

# Croydon Council

## For General Release

<b>REPORT TO:</b>	<b>ETHICS COMMITTEE</b> <b>18 OCTOBER 2018</b>
<b>AGENDA ITEM NO:</b>	<b>7</b>
<b>SUBJECT:</b>	<b>RECENT CASE LAW – COUNCILLOR CONDUCT</b>
<b>LEAD OFFICER:</b>	<b>DIRECTOR OF LAW &amp; GOVERNANCE AND MONITORING OFFICER</b>
<b>CABINET MEMBER:</b>	<b>COUNCILLOR SIMON HALL – CABINET MEMBER FOR FINANCE AND RESOURCES</b>
<b>WARDS:</b>	<b>ALL</b>
<b>CORPORATE PRIORITY/POLICY CONTEXT:</b> The Council has determined that the Ethics Committee shall be responsible for receiving and considering reports on matters of probity and ethics and to consider and recommend revisions to the Code of Conduct.	
<b>FINANCIAL IMPACT</b> Implementation of the recommendations contained in this report have no financial implications.	
<b>FORWARD PLAN KEY DECISION REFERENCE NO:</b> This is not a key decision.	

### 1. RECOMMENDATIONS

The Committee is asked to:

1.1 Note the outcome of recent case law and developments in relation to councillor conduct since the last Ethics Committee (February 2018).

### 2. EXECUTIVE SUMMARY

2.1 This report provides details of a case in the High Court in May 2018 that considered local authority staff grievance procedures and their relationship with the Code of Conduct regime under the Localism Act 2011. The High Court decision in *R (Harvey) v Ledbury Town Council [2018] EWHC 1151 (Admin)* has clarified how a council should deal with complaints against a councillor, and which has implications for Town and Parish Councils throughout England. Any local authority will be acting unlawfully if it tries to bypass the Code of Conduct procedure under the Localism Act 2011 when addressing alleged misconduct by councillors.

2.2 In May 2018 in the case of ***Bennis v The Information Commissioner & Stratford-on-Avon District Council, EA/2017/0220***, the First-tier Tribunal (FTT) decided that details of unsubstantiated complaints made against councillors must not generally to be disclosed to the world at large under section 40(2) (*personal data*) of the Freedom of Information Act (FOIA) 2000. The FTT also considered the position of the Interested Person (IP) in respect of FOIA, in particular whether the views of the IP in respect of an allegation made against a councillor are exempt from disclosure under the exemptions in section 40(2) and/or section 36 (*prejudice to effective conduct of public affairs*).

2.3 As part of its evidence collection, the Committee on Standards in Public Life held two roundtable discussions in April 2018 as part of its review into local government ethical standards:

- 18 April 2018: Monitoring Officers, clerks, and Independent Persons
- 24 April 2018: Academics and think tanks

The Committee has published a summary note and a transcript of above meetings.

2.4 The Local government ethical standards: stakeholder consultation is now closed. The Committee received 317 responses to the public consultation and says it will be publishing its report by the end of 2018.

### 3. DETAIL

#### ***R (Harvey) v Ledbury Town Council [2018] EWHC 1151 (Admin)***

- 3.1 Councillor Harvey had served as a town councillor since 2011. She sat on three of the main committees. Complaints of bullying and harassment were made against Councillor Harvey by the Town Clerk and Deputy.
- 3.2 The Town Council decided to deal with the allegations under their grievance procedure as this was more efficient than the Code of Conduct procedure under the Localism Act 2011 (section 28).
- 3.3 Councillor Harvey did not accept that this was the appropriate procedure to deal with the complaints due to the seriousness of the accusations. She “self-referred” a Code of Conduct complaint to the monitoring officer (MO) of Herefordshire Council (the principal authority for the area).
- 3.4 The Town Council proceeded under its grievance procedure and found against Councillor Harvey. The Town Council imposed sanctions that Councillor Harvey could not serve on any of the Council’s committees, sub-committees, panels or working/steering groups and that she could not represent the Council on any outside body. All bodies affiliated with the Council were to be informed of these

actions and the sanctions would remain in place until May 2017, when the matter would be reviewed.

- 3.5 Hereford's MO instructed internal investigators whose findings were that there was no basis to support the decision that Councillor Harvey had breached the Code of Conduct. The MO's decision was that there had been no breach of the code and she would take no further action.
- 3.6 The Town Council made a further decision in 2017 to continue the sanctions against Councillor Harvey regardless of the independent investigator's findings.
- 3.7 Councillor Harvey brought judicial review proceedings against the Town Council on three grounds:
1. The Council had acted *ultra vires* (beyond its legal power) in determining the complaints through their grievance procedure instead of the Code of Conduct procedure.
  2. The Council's actions were substantively unfair and in breach of Article 10 ECHR (freedom of expression).
  3. The procedure the Council followed was in itself procedurally unfair.
- 3.8 The judge found for Councillor Harvey on all three grounds. It is the first ground, namely that of *ultra vires*, that is of key significance for local authorities.
- 3.9 The judge found that Section 28 of the Localism Act 2011 (*codes of conduct*) contemplates a four-stage process:
1. the making of an allegation;
  2. (optionally) a non-formal investigation or mediation stage or a pause pending other relevant steps being taken (e.g. criminal proceedings being taken);
  3. a formal stage involving an independent person leading to a decision on breach;
  4. (if breach is found) a formal stage, again involving the Independent Person, dealing with action.

The judge emphasised that it was important not just at the sanction stage but also at the decision making stage (breach finding), that an Independent Person must be involved and consulted.

### Comment

- 3.10 The High Court's decision is clear that a council cannot run a grievance procedure alongside, or as an alternative to, a standards regime procedure under the Localism Act 2011, and that complaints regarding a councillor's

conduct have to be dealt with under the authority's standards arrangements.

- 3.11 A local authority will be acting unlawfully if it tries to bypass the Code of Practice Procedure under the Localism Act 2011 when seeking to address alleged misconduct by members and will be at risk if it tries to discipline councillors outside the governance procedures as laid down by the Act.

***Bennis v The Information Commissioner & Stratford-on-Avon District Council, EA/2017/0220***

- 3.12 This case considered the position of the Interested Person (IP) in respect of the Freedom of Information Act (FOIA) 2000, in particular whether the views of the IP in respect of an allegation made against a councillor are exempt from disclosure under the exemptions in section 40(2) (*personal data*) and/or section 36 (*prejudice to effective conduct of public affairs*).
- 3.13 In *Bennis*, the appellant made an unsuccessful complaint of misconduct against a councillor concerning the handling of a planning matter. The appellant subsequently requested Stratford-on-Avon District Council to disclose its advice received when handling the complaint. That advice had been provided by one of two of the appointed IPs. The council provided the appellant with all material information except for advice received from the IP which was withheld under sections 40(2) (*personal data*), 36(2)(b)(i) (*inhibition of free and frank advice*) and 36(2)(c).
- 3.14 Mr Bennis complained to the IC. The IC's decision notice endorsed the council's decision in respect of the two section 36 exemptions; the IC did not go on to consider section 40(2) in its notice. The appellant appealed to the First-tier Tribunal (FTT).
- 3.15 The FTT found that the decision notice was wrong in its assessment of the public interest test concerning both of the exemptions relied on by the council under section 36. In particular this was because while the decision notice gave considerable weight to the contention that IPs would be inhibited in giving robust advice if they knew that their views would be made public, and that this in turn would prejudice the effective conduct of public affairs. The decision notice failed in its assessment of the public interest balance to take into account the fact that the IP's views would in any event have become public if there had been a hearing.
- 3.16 Regarding the section 40(2) exemption, the FTT was '*not satisfied that s40(2) FOIA may also be applied to the personal data of the IPs, as their names are already in the public domain, they occupy senior public roles, and their views may be disclosed if there is a public hearing*'.

- 3.17 As to unsubstantiated complaints against councillors, the FTT agreed with the council that these *'ought not generally to be disclosed to the world at large' under the FOIA. For in its view: 'The proper approach to such information is to consider the rights of the councillor concerned as a data subject.'* The FTT was satisfied that *'the council could not disclose the councillor's personal data in this case (consisting of their name and opinions expressed about them) without breaching the data protection principles and that s40(2) FOIA [was] therefore engaged'*.
- 3.18 The formal decision of the FTT was therefore to conclude that the IC's decision notice was wrong in its assessment of the public interest test as it related to the section 36 exemptions relied on by the council. The council was, however, correct to refuse part of the requested information under section 40(2). Accordingly, the tribunal required no steps to be taken.

### Comment

- 3.19 This FTT case is useful in that it deals with the status of IP advice under FOIA and the position concerning unsubstantiated complaints against councillors (where in this case section 40(2) was found to be engaged).

### **Local government ethical standards: roundtable transcript and summary notes**

- 3.20 The roundtable on 18 April 2018 was held under the Chatham House Rule<sup>1</sup> attended by Monitoring Officers, clerks, and Independent Persons. The Committee on Standards in Public Life has published a summary note of the discussion. The roundtable on 24 April, attended by academics and think-tanks, was held on the basis that participants would approve the transcript prior to publication (also published).
- 3.21 The note of the roundtable attended by Monitoring Officers, clerks, and Independent Persons is appended to this report as Appendix 1. The four-page summary deals, among other things, with codes of conduct, sanctions and role of the Independent Person.
- 3.22 Members can read further details at:  
<https://www.gov.uk/government/publications/local-government-ethical-standards-roundtable-transcript-and-summary-note>

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<sup>1</sup> When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

## **Report into Local Government Ethical Standards**

3.23 The Committee on Standards in Public Life says it will publish its report of local government ethical standards by the end of 2018.

3.24 Members can read further details, including the stakeholder consultation document, at <https://www.gov.uk/government/consultations/local-government-ethical-standards-stakeholder-consultation>

### **4. FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS**

4.1 There are no direct financial implications arising from this report.

### **5. LEGAL IMPLICATIONS**

5.1 There are no direct legal consequences arising from the contents of this report beyond those set out in the body of the report.

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**BACKGROUND DOCUMENTS:** None

**APPENDIX 1:** Summary note of discussion attended by Monitoring Officers, clerks, and Independent Persons (18 April 2018)