

## **Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at the Sir John Wilson Town Hall, Airdrie, on Friday 29 September 2023.**

**Panel Members:** Suzanne Vestri, Chair of the Hearing Panel  
Ashleigh Dunn  
Helen Donaldson

The Hearing arose in respect of a Report referred by Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/NL/3705, concerning an alleged contravention of the Councillors' Code of Conduct dated December 2021 (the Code) by Councillor Kenneth Duffy (the Respondent).

The Respondent represented himself. The ESC was represented by Sarah Pollock, the ESC's Hearings Officer.

### **Referral**

Following an investigation into a complaint received on 2 February 2022 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 5 July 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The ESC advised that he had considered, on the face of it, that the Respondent had failed to comply with paragraphs 3.10, 7.1, 7.4 and 7.5 of the Code, the relevant parts of these being as follows:

#### ***Respect and courtesy***

##### ***Paragraph 3.10***

*I will follow the Protocol for Relations between Councillors and Employees at Annex A and note that a breach of the Protocol will be considered a breach of this Code. I will also comply with any internal protocol the Council has on councillor / employee relations.*

##### ***Annex A - Protocol for Relations between Councillors and Employees***

*2. Councillors and employees should work in an atmosphere of mutual trust and respect, with neither party seeking to take unfair advantage of their position or influence.*

*24. Councillors and employees both have a responsibility to project a positive image of the Council and should avoid making any public comments that could bring it into disrepute.*

#### ***Taking decisions on quasi-judicial or regulatory applications***

##### ***Paragraph 7.1***

*I need to be especially vigilant when I am making a decision on a quasi-judicial or regulatory application. For these applications, I need to ensure there is a proper and fair hearing of the application and I must avoid any impression of bias in the whole decision-making process.*

##### ***Paragraph 7.4***

*In dealing with these applications, I WILL:*

*a. throughout my involvement with the entire application process act fairly and be seen to act fairly.*

##### ***Paragraph 7.5***

*In dealing with such applications, I WILL NOT:*

*a. pre-judge or demonstrate bias or be seen to pre-judge or demonstrate bias;*

*b. indicate or imply support for or opposition to an application nor indicate my voting intention prior to the appropriate meeting where the application will be considered;*

*c. in advance of the decision-making meeting, attempt to influence employees to adopt a particular position as that would imply that I am prejudiced in my decision-making;*

*d. lobby other councillors who may be dealing with the application;*

*e. express any view on the application before the appropriate meeting where the application will be considered. If I do so I will not participate in any aspect of the decision-making nor vote on the application;*

- f. *formulate my conclusions on an application until all available information is to hand and has been duly considered by me at the meeting where the application will be considered;*
- g. *express any indicative or provisional views in the course of my involvement in any aspect of the application; or*
- h. *otherwise act improperly or do anything which could reasonably create a perception that I have acted improperly.*

The ESC advised that he had concluded, however, that a restriction on the Respondent's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), that a finding of breach and the subsequent imposition of a sanction would entail, could not be justified.

The Standards Commission nevertheless decided it was both proportionate and in the public interest to hold a Hearing. This was because the Standards Commission noted that the ESC had concluded that, on the face of it, there was evidence of a breach of the Code and considered that the alleged breach was not of an insignificant or of a technical, minor nature.

### **EVIDENCE PRESENTED AT THE HEARING**

#### **Joint Statement of Facts**

The Panel noted that a Joint Statement of Facts had been agreed between the ESC and the Respondent, in which it was agreed that the Respondent was acting in his capacity as a councillor at the time of the conduct in question, and, as such, the Code applied.

It was further noted, in the Joint Statement of Facts, that there was no dispute that, on 17 January 2022, the Respondent had a telephone conversation with a journalist relating to a planning application in respect of rail freight development at the site of the former Ravenscraig steelworks. Information relating to the application had appeared in a subsequent media article published later that day, entitled 'Councillor reveals controversial Ravenscraig rail freight terminal to be rejected by planners'. The Joint Statement of Facts recorded that the Respondent had not had sight of the article before it was published. It further recorded that, following consultation with council officers, the Respondent did not attend the meetings of the Council's Planning Hearings Committee or full Council, on 15 December 2022, at which the decision on the application was made.

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

The ESC's representative advised that there was significant opposition to the planning application, from the local community, politicians and businesses, with over 600 objections being submitted on various grounds, including that it was contrary to the Local Development Plan. The ESC's representative further advised that as the application concerned a significant development, it was classed as a 'National Development', meaning it required to be considered by the Council's Planning Hearings Committee before a final decision was taken by full Council.

The ESC's representative noted that the Respondent was quoted in the media article of 17 January 2022 as stating that he was "pleased" to impart the news that a vote on the application would be taken in February. The Respondent was further quoted as stating that the local community action group, "*will be no doubt heartened that the recommendation from planners will be for refusal but that in line with the rules governing elected members I will not be expressing my opinion on this development until I have had the opportunity to vote*".

The ESC's representative advised that the ESC had firstly considered whether the Respondent had disclosed confidential information to the journalist. The ESC's representative drew the Panel's attention to an email sent by the Respondent to the Council's Executive Director of Enterprise and Communities, on 12 January 2022, in which he asked whether the application would be determined by full Council or a planning

committee. In a response email that day, the Executive Director of Enterprise and Communities advised that the application would be considered by the Planning Hearings Committee before being determined by full Council. The Executive Director of Enterprise and Communities noted that officers were doing everything they could “to have everything in place for the meetings to be held in February”. The ESC’s representative noted that this response made no reference to what any recommendation from officers might be, in respect of the application or its status. The ESC’s representative further noted that while the response indicated that the matter could be referred for committee consideration as early as February, no firm commitment was provided to that effect.

The ESC’s representative advised that after the media article was published, the Council conducted an internal inquiry to determine whether council officers had inappropriately disclosed confidential information about the status of the application, or what their recommendation would be, to the Respondent that he thereafter passed to the journalist. The ESC’s representative noted that no evidence had been found to suggest any such information had been disclosed by officers to the Respondent or the media. The ESC’s representative advised that the ESC had concluded, therefore, that the Respondent had not breached the confidentiality provisions in the Code.

The ESC’s representative advised, however, that the ESC had proceeded to consider whether the Respondent had disclosed inaccurate information about the application to the journalist and, if so, whether this had the potential to influence the decision that was to be made in respect of it.

The ESC’s representative contended that it was evident that the information in the article’s quote, attributed directly to the Respondent, to the effect that the recommendation from planners would be to refuse, was incorrect at the time of publication. The ESC’s representative drew the Panel’s attention to various contemporaneous emails from council officers indicating that, as further information was awaited from the applicant, the planning service was still considering the matter and had not yet reached a decision on whether to recommend the application be approved. The emails further made it clear that no decisions had been made in respect of the dates that the application was to be put to either the Planning Hearings Committee or full Council.

The ESC’s representative submitted, therefore, that at the time of the article’s publication there was:

- no evidence that officers had disclosed information about what their recommendation would be to the Respondent; and
- no factual basis for the statement in the quote to the effect that officers would recommend refusal.

The ESC’s representative advised, therefore, that the ESC had concluded that the statement the Respondent had given to that effect was simply his opinion in respect of what he thought was likely to happen.

The ESC’s representative noted that while the Respondent could not be held responsible for how the journalist framed any quote he had provided, there was no evidence or suggestion he had asked for the published one to be amended or that he had raised concerns that it did not reflect accurately what he had said.

The ESC’s representative then addressed whether the Respondent’s conduct, in suggesting what the recommendation on the application would be, could be considered reasonably as an attempt to influence either officers or other councillors in their decision-making. The ESC’s representative noted that the Respondent was quoted in the article as stating that he would not be expressing any view on the merits of the application until he had the opportunity to vote on it. The ESC’s representative advised, however, that this statement was made after the one to the effect that a local community action group would be ‘heartened’ to learn that officers would be recommending refusal. The ESC’s representative noted that the application was of a high-profile nature, which had generated significant opposition in the local community. The ESC’s representative submitted that the Respondent’s actions, in providing incorrect information about

the status of the application and recommendation to be made by officers, could be interpreted as an attempt to pressure officers into recommending refusal and to prompt them to take action to set dates for consideration of the application by the Planning Hearings Committee and full Council. The ESC's representative suggested that the Respondent could have done so deliberately, in an attempt to curry favour with the local community, for political gain. The ESC's representative contended, in support of this supposition, that the failure by the Respondent to correct the quote in the article suggested that he was content to let it stand.

The ESC's representative noted that the Respondent's position was that while he did not recall the details of his conversation with the journalist, he accepted the quote attributed to him about the officers' recommendation was incorrect. The ESC's representative indicated that the Respondent's position was that he had based his understanding on what the recommendation was likely to be on what he had been told about the application by local businesses. The Respondent's position was that he had intended to reflect his opinion on that and had not been making any attempt to influence the recommendation or subsequent decision-making. The ESC's representative noted, however, that the information in the quote was presented as fact, rather than opinion, and suggested that it would have been understood by anyone reading the article as such.

Turning to the application of the Code, the ESC's representative argued that it would be reasonable for members of the public reading the article to assume that the contents of the Respondent's quote were accurate and to conclude, therefore, that officers had disclosed confidential information about their recommendation and the timetable for consideration of the application. The ESC's representative contended that this gave the impression that officers had behaved improperly and could have led to their integrity being questioned. The ESC's representative noted that Annex A of the Code, being the protocol for relations between elected members and council officers, requires both councillors and employees to work in an atmosphere of mutual trust and respect, with neither party seeking to take unfair advantage of their position or influence. It further requires councillors and employees to project a positive image of the Council and to avoid making any public comments that could bring it into disrepute. The ESC's representative contended that, by making public comment that could bring officers and the Council into disrepute, the Respondent had, on the face of it, failed to comply with the protocol, in breach of paragraph 3.10 of the Code.

The ESC's representative noted that paragraph 7.1 of the Code requires councillors to ensure there is a proper and fair hearing of a planning application and to avoid any impression of bias in the whole decision-making process. Paragraphs 7.4 and 7.5 require councillors to act fairly and without bias and to ensure they are seen to be acting fairly and without bias throughout their involvement with the entire application process. Paragraph 7.5 further states that, in advance of any decision-making meeting, councillors must not attempt to influence officers to adopt a particular position as that would imply that the councillor is prejudiced in their decision-making. The ESC's representative advised that, having taken advice from officers, the Respondent did not take part in the decision-making on the application. The ESC's representative contended, nonetheless, that his actions, in providing incorrect information about the recommendation and status of the application, had the potential to undermine public confidence in the Council's process. The ESC's representative further contended that the fact the Respondent did not take part in the decision-making, despite having been due to do so, was a tacit admission that his conduct could have given the impression of unfairness or bias and was incompatible with the Code.

While the ESC's representative accepted that it was not clear that the Respondent had been intending or seeking to influence officers or fellow elected members, she contended that the quote attributed to him in the article could be perceived as an attempt to do so. Such comments could also potentially undermine the process, leaving it open to allegations of unfairness. The ESC's representative reiterated that the application had attracted significant interest from the local community for more than two years and strong opposition from local action groups, businesses, and politicians from all sides. The ESC's representative contended that, given this, it would not be unreasonable for members of the public to conclude that the Respondent may

have chosen to advance selected information, that accorded with the majority view, in order to secure political gain. The ESC's representative argued, therefore, that the Respondent had either knowingly or inadvertently failed to avoid the perception that he was biased and was attempting to influence officers and other councillors to adopt a particular position in respect of the application.

As such, the ESC's representative contended that, on the face of it, the Respondent had also contravened paragraphs 7.1, 7.4 and 7.5 of the Code.

The ESC's representative nonetheless noted the Respondent had a right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ESC's representative noted that the Respondent had spoken to the journalist to discuss the planning application in his capacity as an elected member. The ESC's representative argued, therefore that the conversation took place in a political context and that it concerned a matter of public concern. As such, he was entitled to the enhanced protection of his Article 10 rights afforded to politicians when discussing matters of public interest or concern.

The ESC's representative contended that a restriction on the Respondent's Article 10 rights would be justified if it was determined that he was responsible for disclosing confidential information. There was, however, no evidence whatsoever that confidential information had been passed by any council officer to the Respondent. Indeed, at the time the Respondent spoke to the journalist, more information was still required from the applicant who had made the planning application and no formal dates had been set for the Planning Hearings Committee and the subsequent full Council meeting which would make the ultimate decision on the application.

The ESC's representative noted, however, that the ESC had found that the Respondent had provided misleading comments on the application and that he had potentially done so to improve his standing with the local community and to influence the outcome of the application. The ESC's representative noted that politicians often make speculative comments to the media, based on their opinions, and reiterated that the Respondent did not take part in the decision-making on the application. The ESC's representative noted that paragraph 7.5 of the Code distinguishes between providing commentary on an application in advance, and participating in the decision-making process, in that it states that councillors should not express any view on the application before the appropriate meeting where the application will be considered and that if they did so, then they would not be able to participate in the decision-making or voting on the application. The ESC's representative advised that, in the circumstances, the ESC was not persuaded that a restriction on the Respondent's enhanced right to freedom of expression, that a finding of a breach of the Code and imposition of a sanction would entail, was justified.

In response to a question from the Panel about who could have been influenced by the Respondent's conduct and why, the ESC's representative noted that, at the time of his conversation with the journalist, the Council was still awaiting information from the applicant and, further, that the application was not considered by the planning committee and full Council until December 2022, being some 11 months later. The ESC's representative accepted, therefore, that a significant period of time had elapsed between the publication of the article and the conclusion of the application process, meaning its contents could have had less impact. The ESC's representative suggested, however, that it was equally arguable that the fact that incorrect information to the effect that officers were recommending the application be refused was in the public domain for a significant amount of time could have led members of the public to understand it was to be rejected, which in turn could have had the potential to influence officers and other elected members.

The ESC's representative acknowledged, in response to another question from the Panel, that the Respondent's decision not to take part in the decision-making on the application was not necessarily a tacit admission that his conduct was incompatible with the Code, given he may have been following advice from officers. The ESC's representative noted, nevertheless, that it was apparent from the article that the

Respondent had intended to take part in the decision-making and the fact that he did not then do so could at least be perceived, therefore, as an admission that his participation could have been problematic.

In response to questions from the Panel about the application of Article 10, the ESC's representative argued that while the Respondent's comments concerned a planning application, being a quasi-judicial matter, they were not made in the context of a quasi-judicial or regulatory forum, such as a planning meeting. The ESC's representative contended that the Respondent had simply been providing an opinion, albeit she accepted this had been presented in the article as fact.

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

The Respondent advised that he had initiated the email exchange with officers that led to the one to him from the Council's Executive Director of Enterprise and Communities on 12 January 2022 (being five days before he spoke to the journalist), in order to establish the process for consideration of the application. The Respondent advised that the journalist had contacted him on 17 January 2022, by telephone, to seek an update on the progress of the planning application, having been told previously by the Respondent that it was likely he would be able to provide an update in the new year. The Respondent confirmed that he had not been given any information by officers, as to what their recommendation would be in respect of the planning application, before he spoke to the journalist. The Respondent advised that while he could not recall exactly what he had said to the journalist during their discussion, his intention had been to convey that he believed the recommendation would be to reject the application.

The Respondent accepted that he was aware, during the telephone call, that he could be quoted directly in any resulting article albeit he considered with the benefit of hindsight, that the content of the quote did not reflect what he had intended to convey. The Respondent acknowledged, in this regard, that the article reported the information he had provided as fact, rather than as opinion, as he had intended.

The Respondent noted, nonetheless, that while the information contained in the quote attributed to him, about the officers' recommendation and status of the application, had been presented as fact it was, in any event, incorrect. The Respondent entirely rejected any suggestion that he had provided inaccurate information deliberately in order to influence either the recommendation or the decision itself, albeit he accepted the way the article was worded could give rise to a perception that he had done so. The Respondent advised that his opinion on the expected recommendation was based on his discussions with contacts in the building industry about the likelihood of the application being approved.

The Respondent noted that he was not afforded an opportunity to check or correct the article before it was published. The Respondent advised that he had been unhappy with the content as it did not reflect the point he had been trying to get across, namely that he believed the application would be rejected. The Respondent confirmed that he accepted that it would be reasonable for anyone reading the article to infer incorrectly that officers had disclosed confidential information to him and, as such, he had apologised to the Council's Chief Executive at the time. The Respondent advised that, in order to avoid any similar situation from arising, he now ensures that any and all contact he has with the press is in writing.

In response to questions from the Panel, the Respondent advised that his motivation in speaking to the press was to provide the community with an update on the progress of the application. The Respondent confirmed that he had not attempted to contact the journalist to see if the article could be amended, as doing so had not dawned on him. The Respondent noted, in any event, that even if he had wished to do so, by then the information was already in the public domain and, further, that the placement of any corrections in the media tended to make them easy to overlook.

The Respondent noted that the way the quote was worded reflected how he might write, rather than speak. While the Respondent accepted that the journalist would not have made up the information outlined in the article, he noted that it was incorrect, in that no recommendation had been made at the time and no date

had been arranged for the committee and full Council consideration of the application. The Respondent contended, therefore, that he could not have provided a definitive timeframe and, instead, could only have speculated on what this and the recommendation would be.

The Respondent advised that, as Provost, he would have been expected to chair the full Council meeting on 15 December 2022. The Respondent confirmed that he had not attended the meeting, however, as he was aware that some concerns had been expressed about the article and, having sought advice from officers, was worried about how his participation may be perceived. The Respondent noted that had he been seeking political gain, he would have attended the meeting and taken part in the discussion and decision-making, in accordance with what his constituents would have wanted him to do.

## **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 Duffy.
2. The Respondent had breached paragraph 3.10 of the Code

### **Reasons for Decision**

#### **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 noted that neither the Council, during its internal inquiry, nor the ESC, had found any evidence to suggest that officers had advised the Respondent, before his discussion with the journalist on 17 January 2022, that they intended to recommend the planning application be rejected. The Panel further noted that the Respondent denied categorically having received any such information. In the circumstances, the Panel was not satisfied, on the balance of probabilities, that the Respondent had disclosed, to the journalist, information about the application that had been given to him in confidence. The Panel noted, in any event, that this conclusion was supported by the fact that the information contained in the quote in the article of 17 January 2022, attributed to the Respondent, was incorrect. The Panel was satisfied, in this regard, that at the time of the Respondent's discussion with the journalist, further information was awaited from the applicant, meaning that officers had not made a recommendation on the application and no timetable for its consideration had been finalised.

Having determined that the Respondent did not disclose confidential information to the journalist, the Panel proceeded to consider whether the information about the officer's recommendation or status of the application had been presented, by the Respondent, to the journalist as fact and, if so, whether this had been done deliberately in an attempt to influence either officers or other elected members.

The Panel noted that information in the article, that purported to quote from the Respondent, regarding the potential timing of when a decision on the application would be made, appeared to reflect the content of

the emails the Respondent had exchanged with officers the week before. The Panel considered, therefore, that this indicated it was likely that information about the proposed timetable for consideration of the application had been presented to the journalist as fact.

The Panel noted that the Respondent's position was that while he could not recall exactly what had been said during his conversation with the journalist, he was confident that he would not have presented information about the recommendation from officers as fact, given he had not been told what this would be. The Panel noted, however, that the article purported to quote from him directly. The Panel considered the Respondent could have contacted the journalist to ask for the article to be amended if he was of the view that it did not truly reflect their discussion. The Panel nevertheless accepted the Respondent's position that doing so may not have made any difference, given the information in the article was now already in the public domain.

The Panel was of the view, nevertheless, that it was unlikely the journalist would have made up information about the officers' recommendation and therefore was satisfied, on balance, that the Respondent must have at least given an indication of what he believed the recommendation would be. In reaching this conclusion, the Panel again noted that other aspects of the quote attributed to him in the article appeared correct.

The Panel noted, nonetheless, that there was no evidence that officers had told the Respondent what their recommendation was, or was likely, to be. In the circumstances, the Panel accepted that any information the Respondent gave about the likely recommendation may well have been based on his knowledge of the application and the reasons behind the opposition to it, as well as his understanding of its compatibility or otherwise with the Local Development Plan.

The Panel considered, however, that members of the public, on reading the article, may have believed that council officers had acted inappropriately in providing information about their recommendation to the Respondent. This was because that information would have been confidential, and also because further details were still awaited from the applicant. The Panel considered that the suggestion that council officers had revealed prematurely their recommendation on a potentially controversial and high-profile matter had the potential to bring the Council into disrepute.

As such, the Panel was satisfied that, on the face of it, the Respondent had breached the Protocol for Relations between Councillors and Employees and, in turn, paragraph 3.10 of the Code.

The Panel observed that, at the time of the article, it would have been reasonable for anyone reading it to expect that the Respondent would participate in the decision-making on the application, given it was a decision to be made by all North Lanarkshire councillors.

The Panel further observed that the Respondent was quoted as stating that he would not be expressing a view on the application until it was before him for decision-making. The Panel considered, however, that it was reasonable for anyone reading the article to infer that the Respondent was against the application. This was because the quote attributed to the Respondent referred to him being 'pleased' to be able to make available the purported news about when the application would be considered. The quote further suggested that a local community action group would likely be 'heartened' that the recommendation would be to reject the application in the same sentence as the reference to his intention to vote on the matter.

The Panel nevertheless agreed with the ESC's representative that paragraph 7.5 of the Code distinguishes between providing commentary on a planning application in advance, and participating in the decision-making process. The Panel noted that the Code states that councillors should not express any view on an application before the appropriate meeting where it will be considered and that if they did so, then they would not be able to participate in the decision-making or voting on the application.



While the Panel accepted that the Respondent had indicated he intended to take part in the decision-making, it noted that, ultimately, he did not do so. The Panel was not satisfied, therefore, that the Respondent had failed to act fairly or been seen to act fairly, or that he had pre-judged or demonstrated bias before considering the application, in breach of paragraphs 7.4 or 7.5 of the Code.

The Panel noted that paragraph 7.1 of the Code requires councillors to be “vigilant” when making decisions on planning applications. It further requires them to ensure a proper and fair hearing of the application and notes that they must avoid any impression of bias in the whole decision-making process. The Panel again noted that the Respondent had not taken part in the decision-making on the application. The Panel further noted that it had been unable to determine, categorically, that he had presented information about the officers’ recommendation to the journalist as fact. The Panel considered, in any event, that disclosing information (factual or otherwise) about what the recommendation would be, or was likely to be, would not in itself give the impression that the Council was biased against the application. The Panel accepted that, if they had seen the article, the applicant may have questioned why a recommendation had been made before all information had been submitted and considered. The Panel was of the view, however, any such impression could have been dispelled relatively easily, had officers been challenged, given that it was incorrect. The Panel further agreed that there was no evidence to suggest that the Respondent’s actions prevented the Council from giving the application a fair and proper hearing. The Panel was unable to conclude, therefore, that the Respondent had breached paragraph 7.1 of the Code.

The Panel noted that, in respect of planning applications, paragraph 7.5 of the Code states that councillors should not attempt to influence officers to adopt a particular position, and should not lobby other councillors who were to be involved in the decision-making. The Panel noted the ESC’s position was that the Respondent had provided misleading comments on the application and that he had potentially done so to improve his standing with the local community and to influence the outcome of the application. The Panel further noted that the ESC considered the fact that incorrect information, to the effect that officers were recommending the application be refused, was in the public domain for a significant amount of time, could have led members of the public to understand it was to be rejected, which in turn could have had the potential to influence officers and other elected members in their decision-making.

The Panel was of the view, however, that a breach of the requirement in paragraph 7.5 for councillors to refrain from any “*attempt* to influence employees to adopt a particular position” or to “lobby other councillors who may be dealing with the application”, would involve some form of deliberate action or intent.

The Panel was not satisfied that it had any evidence before it to determine, with any certainty, that the Respondent had deliberately provided the journalist with inaccurate or misleading information. Instead, the Panel found that it was likely the Respondent had simply given an indication of what he believed the recommendation would be. The Panel noted that the ESC accepted, in his consideration of the application of Article 10, that politicians often made speculative comments to the media, based on their opinions and, further, that he accepted that it was not clear whether the Respondent had provided misleading information knowingly or otherwise.

While the Panel accepted the ESC’s representative’s point that it would not be unreasonable for members of the public to conclude that the Respondent may have chosen to advance selected information, that accorded with the majority view, in order to secure political gain, it noted this was different from attempting to influence or lobby others involved in the decision-making to adopt the same view. Indeed, the Panel noted that the Respondent could have also secured political advantage if opposition councillors had reached a different view.

The Panel was of the view that, in the absence of any evidence of any deliberate intent by the Respondent to mislead or to influence or lobby officers or other elected members, it could not conclude that there had been a breach of paragraph 7.5.

**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 level<sup>1</sup>. 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 council's consideration of a high-profile planning application. 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 enable local government to function effectively and to ensure the council or office of a councillor is not brought into disrepute. 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 he was 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 it had not found any evidence that the Respondent had provided misleading information to the journalist deliberately. The Panel considered, however, that the Respondent's actions, in failing to make it clear that he was only expressing an opinion about what the recommendation from officers on the application might be, resulted in an article being published that left a clear impression that officers had acted improperly. The Panel was of the view that this had the potential to erode the important relationship between councillors and officers and to bring the Council into disrepute.

In this case, the Panel was satisfied that a restriction on the Respondent's right to freedom of expression that that a finding of a breach of the Code and imposition of a sanction would entail was necessary, sufficient and proportionate to:

- protect the bond between officers and elected members; and
- maintain the public confidence in council officers, the council itself and the council's decision-making processes.

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 advised that he always tried to display the highest possible standards of conduct as he recognised the importance of doing so, particularly in respect of encouraging involvement in political and community matters from under-represented groups in society. The Respondent noted that he had never previously been the subject of any complaint or referral to the Standards Commission and that he had co-operated fully with the investigative and adjudicatory process.

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<sup>1</sup> *Jerusalem v Austria (2003) 37 EHRR 25*

The Respondent advised that he always sought to work effectively with officers and proactively in the best interest of his constituents. The Respondent drew the Panel's attention to a character reference supplied by a local community action group.

The Respondent reiterated that he had not intended to cause any difficulties for officers and again apologised for having done so.

### **SANCTION**

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

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

### **Reasons for Sanction**

In determining the appropriate sanction, the Panel considered:

- first, whether the interference (i.e. the proposed sanction) was the minimum necessary, or whether less restrictive means could be employed; and then
- secondly, whether the benefit of that least necessary measure outweighs its adverse impact on the Respondent's right to freedom of expression.

In making its decision in 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 breach of the Code.

The Panel noted that the requirement for councillors to comply with the protocol for relations between elected members and council officers is a fundamental part of the Code, as a failure to do so can impede the effective functioning of the Council and, further, can bring it into disrepute. The Panel noted, in this case, that the Respondent's conduct resulted in an article being published that left a clear impression that officers had acted improperly. The Panel noted that not only did this have the potential to reduce public confidence in the Council, but it also resulted in further work for officers, who were obliged, as a result, to undertake an internal inquiry and to respond to concerns.

The Panel proceeded to consider whether there were any 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 noted the character reference from the community group to the effect that the Respondent demonstrated an outstanding commitment to public service, by listening to and representing local families, addressing individual casework concerns, and making a positive impact on the community he represents. The Panel further accepted the Respondent's position that he had not intended to create difficulties for officers and noted that he had apologised for doing so at the time.

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

The Panel considered that the Respondent's conduct, in making public comment that suggested officers had failed to act in accordance with proper process, had the potential to damage both their reputation and the reputation of the Council itself.

The Panel nevertheless concluded that the Respondent's conduct did not warrant a more serious sanction than censure. This was because there was no evidence of serious aggravating factors such as dishonesty or repeated behaviour over a long period of time. The Panel also noted that the Respondent had immediately apologised to Council officers, expressed regret and had never previously been the subject of a referral from the ESC. Further, the Panel had no reason to consider that the outcome of the planning application had been affected by the Respondent's conduct.

**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:** 6 October 2023



**Suzanne Vestri  
Chair of the Hearing Panel**