

WINCHESTER CITY COUNCIL
STANDARDS (DETERMINATION) SUB COMMITTEE

DECISION AND REASONS ON THE COMPLAINTS MADE
AGAINST COUNCILLOR KIM GOTTLIEB

INTRODUCTION

1. Councillor Kim Gottlieb has been an elected member of Winchester City Council since May 2011. He was re-elected in May 2016.
2. Under the Localism Act 2011, Winchester City Council must promote and maintain high standards of conduct by members and co-opted member of the authority. The Council must adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity. The Council must also have in place arrangements under which allegations can be investigated and decisions on allegations can be made. The arrangements for making a decision on an allegation must include provision for the appointment by the authority 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 the allegations.
3. On 8 and 19 April 2016 the then Leader of the Council, Cllr Godfrey, made complaints to the Monitoring Officer that the conduct of Cllr Gottlieb was in breach of the Code. On 4 August 2016 the then Chief Executive of the Council, Simon Eden, also made a complaint to the Monitoring Officer about the conduct of Cllr Gottlieb.
4. The matters were referred for investigation through the Council's processes. Ms Olwen Dutton, a partner at Anthony Collins Solicitors, was appointed on 3 May 2017¹ to investigate the complaints made in all three letters against Cllr Gottlieb. Her report is dated March 2018.

¹ An earlier investigation was abandoned.

5. Following that report, the Monitoring Officer, Ms Lisa Hall issued a report (marked SSC46) setting out her views on the allegations.
6. The Standards (Determination) Sub-Committee was convened in order to determine whether Cllr Gottlieb had failed to comply with the Code of Conduct in respect of the complaints made. A procedure for the determination of the complaints was set out in advance of this meeting in consultation with the parties.

PROCESS

7. At the hearing, the parties were represented as follows:
 - 1) Mr Julian Milford, Counsel, represented the Monitoring Officer;
 - 2) Mr Robert Palmer, Counsel, instructed by Bindmans Solicitors, represented Cllr Gottlieb.
8. The sub-committee are grateful for the submissions of both Counsel, as well as their assistance in helping us navigate the large bundle which ran to over 700 pages, and in identifying the key documents.
9. The sub-committee has also been assisted by the Independent Person, Mr Bill Bailey, who remained with the Committee during the course of the hearing and the subsequent deliberations. His views were sought, given and taken into account during the course of the Committee's deliberations and prior to any decision being reached on any of the allegations. We are grateful to him for his thoughts and contribution.
10. Finally the sub-committee was also assisted by an independent legal advisor, Ms Samantha Broadfoot QC. She was also present during the hearing and the deliberations but played no part in the decision reached nor offered any view on what the outcome should be. We are grateful for her assistance in approaching our task.
11. It was agreed by the parties' representatives at the end of the hearing on 26 July that if the Legal Adviser gave us any legal advice arising during the course of our deliberations but which had not been the subject of full argument during the

hearing, the Legal Advisor would notify the parties by email of that advice and seek any response to it prior to reaching a decision. In the event, no such advice was given and accordingly it was not necessary to revert back to the parties.

THE HEARING - PROCEDURE

12. The hearing started shortly after 0915 on 26 July and followed the order set out in the agenda. Cllr Mather was elected chair of the sub-committee. Cllr Power declared that she had known Mr Tilbury for some 20 years. Mr Tilbury is a senior officer in the Council who is the subject of criticism by Cllr Gottlieb, which in turn form part of the basis for the complaints we have to determine. The Chairman asked the parties whether there were any objections to the members of this sub-committee. No objections were made by either party.
13. The first substantive item on the agenda was to consider whether in all of the circumstances of the case the meeting should proceed as exempt business such that the public were excluded. There is a power to do so in certain circumstances under the Local Government Act 1972 (“the LGA”) and this is reflected in the Council’s own procedures.
14. We received oral submissions from both parties on this issue. In summary, Mr Milford for the Monitoring Officer submitted, in reliance on Schedule 12A of the LGA at paragraphs 1 and 10, that there was power to exclude the public but that it was discretionary. It was a qualified public interest test. He accepted that there was a substantial public interest in the decision, but submitted that the documents contained a large amount of private and confidential material giving rise to privacy concerns including engaging the Article 8 human rights of others. He drew our attention to the following factors:
 - a) The fact of the complaint is itself confidential;
 - b) The papers contain a large amount of personal information for example the allegations and effect of the allegations on individuals e.g. of stress;
 - c) The statements were given in the expectation that they would be confidential including frank and unguarded comments made about Cllr Gottlieb and

others, and further there was a significant risk that these comments could be reported without context and presented as uncontroversial in a way would be damaging to relationships and the privacy of others. It was submitted that there was some analogy with a grievance in an employment context, which would be treated as confidential.

15. Mr Palmer on the other hand argued that the meeting should be conducted in public and not as exempt business. He placed particular stress on the principle of open justice and public accountability. He submitted that:

- a) the complaints concern allegations of inappropriate airing of complaints against staff in public;
- b) that if the complaint was upheld, that would be made public;
- c) that the underlying background concerns matters which are public.

16. Mr Palmer accepted that there would be some impact on the privacy of others, but submitted that the question was whether those rights outweighed Cllr Gottlieb's right to have his complaint determined in public. He argued that there was in fact no finding regarding the complaint of stress and he did not accept that there was a proper analogy to be drawn with an employment grievance procedure for example in relation to bullying. He pointed out that other cases had been heard in public: e.g. the *Heesom*² and *Honiton*³ cases.

17. We rose to give these matters consideration in private with the Independent Person and Legal Advisor. At the beginning of those deliberations the Legal Advisor informed us that the parties had correctly identified the relevant principles and that we had to give significant weight to the very important principle of openness and transparency and balance this against the rights of privacy and expectation of confidentiality in relation to the people referred to in the papers.

18. Following our deliberations, and upon returning to the meeting room, the Legal Advisor informed the parties of her legal advice as set out above, and we

² *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin)

³ *Taylor v Honiton Town Council & Anor* [2016] EWHC 3307 (Admin)

announced our decision which was that the resolution would be passed to exclude the public from the meeting during the consideration of the following items of business (namely the determination of the complaint) and that reasons would follow in writing. The reasons were:

- a) We accepted that the principle of openness and transparency was a very important one and that there had to be good reasons to outweigh it. We also accepted that a lot of what we are concerned with happened in public.
- b) However, the witness statements and a significant proportion of the emails were written in the expectation that these would remain confidential. These and the documents contained unguarded and frank personal comments and exchanges which were not intended for wider broadcast. For example, p137 para.37, p145 para.25, the email exchanges at pp798-809.
- c) There was personal information relating to the alleged effect of the various events on employees, for example p134 paras.22-3, p135 para.25, p142 para.13, p163 para.21. As employers we also have duties towards them.
- d) There was a significant risk that some of these matters could be reported on publicly in a manner which suggested that the facts asserted were uncontroversial.
- e) Finally, we were concerned that, in all the circumstances of this case, to have this meeting in public could inhibit others, particularly employees, from raising any complaints about the actions of an elected member.

19. Following the passing of that resolution, the Council nonetheless did not object to Cllr Gottlieb's wife remaining in the meeting on the basis that she treated what she heard as confidential. She gave her agreement. Cllr Burns also remained at the meeting but as an elected member she was entitled to do so.

20. On the substantive issues we heard lengthy submissions from Counsel which took up most of the day. We asked a few questions of the representatives. Neither party called any witnesses and no one availed themselves of the right,

set down in the procedure, to ask questions of either the investigator, the Monitoring Officer or Cllr Gottlieb.

THE CONDUCT FRAMEWORK

21. Winchester City Council's Code of Conduct provides, so far as material:

"3. General obligations of Members and Co-opted Members

As a Member of Winchester City council, your conduct will address the principles of the Code of Conduct by:

...

3.9 Behaving in accordance with all the Council's legal obligations, alongside any requirements contained in the Council's policies, protocols and procedures relating to conduct.

...

3.13 Valuing your colleagues and Officers of the Council and engaging with them in an appropriate manner.

3.14 Always treating all people and organisations with respect and propriety.

3.15 Providing leadership through behaving in accordance with these principles."

22. For present purposes, the relevant policies, protocols and procedures relating to conduct are contained in the Protocol for Member / Officer Relations and the Council Procedure Rules.

23. Insofar as relevant, the Protocol for Member / Officer Relations states:

"INTRODUCTION

1.1 The purpose of this Protocol is to guide members and officers of the Council in their relations with one another in such a way as to ensure the smooth running of the Council.

1.2 Given the variety and complexity of such relations, this Protocol does not seek to be either prescriptive or comprehensive. It seeks simply to offer guidance on some of the issues that most commonly arise. It is hoped, however, that the advice given on these issues will serve as a guide to dealing with other issues.

1.3 *This Protocol is to a large extent no more than a written statement of current practice and convention. It seeks to promote greater clarity and certainty. If the advice is followed, it should also ensure that members receive objective and impartial advice and that officers are protected from accusations of bias and any undue influence from members.*

1.4 *This Protocol also seeks to reflect the principles underlying the Code of Conduct and associated Protocols, and recognised practices that apply to members and officers. The object is to enhance and maintain the integrity (real and perceived) of local government and, therefore, to require very high standards of personal conduct.*

1.5 *It is important that any dealings between members and officers should observe reasonable standards of courtesy and that neither party should seek to take unfair advantage of their position.*

1.6 *Members should not raise matters relating to the conduct or capability of a Council employee or of employees collectively at meetings held in public. This is a longstanding tradition in public service. Employees have no means of responding to criticisms like this in public.*

If a Member believes that he/she has not been treated with proper respect and courtesy or has any concern about the conduct or capability of a Council employee he/she should raise the matter with the Head of the Team concerned, if it fails to be resolved through direct discussion with the employee.

The Head of Team will then look into the facts and report back to the member. If the member continues to feel concerned the member should then report the facts to the Head of Legal and Democratic Services, who will look into the matter afresh. If necessary the member can raise the matter with the Leader and the Chief Executive, if it is considered that the matter has not been satisfactorily resolved.

If a Member has a concern about the conduct or capability of a Director then he/she should raise that concern directly with the Chief Executive.”

24. This effectively recognises the importance of the mutual bond of trust and confidence between councillors and their officers, which is crucial to good and workable administration.

25. Rule 38 of the Council Procedure Rules states:

“ALLEGATIONS OF IMPROPER CONDUCT BY OFFICERS

If any member of the Council wishes to make an allegation about the conduct of an officer of the Council, the member shall only do so publicly or at any Committee or other meeting as a last resort having first:

(a) raised the matter in private with the member of the Corporate Management Team for the Team in which the officer serves or, if the allegation concerns a member of the Corporate Management Team, or if the member is dissatisfied with his/her initial approach to the member of the Corporate Management Team, raised the matter in private with the Chief Executive.

(b) if still dissatisfied, raised the matter with the Chairman (or in his/her absence the Vice-Chairman) of the Cabinet or appropriate Committee.”

ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

26. Article 10 of the European Convention provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions and penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the rights and interests of others..."

27. In summary, the right is not absolute: it may be restricted if (and insofar as) restriction is prescribed by law and "necessary in a democratic society for the protection of the rights and interests of others" – in other words any restriction must be a proportionate means of achieving a legitimate aim.

28. Mr Milford for the Monitoring Officer took us through the *Heesom* decision in some detail. We accept that the caselaw both at home and in Strasbourg has recognised the importance of expression in the political sphere and that it has long been recognised that that what is said by elected politicians is subject to "enhanced protection", that is to say a higher level of protection under article 10.

29. Both parties agreed that the speech in question here was political speech and thus entitled to enhanced protection and therefore that the justification for restriction needed to be correspondingly higher. We accept that and have proceeded on that basis.

30. We received competing submissions about the precise extent to which political speech could be restricted. However, in our view this is fact specific and we approach it in that context.
31. The Monitoring Officer's report set out⁴ that in practical terms the overall effect of Article 10 meant that we had to address the following issues in relation to each allegation of a failure by Cllr Gottlieb to comply with the Code of Conduct:
- a) The Committee should determine whether, apart from any consideration of Article 10, Cllr Gottlieb failed to comply with the Code of Conduct (taken together with any other relevant Council rules, policy or protocol). If not, there was no breach of the Code.
 - b) If so, the Committee should determine whether the resulting restriction on Cllr Gottlieb's right to express his opinions would achieve one or more of the legitimate aims identified above. If not, there was no breach of the Code.
 - c) If so, the Committee should determine whether any such restriction is a proportionate means of achieving the relevant legitimate aim(s). In doing so, the extent to which the relevant legitimate aim(s) would be achieved must be balanced against the interest in open discussion of matters of public concern and the enhanced protection given to Cllr Gottlieb's political speech. If not, the Committee should conclude there was no breach of the Code.
 - d) If so, the Committee should determine that there was a breach of the Code.
32. We accept this approach which we are advised is consistent with *Heesom* and we did not understand Mr Palmer to be dissenting from that.

THE COMPLAINTS

33. The complaints all concern statements by Cllr Gottlieb which, in summary, are said to amount to public criticism of officers in breach of the Code as read with the Member/Officers Protocol and Rule 38 which provides for an internal redress mechanism which must be used prior to any ability to go public.

⁴ P16, para.52

34. The statements have been helpfully distilled down into six particular instances as set out at paragraph 27 of the Monitoring Officer's report. Item (c) was not pursued by the Monitoring Officer at the hearing and so we disregard it. The five remaining statements are as follows (using the report's original numbering):

(a) The statement made in the Southern Daily Echo dated 11 February 2015 that "the position of those who led and guided this process are now clearly untenable. The Chief Executive (Simon Eden) together with the... Corporate Director (Steve Tilbury) should immediately resign."

(b) A statement dated 17 March 2016 sent to the Hampshire Chronicle at which he said "I therefore repeat my call for his [the Chief Executive's] resignation as the underlying issues are too critical and too many lessons to be subverted... it seems we need a whole new senior management team";

(c) [not pursued]

(d) The report from Cllr Gottlieb sent to all Members of the Council on 28 August 2015 and produced to Claer Lloyd Jones;

(e) The email from Cllr Gottlieb sent to all members and staff of the Council on 8 December 2015 relating to the retirement of the then Section 151 Officer and Monitoring Officer which called for "an apology";

(f) A statement made to the BBC on 12 April 2016 which included the statement "the team which mismanaged the project of the Council is still in place and if they remain in control there is no expectation of anything improving any time soon. A prerequisite for a successful future for Winchester must come, in my view, with a completely new senior management team including a new Chief Executive."

35. There is no dispute that these statements were made by Cllr Gottlieb or that he was acting in his capacity as a councillor at the time.

BACKGROUND

36. The overall context of the events giving rise to complaints relates to the proposed major development of a site in central Winchester known as Silver Hill. It is clear from the papers and also our experience as members of the Council that views on the development differed, sometimes very widely, and that the project overall was and remains a matter of legitimate public and political interest. Indeed the Monitoring Officer fairly accepts this in her report.⁵ Cllr Gottlieb is a long-standing proponent of the view that alternative development schemes should be considered on this site.⁶

37. Our task is not to decide who was right and who was wrong on any particular point but to assess the question of breach of the Code by reference to each complaint in its proper context. We therefore set out a basic overview of the relevant background prior to turning to our assessment and reasoning.

38. In 2004 the Council entered into a contract (“the Development Agreement”) with a developer, Thornfield Properties (Winchester) Limited (“Thornfield”), for the comprehensive redevelopment of the Silver Hill area by way of mixed-use development. Planning permission for the redevelopment was granted by the Council in 2009 but in early 2010 Thornfield went into administration and later that year Henderson Global Investors (“Henderson”) acquired the developer from the administrator. Thornfield was renamed as Silver Hill Winchester No.1 Limited (“Silver Hill”).⁷

39. In 2011 the Council made the compulsory purchase order to enable it to acquire all of the outstanding interest in the site. A public inquiry was held. The Inspector recommended that the Secretary of State confirm the CPO and the CPO was confirmed on 20 March 2013.⁸

40. Between 2009 and 2014 the Development Agreement was varied a number of times and by letter dated 12 June 2014 Silver Hill sought the Council’s consent to further variations. These included a reduction in the number of residential units

⁵ P15 para.48.

⁶ High Court Judgment at para.151.

⁷ This general background is taken from the facts set out by the High Court in *R (on the application of Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin) (“the Judgment”).

⁸ Judgment paras. 25-27.

and car parking spaces, the removal from the scheme of a bus station and its replacement by an on-street interchange and facilities, changes to the arrangements for affordable housing and other matters. There were some further changes proposed during the course of seeking agreement but in broad terms, by a decision dated 6 August 2014 the Council agreed to the variations.⁹

41. In the meantime, on 10 June 2014, Cllr Gottlieb wrote to the then Chief Operating Officer, Mr Whetnall, seeking to lodge a formal complaint against the then Chief Executive Mr Eden and the Corporate Director Mr Tilbury. He set out an outline of the complaints which criticised their competence and conduct in relation to the Silver Hill development project, and sought confirmation of the procedure for dealing with the complaints.¹⁰

42. On 12 June 2014 Mr Whetnall responded by email, acknowledging receipt of the complaints and explaining that the appropriate procedure was that contained in Council Procedure Rule 38(b) and that the matter would thus be referred to the Chairman of Cabinet, Cllr Humby, who would consider the complaints once Cllr Gottlieb had submitted the further details he had referred to. Mr Whetnall pointed out that the Rule provided that *“further public comment should not be made at the Council’s meetings while this process is in progress.”*¹¹

43. Cllr Gottlieb responded on the same day, submitting that

*“because Cllr Humby may himself be the subject of a related complaint I would suggest that it is inappropriate for him to preside over this matter. I understand that this will pose a problem but I have heard that sometimes other authorities, such as [Hampshire County Council], will be asked to assist. I note and will respect what you say about public comment. I trust though, that you will have no difficulty with my speaking to Cllr Godfrey who I understand is PH for personnel matters.”*¹²

44. Cllr Godfrey, having now been sent the exchange referred to above by Cllr Gottlieb, stated in his email of 12 June 2014 to Cllr Gottlieb:

“I am not surprised that you have followed this course of action – it may be the most appropriate way of resolving some of your concerns on a number of issues.

⁹ Judgment para.32.

¹⁰ P339

¹¹ P338

¹² Pp337-8

I agree that [Cllr Humby] might not be best placed to investigate your complaint and will suggest that an external legal person is retained to do this – HCC might be too close, in my opinion.

...I and many others share your concerns about the scheme and, although we may differ in the approach we follow to deliver the best for Winchester, we do not want to lose the essence of those concerns.”¹³

45. Cllr Gottlieb did not in fact pursue this matter further at the time.

46. On 4 September 2014 Cllr Gottlieb brought judicial review proceedings against the Council in respect of the 6 August decision, having previously, on 13 August 2014, served a pre-action letter on the Council threatening to do so.¹⁴

Permission to apply for judicial review was initially refused on the papers but granted on an oral renewal on 18 November 2014 on one ground: namely whether the 6 August decision was unlawful because, having varied the terms of the Development Agreement, the Council was required to carry out a procurement exercise under Directive 2004/18/EEC and the Public Contracts Regulations 2006. In summary it was Cllr Gottlieb’s view that a fresh procurement exercise was required and the Council’s position that it was not.¹⁵

47. The matter was heard before a High Court Judge on 28 and 29 January 2015.

By a judgment handed down on 11 February 2015, Mrs Justice Lang held that the varied contract was materially different in character to the original contract and that accordingly the Council’s decision to authorise variations to the Development Agreement, without carrying out a procurement process as required by the Directive and Regulations, was unlawful.¹⁶

48. The Council submitted that the court ought to refuse a remedy in the exercise of its discretion on the grounds that no useful purpose would be served by quashing the decision and the Claimant (Cllr Gottlieb) had no interest in the observance of the public procurement regime.¹⁷

49. This submission was rejected by the Judge. She said:

¹³ P337

¹⁴ P70, para.9.9

¹⁵ HC Judgment paras.5-7.

¹⁶ HC Judgment para. 142.

¹⁷ HC judgment at [143]

145. *“In my judgment, the Council has committed a serious breach of the procurement regime, which is both substantive and procedural in nature. This is the second occasion upon which it has committed such a breach in the lifetime of one contract. It would be an exceptional course to allow its unlawful decision to stand.*
146. *The Council's failure to follow an open, competitive, transparent and non-discriminatory procurement process for such an important contract, at any stage, casts real doubt on whether the scheme proposed by the Developer is the best scheme on the best terms available.*
147. *Deloitte negotiated the variations with the Developer and recommended them to the Council in 2014, advising that "the revised terms represented an attractive financial arrangement for the Council in respect of the delivery of the revised scheme, and not one that was likely to be improved on by marketing the opportunity to be the developer.." (Mr Owen's 1st witness statement, paragraph 35). Deloitte made this judgment without having the benefit of considering any alternative bids. In their negotiations and advice to the Council, they were subject to the constraints imposed by the Council, namely, that the existing scheme should be preserved, and changes should be limited so far as was possible, in an attempt to avoid triggering a procurement process. The Council was keen to proceed with the scheme as soon as possible. So Deloitte was not asked to assess the merits of this scheme against the possibility of any alternative scheme with any other developer.*
148. *Deloitte was, naturally, only considering the financial aspects of the scheme. However, the architecture, design and layout of the scheme are as important as the cost, given its setting in the heart of an historic cathedral city. The Developer had responsibility for presenting the architecture, design and layout of the proposed scheme to the Council. If there was an open competition, other bidders could present alternative, and perhaps improved, proposals. Although the desirability of development on the Site is acknowledged, there has been widespread concern among local people that the appearance, height, bulk and density of the new buildings are out of character with the surrounding buildings and streets.*
149. *The changes to the plans for the City's central bus terminus and the proposed loss of 35% affordable housing are major ones, which merit a genuine re-consideration of the original scheme, with the benefit of an open competition introducing new bidders with fresh ideas.*
150. *Whilst delay is always regrettable, there is no pressingly urgent need to develop this Site. The Council does have time to consider the various options available to it.*
151. *The Claimant, in his capacity as a resident, council tax payer, and City Councillor, has a legitimate interest in seeking to ensure that the elected authority of which he is a member complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme for the City of Winchester. He has been closely involved*

in the consideration of this scheme at different stages, both as a Councillor and as a long-standing proponent of the widely-held view that alternative development schemes should be considered on this site. It is noteworthy that his standing to bring this claim was not disputed at permission stage.

152. *It is well-established that a direct financial or legal interest is not required to establish standing to bring a claim for judicial review...*

153. *This claim is distinguishable on the facts from R (Chandler) v Secretary of State for Children, Schools and Families [2010] LGR 1, where the court held that the claimant lacked standing to bring a judicial review claim because she did not have any interest in the observance of the public procurement regime, being motivated by her political opposition to academy schools. In contrast, the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs.”*

50. There was a great deal of disquiet about the court case and what it revealed.

51. On the day of the judgment the then leader of the Council, Cllr Robert Humby, issued a press release defending the decision to have proceeded with the project.¹⁸

52. Also on 11 February 2015, Cllr Gottlieb made his statement reported in the Southern Daily Echo dated 11 February 2015 that “the positions of those who led and guided this process are now clearly untenable. The Chief Executive (Simon Eden) together with the... Corporate Director (Steve Tilbury) should immediately resign.” This is Item 27(a) in the Monitoring Officer’s report.

53. The Council did not seek to appeal the judgment. However the Developers did and eventually obtained permission to appeal.

54. On 17 February 2015 the Leader (Cllr Rob Humby) and Deputy Leader (Cllr Vicki Weston) resigned their positions. Cllr Pearson was elected the new Leader at the next full Council meeting.

55. On 18 February 2015 Mr Eden issued a letter to all members stating that public statements by members risked exposing the Council to significant legal claims by its staff; members should follow the procedures for complaints about officers and

¹⁸ P249

there should be no further public statements.¹⁹ The letter also noted that Members had made it clear that they would like to see a full and independent review into the decision-making surrounding the Silver Hill scheme and advice given to support that.

56. On 19 February 2015 there was a Council meeting at which the new Leader Cllr Pearson was asked searching questions about the Judgment by Members including Cllr Gottlieb.²⁰ This included a question from Cllr Lipscomb, asking the Leader to note “*the deep concern of Members that the Judgment has exposed serious flaws in the quality of advice and risk assessment provided by Officers and their external legal advisors, on which Cabinet and ultimately Council relied in making decisions which Mrs Justice Lang has found to be seriously contrary to law*”.

57. On 10 March 2015, Claer Lloyd-Jones, a solicitor based in London, was appointed as the external independent reviewer. Her brief and terms of reference are set out in section 2 of her report. In essence:

“In summary, the review is to consider whether:

- *Appropriate advice was sought;*
- *Advice was correctly interpreted and clearly presented in reports put before elected members; and*
- *The advice given was taken into account in decision-making.”²¹*

58. We accept Mr Palmer’s submission that the scope of Ms Lloyd-Jones’ investigation was quite wide and that it specifically included questions relating to the advice that was sought and whether that advice was ‘properly put’ to members. For example, on one view there was an issue arising as to whether there had been a change of advice on the question of variation which was not properly drawn to the attention of Members.²²

¹⁹ P59

²⁰ Pp251-253

²¹ P537

²² For example, section 4.7 of the Lloyd-Jones report at pp549-551.

59. In May 2015, Cllr Godfrey became Leader of the Council.
60. On 31 July 2015 Cllr Gottlieb emailed the Chief Operating Officer Mr Whetnall stating that “events in recent weeks” had prompted him to revisit his earlier 2014 complaint against the Chief Executive.²³
61. Mr Whetnall’s response is dated 4 August 2015 and refers back to the Rule 38 procedure, this time referring to Cllr Godfrey as he had now become Leader. Insofar as Cllr Gottlieb had concerns about his ability to make frank submissions to Ms Lloyd-Jones, Mr Whetnall advised him to raise such points “*directly with her now, before she stops taking submissions and submits her report.*”²⁴
62. Cllr Gottlieb made his further submissions to Ms Lloyd-Jones in a document dated 28 August 2015 entitled *The Silver Hill Review, A note on the provision of legal advice to Winchester City Council.*²⁵ This Note contains his analysis of the legal advice given to the Council over the years. On or around that date Cllr Gottlieb sent this document by email both to Ms Lloyd-Jones and to all members. This is the report referred to as item 27(d) in the Monitoring Officer’s report. The covering email is not in the papers but the fact that he sent it to Ms Lloyd-Jones and Members is not in dispute.
63. On 13 September 2015 Cllr Gottlieb asked Cllr Godfrey for permission to send others his Note.²⁶
64. Cllr Godfrey responded by email the same day informing him that he should discuss this with Mr Whetnall in the first instance but that he was “not happy with the approach that you use in your recent report” and would be writing to him later about this.²⁷
65. That evening Cllr Godfrey did so by an email sent to all Members, Mr Eden and Ms Lloyd-Jones.²⁸ This email is heavily relied upon by Mr Palmer as evidence of

²³ P80

²⁴ P79

²⁵ P63.

²⁶ P734

²⁷ P734

²⁸ P719

Cllr Godfrey 'nailing his colours to the mast' and therefore to his argument that Rule 38 was a wholly unviable procedure to complaints relating to the same matters. It is necessary therefore to set out a substantial part of it:

"In that report, you make some very clear and, in my opinion, defamatory statements about senior officers employed by the City Council. These statements are rude, disingenuous and damaging, both to your Silver Hill campaign and to the smooth operation of the City Council.

By these personal attacks on the employees of the City Council in a manner that is likely to receive a wide circulation, you undermine the important relationship between elected members and the public servants who carry out the decisions made by the councillors...

By openly castigating senior officers in the way that you have done, you are using your dominant position as a councillor to give prominence to your views on officers when they are unable to respond. This tactic is unacceptable, particularly when the vast majority of other councillors, including myself, firmly believe that Winchester is served by excellent public servants who all do their very best to meet the needs of our district's residents.

...I require you to immediately stop insulting and criticising officers and to apologise, through the Chief Executive, to those officers that are justifiably offended by the criticism in your report."

66. On 16 September 2015, Mr Eden wrote a strongly worded letter to all Members about Cllr Gottlieb's Note which he stated had, "ostensibly" been prepared for the independent investigator (in our view on the evidence we have seen it was prepared for that purpose, particularly in light of the earlier express invitation to make submissions directly to her). The letter then stated, "*her terms of reference ask her to advise on aspects of the process and procedure of the City Council which should be improved in the light of the Judicial Review decision on Silver Hill. They do not invite her to apportion blame.*"²⁹ In our view this is not an accurate summary of her terms of reference as set out earlier and narrows their scope. Whilst we agree that it was not her function to apportion blame, her terms of reference did allow her to consider where things might have gone wrong, and thus by implication that there might have been failings at officer level.

67. In a separate letter to Cllr Gottlieb of the same date, Mr Eden repeated his concerns about the content of the Note which he said contained a number of

²⁹ P85

overt criticisms of individual officers who were identified and that its “open circulation” would put Cllr Gottlieb of having breached the Code, Rule 38 and the Member/Officer Protocol.³⁰

68. On 23 October 2015 Cllr Gottlieb made a formal complaint to Mr Whetnall about the conduct of Mr Eden as Chief Executive.³¹ The email stated that the matter related “chiefly to Silver Hill” and concerned Mr Eden’s conduct which in his view had “not been of a standard to be expected of someone in his position”. It was accompanied by a five page document setting out the outline grounds of the complaint.³² The email went on:

“Because the Leader, Cllr Godfrey, has been complicit in and unwilling to challenge the events and decisions that lie behind this complaint, it is not feasible for him to have any involvement in the consideration of this complaint and the procedure involved.

...my primary concern is for the procedure you will implement which must involve an external body. The same procedure, or very similar, will need to be implemented to also deal with the complaints I intend to submit shortly in respect of the conduct of Steve Tilbury and Kevin Warren, also in relation to Silver Hill...”

69. In the event no such complaints were submitted, because, submitted Mr Palmer, the question of the procedure was never resolved.

70. Cllr Gottlieb’s complaint was supplemented by an email of 26 October 2015 relating to Mr Eden’s handling of Ms Lloyd-Jones’ independent review.³³

71. Mr Whetnall responded by email on 5 November 2015. In summary, he confirmed that he had informed the Leader and the Chief Executive of the complaint but not the details (as requested by Cllr Gottlieb). He referred back to his earlier email of 4 August regarding the process: i.e. that the complaint should in the first instance be made to the Leader:

“However, if the Leader decided the matter should be taken further it would be at that stage that the need for any outside involvement would be considered and would be a matter for Member level decision. However, any such involvement

³⁰ P83.

³¹ P347

³² Pp348-352

³³ Pp354-5

*could only relate to advice, and not transfer of responsibility for any decision to another body.*³⁴

72. Insofar as Cllr Gottlieb's assertion that Cllr Godfrey should not be involved in the consideration of the complaint or the process adopted, Mr Whetnall explained:

"I have consulted Cllr Godfrey on your comments, and he does not agree that he is in any way prejudiced from handling your complaint. Should you proceed with the complaint, he proposes to consider it and respond in due course.

However, in order for the Leader to be able to consider it:

(a) You will need to remove your restriction on the details being supplied to him.

(b) You will also need to remove your restriction upon the details being withheld from the Chief Executive. In dealing with any complaint it will be necessary for the Leader to give the opportunity for the Chief Executive to comment on your allegations.

*(c) You have suggested that you propose to submit further written material. Can you clarify your instructions on this point.*³⁵

73. Cllr Gottlieb then sent an email directly to Cllr Godfrey dated 6 November 2015 in an attempt to persuade him that he was not in a position to deal fairly with Cllr Gottlieb's complaint and setting out reasons for his assertion.³⁶

74. Cllr Godfrey responded by email on 13 November, referring back to the Procedure Rules and stating that once he had received the complaint and the response from the Chief Executive he "may need to seek expert advice" but without seeing the complaint he did not know yet whether that would be appropriate in this instance.³⁷

75. On 4 December 2015 Cllr Gottlieb responded to Cllr Godfrey once again challenging his assertion that he could deal with the matter fairly and pointing out that only last year Cllr Godfrey appeared to think that going outside the Council was a reasonable approach.³⁸

³⁴ P357

³⁵ P358

³⁶ P367

³⁷ P366

³⁸ Pp365-6

76. On 8 December 2015 Cllr Godfrey responded to this email on a point by point basis. The detail of that is set out, so far as necessary, under the analysis section. For present purposes however, it is sufficient to note that Cllr Godfrey did not accept the criticisms made of his ability to consider the matter.
77. On the same day, a series of emails were exchanged which resulted in Cllr Gottlieb saying that two officers, who were being made redundant, deserved an apology.³⁹ This is item 27(e) in the Monitoring Officer's report and the detail relating to that is set out so far as necessary under the analysis of that complaint.
78. On 27 January 2016 Ms Lloyd-Jones issued her final report.⁴⁰ This contained various findings and recommendations. Her report is criticised in a number of respects by Mr Eden, who issued a report on it on a date that is unclear but was for the committee meetings due to occur on 10 February 2016.⁴¹ In respect of the question as to the later advice from Leading Council being 'out of step' in relation to the earlier legal advice received from other Leading Counsel, Mr Eden attached a fairly detailed response from the later barrister concerned, Mr Paul Nicholls QC, which explains, in essence, that in his view the matters were not so clear cut.⁴² Ms Lloyd-Jones issued a response dated 10 February 2016 defending her report.⁴³
79. On 19 February 2016 the Head of Legal and Democratic Services Mr Howard Bone issued advice to all Members setting out the relevant procedures for making a complaint in respect of an officer and stating that where the complaint concerned the Chief Executive himself, the complaint should be made directly to the Leader.⁴⁴
80. On 17 March 2016 the Hampshire Chronicle published a letter from Cllr Gottlieb repeating his call for the resignation of the Chief Executive and stating that a

³⁹ P231, also, in its wider context, see pp714-717.

⁴⁰ Pp531-71

⁴¹ Pp263 onwards

⁴² Pp272-5.

⁴³ Pp276

⁴⁴ Pp88-9

whole new senior management team was required.⁴⁵ This is item 27(b) in the Monitoring Officer's report.

81. On 6 April 2016 Henderson's withdrew its appeal against the High Court Judgment.
82. On 12 April 2016 Cllr Gottlieb issued a press release, through an external PR agency, in which he called for "a completely new senior management team including a new Chief Executive."⁴⁶ This is item 27(f) in the Monitoring Officer's report.
83. Cllr Godfrey's complaints followed shortly thereafter as set out earlier, and Mr Eden's followed in August 2016.
84. Mr Eden resigned as Chief Executive in June 2016. He explains in his Witness Statement that this was nothing to do with the issues around Cllr Gottlieb and that he had been considering his next career move for some time.⁴⁷ Mr Tilbury remains in post in the Council.

ANALYSIS

85. Taking each complaint in turn but in chronological order.

Item 27(a) – Southern Daily Echo statement of 11 February 2015 that “the positions of those who led and guided this process are now clearly untenable. The Chief Executive (Simon Eden) together with the... Corporate Director (Steve Tilbury) should immediately resign.”

86. Applying the set of questions set out at paragraph 52 of the Monitoring Officer's report, we answer them as follows:

Question (a) Apart from Article 10, did Cllr Gottlieb fail to comply with the Code of Conduct (taken together with any other relevant Council rules, policy or protocol)?

87. On behalf of the Monitoring Officer it was submitted that this statement imputed the conduct and capability of both Mr Eden and Mr Tilbury and was a breach of

⁴⁵ P90

⁴⁶ P91-2

⁴⁷ P139 para45.

para.3.9 of the Code (because the internal Rule 38 procedure should have been used) and a breach of paras.3.13-3.15. The Monitoring Officer emphasised that whilst Mr Gottlieb had raised a complaint in respect of both these officers in June 2014, this was not pursued at the time.

88. Mr Palmer emphasised the timing of the statement, issued as it was on the day of the High Court Judgment. He submitted that the statement was not an allegation of 'improper conduct' which is what he submits Rule 38 is directed at, but rather it was a call for the immediate resignation of the Leader, Deputy Leader and senior management team following 'the thunderbolt of the judgment criticising the Council in trenchant terms'. It was a call for a 'clean broom' as he put it, and he submitted that it was wholly unrealistic to suggest, in the context of what had occurred until then and the handing down of this judgment which did make serious criticisms of the Council, that Cllr Gottlieb should have instead started an internal complaint.

89. In his reply on the law, Mr Milford submitted that Rule 38 was not only about "improper conduct" in a narrow sense and that it should be read with paragraph 1.6 of the Members/Officer Protocol which refers to conduct and capability. He further submitted that in any event it was an attack on both their competence and their bona fides. Mr Palmer in his reply to Mr Milford did not accept either of those submissions.

90. In our view, the reference to 'conduct' in Rule 38 should not be read restrictively and insofar as necessary it should be read with paragraph 1.6 of the Protocol. In its natural meaning conduct is a broad term which can encompass "leadership, command, management" as well as the manner of conducting oneself.⁴⁸ To read "conduct" in the narrow way contended for by Mr Palmer (as effectively being one half of 'conduct and capability') would leave a significant gap in the Council's procedures and a host of practical difficulties in identifying whether the concern is correctly classified as conduct or capability. To criticise either in public (e.g. by press statements) is potentially highly detrimental to good relations and unfair to officers (we note, for example that 1.6 of the Member/Officer Protocol on its own

⁴⁸ Shorter Oxford English Dictionary, 5th Ed, Vol.1.

would not cover this situation as it refers to “meetings held in public”). Given the importance of the internal complaints mechanism and the role that it plays in maintaining mutual trust and confidence, this cannot have been the intention when Rule 38 was drafted and we reject such a narrow approach in favour the broader meaning which includes behaviour and competence or capability and which is in our view more consistent with the natural meaning of the word ‘conduct’ in the context of Rule 38.

91. But in any event, on either approach to the meaning of conduct, the statement set out falls within the scope of Rule 38. In our view it implied both that Senior Officers were incompetent and that their behaviour or good faith was in issue. The statement referred to the Officers by name and gave their professional titles, stated that their position has become “clearly untenable” and that they should “immediately resign”. In our view that implied that it was not just a question of capability but rather that there was an element of bad faith or behaviour which rendered their continued employment at the Council “clearly untenable” and meant that the only proper course was resignation.

92. The officers were not in a position to respond publicly to this criticism.

93. In our view this was a breach of the Rule 38 procedure. At this stage Cllr Humby was the Leader of the Council and no reasoned basis had been put forward as to why he could not determine the matter save for a general submission that it would be inappropriate for him to do so because a complaint against him might follow. It was not argued that he was compromised. No real effort was made to resolve this internally prior to making this public statement.

94. We also find that the statement was a breach of paragraphs 3.13 and 3.14 of the Code. Issuing press statements imputing the conduct of individual officers by calling for their resignation is not ‘valuing your colleagues and Officers and engaging with them in an appropriate manner’ because the officers are not able to respond publicly to criticism. Furthermore and for the same reason it constitutes a failure to treat all people with respect and propriety.

95. As to paragraph 3.15 we have had difficulty in working out what this means. If a person is already in breach of the principles laid out in the Code, then how does

an allegation that they failed to provide leadership by acting in accordance with those principles add anything? It appears to us to add little to paragraph 3.13 and 3.14 or at least in this context and accordingly we do not find a breach of paragraph 3.15.

Question (b) Does the resulting restriction on Cllr Gottlieb's right to express his opinions achieve one or more legitimate aims?

96. It is inherent in the system of local government that it is for elected members to decide on the policies that are to be adopted, and to answer for those policies to the electorate; and it is for officers, who are loyal to the council as a whole, to advise members and implement their decisions in a politically neutral manner. It is therefore in the public interest that unelected officers are not subject to criticism or undermined in a manner that prevents them from performing their public duties in this way or in a manner which undermines public confidence in public administration.

97. In our view the restrictions on a member's ability to criticise officers or call for officers to resign in public meet the following legitimate aims:

- 1) Protection of an officer's private interests (in terms of his or her honour, dignity or reputation) who is not able to fight back;
- 2) Protection of staff from unwarranted stress and anxiety;
- 3) Protecting good member relations;
- 4) Ensuring the smooth functioning of the Council;
- 5) Maintaining the reputation of the Council itself.

98. On the second issue, protecting staff from unwarranted stress and anxiety, there was a dispute between the parties as to the extent that this could properly be established here. Mr Milford relied upon the Witness Statements which set out the effect that these various matters had had upon officers and one officer in particular. Mr Palmer argued that we were not entitled to find, as a result of those statements, that the alleged stress suffered was as a result of Cllr Gottlieb's actions. That evidence had been squarely before the Investigator who had expressly made no finding on that issue. The witnesses had not been called and Mr Palmer had therefore not been able to cross-examine them. Mr Milford

accepted that the fact that they had not been called meant that less weight could be given to the statements but submitted that it was simply a matter of common-sense that accusations of this nature would cause stress.

99. It seems to us that it is obvious that public criticisms of officers when they are unable to respond is likely to cause upset and potentially stress. That is a fundamental part of the reasoning underlying the Officer / Member Protocol. We accept that, in light of the investigator's decision to make no finding on the question of stress and the lack of any witnesses, it would be unfair of us to make any specific findings on stress and the cause of it and so we do not do so. We do however factor in the potential for stress in the balancing exercises that we conduct later when considering Article 10.

Question (c): Is the restriction a proportionate means of achieving the relevant legitimate aim?

100. *Heesom* explains, at paragraph 42(ii) that whilst it is a legitimate aim to protect public servants from unwarranted comments that have, or may have, an adverse effect on good administration:

"Nevertheless, the acceptable limits of criticism are wider for non-elected public servants acting in an official capacity than for private individuals, because, as a result of their being in public service, it is appropriate that their actions and behaviour are subject to more thorough scrutiny".

101. At para.42(iii) the Judge further explained:

"Where critical comment is made of a civil servant, such that the public interest in protecting him as well as his private interests are in play, the requirement to protect that civil servant must be weighed against the interest of open discussion of matters of public concern and, if the relevant comment was made by a politician in political expression, the enhanced protection given to his right of freedom of expression..."

102. In this case, we accept that the circumstances in which the statement in Item 27(a) was made were very unusual: the application for judicial review, the fact that it was brought by an elected member against his own Council, that he was successful and that the terms of the judgment were clearly critical of the actions of the Council (in particular at para.145). We also accept that it is relevant that

the statement was made on the same day as the judgment was handed down and in response to it.

103. However, in our view Cllr Gottlieb still overstepped the line here. The judgment itself does not criticise individual officers. There was an internal procedure for raising the concerns which had not been sufficiently explored at this stage. Although Cllr Gottlieb had raised a complaint against Mr Eden and Mr Tilbury in June 2014 and raised a concern about whether the then Leader, Cllr Humby, was in a proper position to deal with it, this was not pursued at the time or at any time up to 11 February 2015 when the statement was made. It is true that Cllr Humby did subsequently resign as Leader but he had not resigned at the time of the statement. In our view the internal procedures provide an important safeguard for balancing the competing rights of individuals and they should in general be properly explored before the member is entitled to conclude that the procedure is not 'reasonably open to him' to use the phrase in the Monitoring Officer's report at para.60. The criticism of the officers in the statement of 11 February 2015 was not a 'last resort'. Accordingly, and applying the enhanced protection given to Cllr Gottlieb's right of freedom of expression, we find that in weighing the legitimate aims (in particular the protection of officers from public criticism to which they cannot respond) against the interest of open discussion of matters of public concern, the balance falls in favour of the restriction in this instance.

104. Accordingly, we find a breach of paragraphs 3.9, 3.13 and 3.14 of the Code in respect of Item 27(a). We do not find a breach of paragraph 3.15 of the Code for the reasons set out earlier under Question (a).

Item 27(d) – the report from Cllr Gottlieb sent to all Members of the Council on 28 August 2015 and produced to Claer Lloyd Jones

Question (a) – whether, absent Article 10, Cllr Gottlieb failed to comply with the Code?

105. Counsel for the Monitoring Officer made it clear that this is alleged to be a breach of paragraphs 3.13 to 3.15 of the Code only. As to paragraph 3.15 we repeat what we said earlier in respect of Item 27(a).

106. In our view the drafting of the report and sending it to Ms Lloyd Jones was not a breach of the Code in light of her terms of reference and the fact that Cllr Gottlieb was specifically told to make his submissions directly to her.
107. Insofar as sending it to Members is concerned, in our view this was not a breach of the Code either. Whilst the submissions contain criticism of officers, it is accepted on behalf of the Monitoring Officer that these were genuinely held views and it is not alleged that anything in the report was made in bad faith or, for example, gratuitously offensive. The points made in the report are matters which could have been raised in internal discussions between Members and so we do not accept that to do so in writing in this context was a breach of the Code.
108. We have noted that the report was not marked Confidential and that this may have contributed to it being more widely disseminated to members of staff. It clearly would have been preferable if the report had been marked in that way. However, it is not alleged that Cllr Gottlieb disseminated it other than to Ms Lloyd Jones and Members and indeed the exchange of emails set out at pages 734-740 of the bundle is consistent with Cllr Gottlieb being careful about this. These emails which date from 13 to 28 September 2015 show Cllr Gottlieb expressly seeking permission to release the report to specified named individuals (in the early emails) and under the whistle-blowing policy (in the later ones). It is noted that all the emails have a subject line indicating that the matter is private or confidential and when he was directed to provide a copy of his report to Mr Whetnall, he did so in an envelope marked 'private'.
109. Accordingly and whilst we accept that the contents of the report may be liable to cause officers stress and worry, and whilst in future more care must be taken to ensure that matters which are meant to be internal to Members remains so, the dissemination of the report of 28 August 2015 to Ms Lloyd Jones and Members was not a breach of paragraphs 3.13 or 3.14 of the Code.
110. In the alternative, if we are wrong about that, then in our view the restriction in question would be a disproportionate interference with Cllr Gottlieb's right to political expression on matters of legitimate public concern and we would have found no breach for that reason.

Item (e) – the apology email of 8 December 2015

111. This concerns an email sent by Cllr Gottlieb to all staff and members on 8 December 2015 in response to an email from Mr Eden similarly addressed. Mr Eden’s email informed the addressees that, following organisational change resulting in the removal of two posts and their replacement with one differently titled post, the two named members of staff concerned had opted to be made redundant rather than apply for the new role. The email concluded by thanking the staff members concerned.

112. Cllr Gottlieb’s emailed response was:

“This is very sad news. My personal view, which I’m sure is shared by others, is that not only do [the named officers] deserve our tremendous thanks and very best wishes, they also deserve an apology. I hope it is forthcoming.”

113. This provoked a further exchange of emails over the following days between Mr Eden and Cllr Gottlieb, but it is unnecessary to set these out here.⁴⁹

114. This particular exchange has already been the subject of consideration by a Standards (Assessment) Sub-Committee following a complaint made by Cllr Godfrey on 30 December 2015.⁵⁰

115. Although the complaint was in fact directed at a slightly later email in the subsequent exchange (10 December 2015) it is clear from the Decision Notice dated 16 February 2016 that the Sub-Committee was considering “all the emails” in that exchange⁵¹ and they specifically considered Cllr Gottlieb’s email of 8 December 2015.⁵²

116. The sub-committee’s decision was, in essence, that although a breach of the Code “might have occurred”, taking into account the nature of the conduct complained about, the cost and practicalities of the investigation, and the possible outcomes and sanctions following an investigation, the complaint should not be referred for investigation. However “it was not appropriate to decide that

⁴⁹ Pp 714-18.

⁵⁰ P713

⁵¹ P733

⁵² P732-3

no further action should be taken” and therefore “in this instance, the appropriate course of action was for the Monitoring Officer to give general advice to all Members and draw their attention to the existence of appropriate processes and procedures to be followed if Members wish to complaint about the conduct of either other Members or staff”.⁵³ Mr Bone’s letter of 19 February 2016 referred to in the Background section, is the response to this finding.

117. Mr Milford submitted that this did not constitute ‘double jeopardy’ because the original complaint did not in fact seek a sanction or a finding of breach. We do not agree. The complaint clearly alleged various breaches of the Code and sought consideration by the Standards Committee. The Standards (Assessment) Sub-Committee did consider it. It would have been open to them to refer the matter on for investigation but in the event they did not for the reasons that they gave. In our view the Decision Notice issued by that Sub-Committee constitutes a decision on this complaint and we do not think it would be appropriate to revisit that determination. Accordingly, the complaint that the email of 8 December 2015 is a breach of the Code is not upheld.

Item 27(b) the 17 March 2016 letter to the Hampshire Chronicle

Question (a) Apart from Article 10, did Cllr Gottlieb fail to comply with the Code of Conduct (taken together with any other relevant Council rules, policy or protocol)?

118. The first part of the letter on p90 of the bundle calls into question the Chief Executive’s conduct even on the narrow definition put forward on behalf of Mr Gottlieb. The phrase that the Chief Executive “attacked the independent inquiry commissioned into her...” amounts to an allegation of improper conduct (i.e. it implies that he was not entitled to do so). Similarly the assertion that the Chief Executive has “for all practical purposes, taken control of how the Council will next react to the Claer Lloyd Jones report” is an accusation of improper conduct. It is the administration (i.e. the elected members) who set the policies for the running of the Council and it is the officers who are there to carry those policies out and implement the strategy. This is an accusation that the Chief Executive is seeking to usurp that. The point arises again in the use of the word “subverted”

⁵³ p733

in the next sentence. These are all reasons given to justify Cllr Gottlieb's call for the Chief Executive's resignation in the first paragraph.

119. The final paragraph calls for "a whole new senior management team with the skills, experience, and dare I say, vision to ensure that these major development projects succeed in enriching and beautifying the City." In our view this paragraph implies criticism of the senior management team and calls into question the competence of the senior management team which falls within the meaning of conduct in the broader sense that we have set out earlier.

120. As to para.3.13 and the need to engage with others 'in an appropriate manner' it is our view that setting out criticisms of the Chief Executive and the senior management team by means of the letter to the Hampshire Chronicle did not value Officers or engage with them in an appropriate manner. We therefore find that, apart from any consideration of Article 10, Cllr Gottlieb is in breach of paragraph 3.13 of the Code.

121. As to paragraph 3.14, we find for essentially the same reasons that the letter did not amount to treating others with respect and propriety. We therefore find that, apart from any consideration of Article 10, Cllr Gottlieb is in breach of paragraph 3.14 of the Code.

122. As to paragraph 3.9 and Rule 38 in our view Cllr Gottlieb was not in breach of the Code because we find that it was not reasonable to expect Cllr Gottlieb to use the Rule 38 procedure in these highly unusual circumstances. In our view Cllr Godfrey's email of 13 September 2015 sent in the context that it was, and to all Members in his capacity as Leader, would lead a fair-minded and informed observer to conclude that there was a real possibility that he was biased and therefore that he would not be able to fairly determine Cllr Gottlieb's complaints about Mr Eden (and in due course about other Senior Officers, although these were never in the end articulated). We agree with Mr Palmer that in this email Cllr Godfrey 'nailed his colours to the mast' in the face of Cllr Gottlieb's criticisms of officers by stating that he "firmly believe[s] that Winchester is served by excellent public servants who all do their very best to meet the needs of our district's residents... I require you to immediately stop insulting and criticising

officers and to apologise, through the Chief Executive, to those officers that are justifiably offended by the criticism in your report.”⁵⁴

123. In our view it is implicit from these sentences and the email as a whole that Cllr Godfrey is expressing the view that all of Cllr Gottlieb’s criticisms of the Chief Executive and Officers are wholly unjustified and that he will not countenance any suggestion, from Cllr Gottlieb at least, to the contrary. In those circumstances, the reasonable and fair-minded observer would conclude that there is a real possibility of bias were Cllr Godfrey to be asked to determine any complaints arising out of the aftermath of the Silver Hill judicial review.

124. This is not a finding that Cllr Godfrey was biased – that is not the test. The question for us is what would the fair-minded and informed observer think, given the context as set out in the Background section earlier. We do not think that this means, as was submitted on behalf of the Monitoring Officer, that a Labour Leader could never determine a complaint made by a Conservative Member. It is the effect of the email of 13 September 2015 which is the key point here.

125. Mr Milford submitted that it was premature for Cllr Gottlieb to reach the view that Cllr Godfrey could not determine the matter because he was never given the details of the complaint. He submitted that it was a bit like Counsel making a submission that a judge should recuse himself on the grounds of apparent bias but refusing to tell him anything about the case.

126. We don’t accept the analogy.

127. Whilst the specific details about the complaint were not given, Cllr Godfrey knew it was about the Chief Executive and in our view it would have been clear to him, given the context and history, that this was about Silver Hill.

128. The subsequent email exchange does not accept that there are any circumstances in which a decision on the complaint would be made by someone outside the Council. Cllr Godfrey’s email of 8 December 2015 concludes “if I receive a complaint about the Chief Executive... I will deal with it in the way that

⁵⁴ P719

this Council has agreed to, as set down in the Constitution... If any complaint presents issues that are beyond my capacity or competence to deal with, you can be assured that I will seek the necessary specialist support to complete the task.”

129. Our interpretation of this exchange is that whilst Cllr Godfrey accepted that he might seek “the necessary specialist support” if the matter was beyond his capability or competence, he personally would be taking the decision on the complaint.⁵⁵ (We note that even paragraph 24 of his Witness Statement made in October 2017 does not dissent from that. Rather it says that he would not have carried out the *investigation* himself.⁵⁶)

130. In these highly unusual circumstances, where Cllr Godfrey had so very publicly and in strong terms pinned his colours to the mast in support of members of the senior management team, we conclude that it was not reasonably open to Cllr Gottlieb to use the Rule 38 procedure and therefore there was no breach in this case of paragraph 3.9 of the Code taken in conjunction with Rule 38.

Question (b) Does the resulting restriction on Cllr Gottlieb’s right to express his opinions achieve one or more legitimate aims?

131. For reasons previously set out under Item 27(a), we conclude that paragraphs 3.13 and 3.14 pursue legitimate aims.

Question (c) Is the resulting restriction a proportionate means of achieving one or more of the legitimate aims?

132. In our view the fact that Cllr Gottlieb did not have any internal means reasonably open to him of airing his criticisms of the Chief Executive is very relevant to our assessment of where the correct balance lies. Insofar as the first half of the letter is concerned, taking into account the legitimate public concerns surrounding the issues, the seniority of the individual (i.e. Mr Eden was the most senior officer) and the terms of the criticisms made, we have concluded, on fine balance, that to find this letter constituted a breach of paragraphs 3.13 and 3.14 the Code would be a disproportionate interference with Cllr Gottlieb’s freedom of expression under Article 10.

⁵⁵ Separate thread of emails, unpaginated.

⁵⁶ P145

133. As to the second part of the letter, taking into account that the reference to senior management is in general terms and no other individual is identified (the focus being on the Chief Executive), the legitimate public concerns surrounding the issues and the fact that there was no other reasonable means open to Cllr Gottlieb to ventilate his concerns internally (since they were inextricably bound up with any complaint about the Chief Executive) means that in respect of this too, and on fine balance, we find that to find a breach of paragraphs 3.13 and 3.14 would be a disproportionate interference with Cllr Gottlieb's right to freedom of expression under Article 10. In other words we find that the balancing exercise referred to earlier fell in favour of Cllr Gottlieb.

Item 27(f): the press release to the BBC dated 12 April 2016

134. This allegation is focussed upon the words directly attributable to Cllr Gottlieb in the statement, namely:

"The Council's project management of this strategic development has been farcical, but deeply sad too because it represents a major missed opportunity to enhance the city's future economic prosperity and to reinforce the city's heritage. The root of the problem – as made explicit by Claer Lloyd-Jones' report – has been a lack of development expertise within the Council's executive. This has not changed. The team which mismanaged the project for the Council is still in place, and if they remain in control there is no expectation of anything improving anytime soon. A prerequisite for a successful future for Winchester must, in my view, be a completely new senior management team including a new Chief Executive..."⁵⁷

135. This statement was made following the recent withdrawal, on 6 April 2016, of Henderson's appeal against the High Court Judgment.

Question (a) Apart from Article 10, did Cllr Gottlieb fail to comply with the Code of Conduct (taken together with any other relevant Council rules, policy or protocol)?

136. In our view the statement set out above clearly criticises the Council's senior management team for 'mismanaging the project'. For reasons similar to those set out in relation to the other public statements, these criticisms do, absent Article 10, amount to a breach of paragraphs 3.13 and 3.14 of the Code.

⁵⁷ P117

137. As to whether these matters amount to a breach of paragraph 3.9 of the Code taken in conjunction with Rule 38 we find:

138. The criticisms fall within the scope of conduct even on a narrow definition because the reference to “mismanagement” and there being “no expectation of anything improving soon” implies that there is a lack of will to improve and thus the behaviour and/or good faith of the team is also imputed.

139. However, and even if we were wrong about that, in any event, in our view it was not reasonably open to Cllr Gottlieb to use the Rule 38 procedure for the reasons set out in relation to Item 27(b). Therefore we find that there was no breach of paragraph 3.9 of the Code taken in conjunction with Rule 38.

Question (b) Does the resulting restriction on Cllr Gottlieb’s right to express his opinions achieve one or more legitimate aims?

140. For reasons previously set out under Item 27(a), we conclude that paragraphs 3.13 and 3.14 pursue legitimate aims.

Question (c) Is the resulting restriction a proportionate means of achieving one or more of the legitimate aims?

141. Taking into account that the reference to senior management is in general terms, no individual is identified other than a specific reference to the Chief Executive), the timing of the statement (coming shortly after the appeal against the judgment was finally abandoned), the words used, the legitimate public concerns surrounding the issues and the fact that there was no other reasonable means open to Cllr Gottlieb to ventilate his concerns internally (since they were inextricably bound up with any complaint about the Chief Executive), we conclude, on balance, that to find a breach of paragraphs 3.13 and 3.14 would be a disproportionate interference with Article 10. In other words in this instance we also find that in weighing the legitimate aims (particularly the requirement to protect the Chief Executive and ‘the senior management team’ from public criticism to which they cannot respond) against the interest of open discussion of matters of public concern, the balance in this instance fell in favour of Cllr Gottlieb.

142. Accordingly the complaints in respect of Item 27(f) are not upheld.

CONCLUDING REMARKS

143. Our views have been reached on a finely balanced basis. There is a risk that this decision could be seen as a giving a carte-blanche to anyone to make public criticisms of officers where they feel that the Council's procedures are inadequate in some respect. That would be a mistake. These were highly unusual circumstances and for the reasons set out there was no internal process by which the complaints could properly be resolved. We note that since these events a new Chief Executive has been appointed and that since March 2017 there has been a new Leader of the Council. We sincerely hope that the combination of circumstances giving rise to this decision does not materialise again and that the Council can now move forward in a constructive way.
144. We will make arrangements for the parties to be contacted in order to determine the process for making any submissions on the question of sanction.
145. We will also hear submissions, should the parties wish to make any, about the status of this Decision and whether or not it or any part of it should remain exempt from public disclosure.

Councillor Fiona Mather (chair)

Councillor Margot Power

Councillor Patrick Cunningham

5 August 2018