

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on Monday 1 May 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/An/3690, concerning an alleged contravention of the Councillors' Code of Conduct dated December 2021 (the Code) by Councillor Beth Whiteside, elected member of Angus Council (the Respondent).

REFERRAL

Following an investigation into a complaint received about the conduct of the Respondent, the ESC referred a report to the Standards Commission for Scotland on 28 February 2023, in accordance the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The ESC reported that two complaint forms about the matter had been received. The first, dated 12 January 2022, was from the Respondent, who had decided to self-refer. The second, dated 13 January 2022, was from a former Angus councillor (the Complainer).

The ESC reported that the Complainer and the Respondent had both been members of Angus Council's Licensing Board. At a meeting of the Licensing Board on 13 December 2021, a report about an alcohol licence holder had been discussed. The report had included information about a letter received from the police, which stated it was considered that the licence holder had acted in a way which was inconsistent with two of the objectives set out in the Licensing (Scotland) Act 2005.

The ESC reported that the complaint concerned comments the Respondent had posted on Facebook, on the same day, about what the Complainer had allegedly said at the meeting. The Complainer considered the Respondent had misrepresented what he had said and, in doing so, had breached the respect, and bullying and harassment provisions in the Code. In addition, it was alleged that the Respondent's posts had allowed the identity of the licence holder to become known and reported in the press, meaning that she had also breached the confidentiality provisions in the Code.

The ESC advised that he had considered whether the Respondent had contravened paragraphs 3.1, 3.3, 3.21 3.22 and 3.23 of the Code, which are as follows:

3.1: I will treat everyone with courtesy and respect. This includes in person, in writing, at meetings, when I am online and when I am using social media.

3.3: I will not engage in any conduct that could amount to bullying or harassment (which includes sexual harassment). I accept that such conduct is completely unacceptable and will be considered to be a breach of this Code

3.21: I will not disclose confidential information or information which should reasonably be regarded as being of a confidential or private nature, without the express consent of a person or body authorised to give such consent, or unless required to do so by law. I note that if I cannot obtain such express consent, I will assume it is not given.

3.22: *I accept that confidential information can include discussions, documents, information which is not yet public or never intended to be public, and information deemed confidential by statute.*

3.23: *I will only use confidential information to undertake my duties as a councillor. I will not use it in any way for personal or party-political advantage or to discredit my council (even if my personal view is that the information should be publicly available).*

EVIDENCE PRESENTED AT THE HEARING

Submissions made by the ESC's Representative

The ESC's Representative advised that the Complainer and the Respondent had both been members of Angus Council's Licensing Board. The ESC's Representative advised that it was not in dispute that at a meeting of the Licensing Board on 13 December 2021, a report about an alcohol licence holder had been discussed in private. The report had included information about a letter received from the police, which stated that they considered that the licence holder had acted in a way which was inconsistent with two of the five licensing objectives. The ESC's Representative advised that at the meeting the Board decided, unanimously, to revoke the licence.

The ESC's Representative advised that it was also not in dispute that after the meeting the Respondent posted on Facebook that she was "utterly appalled that an elected member in a council meeting today referred to a very serious assault on a female by her male ex-partner as 'just another domestic'". The Respondent stated that "this not only diminishes the offence but totally feeds into the narrative that somehow violence against women is less serious when committed by someone you know". She further stated that "despite being previously suspended for his attitude towards women, it seems that no lessons have been learned by this particular councillor" and that she had "called out" the Complainer's conduct at the meeting.

The ESC's Representative noted that the mention of a previous suspension was a reference to one imposed on the Complainer by the Standards Commission in November 2018. The ESC's Representative advised that the Respondent had not identified the Complainer in the initial post, but when another councillor had posted a comment on the post questioning whether she was referring to the Complainer, the Respondent replied in the affirmative.

The ESC's Representative advised that the Respondent had provided a transcript of the recording of the meeting. This detailed that the Complainer had actually said: "Now what I am hearing is a domestic, like many, many domestics all over the country."

The ESC's Representative noted that, in response, the Respondent had stated that she would "like to point out that it's not very helpful for members to refer to a serious assault as merely a domestic. It diminishes the importance of it and it's very unhelpful." The Complainer had then stated: "Convener, yes this was a serious incident and by referring to it as a domestic I am in no way trying to demean it". The Complainer noted that there were "too many" incidents of domestic violence and that "they are always of concern".

The ESC's Representative advised that the *Daily Record* had then published an article referring to the Respondent's post. While the article had not named the licence holder, it had referred to him having been convicted of an assault, the month in which he had been convicted and also detailed what the Respondent had alleged the Complainer had said.

The ESC's Representative noted that the Respondent had referred, in her post, to her role as a councillor and had commented on her attendance at a meeting in that capacity. The ESC's Representative further noted that the Respondent had referred to herself as a councillor in the name of Facebook account from which the post was made. The ESC's Representative argued, therefore, that the Respondent was acting, or could reasonably be perceived as acting, as a councillor when publishing the post and, as such, the Code applied.

The ESC's Representative noted that the Complainer had not stated or referred to the assault by the licence holder as being "just another domestic", as alleged by the Respondent in her post. The ESC's Representative contended there were similarities in the wording and word pattern between the phrase used by the Complainer (being "many, many domestics"), and the one the Respondent reported that he had said, (being "just another domestic"). The ESC's Representative contended that this suggested that the Respondent merely misheard what had been said, as opposed to having misrepresented the Complainer deliberately. The ESC's Representative accepted, nonetheless, that the misrepresentation of what had been said, with its associated suggestion that the Complainer had diminished the importance or effect of domestic violence, had served to adversely affect the Complainer's reputation and had diminished him in the estimation of the public. The ESC's Representative concluded, therefore, that in misrepresenting publicly what the Complainer had said at the meeting, the Respondent failed to treat him with courtesy and respect as required by the Code.

The ESC's Representative contended, however, that the misrepresentation did not amount to bullying and harassment in the circumstances. While the ESC's Representative accepted that the post may have encouraged others to subject the Complainer to such behaviour, there was no evidence of the Respondent having threatened the Complainer or of having engaged in any similar course of conduct towards him. The ESC's Representative advised that the Respondent had immediately removed the post when asked by the Council's Monitoring Officer to do so. The ESC's Representative further argued that there was a degree of remoteness between the Respondent's actions and any subsequent consequences in terms of conduct by others towards the Complainer.

The ESC's Representative contended, in any event, that the Respondent would attract the enhanced protection afforded to politicians to the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) when discussing a matter of public concern; namely the Council's approach to personal licence holders who are subsequently convicted of an offence. The ESC's Representative argued that any perceived misrepresentation of the Complainer by the Respondent was not sufficiently egregious as to justify any restriction on her Article 10 rights.

Turning to the question of whether confidential information had been disclosed, the ESC's Representative contended that the content of the Respondent's Facebook post had permitted the identity of the licence holder and information about his conviction to become known, notwithstanding that the Council's Report contained information which was exempt from publication in terms of the Local Government (Scotland) Act 1973. The ESC's Representative advised, in this regard, that while the licence holder's conviction for assault may have been in the public domain, the specific nature of the offence was not. The post also permitted the identity of the current licence holder to become known.

The ESC's Representative accepted that the Respondent had not referred directly to the licence holder or his conviction in her post. The ESC's Representative argued, however, that the content of the post enabled jigsaw identification (being the ability to identify someone by using two or more different pieces of information from two or more sources). This was because:

- the post had been published on the same day as the Licensing Board meeting. As the Licensing Board was the only Council committee meeting that day, anyone viewing the post would have been able to identify readily that it was during its meeting that the discussion to which the Respondent had referred had taken place;
- anyone viewing the Council's website could have found the name of the licence holder and then searched for a conviction under that name; and
- the content of the post meant that it would have been easy for anyone viewing it to identify that the assault, that was the subject of the conviction being considered, was an incident of domestic violence.

The ESC's Representative noted that it was evident from the content of the article in the *Daily Record* (and the references to the purported quote from the Complainer), that the article's author had been alerted to the matter by the Respondent's post. The ESC's Representative contended that the Respondent's post was an integral part of the 'identity jigsaw' and had elevated the possibility of the licence holder being identified.

The ESC's Representative argued that the Respondent should have been aware that any discussions in respect of the report on the licence holder were confidential, given that part of the meeting had been held in private and given it had been temporarily paused before the discussion, in order for council officers to halt the meeting's livestream. The ESC's Representative advised that the Council had been required to report the matter to the Information Commissioner's Office as a data breach and contended that the Respondent should accept responsibility for the consequences of her post.

In response to questions from the Panel about the exact nature of the confidential information that was allegedly disclosed in the Respondent's post, the ESC's Representative advised that she considered that all discussions in the private part of the meeting, including the remarks the Complainer was alleged to have made and any information about the licence holder's conviction, were confidential. The ESC's Representative argued that the reasons why a council might choose to hold part of a meeting in private was to prevent data breaches and allow full and frank discussions. The ESC's Representative argued that as the Complainer's comments were confidential, they should not have been disclosed. The ESC's Representative reiterated that, having viewed the Respondent's post, only small steps needed to be taken to identify various matters that were not in the public domain at that stage. These included the identity of the licence holder, the nature of his conviction and the fact that consideration was being given to the revocation of his licence. The ESC's Representative further reiterated that it was evident, from its contents, that the Respondent's post was the 'catalyst' for the *Daily Record* article.

Submissions made by the Respondent

The Respondent advised that she had not intended to misrepresent the Complainer and had drafted the post based on her recollection of what had been said. In providing context, the Respondent advised that the Licensing Board had met specifically to discuss the letter from the police, in which removal of the licence was recommended in light of the licence holder's conviction for a serious assault on his former partner. The Respondent advised that it had been the first time that council officers had insisted on hearing such a matter in private. The Respondent advised that she had been concerned about this decision as she considered the question of whether a licence holder met the licensing conditions required to be considered a 'fit and proper person' was a matter of public concern.

The Respondent further advised that as:

- the Complainer's remark, which she now understood to have been a reference to "many, many domestics" had been made after he had advocated that the licence should not be removed;
- she was aware of the Complainer's previous suspension by the Standards Commission for inappropriate behaviour; and
- the meeting had taken place just after the '16 Days of Activism Against Gender Based Violence Campaign', during which women were being encouraged to call out inappropriate behaviour,

she had been dismayed by the Complainer's remarks and had felt compelled to draw attention to them.

The Respondent advised that the content of the post was based on her recollection of what had been said. The Respondent noted that she would not have been able to check the minutes of the relevant part of the meeting, before publishing her post, as they were not available at the time. The Respondent reiterated that she had not intended to misrepresent the Complainer and, instead, had just been attempting to give a sense of what she had understood he had said. The Respondent further stated she had only published the post to express concern about her perception of the Complainer's attitude towards women, and she had not been motivated by any party political or other reason. The Respondent confirmed that she had removed the post immediately after being asked to do so.

In respect of the allegation that she had disclosed confidential information, the Respondent accepted that while she had not mentioned the licence holder by name, the reference to his conduct in the post had nevertheless allowed the connection or 'jigsaw identification' to be made. The Respondent noted, however, that the licence holder's identity and information about the events that resulted in his conviction would have been in the public domain anyway had the meeting been held in public, as was the norm. The Respondent further noted that, contrary to the ESC's Representative's position, the report and its content was being considered by a Licensing Board, not a Council Committee and, therefore, did not fall within a category of exempt information under the 1973 Act.

The Respondent confirmed that the Information Commissioner's Office had advised the Council that no further action was necessary in respect of the potential data breach. The Respondent further confirmed that she had not provided any further details about the matter after being contacted by a member of the press about her post. The Respondent noted that press would have been able to access the additional information about the nature of the conviction from the Courts, as this would have been a matter of public record.

In response to questions from the Panel, the Respondent accepted that the Complainer had qualified his remarks after she had raised concerns about them at the meeting. The Respondent advised that as the meeting had taken place some 17 months ago, she did not recall the exact timing of events on the day. The Respondent advised that she nevertheless remembered having asked a colleague if her recollection of what the Complainer had said was correct, and that she had received confirmation from the colleague that it was, before she published the post. The Respondent accepted, however, that with the benefit of hindsight she should not have published the post and should have taken more time to reflect on the matter. The Respondent confirmed that she would not have posted the alleged quote if she had been able to see a transcript of the exact words used by the Complainer.

The Respondent reiterated her position was that the matter had been discussed in private at the meeting for data protection reasons, as opposed to being held in private to protect councillors in the event that any comments they made were inappropriate.

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 Whiteside.
2. A formal finding that the Respondent had breached the Code could not be made.

Reasons for Decision

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.
- Secondly, 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.
- Thirdly, 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 (and, in particular, in this case, for the protection of the reputation or rights of others).

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

The Panel noted that, in her post, the Respondent had referred to her role as a councillor and had commented on her attendance at the Licensing Board meeting in that capacity. The Panel further noted that the Respondent was commenting, in the post, on events that happened at a meeting in which she had attended and participated as a councillor. In addition, the Panel noted that the Respondent had referred to herself as a councillor in the name of the Facebook account from which the post was made. The Panel was satisfied, therefore, that the Respondent was acting, or could reasonably be perceived as acting, as a councillor at the time of the events in question and, as such, the Code applied.

The Panel noted that it was not in dispute that the Respondent's post stated that the Complainer had referred, at the meeting, to a serious assault on a female by her male ex-partner as "just another domestic". The Panel noted, that although the Respondent had not specifically named the Complainer in her post, she had referred to him having been suspended previously by the Standards Commission. The Panel was satisfied that this would have enabled anyone viewing the post to identify the Complainer. In any event, the Panel noted that when another councillor had questioned, in a comment on the post, whether the Respondent was referring to the Complainer, the Respondent replied in the affirmative.

Having viewed the recording of the meeting before the Hearing, the Panel was satisfied that it was clear the Complainer had not used the words "just another domestic", as quoted by the Respondent.

The Panel acknowledged the Respondent's assertion that she had not intentionally misrepresented the Complainer and that she had removed the post immediately when asked to do so by the Council's Monitoring Officer. The Panel considered, however, that by presenting what the Complainer had said as a direct quote, the Respondent had misrepresented his position.

The Panel noted that not only had the Complainer not made the remark as presented; he had also acknowledged the seriousness of the incident in question earlier in the meeting and had expressed sympathy for the victim. The Panel noted that later in the meeting, after being challenged by the Respondent about what she thought he had said, the Complainer had again reiterated the seriousness of the incident, had clarified that he was not trying to demean the matter, and had noted that incidents of domestic violence were "always of concern".

The Panel accepted, on the balance of probabilities and in light of the Respondent's submissions, that she had not misrepresented the Complainer deliberately. The Panel was nevertheless of the view that, in light of all the comments the Complainer made at the meeting, the Respondent should have realised that she was not reporting his views or position accurately. The Panel was of the view that, given the emotive nature of the subject and the likelihood that it could provoke a strong reaction from other Facebook users, the Respondent should not have published the post without checking properly that it was accurate. The Panel considered that the Respondent must have known that it was likely the Complainer would be the subject of a negative reaction from members of the public who might be upset or offended by the apparent trivialisation of domestic violence.

The Panel was satisfied that, by failing to check the accuracy of the post and, as a consequence, in misrepresenting the Complainer's position, the Respondent's conduct in posting the comment amounted, on the face of it, to a contravention of the requirement under paragraph 3.1 of the Code for councillors to treat everyone with courtesy and respect.

The Panel agreed that the Respondent would, or should, have known that others viewing the post may have been encouraged, by his apparent trivialisation of domestic violence, to subject the Complainer to negative comments or even abuse. The Panel noted that it had resulted in the Complainer receiving adverse publicity, with the article in the *Daily Record* naming the Complainer, repeating the alleged remark as quoted by the Respondent and referring to his previous suspension by the Standards Commission. The Panel noted,

nevertheless, that it had no evidence before it to demonstrate that the Respondent's conduct towards the Complainer was anything other than a one-off incident, or of the Respondent having threatened the Complainer. The Panel further considered that it was apparent that the main thrust of the criticisms in the Respondent's post were directed towards the Complainer's alleged comments (as opposed to being a personal attack on him), and noted that the Respondent had immediately removed the post when asked by the Council's Monitoring Officer to do so. In the circumstances, the Panel determined that the Respondent's conduct did not amount to bullying and harassment in contravention of paragraph 3.3 of the Code.

The Panel further noted that it was alleged that the Respondent's post had permitted the identity of the individual who was the subject of the licence renewal application being considered by the Committee, to become known, in breach of the confidentiality provisions in the Code.

The Panel noted, however, that the Respondent had not identified the licence holder in her post and had not referred to the report or the discussion about whether his licence should be revoked. Instead, the Respondent had disclosed remarks that she alleged the Complainer had made at a meeting and commented on these. The Panel disagreed with the ESC's representative's view that any, and all, comments made during a private part of a meeting are confidential; just as not every word in a report marked as confidential will be of that nature. The Panel was of the view that it was clear from the fact that the report was being considered in private, that information about the specific licence holder was to be kept confidential. The Panel agreed, however, that the (alleged) remarks made by the Complainer, as reported upon by the Respondent in her post, about the rate or extent of domestic violence incidents in general, could not be categorised as information about a specific licence holder. The Panel further noted that the Council's Monitoring Officer had confirmed, in writing, that the provisions in the Local Government (Scotland) Act 1973 regarding information being exempt from publication, were not applicable to the Licensing Board and that the reason the report had been considered in private at the meeting was to ensure that the Council complied with data protection requirements.

The Panel accepted the ESC's Representative's position that the Respondent's posts increased the likelihood of the licence holder's identity, conviction and nature of the offence being revealed. The Panel did not accept, however, that this automatically meant that the Respondent had breached the confidentiality provisions in the Code. The Panel noted that anyone viewing the post would have had to search the Council's website to identify the meeting in question and the name of the licence holder, before conducting an online search or contacting the Courts to find details of their conviction. The Panel noted that the only information disclosed in the Respondent's post, that may not have been readily accessible, was the fact that the assault for which the licence holder was convicted was on his former partner. The Panel was not satisfied, however, that such information would not have been in the public domain already. As such, while the Panel accepted the submission that the Respondent's post had provoked interest and had led to the licence holder being named and details of his conviction being disclosed in the *Daily Record* article, it was not satisfied that the Respondent had disclosed any information that was confidential and not already in the public domain. The Panel concluded, therefore, that on the balance of probabilities, a breach of the confidentiality provisions, as outlined at paragraphs 3.21 to 3.23 of the Code, had not been established.

Stage 2: Whether a finding of a contravention of the Code 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 applies to all levels of politics, including local politics. 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 concern¹. In this case, the Panel was satisfied that the Respondent was commenting on a matter of public concern, namely how she had perceived a fellow politician's attitude towards domestic violence. In

¹ *Thorgeirson v Iceland (1992) 14 EHRR 843*

the circumstances, the Panel considered that the Respondent would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

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, however, absolute. Article 10(2) states that restrictions can be imposed for the protection of the reputation or rights of others. The Panel noted, however, that Article 10(2) states that any such restriction must be necessary in order to achieve its aim. The Panel proceeded to consider whether the restriction involved by the finding that the Code had been breached was therefore justified, in terms of Article 10(2), to protect the reputation or rights of others.

The Panel noted that it was required to undertake a balancing exercise, weighing the enhanced protection to freedom of expression enjoyed by the Respondent against any restriction imposed by the application of the Code and the imposition of any sanction. In this case, as the issues being discussed by the Respondent concerned matters of public interest or concern, the Panel noted there was limited scope under Article 10(2) for a restriction on the Respondent's right to freedom of expression.

The Panel accepted that the Courts have held that the less egregious the conduct in question, the harder it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction on an individual's right to freedom of expression is required².

The Panel noted that the Courts have held that, in a political context, a degree of the immoderate, offensive, shocking, exaggerated, provocative, controversial, colourful and emotive, that would not be acceptable outside that context, is tolerated³. The Courts have also held that comments made in a political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis. Even a statement of fact will be tolerated if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for saying it⁴.

The Panel considered that the Respondent's post could and did have an impact on the rights and reputation of the Complainer. The Panel noted, however, that the Standards Commission's previous decision to suspend the Complainer was already in the public domain and, further, that the Respondent had removed the post when asked to do so. The Panel further noted that the *Daily Record* had published a correction noting that the information reported in its original article, to the effect that the Respondent had referred to the assault as 'just another domestic' was untrue. While the Panel accepted that not everyone would have noticed or read the correction, the other factors outlined above meant that the impact of the post was somewhat limited.

The Panel considered that the Respondent's post was emotive in nature. It did not consider, however, that it was sufficiently offensive, personally abusive or gratuitous as to justify a restriction on her right to freedom of expression. In reaching this view, the Panel noted that it had accepted that the Respondent had not deliberately misquoted the Complainer. The Panel could not determine, therefore, that the Respondent had expressed a value judgement about what she thought the Complainer had said, in anything other than good faith. As the Panel had found that a restriction on the Respondent's Article 10 right to freedom of expression could not be justified, it concluded that a formal finding of a breach of paragraph 3.1 of the Code could not be found.

The Panel would nevertheless emphasise that the requirement for councillors to behave in a respectful and courteous manner towards colleagues is a fundamental requirement of the Code, as it ensures public

² *Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 2) [2012] EWHC 1172 (Admin)*

³ *Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin)*

⁴ *Lombardo v Malta (2009) 48 EHRR 23*

confidence in the role of an elected member and the Council itself is not undermined. The Panel further emphasised that it was important for councillors to take care when using social media and to avoid misrepresenting anyone, given the potential impact that doing so could have on the rights and reputations of others.

The Panel also emphasised the need for councillors to take care with confidential information, not only to ensure they did not breach confidentiality and in consequence contravene the Code, but also to ensure compliance with data protection requirements.

Date: 4 May 2023



**Suzanne Vestri
Chair of the Hearing Panel**