



ADJUDICATION AND REVIEW COMMITTEE

(Members' Code of Conduct)

Adjudication & Review Assessment Panel

1st October 2020

Subject Heading:

Initial Assessment of Code of Conduct
Complaints against Cllr Damian White

CMT Lead:

Daniel Fenwick, Deputy Monitoring Officer
/ Director of Legal & Governance

Report Author and contact details:

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Policy context:

Consideration of complaints under the
Code of Conduct for Councillors against
Cllr Damian White

Financial summary:

Costs are budgeted for.

SUMMARY

The Council has a duty to promote and maintain high standards of conduct by its elected and co-opted members under s.27 of the Localism Act 2011 (hereafter the "2011 Act"). The Council's Code of Conduct is established to comply with the mandatory requirements of s.27 and s.28 of the 2011 Act (**see Appendix 1 / Part 5.1 of the Council's Constitution**, hereafter "the Code").

This report seeks the Adjudication & Review Assessment Panel's (hereafter the "Panel") decision as to whether the two complaints against Cllr Damian White should be investigated further or dismissed in accordance with Section 4 of the Council's procedures for the consideration of Code of Conduct complaints (**see Appendix 2 / Part 5.2 of the Constitution**, hereafter the "Complaints Procedure").

I was appointed by John Jones, the Monitoring Officer to have conduct of the consideration and determination of the two complaints by the Council. It is noted

that, since my appointment, Abdus Choudhury has been appointed by full Council in September 2020 as Monitoring Officer.

RECOMMENDATIONS

For the reasons set out in this report:

- (1) the Panel is recommended to agree to investigate both complaints under the Code of Conduct against Cllr Damian White.
- (2) if (a) is agreed, the Panel is asked to note that:
 - a) an external independent investigator will be appointed on behalf of the Deputy Monitoring Officer and their report and findings will be referred back to the Panel for the final determination of the complaints.
 - b) this recommendation and the Panel's decision is not a determination of the merits of the complaint

REPORT DETAIL

1. Two complaints under the Code of Conduct against Cllr Damian White were received as set out below:
 - a) Cllrs Ford and Morgan and three others (as the Havering Residents Association or HRA) dated 21 July 2020 (hereafter the HRA complaint) at **Appendix 3 (with attachments¹)**;
 - b) John Cruddas MP in letter dated 17 July 2020 (hereafter the Cruddas complaint) at **Appendix 4**;
2. The complaints were received or referred to John Jones, the then Monitoring Officer (MO) for the Council. The MO has responsibility for handling of complaints under the Members Conduct under the procedure in Section 5.2 of the Council's Constitution. As Mr Jones was involved in the development of the Council's Boundary Review ward pattern submissions, he has excused himself from participation in the complaints and delegated his functions to me as Deputy Monitoring Officer.
3. The Panel is referred to the complaints. The HRA and Cruddas complaints are substantively the same. They allege that Cllr Damian White sought to gain party political advantage for the Conservative Party through the Council's submission to the Local Government Boundary Commission for England (the Boundary Commission). The complaints allege that Cllr White influenced or sought to influence officers to put forward proposals to full Council for approval, which were to the electoral benefit of the Conservative Party.
4. The complaints rely on a recording of a Conservative political group meeting on 3 February 2020 by a former member of the Conservative group, Cllr

¹ With the exception of the tape recording due its format but is available for playback at the Panel hearing, if the Panel wishes to hear it.

Bob Perry. A transcript of the recording is attached to this report at **Appendix 3** and the tape is available to be played in the meeting if required. The Panel should note that the transcript has been prepared by the complainants but my advice is that it is a sufficiently accurate transcription of the tape for the purposes of their decision, i.e. whether or not an investigation is required. The accuracy or otherwise of the transcript can be a matter for the investigator to examine.

5. The Panel is asked to note that the highlights and comments on the transcript are made by the HRA as part of their complaint and are not part of my submissions in this report. The Panel should also note that Cllr White has objected to the admission of the tape as evidence and this is referred to in more detail below.

Monitoring Officer Assessment

6. Under paragraphs 4.1 to 4.6 of the Complaints Process, all complaints should be assessed by the Monitoring Officer and referred to a Panel for decision, unless the Monitoring Officer considers that the allegations may be dismissed under paragraph 4.4 of the Complaints Process.
7. On behalf of the Monitoring Officer, I have reviewed the allegation and consider that it is not appropriate to dismiss on the grounds set out in paragraph 4.4 for the following reasons. Addressing the criteria in 4.4, my rationale is as follows.

Do the allegations demonstrate a potential breach of the Code – 4.4 (c)

8. It is my decision the allegations in the complaints a potential breach under the Code of Conduct. There are two issues of note here..

Was Cllr White acting in his Official Capacity as a councillor?

9. A complaint under the Code of Conduct may only be considered where the member is acting in their official capacity at the time of the matter complained of. This is broadly defined as covering situations where a councillor is undertaking official duties and excludes matters in their private life.
10. It is my view for the purposes of this assessment that Cllr White was acting in his official capacity for the following reasons:
 - a) The core allegation in the complaint is that Cllr White used his position as Leader to influence the Council's submissions to the Boundary Commission. These allegations are alleged to have taken place in meetings and / or conversations with officers prior to the 3 February Group meeting, where Cllr White was acting in his role as Leader in the alleged meetings and / or other communications with officers.
 - b) The statements made by Cllr White in the Conservative Group meeting on 3 February are primarily significant as evidence of the alleged improper influence that took place before the meeting, as set out in a. above.

11. Therefore, my assessment is that Cllr White was acting in his official capacity at the time of the allegations in the complaint and so this complaint should not be dismissed on this basis.

Do the matters complained of fall within the Code of Conduct?

12. A complaint under the Code of Conduct should only be investigated where it the matters complained of could, if proven, fall within the provision of the Code of Conduct. The relevant provisions are set out in the Council's Code of Conduct at **Appendix 1** under the headings "Principles of conduct in public office" (also known as the Nolan Principles) and "Personal conduct".
13. It is my assessment that the allegations fall within the provisions of the Code of Conduct, including the obligations to make decisions on merit; acting solely in the public interest; and ensuring that a member does not use facilities provided by the Council for improper purposes, including "party political purposes".
14. At the risk of repetition, my assessment that the allegations fall within the remit of the Code is not a finding there has been a breach of the Code and the Panel is not being asked to make that assessment either. My assessment is simply that the complaint should not be dismissed under paragraph 4.4 as conduct falling outside of the Code of Conduct. Further, the obligations identified in the preceding paragraph are not intended as an exhaustive list and an investigation may consider all of the provisions of the Code and is not bound in any way by my assessment.

Informal Resolution - 4.4 (i)

15. In accordance with the Complaints Procedure, I asked Cllr White and the complainants whether they would consider informal resolution of the complaint. Cllr White and Mr Cruddas indicated that they would consider this but the HRA complainants did not agree. There is no obligation under the Complaints Procedure to agree to explore information resolution but, without consensus, it is not possible to do so. This option remains open to all parties, however.

Is the complaint out of time? 4.4 (g)

16. Under the Complaints Process, a complaint may not be considered for investigation where the dates of the matters complained of took place more than 3 months before the date of receipt of the complaint and there are no exceptional circumstances which justify an investigation or it is otherwise appropriate to investigate the allegation. A purpose of this provision is to prevent "stale" matters being raised but also to ensure that matters are considered fairly and before memories have faded and other evidence is at risk of being deleted or lost.
17. The complaint was submitted in mid to late July about matters that took place before 3 February and the substance of the allegations were known to Cllr Perry on or about 3 February. It is a legitimate concern that the matter was not raised at that time by Cllr Perry with the Council so it could have been considered and addressed before the Governance Committee and Council meetings took place. However, the primary issue is whether the complaint against Cllr White can be considered despite the late submission of the complaint.

18. Both complainants have been asked about this issue and their responses are at **Appendix 5**. Mr Cruddas in his email states that he was not aware of the allegations until the newspaper reports in mid-July 2020 and submitted his complaint a few days later and so without delay. The HRA set out in their response in more detail and the Panel are referred to their letter.
19. It is a discretion whether or not to dismiss a complaint that is more than 3 months old. It is my assessment that the allegations are sufficiently serious to justify an investigation notwithstanding the delay and it is in the wider interests of the Council and its legal duty to uphold the Nolan Principles that an investigation takes place. It is my view that the matter can still be investigated, though noting that there is a risk that the delay has had a prejudicial impact. It is better in my view that the investigator determines, when all the relevant evidence has been collated from Cllr White and the complainants, however, and it does not need to be decided at this assessment stage. **Appendix 6** contains further evidence submitted at this stage by the HRA.
20. It is my assessment that paragraphs 4.4 (a), (b), (d), (e), (f) and (h) are not applicable or relevant to the determination of whether an investigation should take place in this complaint.
21. It is also my view that the investigation is a proportionate response to the issues raised and likely outcomes, as required by paragraph 4.3 of the Complaints Process. The requirement that an investigation is proportionate is primarily intended in my view to avoid the use of excessive time and public resources on, for example, minor or trivial “tit for tat” complaints or issues that could be resolved by alternative resolution. An investigation is a proportionate response in my view as the allegations in this complaint are serious in nature, involve the Leader of the Council and have a significant public profile in the local newspapers. This also allow both sides to the allegation to state their case in full.

Reliance on the Tape Recording & Transcript

22. The complaints rely on the statements of Cllr White in a recording of the Conservative Group meeting on 3 February. It is not disputed that the covertly recorded by Cllr Perry, was made without the consent of Cllr White (and very probably others at the meeting) and that the meeting was private.
23. The recording, however, contains relevant evidence supportive of the allegation that Cllr White breached the Code of Conduct at a time prior to the meeting on 3 February. There is recent Supreme Court authority that covertly recorded evidence obtained by private persons can be used in legal proceedings (*Sutherland v HM Advocate (2020) UKSC*, paras 64-72) and it is my view that the recording and transcript can be used as evidence to determine this assessment and the complaint.
24. It should be noted, however, that the primary allegation in my assessment relates to the alleged interaction between Cllr White and officers prior to the meeting and not what was said in the meeting.
25. As this matter was raised during the course of preparing this report, I wrote to Cllr White and both complainants to give them the opportunity to make any submissions on this issue that could be considered as part of the

assessment process. I did not receive any responses but, if this complaint is to proceed, it remains open to any party to raise this issue with the investigator.

The Panel's Determination

26. As my decision is not to dismiss the complaints under paragraph 4.4, under the Complaints Process, I am required by paragraph 4.6 of the Complaints Process to refer the complaints to the Panel. The Panel must determine what action to take in respect of the complaints. The relevant powers of the Panel are set out for convenience below:

4.7 Where the Monitoring Officer refers an allegation to an Adjudication and Review Assessment Panel for consideration, the Panel shall determine whether the allegation:

- (a) Merits no further investigation and is dismissed; or*
- (b) Merits further investigation*

4.8 An Adjudication and Review Assessment Panel may determine that an allegation merits no further investigation for whatever reasons it thinks fit, but it may have regard to the criteria set out in Paragraph 4.4 above and to the following additional criteria:

- (a) The allegation is not considered sufficiently serious to warrant investigation; or*
- (b) The allegation appears to be motivated by malice or is "tit-for-tat";*

or

- (c) The allegation appears to be politically motivated*

4.9 Where an Adjudication and Review Assessment Panel considers that an allegation merits further investigation, the Monitoring Officer shall undertake such investigation. The meeting of the Panel shall adjourn and reconvene when the Investigation Report is available.

27. The Panel's power to determine whether or not to investigate the complaints is discretionary. Whilst the decision may be based on "whatever reasons it thinks fit", the decision must be a rational decision based on the evidence before the Panel and taking into account the criteria above. In making its decisions, the Panel should take into account that the courts have held that it is a local authority's duty to ensure observance of the Nolan Principles and to secure the public interest in maintaining confidence in local government. Reasons should be given for any decision.
28. I have set out my advice on the criteria in paragraph 4.4 of the Code and it is my advice and assessment that, on balance, the complaints should be investigated.
29. In respect of the additional criteria at 4.8, it is my advice to the Panel:
- a) For the reasons set out in this report, the complaint is sufficiently serious to warrant investigation.
 - b) There is no evidence at this stage that the allegations are motivated by malice or are "tit for tat", i.e. in response to an earlier allegation.
 - c) Whilst the complainants are political "opponents", this should not automatically lead to a conclusion that the complaint should be dismissed as politically motivated. The substance of the complaint

as a whole must be considered, as set out in the report as well as the importance of the Council's duty to ensure observance with the Nolan Principles.

30. In reaching their decision, the Panel may also take advice from the Independent Person for LB Havering who will attend the meeting, who may particularly assist on the public perception of these complaints.
31. If the Panel decides an investigation is necessary, I will appoint an independent external investigator who will then contact the parties and any necessary witnesses before reporting back to me. The investigator's report will be submitted to the Panel to determine next steps. There is no right of appeal against a decision to investigate a complaint.
32. If the Panel decides not to agree to an investigation, there is no right of appeal against this decision under the Complaints Process.

IMPLICATIONS AND RISKS

Financial implications and risks:

Code of Conduct investigations are an unbudgeted financial burden on the Members budget. Contingency funding will be available for the investigation and hearing process of this complaint.

Legal implications and risks:

See the body of the report.

Human Resources implications and risks:

Any allegations in the original complaints against officers have been stayed until the outcome of this complaint. The Assessment Panel has no delegated powers to consider these matters.

Equalities implications and risks:

There are no equalities implications to the decisions sought.