

**STANDARDS COMMITTEE
26 SEPTEMBER 2016**

REPORT OF THE MONITORING OFFICER

**A.2 OUTCOME OF A CODE OF CONDUCT INVESTIGATION – COMPLAINT AGAINST
A DISTRICT COUNCILLOR**

(Report prepared by Lisa Hastings)

PART 1 – KEY INFORMATION

PURPOSE OF THE REPORT

In accordance with the District Council's Complaints Procedure, following a Members' Code of Conduct investigation, the Monitoring Officer is required to report the outcome to the Standards Committee.

In this case, the Investigator's finding was that the Councillor has not breached the Code of Conduct based upon the right to freedom of expression, although there were concerns that the Councillor's behaviour demonstrated a lack of good judgement when using social media.

Consequently, the Standards Committee should consider promoting a review of the Council's Social Media Policy, understanding the principles of the right to freedom of expression, in order to provide councillors with guidance.

EXECUTIVE SUMMARY

A Complaint was received in January 2016 from District Councillor Paul Honeywood regarding the actions of District Councillor Ivan Henderson under the Members' Code of Conduct and Complaints Procedure (**Appendix 1**), which was adopted by full Council on 26 November 2013.

The complaint alleged that Councillor I. Henderson had breached the Tendring District Council Members' Code of Conduct. The basis of the complaint concerned the alleged circulation of inaccurate and misleading information on the subject of the Careline Lifting Service along with quotes attributed to Cllr. I Henderson appearing in national and local media. It was alleged that inaccurate information was also promoted by Cllr I. Henderson through his own Twitter account. The complaint referred to:

- (i) Not having regard to three of the Seven Principles of Public Life:
 - Selflessness
 - Objectivity
 - Honesty

- (ii) Paragraph 3.4(a) of the Members' Code of Conduct: by conducting himself in a manner which could reasonably be regarded as bringing his office, or the authority, into disrepute.

On 4 March 2016, having considered the responses received from both parties, the Monitoring Officer decided that it was reasonable and appropriate that this complaint merited further investigation. There was a fairly wide difference of opinion between whether information shared on social media was incorrect and misleading and if so, the impact of the media reporting and subsequent use of social media on the proposed Careline Lifting Service.

If there is a potential breach of the Code of Conduct and informal resolution, or mediation, is not appropriate, the Monitoring Officer must consider an investigation. It is important to stress that the investigation did not look into any policy decision. Politically motivated complaints are not referred for investigation. Consideration of whether the policy for introducing a lifting service and the ability to charge for it is right or wrong would not be the subject of the investigation. The investigation was commissioned to look at the evidence of how information was used, whether it was correct or not, and if not, if it was used intentionally to mislead the public and bring the Council into disrepute.

The parties were informed of the Monitoring Officer's decision and that an external investigator would be appointed. Section 5 of the Complaints Procedure sets out how an investigation is conducted and under Section 5.6, the investigation report must contain a conclusion as to whether the evidence supports a finding of failure to comply with the Code of Conduct. Annex E of the Complaints Procedure sets out the Investigation Procedure.

All parties have had the opportunity to comment on the investigation report in its draft form and the findings contained therein. Consultation has been undertaken with the Independent Person. The final investigation report was received by the Monitoring Officer on 1 September 2016.

If an investigation concludes that there is no evidence of a failure to comply with the Code of Conduct, the Council's Complaints Procedure at Section 6.1 provides the Monitoring Officer with the authority to, in consultation with the Independent Person, to decide no further action is required. In such circumstances, the Monitoring Officer will notify the Standards Committee.

The Monitoring Officer agrees with the outcome of the investigation which is as follows:

- Councillor I. Henderson is found to have been acting in his capacity as a councillor (official) when posting on social media and engaging with the press in the circumstances of this case. The Members' Code of Conduct was therefore relevant.
- A finding that he failed to comply with the Members' Code would be a disproportionate restriction on his freedom of expression and, therefore, it was recommended that Councillor I. Henderson is found not to have breached the Code.
- There were concerns that *“some of Councillor I. Henderson's posts on Twitter demonstrated a lack of good judgement on his part. The way in which councillors use social media is increasingly becoming an issue for councils across the country. It is therefore recommended that a summary of the investigation findings are provided to the Council's Standards Committee”*.
- It is recommended that guidance be made available to all councillors on the appropriate use of social media.

RECOMMENDATION

That the Standards Committee:

- (a) Notes the outcome of an external investigation undertaken on behalf of the Monitoring Officer in respect of Councillor Ivan Henderson;**
- (b) notes the Investigator's concerns that the behaviour demonstrated a lack of good judgement on Councillor Ivan Henderson's part when using social media;**

- (c) notes that Councillor Ivan Henderson has been found not to have breached the Code of Conduct and subject to reporting this to the Committee, no further action will be taken in respect of Councillor Ivan Henderson;
- (d) notes that the basis of the finding to this particular case is on the right of freedom of expression, notwithstanding there is still an expectation of high standards of behaviour for all councillors in accordance with the Code of Conduct and Principles of Public Life; and
- (e) agrees to a review of the Council's Social Media Policy to provide councillors with guidance and parameters on appropriate use of social media.

BACKGROUND:

To understand the context of the Investigator's findings it is necessary to provide some background information some of which is already in the public domain due to the subject matter of the complaint. A summary of the information provided to the Monitoring Officer is included for the Committee to note the outcome of the investigation and assist with its further considerations.

At the Council's Cabinet meeting, held on 11 December 2015, Councillor Tom Howard (at the time Portfolio Holder for Finance and Transformation) submitted a report that updated the Financial Baseline 2016/17, Detailed Budget Proposals for a Revised Budget 2015/16 and Original Budget for 2016/17. This report and recommendations included the publication of possible future fees and charges so that they could go through the required budgeting approval process.

At this meeting Councillor I. Henderson, in his capacity as Leader of the Labour Group, questioned Councillor Howard on various matters associated with the budget report, including a newly listed charge for Careline Lifting linked to the Council's Careline service.

Councillor Howard stated:-

"basically there is a service that's being introduced where what happens is that people often on Careline often fall over at home and then what's happening is that people are being called out ... paramedics are being called out to go to them, to go to the site, then basically a lot of the time all that they need is for the person to be lifted up rather than treat any injury or illness. So what is being introduced is a pilot last year initially was that we provided a service where we go there first to assess the situation and if there was no injury or medical requirement then we would provide that lifting service and I believe this saves five or six hundred visits by paramedics. So there is quite a significant saving to the relevant service who would have been coming out to those without a real need. So that is a service that we are now providing and therefore that charge is to pay for that service in its entirety so, if people wish to subscribe to that service they pay for the cost of the cover."

In response to Councillor I. Henderson's question "so a person who falls over has to pay £21 if someone turns up to pick them up?" Councillor Howard responded "yes, but they do not have to subscribe to that".

On 12 January 2016, Councillor Paul Honeywood (Portfolio Holder for Housing) made a complaint to the Monitoring Officer alleging that Councillor I. Henderson had failed to comply with the Council's Members' Code of Conduct. Councillor Honeywood alleged that

following the Cabinet meeting a considerable amount of inaccurate and misleading information appeared in national and local media about the proposed Careline Lifting service. Councillor Honeywood's complaint was that these articles were supported by quotations attributed to Councillor Henderson and that he subsequently promoted them through his Twitter account.

Councillor Honeywood said in his complaint that Mr Nigel Brown, the Council's Communications and Public Relations Manager, had tried to counter this misinformation in a press release on 17 December 2015, which was distributed to various media outlets and all councillors. Councillor Honeywood alleged that despite this, Councillor I. Henderson continued to promote misleading and inaccurate information.

In his complaint, Councillor Honeywood said that a number of other local authorities had introduced a similar service without ever being subjected to the attention this Council's proposal received. Councillor Honeywood alleged that Councillor I. Henderson's approach to publicising the proposed lifting service in a misleading and inflammatory manner directly led to the media coverage and ensuing fallout.

TIMELINE (all of this information occurred in the public domain):

- **Friday 11 December 2015:**
Cabinet meeting where Councillor I. Henderson asked Councillor Howard for clarification about Careline Lifting.
- **Monday 14 December 2015:**
The Daily Mirror ran the "box article" referring to Careline Lifting as a "money making scam" which Councillor Henderson tweeted twice.
- **15 December 2015:** Councillor Henderson re-tweeted the "box article".
- **17 December 2015:** The Sun and Mail ran critical articles quoting Councillor Henderson. The Mail described the service as a cost cutting measure and suggested that people who didn't pay would be left on the floor.
- **17 December 2015:** The Council issued its press release to counter the misinformation.
- **18 December 2015:**
Further critical coverage occurred in a range of local and national media. Also that day Councillor Henderson tweeted links to a Mirror article three times. The article quoted him as saying people who didn't pay would be lying on the floor.
- **19 December 2015:**
Councillor Henderson tweeted links to the Mail Online article three times.
- **22 December 2015:**
Bernard Jenkin MP accused Councillor Henderson on Twitter of needlessly frightening vulnerable people. Councillor Henderson rebutted his comments.
- **7 January 2016:** Councillor Henderson promoted a petition.

It is undisputed that Councillor Henderson made public statements in the press and shared

information on Twitter that was critical of the Council's proposed Careline Lifting service.

As a leading opposition member, it is part of his role to challenge and scrutinise the actions of the ruling group.

It was not part of the investigation to consider the rights and wrongs of Careline Lifting or interfere with any policy decisions. The focus was only as to whether Councillor I. Henderson intentionally misled or deceived the public. In doing this, the right to freedom of expression, in particular the higher level of protection offered to political speech and the reality of political life were pertinent.

FREEDOM OF EXPRESSION

In considering whether Councillor I. Henderson breached the Code consideration was given to Article 10 of the European Convention on Human Rights (ECHR). It is important for the Committee to understand the principles of the right to freedom of expression and its restrictions. Article 10 provides:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of...the protection of the reputation or rights of others ...”

It is also important to note the words of Collins J in ***Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin)*** [at para.39]:

“The burden is on [the Adjudication Panel for England] to justify interference with freedom of speech. However offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions”.

The right to freedom of expression is a crucially important right in a democratic society and it is clear that it may only be interfered with where there are convincing and compelling reasons within the terms of Article 10(2) justifying that interference. A key issue for determination was thus whether a finding of a breach of the Code on the facts as found, would represent no greater an impairment to an elected member's right to freedom of expression than is necessary to accomplish the legislative objective of the Code. Any finding that Councillor I. Henderson breached the Code in relation to his comments in the press and on Twitter would amount to a restriction to his right of freedom of expression. The investigation considered whether the comments related to matters within his legitimate concerns as a councillor (political or quasi-political comment) as they would benefit from a high level of protection under Article 10.

The question as to whether information is fair and balanced should be, in the first instance, the stuff of political debate and journalistic analysis. The presumption should be that censure through the regulatory approach of the Code of Conduct should be reserved for cases where impropriety, mischief, or abusive ends are being pursued under the mask of promoting debate. Politicking, even if it involves unbalanced and misleading information,

is not necessarily a form of deception, provided that the core assertions are correct.

A clear distinction exists between “rough and tumble” politicking, which is aimed squarely at the competence of political opponents and the spreading of information about actual services for vulnerable people. In the latter scenario, a member should be alive to the risk that the added octane and publicity lent to their arguments by the emotive content might be at the expense of the customers of services and their carers.

In assessing the extent to which a councillor’s use of Twitter should be restricted, the importance of freedom of political expression in the political sphere should be considered. In a democratic system the actions, or omissions of any governing body must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.

In *Heesom v Public Service Ombudsman for Wales*, Mr Justice Hickinbottom considered a councillor’s right to free speech in some detail. His considerations drew attention to a number of earlier cases in which the following propositions could be derived:

- While freedom of expression is important for everyone, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests.
- The enhanced protection applies to all levels of politics, including local.
- Article 10 protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated.
- Whilst, in a political context, Article 10 protects the right to make incorrect but honestly made statements, it does not protect statements which the publisher knows to be false.
- The protection goes to “political expression”; but that is a broad concept in this context. It is not limited to expressions of or critiques of political views, but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others.
- Past cases draw a distinction between facts on the one hand, and comment on matters of public interest involving value judgment on the other. As the latter is unsusceptible of proof, comments in the political context amounting to value judgments are tolerated even if untrue, so long as they have some – any – factual basis. What amounts to a value judgment as opposed to fact will be generously construed in favour of the former; and, even where something expressed is not a value judgment but a statement of fact (e.g. that a council has not consulted on a project), that will be tolerated if what is expressed is said in good faith and there is some reasonable (even if incorrect) factual basis for saying it, “reasonableness” here taking account of the political context in which the thing was said
- As Article 10(2) expressly recognises, the right to freedom of speech brings with it

duties and responsibilities however, any restriction must respond a “pressing social need”.

There have been other cases in which the Courts have given consideration to freedom of expression, the public interest in such a freedom, and on the other side of the balance, the public interest in proper standards of conduct by elected members. The Article 10 balancing process is highly fact sensitive and while decisions will provide valuable guidance on the general approach, the Courts have stressed that it is important to keep in mind the particular facts in any one case. What is essential is who the comments are directed to, who is involved in the debate and if the recipient is not part of the political environment, the impact of the comments on them. In addition, it is possible to justify interference with the right to freedom of expression if the intention, or impact, results in civil, or criminal activity, such as defamation, inciting public disorder, or breach of equality duties.

SUMMARY OF THE INVESTIGATORS CONSIDERATIONS & CONCLUSIONS:

CONSIDERATIONS:

The investigation considered whether Councillor I. Henderson has shown the necessary regard for four of the seven principles of public life:

- Selflessness: Holders of public office should act solely in terms of the public interest.
- Objectivity: Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.
- Honesty: Holders of public office should be truthful.
- Leadership: Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs (this Principle was included by the Investigator).

In addition, whether Councillor I. Henderson failed to comply with paragraph 3.4 of the Council’s Code of Conduct (the Code), which provides that members must conduct themselves in a manner which could reasonably be regarded as bringing their office or authority, into disrepute.

The complaint alleged that Councillor I. Henderson continued to promote inaccurate information via his Twitter account by sharing and retweeting comments and articles when he clearly knew them to be false. Councillor I. Henderson’s comments in the press were not found to be deliberately deceptive; clearly the articles that featured them and those that he subsequently tweeted included a number of inaccuracies. Importantly, Councillor I. Henderson continued to share this information after the Council had issued its press release.

The external investigator raised serious concerns about Councillor I. Henderson’s use of Twitter. Councillor I Henderson was entitled to take a view on Careline Lifting and has the right to freedom of expression, which is vital in political debate. Councillor I. Henderson expressed the view that he should be free to share information on Twitter without others assuming that he is in some way supporting or adding credibility to it (“*A public debate was in progress and I believe that re-tweeting was a legitimate way of furthering this debate*”);

in this the Investigator considered him mistaken.

Councillor I. Henderson should have been able to rely on the responses given to him at Cabinet however, despite the potential impact on current Careline customers; he did not seek additional information before speaking to the press and sharing articles about the matter. It is the duty of councillors not merely to give voice to any information they receive; they should think carefully about the accuracy of the information they spread and the underlying evidence for their assertions (whether their own or others'). In the Investigator's view had Councillor I. Henderson's intention truly been to "*inform the debate*" he would have made an effort to, at least, refer to the Council's press release, or the more accurate reportage in his later tweets. Instead, even after the Council's press release had countered some of the inaccurate reporting, Councillor I. Henderson continued to spread potentially misleading information in the form of newspaper articles and re-tweeted comments. While Twitter is a fairly recent construct, **McAlpine v Bercow** for example, indicates that users who share / retweet dubious information may be found liable regardless of the source. In this instance his decision to rely on the limited and ambiguous information provided by Councillor Howard in Cabinet speaks more of political opportunism than concern for vulnerable people.

That said, Councillor I. Henderson was fundamentally opposed to the principle behind the Careline Lifting proposal and believed he was using politics ethically to support some of the most vulnerable people in Tendring. Following the publication of the Council's press release, he knew (or should have known) that some of the information he was spreading contained inaccurate and misleading information. Councillor I. Henderson did not seem to weigh his responsibility to abide by the key underlying principles of public life against the political opportunity afforded by the negative response the lifting service proposal received. This was not a proposal about pot holes, or rubbish collection. It had the potential to affect many vulnerable people and their carers. As time went on and the Council corrected the misinformation, the Investigator found that Councillor I. Henderson did put politics before some of the Nolan principles and in so doing risked causing unnecessary distress to the very people within the community that he was purporting to represent.

A key question when considering this complaint was the extent to which Councillor I. Henderson should be held responsible for the public reaction and media coverage described in Councillor Honeywood's complaint. Councillor Honeywood alleged that Councillor I. Henderson had to take responsibility for all the 'fallout' from the negative publicity, including an allegedly inaccurate website petition, a cyberattack on the Council website and staff being inundated with hateful email and telephone enquiries about the matter. Councillor Honeywood pointed out that other councils had managed to implement a similar policy without experiencing the same problems.

It was the Investigator's view that it is disingenuous for Councillor I. Henderson to claim no responsibility for the 'fallout' that ensued and was somewhat concerned that throughout the investigation process he rejected any criticism of his own conduct; he selected which articles and comments to share, choosing those that best supported his position despite the potential impact the misleading information included in those tweets might have had on vulnerable people. The Investigator was of the view that Councillor I. Henderson's conduct was not the main cause of the difficulties created for the Council and its officers by the public reaction to the Careline Lifting proposal.

There is a distinction to be made between bringing a council into disrepute through misconduct, which is clearly a Code breach, and accusing a council of pursuing or

considering a disreputable policy. The latter may bring a council into disrepute by reducing its reputation but attacking council policy is also a key function of Members, particularly opposition Members. In this case it is important to judge that the focus is maintained on the ethical basis of Councillor I. Henderson's actions rather than the "noise" which followed the media coverage.

The principles in the **Heesom case** (referred to above) are relevant to the finding. In line with those principles, Councillor I. Henderson's contribution to the misinformation spread by the media should be significant before a failure to comply with the Code may be found. A significant part of the good reputation of local government depends on Members' ability to use the press, politics and political discourse to achieve desired outcomes. Councillors must be allowed to draw attention to, and attack, council policies that they disagree with. At times the methods which members deploy to that end will be so offensive, or inaccurate, that the Code, and at times the law, is breached. In the investigator's view though, while some of the information shared by Councillor I. Henderson would not have stood up to close scrutiny, it was not sufficiently inaccurate (in that the proposal involved the introduction of charging customers an additional amount for Careline Lifting) or out of line with how the service had been described in Cabinet (in particular by Councillor Howard) in the first instance, to represent a breach of the Code.

There is no doubt that Councillor Henderson contributed to the media storm but the Cabinet's presentation of the lifting proposal on 11 December 2015 had started to raise questions. On balance, the Investigation did not consider that his contribution was sufficient to reduce public confidence in his own, or his Council's, ability to fulfil their functions. It was, therefore, recommended that Councillor I. Henderson was found not to have breached the Code.

CONCLUSION:

- Councillor Ivan Henderson is found to have been acting in councillor (official) capacity when posting on social media and engaging with the press in the circumstances of this case. The Code of Conduct was therefore engaged.
- A finding of failure to comply with the Council's Code would be a disproportionate restriction on the right to freedom of expression and is therefore recommended that Councillor I. Henderson is found not to have breached the Code.
- There were concerns that *"some of Councillor I. Henderson's posts on Twitter demonstrated a lack of good judgement on his part"*. The way in which councillors use social media is increasingly becoming an issue for councils across the country. It is therefore recommended that a summary of the investigation findings are provided to the Council's Standards Committee.
- Councillor I. Henderson was urged to reflect on his conduct and consider whether he thought enough about the impact on vulnerable people of spreading false information. It should be of concern to him that service users who may already have had anxieties about using emergency services needed accurate information from Council officers, accurate information which he could have been promoting from the public platform from which he was operating.
- Social media is having a massive impact on the relationship between councillors and their constituents. It can be used to inform, connect and mobilise a community. It can help Members test the temperature of public opinion; it can be used to shape or explain policy and it can be used to gather casework. With this opportunity comes risk. Improper use of social media by a councillor can expose the council to security risks and reputational damage and may risk breaching the Data Protection

Act.

- The Council, through its Standards Committee, is encouraged to use this opportunity to introduce a social media policy that ensures that councillors are given suitable guidance as to what the Council deems to be an appropriate use of social media and indicates how any risks or pitfalls can be minimised or mitigated in the future.

CONSULTATION WITH THE INDEPENDENT PERSON

John Wolton, one of the Council's Independent Persons has responded that this case clearly involves political differences from the time of the Cabinet meeting, the subsequent use of social media and submission of the complaint.

The investigation although necessary, has involved individuals' time and expense for the authority, and it is unfortunate that this started with a Cabinet Report, which, when questions were asked, the responses and details were unclear. Details of the Policy introducing the charges should have been known and considered first, especially when the service users would be vulnerable people.

However, Councillor I. Henderson 'jumped on' what he saw as a political opportunity but with his vast experience he should have also considered the impact of the way in which he shared the information and used the media attention, especially after the Council's press release.

John Wolton noted the reliance on freedom of expression and agreed with the investigator's findings and looking at it from a member of the public's viewpoint concurs with the concerns raised.

MISCELLANEOUS MATTERS

A Report of the Housing Portfolio Holder was presented to Cabinet on 19th February 2016, which supplied details on the enhanced Careline Service and gave consideration of options and costs of the Scheme to all current and future Careline Customers, which included the lifting service.

In future, if implementation of a new, or changed, policy requires Cabinet approval due to the impact on service users, the policy report will include proposals for setting fees and charges rather than inclusion within the annual budget setting report, as the latter would not include the necessary detail and requires a further report in any event to seek policy approval.

APPENDICES

- Appendix 1 – Code of Conduct and Complaints Procedure