

Standards Committee	
Meeting Date	16 November 2021
Report Title	Annual Monitoring Officer Report
Cabinet Member	Not applicable for this report
SMT Lead	David Clifford, as monitoring officer
Head of Service	
Lead 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 2020 to 31 October 2021. 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 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 a year in which the council has continued to cope well with the exigencies of the pandemic, but also one in which the outlines of a new post-pandemic normality have begun to emerge. This has been evident, for example, in the 'new ways of working' programme intended to give a more permanent footing to some of the flexibilities around officers' working patterns which were initially introduced as a temporary emergency measure.
- 1.3 Members' own ways of working also changed as a result of the pandemic, but with the government's failure to replace the temporary regulations on remote meetings when these expired in May, some of the changes which many members would have preferred to make permanent have had to be given up. Nonetheless, officers have worked hard to make hybrid meetings possible for as many committee meetings as possible, meaning that only members who are actually making decisions need to be present in the chamber.

- 1.4 The technology we have used to achieve this is not flawless, and some members (and to a lesser extent officers) have experienced problems, but on the whole the period since May has demonstrated the fundamental viability of hybrid meetings, even if there remain some technical issues to iron out. Given the physical constraints of the council chamber and its consequent inappropriateness as a venue for large meetings, several full council meetings have been successfully held in, and livestreamed from, larger and better-ventilated venues in Faversham and on Sheppey.
- 1.5 A new chief executive took up her post in January, and has now implemented a senior management restructure. This has involved the creation of two new director posts, together with some changes to the head of service tier. The new director of resources has also been appointed the s151 officer. Collectively these changes bring Swale more into line with a 'typical' district council structure, and configure the senior management resource in a way which should prove sustainable going forwards.
- 1.6 It has been another busy year in terms of complaints against borough and parish councillors under the code of conduct, with 26 formal complaint cases¹ and 41 individual complaints dealt with in the year to 31 October. These complaints are reviewed in 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

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

Description	Source
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
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 Objective 4.1 of the current corporate plan is to 'Review the council's constitution to diffuse decision-making power more widely among elected members and improve the transparency, responsiveness and public accountability of that decision-making'. This has already resulted in significant changes to the constitution, and will continue to do so over the coming months.
- 3.3 The focus this year has been on cabinet advisory committees, which replaced

the policy development and review committee (PDRC) from May. There are three politically-balanced committees, each covering a number of cabinet portfolios. The committees meet quarterly, receiving updates on significant pieces of work in their portfolios by cabinet members, and providing advice and informal pre-decision scrutiny on forthcoming cabinet decisions. While these committees are purely advisory in nature, they are intended partly to act as a 'bridge' between the current leader-and-cabinet governance model and a future committee system.

- 3.4 A further change introduced during the year involved improvements to the council procedure rules on motions with notice. These changes seek primarily to prevent council motions being used in a way which circumvents or appears to circumvent constitutional (and hence lawful) decision-making processes. In addition, amendments to motions now need to be registered with democratic services in advance of the council meeting, and statutory officers have a new right, in consultation with the mayor, to append a short note to both motions and amendments setting out any relevant financial or other implications.
- 3.5 Following a detailed consideration of pros and cons by a cross-party working group, council voted unanimously in October to move to a committee system of governance from the annual council meeting in May 2022. This decision will require a wholesale redrafting of the entire constitution, not simply to bring the necessary service committees into being, but to remove the leading role of the executive which is currently referenced in almost all sections of the document.
- 3.6 While redrafting the constitution to move from a leader-and-cabinet model to a committee system is arguably a more straightforward task than the reverse, not least because it is more about deletion than addition, this is still an important opportunity to review the constitution in its entirety, and one that I would like to ensure we capitalise on fully.
- 3.7 While the three watchwords agreed by council for the future functioning of the constitution are efficiency, effectiveness and engagement, with respect to the structure and wording of the constitution I would like us to add a fourth requirement for concision, simplicity and cohesiveness. Given the myriad incremental changes which have been made to it over the many years of its existence, these are not words which I believe a fair-minded observer would readily associate with the current constitution.

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 director of resources, 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 under the current governance model 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. The cabinet has met on eight occasions between 1 November 2020 and 31 October 2021.
- 4.3 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, director of resources or head of human resources as necessary. This process enables a robust set of recommendations and alternative options to be presented to cabinet for consideration and decision, while ensuring that cross-cutting implications are adequately assessed by specialist officers.
- 4.4 While the rules on the forward plan and access to information more generally are in some cases less rigid for councils operating the committee system, I do not envisage the process of publicising proposals and forthcoming decisions to be very different when the decision-maker is a service committee rather than the cabinet or a cabinet member. There will still be a need for implications to be considered corporately, and for all members and senior officers to know what decisions are going to be made when. This could be by means of committee work programmes rather than a single forward plan.
- 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 causing injustice, 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 2021.

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.
- 5.2 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 basic processes continue to function appropriately, but there are legitimate questions about how well the code of conduct has kept up with the advent of social media and the generally more rancorous political atmosphere – nationally and to some extent locally – that it has helped to create. This issue is the subject of a separate agenda item at the standards committee meeting, and I do not intend to labour the point here.
- 5.3 The legally mandated registers of interests are available on the council's website, and both borough councillors and parish clerks are very familiar with how these work. The system for registering members' gifts and hospitality is now also fully operational. The key requirement and the key point of the rules on interests 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. The declaration and resolution of personal interests should always be guided by this principle.
- 5.4 Most members will be aware that the law provides for the possibility for the monitoring officer to classify an interest as 'sensitive' if both I and the member concerned reasonably believe that its disclosure could lead to the member being subject to violence or intimidation. The effect of an interest being 'sensitive' is that details of it are redacted from the published register, although the fact that an interest exists still needs to be declared in the usual way.
- 5.5 In recent years, in response to increasing levels of intimidation and threats of violence against elected representatives, and in common I believe with most monitoring officers, I have taken a fairly liberal approach to the question of whether an interest is 'sensitive', and have been sympathetic towards members who are fearful of the consequences of having their interests – particularly their home addresses – published. I am always willing to discuss this with members.

Code of conduct cases 1 November 2020 to 31 October 2021

- 5.6 During the period covered by this report a total of 41 contacts were recorded as complaints (“complaints”), resulting from 26 separate incidents or alleged incidents (“complaint cases”). Last year these figures were 42 and 21 respectively, largely because of a single incident which generated a very high number of complaints. This year’s figures represent a concerning 24% increase in complaint cases over the previous year.
- 5.7 Of these 26 complaint cases, 23 related to borough councillors and the remaining three to parish councillors. Eleven of the 41 complaints (27%) were made by borough councillors against other borough councillors. This is a reduction on the exceptionally high proportion (67%) last year when, again, the figures were somewhat skewed by a single complaint case, but in my view this is still a cause for concern.
- 5.8 Fifteen borough councillors (32% of the total number) were the subject of a complaint during the year. Clearly this should in no way be interpreted to mean that this number of councillors had in fact breached the code of conduct. Of those 15 councillors, 10 were the subject of only one complaint case, while three borough councillors were the subject of more than three complaint cases each.
- 5.9 Of the 26 complaint cases, eight were considered and/or investigated by the monitoring officer or deputy monitoring officer, who determined that there was no case to answer. Two complaint cases were considered by the monitoring officer or deputy monitoring officer and immediately rejected as failing at least one of the tests set out in the assessment criteria which are included in the constitution. This could be because the complaint was trivial, tit-for-tat, politically motivated, out of time, or a combination of these.
- 5.10 In two cases a preliminary investigation was commenced or concluded, which showed there to be insufficient evidence to support any further action. In a further two cases, the complaint was withdrawn by the complainant. Two complaints were informally resolved, by an apology being provided to the complainant or words of advice being given to the subject councillor. In one of these cases the complainant was satisfied with the resolution; in the other, the complainant wanted to take the matter further, but I determined in consultation with one of the independent persons that following the informal resolution there was no public interest in any further action.

- 5.11 In four complaint cases the subject councillor was determined not to have been acting in the capacity of a councillor at the time of the alleged conduct. Section 27 of the Localism Act 2011 makes it clear that the standards regime cannot be engaged by such conduct, although this provision has been the subject of some criticism in recent years, not least from the committee on standards in public life.
- 5.12 One of the cases in which the councillor was determined not to have been acting in that capacity was a substantial complaint which would have been a serious breach of the code of conduct had it been lawful for the standards regime to engage with it and had it been proven. I discussed this case at length with one of the independent persons, and we were unable to identify any reasonable argument which would have satisfied the tests established in case law for the councillor concerned to have been regarded as acting in that capacity at the time of the alleged conduct.
- 5.13 A summary of these complaint outcomes is provided below.

Final outcome of complaint case	No.
Complaint considered or investigated and not upheld	8
Subject councillor not acting in that capacity	4
Complaint withdrawn by complainant	2
Complaint failed initial tests in constitutional assessment criteria	2
Investigation dropped for lack of evidence	2
Complaint informally resolved to complainant's satisfaction	1
Complaint informally resolved; no public interest in further action	1
Ongoing case still open at time of report	6

- 5.14 Six complaint cases remain open at the time of writing this report. Last year only one case was open at the time of writing. That case finally went to a formal standards hearing, which found that the subject member had breached the code of conduct. In view of the fact that the member had already offered a full public apology for the conduct, no sanction was applied.
- 5.15 The two independent persons appointed in 2017 under s28 of the 2011 Act to give their views on complaint cases, Patricia Richards and Christopher Webb, have remained in their roles, with an extension to their contracts to 2025 recently agreed by council. The ability to consult the independent persons on matters relating to complaints has enabled me to be both challenged and supported in my

thinking about cases, and this is a facility which I continue to find to be extremely valuable. I am very much indebted to Patricia and Christopher for their invariably wise and thoughtful counsel.

Historic cases of interest

- 5.16 A summary of some of the key rulings in the development of case law as it relates to councillor conduct is provided for information in Appendix I. There are a number of cases dealt with by the Swale monitoring officer before November 2020 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 regular basis. In response to an internal audit recommendation, a new IT system is currently being implemented to improve the way that this process works and to ensure that officers who should be able to consult the information are supported to do so. The system is expected to be live early in the new calendar year.

7 Related party transactions

- 7.1 In accordance with the code of practice on local authority accounting in the United Kingdom, 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.
- 7.2 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 2021 for the 2020/21 annual accounts.

8 Protected disclosures – the whistleblowing policy

- 8.1 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.

8.2 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 last year.

9 Support to council, cabinet, scrutiny and committee meetings

9.1 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, whether attending in person or remotely; and
- Publishing minutes as soon as possible after the meeting, in particular ensuring that cabinet minutes are published within three working days of the meeting.

9.2 The restrictions on gatherings which came into effect in March 2020 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.

9.3 The relevant regulations expired in May of this year, and despite pressure from across the local government sector, the government took no steps to renew them or enshrine them permanently in primary legislation. A court case brought by the Association of Democratic Services Officers unhelpfully confirmed that terms such as 'present' in the Local Government Act 1972 had to be interpreted as meaning that members had to be physically present in a single location in order to make lawful decisions.

9.4 Given the physical constraints of Swale's council chamber at a time when the

pandemic was still raging and few members or officers felt completely safe to attend crowded meetings, the council was innovative in pioneering 'hybrid' committee meetings at which the committee members and a small number of technical officers are physically present but other attendees – visiting members, most officers and members of the public – are able to dial in remotely.

- 9.5 While the technology we use for this is not perfect, it does provide a safe, affordable and generally effective means for members to continue to make decisions in a transparent, democratic and accountable way. Meetings which have had no formal decisions on the agenda (including cabinet advisory committees, scrutiny committee and other meetings) have largely continued to be held fully remotely, while we have also successfully trialled full council meetings at a couple of different venues around the borough.
- 9.6 The ability to participate in meetings from home has meant that over the last 18 months 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. I am sure all members will agree that this is extremely positive.
- 9.7 From 1 November 2020 to 31 October 2021 the following meetings were serviced by the democratic services team:

Name of meeting	Count
Annual council	1
Appointments subcommittee	2
Audit committee	4
Cabinet (including extraordinary meetings)	8
Cabinet delegated decisions	0
Community, economy and property cabinet advisory committee	2
Council (including extraordinary meetings)	9
Eastern area committee	4
Emergency committee	1
Environment, health and wellbeing cabinet advisory committee	2

Name of meeting	Count
General licensing committee (including extraordinary meetings)	4
General purposes committee	3
Licensing Act 2003 committee (including extraordinary meetings)	4
Licensing sub-committee	11
Local plan panel (including extraordinary meetings)	8
Member development working group	2
Planning committee	13*
Planning working group	4**
Policy development and review committee (now abolished)	2
Policy, finance and housing cabinet advisory committee	2
Record of officer decision	7
Scrutiny committee (including extraordinary meetings)	10
Sheppey area committee	4
Sittingbourne area committee	4
Standards committee	1
Standards hearings subcommittee	1
Swale joint transportation board	4
Western area committee	4
Total	121

* Includes one reconvened planning committee meeting.

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

9.5 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 represent an effective and productive use of these.

9.6 It is worth emphasising that virtual or hybrid meetings require the attendance of more democratic services officers, because of the risk of individuals' broadband connections failing and because of the assistance which is sometimes needed by members and the public in participating in the meeting. Democratic services are a small team of extremely dedicated officers who have worked tirelessly over the last 18 months to enable decision-making to keep going in a way that members and the public have been able to engage with. I am sure members share my sense of gratitude to them for their commitment, industriousness and consistently solutions-focused approach.

10 Member training and development

10.1 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.

11 Use of covert surveillance

11.1 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 2021.

12 Comments and conclusions

13.1 This has been another year of significant change for the council, with the promise of more change to come. The advent of hybrid meetings, while not without its issues, has embedded at least some of the improvements to the accessibility of meetings, for councillors and for members of the public, that we witnessed as a result of the covid regulations, probably on a permanent basis.

13.2 For officers, the possibility of returning to the office after the months of no face-to-face contact with colleagues has been welcome, but with the pandemic having demonstrated the feasibility for most people to work almost exclusively at home if that is their preference, the new permanent way of working which ultimately emerges from the covid crisis will be very different to the old one. In

the longer term, this is likely to have implications for the recruitment and retention of staff which will affect the whole local government sector.

- 13.3 Change is also the order of the day with regard to the council's constitution and the way in which members make decisions and control the organisation. The move to a committee system will provide more members with meaningful opportunities to influence decisions as they are being taken, but the removal of individual decision-making powers from the constitution will necessitate a more strategic and more policy-based approach to the task. The adoption of a new governance model will affect both the political dynamics of the council and the way members and officers work with each other, and both members and officers will need to be appropriately supported to adapt to these changes.
- 13.4 The number of complaints made against borough councillors last year remained high, and the proportion of them which were made by fellow councillors is in my opinion also a cause for concern. The discussion which the committee is due to have under a separate agenda on the future of the code of conduct may have the kernel of a solution to this issue, particularly if it represents an opportunity for all members to reflect on what they want from the standards regime and how they want to use it to drive a respectful political culture focused on the needs and aspirations of the borough and its residents. In my view as monitoring officer, this is the key task for the standards committee in the year ahead.

14 List of appendices

- 14.1 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.

Borough councillor made unsubstantiated allegations of corruption against cabinet members at a meeting of the full council.

Action: In consultation with the independent person it was determined that there was no need for an independent investigation as the relevant facts were all contained in the transcript of the meeting. The monitoring officer wrote an 'investigation' report for the standards committee.

Outcome: Monitoring officer's report indicated that there had been a breach of the code of conduct. Standards hearing upheld this view, but as the subject councillor had already made a full public apology, no further sanction was applied.

