondent acknowledged that his post had been “untimely for the family”, but argued that publicity about the Hearing had highlighted the councillor’s passing which, in turn, would have revived the family’s anguish.

The Respondent stated that he had never been discourteous to any member of the public in all his years in public office and noted that this was emphasised in the character references submitted on his behalf. The Respondent noted that he had been prevented from attending elected member briefings since 20 April 2020 and that he had “diligently stuck by that ban”.

The Respondent ended his plea of mitigation by offering a “frank and sincere apology” for his conduct. The Respondent accepted that he had not met the high standards of conduct expected of public servants and indicated that he would learn from the experience to ensure he did so in future.

SANCTION

The decision of the Hearing Panel is to suspend the Respondent, Councillor Scott’s entitlement to attend the full meetings of Orkney Islands Council for three months, with effect from 26 January 2021.

The decision is made in terms section 19(1)(b)(i) 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 noted that the Respondent had served faithfully for some 35 years in public life and, throughout, has been committed to openness and transparency, being two of the key principles of public life. The Panel noted, from the numerous positive character references submitted on his behalf, that the Respondent took his position as a councillor very seriously and worked hard to assist his constituents and improve communities within his ward.

The Panel further noted, in mitigation, that the Respondent had taken action to remove some of the post of 23 March 2020 and that he had taken down the post of 20 April 2020 when members of the deceased councillor’s family had asked him to do. The Panel accepted that, in his post of 20 April 2020, the Respondent wished to honour the death of his colleague and had not intended any distress or disrespect. The Panel was pleased to note that, in his statement of mitigation, the Respondent had acknowledged the impact of his disclosures on council staff and that he had proffered an apology for his actions.

The Panel was concerned, however, about the Respondent’s failure to understand the need to keep elected members briefings private and to maintain confidentiality, in order for them to be a safe space for discussion and information-sharing. The Panel noted this was despite it being clear, from the witness evidence, that other councillors had clearly understood this. The Panel considered that this was a legitimate and appropriate way of building trust and provide openness and accountability within the Council. The Panel was further concerned that the Respondent had failed to understand the importance of managing communications about

sensitive topics and difficult decisions in a controlled and sensitive manner, in order to avoid causing undue alarm or anxiety. The Panel noted that the Code had been breached on more than one occasion and considered that the contraventions would have had a negative impact on officers, fellow councillors, the family of the deceased councillor and potentially the public.

The Panel emphasised that the requirement for councillors to refrain from disclosing confidential information is a key requirement of the Code. 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. The Panel agreed that, in this case, it was legitimate for the Council to have decided that the information was kept confidential until such a time as it had been able to ensure that officers were in a position to manage external communications effectively.

While the Panel noted that the Respondent claimed his motivation was to be a champion of openness and accountability, it was concerned that he may have also been driven by a desire to be perceived as being transparent and the first to a story. The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction as it accepted his apology and apparent commitment to learn from the experience.

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: 25 January 2021



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