

Ethical Standards Commissioner

As at

29th July 2021

Investigation Report

Complaint by Councillor A

Current document status: FINAL

Please note – this version supersedes and makes redundant all previous versions

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Final

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1 Introduction

1.1 Background

1.1.1 In October 2020, Councillor A of Council X (CX) lodged a complaint with the Ethical Standards Commissioner (ESC) about alleged repeated behaviours of Councillor B, also of CX.

1.2 Complaint

1.2.1 Following receipt of the ESC's Complaint Response Letter, Councillor A responded by email on 14th January 2021 citing several areas of dissatisfaction with the handling of the original complaint and subsequent interactions with the ESC. A subsequent email on 21st January 2021 raised further issues. These have been summarised in column 1 of the table in §1.3.

1.3 Key findings

1.3.1 We extracted the allegations noted in §1.3.2 from the complaint emails of 14th and 21st January 2021 and verified these in our interview with Councillor A on 17th May 2021. Matters raised in later correspondence between the Councillor and the ESC have been referenced within the body of the report.

1.3.2 Based on the evidence available to us, having conducted our investigation, we are able to conclude as follows:

Underlying allegations	Outcome
<ul style="list-style-type: none"> • Failures in respect of statutory duties: <ul style="list-style-type: none"> ○ Failure in diligence of the ESC in being the guardian of the Code; ○ Failure of the Commissioner to fulfil their duty under the Act; ○ The IO's failure to follow directions of the Commissioner in the handling of the complaint; ○ Failure to address a breach of confidentiality by the respondent in respect of correspondence from the ESC. 	<p>A material risk is observed</p> <p>Substantially upheld</p> <p>Not upheld</p> <p>Not upheld</p>
<ul style="list-style-type: none"> • Mishandling of the complaint: <ul style="list-style-type: none"> ○ The IO had conducted an investigation not an evaluation; ○ It took 4 months to complete an evaluation in breach of ESC's own guidance on such matters; ○ Repeated and unexplained references to stopping the clock; ○ Deliberate misinterpretation of evidence and the taking at face value the responses of the respondent in the face of other evidence. 	<p>Upheld</p> <p>Upheld in principle</p> <p>Upheld</p> <p>Partially upheld</p>
<ul style="list-style-type: none"> • Calling into question Councillor A's motivation: <ul style="list-style-type: none"> ○ The tone of correspondence implied criticism of Councillor A as a complainant; 	<p>Partially upheld</p>

Underlying allegations	Outcome
<ul style="list-style-type: none"> ○ Inferring in correspondence that this is a malicious allegation against the Respondent. 	Not upheld
<ul style="list-style-type: none"> ● Failure to answer the questions raised by Councillor A in correspondence. 	Upheld

1.4 Conclusion

1.4.1 The position of the ESC, of having not conducted an investigation, is not tenable. However, based on the ESC assertion that there was no investigation, the schedule for the "Screening" over-ran relative to the published timescale.

1.4.2 The interpretation of the Commissioner with regard to the latitude taken on entering complaints into the investigative process is not the only one available and relies on complainants not having the wherewithal to challenge the position. We are of the view that the stance adopted by the Commissioner places the ESC at risk of legal challenge.

2 Approach

2.1 Complaint

2.1.1 Councillor A wrote to the ESC Investigating Officer, the IO, on 14th and followed up on 21st January 2021 setting out their complaint and alleging:

- Failures in respect of statutory duties:
 - Failure in diligence of the ESC in being the guardian of the Code;
 - Failure of the Commissioner to fulfil their duty under the Act;
 - The IO's failure to follow directions of the Commissioner in the handling of the complaint;
 - Failure to address a breach of confidentiality by the respondent in respect of correspondence from the ESC;
- Mishandling of the complaint:
 - The IO had conducted an investigation not an evaluation;
 - It took 4 months to complete an evaluation in breach of ESC's own guidance on such matters;
 - Repeated and unexplained references to stopping the clock;
 - Deliberate misinterpretation of evidence and the taking at face value the responses of the respondent in the face of other evidence;
- Calling into question Councillor A's motivation:
 - The tone of correspondence implied criticism of Councillor A as a complainant;
 - Inferring in correspondence that this is a malicious allegation against the Respondent;
- Failure to answer the questions raised by Councillor A in correspondence.

2.1.2 We extracted the allegations noted in 12.1.1 from the complaint emails of 14th and 21st January 2021 and verified these in our interview with Councillor A on 17th May 2021. Matters raised in later correspondence have been referenced within the body of the report.

2.2 Resolution

2.2.1 In interview, we sought from Councillor A how they felt the matter could be resolved. In short, there were two outcomes desired:

- An apology for the deliberate attempt to misrepresent the work done by the ESC as well as for the tone of correspondence; and
- Assurances over the steps being taken to ensure that an appropriate process based on statutory obligations and good practice standards is followed in future.

2.3 Reference standards

2.3.1 The principal reference standards used in this investigation were:

- Ethical Standards in Public Life etc. (Scotland) Act 2000;
- The Scottish Parliamentary Standards Commissioner Act 2002;
- Bribery Act 2010;
- The Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc.) Order 2013 SI 2013/197;
- Commissioner for Ethical Standards in Public Life in Scotland Complaint Handling Procedures (complaints about ESC);
- Code of Conduct for Councillors (July 2018).

2.3.2 Several terms may have been used to abbreviate language in the report. These include:

- Et seq – meaning and the following sequence;
- In toto – meaning in their entirety;
- Inter alia – meaning among many other things;
- Prima facie – meaning at first sight, signifying that upon initial examination, sufficient corroborating evidence appears to exist to support an assertion;
- Ultra vires – meaning an act or action that is outside of a person or body's powers.

3 ESC complaints process

3.1 Glossary

3.1.1 In reviewing the documentation made available to this investigation, it became apparent that terms and phrases were being used interchangeably across a range of correspondence. To minimise the risk of misinterpretation we have adopted the following definitions, whether the term is capitalised or not:

Act

Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended.

Assessment

Assessment has the same meaning as Screening.

Code

The Code of Conduct for Councillors.

Complaint

Complaint means a submission made to the ESC by a third party, ostensibly about the conduct of a councillor or member of a devolved public body in relation to the Code.

Complaint Response Letter

A letter issued to a complainant setting out the conclusion of the Commissioner. For example, the letter to Councillor A from ESC dated 11th January 2021.

Investigate(d)

Investigate means a formal or systematic examination or research into a matter.

Investigation

The vehicle by which a complaint made under the Act and determined to be within its scope is investigated. That is, the complaint has been screened and determined to meet the criteria set out in s9 of the Act.

Screening

The process by which a complaint made to the ESC is assessed or evaluated and a finding or determination reached as to whether it is within the scope of the Act or not.

Standards Act

The Scottish Parliamentary Standards Commissioner Act 2002.

3.2 Legal obligation

- 3.2.1 In accordance with s9 of the Ethical Standards in Public Life, etc (Scotland) Act 2000 (the Act), it is the duty of the Commissioner for Ethical Standards in Public Life in Scotland (ESC) to investigate and report to the Standards Commission for Scotland (the Commission) on cases where a councillor or member of a devolved public body has, might have or is alleged to have contravened the councillors' or members' Code.
- 3.2.2 It is wholly within the Commissioner's gift as to how investigations are carried out (section 12(2) of the Act) and whether the findings are reported to the Commission or not (section 14(1) of the Act). The Commissioner does also have some discretion where complaints made are anonymous. Section 12(6) provides:
- Investigations shall, so far as possible, only be undertaken in response to allegations of misconduct which are made in writing and signed by the complainant.*
- 3.2.3 Generally, we would anticipate exceptions to meeting the s12(6) test to be where there is a public interest element in the allegations made or some other matter of principle.
- 3.2.4 Where a report is to be laid before the Commission, the respondent must have received a copy of the draft report and had the opportunity to make representation on the allegations and findings therein (section 14(2) of the Act).
- 3.2.5 Accordingly, we have to work on the premise that an Investigation shall take place where Screening concludes that the relevant tests are met.
- 3.2.6 The requirement for a complaint to be made within 12 months of the last incident having taken place has, as far as we can determine, no legal basis. This is a matter of undocumented

policy that has become custom and practice at the ESC. Though there is no legal basis for this, it would not be unreasonable for there to be a time limit on bringing complaints within a properly approved policy.

3.3 Policy

3.3.1 As far as we can determine, no approved (and FOIable) policy has been issued by the Commissioner on the conduct of Screening or Investigations concerning a complaint against a councillor or member of a public body.

3.3.2 General guidance is available from the ESC website stating that the Commissioner will investigate complaints about:

- poor behaviour by elected members;
- poor behaviour by board members of public bodies;
- how an individual has been appointed to the Board of a public body; and
- lobbyists.

3.3.3 This same guidance notes that:

You can even complain about us – or the Commissioner – if you don't think we've followed proper procedure.

3.3.4 Other guidance issued by the Commissioner, such as for investigation of a public appointment complaint, refers to a time frame of 20 working days.

3.3.5 The ESC website guidance then goes on to describe the investigation process as having three steps:

- Screening (which we refer to as evaluation). This is a pre-investigation process and may result in a decision not to investigate a complaint;
- Investigation. Where a complaint has been screened and a decision to investigate reached, only then will an investigation be carried out; and
- Decision. The guidance stipulates that the Commissioner's decision is final and may not be appealed.

3.4 Standards Investigation Guidelines

3.4.1 There exists a procedural document called the Standards Investigation Guidelines (SIG), an internal document, the most recent version being dated 13th June 2018. It has not been updated since and is not used during the employment induction process for Investigating Officers.

3.4.2 The Investigation Officer for Councillor A's complaint was not aware of the existence of the SIG. Another ESC Investigating Officer recollected a discussion with the Commissioner where they were instructed not to use the SIG. We have several observations:

- This is a recollection and has not been verified with the Commissioner;
- Any support is better than no support, even if in draft;
- ESC staff should have a reasonable expectation of there being a documented policy, guidance and process being available that promotes consistent application of regulations and decision-making;

- Greater clarity needs to be given to highlight:
 - Legal requirements;
 - Interpretation;
 - Policy;
 - Guidance; and
 - Process & procedure.

3.4.3 Though the SIG is not used, it summarises, only very briefly, the circumstances whereby a complaint would or would not be investigated. Section 7.6 of the SIG does no more than reproduce the requirements of the Act, topped and tailed with procedural matters concerning production of an initial assessment and related correspondence.

3.4.4 There is no interpretation, policy or guidance given. In this regard, the document is not fit for purpose.

3.5 Standards Act

3.5.1 In the absence of current guidance on complaints against a councillor in respect of breaches of the Code, we sought other similar complaint management obligations. Though there are differences, some significant, in obligation and application, the Standards Act sets out provisions for the investigation of complaints against MSPs; at a high level this represents a broadly parallel approach to that against councillors.

3.5.2 Section 5 of the Standards Act provides that the Commissioner's response to a relevant complaint will be in two stages:

- Stage 1 – determining if a complaint is admissible (within 2 months); and
- Stage 2 – investigation of an admissible complaint and reporting on it to Parliament (within 6 months of determination of admissibility).

3.5.3 The Standards Act stipulates that a complaint is admissible if it passes three tests:

- It is relevant if:
 - It is about an MSP,
 - The complaint was lodged within 12 months of the event; and
 - At first sight, the event may have breached a relevant provision(s) of the code for MSPs.
- It meets the requirements if it:
 - Is made in writing;
 - Is made by a natural person, and signed with their name and address;
 - Names the member concerned;
 - Sets out the facts and is accompanied by evidence;
 - Is made within 12 months of the complainant being reasonably aware of the conduct being complained of.
- Further investigation is warranted:
 - On completion of the two previous tests, the evidence is sufficient to indicate that the alleged conduct may have taken place.

3.5.4 In respect of the scope of the Standards Act, the final bullet can only be considered if there is *prima facie* evidence from the complaint submission as no investigation has yet taken place. *Prima facie* evidence would, in our experience, be material that indicates a breach (whether statutory, regulatory or code) may have, or could be perceived to have, taken place. This is in line with the general principle set out in s9 of the Act.

3.5.5 Given the parallels between the Commissioner's responsibilities in respect of MSPs, councillors and members of the devolved administration in Scotland, the common processes by which the Commissioner must report to the Standards Commission or Parliament under the Act or Standards Act respectively, we consider it reasonable to use the foregoing approach to provide a reasonableness test in our consideration of the expectations of the complainant.

3.6 Performance indicators

3.6.1 Until the appointment of the Commissioner in office at the date of writing, the ESC monitored complaints and published data in respect of those complaints in its Annual Report and Accounts. The most recent available with such data is 2017-18.

3.6.2 The number, types, source and outcomes of complaints received against councillors and Members of Public Bodies were published. Performance targets and actual performance for the Assessments and Investigations were published for councillors and members of public bodies collectively.

3.6.3 Targets then were:

Activity	Completion target
Assessment	15 working days
Investigation	60% within 3 months
	75% within 6 months
	95% within 9 months

3.6.4 We consider it reasonable to use the foregoing, though now abandoned, targets to provide a reasonableness test in our consideration of the expectations of the complainant.

3.7 Conclusions

3.7.1 There is a need for improved accuracy in the use of language within ESC communications to remove ambiguity. Whilst ESC staff and the Commissioner may readily understand the contextual use of terminology, those not familiar with it may misinterpret what is meant.

3.7.2 The Commissioner should publish a policy and process in respect of the management of complaints about councillors and members of public bodies.

3.7.3 The SIG requires to be heavily updated, and the content expanded to provide:

- Legal requirements;
- Interpretation;
- Policy;
- Guidance;
- Process & procedure.

4 Timelines

For original complaint(s)

Elapsed refers to the number of working days (D) or weeks (W) following receipt of the complaint.

Date	Elapsed	Event
12 Oct 2020	D00 W00	Complaint and supporting evidence recorded as received at ESC
16 Oct 2020	D05 W01	Additional complaint by Councillor A recorded as received at ESC
		Undated CAF prepared but records the second complaint from Councillor A
20 Oct 2020	D07 W01	CAF updated but the detailed assessment has not been completed
30 Oct 2020	D15 W02	Internal review of CAF and correspondence and RFI completed
2 Nov 2020	D16 W3	RFI issued to complainant with a two week deadline
9 Nov 2020	D21 W04	Complainant supplies information requested in RFI
13 Nov 2020	D25 W04	Internal review of letters to second complainant and DCS. Instruction not to send RFI to MO till response received from DCS
16 Nov 2020	D27 W05	RFI issued to DCS
16 Nov 2020	D27 W05	DCS response to ESC
20 Nov 2020	D31 W05	RFI to MO
20 Nvo 2020	D31 W05	Invitation to respondent to submit evidence in defence of complaint
27 Nov 2020	D35 W06	MO response to ESC
2 Dec 2020	D38 W07	Letter from ESC to Councillor A explaining delay
3 Dec 2020	D39 W07	MO phone call to ESC
4 Dec 2020	D40 W07	MO documentation sent to ESC
7 Dec 2020	D41 W08	Respondent sends response to request for defence from personal email account
7 Dec 2020	D41 W08	Email from Councillor A to ESC expressing dissatisfaction with service
18 Dec 2020	D50 W09	Commissioner approves completed CAF and gives decision not to investigate
7 Jan 2021	D64 W12	Commissioner reviews LOR and requests changes
11 Jan 2021	D66 W13	Commissioner approves LOR for release
11 Jan 2021	D66 W13	LOR issued in name of the IO
14 Jan 2021	W69 W14	Acknowledgement from Councillor A again expressing dissatisfaction with process

CAF Complaint Assessment Form
DCS Director of Corporate Services, CX

ESC Ethical Standards Commissioner
LOR Letter of Response to Complaint

MO Monitoring Office, CX
RFI Request for Information

Timeline for establishing Stage 2 complaint

Date	Elapsed	Event
21 Jan 2021		Formalisation of complaint against ESC by Councillor A
21 Jan 2021		Draft response by ESC to Councillor A stating no recourse, explaining how the elapsed time was within relevant targets and remarking on the confidentiality issue
21 Jan 2021		Email correspondence between Commissioner and staff setting terms of correspondence with Councillor A
28 Jan 2021		Response from ESC to Councillor A sent
4 Feb 2021		Further draft letter of response to Councillor A prepared addressing the nature of the review undertaken and the amount of time taken for the review
5 Feb 2021		Draft response of 4 Feb 2021, including apology to Councillor A passed to the Commissioners for review
12 Feb 2021		Letter from Councillor A to IO intimating that as the complaint of 14 and 21 January had not been considered, to treat this letter as a formal complaint
12 Feb 2021		Internal email to Commissioner with relevant documents and a draft response to Councillor A.
16 Feb 2021		Further copy of letter of 28 Jan 2021 is sent to Councillor A
16 Feb 2021		Email from Commissioner to IO expressly stating that in their view there were no delays in the initial review
16 Mar 2021		Letter from Councillor A to ESC responding to letter from ESC of 16 Feb 2021 and advising that the matter will be pursued externally
9 Apr 2021		Letter from ESC to Councillor A setting out how the complaint of 12 Mar 2021 would be investigated
12 Apr 2021		Letter from Councillor A confirming satisfaction with the proposed approach to investigation

5 Failure in respect of statutory duties

5.1 Failure of ESC as the guardian of the Code

- 5.1.1 We can only conclude on this matter in respect of the specific complaint and not on whether there has been a more general failure.
- 5.1.2 The purpose of the Code is to ensure that all those within the scope adhere to a common set of principles and standards.
- 5.1.3 The purpose of the Act, *inter alia*, is to ensure that where complainants have a cause for concern over compliance with the Code of a given person who falls within the scope of the Code, there is a process by which they receive a fair and impartial hearing.
- 5.1.4 The guardian of the Code is, arguably, the Standards Commission and not the ESC *per se*. The ESC is the channel by which complaints are received and, where warranted, investigated and then reported upon to the Standards Commission for their deliberation, decision and, where warranted, a sanction applied.
- 5.1.5 The question is therefore whether on this occasion the actions of the ESC caused the Standards Commission not to meet their "role" as guardian of the Code. To answer this absolutely, one would also need to consider whether the substantive decision reached by the ESC would have caused the Standards Commission to fail in their subsequent duties.
- 5.1.6 It is this last point we cannot answer for two reasons:
- To answer the question would require fuller investigation of the original complaint; and
 - It is not our role to reinvestigate the original complaint.
- 5.1.7 However, we have, in our deliberations below, concluded that:
- Absence of an appropriate Screening and Investigation policy;
 - Obfuscation of purpose through the interchanging of terminology;
 - Mishandling of Councillor A's complaint; and
 - Poor quality correspondence;
- all contributed to the introduction of risk to what should otherwise have been a transactional process.

5.2 Statutory duties in respect of a complaint

- 5.2.1 As noted in §3.1, the Commissioner has a duty under s9 of the Act:

...to investigate and report to the Commission on cases in which a councillor or member of a devolved public body has, might have or is alleged to have contravened the councillors' or, as the case may be, the members' code.

- 5.2.2 Section 12(6) of the Act provides:

Investigations shall, so far as is possible, only be undertaken in response to allegations of misconduct which are made in writing and signed by the complainant.

- 5.2.3 At first glance, this appears straightforward:

1. Does the complaint meet the following tests:
 - a) The complaint subject is a councillor or member of a devolved body;
 - b) There has been, may have been or is an allegation that there has been a breach of the Code; and
 - c) The complainant has submitted their complaint in writing, identified themselves and signed the complaint.
 2. If all tests are met, then investigate and report on the complaint to the Commission.
- 5.2.4 We have commented in ¶3.2.6 on the requirement to submit a complaint within 12 months of the last incident occurring. There is no identifiable legal basis for this and it should not be used to a complainant's detriment. Whilst there is no statutory basis, the practice aligns with the Standards Act's admissibility requirement for a complaint to be made within 12 months and is considered reasonable. There is provision in the CAF to relax the time limit where there is an overriding public interest and the complainant was unaware of the conduct before the time limit expired.
- 5.2.5 The ESC Letter to Councillor A dated 21st January 2021 in response to Councillor A's email of 14th January cites s12(1) of the Act as the reason that no investigation was carried out; it is for the Commissioner to decide on whether an investigation takes place or not.
- 5.2.6 However, in our view, s9 of the Act is explicit in compelling the Commissioner to investigate where the criteria set out in ¶5.2.2 are met.
- 5.2.7 Testing the reasonableness of our conclusion at ¶5.2.6 against the Screening provisions of the Standards Act, as set out in ¶3.5.3, on the basis of a broadly similarly designed test, would most likely have reached a similar conclusion based on the evidence available at the point of Screening.
- 5.2.8 Our interpretation of the provisions of s12(1) are that the condition "whether...to investigate" refers only to the ability of the Commissioner to decide whether a complaint meets the test in s9 rather than the apparent prevailing interpretation that, irrespective of the provision of s9, the decision to investigate is wholly at the discretion of the Commissioner.
- 5.2.9 The complaint submitted by Councillor A met the s9/s12(6) tests and should therefore have been investigated. Consequently, the Commissioner is unlikely to have met their statutory duty under the Act.
- 5.2.10 Arguably, the complaint was, *de facto*, investigated as a consequence of the events described in §6.1. However, it was always maintained by the ESC that the complaint was merely Assessed and not Investigated. Notwithstanding our finding, as a result of the ESC assertion that no investigation took place, the Commissioner was in breach of the statutory duty to investigate a valid complaint.

5.3 The IO's failure to follow directions of the Commissioner

- 5.3.1 From our review of internal ESC correspondence from December 2020, it is evident that the IO was following the directions of the Commissioner.
- 5.3.2 There is documentary evidence that the Commissioner was actively editing or directing the editing of various letters subsequently issued in the IO's name.

5.3.3 There is also documentary evidence that the Commissioner had reviewed and approved the Complaint Assessment Form used to substantiate the decision of the Commissioner not to investigate.

5.3.4 We have concluded that the IO was following the instructions of the Commissioner.

5.4 Failure to address a breach of confidentiality

5.4.1 Section 12(2) of the Act provides:

Investigations shall, so far as possible, be conducted confidentially.

5.4.2 All ESC correspondence carries a caveat:

The process is conducted under the Act. I would draw your attention to the confidential nature of the Commissioner's process and would request your full cooperation in this regard.

5.4.3 No provision is made in the Act on how the Commissioner should deal with, or sanction, a Respondent who breaches that confidentiality.

5.4.4 Councillor B is alleged to have repeatedly interacted with the press and media over the investigation, contrary to the specific requests of the Commissioner's office; no action was taken by the ESC.

5.4.5 We cannot determine if Councillor B was the source of the information leak. Councillor A had as much to gain as Councillor B in making information public. However, the nature of the questions asked by the reporter suggest a position sympathetic to Councillor B. Furthermore, there is correspondence that suggests a fruitful ongoing media relationship between Councillor B and the reporter.

5.4.6 The Code's scope, and therefore duty of confidentiality in ¶13.17 of the Code, does not explicitly cover any interaction with the Commissioner; in ¶11.6 it brings within scope interactions with the Standards Commission but not the Commissioner. The Act is equally unclear as to whether a duty of confidentiality is placed on those who are subject to an interaction with the Commissioner.

5.4.7 It is clear that the ESC did not deal with Councillor A's complaint of a breach of confidentiality as a complaint. Ordinarily, we understand that the ESC would have clarified with a complainant whether a further complaint was being submitted.

5.4.8 Had it been treated as a complaint a CAF would have been completed and an Assessment undertaken to establish if, and provide an audit trail as to whether, the matter was within the scope of the Code or not. In our view, there was a shortfall in the recognition of the remarks made by the Councillor as a potential complaint.

5.4.9 Whether the Commissioner should then have investigated the complaint or not would have been contingent on whether the leak of a letter from the ESC to a councillor falls within the definition of a councillor on Council business (to which the Code applies) or is merely a function of being a councillor.

5.5 Conclusion

- 5.5.1 In our view, there is a significant uncertainty as to whether the Commissioner met their obligation under s9 of the Act to investigate a councillor who has, might have or is alleged to have contravened the councillors' Code. The justification made was that under s12(1) of the Act, the decision to investigate is entirely at the Commissioner's discretion; we disagree with the interpretation.
- 5.5.2 Councillor A's complaint of a breach of confidentiality does not fall within the provisions of either the Code or the Act. It may have been helpful to put the complaint through a Screening process to evidence this. We accept that it is likely that the conclusion of the Screening process may have been that the matter was outside the scope of the Act.
- 5.5.3 However, an important clarification is required as to whether the actions of a councillor (breach of confidentiality) in dealing with a regulator about their behaviours (whilst on council business) constitutes council business does not appear to fall within the Code or the Act.

6 Mishandling of the complaint

6.1 Investigation conducted, not an evaluation

- 6.1.1 As noted in ¶3.3.1 we have been unable to identify any internal policy document setting out how a complaint against a councillor will be managed. The process appears very broadly to follow those in respect of complaints against an MSP, or the Commissioner and has two stages:
1. Completion of a Complaint Assessment Form (Form) to determine if the complaint should be investigated, i.e. does it fall within the scope of the Act;
 2. On reaching a decision on Assessment:
 - a) If not within the scope of the Act, advise the complainant that the matter will not be investigated; or
 - b) If within the scope of the Act, undertake an investigation.
- 6.1.2 On the ESC website the process is described as:
1. Screening – aligned to and facilitated by completion of the Form. The aim is to complete this within 2 months;
 2. Investigation – characterised by notifying and providing a copy of the complaint to the person being complained of (Respondent). This is followed by witness interviews, document reviews, etc. The Act stipulates that if an investigation goes beyond 3 months, the Complainant must be updated.
 3. Decision – Commissioner's decision is final with no right of appeal. The Respondent has the right of review and comment on the decision before reporting to the Standards Commission.
- 6.1.3 We would have anticipated the Screening process to:
- Review the framing of the allegation and, if unclear, clarify with the complainant;
 - Confirm the complaint was submitted within a reasonable time, say 12-months, of the alleged event(s);

- Determine if the allegation as framed was within the scope of the statutory duty and one therefore that the Commissioner had the power to investigate;
- Review previous complaints to confirm that there was no pattern or vexatious complaining; and
- Determine whether, if the allegation as framed was ultimately proven, it would constitute a breach of the code.

6.1.4 The Form is completed in two parts:

1. Validation of the complaint. Largely, this fulfils the same role as our bullet 1 in ¶6.1.2;
2. Substantiating the complaint. This comprises a determination of whether the complainant has provided documentation to support their assertions in the complaint.

6.1.5 Provision is made in the Form to permit the person undertaking the Assessment to seek further documents in respect of "substantiating the complaint". The IO stated that on the instruction of the Commissioner, the IO:

- Offered Councillor B the opportunity on 2nd November 2020 to respond to the allegations with a response to be submitted by 16th November 2020. The extensive response was ultimately received on 7th December 2020;
- Made a request for information to the CX Director of Corporate Services on 16th November 2020;
- Made a request for information to the CX Monitoring Officer on 16th November 2020.

The instruction from the Commissioner's role was unable to be confirmed with the Commissioner.

6.1.6 Reviewing the work undertaken by the IO to complete Part 2 of the Form, it has the characteristics of the Investigation phase as described on the ESC website and in our definition in ¶3.1.1. In our view, the work undertaken goes materially beyond validating the legitimacy of the complaint, based on the provisions of the Act and as we describe in ¶6.1.2.

6.1.7 The Complaint Response Letter runs to c11 pages, more than 5,000 words and contained a very detailed explanation of why Councillor A's complaints were not being upheld. The detailed nature is more than would be expected for a mere Screening.

6.1.8 The IO responded to our question as to what more work would have been done had an investigation been done:

In answer to your question, I'm not sure whether we would have done any more investigation or whether we would have requested any further information because I think we were satisfied with the information we'd obtained...

6.1.9 However, as an investigation, we have the following observations:

- There is little recognition that the formal record of a meeting will not document the behaviours associated with an attendee's action. For example, a minute will record someone leaving a meeting not the manner by which they left;
- The witness pool appears incomplete, focusing solely on officers;
- There was no testing of the evidence presented by witnesses or respondent. Only the evidence presented by the Complainant was tested.

In this last regard, Councillor A's assertion that the evidence of Councillor B was accepted at face value has merit.

6.1.10 There was no explicit consideration recorded in the Form of whether the Commissioner had the power to investigate, though it was obvious from the material available that the complaint was within the scope of the statutory duty; the power therefore existed (see ¶5.2.9).

6.1.11 Our position on the circumstances of this complaint is founded on there being no criteria for admissibility permitted under statute. However, there is always a risk of ongoing or repeated malicious or vexatious complaints. Throughout this report we promote the publication of policy and/or investigations guidance and this risk could be addressed in this way through provision of guidance.

6.1.12 From our understanding of matters, Councillor A had submitted no complaints in the past that were related to the present complaint.

6.1.13 In interview, the IO stated that they had conducted an investigation.

I think essentially what happened in this case is it was an investigation, because we did weigh up evidence, we did weigh up different parties.

It was an investigation in a letter. Instead of being in a report which is what we'd normally do, it essentially was... it felt like it was an investigation within a "we're not going to investigate this" letter.

6.1.14 Given the Commissioner's editorial input and approval of both the Form and the Complaint Response Letter to Councillor A, we can only conclude that the approach adopted was sanctioned by the Commissioner.

6.2 Commissioner took 4 months to respond to the complaint

6.2.1 As noted in ¶3.3.1, we have been unable to identify any internal policy document against which to reach our conclusions. The only ESC guidance is that which is available is on its website as set out in ¶6.1.2, summarised in respect of schedule as follows:

- Screening – up to 2 months;
- Investigation – undetermined but mandatory engagement with the complainant after 3 months;
- Decision – no time stipulated for referral to the Standards Commission.

6.2.2 A contributory factor in the timeline was the manner in which additional evidence was sought. Rather than writing out to third parties concurrently, the process was undertaken consecutively, awaiting a response from the witness before writing to the next person.

6.2.3 Based on the timeline in §4, 13 weeks elapsed from the date of the complaint being received until the Letter of Response was issued. Thirteen weeks is one calendar quarter or 3 months exactly.

6.2.4 Based on the ESC assertion that no investigation took place, the published timescale for Screening was exceeded. However, the ESC did advise Councillor A of a delay on 2nd December 2020 (week 07).

6.2.5 In the Complainant's 7th December response to the IO's 2nd December 2020 email, Councillor A inaccurately refers to this as being week 11 of the complaint.

6.3 Stopping the clock

6.3.1 A principle of "stopping the clock" is referred to in correspondence between the IO and the Commissioner, and between ESC and Councillor A.

6.3.2 We can find no legal basis on which this principle can be instituted, except that under s12(1) of the Act, it is at the Commissioner's discretion:

To decide whether, when and how to carry out any investigation.

6.3.3 Whilst the Commissioner's interpretation may be within the letter of the law, it is not within the spirit of the Act nor of other public engagement legislation as far as we can determine. None of the other Acts under which the Commissioner operates provides any "Stop the Clock" mechanism from which we can draw a parallel. Therefore, we consider it reasonable to conclude that no similar mechanism is available for an investigation under the Act, notwithstanding the provisions of s12(2).

6.3.4 We would anticipate that the ESC would adhere to the principles they have published and to reasonably expected norms. The "Stop the Clock" mechanism is open to interpretation as having been a means by which to justify the elapsed time taken to provide a response to Councillor A.

6.3.5 Though ESC has noted that historically they did work to achieve certain targets (see ¶3.6.3), additional policy guidance is required to explicitly prohibit the use of the Stop the Clock mechanism.

6.4 Misinterpreted evidence & evidence from Councillor B taken at face value

6.4.1 Please refer to ¶6.1.8.

6.4.2 Having reviewed all of the correspondence and the evidence presented by the CX Director of Corporate Services and CX Monitoring Officer, we conclude that misinterpretation of evidence is overly strong an interpretation. However, the evidence presented by those two officers creates more questions than it answers, and this fact is ignored. Perhaps this lack of clarification gives rise to a perception that evidence has therefore been deliberately misinterpreted.

6.5 Other matters

6.5.1 We note the Commissioner's reliance on the "Schodlok" case. The General Medical Council (GMC) brought a number of charges regarding a Dr Schodlok's conduct whilst working as an Orthopaedic Registrar.

6.5.2 The GMC panel made four findings of serious misconduct concerning her dealings with an orthopaedic technician at her hospital. A further six findings of non-serious conduct were made regarding other colleagues. Schodlok was held to be impaired and was sanctioned by the GMC. She appealed and the appeal was heard by LJ's Vos, Beatson and Moore-Bick.

- 6.5.3 The case was considered to be especially complex and, in any event, the Justices hearing the appeal did not agree with the findings of the GMC panel in respect of the substantive charges faced by Schodlok. They refused to hear certain aspects of the appeal due to the availability of other statutory channels available to Schodlok.
- 6.5.4 The Commissioner sought to rely on Schodlok, by drawing a parallel that each incident committed on each different date and being of slightly different character constitutes a separate event (i.e. a Misconduct) and that each proven event could not be cumulated into a single "chargeable" incident (Gross Misconduct) under the Code.
- 6.5.5 In our view the interpretation of the case and its application to the present complaint is not appropriate on two counts:
- Schodlok relates to the aggregation of *decisions* on Misconduct charges to reach a threshold to justify the sanction imposed; and
 - The outcome did not set aside the GMC's decisions on Gross Misconduct. The GMC aggregate and translated several proven Misconduct charges post-decision into one of Gross Misconduct when sanctioning of Dr Schodlok.
- 6.5.6 In fact, Beatson LJ concluded in his summing up (our emphasis added):
- I recognise that a small number of allegations of misconduct that individually are held not to be serious misconduct should normally not be regarded collectively as serious misconduct. **Where, however, there are a large number of findings of non-serious misconduct, particularly where they are of the same or similar misconduct, I consider the position is different.** In such a case, it should in principle be open for a Fitness to Practise Panel to find that, **cumulatively, they are to be regarded as serious misconduct** capable of impairing a doctor's fitness to practise.*
- 6.5.7 A more realistic parallel would have been that the ESC is akin to the GMC and was therefore responsible for properly assessing the charges (on Schodlock or in this complaint). The Standards Commission would have been the parallel to the Appeal Court.
- 6.5.8 The Commissioner justified treating and concluding on each individual element on the complaint by reliance on the decision in Schodlock. But, Schodlock was about the amalgamation of several Misconduct outcomes to justify a harsher sanction than the GMC was entitled to levy upon each individual Misconduct outcome.
- 6.5.9 Had the GMC amalgamated the charges into a single charge of Gross Misconduct looking at Schodlock's overall treatment of the orthopaedic technician and determined an outcome of proven, then the sanction would have been justifiable. That is, Schodlock was about the sanction levied relative to the outcome(s) reached and the basis on which the sanction was decided upon.

6.6 Conclusion

- 6.6.1 We have adopted a principle of substance over form. Accordingly, we conclude that Councillor A's complaint that an investigation was conducted is upheld.
- 6.6.2 In our view, the investigation conducted was:
- Not impartial;

- Did not consider a complete evidence pool;
- Did not seek clarification of, or test, evidence presented; and
- Was conducted in such a way so as to achieve a particular outcome.

6.6.3 Using the same substance over form principle, the complaint, having been subject to Investigation, would have fallen, just, within the published timescale of completing an investigation within 3 months elapsed time.

6.6.4 However, the review being undertaken was represented by the ESC to Councillor A as Screening, therefore, the elapsed time must be tested against the published time for conducting Screening. In this regard, the work was not carried out within a reasonable time nor within the published timescale.

6.6.5 The principle of *Stopping the Clock* may be a policy justification of the Commissioner, but we consider it to be an unreasonable approach to public engagement timescales. It has been used to justify the apparently extended timescale (for Screening) and mask the carrying out of work (Investigation) deemed by the Commissioner not to be being undertaken.

6.6.6 Notwithstanding the foregoing, the complaint was in its 4th month of consideration therefore we understand how Councillor A reached the conclusion of which they complained – that the Commissioner took 4 months to look at the complaint, an assertion that is factually inaccurate.

7 Calling into question Councillor A's motivation

7.1 Tone of correspondence, implied criticism of Councillor A as a complainant

7.1.1 We have reviewed the correspondence between Councillor A and the IO. In particular, we have been able to consider a draft of the letter to be dated on issue as 21st January 2021 prepared by the IO and the version of the same letter following editing by the Commissioner and actually issued dated 21st January 2021.

7.1.2 In their draft, the IO apologised to Councillor A for the dissatisfaction felt over the decision. That apology was removed in the final version. The final version also contained a complex explanation of why the Complaint Response Letter had been issued within the 2-month time limit though 13 weeks had actually elapsed; essentially placing reliance on the ability to pause the Screening process on which we have already commented in §6.3.

7.1.3 Overall, and relative to the other correspondence made available to us, the tone of correspondence is not unprofessional but is tending to being legalistic in nature and is brusque.

7.1.4 Councillor A takes issue with an apparent inference that they provided insufficient documentary or physical evidence. The phrasing of the letter could have been better, for example, it was written in the accusative.

...for which no documentary or physical evidence was provided [by you].

7.1.5 Some additional evidence was required for Screening purposes:

- Confirmation of the availability of a recording or transcript of the XX August 2020 [XXX] Community Council Meeting, if available;

- Confirmation of the availability of a recording or transcript of the XX September 2020 CX Policy and Resources Committee meeting;
- Copy [XXX] Times Article of 2nd October 2020.

to validate the allegation and was sought from Councillor A on 2nd November 2020, 16 workdays following the complaint. As noted at ¶6.2.2, the ESC subsequently also sought additional evidence from a number of third parties.

We were able to obtain a copy of the last item within 4 days of buying the relevant back issues from the [XXX] Times.

7.1.6 It is our view that had the 21st January 2021 ESC response to Councillor A's email of 14th January 2021:

- Explained why the complaint was not being "investigated";
- Not contained a complex justification of the delay in completing the "Screening". A simple apology would have been far more effective; and
- Not appeared to be interpretable as how ESC had gone out of its way to ensure all Councillor A's complaints were addressed at the same time even though they were [deemed] *unrelated (our insertion and word)*.

it is unlikely that a complaint would have been made.

7.2 Inference of making a malicious allegation against the Respondent

7.2.1 Councillor A stated in an email dated 14th January 2021

Clearly if you are correct [in terms of the Complaint Response Letter] then I must be guilty of making malicious allegations against the respondent.

7.2.2 We have reviewed the Complaint Response Letter and did not reach the same conclusion. Given all of the foregoing, we consider that Councillor A is predisposed to perceiving some remarks made in correspondence from ESC as being critical of them.

7.3 Conclusion

7.3.1 Though we do not consider the correspondence with Councillor A to be unprofessional, it was legalistic and brusque in tone. There were also several poorly constructed elements and unnecessary justifications, all of which may have contributed to one interpretation of the letter as being critical of Councillor A as a complainant.

8 Failure to answer reasonable questions on the matter

8.1 Questions raised in correspondence

8.1.1 In their email of 14th January 2021, Councillor A asked several questions:

- Does the IO consider Councillor A as having made malicious allegations against Councillor B and if so, does the IO intend to report Councillor A to the Commissioner? If Councillor A is not to be reported, why not?

- What exactly is the point of a protocol for Councillor/Officer relations if councillors, supported by the Commissioner, can simply choose to ignore it and make baseless and offensive allegations in public instead?
- What are your [ESC] service standards in respect of time to respond to a complaint and making a decision on investigation?
- Can you [the IO] explain why on Tuesday morning (12 January, the day after your letter) I was contacted by a journalist who was able to quote detail from the letter you [the IO] had sent to the respondent?
- Is it acceptable for the respondent to go to the press?
- If not, what does the Commissioner intend to do about this breach of confidentiality?
- I [Councillor A] would be grateful for details of your complaints process.

8.1.2 In the ESC response to this, only the last two points were acknowledged and responded to. Essentially, on the breach of confidentiality the matter was considered to reflect the position we have outlined at §5.4. Councillor A was provided with a copy of the complaint's process. No other question noted above received acknowledgement or response.

8.1.3 In Councillor A's 21st January 2021 response to the IO's letter of the same date, Councillor A intimated dissatisfaction with the IO's letter and noted the absence of explanations relating to these questions. They noted 4 further questions arising:

- Would you [the IO] address an ordinary member of the public making such a complaint in this manner?
- There appear to be some contradictions in your [the IO] responses. You [the IO] have clearly stated previously that my complaint was 'not accepted for investigation'. It is not then, in my [Councillor A] view, reasonable to take almost 4 months to consider whether there was a prima-facie case for investigation. What was happening in that period if not an investigation?
- In short, did you [the IO] or did you not undertake an 'investigation' of my complaint?
- Finally, are you [the IO] confident that you [the IO] fulfilled both your duty under the Act and all directions given to the Commissioner in my [Councillor A] complaint?

8.1.4 A holding response was issued by the IO on 28th January 2021, notwithstanding that the draft formal response had been prepared by a Senior Investigating Officer ESC (SIO), on 22nd January 2021 and edited by the Commissioner on 25th January 2021.

8.1.5 The formal response letter was sent to Councillor A on 5th February 2021 by the IO, and addressed only two matters, but ostensibly dealt with all questions raised:

- Asserting that no investigation was carried out;
- Expressing confusion as to Councillor A's understanding of the timeframe of the Screening when an explanation had been provided by the ESC letter of 21st January 2021.

8.1.6 Given our conclusion at ¶6.6.1, we are of the view that the first assertion is at best inaccurate. The second assertion once again seeks to deflect Councillor A's concerns back on themselves further engendering an adverse perception of them as a complainant.

8.1.7 The IO stated in interview that though the letters were issued under the IO's signature, they were essentially written by the Commissioner. Arguably, the IO should have requested that

the correspondence be issued under the Commissioner's signature. We understand that circumstances in ESC precluded this course of action from being pursued by the IO.

- 8.1.8 The Commissioner could equally argue that any correspondence being issued from the ESC, irrespective of who signs it, is issuing correspondence in the name of the Commissioner as a juristic person. In the case of such an assertion as this, we would respond that correspondence issued in that way should always be under the signature of the ESC and not that of a natural person.

8.2 Conclusion

- 8.2.1 We conclude that the ESC, irrespective of who signed the correspondence - the IO or the Commissioner, failed to provide appropriate responses to Councillor A with respect to the questions that they raised. We accept that the ESC may have wished to have declined to answer the specific points, but ESC should have, as a minimum, acknowledged Councillor A's questions.
- 8.2.2 Given the Commissioner's input to the drafting we can only conclude that the content and tone of correspondence was sanctioned or directed by the Commissioner.

9 Conclusion

- 9.1.1 Section 9 of the Act compels the Commissioner to investigate any complaint that meets certain thresholds. Section 12 of the Act appears to give the Commissioner the right to decide whether to investigate any complaint at all. We have interpreted these provisions to mean that the Commissioner may decide if a complaint meets the s9 threshold (whether to investigate), the s12(6) preference for the complainant to be identifiable, and if these conditions are met, the Commissioner is then compelled to investigate.
- 9.1.2 Irrespective of what is meant to happen – Screening or Investigation, from our review of the documentation in this matter, we have concluded that the activities undertaken in the "Screening" process in respect of this complaint went far beyond those necessary to determine if a complaint met the criteria for investigation. The Commissioner's policy of having the sole discretion whether to investigate any complaint or not is:
- inconsistent with the principle of compulsion where the complaint meets the s9/s12(6) test; and
 - out of line with the other processes the Commissioner has to follow in respect of statutory complaints.
- 9.1.3 It is not our role to investigate the original complaints by Councillor A. However, in conducting this review, we have identified several anomalies or inconsistencies in the work undertaken:
- Evidence consistent with Councillor A's account viewed through a different prism;
 - Incomplete witness population;
 - Incomplete evidence;
 - Failure to clarify inconsistencies in evidence;
 - Unrepresentative examples of comparison.

9.1.4 In this matter, several allegations amounting to (in lay terms): misrepresentation of officers' characters and competence (Code 3.7, s20 Annex C), and unruly and disrespectful behaviour (code 3.2, 3.3 and 3.5) were made. In our view, opportunities were sought and taken to establish a basis for which a proper investigation conducted reasonably could be avoided.

9.1.5 Whilst we are very critical of the process followed and the attitude adopted, they may have had no effect on the ultimate outcome. However, that does not mitigate either process followed, nor attitude adopted.

9.1.6 Based on the foregoing, we reached the following conclusions:

Ref	Allegations made	Outcome
A	<ul style="list-style-type: none"> Failures in respect of statutory duties: 	
A1	<ul style="list-style-type: none"> Failure in diligence of the ESC in being the guardian of the Code; 	A material risk is observed
A2	<ul style="list-style-type: none"> Failure of the Commissioner to fulfil their duty under the Act; 	Substantially upheld
A3	<ul style="list-style-type: none"> The IO's failure to follow directions of the Commissioner in the handling of the complaint; 	Not upheld
A4	<ul style="list-style-type: none"> Failure to address a breach of confidentiality by the respondent in respect of correspondence from the ESC. 	Not upheld
B	<ul style="list-style-type: none"> Mishandling of the complaint: 	
B1	<ul style="list-style-type: none"> The IO had conducted an investigation not an evaluation; 	Upheld
B2	<ul style="list-style-type: none"> It took 4 months to complete an evaluation in breach of ESC's own guidance on such matters; 	Upheld in principle
B3	<ul style="list-style-type: none"> Repeated and unexplained references to stopping the clock; 	In that there was a significant over-run of the work done.
B4	<ul style="list-style-type: none"> Deliberate misinterpretation of evidence and the taking at face value the responses of the respondent in the face of other evidence. 	Upheld Partially upheld
C	<ul style="list-style-type: none"> Calling into question Councillor A's motivation: 	
C1	<ul style="list-style-type: none"> The tone of correspondence implied criticism of Councillor A as a complainant; 	Partially upheld
C2	<ul style="list-style-type: none"> Inferring in correspondence that this is a malicious allegation against the Respondent. 	Not upheld
D	<ul style="list-style-type: none"> Failure to answer the questions raised by Councillor A in correspondence. 	Upheld

10 Summary of complaint and findings

10.1.1 In reading the two complaint emails we identified that there were several overlapping and duplicate complaints. Therefore, and to test our understanding of these, we related back and confirmed our summation of the complaints to Councillor A.

#	Issues set out in complaint email of 14 th and 21 st January 2021	Ref	Complaint specification	Finding
<i>Email of 14th January 2021</i>				
1	I consider the Commissioner's findings flawed, perverse and a failure to uphold the Councillors Code of Conduct.	A1	Failure in diligence of the ESC in being the guardian of the Code.	<p>It was beyond the scope of this investigation to consider if:</p> <ul style="list-style-type: none"> • The alleged failure was isolated or systemic; and • Any actions of the Commissioner brought the application of the Code into disrepute. <p>We do conclude that in the approach adopted in respect of this complaint, a significant reputational risk was introduced.</p>
2	That you reached such a position and managed to write such a detailed letter dismissing my complaint without conducting an investigation, is indeed quite remarkable.	A2 A3	<p>Failure of the Commissioner to fulfil their duty under the Act.</p> <p>The IO had conducted an investigation not an evaluation.</p>	<p>The complaint met the tests in s9 and s12(6) of the Act and should have been fully investigated. An incomplete investigation was carried out and presented as Screening the outcome of which was a decision by the ESC not to investigate. Accordingly, we consider there to have been a failure to fulfil the duty of the Commissioner under the Act.</p> <p>The scope of work carried out, notwithstanding describing it as Screening, went materially beyond the definition of screening on the ESC website. It also involved seeking evidence, written witness testimony and a formal response from the Respondent to the complaint; this represents investigation. As noted above, the investigation was, in our view, incomplete. The witness pool was not complete, and questions raised by evidence received was not followed up.</p>
3	you allege I have misrepresented the evidence in regards to the respondents use of expletives.	B4	Deliberate misinterpretation of evidence and the taking at face value the responses of the respondent in the face of other evidence.	The investigation of the specific complaint relied upon an indistinct recording of one or more meetings. No account was taken of witness testimony and the witness pool was incomplete.

#	Issues set out in complaint email of 14 th and 21 st January 2021	Ref	Complaint specification	Finding
4	it appears you may have accepted at face value everything the respondent has told you whilst at the same time seeking to discredit evidence to the contrary.	B4	Deliberate misinterpretation of evidence and the taking at face value the responses of the respondent in the face of other evidence.	The investigation that took place appears to have been partial in that it can be concluded that the evidence of the Complainant was subject to a higher degree of scepticism compared to evidence supplied by the Respondent which, at face value, appears to have been accepted without question.
5	if you are correct then I must be guilty of making malicious allegations against the respondent	D1	Failure to answer the questions raised by Councillor A in correspondence.	Only two of the several questions raised by Councillor A were answered by ESC in their 21 st and 28 th January, and 5 th February 2021 responses to the councillor.
6	do you intend to report me to the Standards Commissioner? If not why not?	D1	Failure to answer the questions raised by Councillor A in correspondence.	Only two of the several questions raised by Councillor A were answered by ESC in their 21 st and 28 th January, and 5 th February 2021 responses to the councillor.
7	Can you explain why on Tuesday morning (12 January, the day after your letter) I was contacted by a journalist who was able to quote detail from the letter you had sent to the respondent? The journalist quite openly advised me that they had been contacted by the respondent "with an exclusive".	A4	Failure to address a breach of confidentiality by the respondent in respect of correspondence from the ESC.	No Screening of the new complaint was undertaken. A policy determination is required as to whether an alleged breach of confidentiality in respect of an interaction with the Regulator constitutes council business or merely a function of being a councillor.
8	<i>Email of 21st January 2021</i>			
9	I also regret the tone of your letter which, as before, appears critical of me as a complainer in, for example, not providing enough "documentary or physical evidence".	C1	The tone of correspondence implied criticism of Councillor A as a complainant.	Though we are critical of the tone of the letter as legalistic and brusque, we do not consider it to be unprofessional. Whilst it is possible to, potentially, read implied criticism in the letter, we do not consider this was intentional but was a by-product of the voice in which the letter was drafted.
		C2	Inferring in correspondence that this is a malicious allegation against the Respondent.	
10	You have clearly stated previously that my complaint was 'not accepted for investigation'. It is not then, in my view, reasonable to take almost 4 months to consider whether there was a prima-facie case for investigation.	B2	It took 4 months to complete an evaluation in breach of ESC's own guidance on such matters.	On the ESC assertion that no investigation was undertaken, the time taken to conduct the Screening was excessive. Based on Substance over Form, an investigation, even if incomplete, was undertaken and a decision reached in 13 weeks which is within the published timescales.

#	Issues set out in complaint email of 14 th and 21 st January 2021	Ref	Complaint specification	Finding
11	Furthermore, I do not accept the clock stops each time a further complaint was submitted.	B3	Repeated and unexplained references to stopping the clock.	As far as we can determine, there is no legal basis for the Commissioner's "stopping the clock" with additional evidence being presented nor when writing out to witnesses for evidence.
12	Of course, had you been more diligent in your role as guardian of the code, further complaints may not have been necessary.	A1	Failure in diligence of the ESC in being the guardian of the Code;	Please refer to our finding in respect of #1 above.
13	In short, did you or did you not undertake an 'investigation' of my complaint? It is important you answer this as it will help me consider, amongst other things, whether to pursue a complaint regarding the 'administrative' aspects of this affair.	A3	The IO had conducted an investigation not an evaluation;	Please refer to our finding in respect of #2 above.
14	Finally, are you confident that you fulfilled both your duty under the Act	A2	Failure of the Commissioner to fulfil their duty under the Act	Please refer to our finding in respect of #2 above.
15	and all directions given to the Commissioner in my complaint?	A2	Failure of the Commissioner to fulfil their duty under the Act	There is a clear evidence trail of the involvement of the Commissioner in internal correspondence. ESC staff have suggested strongly, and there is documentary evidence to support the contention, that the Commissioner directed the: <ul style="list-style-type: none"> • outcome of the complaint; • evaluation of evidence to reach the outcome; and • drafting of correspondence to the complainant setting down the outcome and the justification for it.

11 Recommended actions

11.1 Introduction

11.1.1 These recommended actions do not form part of the investigation report. They exist only to provide guidance as to where business improvements could be obtained.

11.2 Grading recommendations

11.2.1 In making recommendations in the course of our work, we assess the relative impact of the related risk. The more serious the risk, the higher the priority we assign to the recommendation. We have made 9 recommendations, some of which have multiple actions, that fall into the categories as follows:

Colour	Definition	Parameters	Number
Red	Fundamental	Critical to the effective functioning of governance or rectification of a legal or regulatory breach and reduce the risk of operational failure.	1
Orange	Significant	Important to the effective functioning of governance and reduce the risk of operational failure.	4
Green	Important	Manage the proposed actions as a part of a wider programme of improvements. There is a moderate level of risk.	4
Blue	Good practice	The recommendation would be in line with good practice.	

11.3 Consideration of recommendations

11.3.1 In preparing these recommendations, we have not lifted each and every lesson to be learned from the body of the report and made a recommendation. We have tried where possible to couch our recommendations in terms of policy or process which if implemented would address more than the individual lessons learned from the body of the report. Additionally, there are a smaller number of specific recommendations on particular points which we consider worth drawing out.

11.3.2 We would of course be happy to provide assistance in implementing recommendations as you felt appropriate.

11.4 Recommendations

Grading	Observation	Risk	Recommendation	Response
1 FUNDAMENTAL	Section 9 of the Act compels the Commissioner to investigate any complaint that meets certain thresholds. Section 12 of the Act appears to give the Commissioner the right to decide whether to investigate any complaint at all.	The relevant clauses can be read so as to be able to be interpreted however one wishes.	<p>An opportunity is sought to amend s12 of the Act in order to restrict the Commissioner's discretion to those complaints meeting the s9 test or to remove the s9 test.</p> <p>The s9 test or s12 is amended to include a time limit of 12 months for bringing complaints except for cases involving any criminal matter, where there should be no time limit, whether reported to the police or not.</p>	<p>This is not wholly within the ESC's gift.</p> <p>We will however highlight the issue with the SPCB in the course of discussions about our governance arrangements.</p> <p>Our policy and procedures have already changed in this area and are in the process of being codified in a manual.</p> <p>The ESC will publish the manual of policies and procedures for investigations and consult stakeholders on its content. The ESC's policy interpretation in respect of investigations, confirming that it will investigate any complaint that meets certain criteria, will be included. This will address the main element of the risk.</p>
2 SIGNIFICANT	There is the ability for a difference between the ESC and common use of certain terminology that may give rise to misunderstanding or misinterpretation.	There is a risk of misinterpretation of the meaning of policy and practice resulting in dissatisfaction with, or misinterpretation of, the outcomes reached by ESC	In the policy and procedure documents published by the ESC there is a glossary dealing with terminology that has a specific meaning to the ESC (e.g. as we have used in §3.1).	<p>We will include an index of key terms in our procedural manual to ensure that all staff and stakeholders have a common understanding of the terminology that we use.</p> <p>We have arranged plain English training for all staff for October 2021 to ensure that our communications are straightforward and readily understood.</p> <p>We will offer to provide further information and to respond to any questions people may have in all of our substantive communications.</p>
3 SIGNIFICANT	As far as we can determine, no specific policy has been issued by the Commissioner on the conduct of Screening or Investigations	Failure to have in place a proper policy and procedure risks allegations of unfair, biased or impulsive decision-making.	A publicly available policy document on the management of complaints is established including setting down	Our policy and procedures have already changed in this area and are in the process of being codified in a manual.

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	concerning a complaint against a councillor or member of a public body.		the thresholds for each stage of the agreed process.	The ESC will publish the manual of policies and procedures for consultation. The manual will include guidance on the conduct of Screening and Investigations concerning complaints against a councillor or member of a public body and of the management of complaints at each stage of the process
4 IMPROVEMENT	There is a need for the improved accuracy in the use of tone and language within ESC communications.	Whilst ESC has a statutory duty to fulfil, the use of overly formal tone or legalistic language risks the recipient misunderstanding, misinterpreting, being offended or missing the subtlety of a point.	The style, tone and language used in correspondence is reviewed in the context of an appreciation that, in most circumstances, ESC is dealing with a lay audience.	We have arranged plain English training for all staff for October 2021 to ensure that our communications are straightforward and readily understood. The manual referred to above will also specify appropriate "tone of voice". Staff have already had clear instructions to the effect that all communications must comply with our values. We will offer to provide further information and to respond to any questions people may have in all of our substantive communications.
5 SIGNIFICANT	The Act stipulates that an investigation should be confidential so far as possible. Neither the Code nor Act provides any means of remediation of breaches of confidentiality	Without any means of sanction, the ability of the Commissioner to maintain their duty of confidentiality is subject to the discretion of the individual being asked to support that privacy.	We would argue this confidentiality should be extended to complaints generally. A means should be found for the Commissioner to be able to enforce the confidentiality obligation until such times as their work, and that of the Standards Commission, is completed in respect of an individual complaint.	We recognise that making this aspect of the Act enforceable would require a change to primary legislation. We will discuss this with the relevant parliamentary subject committee. We note that the Code has already been revised to refer to applicable legislation in respect of adherence to confidentiality obligations. We will in the meantime ask the Standards Commission for Scotland to make specific reference to our and their expectations in respect of confidentiality of investigations in

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6 IMPROVEMENT	There is no express consideration in the Complaint Assessment Form of the Commissioner's power to investigate.	Though the matter is implicit in considerations, a clear conclusion would provide an improved audit trail and should improve consistency of decision-making.	The Complaint Assessment Form is amended to include an explicit evaluation of the power to investigate.	<p>their guidance on application of the Code of Conduct as revised. We recognise that this would apply to councillors and members only.</p> <p>The Complaint Assessment Form when completed already ensures that an audit trail exists for decisions taken to investigate or not, as the case may be.</p> <p>It may be that this recommendation refers to the inappropriate use of discretion on the part of the ESC whether to investigate complaints. That has been addressed in response to another recommendation.</p>
7 IMPROVEMENT	There is no express consideration in the Complaint Assessment Form of the context of the complainant's actions (i.e. is the complaint repetitive, vexatious, frivolous, etc).	Though the matter is implicit in considerations, a clear conclusion would provide an improved audit trail and should improve consistency of decision-making.	The Complaint Assessment Form is amended to include an explicit evaluation to reduce the risk of ongoing or repeated malicious or vexatious complaints.	<p>The ESC will publish a manual of policies and procedures for consultation.</p> <p>The manual will include guidance on the management of complaints at each stage of the process, including guidance on considerations to be given to the complainant's actions.</p> <p>It may be helpful to note that complainers who have previously complained to the ESC in other cases, or otherwise related cases, are noted from the face of the case file on a complaint in our case management system.</p> <p>The ESC has established a register of all occasions on which the office's unacceptable behaviour policy (UBP) has been invoked, which includes reasons for invocation on each occasion. The ESC has published a revised UBP to make it clear when it will invoke the policy. Invocation of the policy is rare. Both the policy</p>

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				and register will be referred to in our manual of policies and procedures. Every new complaint is considered on its individual merits, regardless of whether the UBP was invoked in respect of a complainer or respondent on a previous occasion. As such, we don't intend to include reference to invocation of the UBP in our initial assessment form as it suggests that it is appropriate for consideration at that stage.
8 SIGNIFICANT	<p>In our view, neither an assessment nor an investigation done well was carried out. The process followed, in this case, lacked rigour and completeness.</p> <p>For the level of work done, we believe that there were interviews omitted, documents not obtained, and clarifications not followed up.</p>	Failure to have a consistent investigative methodology or approach that has an inherent assurance as to completeness of evidence risks inconsistent outcomes and challenge from complainants.	<p>We have recommended elsewhere the codification of policy, process and procedures.</p> <p>Further investigations training is required to reduce the level of risk faced.</p> <p>Such training should be based on adopted policy, process and procedures.</p>	<p>Agreed. The ESC will publish a manual of policies and procedures for consultation.</p> <p>The manual will include guidance on conducting screening and investigations of complaints.</p> <p>Three new investigating officers are currently undergoing a comprehensive induction programme which includes all current policies and procedures. Current staff working on investigations have also been fully involved in that induction programme. The induction training will be supplemented by formal training by external providers.</p> <p>All staff will be fully trained on use and application of the manual when it is finalised.</p>
9 IMPROVEMENT	It is unclear whether correspondence issued under an individual's name is being issued in the name of the correspondent as a function of their role or whether it is being issued in the name of the Commissioner.	Different legal structures required different signature regimes and a lack of clarity can result in the organisation or those in positions of accountability being inadvertently made liable or for delegated authorities being exceeded.	Clarity is given to in what capacity individuals within the ESC are signing different types of correspondence.	<p>Staff will be issuing letters on their own behalf during the course of investigations and in order to ingather information.</p> <p>Staff also have delegated responsibility for invocation of the UBP to ensure that there is a route of appeal to the ESC.</p>

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	<p>Transmittal correspondence may require one regime and opinions another.</p>			<p>In practice, all final decisions made in the case of complaints are ultimately the responsibility of the ESC.</p> <p>We will amend our templates for correspondence to make it clear in what capacity our investigating officers are operating and to confirm that decisions in cases have been made by the ESC.</p>

Final