

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

**Panel Members:** Mr Michael McCormick, Chair of the Hearing Panel  
Ms Ashleigh Dunn  
Mr Paul Walker

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Acting Ethical Standards Commissioner (the Acting ESC), further to complaint reference LA/PK/3477, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Lewis Simpson (the Respondent).

The Acting ESC 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 Acting ESC referred a report to the Standards Commission for Scotland on 4 August 2021, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

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 7.4, which states:

#### ***Fairness and Impartiality***

*7.4 To reduce the risk of your, or your Council's, decisions being legally challenged, you must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance of improper conduct.*

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

#### **Joint Statement of Facts / Background Information**

The Panel noted that it was not in dispute that the Respondent sent an email to a constituent on 16 October 2020 (which was copied to another member of the public and to the complainer), in relation to a planning matter to be considered at a meeting of the Council's Planning and Development Management Committee meeting on 21 October 2020. In his email, Councillor Simpson included a comment that he had: *"colleagues who may be persuaded to ask questions etc on my behalf"*.

The Panel noted that while the complainer was a member of the Planning and Development Management Committee at the time the email was sent, the Respondent was not.

#### **Witness Evidence**

The ESC's representative led evidence from two witnesses, being the complainer, Councillor Eric Drysdale and the Council's Head of Legal and Governance Services and Monitoring Officer, Lisa Simpson.

The complainer advised that he had been a member of the Council's Planning and Development Management Committee in October 2020, when the email in question was sent. The complainer explained that, at its meeting on 21 October 2020, the committee considered planning matters relating to the Cross Tay Link Road project. The complainer advised that, in addition to committee members and council officers, any interested parties, including members of the public, were entitled to attend meetings of the Planning and Development Management Committee to make representations about any applications being considered. The complainer confirmed that other elected members were usually permitted to attend to either make representations or to address the committee on behalf of constituents, but only committee members were permitted to put questions to any planning officers present. The complainer further confirmed that while elected members

might sometimes have informal conversations with each other about matters to be considered at the committee, they were not permitted to pre-judge applications or to make decisions as a political group.

The complainer noted that it had been made clear to all committee members, in training sessions, that planning decisions were of a quasi-judicial nature. The importance of making such decisions both individually and objectively had been stressed and, as such, all committee members were aware that they were required to make up their own minds on matters before them, having considered all relevant and material evidence presented at the relevant meeting.

The complainer advised that he had been concerned about the contents of the Respondent's email as he considered it implied or suggested that committee members might be open to having questions, based on the Respondent's views, fed to them. As such, the complainer considered the email struck at the heart of the requirement for committee members to not only make decisions, but be seen to be making decisions, in an objective and transparent manner. The complainer contended any implication or suggestion that the committee members might not consider matters properly and objectively at the meeting was unacceptable as it could undermine confidence in the whole decision-making process. The complainer stated that he had been surprised, therefore, to have received the Respondent's email of 16 October 2020 and had been unclear as to why it had been copied to him. The complainer advised that he had concluded that his inclusion as a recipient could only have been inadvertent.

The complainer explained that he had raised his concerns about the Respondent's email internally. The complainer noted that the Council's Monitoring Officer had advised that both she, and the then Chief Executive, had spoken to the Respondent about the matter. The complainer confirmed that the Respondent had apologised to him on 20 October 2020, for his poor choice of language, in an email of the same day. The complainer advised that while he had remained concerned that the Respondent's actions undermined the integrity of the planning process, he had not escalated the matter by making a complaint to the ESC until February 2021. The complainer explained that this was because his concerns had been heightened when the Respondent was appointed, in January 2021, as Convener of the Council's Local Review Body (being a committee charged with considering appeals from members of the public about planning decisions made by council officers), and when the Respondent subsequently made unfounded comments to the press to the effect that the reaction to his email was politically motivated.

In response to questions from the Panel, the complainer confirmed that the Council's Local Review Body was not responsible for considering appeals made about planning matters relating to major projects, such as the Cross Tay Link Road. The complainer noted that if an elected member had concerns about planning matters to be considered by the Council's Planning and Development Management Committee that affected their ward, they could request permission to make representations at the meeting where the matter was to be determined. The complainer advised that he had made representations on a planning matter on one occasion and had then withdrawn from the decision-making on that application, as required by the Code. The complainer contended that was an appropriate approach to take and that the committee members should be both entitled and allowed to make up their own minds on matters before them at meetings, without all other elected members proffering their views beforehand.

The Council's Monitoring Officer advised that the Cross Tay Link Road was one of the largest projects ever undertaken by the local authority and that it had formed part of the Council's strategic plan for some 15 to 20 years. The Monitoring Officer confirmed that the project had been agreed by October 2020 and, as such, the Planning and Development Management Committee was only considering planning matters in respect of the first phase of works at its meeting on 21 October 2020.

The Monitoring Officer advised that the role of committee members on the Planning and Development Management Committee was to interrogate the papers and reports before them, and to ask questions of planning officers, before reaching an objective decision based on the evidence, facts and circumstances and

any legal advice provided. The Monitoring Officer advised that other elected members were entitled to attend meetings of the committee and were normally given permission to make representations on behalf of constituents or other interested parties. The Monitoring Officer noted that while other elected members were not allowed to put questions to officers at the meetings, they would often would ask rhetorical ones to ensure their constituents' concerns were considered. The Monitoring Officer advised that she did not consider there was any difficulty in this approach, as it helped ensure all views were taken into account and that there was transparency in terms of the decision-making process.

The Monitoring Officer confirmed that after the complainer had raised his concerns about the email of 16 October 2020 with her, she and the Council's then Chief Executive had met with the Respondent to discuss them. The Monitoring Officer advised that she had attempted to get the Respondent to understand that the use of certain language in his email was somewhat 'clumsy' and that there was the potential, in the 'worst case scenario' for the word "persuaded" to be misunderstood and to be perceived as meaning that committee members might be open to reaching a particular decision. The Monitoring Officer stated that she had explained that this was particularly the case as the Respondent's own views on the Cross Tay Link Road project were well known. The Monitoring Officer reported that the Respondent had been 'horrified' at this suggestion and, as a result, had agreed to apologise to the complainer and to write to both constituents who had received the email to clarify that he had only meant that the committee members might be agreeable to asking questions. The Monitoring Officer confirmed that the Respondent had proceeded to do so. The Monitoring Officer advised that while the Respondent would have been entitled to attend the Planning and Development Management Committee's meeting on 21 October 2020, he had decided it was better not to do so in light of the complainer having raised his concerns about the email.

In response to cross-examination, the Monitoring Officer advised that following receipt of his apology, the complainer had sent the Respondent an email on 21 October 2020, advising that it had been accepted and that there were "no hard feelings". The Monitoring Officer confirmed that she had not received or seen any complaint or objections about the complainer's appointment, in January 2021, as Convener of the Local Review Body and that the complaint had only been made to the ESC after articles on the appointment appeared in the press in February 2021. The Monitoring Officer further confirmed that she had never previously received any complaints about the Respondent's conduct.

The Monitoring Officer advised, in response to questions from the Panel, that she did not consider it was inappropriate or unusual for an elected member to request that a colleague ask questions on their behalf at a forthcoming committee, providing they were not trying to lobby or influence the colleague into making a decision privately, before they had considered all relevant and material evidence at the meeting in question.

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

The ESC's representative acknowledged that the Respondent could have asked to address the Planning and Development Management Committee in his capacity as a ward councillor and that it was likely that any such a request would have been granted. The ESC's representative accepted that the Respondent could have posed rhetorical questions when doing so, but noted that, as he was not a member of the committee, he would not have been able to question officers directly or pose further questions to address any initial response.

The ESC's representative argued that the wording used by the Respondent in his email could have been interpreted as giving "occasion for suspicion or appearance of improper conduct" in terms of paragraph 7.4 of the Code, even if that had not been his intention. In particular, the ESC's representative argued that the word "persuaded" could have implied, to a member of the public, that Committee members could be pressured or influenced behind the scenes to come to a certain decision, in the context of raising questions on the Respondent's behalf. The ESC's representative noted that the email had been sent to two members of the public. While the recipients of the email may not have interpreted its contents in such a manner, they could have circulated it more widely to other members of the public who may have reached a different

understanding. The ESC's representative noted that the use of the word "persuaded" could have given other members of the public, who may have been less familiar with the committee's usual procedures, occasion to be suspicious.

The ESC's representative contended that while some parts of Section 7 of the Code applied only to councillors who were making quasi-judicial or regulatory decisions, it was evident that paragraph 7.4 of the Code applied to all elected members. In support of this contention, the ESC's representative noted that paragraph 7.5 stated that councillors should not seek privately to lobby colleagues who were responsible for dealing with quasi-judicial or regulatory applications. The ESC's representative further noted that paragraph 7.4 referred not just to the risk of a councillor's decisions being challenged, but also to one made by their council. In addition, the reference in paragraph 7.4 to the requirement for councillors to avoid any occasion for suspicion and any appearance of improper conduct "at all times", supported the view that it had a broad application and was not restricted to applying only to those elected members making quasi-judicial or regulatory decisions at certain committees.

The ESC's representative noted that, at the start of his email of 16 October 2020, the Respondent had stated that while elected members were not allowed to discuss planning matters before applications were considered at committee meetings, there would "in practice" be some advanced discussions. The ESC's representative contended that this statement, along with the Respondent's use of the word "persuaded", could be taken as him implying that some form of pressurising or lobbying of committee members took place behind the scenes.

The ESC's representative noted that if the Respondent had been allowed to address the committee and had put his questions to officers in a rhetorical manner, it was entirely possible that a committee member may have picked up on some of these points, put them to the planning officers present and required a response. The ESC's representative accepted that this would have meant that the Respondent's questions would have been addressed, regardless of whether any action had been taken in respect of the suggestion in his email. The ESC's representative argued, however, that the Respondent's use of the phrase "may be persuaded", in the context of the rest of his email, created an impression that members of the committee could be persuaded to reach a certain decision, by way of the Respondent convincing them to ask certain questions that he would not otherwise be allowed to put to officers. As such, the ESC's representative contended that, regardless of his intention, the Respondent failed to avoid any occasion for suspicion, as required by paragraph 7.4. The ESC's representative noted that the Respondent lived near the site of the proposed road and argued that his personal interest in the matter was even more reason for him to have ensured he did so.

The ESC's representative noted that the size of the majority vote on the application before the Planning and Development Management Committee on 21 October 2020 meant that it was likely that any attempt the Respondent could have made to persuade colleagues to support his views would have made little difference to the outcome. The ESC's representative argued, however, that both the outcome of the application and the absence of any subsequent legal challenge were irrelevant, in terms of the Code, as it was concerned solely with how councillors should conduct themselves (regardless of any impact on the voting and decision). Similarly, the ESC's representative noted that the complainer's motivation in making the complaint was irrelevant to any determination as to whether the Respondent had breached the Code.

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

The Respondent advised that his main aim, in sending the email of 16 October 2020, was to allay his constituent's concerns that the committee's consideration of the application was merely a "tick-box exercise" and to refute any suggestion that members would have already made up their minds in relation to the upcoming planning decision. The Respondent advised that he was seeking to make clear to the recipients that the very purpose of the meeting was for the committee to consider the application in light of matters put forward at the meeting and any representations made. It was only then that a decision would be made.

The Respondent noted that nothing in the Code precludes councillors from asking colleagues on a committee to pose questions at meetings on their behalf and, moreover, that it was not unusual practice for elected members to do so. The Respondent noted that the Code only seeks to ensure that councillors who are members of quasi-judicial or regulatory decision-making committees, such as planning committees, do not pre-judge applications and, instead, make decisions solely on the evidence before them.

The Respondent accepted that councillors who were not on quasi-judicial or regulatory committees may be afforded the opportunity to attend meetings and make representations. The Respondent noted, however, that they may not always be available to do so and, in any event, it may not be practical or desirable for all forty or so elected members to appear at a meeting. The Respondent contended that, as such, it was common practice, and indeed desirable, for councillors to ask their colleagues who were on such committees to raise, at the relevant meeting, any queries they may have on a matter to be considered. The Respondent advised that if he had attended the Planning and Development Management Committee as a substitute member, he would have been required to declare an interest and take no part in the discussion, as he lived near the site of the proposed road and, as such, had a conflict of interest. The Respondent accepted that he could have attended the meeting and made representations on the application, but noted that this would have meant that he would have been unable to ask any follow up questions or require officers to respond.

The Respondent confirmed that he had not attended the committee meeting on 21 October 2020 and explained this was because he had considered it would have been inappropriate for him to do so given the 'furor' over his email.

The Respondent argued that paragraph 7.4 did not apply to him at the time of the email in question, as he was not a member of the Planning and Development Management Committee and was not, therefore making a decision that could be legally challenged. The Respondent contended, in any event, that the complaint failed the 'objective test' as no member of the public, with knowledge of the relevant facts, would reasonably understand his use of the phrase "may be persuaded to ask questions" as meaning that the committee members may be influenced into making a certain decision. The Respondent accepted, with hindsight, that "persuaded" was not the best choice of word, but argued that it was evident from the context that it was limited to the asking of questions and, as such, could not be taken as meaning he might have any influence whatsoever over the decision-making.

In response to questions from the Panel, the Respondent confirmed that he had not intended to copy the complainer into his email of 16 October 2020 and that he had done so inadvertently. The Respondent confirmed that after he had discussed the complainer's concerns at a meeting with the Council's Chief Executive and Monitoring Officer, he had sent the recipients of his email of 16 October 2020 a further email clarifying that he had not meant the committee members could be persuaded to make a particular decision. The Respondent advised that he done so in order to address any potential concerns that he had inadvertently given the recipients the wrong impression in this regard.

## **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 Simpson.
2. The Respondent had not breached paragraph 7.4 of the Code.

### **Reasons for Decision**

Having considered all the submissions made and evidence led, the Panel considered that while the wording used by the Respondent in the email in question could have been clearer, his conduct did not amount to a breach of paragraph 7.4 of the Code.

The Panel agreed with the ESC's representative that, while it did not contain any express statement to that effect, the wording of paragraph 7.4 of the Code and, specifically, its reference to councillors being required to ensure that they reduced the risk of both their own individual decisions *and* those of the Council being legally challenged, meant that it was evident that it applied to all elected members, at all times (regardless of whether they were members of a committee that was making, or was due to make, a decision on a quasi-judicial or regulatory matter). The Panel noted, in support of this interpretation, that the following paragraph of the Code also did not contain any explicit statement to the effect that it applied to all elected members. The Panel noted that this was despite the provision clearly doing so, as it concerned a requirement for councillors to refrain from seeking privately to lobby colleagues who were responsible for dealing with quasi-judicial or regulatory applications.

The Panel further agreed with the ESC's representative that the complainer's motivation was irrelevant to the question of whether the Respondent had breached the Code. The Panel noted that, had a breach of the Code occurred, it would not have mattered whether any complainer was concerned about preserving the integrity of the committee's decision-making process and maintaining the public's confidence in this, or whether they were engaged in party political mischief-making. This was because all elected members are personally responsible for ensuring that they comply with the Code, at all times when they are acting as councillors or when they could reasonably be perceived as acting as such.

Similarly, the Panel agreed that both the outcome of the application and the absence of any subsequent legal challenge were irrelevant to the question of whether the Respondent had breached paragraph 7.4, as the requirement to adhere to the standards of conduct outlined in the Code is not subject to there being any tangible or demonstrable consequence arising as a result of a councillor's behaviour.

The Panel noted that there was no evidence or suggestion that there had been any impropriety on the part of the Respondent. As such, it was only required to consider whether the Respondent had avoided any occasion for suspicion and any appearance of improper conduct, as required by the second part of paragraph 7.4.

The Panel was of the view that the requirement under paragraph 7.4 to avoid "occasion for suspicion and any appearance of improper conduct" must be subject to some form of objective or reasonableness test. The Panel noted that, if not, the mere fact that an individual had a groundless or spurious reason for occasion for suspicion could give rise to a breach of the Code. The Panel was satisfied that this would not have been the intention of Ministers when issuing the Code.

The Panel therefore considered whether a member of the public, with knowledge of the relevant facts, could reasonably regard the Respondent's conduct as giving rise to an occasion for suspicion and / or any appearance of improper conduct.

In considering this, the Panel agreed with the Respondent that there was nothing in the Code that prevented a councillor from asking a colleague to put certain questions to officers at committee meetings, regardless of whether the committee was one that dealt with quasi-judicial or regulatory applications. The Panel noted that any elected member on such a committee would have a personal responsibility to ensure that they complied with the Code, in the event that another councillor, a constituent, or any other party, approached and asked them to pose questions at an upcoming committee meeting. The committee member would, for example, be responsible for ensuring that they did not pre-judge and could not be perceived as having pre-

judged, any quasi-judicial or regulatory matter. The Panel noted, however, that this did not mean that they could not be approached to ask a question or, indeed, that they would be prevented from doing so. While the Panel noted that it may have been helpful for the Respondent to have explained this in his email, the Code did not place any responsibility on him to do so.

The Panel noted that it was accepted that other councillors could ask to attend meetings of the Planning and Development Management Committee to make representations, and that any such requests were usually granted. As such, the Panel noted that it was likely that the Respondent would have been able to attend the meeting on 21 October 2020, had he wished to do so, and that he could have made any points he wished (albeit he would not have had the right to put direct questions to any officers who were present). The Panel noted that the Respondent would have been able to make such representations regardless of whether he had a personal interest in the application being considered, as he was not a member of the committee and was not therefore required, as a decision-maker, to make a declaration.

The Panel accepted that asking a colleague, in advance, to put questions to officers at the meeting may be inherently less transparent than making representations in public at a meeting. The Panel considered, however, that it was not practical to expect all potential questions to be put to the committee in the form of formal representations at the meeting, given that not all constituents may be comfortable or able to do so and given that not all other elected members would be necessarily available or willing to do so. In addition, the Panel considered that meetings could become difficult to manage if all other councillors who wanted their own or their constituents' questions or points addressed were only able to raise these by making formal representations before a committee.

The Panel was of the view that a member of the public, with knowledge of the relevant facts (being how quasi-judicial or regulatory decisions were made), would be aware that there was nothing to prevent the Respondent, or anyone else, from asking a committee member to raise a question at a forthcoming meeting, provided that committee member could still proceed to consider the matter objectively and on its own merits. The Panel concluded, therefore, that the fact that the Respondent had indicated, in his email, that he could ask committee colleagues to raise questions at the meeting on his behalf would not, in itself, give rise to an occasion for suspicion and / or to any appearance of improper conduct.

The Panel noted the complainer's concerns that any suggestion that committee members could have questions fed to them in advance had the potential to undermine public confidence in the integrity of their decision-making. The Panel noted, however, that a statement to the effect that committee members might be open to asking questions was distinct from a suggestion that committee members might not have queries of their own or that they would be incapable, or unwilling, to consider the matter objectively, and on the evidence presented at the meeting.

Furthermore, the Panel considered that a statement to the effect that committee members might be open to asking questions should be distinguished from, for example, a statement to the effect that a committee member could be persuaded to vote a certain way, or to pressurise other committee members to vote in concert with them.

The Panel noted the ESC's representative's argument that the use of the word "persuaded" could give rise to a suspicion that the committee members were open to acting inappropriately or improperly. The Panel was not convinced, however, that the Respondent's use of the word "persuaded", or even his inclusion of the word "etc." after his reference to the committee members being open to asking questions, would necessarily be interpreted as him suggesting, behind the scenes, that his colleagues could be pressured or influenced into reaching a certain decision or into doing something wrong (such as breaching the Code, law or council policy). Indeed, the Panel considered that the very fact that the Respondent had sent the email in question to more than one person served to negate such an interpretation.

The Panel did not consider, therefore, that it was reasonable to conclude that an informed member of the public would have any occasion for suspicion or perceive the appearance of any improper conduct. As such, the Panel determined that the Respondent had not breached paragraph 7.4 of the Code.

**Date: 21 October 2021**



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