

North Tyneside Council

Report to Standards Committee

Date: Thursday 30 November

ITEM

Title: Monitoring Officer
Review and Update

Report from Service Area: **Legal Services**

Report Author: **Stephen Ballantyne, Head of Law and Monitoring Officer** **(Tel: 643 5329)**

Wards affected: **All**

1.1 Purpose:

To provide an opportunity for the Monitoring Officer to share his observations with Standards Committee following 7 months in post, together with an update on the Monitoring Officer's review of the Authority's Code of Conduct and Local Arrangements following the Local Government and Social Care Ombudsman's report into the managements of a Code of Conduct complaint at Teignbridge District Council.

1.2 Recommendation(s):

The Standards Committee is recommended to note this report.

1.3 Information

The Monitoring Officer Reflections on 7 months in post

- 1.3.1 The Monitoring Officer came into post on 3 April 2023 and took over the responsibilities of the role from the Assistant Chief Executive who undertook that role from early 2022, following the departure of the previous Monitoring Officer.

- 1.3.2 A thorough handover from the Assistant Chief Executive took place via a series of meetings and discussions with the Monitoring Officer, together with support from the two Deputy Monitoring Officers.
- 1.3.3 The Monitoring Officer joined North Tyneside Council with a previous substantial work history within the Borough, having undertaken the role of Legal Manager, Governance and worked closely with a number of North Tyneside Council's chief executives and elected members over a period of 26 years. The Monitoring Officer also brought with him the experienced he had gained at Sunderland City Council where he had had focussed on governance and decision making as well as managing the Democratic Services Function, and the Member Services and Scrutiny Function of that Council.
- 1.3.4 Upon coming into post, it has been a priority for the Monitoring Officer to gain a thorough knowledge of the standards and governance matters which have arisen in the Authority in recent years, including, in particular, the allegations of breaches of the code of conduct and the decisions taken. As with all authorities the challenges presented by social media, both positive and negative, are a current issue that requires consideration and acknowledgement. The Committee will be aware that specific training on the use of social media has been provided to all Members earlier this week. This was one of the tasks that the Committee had set as a part of its work programme for this municipal year.
- 1.3.5 In the process of gaining a thorough knowledge of the governance and standards matters in the Authority, the Monitoring Officer has undertaken upon request reviews of certain cases that had been dealt with previously. In all cases, the Monitoring Officer noted that all decisions had been taken properly, reflecting the facts of those cases, the law and relevant case law.
- 1.3.6 Following 7 months in the role, the Monitoring Officer is of the view that the ethical governance arrangements within the Authority are fit for purpose in so far as they relate to the conduct of elected members. The Code of Conduct for Members and the Local Arrangements are proper and effective and reflect current best practice. It is noted that the Annual Governance Statement Update 2022-2023 which was presented to Audit Committee on 31 May 2023 concluded that there were no significant governance issues identified and that as whole, the governance arrangements in operation during 2022/23 within the Authority were adequate.

Internal Audit – Review of Ethical Governance

1.3.7 Prior to the current Monitoring Officer coming into post Internal Audit had commenced a high-level review of ethical governance within the Authority to look at the key controls around how the Authority promotes, delivers, monitors and maintains its ethical standards throughout the organisation. This included looking at codes of conduct, including the member code of conduct. As part of this, discussions have taken place between the Monitoring Officer and his team and colleagues within Internal Audit. In addition, information has been shared with regard to the processes and procedures followed within the team. This piece of work is nearing completion and the outcome, together with any recommendations will be carefully considered and, if necessary, appropriate follow up action will be taken.

Local Government and Social Care Ombudsman (LGSCO) – Review of Best Practice

1.3.8 On 21 December 2022 the LGSCO published a report upholding a complaint against Teignbridge District Council. The complaint was made by a Councillor who alleged that the Council was at fault as it failed to follow due process when investigating him for alleged breaches of its code of conduct for elected members.

1.3.9 The report provided a reminder to all local authorities of good practice and reaffirmed the importance of following the correct procedure and addressing relevant rights (such as the Article 10 right to freedom of expression).

1.3.10 The Chair of Standards Committee was quite rightly keen to ensure that North Tyneside Council was operating in accordance with good practice and raised this with the then Monitoring Officer. In light of the widely reported case concerning Teignbridge District Council the then Monitoring Officer had requested a review of North Tyneside Council's policy, process and practices in connection with standards complaints and was able to provide assurances to the Chair of Committee. The review was also shared with the incoming Monitoring Officer who is in agreement with the conclusions of the review.

1.3.11 A summary of the Teignbridge case, together with the findings of the internal review of North Tyneside Council's policy, process and practices is attached (Appendix 1 & 2). The internal review has provided the Chair of Standards Committee and the Monitoring Officer an assurance as to current procedures within the Authority.

Maintaining Best Practice

1.3.12 The Monitoring officer is pro-active in keeping up to date and maintaining best practice.

1.3.13 In addition to meetings on individual matters as and when required, the Monitoring Officer meets with the lead democratic officer and the two deputy monitoring officers on a monthly basis to review progress with complaints and the action plan and to discuss any areas of concern or interest.

1.3.14 The Monitoring Officer team has attended two on-line conferences for Monitoring officers, one in July 2023 and the other in October 2023. The conferences provide an opportunity to build connections with Monitoring Officers from across the country, to gain insights into how issues have been approached in other authorities, to discuss areas of concern and receive updates on relevant case law. Matters covered include:

- a legal update on cases of note
- an informative talk from Lord Lisvane, former Clerk and Chief Executive of the House of Commons and former Independent Chair of a local authority standards committee
- a presentation from Monitoring Officers at Arun District Council and Chichester District Council
- a presentation on the use of mediation in Code of Conduct cases.

1.3.15 In-house training has been developed and delivered (on 16 November 2023) to an initial cohort of lawyers within the team to ensure that they are fully aware of the Monitoring Officer's role within the Authority and the part they play in supporting and ensuring that good governance is maintained and concerns are reported to the Monitoring Officer.

1.3.16 In accordance with the Committee Work Programme, the Monitoring Officer has a meeting with the Independent persons, together with the Chair and Deputy Chair of Committee, scheduled to take place in December 2023. A further meeting will take place in March/April (date to be confirmed). The purpose of the meeting is to give and receive feedback on recent standards matters and the social media training, review the work programme, together with any other issues.

1.3.17 As mentioned above, a key challenge faced by local authorities in relation to managing conduct issues is presented by the use of social media. This is an evolving area which will be carefully considered and kept under review to ensure that elected members are not discouraged from using social media and have the tools available to them, including access to training, to ensure that their use is appropriate and does not give rise to code of conduct concerns. The recent training provided to members is the subject of a separate report to this evening's meeting.

1.4 Appendices:

Appendix 1 – Summary of the Local Government and Social Care Ombudsman's (LGSCO) Findings in relation to Teignbridge District Council

Appendix 2 – Summary of Internal Review of North Tyneside Council's policy, process and practices in light of the Teignbridge report

1.5 Contact officers:

Louise Watson, Senior Manager Legal & Registration Services, (0191) 643 5325
Deputy Monitoring Officer

Joanne Holmes, Democratic Services (0191) 643 5315

1.6 Background information:

- Code of Conduct for Members and Co-opted Members.
- The Localism Act 2011.
- Standards Committee Annual Report 2022/23.
- Annual Governance Statement 2022/23

Appendix 1 – Summary of the Local Government and Social Care Ombudsman’s (LGSCO) Findings in relation to Teignbridge District Council (TDC)

The LGSCO acknowledged that councils have a responsibility to protect the wellbeing of officers. This includes protecting them from overly critical comments from local councillors. However, this needs to be balanced against a local councillor’s right to freedom of expression which includes legitimate questioning and criticism of a council’s actions.

Ombudsman’s Role and Powers:

- The LGSCO has the power to investigate complaints of injustice caused by ‘maladministration’ and ‘service failure’. The LGSCO considers whether there was fault in the way an organisation made its decision. If there was no fault in the decision making, the LGSCO cannot question the outcome.
- The LGSCO also considers whether any fault has had an adverse impact on the person making the complaint. It refers to this as ‘injustice’. If there has been fault which has caused an injustice, the LGSCO may suggest a remedy.
- In relation to code of conduct matters the LGSCO is not an appeal body. Its remit is not to take a second look at a decision to decide if it was wrong. However, it may look at the procedure the local authority followed to make its decision.

Relevant Law

The Localism Act 2011 requires all local authorities to “promote and maintain high standards of conduct” by elected councillors.

Local authorities are required to:

- adopt codes of conduct for councillors
- have in place arrangements for investigating allegations that councillors have breached the code.
- include provision for the appointment of at least one independent person whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate.

The legislation stipulates that “an allegation” under the Act means a written allegation that a member has failed to comply with the authority’s code of conduct.

The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. The Act requires all local authorities to respect and protect individuals' rights.

Not all rights operate in the same way. Instead, they break down into three separate categories:

- absolute rights: those which cannot be interfered with under any circumstances;
- limited rights: those that can be interfered with in certain circumstances;

and

- qualified rights: those rights where interference may be justified to protect the rights of others or wider public interest.

The LGSCO's remit does not extend to making decisions on whether a local authority has breached the Human Rights Act – this can only be done by the courts. However, the LGSCO can make decisions about whether a local authority has had due regard to an individual's human rights in their treatment of them, as part of the consideration of a complaint.

Of relevance in the TDC complaint is Article 10 of the Human Rights Act which protects freedom of expression. It aims to ensure people can give their views and opinions. However, it is a qualified right, which means there are circumstances where the freedom can be curtailed so long as that is lawful, necessary and proportionate.

Court judgments have considered the interplay between regimes that aim to protect standards in public life through local authority code of conduct schemes with elected representatives' right to free expression. The courts have recognised that elected politicians have an enhanced right of protection to free expression. However, where an elected politician makes a critical comment about a non-elected official, it is legitimate to consider the requirement to protect that official.

However, this must be weighed:

- first, against the interest of open discussion of matters of public concern;

and

- second, where the comment is made by a politician as a political expression, the enhanced protection given to his right of freedom of expression.

The LGSCO's Findings regarding TDC

The TDC complaint concerned a code of conduct matter concerning the behaviour of a councillor who was campaigning against proposed housing development in part of the Council's area. Under TDC's processes the councillor was found to have breached the code of conduct. He complained to the LGSCO and his complaint was (largely) upheld.

The LGSCO found that TDC should take the following action:

- Apologise to Councillor D, accepting the findings of the investigation.
- Rescind its decision notice of 22 July 2020 upholding the complaint that Councillor D breached the Code of Conduct and ensure it is no longer available on its website. In its place it should provide a statement saying the notice has been withdrawn following the LGSCO's investigation and provide a link to the LGSCO report.

In addition, the LGSCO stated that TDC should learn lessons from the complaint and ensure it has a written procedure for its officers and any independent investigators asked to consider standards complaints that should include:

1. ensuring the Council has a record of complaints being made in writing;
2. ensuring there is a clear written record of consultation with an Independent Person to include their response;
3. recording that the written complaint has been shared with the Councillor complained of, or a clear written record as to the reasons why not;
4. ensuring that where an investigation expands to consider further allegations arising during the investigation, it keeps a clear written record of that and a record that this has been explained to the Councillor complained about; and
5. that in all appropriate cases it considers the rights of the councillor complained about to free expression under Article 10 of the Human Rights

Act, as part of any investigation report and subsequent committee decision making.

Appendix 2 – Summary of Internal Review of North Tyneside Council’s policy, process and practices in light of the Teignbridge report

1. Complaints Recorded in Writing

NTC’s local arrangements for Dealing with Allegations of Breaches of the Code of Conduct for Members and Co-opted Members (2023) explicitly recognises that the Localism Act 2011 requires allegations to be in writing. However, it also notes that this requirement should be considered in conjunction with the Equality Act 2010 and the Authority’s duty to make reasonable adjustments under that Act.

In practice, this would mean, for example, that if a complainant had a disability which prevented them from providing a written complaint the Monitoring Officer could nonetheless take down their complaint by speaking with them and putting the complaint in to writing. Care would be required to ensure that the complaint was accurately recorded, for example, by reading it back to the complainant and asking them to confirm that it is correct.

NTC uses a standardised complaint form which is available on the Council’s website and encourages all complainants to complete it. For example, if a potential complaint is received via e-mail the Monitoring Officer or his staff will direct the individual to the website and ask them to read the documentation and complete the form if they consider that there has been a breach of the code of conduct.

In practice, where an individual states that they do not have internet access, a written copy of the documentation is sent to them to read, complete and return.

Outcome of Review: No action required.

2. Written record of consultation with Independent Person including their response

NTC’s current procedure documents include the following extracts:

“The Monitoring Officer will review every complaint received and, after consultation with one of the Independent Persons and consideration of the initial comments of the subject member, decide whether the complaint will be investigated.”

The procedure on Standards Hearings states that at the point of sending out the report:

“The Monitoring Officer will also seek the views of the Independent Persons on the report and on any action the Independent Persons feel should be taken in respect of it.”

“What happens if the Investigating Officer concludes that there is no evidence of a failure to comply with the Code of Conduct?”

In considering the report, the Standards Committee/Sub-Committee will consult with one of the Authority’s Independent Persons”

Under the heading of “Examination of report and written representations” the procedure note states that:

“The Panel will consider the report together with any written response from the Member to the report. The Committee may require the Investigating Officer to answer questions put to him/her by members regarding the contents of the report.

The Committee must also take account of the views expressed by the Independent Persons in their response to the Monitoring Officer.”

“In deciding what sanction (if any) to take, the Standards Committee/Sub-Committee will consider all relevant circumstances including any views expressed by the Independent Persons.”

“The Independent Persons are invited to attend meetings of the Committee/Sub-Committee and their views are sought and taken into consideration before the Committee/Sub-Committee takes any decision on whether a member’s conduct constitutes a failure to comply with the Code of Conduct and as to any action to be taken following a finding of failure to comply with the Code of Conduct.”

“The Monitoring Officer will also inform the Member that if, at the meeting of the Standards Committee, s/he seeks to dispute any matter contained in the report, without having previously notified his/her intention to do so, the Standards Committee may either adjourn the meeting to enable the Investigating Officer to provide a response, or refuse to allow the disputed matter to be raised.

The Monitoring Officer will also seek the views of the Independent Persons on the report and on any action the Independent Persons feel should be taken in respect of it.

Upon receipt of the responses, the Monitoring Officer will discuss the responses of with the Chair of the Standards Committee and will complete the Pre-hearing Process Summary at Appendix 7.”

Outcome of Review:

It is apparent that in practice NTC’s MO consults with the IP’s. From reviewing a selection of complaints it is clear that an IP has been present and participating in discussions at the appropriate stage, for example:

- minutes of assessment meetings with the MO reflect that on occasion the MO has, following such consultation, sought additional advice on whether the code is engaged prior to determining whether an investigation would proceed,
- minutes of a meeting between the MO, the Chair and the IP to review an assessment decision taken by the MO, and
- minutes of Standards Sub Committee which refer to the attendance of and consultation with the IP.
- Assessment decision letters to complainants and subject members reference and confirm that consultation with an IP has taken place.

3. Record that the written complaint has been shared with Councillor

NTC’s local arrangements for Dealing with Allegations of Breaches of the Code of Conduct for Members and Co-opted Members (2023) states that the Monitoring Officer will acknowledge receipt of the complaint to the complainant and ordinarily provide the subject member of the complaint, with a copy of the complaint within 5 working days of receiving it and will keep all parties informed of the progress of the complaint. The Monitoring Officer will also seek comments from the subject member of the complaint to assist in the initial assessment of the complaint.

The Monitoring Officer and his team use a standard form of acknowledgement letter to both the complainant and the subject member. The letter to the subject member states that a copy of the complaint or the relevant extract is enclosed.

Each complaint has its own complaint file upon which the correspondence is saved.

Outcome of Review: No action required.

4. Ensuring further allegations are clearly recorded and a record that this has been explained to the Councillor

The practice within NTC is to give each complaint its own unique reference. An individual member may be subject to a number of complaints at a particular point in time but each complaint is considered on its own merits and care is taken to ensure that the appropriate case reference is used in correspondence.

Information which is shared in the course of an investigation may simply be further evidence in support of an allegation. It would be expected that the information would be put to the subject member for comment it and it would be included in the draft report, providing another opportunity for comment. However, if during the course of the investigation entirely new allegations were raised they would need to first be referred in writing to the Monitoring Officer in order for an initial assessment to take place.

Outcome of Review: This has not been an issue within NTC. Care is taken to ensure that the basis of complaints is clear and information is shared appropriately. However, to ensure this is formally embedded within our procedures it could be specifically referenced within the procedure documents.

5. In all appropriate cases it considers the rights of the councillor complained about to free expression under Article 10 of the Human Rights Act, as part of any investigation report and subsequent committee decision making.

It has long been recognised that members have article 10 rights to freedom of expression. With the increased use of social media it has become of increasing relevance to code of conduct complaints. It would be expected that any investigator looking at a complaint which involved Art 10 would consider this issue carefully and reflect it within their report. If it was missing from the draft report it would be incumbent upon the Monitoring Officer and their team to address this and ask the investigator to look at it more closely and/or address it more fully within the report. Ultimately, if a complaint proceeds to a hearing it will be for the committee to undertake the balancing exercise as part of their determination and this would be reflected in the decision record.

NTC's Code of Conduct refers to the right to freedom of expression as follows:

““Respect” means politeness and courtesy in behaviour, speech, and in the written word. Debate and having different views are all part of a healthy democracy. As a member, you can express, challenge, criticise and disagree with views, ideas, opinions and policies in a robust but civil manner. Whilst greater allowance may be given for robust political debate between members, bearing in mind the right to freedom of expression, members should not, however, subject individuals, groups of people or organisations to personal abuse.”

NTC's Assessment Criteria for complaints includes the following:

“3. Is the complaint made by one member against another?

If yes, a greater allowance for robust political debate (but not personal abuse) may be given, bearing in mind the right to freedom of expression.”

Standards Committee, when determining breaches, will be directed to the relevant law by the investigator and the legal advisor. Each case is determined on its own facts and while Article 10 provides enhanced protection to elected members it does not provide an absolute defence.

Outcome of Review:

It is not considered necessary to further expand upon current references to freedom of expression within NTC's standards documents but this could be done if requested by Committee. If this were to be done, it is suggested that that other key rights are also referenced.

The review of training for members to include a key case 'round-up'.