

FULL DECISION

CASE REF:	APE 0420
HEARING DATE:	3 June 2009
RE:	Reference in relation to a possible failure to follow the Code of Conduct
RESPONDENT:	Councillor Mitchel Wicking
RELEVANT AUTHORITY CONCERNED:	West Somerset District Council
ESO: (Ethical Standards Officer)	Hazel Salisbury
ESO REPRESENTATIVE:	Gylian Murphy
<u>Case Tribunal Members:</u>	
Chairwoman:	Beverley Primhak
Member:	Sam Jones
Member:	Keith Stevens

1 Preliminary Documents

- 1.1 In a letter dated 12 February 2009, the Adjudication Panel for England received a reference from an Ethical Standards Officer ('ESO') in relation to an allegation that Councillor Wicking had failed to comply with Paragraph 4(a) of West Somerset District Council's Code of Conduct in that he disclosed information of a confidential nature given to members in confidence about a proposed redundancy agreement with the council's Chief Executive without the disclosure being reasonable and in the public interest.

2 Procedural Matters

- 2.1 A letter was received from the former Chief Executive prior to the hearing stating that the terms of the redundancy agreement were subject to a confidentiality agreement and requesting that the hearing should not be held in public.

- 2.2 The Respondent in response stated that he believed the hearing should be in public.
- 2.3 The ESO submitted that the interests of both the Respondent and the Chief Executive could be served by excluding the public and press from the hearing when any confidential information relating to the Chief Executive might be disclosed but conducting the hearing in public. There did not appear at the time to be a dispute as to the facts and therefore it appeared possible to conduct the hearing that way. However this may not be practicable. The Chair of the Tribunal made a direction that this issue should be dealt with as a preliminary matter at the hearing.
- 2.4 The Respondent did not attend the hearing and was not represented.
- 2.5 Article 6 of the European Convention on Human Rights provides that everyone in determination of his civil rights and obligations is entitled to a fair and public hearing. However, this is a qualified right and the press and public may be excluded under certain circumstances. This was a case dealing with an allegation of breach of the Code of Conduct on the basis that confidential information had been wrongly released. The Case Tribunal considered that it would be pre-judging the case and potentially unfair to persons affected by the disclosure of that confidential information to allow it to be aired in a public forum while dealing with the matter.
- 2.6 The ESO had referred to the decision in *Thomas (APE 149)* where it was considered that the fact that information given in confidence had been improperly made public did not mean that it could thereafter be recited in public with impunity. The Case Tribunal considered this to also be applicable in this case and decided to hear the case in public but that in the circumstances the alleged confidential information should not be divulged.

3 Findings

The following material facts were not disputed:

Councillor Wicking's official details

- 3.1 Councillor Wicking was elected to office on 3 May 2007 for a term of four years. Following his election, Councillor Wicking served on the Performance Committee, Policy Development Committee and the Local Development Panel, but currently serves on the Local Development Panel only.
- 3.2 Councillor Wicking gave a written undertaking to observe the Code of Conduct on 8 May 2007.
- 3.3 Councillor Wicking received training on the Code of Conduct from the Council's Monitoring Officer on 8 August 2007. This lasted about 90 minutes and covered confidentiality.

The relevant legislation and protocols

- 3.4 On 16 May 2007 the Council adopted a Code of Conduct under the Local Authorities Model Code of Conduct Order 2007. Paragraph 4 of the Code states:

“You must not –

(a) Disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to have been aware, is of a confidential nature, except where-

(i) you have the consent of a person authorised to give it;

(ii) you are required by law to do so;

(iii) the disclosure is made to a third party for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person; or

(iv) the disclosure is-

(aa) reasonable and in the public interest; and

(bb) made in good faith and in compliance with the reasonable requirements of the authority.”

The allegation

- 3.5 On 12 December 2007 West Somerset District Council considered a report relating to the potential redundancy of an identified individual. A resolution had been passed, without dissent or discussion from any member (including Councillor Wicking), to exclude the press and public while the report was considered.
- 3.6 The minutes record that the leader of the council told all members present that information in the report was confidential “and must remain so. Any leaking of the information could lead to formal proceedings being taken against the authority”.
- 3.7 The report contained information about a redundancy settlement for the Chief Executive, setting out the various financial elements of the arrangement as well as some personal information relating to the Chief Executive.
- 3.8 Following the meeting Councillor Wicking communicated with the press and based on the confidential report disclosed the details of the Chief Executive’s redundancy package.
- 3.9 At the time that Councillor Wicking communicated with the press, he did not know whether the agreement with the Chief Executive had been concluded.
- 3.10 The information was published in the local newspaper and correctly attributed to Councillor Wicking on 28 December 2007.

4 Whether the material facts disclose a failure to comply with the Code of Conduct

- 4.1 Councillor Wicking has made the following submissions:

- 4.2 He had deliberately breached confidentiality by sending his press release to the media as *"an act of protest at what I considered to be a serious public injustice"*. He felt that his disclosure was in the public interest.
- 4.3 The disclosure related to his view about officer accountability and argued that a significant part of the blame for the council's financial difficulties was the responsibility of the Chief Executive who, he considered, should have resigned or been dismissed.
- 4.4 The redundancy arrangements had been made inappropriately, in secrecy, and without input from back-benchers. Revealing the information was *"an act of protest against the culture of secrecy [within the council] that had enveloped the negotiations between Councillor Ross and [the Chief Executive and Deputy Chief Executive]"*
- 4.5 The *"taxpayer had a right to know"* about the payment given that the council was *"basically [financially] crippled"*.

"To my mind (and every single member of the public who has contacted me over this issue) there should be no secrecy when it comes to the salaries of senior officials within local authorities or public bodies in general".

- 4.6 Councillor Wicking quoted part of Article 1 of the council's constitution which states:

"The purpose of the Constitution is to ...create a powerful and effective means of holding decision-makers to public account"

- 4.7 Councillor Wicking quoted from a decision notice by the Information Commissioner concerning a complaint that Corby Borough Council had inappropriately withheld information relating to the employment of a temporary finance officer (reference FS50062124) which states:

"The Commissioner recognises that ultimately all public sector employees are accountable to the public. However the Commissioner is satisfied that in general, occupants of senior posts within public authorities have for some time understood that they are more likely to be exposed to greater levels of scrutiny and accountability than staff in more junior positions. Senior staff ... are responsible for policy decisions affecting the public and for the expenditure of public funds. Greater levels of scrutiny help to ensure that they are fully accountable for their actions when carrying out their professional duties, which is in the public interest.

"The Commissioner is satisfied that, in the circumstances, there is a public interest in the total amount of money paid to [Corby Borough Council's former temporary finance officer] being made publicly available. This should inform the ongoing debate on this issue and should help to ensure that the Council is held to account for the performance issues identified by the Audit Commission. This additional public scrutiny should increase the likelihood that procedures are put in place to avoid a recurrence of similar problems in the future".

- 4.8 On 12 December 2007 the council was presented with what was in effect a 'done deal' with no proper opportunity for debate and decision, and insufficient information on which to base an informed decision.
- 4.9 The information he had disclosed was "wrongly classified confidential" because the salaries of the Chief Executive and his deputy within £10,000 bands were already public knowledge through the council's published accounts for 2005-6 and 2006-7. Because the Chief Executive's settlement was based on his annual salary, it could not be seen as confidential.
- 4.10 He did not "really weigh the pros and cons" of disclosure:

"If it meant additional cost to the council and taxpayer, then so be it. I felt the people would rather know the truth and bear the cost, than not know. Besides I also felt the council was in such a mess that any further expense would be almost irrelevant.

"I did spare a thought for the families of the CEO and Deputy and the public wrath they might possibly face in the aftermath of my disclosure, but after all we are talking about the mismanagement of public funds which effects us all and not just a few so again the public interest I felt outweighed the consequences of my actions.

" ... whilst compiling my protest for the press, the possible repercussions to the council financially did not enter my mind as I felt that the council was in such financial difficulty anyway that one more item of expenditure would not make much difference as the authority was virtually bankrupt.

"I also felt that it would have been rich of them to file any lawsuit in light of the fact that the council had no money which was down to them, so in some ways I was calling their bluff so to speak".

- 4.11 The ESO made detailed submissions both prior to and at the hearing to support her view that Councillor Wicking failed to comply with paragraph 4(a) of the Code of Conduct.
- 4.12 **Case Tribunal decision**
- 4.13 Councillor Wicking breached paragraph 4(a) of West Somerset District Council's Code of Conduct.
- 4.14 Paragraph 2 of the Code of Conduct states that (subject to exceptions that do not apply in this case) the Code does not have effect in relation to a councillor's conduct other than where it is in his official capacity. The information that the Respondent had released had been obtained by him at a meeting of the council. His press release was headed: ' "Rebel Councillor Blows Whistle on District Farce" a Statement by Independent Councillor Mitch Wicking December 19th 2007'. From his detailed statement it is very clear that the Respondent was writing as a councillor, not as a member of the

public. The Case Tribunal concluded that he was acting in his official capacity when he released the statement.

- 4.15 The Case Tribunal had next to consider whether there had been a breach of paragraph 4 of the Code. The first issue was whether Councillor Wicking had disclosed information of a confidential nature. If not, there would be no breach.
- 4.16 Just because information was received in confidential session did not necessarily mean that it had the necessary "quality of confidence". A key element in this is that the information must not be readily available by other means. The Respondent argued that the information he disclosed was wrongly classified as confidential because the Chief Executive's salary was already public knowledge within £10,000 bands within the council's published accounts for earlier years. He says that because the Chief Executive's settlement was based on his annual salary it could not be seen as confidential.
- 4.17 The Case Tribunal does not accept this. As submitted by the ESO, to work out from a broad knowledge of the Chief Executive's salary what his redundancy pay was you would need more information than was readily in the public domain, such as years of service and age. In addition there were other elements in the settlement that had never been in the public domain as well as personal biographical details.
- 4.18 The Respondent received the information at an "exempt" session of the council, the minutes of which show that the council considered the public interest test in deciding whether the information should be kept confidential. At the meeting it was impressed upon Councillor Wicking and the other councillors by the leader of the council that the information was confidential. The Case Tribunal considered that the information that was disclosed was given to the Respondent in confidence and was of a confidential nature.
- 4.19 The Respondent relies on the decision of the Information Commissioner dated 25 August 2005 relating to Corby Borough Council (reference FS50062124). In that decision the Information Commissioner ruled that Corby Borough Council should disclose the exact total amount paid to an Interim Head of Finance, following a critical report from the Audit Commission. The short-term post attracted a higher salary to compensate for a lack of employment rights, but the Chief Executive subsequently renewed the contract at the same rate with the addition of holiday and pension contributions. The Commissioner decided this justified "additional public scrutiny".
- 4.20 The Case Tribunal considered that there were clear differences between the circumstances in the *Corby* case and the case before it. For instance:
- 4.20.1 In this case, unlike the *Corby* case, the Chief Executive negotiated on the basis of and was led to believe that the redundancy package would be kept confidential;
- 4.20.2 In the *Corby* case the Information Commissioner directed the release of the "total" sums, in this case detailed sums were disclosed, not just the total.

4.20.3 In this case the decision to agree to the voluntary redundancy package with a confidentiality clause was agreed to unanimously by the full council following a proper report, unlike the *Corby* case where there was a critical audit report from the Audit Commission about procedures.

4.21 The Case Tribunal was referred to the Information Commissioner's guidance "*When should salaries be disclosed?*". As part of the overview this indicates inter alia:

4.21.1 Salary scales should usually be published as a matter of routine. Disclosure should only be to the extent necessary to fulfil a legitimate public interest. This may involve narrowing down advertised scales, for example to the nearest £5000. Only in exceptional circumstances is disclosure of exact pay likely to be justified.

4.21.2 The exceptional circumstances cited include for instance where there "are current controversies or credible allegations" and "normal procedures have not been followed". The Case Tribunal did not consider that this was the case here.

4.22 Although this guidance related to salaries rather than redundancy payments, the Case Tribunal considered that the principles were relevant and provided support for the argument that the Chief Executive's detailed redundancy arrangements could legitimately be considered to be confidential.

4.23 In conclusion the Case Tribunal took the view that Councillor Wicking had disclosed information given to him in confidence and which he believed or ought reasonably to have been aware was of a confidential nature, contrary to Paragraph 4(a) of the Code of Conduct.

4.24 Having reached this conclusion the Case Tribunal then had to consider whether any of the exceptions in paragraph 4 applied.

Para 4(a)(i): Did the Respondent have the consent of a person authorised to give it?

4.25 The Respondent did not have consent to disclose the information.

Para 4(a)(ii): Was the Respondent required by law to disclose the information?

4.26 The Respondent was not required by law to disclose the information.

Para 4(a)(iii): Was the disclosure made to a third party for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person?

4.27 The information was not disclosed for this purpose.

Para 4(a)(iv): Was the disclosure (aa) reasonable and in the public interest; and (bb) made in good faith and in compliance with the reasonable requirements of the authority?

(aa) Was the disclosure reasonable and in the public interest?

- 4.28 This is a case where both Article 10 (right to freedom of expression) and Article 8 (right to respect for private and family life, home and correspondence) of the European Convention on Human Rights was engaged. The House of Lords in the case of *Campbell v MGN Ltd [2004] 2 AC 457* considered the competing rights of free speech and privacy. Lord Hope of Craighead stated at paragraph 113: "*Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life. The decisions that are then taken are open to review by the court. The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. ... Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise.*"
- 4.29 The Case Tribunal undertook a balancing exercise in determining the public interest in disclosure of the information against the public and private interests in maintaining confidentiality of the agreement between the Chief Executive and the council.
- 4.30 The factors that the Case Tribunal took into account in favour of disclosure were:
- 4.30.1 The right to, and value of, freedom of expression.
 - 4.30.2 The right of the public to know about decisions made by their elected representatives.
 - 4.30.3 Openness and transparency in relation to the use of public money.
 - 4.30.4 The fact that the council had not indicated at or soon after the council meeting on 12 December 2007 that it had any intention to disclose by way of a press release a general statement that it had agreed to the departure of the Chief Executive on mutually accepted terms. On the evidence available there had been no attempt to agree that a press release be issued or its content. There was a clear public interest in disclosure of the fact that the Chief Executive had been made redundant. It was not sufficient that a brief minute had been produced and that the public could discover the fact of the redundancy from the council's offices or a detailed examination of the council's accounts.
- 4.31 The factors which weighed against disclosure were:
- 4.31.1 The disclosure intruded on the Chief Executive's privacy.

- 4.31.2 Because of the timing the press release could have hindered the conclusion of the agreement that had been agreed by the full council.
- 4.31.3 The council had determined that the matter should be considered as 'exempt' business.
- 4.31.4 The council and the chief executive were negotiating a confidentiality clause in the termination agreement which could well have been a significant factor for either party in deciding whether to complete the agreement. Councillor Wicking's disclosure might well have rendered such a clause nugatory.
- 4.31.5 Councillor Wicking voted both for the matter to be considered as 'exempt' business and also for the redundancy arrangements. Councillor Wicking knew that it was about to be a legally binding agreement that all the councillors had agreed to and was subsequently prepared to knowingly breach the terms of that agreement.
- 4.31.6 The disclosure would be likely to reduce the confidence of employees in the authority's ability to protect their right to privacy.
- 4.31.7 The disclosure would be likely to reduce the ability to negotiate in confidence with employees in relation to employment disputes in the future making it difficult to settle employment disputes in a cost effective way.
- 4.31.8 Some of the information released was still subject to the agreement of the Audit Commission. The Respondent had not given a full, accurate or definite picture of the redundancy settlement in the details he had released.
- 4.32 The Case Tribunal considered that there should have been some transparency in relation to the Chief Executive's redundancy arrangements. The fact that he had been made redundant should have been in the public domain (and was referred to in the minute of the meeting on 12 December 2007). However the Chief Executive was entitled to some privacy in his financial arrangements and the details of his redundancy package should not have been disclosed by Councillor Wicking, particularly as they had been subject to confidential negotiations.
- 4.33 The Case Tribunal, having weighed up the different issues, considered that it was not in the public interest to disclose the detailed information of the Chief Executive's redundancy package. They put particular weight on the fact that the decision to treat the information as exempt had been agreed unanimously by the full council after considering the public interest and that the Respondent had not put forward any objections. The full council had unanimously agreed to the redundancy package. They also considered that as a matter of good governance there was a public interest in councils being able to rely on confidential information remaining so where the proper process had been followed.

- 4.34 The Chief Executive had been led to believe and had a legitimate expectation that the agreement would be formally recorded in a legally binding document with a confidentiality clause which was due to be signed shortly after the meeting. It was unreasonable in the circumstances to release that information.
- 4.35 The Case Tribunal considered the Respondent's submissions that the redundancy arrangements had been made inappropriately and in secrecy and that instead of receiving a redundancy pay the Chief Executive should have been disciplined; it was therefore in the public interest for the arrangements to be disclosed. However, the Case Tribunal did not accept this as a justification for his actions. It was clear that the Audit Commission were aware of what was taking place and were being consulted about the settlement. Also, the council had chosen to agree a redundancy package for the Chief Executive when, if there were grounds for so doing, it could have used statutory procedures to investigate his actions.

(bb) Was the disclosure made in good faith and in compliance with the reasonable requirements of the authority?

- 4.36 The Case Tribunal did not consider that the Respondent could rely on this exemption. He had not acted in good faith as he had not sought advice as to how the public could be told about the redundancy package. He could, for instance, have sought advice from the Monitoring Officer or his own lawyer, who could have assisted him to make a formal application for some or all of the information to be made public. He clearly did not comply with the reasonable requirements of the authority: it was made very clear to him that the Chief Executive's redundancy package was confidential but he then without any warning disclosed the details of it to the press.
- 4.37 The Case Tribunal therefore concluded that the Respondent had breached paragraph 4 of the Code of Conduct.

5 Submissions as to the action to be taken

The ESO's Submissions

- 5.1 The ESO's representative said that it was not the ESO's policy to advocate a sanction.
- 5.2 She pointed out that the Adjudication Panel for England's guidance on sanctions indicates that the Code is in place to endorse standards of conduct and to discourage similar behaviour. The Case Tribunal was informed that there has been some controversy in the council recently in connection with the leaking of confidential information and that the Monitoring Officer has sought not to publish all papers.

The Respondent's submissions

- 5.3 The Respondent stood for election as an independent, offering people a choice as to what had gone before. He campaigned to bring local democracy back to the people. The trouble was that when he crossed the threshold from the outside world into the council he became aware of a very imposing barrier called bureaucracy and

officialdom. As soon as you are elected the Code of Conduct prevents you from being fully able to represent your constituents.

- 5.4 He has always admitted that he knew what he was doing when making a disclosure to the press about confidential payments and knew he would be breaking the Code of Conduct.
- 5.5 The council had been mismanaged and to allow those responsible to be fast-tracked out of the authority without proper accountability was plainly wrong. To allow them to leave with healthy pay cheques was equally galling.
- 5.6 He was representing himself and his constituents to the best of his ability.

6 Case Tribunal decision

- 6.1 The Case Tribunal has taken into account the current Guidance on decisions available to a Case Tribunal.
- 6.2 The Case Tribunal notes the Respondent's relative inexperience as a councillor and his desire to do the best by his constituents. However this was a case where he had released information which was clearly provided to him in confidence and where harm could have been caused.
- 6.3 The Case Tribunal understood the Respondent's concern that the fact of the Chief Executive's redundancy should be made public and noted that it appeared that the council had failed to indicate that it was intending to publicise this. The Case Tribunal considered that this would have been the normal practice in most local authorities on the grounds that it was in the public interest and might have meant that the Respondent was deterred from disclosing the information as he did.
- 6.4 However, the Case Tribunal considered it was a serious matter to disclose confidential information in breach of the Code.
- 6.5 Councillor Wicking had himself voted for the agreement with the Chief Executive. When he subsequently had had concerns about it he could have raised this in a proper way, rather than releasing private information which was bound to cause upset to the Chief Executive and the Council. He could also have released the fact that the arrangement had been made but without disclosing detailed financial information.
- 6.6 The Case Tribunal noted that, although the Respondent had accepted that he had breached the Code, he had not expressed contrition. The Tribunal noted also that he had considered the Code of Conduct to provide unwelcome restraints on what he could do as a councillor.
- 6.7 The Guidance states that the action taken by the Case Tribunal should be designed both to discourage or prevent the Respondent from any future non-compliance and also to discourage similar action by others. The Case Tribunal considered that as a matter of good governance the council and council employees should be entitled to be able to rely

on councillors to keep confidential information that was properly provided to them during “exempt” business.

- 6.8 Taking all these factors into consideration the Case Tribunal decided to suspend the Respondent from being a member of the West Somerset District Council for a period of three months.
- 6.9 The decision of the Case Tribunal was unanimous.
- 6.10 The Respondent may seek leave from the High Court to appeal against the decision of the Case Tribunal that there has been a failure to comply with the Code of Conduct and/or the decision as to sanction. The President of the Adjudication Panel for England may suspend the effect of the sanction if requested to do so by a Respondent who intends to seek leave to appeal to the High Court against the decision of the Case Tribunal. Applications for leave to Appeal must be made to the High Court within 21 days of this decision. The Respondent is directed to the provisions of Part 52 of the Civil Procedure Rules.

Beverley Primhak
Chairwoman of the Case Tribunal
10th June 2009