



# Basingstoke and Deane

## **BASINGSTOKE AND DEANE BOROUGH COUNCIL** **DECISION NOTICE**

### **DECISION NOTICE:**

**Reference: 048555/AGR**

**Complainants: Cllr Onnalee Cubitt and Cllr David Potter**

**Subject Member: Cllr Andrew McCormick**

On dates between 18<sup>th</sup> December 2020 and 2<sup>nd</sup> February 2021 the Deputy Monitoring Officer, Independent Standards Assessor and Independent Person considered a complaint from the Complainants concerning the alleged conduct of the Subject Member under the Council's Code of Conduct (the Code), whilst acting as a member of Basingstoke and Deane Borough Council. The Complainants also made a separate complaint against Cllr Bound arising from the same set of facts which is the subject of a separate decision letter.

The Subject Member has taken the opportunity to comment upon the Complaint.

### **Summary of the complaint**

On the 18<sup>th</sup> December the Complainants submitted two complaints under the Council's Arrangements for Considering Complaints (the Arrangements). The first against the Subject Member and the second against Cllr Bound which is dealt with in a separate decision letter.

The complaint states that the Subject Member and Cllr Bound in submitting their Complaint against the Complainants on the 7<sup>th</sup> December breached the Code of Conduct in that

- they failed to abide by the Nolan principle of openness under paragraph 1(2)(e);
- they attempted to intimidate the Complainants by using the Code of Conduct as a tool of punishment contrary to paragraph 2(2)(c )
- that without acting in good faith they disclosed confidential information contrary to paragraph 3(a)(iv)

## Relevant provisions of the Code

### Paragraph 2

(2) You must not:

- c) Intimidate or attempt to intimidate any person;

### Paragraph 3

You must not

- (a) disclose confidential information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where:
  - (iv) the disclosure is:
    - (aa) reasonable and in the public interest; and
    - (bb) made in good faith and in compliance with the reasonable requirements of the authority

### Nolan principles Paragraph 1(2)

(c) Openness – holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

## Facts

On the 7<sup>th</sup> December the Subject Member and Cllr Bound made a complaint to the Monitoring Officer under the Code of Conduct relating to an email written by Cllr Cubitt on the 3<sup>rd</sup> December responding to the SWOW survey consultation- the SWOW survey consultation related to an office accommodation refurbishment project -(the Bound and McCormick Complaint). Cllr Cubitt had addressed this email to most Councillors and some officers. This email contained the below paragraph. The Subject Member and Cllr Bound objected to the use of the phrase “Year Zero” alleging it demonstrated a lack of respect for those who have suffered injustice or unfair treatment due to the origins of the term in the Cambodian genocide. This complaint (the Bound and McCormick Complaint) is the subject of two separate decisions which found that Cllr Cubitt had not used the term in this context.

*“As elected members we are honoured to be the current custodians/guardians of local democracy in our Borough. The Wood Panelling and the Parlour give a sense of our history of our Town and our Borough. The same applies to the contents of our display cabinets. It is something to show visitors and the children of our Borough and beyond. The Council and its collective history does not belong to us. We should not be aspiring to create a utilitarian “Year Zero” space at great expense especially in these straightened times. Councillors have not requested this. This SWOW Project has not been initiated by councillors. Indeed it appears councillors did not know anything about it until the Members’ Briefing on 1st October.”*

On Friday 4<sup>th</sup> December, prior to submitting his joint Complaint against Cllr Cubitt (and Cllr Potter), the Subject Member contacted the Gazette and informed them of Cllr Cubitt's views as submitted in response to the SWOW survey. Subsequently the Gazette asked him for comments on Cllr Cubitt's email and he submitted a reply to the Gazette on the 6<sup>th</sup> December. On Monday 7<sup>th</sup> December the Gazette published an article in which the Subject Member is quoted as stating Cllr Cubitt "lacked a sense of proportion" and that "in no way is a civic office re-organisation anything like a genocide".

## Decision

**In accordance with the Arrangements, the Subject Member has not breached paragraph 2(2)(c) or 3(a)(iv) of the Council's Code of Conduct or conducted himself contrary to the Nolan principle of openness.**

## Reasons for decision

### 1(2) (e) Principle of openness:

It is alleged that the Subject Member and Councillor Bound have not been open or transparent in their use of the complaints process. The complainants do not challenge the Councillors' right to use the complaints process to address concerns under the Equality Act 2010, but instead suggest that this was not the true intention of their complaint.

In their complaint, the Subject Member and Cllr Bound objected to the use of the term 'Year Zero'. They clearly found the use of the term deeply offensive interpreting it as being a reference to: *'The [beginning](#) (1975) of the period during which [Cambodia](#) was under the control of the [Khmer Rouge](#)'.*

They brought the complaint because they objected to the use of the term 'Year Zero'. This is supported by the Subject Member's response of the 27<sup>th</sup> January to this complaint when he stated: *The use of "year zero" juxtaposed with "utilitarian" leave little room for doubt as to the context.*

The findings in the Complaint decision against Cllr Cubitt found that Subject Member and Cllr Bound did not appear to recognise or have considered other uses of the term "Year Zero" in their complaint against Cllrs Cubitt and Cllr Potter.

This is also highlighted in Cllr McCormick's response:

*There has been public commentary that "Year Zero" can mean other things and that Cllr Cubitt was alluding to one of the other meanings; these do not fit the context in which it was used in Cllr Cubitt's email.*

There is therefore insufficient evidence to conclude that the Subject Member and Cllr Bound were trying to further any political argument about the pros and cons of the office refurbishment or that they had any other motivation in bringing the complaint. The Complainants offer no evidence for this allegation other than their own opinion. The

Bound and McCormick Complaint was specific and focused on the terminology - 'Year Zero'; the context in which it is used; and their objection to its use. They were concerned that the use of this term was discriminatory and lacking in respect. Therefore there has been no breach of the Nolan principle of openness

### **2(2)(c) Prohibition of intimidation:**

The Complainants argue that the Code of Conduct complaints process has been used to silence or intimidate Cllrs Cubitt and Potter. The suggestion is that the original complaint made by the Subject Member and Cllr Bound was not in truth an attempt to uphold proper standards of conduct but was in fact intended to silence Councillor Cubitt in particular. All councillors are entitled to raise a complaint if they believe the Code of Conduct has been breached; making a complaint in, and of itself, is not intimidatory. The fact that the complaint was not dismissed at Stage 1 of the complaint process demonstrates that there was an issue that needed proper consideration.

The Subject Member and Cllr Bound made the complaint because of their understanding of the term 'Year Zero'; they sought to "call out" the language used by Cllr Cubitt as, in their view, it was insensitive, unacceptable and offensive.

There is insufficient evidence to conclude that the Subject Member and Cllr Bound sought to intimidate Cllrs Cubitt and Potter by raising this complaint. All the Cllrs involved in this complaint are elected representatives of the Borough and well versed in both conducting themselves in robust political activity, and in withstanding the consequent pressure. There was no obvious victimisation of a weaker party or an obvious power imbalance. The complaints process is at the heart of standards work and ensures fair and balanced assessment of complaints and members must feel able to use the process without fear that lodging a complaint will be regarded as an act of intimidation.

### **3 (a)(iv) Prohibition of disclosure of confidential information**

The Complainants state that the disclosure of the email to the Gazette by the Subject Member was a disclosure of confidential information. They accept that there was public interest in the disclosure of the email but state that the disclosure was not made in good faith but rather to besmirch the reputation of Cllr Cubitt and to gain a greater political advantage. The consideration of whether the disclosure was made in good faith only arises if the email is properly to be regarded as confidential information.

Paragraph (2.4(b)) in article 2 of the Council's constitution is in the following terms:-

*Cllrs should not make public, information which is confidential or exempt without the consent of the council, or divulge information given in confidence, to anyone other than a Cllr or Officer entitled to know. If there is any question regarding whether information is confidential or exempt Cllrs should seek the advice of the*

*Head of Law and Governance. Cllrs can refer to the whistleblowing policy and procedure of the council.*

The terms “confidential” and “exempt” have specific statutory meaning under Schedule 12A of the Local Government Act 1972. The definitions of these terms are set out in paragraph 10.4 and 10.5 of the Council’s Access to Information Rules in the Constitution which is on the council website.

In these definitions “confidential” refers to information given to the Council by a government service or agency on terms which forbid its public disclosure or information which cannot be publically disclosed by any enactment or court order. The email sent by Cllr Cubitt does not fall within this definition. It is therefore necessary to consider whether the email still falls within Paragraph 3(b) of the Code by virtue of being information acquired by the Subject Member which he believed or **ought reasonably to have been aware** was of a confidential nature.

The common law duty of confidence arises when three tests are satisfied. There must be a quality of confidence to the information in that the information, in this case the email must be objectively confidential. Secondly, the information must be provided in circumstances giving rise to an obligation of confidence. This is determined on the basis of whether a reasonable person standing in the shoes of the recipient of the information would have realised that the information was being given to him or her in confidence. Thus, would a reasonable person think that an email sent by a councillor to fellow councillors and some officers relating to the merits of proceeding with the accommodation project was sent in confidence? Finally, there must be unauthorised use of the information to the detriment of the sender of the email.

The Subject Member in his response to the complaint states *“It is debatable that a wide-circulation e-mail to 60 councillors and 15 officers is “confidential”*. This shows that the Subject Member did not necessarily realise that the email sent by Cllr Cubitt was intended to be confidential if indeed it was. Further the email was not marked as confidential. There is no issued internal guidance to councillors about whether internal emails should be treated as confidential and therefore it cannot be said that the Subject Member ought reasonably to have been aware that the email could have been of a confidential nature.

Whether internal correspondence is confidential is likely to depend on the contents of the email. For instance, an email disclosing personal sensitive data of anyone associated with the Council would be confidential. Whilst the Subject Member could have taken the advice of the Head of Law and Governance, he would only have thought to do so had he realised that the email may have contained confidential information. Given the wide distribution list of the email, it appears that the Subject Member did not consider an email shared so widely to be confidential. As he did not consider whether or not the email was confidential, even were the email to be regarded as of a confidential nature, it is clear he did not breach paragraph 3 of the Code on the basis that he believed the information to be confidential. Furthermore, it is the assessment of the Deputy Monitoring Officer, the Independent Standards Assessor and the Independent Person that this conclusion was reasonable given the wide distribution of the email; the subsequent publishing of the email by Cllr Cubitt; the subject matter of the email and that the email was not marked confidential.

This decision notice is sent to the person or persons making the allegation and the Member against whom the allegation was made.

### **Right of Appeal**

There is a right of Appeal to the Monitoring Officer within 10 working days of the date of this notice.

### **Additional Help**

If you need additional support in relation to this or future contact with us, please let us know as soon as possible. If you have difficulty reading this notice we can make reasonable adjustments to assist you, in line with the requirements of the Disability Discrimination Act 2000.

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

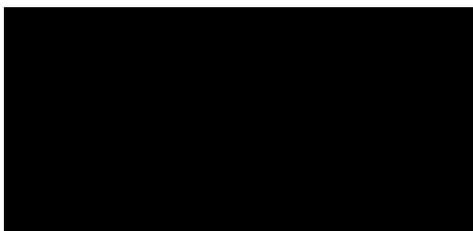
### **Access to the complaints process**

Certain groups of customers may find it more difficult to make a complaint for example due to English not being their first language, sight impairment etc. It is our duty to assist the complainant in gaining access to the complaints procedure but we must not make the complaint for them or misrepresent their complaint. The Council do not insist that a complaint is made in writing, particularly where this would hinder an individual in making their complaint.

The following services are available to assist customers in making their complaint.

Translation  
Interpreting  
Braille/Large Print  
Minicom  
Text  
Online form

Signed



Ann Greaves  
Deputy Monitoring Officer

Signed



Camilla Proctor  
Independent Standards Assessor

Date 4<sup>th</sup> February 2021