

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at South Lanarkshire Council Headquarters, Almada Street, Hamilton, on Tuesday 27 June 2023.

Panel Members: Ms Suzanne Vestri, Chair of the Hearing Panel
Mr Paul Walker
Ms Anne-Marie O’Hara

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/SL/3558a, concerning an alleged contravention of the Councillors’ Code of Conduct (the Code) by Councillor Joe Fagan (the Respondent).

The Respondent was represented by Mr Brian McLaughlin, Solicitor, Unionline Scotland.

Referral

Following an investigation into a complaint received on 23 June 2021 about the conduct of the Respondent, the ESC referred a report to the Standards Commission for Scotland on 3 March 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The complaints alleged that, on 30 April 2021, the Respondent disclosed to the press confidential information about leisure and culture facilities that had been identified for potential closure, which had been disclosed to a Cross-Party Working Group on South Lanarkshire Leisure and Culture (the CPWG) on 21 April 2021. The substance of the referral was that, in doing so, the Respondent failed to comply with the provisions of the 2018 version of the Code (being the version of the Code in place at the time) and, in particular, that he had contravened paragraphs 3.16 and 3.17, which were as follows:

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.

Evidence Presented at the Hearing

Joint Statement of Facts

A joint statement of facts agreed by the ESC and Respondent recorded that the following matters were not in dispute:

- The Respondent was acting in his capacity as a councillor at the time of the events in question.

- The Respondent was a member of a Cross-Party Working Group on South Lanarkshire Leisure and Culture (the CPWG). The purpose of the CPWG was to make recommendations for determination by the Council. The members of the CPWG met in private. The CPWG had been considering the future of the South Lanarkshire's leisure and culture facilities and had drawn up a list of facilities that it could recommend for potential closure.
- That, on 29 October 2020, the Respondent sent an email to the Council's Labour group with copies of briefing papers prepared for the CPWG by the Executive Director of Community and Enterprise Resources, dated 27 October 2020, for a private CPWG meeting that day. In his email, the Respondent advised that the briefing papers were to "remain confidential at this time". The briefing papers concerned the potential closure of some outdoor bowling and golf facilities in the council area.
- That, on 8 December 2020, the General Manager of South Lanarkshire Leisure and Culture (SLLC) gave a presentation to the CPWG. On 9 December 2020, he emailed the members of the CPWG (including the Respondent) a copy of the presentation slideshow. The email, provided a note for two members who had not attended the meeting the previous day, which stated that the attached presentation was "highly confidential, only for the eyes of the CPWG members and not for further distribution". The members were asked to note that the content of the presentation was sensitive in nature and "could be damaging if considered out of context". The slideshow was entitled 'Projected Outcomes' and, at the bottom of each page, the words "confidential – not for further distribution" appeared in large red type face. A table detailing relevant facilities in the council area were colour coded red, amber or green, with the facilities in amber being ones that remained under consideration, and those in green being ones that were to be retained. The General Manager explained in his email that the facilities in red were those that may no longer be required if the SLLC reduced its footprint.
- The Executive Director prepared an internal briefing paper entitled 'Proposed Process for Identified Facilities', which was presented to the CPWG at its meeting on 1 April 2021. The internal briefing paper did not specifically state that it is confidential, other than by the 'internal' descriptor. The internal briefing paper stated that its purpose was to "present a proposed process for the properties / facilities which have been identified through review as no longer required by SLLC, but which may prove to be beneficial for the community or other key partner organisations." Section 4 of the Internal Briefing Paper was headed "Identified Properties" and outlined facilities that it may no longer be in SLLC's best interests to manage and maintain. It categorised the facilities as either red (recommended for closure, community asset transfer or alternative use) or amber (recommended for retention, subject to outcomes from other service reviews and future considerations). There followed a colour-coded table showing all the red and amber facilities identified for potential closure or subject to further consideration. The facilities that were identified reflected those in the slideshow presentation of 8 December 2020 (which was marked as confidential).
- The Respondent attended a meeting of the CPWG on 21 April 2021. The papers the Respondent had received at the CPWG meeting on 21 April 2021 were intended to be confidential.
- The minutes of the meeting on 21 April recorded that the Executive Director presented a slideshow on the draft strategic commissioning framework and emphasised the presentation and paper were for discussion, not decision. The minutes further recorded that it was agreed that feedback would be sought from members on 19 May 2021 and, when one councillor asked if he could share the document with his political group, the Executive Director had "emphasised that the draft document is confidential, and its content should not be shared with the public at this stage". The minutes recorded that the Respondent indicated he was frustrated with the process and felt that discussions should have taken place at an earlier stage.

- The slideshow presentation was not marked as confidential. Reference was made in it to the SLLC's role in considering which of its services were to be expanded, reduced, introduced or discontinued, and noted that its facilities had been categorised as red, amber, or green. No details were provided, and the specific facilities were not named.
- The slideshow was accompanied by a document entitled 'The Future of Leisure and Culture in South Lanarkshire: Draft Strategic Commissioning Framework for South Lanarkshire Leisure and Culture', which contained the colour-coded table showing the leisure facilities to be retained or closed. The document was not marked as confidential. The same colour-coded table was included in a second accompanying document marked as an "internal briefing paper".
- The SLLC's Executive Director and General Manager had a meeting with the Respondent and the Labour Deputy Leader on 29 April 2021. The Executive Director stated it was emphasised at the meeting that the strategic commissioning framework was a draft document prepared by officers that would be subject to members' feedback at a meeting to be held on 19 May 2021 and, as such, was not for public circulation.
- The Respondent issued a news release, on 30 April 2021, to various local news outlets entitled: 'Labour Slam Lack of Transparency Over Facility Closures'. He sent the news outlets an email stating that: *"South Lanarkshire's Labour Opposition hit out at a lack of transparency over the potential closure of up to 50 community leisure and cultural facilities across South Lanarkshire, including libraries, community halls, golf courses and outdoor bowling areas"*.
The Respondent blamed the other political parties for hiding the potential closures from the public and indicated that he considered the Council should be upfront and honest with the public to ascertain how valuable each facility was to the community in which it was located.
- The Respondent then emailed the news release to the Council's Labour Group, stating that he was doing so ahead of the Group's upcoming meeting with the SLLC's Executive Director. When another councillor asked, in response, if she could share the news release on social media, the Respondent responded stating that she could and that she should adapt it for her "own purposes too". The Respondent copied all other group members into his response.
- One of the journalists (Journalist A) who received the Respondent's news release replied to him asking whether he had a list of the venues at risk. The Respondent replied immediately, stating that the list was "still confidential", but that an enquiry to the Council might lead to it being disclosed.
- The secretary of the Constituency Labour Party sent an email to all South Lanarkshire Labour members that evening, attaching the Respondent's press release. The following day, 1 May 2021, the Chair of the East Kilbride Constituency Labour Party replied stating that he was frustrated that the information had not been disclosed earlier, as he believed it would have been useful in the Labour election campaign. The Chair's email was forwarded to the Respondent, who replied later that day stating that all members of the Labour Group had been aware of the potential closures for several months. The Respondent noted, however, that "the critical documents remain marked confidential", and that the Group did not yet have position on each individual facility. The Respondent explained that these were "the two main reasons why we have not identified all 50 facilities to the press at this stage". The Respondent stated that "the purpose in the release was to ensure that the issue was put into the public domain in some form before the election."
- On 3 May 2021, Journalist A sent the Council's Head of Corporate Communications an email in which he noted that he had received, and wanted to publish a story about, the Respondent's news release

relating to the potential closures of SLLC venues. Journalist A asked the Council to confirm which facilities were at risk of closure, and requested a comment in response to the Labour Group's concerns.

- A second journalist (Journalist B) sent the Respondent an email on 3 May 2021 asking if he had any further details on the facilities that were under threat of closure.
- The Head of Corporate Communications replied to Journalist A on 4 May 2021, with a statement from the Executive Director, noting that, a cross party working group, which included councillors from all political groups, had been considering the leisure and culture services that should be commissioned from the SLLC. The Executive Director noted that, at that time, "any speculation about facilities being closed is therefore premature and unhelpful, and may cause undue and unnecessary alarm", and that "any final proposals will be presented as part of a Strategic Framework to both the Council's Executive Committee and the SLLC Board for their full consideration."
- Journalist A sent the Respondent an email with a copy of the response he had received from the Executive Director earlier that day. Journalist A noted that he still had not been provided with information about the specific facilities that had been marked for potential closure. The Respondent replied that same day and stated: "Typical. Obviously I phrased it very carefully" as "potential closure of up to 50 facilities". The Respondent then listed the 50 facilities identified for potential closure.
- The Respondent advised the ESC's office that he typed this list himself, using information from the internal briefing paper that had been prepared by the Executive Director.
- Journalist A then sent the Head of Corporate Communications an email, including a list copied from the Respondent's email to him, advising that he was now in possession of a list of the 50 venues that he understood were recommended for closure, alternative use, or asset transfer. Journalist A asked the Head of Corporate Communications if the list was accurate.
- The Head of Corporate Communications replied, the same day, noting that the work of the CPWG was meant to be confidential. The Head of Corporate Communications advised that list was not the list of facilities recommended for closure, alternative use, or asset transfer and, therefore, he considered that Journalist A had been misled.
- Later the same day (4 May 2021), the Respondent sent a screenshot of the colour-coded table from the Internal Briefing Paper of 1 April 2021 to Journalist A.
- In response to the Head of Corporate Communications, Journalist A advised that he did not have the full internal documents as they contained other confidential information that was not relevant to his proposed article and "understandably, my source doesn't want that compromised". Journalist A noted, however, that he was in possession of the relevant page listing the facilities.
- The Respondent wrote to the Executive Director on 4 May 2021 stating that he had been frustrated by the lack of transparency about the identity of the facilities under threat. The Respondent indicated that he did not consider the CPWG was acting in the public interest by keeping this information from the public, as he considered that "an upfront conversation with the people of South Lanarkshire would help identify options to sustain or reorganise facilities". The Respondent stated that he was, therefore, writing to advise that "after much consideration" he had decided "that it is reasonable and in the public interest to share the details [of] 50 facilities which are being considered for potential closure, asset transfer, alternative use or further review." The Respondent included a list of the facilities at the foot of his letter, which was identical to the list Journalist A stated that he had received from a source.

- STV News published an article on its website on 5 May 2021 entitled 'Leaked report shows dozens of council venues at risk of closure'. The article states that 29 'red' and 21 'amber' venues had been identified in "a leaked draft report" for closure or community transfer. The article listed all the red and amber facilities.
- The Scottish Parliamentary election was held on 6 May 2021.

Submissions made by the ESC

The ESC noted that the Respondent's press release alerted the local news outlets to the possibility of the potential closure of 50 facilities across South Lanarkshire and made it clear that his party opposed any such a proposal.

The ESC noted that when Journalist A asked for a list of the facilities under threat on 30 April 2020, the Respondent replied noting that this was confidential and suggesting that it might be produced if an enquiry was made to the Council. The ESC argued that it was evident that the Respondent's reply led to the journalist A contacting the Council.

The ESC noted that after the Respondent sent a copy of his press release to his fellow group members, the Constituency Labour Party's secretary sent an email to all South Lanarkshire Labour members that evening, expressing annoyance that the information had not been disclosed earlier, as he believed it would be helpful to the party's election campaign for the forthcoming Scottish Parliamentary election.

The ESC noted that it was clear to all members of the CPWG that it was a private, internal group, as opposed to a public forum, and that information provided to its members in their capacity as members of the CPWG was for private, internal discussion only. The ESC noted that critical documents about the potential future of the facilities had been marked as confidential and argued, in any event, that it was evident that the information was not to be disclosed, given that matters were still at the proposal stage and that no decisions had been made. The ESC noted that the Standards Commission's Guidance on the Code made it clear that sometimes the confidential nature of material will be explicit, such as if a document is marked 'confidential'. In other cases, however, it was clear from the nature of the information or from the circumstances in which it was provided that the information was confidential and was to be treated as such.

The ESC contended, therefore, that the Respondent was aware the information about the potential closure of some facilities was confidential, and that the sole purpose of his press release had been to put this information into the public domain before the election.

The ESC accepted that it was at least arguable that the fact that the Council was considering the future of some facilities was not, in itself, confidential. The ESC advised, however, that there was no question that the colour-coded list of the specific facilities being considered was anything other than confidential, and that there was no dispute that the Respondent had sent this list to a journalist.

The ESC advised that, in response to the complaint about his conduct, the Respondent's initial position was that he had been unaware at the time that the information was confidential. The Respondent had, however, later changed his position, and had contended that, while he was aware the information was confidential at the time, he had believed that there was a 'public interest' exemption in the Code. The Respondent contended that he had understood that this exemption entitled him to disclose the information, even though he was aware it was confidential.

The ESC noted that there was no public interest exemption in either the current version of the Code or the version in place at the time. The ESC advised that he was unclear, therefore, about why the Respondent thought this had been the case. The ESC noted, in any case, that if the Respondent had considered the Code was unclear, he could have referred to the Guidance or sought advice from the Standards Commission or

the Council's Monitoring Officer. The ESC noted that there was no evidence or suggestion that he had done so.

The ESC contended, for the reasons outlined above, that the Respondent was aware, both implicitly and explicitly, at the time of the press release and his subsequent correspondence with party members and Journalist A, that the information he disclosed was confidential. The ESC argued that, as such, the Respondent had contravened paragraph 3.16 of the Code.

The ESC noted that paragraph 3.17 of the Code stated that confidential information should not be used for personal or party-political advantage, or to discredit the Council. The ESC argued that the evidence indicated that the Respondent strongly disagreed with the plans to close any facilities and felt that his constituents would be unhappy with any proposal to do so. The ESC noted that the disclosure occurred a week before the Scottish Parliamentary election and that the Respondent had circulated his new release to other Labour councillors and had encouraged them to share it with the public. The ESC contended that it was obvious from the timing and the content of the Respondent's emails and news release that his intention in disclosing the information about the potential closures was to discredit the Council's SNP Administration, for party-political gain.

The ESC noted that the Respondent had been open about his view that the Council should have been transparent about any plans to close leisure facilities. The ESC noted, however, that paragraph 3.17 makes it clear that the disclosure of confidential information is a breach of the Code even if a councillor considers that the information should be publicly available. The ESC contended, therefore, that the Respondent had also breached paragraph 3.17 of the Code.

The ESC noted that, in making its decision, the Panel would be required to consider the Respondent's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ESC noted that the right to freedom of expression was not absolute and that restrictions can be imposed to prevent the disclosure of information received in confidence. This is provided that any restriction is for relevant and sufficient reasons and is proportionate to the legitimate aim being pursued.

The ESC noted that the public interest could, in some circumstances, be considered strong enough to override a legally imposed duty of confidentiality. The ESC noted, nevertheless, that the Code requires councillors to maintain confidentiality in order to:

- maintain standards and ensure good conduct;
- enable councillor officers to undertake their duties without undue disturbance;
- protect the bond between councillors and officers;
- allow the Council to operate effectively; and
- ensure the council is not brought into disrepute and that public confidence in the council, the role of a councillor and democracy itself is not undermined.

In this case, the ESC noted that as the information concerned a matter of public interest, the Respondent would enjoy enhanced protection in respect of his Article 10 rights. The ESC noted, nevertheless, that the Respondent had the opportunity to express his views about when the information should be disclosed at the CPWG or after the election and, further, that he could have expressed an opinion about the potential closure of facilities in general, without disclosing specific information that was confidential. The ESC further noted that there was no question that the information would be been released into the public domain when the plans were finalised. The ESC contended that, instead of using the available opportunities to express his views on transparency or closures in general, and instead of waiting for the information to be made public before commenting, the Respondent chose to use the confidential information as political capital before the election. The ESC noted that, in doing so, the Respondent undermined public confidence in the work of the Council and council officers. The ESC argued, therefore, that a restriction on the

Respondent's Article 10 rights, that a finding of breach and imposition of a sanction would entail, was justified.

In summing up, the ESC noted that while he accepted that a certain amount of contextual evidence had been provided to explain the circumstances surrounding the Respondent's conduct, it was worth highlighting that the Respondent had accepted he had breached both paragraphs 3.16 and 3.17 of the Code.

Evidence from the Respondent

The Respondent's representative led evidence from the Respondent.

The Respondent advised that he had first been elected as a councillor in May 2017 and had become the Leader of the Labour Group in June 2018, before becoming Leader of the Council last year. The Respondent advised that he had never previously been the subject of a complaint to the ESC.

The Respondent advised that he had been concerned about the proposed process for consulting with the public on the potential closure of facilities for some time, and noted that, in his opinion, the proposals in question were an unprecedented departure from the way matters of this nature were usually handled. The Respondent accepted that he was aware that certain matters before the CPWG were to be treated as confidential but explained he had understood there was a distinction to be drawn between, on the one hand, matters that were generally agreed as being confidential and, on the other, matters that the Code required councillors to treat as confidential.

The Respondent advised that as he considered the public had a right to know, and it was in the public interest to disclose information about the potential closure of the facilities in question, he had consulted the Code to see whether he was required to treat it as confidential. The Respondent explained that he had noted that paragraph 3.16 expressly stated that councillors should work on the basis that council proceedings and printed material were "generally open" to the public, albeit it noted that there may be times where councillors were required to treat discussions, documents, and other information in a confidential manner. The Respondent advised that he had, therefore, begun his consideration of whether he could disclose the information from the starting point that the Code was relatively permissive and encouraged transparency.

The Respondent indicated that he had then considered the documents and had noted they did not contain any obvious confidentiality markers. The Respondent accepted that information could, by its very nature, be inherently confidential, but explained he had not considered this to be the case in respect of the information in question. The Respondent advised that he had concluded, therefore, that he had a right to disclose the information if it was in the public interest to do so.

The Respondent advised that he now understood that there was not, and is not, any public interest exemption under the Code. The Respondent nevertheless reiterated that this had been his understanding at the time. The Respondent advised that he had exercised his judgement in weighing up various factors, including his duty to the public, his understanding of what was required under the Code and the nature of the information, and had concluded he had grounds to make a disclosure.

In response to a question regarding the CPWG's strategic framework document, the Respondent explained that it was his understanding that it had been a draft which was intended to state the anticipated outputs of the CPWG. The Respondent advised that, to the best of his knowledge, the strategic framework document had not entered the public domain until it was circulated at a much later date.

The Respondent rejected that the timing of his disclosure of the information in question was chosen to capitalise politically on the upcoming Scottish Parliament elections. The Respondent advised that his decision to release the information followed a meeting of the group of 29 April 2021, where the nature of

the public consultation was confirmed. The Respondent noted that, by then, the election campaign had been running for weeks. When questioned by the ESC on his statement, in his email of 1 May 2021, that he wanted the issue to be in the public domain “in some form before the election”, the Respondent advised that he had meant that he wanted the information to be out before the election itself, as there was a danger it would get lost in the news cycle that would inevitably follow the election result. The Respondent contended that had his motivation been political gain, it would have been better to release the information well in advance of the election, rather than waiting until the week beforehand.

The Respondent rejected any suggestion that he had actively encouraged his fellow party members to disclose confidential information. Instead, he explained that there had been nothing unusual about the decision to share his news release with his party colleagues, noting it was standard practice to do so. The Respondent noted that it had been up to his colleagues to use the information as they wished.

The Respondent objected to the suggestion that he had leaked information to the press, stating that the word ‘leak’ suggested some form of clandestine or furtive activity. The Respondent noted that he had made no attempt to conceal his disclosure. On the contrary, he had issued a press release and had written to the Executive Director (as a matter of courtesy), to advise that he had decided to share the details of the facilities that were under review.

The Respondent advised that he nevertheless accepted that he had contravened paragraphs 3.16 and 23.17 of the Code by disclosing the information. The Respondent advised that if he had any doubt in future as to whether information was confidential, he would seek advice and would not disclose anything until he had done so.

Submissions made by the Respondent’s representative

The Respondent’s representative explained that his submissions would be very brief, having led extensive evidence from the Respondent that allowed him to contextualise the circumstances surrounding his conduct.

The Respondent’s representative highlighted that the Respondent had accepted, from the outset of the ESC’s investigation, that he had breached the Code. The Respondent’s representative advised that he hoped the Panel would, having heard from the Respondent, now have a better understanding of how the breach had taken place, and that it would take this into consideration when making its decision.

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 Fagan.
2. The Respondent had breached paragraphs 3.16 and 3.17 of the 2018 Code, being the version in place at the time of the events in question.

Reasons for Decision

The Panel determined that the Respondent was acting as a councillor at the time of the events in question. This was because the Respondent had received the information, in his capacity as a member of the Council Cross-Party Working Group. As such, the Panel was satisfied that the Code applied to the Respondent.

Stage 1: Whether the Respondent’s conduct amounted, on the face of it, to a breach of the Code

In reaching its decision as to whether there had been a breach of the Code, the Panel took the following three-stage approach, as outlined in the Standards Commission's Advice Note on the Application of Article 10 of the ECHR.

- First, it would consider whether the facts found led it to conclude, on the balance of probabilities, that the Respondent had failed to comply with the Code.
- Second, if so, it would then consider whether such a finding in itself was, on the face of it, a breach of the Respondent's right to freedom of expression under Article 10.
- Third, if so, the Hearing Panel would proceed to consider 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 heard that the following facts were not in dispute, being that:

- In his capacity as a member of the CPWG, the Respondent received, on 21 April 2021, an internal briefing paper that broadly recommended the closure of some leisure facilities.
- On 30 April 2021, the Respondent sent various press outlets a news release advising that his party was concerned about a lack of transparency "over the potential closure of up to 50 community leisure and cultural facilities across South Lanarkshire, including libraries, community halls, golf courses and outdoor bowling areas". The Respondent shared the news release with other councillors in his political party and encouraged them to share it.
- Having received an enquiry from a journalist on 4 May 2021, the Respondent then sent the journalist a list outlining the 50 facilities that had been identified for potential closure. It was not in dispute that the Respondent provided this list himself, using information from an internal briefing paper provided to the working group.
- After the Council's Head of Corporate Communications sent the journalist an email noting that the working group was meant to be working confidentially and that the list the journalist had was not the list of facilities recommended for closure, alternative use or asset transfer, the Respondent then sent the journalist a screenshot of a colour-coded table from the internal briefing paper of 21 April 2021, which contained a colour-coded list of the facilities.

The Panel found that while the briefing paper had not been marked explicitly as confidential in all its iterations, it was clear from the context in which it had been provided, and the set-up and purpose of CPWG, that it was to be treated as such.

The Panel found that the Respondent was fully aware that the CPWG's work in considering the future of the leisure facilities was confidential when he disclosed the information to the press. The Panel determined, therefore that the Respondent knowingly and deliberately disclosed confidential information, in breach of paragraph 3.16 of the Code.

The Panel noted that paragraph 3.17 of the Code stated that confidential information should not be used for personal or party-political advantage, or to discredit council. The Panel noted that the Respondent disclosed the information a week before Scottish Parliament election. Having reviewed all the available evidence, the Panel was satisfied it was evident from Respondent's comments in the news release, and his email to Labour party colleagues of 1 May 2021, that he had done so, at least in part, for party-political gain. The Panel found therefore, that the Respondent had also, on the face of it, breached paragraph 3.17 of the Code.

Stage 2: Whether any findings that the Code had been contravened would be a breach of the Respondent's right to freedom of expression under Article 10 of the ECHR

The Panel noted that enhanced protection of freedom of expression under Article 10 of the ECHR can apply to all levels of politics, including at a local government level¹. The Panel further noted that the Courts have held that political expression is a broad concept and that there is little distinction between political discussion and discussion of matters of public concern.

The Panel accepted that the information that had been disclosed concerned a matter of public concern, being the potential close of local leisure facilities. The Panel concluded, therefore, that the Respondent benefitted from the enhanced protection of freedom of expression afforded to politicians under Article 10 of the European Convention on Human Rights.

Stage 3: Whether any restriction on the Respondent's right to freedom of expression involved by a finding of a contravention of the Code would be justified by Article 10(2) of the ECHR

The Panel noted, nevertheless, that the right to freedom of expression is not absolute. Article 10(2) allows restrictions, such as the imposition of a sanction for a breach of a regulatory code of conduct, to be imposed to prevent the disclosure of information received in confidence. This is provided that any restriction is for relevant and sufficient reasons and is proportionate to the legitimate aim being pursued.

The Panel noted that it was required to undertake a balancing exercise, weighing the right to freedom of expression enjoyed by the Respondent (and particularly the enhanced right to which they were entitled in this case), against any restriction imposed by the application of the Code and the imposition of any sanction.

The Panel noted, in this case, that there was no question that it was intended that any information regarding the closure of leisure facilities would be made public. The Panel agreed, however, that there had been a need to preserve confidentiality until any final decision was made, so that officers were able to perform their duties and to avoid any undue and unnecessary concern amongst members of the public. The Panel further agreed that requirement to keep the information confidential was necessary 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.

Evidence in Mitigation

The Respondent's representative asked the Panel, in determining the sanction to be imposed, to note that no evidence had been led to demonstrate that any damage or loss had been suffered as a consequence of the Respondent having disclosed the information. In particular, the Respondent's representative asked the Panel to note the various testimonials submitted from individuals across the political divide stating that the disclosure had a limited effect. The Respondent's representative, nonetheless, indicated that the Respondent accepted the potential impact that the breach could have had on public confidence in the council and on the relationship between councillors and officers.

The Respondent's representative noted that, initially, two complaints had been made to the ESC about the Respondent's conduct, but that one had subsequently being withdrawn. The Respondent's representative advised that the complainer who had withdrawn her complaint had reconsidered her position and had subsequently provided a testimonial on behalf of the Respondent.

¹ *Jerusalem v Austria (2003) 37 EHRR 25*

The Respondent's representative noted that the breach was an isolated, one-off incident. There had been no repetition of the contravention and no other concerns had been raised about the Respondent. The Respondent's representative further noted that the Respondent had not previously been the subject of any investigation by the ESC.

The Respondent's representative accepted that there may have been, in part, some element of political gain. The Respondent's representative stated, however, that the Respondent had faced a "dilemma" in determining whether or not to release the information, given his view that it was in the public interest for the information to be disclosed.

The Respondent's representative contended that no evidence had been led to suggest that the Respondent had deliberately and flagrantly breached the Code, instead arguing that the breach had been of an inadvertent or technical nature. The Respondent's representative explained that the Respondent was driven by a desire to ensure the public were aware of the proposals. The Respondent's representative noted that the Respondent had been transparent in his actions, with the press release being issued in his name.

The Respondent's representative advised that the Respondent had co-operated fully with, and had provided everything asked for by, the ESC during his investigation, and that he had also co-operated fully with the Standards Commission's adjudicatory process.

The Respondent's representative noted the Respondent had accepted, at a very early stage, that he had made an "error of judgement", which he regretted "immensely". The Respondent's representative advised that the Respondent has participated in extra training on the Code, and that not only had he apologised for his errors, but that he had also learned from them.

SANCTION

The decision of the Hearing Panel was to suspend, for a period of two months with effect from the date of this decision, the Respondent, Councillor Fagan, from all meetings of the council and of any committee or sub-committee thereof and of any other body on which the Respondent is a representative or nominee of the council or body.

The sanction was made under section 19(1)(c) terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

Reasons for Sanction

In making its decision on sanction, the Panel had regard to the Standards Commission's Policy on the Application of Sanctions. A copy of the policy can be found on the Standards Commission's website, here: <https://www.standardscommissionscotland.org.uk/cases/hearing-rules>. The Panel began by assessing the nature and seriousness of the breaches of the Code.

The Panel noted 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 can also impede discussions and decision-making.

The Panel agreed that in this case, it was legitimate for the Council to have decided that the information be kept confidential until such a time as the proposals discussed had been finalised. The Panel noted that this would have afforded officers sufficient time to prepare and manage external communications which, in turn, would ensure that the Council's position and response were communicated clearly and fully.

The Panel noted that the Respondent had indicated he thought he was allowed to leak information in exceptional circumstances if there was a clear public interest in doing so. The Panel noted, however, that it was clear from the wording of the Code that this was not the case, and that the requirement to maintain confidentiality applied in instances where a councillor held the personal view that such information should be publicly available. The Panel considered that the Respondent should have been aware of the Code's requirements and should have sought advice if he was unclear as to how they should be applied.

Having considered the nature and seriousness of the breach, the Panel considered the aggravating and mitigating factors as set out in the Policy on the Application of Sanctions, beginning with those in mitigation. The Panel noted that mitigating factors are those which may lessen the severity or culpability of the breach.

The Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes. The Panel further noted that there was no evidence of repeated behaviour over a long period of time, of dishonesty and /or concealment, or of any previous or subsequent contraventions of the Code by the Respondent.

The Panel noted that the Respondent had admitted he had breached the Code, had expressed some remorse for doing so and that he had undertaken further training on the requirements of the Code in relation to confidentiality. The Panel further noted the numerous character references provided by the Respondent, which highlighted his ability and integrity, and that he worked hard. In addition, the Panel noted the Respondent's contribution to public life from an early age and to his community and constituents.

The Panel then proceeded to consider the aggravating factors; being ones that may increase the severity or culpability of the breach.

The Panel noted that it had found that the Respondent had deliberately disclosed the information and that it was satisfied, on balance, that he had done so at least in part for party-political gain.

The Panel was concerned by the deliberate nature of the disclosure and noted that, despite being aware that the information in question was confidential, the Respondent chose to share it with the press. The Panel further noted that while the Respondent now accepts that the best course of action in such situations would have been to seek advice from council officers, no such advice was sought at the time. This was also despite the Respondent's clear admission that he had considered it to be a "borderline" case.

While noting the Respondent's contention that the disclosure of the information in question was motivated primarily because of his concern that the council's proposals would not be shared with the public, the Panel observed that it had found the information had been disclosed at least in part, for party-political gain. The Panel was concerned by this finding, noting that the Respondent had been afforded ample opportunity to propose changes to the management of the release of the information as a member of the CPWG. The Panel was particularly concerned that the Respondent had sought to amplify the effect of his disclosure to the media, and by consequence its political impact, by emailing his news release to his party colleagues and encouraging them to share it with the public.

The Panel noted the potential impact of the Respondent's actions on others, particularly council officers, who would have been responsible for dealing with any resulting enquiries from the press and public. The Panel was concerned that the Respondent appeared not to have considered this before making the decision

to disclose the information. The Panel further noted that the disclosure was likely to have resulted in speculation about facilities being closed, before any final decision had been taken, which may have caused undue and unnecessary concern.

The Panel took note of the fact that, during the Hearing, the Respondent had sought to assure the Panel that he had gained insight into the matter and the Code, as well as stating he was remorseful for his actions.

The Panel was, therefore, especially disappointed to note the quotes attributed to the Respondent that appeared in the press following the Hearing, which appeared to indicate that he did not understand that there are legitimate reasons as to why certain information is deemed confidential for a period of time and why it should not be disclosed during that period.

The Panel warned that any future breach of the confidentiality provisions in the Code by the Respondent will be treated with the utmost seriousness.

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: 7 July 2023



**Ms Suzanne Vestri
Chair of the Hearing Panel**