

## **ASSESSMENT DECISION NOTICE**

### **A BREACH OF THE CODE HAS BEEN FOUND**

#### **ACTION REQUIRED**

<b>Subject Member:</b>	<b>Councillor Toby Tobin-Dougan</b>
<b>Person conducting the Assessment:</b>	<b>Simon Mansell, Monitoring Officer</b>
<b>Date of Assessment:</b>	<b>24 January 2022</b>

#### **Complaint**

It is alleged that the Subject Member has breached the Code of Conduct by;

- Sending an email on 28 October 2021 @ 15.55 which made comments which were disrespectful, bullying and intimidatory; and
- By making a post on Social Media with regards to a local matter which was designed to bring the Council into disrepute.

#### **Decision and Action**

That, for the reasons set out in this notice, the Subject Member has breached the Code of Conduct for the Council for the Isles of Scilly.

It is recommended to the panel of the Scrutiny Committee that the Subject Member;

- Writes a meaningful apology with 28 days of the final determination of this matter to all those who were the recipients of the email dated 28 October 2021, with this apology first approved by the Head of the Paid Service. Should the apology not be sent within 28 days of the final determination of this matter, then it is recommended that Council censures the Subject Member.
- Undergoes 1-2-1 training on equalities and diversity, with a particular emphasis placed on the need to ensure that respect should be given to the Holocaust its

survivors and why it is not acceptable to use this subject, as the Subject Member opted to do.

## **Reasons**

In undertaking this assessment, I have had regards to the following;

- The material which is the subject of the complaints; and
- The response from the Subject Member.

I have also referenced in this assessment the views of the Independent Person.

### Preliminary considerations

For the Code to apply to the actions of the Subject Member, he has to have been acting in his official capacity at the time of the alleged conduct. Having reviewed the complaint I am satisfied that, with regards to the material that is the subject of this complaint, the Subject Member was acting in his official capacity, or gave the impression he was acting in his official capacity, when undertaking the conduct complained of.

Within his responses to the complaint, which are covered below, the Subject Member has set out that he was seeking to press the Council on the matter of the public toilets in his area. It should be noted that, whilst it is unavoidable that this forms a backdrop to the complaint, this process is not in place to consider the merits of the public toilets, or the actions of the Council regarding them, and any mention of the toilets is incidental in considering the conduct of the Subject Member.

As was confirmed in *Heesom v Public Services Ombudsman for Wales*, there is a quasi-employer/employee relationship between an elected member and an officer of a Council, and therefore the mutual trust and confidence which has to exist between an employer and their employee has to be maintained at all times and this is considered within the assessment.

In considering the facts of this matter and whether there has been a breach of the Code, the facts are considered on the balance of probabilities that is, would a reasonable person objectively, considering all of the facts, be of the view that it is more likely than not that the actions of the Subject Member are a breach of the Code.

It is noted that the Subject Member has set out, which is covered below, he requires evidence if the matter goes further. In processing this complaint in accordance with the procedures adopted by the Council, the only evidence which is used in considering if there has been a breach of the Code is the email sent by the Subject Member and the post on Social Media. Therefore, it is considered that the Subject Member is aware of the facts on which the complaint is based.

### The Complaint Part 1 – The email dated 28 October 2021

The email which is the subject of this complaint was sent on 28 October 2021 @ 15.55 to another Councillor and copied in several officers.

In writing the email, the Subject Member was responding to a question from another member and within the email he sets out;

- Those involved with the toilets on St Martins are conducting a conspiracy of silence, delay, ineptitude and displaying a total lack of concern and of 'not giving a damn';
- Compares the conditions on St Martins as akin to those suffered in Bergen Belsen or Dachau;
- Saying things are a hogwash, and references being sick of the Council, and sets out he will bypass the Council and go to Cornwall Council, the LGA and then the press;
- Suggests that dog and human waste be collected on St Martin's and deposited on the quay at St Mary's; and
- Sets out that Council Tax will be withheld.

In his response to the complaint, the Subject Member has set out his reason for adopting the stance he has, which is that the Council has neglected their approach to the toilets on St Martin's and has prevented the installation of waste bins. The Subject Member has stated that he refutes all of the allegations, and he has not shown disrespect to anybody and he requires evidence if this goes further. He is also of the view he has not brought his position or his office into disrepute. Within his response, the Subject Member has further restated that Council Tax will be withheld.

It is noted that the officers who were the recipients of the email consider that the tone was unacceptable and that, informally, the Subject Member was given the option to apologise, but this was not taken.

#### Application of the Code of Conduct to Part 1 of the Complaint

Paragraph 2.1 of the Code of Conduct sets out that a member must treat others with respect. Whilst it is completely within the remit of a member to be challenging and critical, this must not be done in a manner which is disrespectful, and comments must not be unduly personal.

As part of this there is the requirement that, when dealing with officers of the Council, the Subject Member, as the employer of the officers, should work to ensure that the mutual trust and confidence that is required between an employer and an employee is maintained. This stands throughout this assessment.

In terms of the subject matter of the email, I can find no fault with this. The subject of the public toilets is something which could be taken up by a local member to champion on behalf of their local community. As an elected member, the Subject Member has unique access to officers of the Council in order to further projects that he is championing.

However, in undertaking this role, the Subject Member is required to adhere to the Code of Conduct and in particular must ensure that he is respectful of the work that is undertaken by officers, and he should make sure that he does not misuse his position.

In undertaking an objective view of the facts, it is considered that no one would wish to receive an email such as that sent by the Subject Member on 28 October 2021, particularly no employee would expect to receive such an email from their employer. As is set out above, the fact the Subject Member wishes to champion this cause does

fall within his role. However, I consider that the way he has opted to do this falls a long way short of the standard of conduct that is expected of an elected official.

Within the email, the Subject Member also sets out that the actions of the Council have created conditions similar to those in Bergen Belsen or Dachau. It is considered that any person would consider that this statement is completely unacceptable in any form, and is a clear affront to those that suffered in these camps during the Holocaust. A comparison is clearly disrespectful to them and to those the Subject Member alleges have caused the problems on St Martin's and shows a lack of understanding of the distress and upset that such comments can cause.

Therefore, I consider that the tone and the content of the email sent by the Subject Member on 28 October 2021 breaches paragraph 2.1 of the Code of Conduct as it is not considered that anyone would view the email sent by the Subject Member as acceptable.

In particular, I have concerns that the Subject Member should try to link the actions of the Council and thereby implicating the officers involved to those who died in the camps during the Holocaust, and this is something which is unprecedented for an elected official to do.

Paragraph 2.3 of the Code of Conduct sets out that a member must not bully any person.

The ACAS guide on bullying sets out that, although there is no legal definition of bullying, it can be described as unwanted behaviour from a person or group that is either: offensive, intimidating, malicious or insulting, an abuse or misuse of power that undermines, humiliates, or causes physical or emotional harm to someone and this can be a regular pattern of behaviour or a one-off incident.

As there is a quasi-employer/employee relationship between elected members and officers, it is clear that an elected member should use their position as an employer responsibly.

The emotive language used in the email from the Subject Member is clearly designed to seek to undermine the officers concerned and to humiliate them, and the comparison with Bergen Belsen and Dachau to the actions of the Council is offensive in the extreme.

No objective person would consider it reasonable for an employer to send such an email to an employee, and as is set out, no one would expect to receive an email such as the one sent. This was clearly designed to try to elicit a response from the officers and can only be seen as an attempt to bully the recipients into some form of action over the toilets on St Martin's.

As a result of this, it is considered that the Subject Member has breached paragraph 2.3 of the Code of Conduct.

## 2.7 You must not intimidate or attempt to intimidate others.

Whether intimidation exists is very similar to bullying, and intimidation is when threats or abuse is used to try to manipulate someone to gain an advantage.

Whilst it is not always the case that if bullying is found intimidation will also be found, I am of the view that, in this case, a reasonable person would make such a finding. The highly emotive language used, the linking of the matter to the Holocaust and the threats to break the law are all indicative of intimidation and an attempt on the part of the Subject Member to get others to do his bidding.

As a result it is considered that the Subject Member has breached paragraph 2.7 of the Code of Conduct.

2.11 You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or the Council into disrepute.

In considering this part of the Code, the objective consideration is, would a reasonable person be of the view that the actions of the Subject Member have brought his office as a Councillor into disrepute or his whole Council.

One of the key general principles that underpin the Code of Conduct is a duty to uphold the law, and no matter what the circumstances, all elected members are required to abide by this principle and should never condone breaking the law.

That the Subject Member seeks to suggest in his emails that he would support the legal requirement for his constituents not to pay Council Tax is clearly designed to suggest that he is in support of breaking the law, as are his suggestions that dog and human waste are collected on St Martin's and dumped on St Mary's. This is not an acceptable stance to take, and such an action should not be advocated by a member.

In again considering the tone and the content of the email, I am not of the view that anyone acting objectively would consider that this was something that an elected official should be sending, and the attempt by the Subject Member to use the camps of Bergen Belsen and Dachau to try to further his argument is something no one should ever contemplate doing.

There can be no mitigation for this, everyone is required to uphold the law and there is a particular emphasis placed on an elected official due to the additional responsibility which is placed on them. Likewise, the use of the subject of the Holocaust by the Subject Member is of real concern, and such a comparison should never have been made and it is considered no one acting reasonably would make such a comparison.

I am fully satisfied that any objective consideration of the facts would result in a reasonable person being of the view that the email brought the Subject Member's office into disrepute, and is a breach of paragraph 2.11 of the Code of Conduct.

However, I am not of the view that the Subject Member has brought his Council into disrepute. The reason for this is that an objective observer would see that the actions proposed were those of the Subject Member alone, and could not be seen as the views of the Council as a whole.

2.4 You must not conduct yourself in a manner which is contrary to the Council's duty to promote and maintain high standards of conduct by Members.

Given the fact that the Subject Member has breached paragraphs 2.1, 2.3, 2.7 and 2.10 it follows that he has failed to uphold the high standards of conduct that is required of an elected member and is therefore in breach of paragraph 2.4 of the Code of Conduct.

*Views of the Independent Person on the email*

The Independent Person allocated to this matter has set out that he did not hear from the Subject Member with regards to the complaint.

With regards to the email, the Independent Person considers that its tone is aggressive and must have caused considerable distress to those who received it. With regards to linking the matter to the Holocaust, the Independent Person has set out that;

*A number of aspects of this email are, in my view, disgraceful and tactless most especially a direct comparison made between the toilets at Highertown and the Nazi Germany Concentration Camps of Dachau and Bergen Belsen. This is actually outrageous, beyond all decency, and besmirches the memory of 6m people who were exterminated in Nazi death camps. If this comparison was brought to wider public attention, it would clearly be a resigning matter, as no public servant could hold their head up high after such a crass assertion. All dignity was lost when that statement was made in the email, and it utterly weakens and undermines all subsequent statements made on the issue.*

Further, with regards to the threats made, the Independent Person is of the opinion that these are a direct challenge to the standing of the Council of the Isles of Scilly.

Finally, in considering all of the facts, the Independent Person is of the opinion that the email sent on 28 October 2021 breaches the Code of Conduct.

*The Complaint Part 2 – The post on social media*

The post made by the Subject Member was made in a group for residents of St Martin's and covers the fact that he and a third party are working to resolve the situation with the public toilets.

As part of this post' the Subject Member does reference the inaction of the Council which has resulted in the toilets being closed, with this linked to a lack of interest and investment from the Council. The post closes by asking people to write to the Council if they have any concerns regarding the toilets.

*Application of the Code of Conduct to Part 2 of the Complaint*

In considering the wording of the post made by the Subject Member, it is unusual for an elected member to be critical of their Council in such posts, but this is not something which is unprecedented. As is set out at the start of this assessment, the matter of the toilets is something which does come under the role of a local member and any member can therefore seek to press for any facilities that are closed to be reopened.

Having carefully considered the post, I am not of the view that it breaches the Code of Conduct. It is unusual and it is robust in its wording, but not to the extent that

when viewed objectively it oversteps the boundaries which are set by the Code of Conduct.

### Views of the Independent Person on the Social Media Post

My considered view of this Social Media post is that it is robust, reveals a clear frustration over an issue, pleads for wider support but in my view does not break the Councillor Code of Conduct. I do not consider that this Social Media post seeks to fully undermine the standing of the Council, but rather should be seen for what it is, words borne of frustration.

### Summary and Actions

As no breach of the Code of Conduct has been found with regard to the Social Media post, no further action needs to be taken and this is not considered further.

With regards to the email of 28 October 2021;

Even though I have noted the responses to the complaint by the Subject Member, I can find no justification for the way the Subject Member has addressed others in the email. The wording of the email is disrespectful, bullying and intimidatory and linking the Holocaust to the matter on St Martin's is something I am sure most people would find distasteful.

At the moment, the actions which can be recommended to the panel of members are limited due to the current constraints of the ethical standards regime. However, given the comments about the camps and linking the works of officers to the Holocaust, were I able to, I would have no hesitation in recommending the Subject Member be suspended from office.

As it stands, the actions that are recommended to the panel of the Scrutiny Committee are that the Subject Member;

- Writes a meaningful apology with 28 days of the final determination of this matter to all those who were the recipients on the email dated 28 October 2021, with this apology first approved by the Head of the Paid Service. Should the apology not be sent within 28 days then it is recommended that Council censures the Subject Member.
- Undergoes 1-2-1 training on equalities and diversity with a particular emphasis placed on the need to ensure that respect is given to the Holocaust and why it is not acceptable to use the names of the camps, as the Subject Member opted to do.

### Consideration by a Panel of the Scrutiny Committee

A Panel of members of the Scrutiny Committee considered the findings of the Monitoring Officer on 13 January 2022. The Panel were of the view that the comments made by the Subject Member to officers were unacceptable to a Council that prided itself on the effectiveness of the working relationship between its Councillors and officers and the breaches of the Code of Conduct as found by the Monitoring Officer were supported by the Panel.

As a result the Subject Member will now be asked to apologise to the officers concerned and to undergo training as it set out in the Notice.

### **What happens now?**

This decision notice is sent to the Subject Member, and a copy of this assessment has been provided to the Independent Person and the Head of the Paid Service. A copy will also be provided to the panel of the Scrutiny Committee who will consider the findings in this assessment.

### **Right of review**

At the written request of the Subject Member, the Monitoring Officer can review and is able to change a decision not to refer an allegation for investigation or other action.

Any review cannot simply disagree with the findings in this notice, and it must contain something substantive which was not considered as part of this initial assessment. We must receive a written request from the Subject Member to review this decision within 14 days from the date of this notice, explaining in detail on what grounds the decision should be reviewed. Any request that is not substantive will be rejected.

If we receive a request for a review, we will write to all the parties mentioned above, notifying them of the request to review the decision.

It should be noted reviews will not be conducted by the same person who did the initial assessment.

### **Additional help**

If you have difficulty reading this notice we can make reasonable adjustments to assist you, in line with the requirements of the Equality Act 2010.

We can also help if English is not your first language.



SJR Mansell MBE  
Monitoring Officer  
Date: