

Standards Committee	
Meeting Date	17 November 2020
Report Title	Annual Monitoring Officer Report
Cabinet Member	Not applicable for this report
SMT Lead	David Clifford, as monitoring officer
Head of Service	Not applicable for this report
Lead Officer	David Clifford, as monitoring officer
Key Decision	No
Classification	Open
Recommendations	The report is for information only.

1 Introduction

- 1.1 This report provides an overview of the work of the monitoring officer during the period 1 November 2019 to 31 October 2020. It includes a summary of the main mechanisms in place at Swale to ensure sound governance and lawful decision-making, together with an indication of how well these have operated during the period. It provides a summary of cases dealt with under the code of conduct, and finally offers a brief update to the standards committee on relevant developments in the wider legal and policy context over the course of the year.
- 1.2 This has been very difficult year for the council and its senior officers, as it has of course for the borough and its residents. The Covid-19 crisis has been a huge challenge, but one which the council has risen to meet, supporting both vulnerable residents (such as homeless people and people whose health conditions make them susceptible) and vulnerable businesses, as well as playing a leading role in the enforcement of new regulations.
- 1.3 Following a period of sick leave, our highly respected chief executive and former monitoring officer Mark Radford sadly passed away in May, so this has been another year with SMT members jointly covering the role at the top of the officer hierarchy. A new chief executive has been appointed and will take up her post in January.

1.4 It has also been a busy year in terms of complaints against borough and parish councillors under the code of conduct, with 21 formal complaint cases¹ and 42 individual complaints dealt with in the year to 31 October. These complaints are reviewed in more detail in Section 5 of this report.

2 The role of the monitoring officer

2.1 The Local Government and Housing Act 1989 requires local authorities to appoint a monitoring officer, giving that officer a broad role in ensuring the lawfulness of council decision-making and promoting good governance and high ethical standards. A summary of the monitoring officer's functions is as follows:

Description	Source
Report on contraventions or likely contraventions of any enactment or rule of law.	Local Government and Housing Act 1989
Report on any maladministration or injustice where the ombudsman has carried out an investigation.	Local Government and Housing Act 1989
Report on sufficiency of resources.	Local Government and Housing Act 1989
Maintain the constitution.	Council constitution
Provide advice to members on governance, probity, vires issues, and questions concerning the budget and policy frameworks.	Council constitution
Consult with, support and advise the chief executive and chief financial officer on issues of lawfulness and probity.	Council constitution
Advise on whether executive decisions fall within the budget and policy framework.	Council constitution
Establish, publish and maintain the register of members' interests.	Localism Act 2011
Issue dispensations to members regarding disclosable pecuniary interests.	Localism Act 2011
Promote and maintain high standards of conduct.	Localism Act 2011

¹ By 'complaint cases' I refer to incidents or alleged incidents each giving rise to one or more complaints.

Description	Source
Undertake the assessment of complaints that a member may have breached the code of conduct.	Localism Act 2011
Act as legal advisor to the standards committee when carrying out a local determination hearing.	Localism Act 2011

3 Maintenance and review of the constitution

- 3.1 The constitution sets out how the council operates, including most essentially how authority is gained, delegated and exercised, and how decisions are made. It describes the procedures which are followed to ensure that decision-making is lawful, reasonable and fair, and that those who make decisions are accountable to local people. It provides clarity on the respective roles of members and officers, as well as on the split between executive and non-executive matters.
- 3.2 The monitoring officer is the ‘guardian’ of the council’s constitution, and is responsible for ensuring that the constitution is properly maintained and is adhered to in practice.
- 3.3 One of the policy objectives of the coalition administration is to improve public engagement with council decision-making and to diffuse power more widely among elected members than is typically the case in a leader-and-cabinet governance model. This is likely to result in significant changes to the constitution over the next few years.
- 3.4 The focus this year has been on area committees, which have the potential to further both elements of this objective. The four new area committees each had their inaugural meeting in September 2020, and will meet quarterly going forwards. Meetings include a public forum where local residents and parish councillors can raise issues of local concern.
- 3.5 There remain a number of open questions with regard to area committees, primarily in terms of how parish councils can best be represented and what mechanisms need to be developed to help the committees agree and deliver a meaningful work programme without putting undue pressure on already stretched council resources. These questions will be informed by experience of the meetings over the next couple of cycles, and it is anticipated that the committees will have ‘bedded in’ more thoroughly by next year’s annual report.

- 3.6 The next major change expected to the council's constitution is the development of multiple cabinet advisory committees, which are expected to replace PDRC as the main mechanism for enabling non-cabinet members to feed into executive decision-making from next municipal year. The details of this are still to be worked out, and a PDRC working group has been established to make relevant recommendations to cabinet.

4 Lawful decision-making and good governance

- 4.1 The monitoring officer is the council's lead adviser on questions of lawfulness and the scope of the council's powers. In consultation with the chief executive and chief financial officer, I advise on compliance with the budget and policy framework. Part of this role involves monitoring reports, agendas and decisions to ensure compliance with legislation and the constitution.
- 4.2 At the heart of this work is the agenda of, and reports and recommendations to, the cabinet. Cabinet reports and decisions are made publicly available for councillors either electronically or by way of a paper version. Cabinet decisions can also be viewed by members of the public through the council's website.
- 4.3 The cabinet has met on nine occasions between 1 November 2019 and 31 October 2020. In each case the strategic management team (SMT) has reviewed the agenda and associated draft reports. This clearance process is an important part of ensuring corporate working in an effective council, providing a vital opportunity to discuss aspects of reports or decisions that require 'buy-in' from, or have implications across, multiple services.
- 4.4 All heads of service receive draft agendas, and senior finance, HR and legal officers have the opportunity to comment on reports in the 'Implications' section. Items on the cabinet forward plan are added automatically onto the SMT forward plan, enabling SMT to seek advice from the head of legal, chief financial officer or head of human resources as necessary. This ensures a corporate approach is taken to reports being drafted, enabling a robust set of recommendations and alternative options to be presented to cabinet for consideration and decision.
- 4.5 In cases where I consider that any proposal, decision or omission by the council would result in a breach of any enactment or the rule of law, or if any decision or omission has been found by an ombudsman investigation to have given rise to maladministration, as monitoring officer I am under a personal statutory duty to make a report on the matter to members. Any proposal that is subject to such a

report cannot be implemented until the report has been considered. The sound governance processes operated by the council ensure that the obligation to report potentially unlawful decision-making rarely, if ever, arises at Swale. I issued no such reports during the year to 31 October 2020.

5 Ethical standards and the members' code of conduct

- 5.1 While robust and well-understood constitutional processes and procedures are an essential component of good governance, the importance of high standards of ethical conduct on the part of the individuals involved in decision-making on behalf of their communities cannot be overstated.

National developments

- 5.2 In 2011, when the Localism Act abolished the centralised standards regime and replaced it with local responsibility for maintaining members' ethical standards, government agreed to carry out a review of how the new system was working within five years of its launch. However, in spite of sporadic reminders from the committee on standards in public life (CSPL, also known as the Nolan committee), this review was never forthcoming, so in 2018 the committee commenced work on a review of its own.
- 5.3 The report and findings from this review were published in 2019, supported by a great deal of evidence provided in part by councils, their standards committees and their monitoring officers. The review found that the new system was working well for the most part, but still made a total of 26 recommendations for improvement. These were considered in some detail at the annual standards committee meeting in January. With one or two exceptions, the recommendations require legislation or other government action to implement, but there has to date been no indication that this legislation will be forthcoming.
- 5.4 One of the exceptional recommendations was for the Local Government Association to produce a model code of conduct, with the expectation that this would eventually be adopted by most if not all local authorities. The LGA has made progress with this this year, and following input from standards committee members, Swale submitted a comprehensive response to a consultation on a draft model code during the summer.
- 5.5 The draft model code more closely resembles the code in use across much of Kent than our own Swale code, and this is probably a positive development.

Swale's response to the consultation was broadly favourable, with suggestions for improvement only on relatively minor points of detail. The LGA team responsible are due to take a further draft of the code, updated following the consultation, to their member board in December.

- 5.6 Two relatively minor recommendations in the CSPL report for local authorities were actioned in Swale during the year, covering indemnification for the independent persons appointed under s28 of the Localism Act, and the publication of the name and contact details of the council's external auditor in its whistleblowing policy and on its website.
- 5.7 Previous versions of this annual report have generally included a summary of key legal cases, not just from the year in review but since the introduction of the localised standards regime. This is a useful opportunity to remind members of what case law on local government ethical standards has said, but given that the number of such cases is now fairly high, these are this year to be found in Appendix I.

Local developments

- 5.8 The council adopted its current code of conduct in 2012, along with revised arrangements for the standards committee and the registration and disclosure of interests and dispensations. These continue to work reasonably well, and overall it is fair to say that the council's processes for complying with the standards provisions of the Localism Act continue to demonstrate their effectiveness notwithstanding widely-shared concerns over the lack of effective sanctions.
- 5.9 The legally mandated registers of interests are available on the council's website, and both borough councillors and parish clerks are now familiar with how these work. As highlighted by guidance issued by the Department for Communities and Local Government (as was) in 2013, the key requirement is that councillors should not act or take decisions in order to gain financial or other material benefits for themselves, their families or their friends, and the declaration and resolution of personal interests should be guided by this principle.
- 5.10 The process for registering members' interests was the subject of an internal audit review during the year, receiving a 'sound' assurance rating. A number of relatively minor recommendations have been actioned.
- 5.11 At the last annual meeting of the standards committee in January, the committee agreed that members should be under an obligation to declare any gifts and

hospitality received with a value of £50 or more (or £100 worth of separate gifts/hospitality from a single source). The system for recording and publishing this information is now live on Modern.gov, and declaration forms are available from Sue Revell. A guidance note for members will be available shortly. It is worth highlighting that the draft LGA model code of conduct also requires members to declare gifts and hospitality, in this case above £25 in value.

Code of conduct cases 1 November 2019 to 31 October 2020

- 5.12 During the period covered by this report a total of 42 contacts were recorded as complaints (“complaints”), resulting from 21 separate incidents or alleged incidents (“complaint cases”). This is a 25 percent reduction in the number of complaint cases from last year, although last year (and indeed this year) were significant increases on previous years. The number of individual complaints is very slightly lower than last year.
- 5.13 Of these figures, 15 complaint cases related to a borough councillor and six to one or more parish councillors. Fourteen of the individual complaints were made by members of the public, while fully 28 came from fellow elected members. Even allowing for the fact that 19 of these complaints from members related to a single complaint case, this is a very high figure in relation to previous years.
- 5.14 Of the 21 complaint cases, two were considered by the monitoring officer and immediately rejected as failing at least one of the tests set out in the assessment criteria which are included in the constitution². In three cases the councillor was determined not to have been acting in the capacity of a councillor at the time of the alleged conduct; s27 of the Localism Act makes it clear that codes of conduct cannot apply to such conduct.
- 5.15 The monitoring officer conducted a preliminary investigation in seven cases and a more thorough investigation in two cases, and determined in all nine of these cases that the subject member had no case to answer. In three cases the monitoring officer or deputy monitoring officer determined that there was no public interest in pursuing the matter³ or that no further action was possible or necessary. One case was dropped by the complainant, and in two cases informal

² The tests in the assessment criteria are that the complaint is about a named member of a relevant council who was in office at the time of the alleged conduct and that the complaint if proven would constitute a breach of the code of conduct which was in force at that time.

³ The constitutional assessment criteria also set out guidelines on categories of complaint which will not be pursued, including anonymous, trivial, malicious, politically-motivated and tit-for-tat complaints.

advice was given to the subject member by the monitoring officer in resolution of the complaint. One case opened during the period of this report is ongoing.

5.16 The table below provides a summary of these outcomes.

Final outcome of complaint case	No.
Failed initial test in constitutional assessment criteria	2
Subject member not acting in capacity of councillor	3
No case to answer following investigation	9
No further action necessary/possible or no public interest in pursuing	3
Case dropped by complainant	1
Informal advice provided to subject member by monitoring officer	2
Ongoing case still open at time of report	1

- 5.17 Social media has once again been a source of rancour both between elected members and between elected members and the public over the course of this year. Often these issues do not evolve into formal complaints and will therefore not find their way into the figures, although six (29 percent) of the 21 complaint cases dealt with this year were the result of social media posts.
- 5.18 Clearly social media is a fixture of the contemporary world and will inevitably be used by local politicians to communicate their messages. This is not generally a bad thing, and social media activity by local activists is often a helpful way of imparting important information to residents, with the Covid crisis an obvious case in point here.
- 5.19 It is also entirely legitimate, of course, for councillors and others to make political points on social media, but there is a broad grey area between points of policy difference and what are effectively ad-hominem attacks. While relevant case law guarantees extremely broad rights of free expression to politicians, members do need to exercise care and restraint in not stepping too far into that grey area, particularly when the ‘homines’ being attacked are members of the public rather than fellow councillors.
- 5.20 An extremely tumultuous virtual council meeting during the summer of 2020 resulted in three separate complaint cases totalling 24 individual complaints against a total of three borough councillors, all but two of them lodged by borough councillors. One of these complaint cases remains open, with the matter

expected to be resolved within the next month. It would not be appropriate to comment any further on this case in advance of that resolution.

- 5.21 The two independent persons appointed in 2017 under s28 of the Localism Act to give their views on complaint cases, Patricia Richards and Christopher Webb, have remained in their roles and are expected to do so until September 2021 when their contracts expire. I had reason to consult one or both of the independent persons in four (19 percent) of the 21 complaint cases dealt with during the year. This has enabled me to be both challenged and supported in my thinking about cases, and is a facility which I continue to find to be extremely valuable.

Historic cases of interest

- 5.22 There are a number of cases dealt with by the Swale monitoring officer before November 2019 which remain of interest because they included more serious allegations than is typical and/or because they reached a further stage of investigation. These are summarised for information in Appendix II.

6 Officers' code of conduct

- 6.1 The constitution includes a code for employees, which contains a requirement to register interests. Officers are reminded of this requirement on an annual basis. This registration process was subject to an internal audit review during the year, with a 'weak' assurance rating being reported to the audit committee in September. As a result of this, actions have been put in place to improve both the way in which information is collected and the way in which it can be consulted by those who need to be aware of it.

7 Protocol on councillor/officer relations

- 7.1 The constitution includes a protocol on councillor/officer relations, setting out what is expected of officers and what of members. In the event of relationships between members and officers breaking down or becoming strained, the protocol first attempts to resolve matters informally by conciliation through the appropriate senior manager(s) and/or member(s).
- 7.2 Officers in these situations will have recourse to the council's grievance procedure or to the monitoring officer, as appropriate to the circumstances (this is set out in the constitution, but see also the summary of R (Harvey) v Ledbury

Town Council (2018) in Appendix I). I am pleased to report that there have been no complaints of this type to the monitoring officer over the past year.

8 Related party transactions

- 8.1 In accordance with the code of practice on local authority accounting in the United Kingdom 2019/20, councillors and senior officers (those above a certain salary grade and those appointed by statute) are requested on an annual basis to complete and sign a declaration on related party transactions.
- 8.2 The declaration captures transactions between the council on the one hand and the individual, members of the individual's close family or household, or entities in which the individual or their close family or household has a controlling interest on the other. All declarations were satisfactorily completed and recorded by the end of June 2020 for the 2019/20 annual accounts.

9 Protected disclosures – the whistleblowing policy

- 9.1 The purpose of the council's whistleblowing policy is to enable employees to feel confident in making disclosures about potential wrongdoing by individual(s) in a position of authority within the organisation. It provides a mechanism for raising concerns without fear of victimisation, discrimination, disadvantage or dismissal.
- 9.2 Following agreement by the standards committee, a CSPL recommendation for local authorities to include the name and contact detail of the external auditor in their whistleblowing policies and on their websites was actioned during the year.

10 Support to council, cabinet, scrutiny and committee meetings

- 10.1 Ensuring that meetings are run efficiently, transparently and lawfully is central to good governance. In practice, this includes:
- Advertising public meetings at least five clear days before the meeting date, and ensuring that agendas are published and distributed in a timely manner;
 - Ensuring that agendas are compliant with regulations on access to information, and that exempt information is properly marked up;
 - Ensuring that papers are available to the public either through the website or from district offices and libraries;
 - Ensuring that meetings are accessible to the public;

- Publishing minutes as soon as possible after the meeting, in particular ensuring that cabinet minutes are published within three working days of the meeting; and
- Ensuring that petitions are handled in accordance with the council's constitution.

10.2 The restrictions on gatherings which came into effect in March caused the council to cancel or postpone planned meetings for a short while, but we quickly developed the means for formal meetings to be conducted virtually via skype, all in accordance with the regulations made under the Coronavirus Act 2020. Swale was one of the first districts in Kent to hold a virtual council meeting and a virtual annual council meeting.

10.3 Given the success of online meetings and the ongoing risks to individuals' health from holding physical meetings, it is likely that the virtual approach will continue for the duration of the Covid crisis, regardless of changes to the regulations. The ability to participate in meetings from home has meant that we have seen a considerable increase in visiting members attending committees, as well as a more modest increase in attendance by members of the public.

10.4 From 1 November 2019 to 30 October 2020 the following meetings were serviced by the democratic services team:

Name of meeting	Number
Annual council	1
Audit committee	3
Cabinet	8
Cabinet delegated decisions	3
Council	5
General licensing committee	2
General purposes committee	5
Licensing sub-committee	4
Local plan panel	10
Member development working group	2
Planning committee	14*

Name of meeting	Number
Planning working group	4**
Policy development and review committee	5
Scrutiny committee	7
Standards committee	1
Standards hearings subcommittee	0
Swale joint transportation board	3
Total	77

*Includes two extraordinary planning committee meetings.

**The four working group meetings cover a total of 8 site visits.

- 11.5 These figures do not reflect the additional meetings administered by the democratic services team, including two external charities as well as pre-meetings and agenda-planning meetings. The overall volume of meetings represents a substantial commitment of both members' and officers' time and resources, and it remains of great importance that meetings constitute an effective and productive use of these. It is worth emphasising that virtual meetings require the attendance of more democratic services officers than physical meetings, because of the risk of individuals' broadband connections failing.

12 Member training and development

- 12.1 It is essential to good governance that members are supported in their roles to make robust, transparent and well-informed decisions for the good of the borough and its communities. The council has established a cross-party member development working group (MDWG) with support from democratic services to oversee and develop the provision of appropriate training for members. Further information is provided in the annual report on member training and development which will be considered by the standards committee in tandem with this report.

13 Use of covert surveillance

- 13.1 Since April 2010, in accordance with the relevant codes of practice, the monitoring officer has been obliged to report the number of occasions on which the authority has used covert surveillance. No applications for such surveillance were made during the year to 31 October 2020.

14 Comments and conclusions

- 14.1 As stated at the beginning of this report, this has been a busy and challenging year in the life of the council. While the Covid crisis has rightly meant that resources have been diverted away from less urgent matters, the council's core functions, including its democratic processes, have all continued to run effectively thanks to the dedication of officers at all levels of the organisation.
- 14.2 The number of complaints against councillors under the code of conduct has been broadly stable in a year in which, given the restrictions on people undertaking activities in the community, it might have been expected that the number would decrease.
- 14.3 This probably reflects the continuing rise in the number of complaint cases related to social media, and possibly suggests that in the absence of the Covid restrictions complaint levels would have been as high this year as they were the previous year, when the numbers were considered exceptional. This is particularly interesting in the context of such a high proportion of complaints being made by fellow councillors, and this is a phenomenon to which the monitoring officer will be paying close attention in the year ahead.

15 List of appendices

- 15.1 The following appendices are to be published with this report and form part of the report:
- Appendix I: Compendium of recent legal cases of interest
- Appendix II: Historical cases of interest dealt with by the Swale monitoring officer

Appendix I:
Compendium of recent legal cases of interest

R (Greenslade) v Devon County Council (2019)

Interaction between standards regime and grievance procedures

Facts: The case was brought by a councillor who had been found to have breached the Devon code of conduct. Devon's complaints procedure provided for anonymity of the complainants and did not allow for an oral hearing before the standards committee.

Findings and decision: The court held that, when assessed overall, that procedure was not unfair: Cllr Greenslade had had the opportunity to answer the complaints in person before an independent QC, and to provide comments on his draft report, as well as being able to make written submissions to the Standards Committee. The context in which fairness was to be judged importantly comprised both the changes wrought by the Localism Act 2011 and the particular procedures adopted by the council, to which there had been no direct challenge.

Comment: This case underlines the freedom allowed to local authorities under the Localism Act 2011 in regulating their own procedures for dealing with complaints against elected members. It is also noteworthy that Mrs Justice Andrews appeared to accept the council's argument that Article 6 ECHR does not apply to local government standards matters, which are essentially disciplinary in character.

R (Harvey) v Ledbury Town Council (2018)

Interaction between standards regime and grievance procedures

Facts: Following complaints that Cllr H had bullied, intimidated and harassed staff, the town council's grievance panel met to discuss the allegations. Cllr H did not attend, stating that she did not recognise the authority of the panel, and she requested that the matter be properly investigated under the standards procedure. The panel upheld the accusations, and the town council then resolved to impose a number of prohibitions on Cllr H, including that she should not sit on any committees, sub-committees, panels or working groups nor represent the council on any outside body, and that all communications between her and its clerk and deputy clerk should go through the mayor. Cllr H applied for judicial review of the town council's decision to impose sanctions under its grievance procedures.

Findings: The High Court considered local authority staff grievance procedures and their relationship with the code of conduct regime under the Localism Act 2011. The court held that a council cannot run a grievance procedure alongside, or as an

alternative to, a standards regime procedure, and that complaints regarding a councillor's conduct have to be dealt with under the authority's standards arrangements.

Decision: The court granted the application, and ruled that the town council's decision to continue and enlarge the prohibitions must be quashed and that Cllr H was entitled to declaratory relief. Mrs Justice Cockerill found that there was no general power to run a grievance procedure process in tandem with or as an alternative to the code-of-conduct process envisaged by the Localism Act, as that would be contrary to the intention of Parliament.

Comment: This case provides a useful analysis of the standards regime under the Localism Act 2011, making clear that it overrides the previous statutory procedures, as well as local authorities' inherent powers under the 1972 Act. It also highlights that councils cannot try to obviate the 2011 Act's lack of effective sanctions by dealing with complaints under their staff grievance procedures. The judgment provides a reminder that any process must be fair and in accordance with the principles of natural justice; however, notwithstanding this judgment, local authorities must continue to be mindful of their responsibilities to protect their employees from bullying, intimidation and harassment, since the authority may be liable for the actions of its councillors. The proper course for the investigation of alleged behaviour of this type by councillors is now under the code of conduct adopted under the Localism Act, and following investigation it is for the monitoring officer to discuss the outcome with the independent person(s), ensuring that any hearing or informal action is proportionate in all the circumstances of the case.

Hussain v Sandwell Metropolitan Borough Council (2017)

Councils' and MOs' powers to investigate alleged misconduct

Facts: The claimant was alleged to have procured the sale of council assets to family friends at a substantial undervalue. He was also alleged to have used his power and influence as a senior politician within the council to have parking tickets issued to his family expunged. The council's audit committee conducted a 'pre-formal investigation' under the Local Government Act 1972 to determine whether the allegations had substance and if so to decide on next steps. Counsel was appointed and they advised that there was a serious case to be met and that the Localism Act processes for breach of the code of conduct should be initiated. The claimant challenged the power of the council to conduct both formal and informal investigations of alleged wrongdoing by councillors, arguing that the investigation was ultra vires since there was no power to investigate alleged misconduct before the Localism Act took effect and that the investigating officer had predetermined the

outcome and usurped the adjudicatory functions of the standards committee. The Court of Appeal granted leave for judicial review to stay the investigation.

Findings: The court's view was that there is ample power under both the Local Government Act 1972 and the Localism Act 2011 to carry out pre-formal investigations, and that a council is entitled both to investigate in order to establish whether a prima facie case exists and to receive advice as to the appropriate next steps. In addition, it was found that the current standards framework could be used to investigate historic allegations and that the report of the independent person could not predetermine findings as the author of the report was not a decision-maker.

Decision: The court concluded that there was a powerful public interest in the allegations being fully and fairly investigated, and the stay in proceedings was therefore lifted.

Dedman v Information Commissioner's Office (2016)

Limits of personal data exemptions in Freedom of Information Act

Facts: C, then chair of Hickling Parish Council, was quoted in a local newspaper as saying a local charity had shown no desire to negotiate a new constitution and "*they don't want to make changes to the constitution to protect the village asset and it's very sad.*" A resident then complained to North Norfolk's monitoring officer that C had made factually inaccurate comments and deliberately misled readers, amounting to a breach or breaches of the councillors' code of conduct. North Norfolk's monitoring officer appointed an external solicitor to investigate the complaint. She submitted a draft final report for North Norfolk's standards committee after C had ceased to be a councillor, having lost her seat in the election of May 2015. The monitoring officer decided that there was 'no public benefit' in taking the matter further because C was no longer a serving councillor. When another resident requested a copy of the draft report, North Norfolk refused, relying on s40(2) of the Freedom of Information Act, on the grounds that the draft contained personal data about C who no longer held a public position. The dispute then reached the Information Commissioner's Office, which accepted C would have had a legitimate expectation that the details of the investigation would remain confidential. North Norfolk's policy was that draft standards investigation reports were not shared with persons who were not parties to the complaint, and the prejudice to C's interests outweighed any legitimate public interest in disclosure. The complainant then appealed to the Information Rights Tribunal.

Findings: The Tribunal agreed that there was no doubt that the report contained the personal data of C and that there was no practical possibility of editing it so as to avoid the disclosure of such data. However, the tribunal added:

“There is plainly a strong public interest in the disclosure of findings as to the conduct of the chair of a parish council when performing her public duties. That is especially the case where a complaint has been made that she misled a newspaper and its readers, including her local parishioners, as to important matters relating to a controversial local issue. There is a danger that the withholding of a report may encourage the suspicion that its findings are adverse to the subject, whether or not that is, in fact, the case.”

The tribunal stated that such transparency is essential to the maintenance of proper standards in public life, whether or not the subject of the complaint remains in office and if this were this not so *“a delinquent public officer, faced with a draft report containing serious criticism of his/her conduct, could simply prevent disclosure by timely resignation”*. In addition, there was a realistic possibility that C would again seek election to the parish council or another public authority in the future.

Decision: The tribunal concluded that disclosure of the draft report was not unfair and North Norfolk was not entitled to rely on the s40(2) exemption.

Taylor v Honiton Town Council and East Devon District Council (2016)

Inability of parish councils to impose their own sanctions

Facts: Cllr Taylor published comments concerning a loan extension from the Public Loan Works Board and accusing the town clerk of illegality in connection with the loan and investment in a conspiracy to use the money for an improper purpose. East Devon District Council, as the principal authority, determined that Cllr Taylor had failed to treat the town clerk with respect and imposed sanctions, namely censuring Cllr Taylor, publishing its findings, and requiring Cllr Taylor to undergo training on the code of conduct. Honiton Town Council imposed the sanctions recommended by East Devon, however, they also applied additional measures until the training requirement had been fulfilled. Cllr Taylor challenged Honiton’s decision for illegality and procedural unfairness.

Findings: It was held that the Localism Act gives decision making power to the principal authority and requires it to have arrangements for the exercise of that power in place to investigate and determine any breach of parish council codes of conduct. It would therefore be a nonsense of that scheme if the parish council were able to take its own decisions without having those in place. The whole point of the scheme is to remove decision-making powers and duties from very small authorities which do

not have the resources to manage them effectively and who may be so small that any real independence is unattainable.

Decision: East Devon's decision both as to breach and sanction was lawful, however the parish council cannot impose sanctions over and above those recommended by the principal authority.

R v Flower (2015)

Criminal implications of non-disclosure of a disclosable pecuniary interest

Facts: Cllr Flower listed as a pecuniary interest a non-executive directorship of a housing charity, for which he received remuneration payments. He was present at a meeting about the proposed East Dorset core strategy and voted at the meeting. The housing charity had responded to a consultation about the core strategy and owned land which was being considered for development through the strategy. Cllr Flower had previously attended a meeting of the charity at which the long-term future of the land had been considered. He was charged with an offence under the Localism Act 2011 for participating in a discussion and vote without reasonable excuse despite having a disclosable pecuniary interest (DPI) in a matter being considered.

Findings: Cllr Flower was guilty of the offence. His defence that the matters discussed at the meeting were of a broad nature and did not concern detailed issues of planning and ownership did not amount to 'reasonable excuse'. It was not right that the core strategy had no relevance to pecuniary matters, and it was not a defence that he did not obtain any direct benefit from the vote. The judge held that it would have been reasonable for him to have consulted the monitoring officer and could have gained a dispensation. He was under a duty not to participate and vote. The judge noted that Cllr Flower was of good character and the court received a number of character references speaking highly of his abilities, his conscientiousness and his years of public service.

Decision: Conditional discharge for six months and an order to pay £930 in costs.

Commentary: The lack of any real sanction or appetite for prosecution in the Localism Act 2011 is evidenced by the fact that since its implementation this is thought to have been the only prosecution in relation to an elected member participating in a discussion and vote without reasonable excuse despite having a DPI.

R (Benjamin Dennehy) v London Borough of Ealing (2013)

Social media, freedom of expression and the code of conduct

Facts: Cllr Dennehy posted on a blog which he maintained comments about residents of Southall in which he stated:

“It is a largely Indian community who say they deplore this behaviour but yet it is that very same community that harbours and exploits their own people in squalid third world living conditions... the exploding population of illegal immigrants is a constant on the public purse. Illegal immigrants don’t pay tax. The legitimate immigrants exploiting them in the squalid bed sheds don’t pay tax on their rental income. If these are the sorts of people who exploit the desperate what other scams are they perpetrating I ask? Criminality is endemic in Southall.”

He declined to issue an apology when a number of Southall residents complained because they were offended by the statements.

Findings: Cllr Dennehy failed to treat others with respect and brought the council into disrepute because the tone and much of the content was inappropriately and unnecessarily provocative, and the comments about Southall residents were in a different part of the blog from that which raised legitimate topics of political debate. The comments were not the expression of a political view, but a personal and generic attack on a section of the public. The subjects of the speech were not politicians but ordinary members of the public, so the comments did not attract the higher level of protection applicable to political expressions. Accordingly, sanctioning Cllr Dennehy was justified and proportionate under article 10 (2) of the convention.

Decision: The standards committee’s decision that Cllr Dennehy breached the code and should issue an appropriate apology was upheld.

Commentary: The use of social media has continued to raise issues throughout the country, and there is continuing debate on the extent to which these issues fall within the code of conduct. Guidance on this has been made available to councilors as part of the induction handbook following the May election. This case does provide an illustration of the need to consider very carefully what is said in electronic communications and how an appropriate level of caution needs to be balanced against the importance of freedom of political expression.

Cllr John Copeland v West Lindsey DC Standards Committee (2012)

Freedom of expression and the code of conduct

Facts: Cllr Copeland was a parish councillor. He was found by the standards committee to have breached the parish council's code of conduct by referring, in a number of emails, to a member of the public as a grumbler and a geriatric, which had failed to show respect to that person and had brought his office or authority into disrepute. Cllr Copeland's appeal was successful.

Findings: it was not 'necessary' within the meaning of article 10(2) of the European convention on human rights to interfere with Cllr Copeland's freedom of expression by sanctioning him for his comments. The unidentified individual had a remedy in defamation, if there was damage to his reputation, which was doubted. Proceedings before the standards committee were a 'wholly disproportionate response'.

Decision: The standards committee's decision to censure was set aside.

Appendix II:

Historical cases of interest dealt with by the Swale monitoring officer

Conduct of parish councilor in dealing with parish clerk (two complaints).
Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.
Outcome: Two separate hearings were held. No breach of paragraph 8 of the relevant code of conduct, but breach of paragraphs 5, 7, 9, 10 and 11. Recommendations made to parish council that the subject member attend training on the role of the parish clerk and refresher training on role of chairman, and that the entire parish council undertake training on the role of the clerk and other matters including closed sessions and employment issues, policies and procedures. It was further recommended that any new parish clerk should attend appropriate training as part of their induction, and that a review of standing orders should be carried out to ensure that they incorporate the outcomes of any training. Following receipt of the report, the parish council wrote to say that whilst they would comply with the recommendations where possible they did not accept the report.
Parish councillor alleged not to have dealt with representations fairly, appropriately and impartially and not to have treated people with respect, including allegedly making racist remarks.
Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.
Outcome: Hearing held. Breach of paragraphs 2, 8, 10 and 11. Recommendations made to the parish council that the subject member should attend equalities training and be removed from all outside appointments until such training is undertaken, and that the entire parish council should attend equalities training and review its policies and procedures governing equalities and the conduct of meetings. Note that the subject member resigned from the parish council prior to the hearing and did not attend.

Parish councillor alleged not to have dealt with representations fairly, appropriately and impartially, and not to have treated people with respect.

Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.

Outcome: Hearing held. Breach of paragraphs 2, 10 and 11. The findings were reported to the parish council with a recommendation that the entire council undertake training on the code of conduct and adopt a more formal approach to meetings.

Borough councillor, having borrowed an officer's unnumbered copy of a confidential paper, returned a numbered copy at the end of the meeting but failed to return the unnumbered copy, contrary to advice provided.

Action: Monitoring officer discussed with independent person and the complaint was referred for investigation.

Outcome: Hearing held. No breach of paragraph 5, but breach of paragraph 8 and the principle of leadership. Reported to full council with a recommendation to remove the subject member from scrutiny committee, as either a member or a substitute member, for a period of three months. This was agreed and implemented by council.

Borough councillor alleged to having sent a personal letter of an inappropriate nature to complainant, in addition to other allegations by other complainants.

Action: Monitoring officer discussed with independent person and the complaint was referred for investigation by a professional external investigator.

Outcome: Investigator concluded that on the balance of probability the subject member was not the author of the letter. Other conduct did not amount to a breach of the code of conduct, but diversity training was recommended and accepted by the subject member.