

## STANDARDS COMMITTEE – 3<sup>RD</sup> NOVEMBER 2005

### THE CASE REVIEW NUMBER THREE

Report of the: Monitoring Officer

Status: For Consideration

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#### **Executive Summary:**

The Case Review sets out new developments on the interpretation of the Code of Conduct and considers recent case law as more particularly set out in the introduction.

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**This report supports the Key Aim of promoting and maintaining high standards of conduct in local government through training and development**

**Portfolio Holder** Cllr. Loney

**Head of Service** Head of Legal Services – Mrs. Christine Nuttall

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**Recommendation:** Members are requested to note this report.

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#### **Background**

- 1 Delegates to the Standards Board for England's Fourth National Assembly that took place on the 5<sup>th</sup> and 6<sup>th</sup> September 2005 were presented with a copy of the Case Review number three. This Case Review shares with its readers the Standards Board for England's experience of conducting investigations, giving legal advice and developing policy in relation to the Code of Conduct.
- 2 The Case Review aims to reflect on, and inform about, new developments in the interpretation and working of the Code of Conduct.

#### **Introduction**

- 3 Chapter 1 of the Case Review is entitled "Considering complaints" and emphasised that the Standards Board for England is obliged to consider every complaint on its merits and so the final decision is often one of judgement. The referral criteria is examined to give an insight into the decision-making process and a general indication of the types of cases that are likely to be referred.
- 4 Chapter 2 is entitled "Confidentiality and the public interest" and looks at the impact of European human rights legislation on the rules governing the disclosure of confidential information as set out in the Code of Conduct.

**Item No. 6**

- 5 Chapter 3 “Local determinations” looks at how Standards committees have been helping to tackle local issues by holding hearings on cases referred by ethical standards officers.
- 6 Chapter 4 “High Court appeals” sets out recent High Court case law.
- 7 Chapter 5 “Significant others” considers cases of particular significance.

**Considering Complaints**

- 8 In order for the Standards Board for England to have authority to consider a complaint, it must first pass several jurisdictional tests:
  - a. the complaint must be made in writing
  - b. it must be about something that happened after the Code of Conduct came into effect
  - c. it must be about a member of a relevant authority
  - d. the member must have been a member at the time of the incident
  - e. the complaint must be about something covered by the Code of Conduct
- 9 Matters that occurred before the adoption of the Code cannot be considered. In addition complaints against the authority as a whole cannot be considered. The member who is complained against has to have been a member of a relevant authority at the time of the alleged incident. The conduct complained about has to amount to a breach of the code. Also the Board cannot consider an anticipated breach of the code.
- 10 The Standards Board for England has a wide discretion to decide whether or not complaints should be investigated. The criteria for referral state that a matter will be referred for investigation if it is believed to meet one of the following criteria:
  - it is serious enough, if proven, to justify the range of sanctions available to the Adjudication Panel for England or the local standards committee
  - it is part of a continuing pattern of less serious misconduct which is unreasonably disrupting the business of the authority and there is no other avenue left to deal with it short of investigation
- 11 There are categories of complaints that are unlikely to be referred and these are:
  - it is believed to be malicious, relatively minor or tit-for-tat
  - the same, or a substantially similar, complaint has already been the subject of an investigation or inquiry and there is nothing further to be gained

**Item No. 6**

- the complaint concerns acts carried out in the member's private life which are unlikely to affect his or her fitness for public office
  - it appears that the grievance is really about dissatisfaction with a council's decision
  - there is insufficient information currently available to justify a decision to refer the matter for investigation
- 12 Although the Board has a wide discretion in deciding to refer cases for investigation the consistency of the Board's decision making is closely monitored by a panel of Board members who meet regularly to examine a sample of decisions.
- 13 If a complaint is not referred for investigation there can be an appeal to the chief executive of the Standards Board for England who will review the decision.

**Confidentiality and the Public Interest**

- 14 In the case of Westminster City and Councillor Paul Dimoldenberg the Adjudication Panel for England ruled that the Code of Conduct should allow for the disclosure of confidential information when it is in the public interest.
- 15 Councillor Dimoldenberg was alleged to have disclosed confidential information in breach of paragraph 3(a) of the Code of Conduct but argued in his defence that he acted in the public interest. He leaked confidential documents about the council's former leader, Dame Shirley Porter, to a BBC journalist on three separate occasions in 2003. The documents concerned the council's attempts to recover £27 million in compensation from Dame Shirley for gerrymandering in the 'homes for votes' scandal. The councillor said he was acting in the public interest to encourage the council to recover the money.
- 16 S. 3(a) of the Code of Conduct states that a member must not:
- ...disclose information given to him in confidence by anyone, or information acquired which he believes is of a confidential nature, without the consent of a person authorised to give it, or unless he is required by law to do so...*
- 17 Initially it was thought that a public-interest defence could only be used to reduce the sanction. However, it was argued that a public-interest defence should be relevant to whether there had been a breach of the Code at all. In addition it was also unclear to what extent the paragraph was compatible with human rights legislation and these points were argued by Councillor Dimoldenberg.
- 18 The debate centred on Article 10 of the European Convention on Human Rights i.e. that everyone has the right to freedom of expression and the extent to which these freedoms may be subject to constraints.

**Item No. 6**

- 19 The Adjudication Panel found that it was necessary to take into account the circumstances surrounding the disclosure of confidential information when determining whether there is a breach of the Code of Conduct – particularly whether the member acted in the public interest.
- 20 The tribunal in the Dimoldenberg case was satisfied that in disclosing the confidential information the Councillor had exercised his right to freedom of expression afforded him by Article 10 of the European Convention on Human Rights. However, in the end the tribunal decided that the overriding public interest was in helping with the recovery of the money, rather than exposing the council's alleged inactivity. The High Court had imposed a number of gagging orders and the tribunal considered that these were proportional restrictions on the freedom of expression. Although, the tribunal therefore concluded that Councillor Dimoldenberg had breached the Code of Conduct it imposed no sanction as Councillor Dimoldenberg had not gained financially or politically by his actions.
- 21 This case highlights the need for the Standards Board for England to clarify the meaning of paragraph 3(a) in the review of the Code of Conduct and to produce guidance in this area.

**Local Determinations**

- 22 Standards committees have been helping to tackle local issues by holding hearings on cases referred by ethical standards officers for almost two years now. They have in most cases censured or suspended members for misconduct, but they have also been able to address local problems by requiring members to complete training or apologise for their behaviour.
- 23 Most of the hearings concerned members with alleged personal and prejudicial interests. These cases accounted for two-thirds of the hearings.
- 24 Examples of cases being determined locally are as follows:
  - A member did not declare an interest or leave the room when the council discussed a tree preservation order and a conservation order that covered his property, or when the council awarded a grant to a group of which he was a member. The incidents occurred over an eight-month period and the member was suspended for the maximum period of three months.
  - A member failed to declare an interest in an application to build a bungalow on land opposite his daughter's house. He also attended a site visit and tried to influence a decision on the application. The member was suspended from attending planning committee meetings and from representing the authority on any planning matters for three months, or until he had taken appropriate training on the Code of Conduct.
  - A parish councillor was censured for failing to declare a personal and prejudicial interest and failed to withdraw from a meeting about a churchyard, despite his close association with the church.

**Item No. 6**

- A town councillor was suspended for three months for calling the clerk a “nasty bastard”, with the condition that the suspension would end if the member apologised for her behaviour.
- One member was censured and required to take training after he made offensive racist comments during and after a parish council meeting. Another member was censured for calling a colleague a “bald headed git” and for saying “I’ll wait for you outside”.
- A member of a national park authority was censured for saying to another member: “If you don’t shut up, I’ll come back and shut you up.”
- One member of a town council brought her office and authority into disrepute by drink-driving. The standards committee suspended her for one month.
- Another member was suspended from being the chair of his council’s planning committee for two months after he discussed a number of planning applications with an applicant before the planning meeting, in breach of the council’s guidelines on planning matters.
- In another case a member leaked confidential information about the council’s proposed purchase of a plot of land. The standards committee censured the member for releasing information that could have hampered the council’s negotiations over the land.
- In another case, a member of a parish council improperly secured an advantage for a member of the public by asking the parish clerk to make a payment which had not been approved by the council. The payment was for repairs to a private road used by the member to get to his allotment. The standards committee suspended the member for two months.
- A member used personal computer facilities provided by the council to store a number of emails containing pornography. He failed to act in accordance with his authority’s requirements for the use of its resources. However, he apologised for his misconduct and agreed to training. In view of this, the standards committee decided to suspend him for one month without allowances, and to require him to take training on the Code of Conduct and the authority’s email policy.
- Five members allegedly failed to register interests. Three members failed to register their membership of campaign groups, and one member failed to register interests in his land.
- One member failed to register his financial and other interests following his re-election to the authority.

## **High Court Appeals**

- 25 A complainant may seek judicial review of a decision not to refer a complaint for investigation or a decision by an ethical standards officer that no action needs to be taken. In practice such challenges are rare. However one recent challenge was brought against a local Standards committee. The Dawkins case involved the timetabling of the Standards committee hearing. Under the local determination regulations the Standards Committee of an authority shall ensure that the hearing is held within the period of three months beginning on the date on which the monitoring officer first received the report. In the Dawkins case the standards committee hearing was held considerably after the three-month period had expired.
- 26 It was decided that delay beyond the three month period did not make the hearing automatically unlawful. However, substantial compliance with the regulations has to be achieved.
- 27 The Dawkins case has practical implications for standards committee hearings and sets a high standard for standards committees. They must plan to meet the statutory time limit in every hearing.
- 28 The Judge in this case issued a warning against any practice of arranging “token hearings” within the specified three-month period with a view simply to adjourn the matter to a date outside the three-month period. Such a practice would not be likely to constitute substantial compliance.
- 29 Authorities need to be wary of being overly flexible towards the subject member when scheduling the hearing. Requests for more time to prepare a case should be treated with caution.
- 30 Subject members are given an additional right of appeal against decisions of the Adjudication Panel. As there is no requirement for permission to appeal such appeals are relatively frequent and with this type of appeal the court can overturn any decision it believes are wrong in principal.
- 31 Cllr. Murphy brought such an appeal when the meaning of the phrase ‘wellbeing’ was considered in relation to the personal interest test. It was decided that ‘wellbeing’ could be said to affect a person’s quality of life, either positively or negatively. It is not restricted to matters affecting a person’s financial position. The range of personal interests is, accordingly, likely to be very broad. The case tribunal had to consider the matter objectively from the point of view of “an informed outsider”.
- 32 Cllr. Murphy also complained unsuccessfully that the composition of the case tribunal was lacking in impartiality and therefore infringed his right to a fair hearing.
- 33 Cllr. Murphy also argued unsuccessfully that the Code of Conduct amounted to an infringement of his right to freedom of expression.

**Item No. 6**

- 34 Cllr. Murphy's challenge was only successful in reducing the sanction that had been imposed.
- 35 However, the decision in Murphy to reduce the sanction imposed by the case tribunal can be contrasted with the case of Sloam where the High Court did not think that it would be right to interfere with the case tribunal's decision. In considering sanctions imposed by a case tribunal, the High Court was acting as a court of review and would be slow to intervene in matters decided by a specially trained tribunal.
- 36 The case of Scrivens involved a failure to withdraw from an agenda item in which he had a prejudicial interest and furthermore, Cllr. Scrivens had improperly sought to influence the authority's decision.
- 37 The Scrivens' appeal raised a narrow but extremely important point concerning the proper approach to the tests for personal and prejudicial interests. Cllr. Scrivens argued that, in determining whether a member had a personal and prejudicial interest, the proper approach was for the case tribunal to consider whether the member concerned could rationally have come to the view that they did not have a personal or prejudicial interest. This approach suggests that there may be a range of reasonable responses to a given set of facts. On this interpretation there could only be a breach of the code where a member's conclusion that he or she did not have a prejudicial interest was unreasonable.
- 38 This approach was not accepted. Whether a member has a personal or prejudicial interest is a question to be determined objectively. The mistaken but reasonable view of the member that he has no such interest is irrelevant.
- 39 The case of Sanders involved the right to freedom of expression under Article 10 of the European Convention on Human Rights. However, the Court concluded that Cllr. Sanders comments amounted to no more than expressions of personal anger and personal abuse rather than political expression and found that the case tribunals finding was not in breach of Article 10.

**Significant Others**

- 40 This last chapter in the Case Review looks at a range of cases to illustrate points and draw conclusions.
- 41 Three cases involved members who were charged with criminal offences involving indecent pictures of children.
- 42 The repugnance with which the public regards child pornography means that these cases had the potential to be particularly damaging. The members not only failed to uphold the law, but they also fatally undermined the public's trust in them and called into question their own honesty and integrity. Such cases have tended to warrant the heaviest sanction available to the Adjudication Panel.

**Item No. 6**

- 43 A case involving an attack on a member of the public was also examined. The case underlined the heavy sanctions that members can face for acting in an unacceptable way, even if this is in their private capacity. An attack on a member of the public is particularly unacceptable, as members are supposed to provide a degree of moral leadership in the community by upholding the principles of public life.
- 44 The manipulation of the electoral process was looked at in a case where a member of a parish council manipulated the electoral process by persuading three candidates to withdraw their nominations. The member's behaviour in this case undermined the democratic process itself. The case showed the consequences of members overstepping the bounds of their authority and presuming to second-guess the wishes of the electorate.
- 45 Conflict of interest was examined in a case where a member was asked for help in making an application for a taxi licence. The member believed that he could separate his roles as a councillor and solicitor. However, this was a serious misjudgement. The Code of Conduct does not prevent members from acting as advocates for their constituents before council committees. The case established the principle that it would be incorrect for a member to appear in a professional capacity before committees of their own authority.
- 46 The last case raised questions about whether offensive comments are covered by the Code of Conduct. This case concluded that members may express the strongest dislike or criticism of a particular ideology, religion, moral tenet or political stance, even if that expression gives offence, so long as they are not abusive, in breach of the law or in conflict with their authority's legal obligations or policies.

**Financial Implications**

- 47 The Case Review number three gives practical advice that if followed should result in reduced referrals to the Standards Board for England, investigations and determination hearings as well as any subsequent appeals. Reductions in such procedures will reduce the overall costs involved in such procedures.

**Legal Implications**

- 48 The Case Review sets out recent case law and new developments on the interpretation of the Code of Conduct. This will aid the future interpretation of cases.

**Conclusions**

- 49 The Case Review number three provides a practical advice kit on the interpretation of the Code of Conduct. It provides useful guidance to members, monitoring officers and others.



**Sources of Information:** The Standards Board of England – the Case  
Review number three

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### **RISK ASSESSMENT STATEMENT**

Training and development is essential in order to achieve high standards of conduct in public life

