

Bevan Brittan 

SOUTHWARK LONDON BOROUGH COUNCIL

Standards Investigation Report

Councillor Leo Pollak

9 November 2021

B

1 EXECUTIVE SUMMARY

- 1.1 On 21 March 2021 a complaint was received from [REDACTED] (“the Complainant”) alleging that Councillor Leo Pollak (“the Councillor”) had breached the Council’s Code of Conduct (“the Complaint”). The Councillor also self-referred through the Council’s standards regime (“the Referral”).
- 1.2 Both the Referral and the Complaint share the same base facts, however the Complaint focuses on a post on Twitter that relates to the Complainant’s campaign group, and two statements made in support of a planning application.
- 1.3 For ease of reference, we have summarised both the Referral and the Complaint as follows:
 - 1.3.1 The Councillor set up a Twitter account @SouthwarkYIMBY (“the Account”) in November 2017 through which he made anonymous posts on Twitter regarding housing issues and proposed developments in the Council’s area. The Account also retweeted housing related posts from other Twitter users including those made by the Councillor using his named account.
 - 1.3.2 During the latter part of 2020 and in February 2021 the Councillor used the Account to post tweets directly relating to two campaigns regarding specific proposals for development, being the Priory Court development (@courtcampaign), and a development proposed on the Elim estate (@BallcourtGarden).
 - 1.3.3 In February 2021, the Councillor was contacted by the South London Press who stated that they believed that he was behind the Account, which he admitted.
 - 1.3.4 The Councillor then resigned from his role as Cabinet Member for Housing, issuing a written apology which he also read out at the meeting of the Council Assembly on 24 February 2021, a copy of which is attached at **Schedule 2** to this report;
 - 1.3.5 Upon becoming aware that the Councillor was behind the Account, the Complainant made [REDACTED] Complaint. In that Complaint [REDACTED] refers in particular to a tweet posted on 11 February 2021 in response to tweets made by the @BallcourtGarden twitter account (managed by the Complainant).
 - 1.3.6 The Complainant states that the tweet was aggressive, and that the use of the phrase ‘nimbyism’ was offensive. [REDACTED] further states that the tweet was clearly intended to undermine the integrity of the campaign group, and that the Councillor’s behaviour was not only dishonest, but lacked all of the required qualities set out in the Council’s Code.
 - 1.3.7 The Complainant also suspects that two anonymous comments made in support of the planning application for the development on the Elim estate, posted on 12 February 2021, may have also been made by the Councillor prior to it being disclosed that he was behind the Account.
 - 1.3.8 The Complainant states that if the above comments were made by the Councillor, this demonstrates behaviour contrary to all of the principles of the Code.
- 1.4 Having carefully considered the issues, the available documentation, and the information gathered by way of interviews, we have found that (albeit very finely balanced) the Code:
 - 1.4.1 did apply to the Councillor in relation to those tweets about Priory Court and the Elim estate ballcourt;
 - 1.4.2 did apply in relation to other tweets and retweets that referred to schemes and developments in which the Councillor had been involved in his official capacity; but

- 1.4.3 did not apply in relation to the residue of tweets by the Account as these were more general in nature.
- 1.5 It must be made very clear that we do not condone the Councillor's behaviour. Seeking to use an anonymous account through which to comment on social housing and housing developments, and to challenge others commenting on the same, is certainly not appropriate in the circumstances.
- 1.6 We have determined that the content of the tweets to which the Code applied was not such as to result in a breach of the Code.
- 1.7 The content of the tweets that referred to specific developments and schemes in which the Councillor had been involved in a formal capacity (mainly retweets), are generally inoffensive and uncontroversial.
- 1.8 With reference to the tweets regarding Priory Court and the Elim estate ballcourt, the content was at times provocative, but did not amount to breach. Those with whom the Councillor was engaging had voluntarily chosen to involve themselves publically in matters of public concern, and the enhanced protection afforded by Article 10, as well as the higher thresholds of tolerance expected, applied to both the Councillor and those third parties.
- 1.9 We do however find that by acting anonymously the Councillor has breached the Code..
- 1.10 By his own admission, one of the reasons that the Councillor sought to use the Account was to address what he believed to be false statements about the Priory Court and Elim estate ballcourt developments which he felt could significantly undermine them, and which he had not been able to address adequately using his named account. In other words his intention in this respect was the same, both when he was acting overtly using his named account, and when he was acting covertly, and that was to address misinformation, and influence public opinion and support for the developments.
- 1.11 The Councillor also stated that he and other Members of the Council had been subjected to aggressive and provocative behaviour in response to their activities in the past. This was also stated by ██████████ during our interview with ██████████. They both stated that they were genuinely concerned about this behaviour, and we have no reason to disbelieve them. This included allegations of an incident where ██████████ was shouted at in the street by a local resident and campaigner whilst ██████████ were with ██████████. In this context we can also understand why the Councillor might be concerned about his safety and the safety of his family – he stated that at the time he posted the tweets, he was also considering moving to that area. Although again we must make it clear that we do not condone the Councillor's behaviour, which he himself states was inappropriate and contrary to the Code, we accept that these concerns were genuine and go towards mitigation for his actions.
- 1.12 Indeed notwithstanding the higher threshold of tolerance required by those in public office, there is and has been for some time a growing national concern in relation to behaviour towards public figures, and whether a change in the law is required.
- 1.13 In relation to the anonymous comments in support of the application for development of the Elim estate ballcourt, the Councillor denied that he had made them, and we did not find evidence other than supposition to conclude otherwise.
- 1.14 The Councillor has clearly acknowledged at all stages that his actions were not appropriate. He has also repeatedly expressed remorse, including via the statement he made to Council, and by way of his self-referral through the standards regime.
- 1.15 It should also be noted that the Councillor resigned his role on Cabinet, a role which he is passionate about, and has suffered public criticism and condemnation for his actions, including significant personal hardship and turmoil. In our opinion any sanctions that could be applied in relation to this matter fall significantly short of the consequences that have resulted quite independently of this process.

- 1.16 Although it took longer than was ideal, the Councillor has now written an apology to the Complainant, which was received on 24 June 2021. Following receipt of our draft report, the Councillor informed us that he has now also sent a written apology to [REDACTED]
- 1.17 The Councillor is clearly passionate about social housing and the significant issues arising in this context. Seeking to further his views by way of anonymous postings through the Account was ill considered and inappropriate, which he wholeheartedly acknowledges. It is likely that the Councillor will have learnt a number of valuable lessons from this unfortunate episode.
- 1.18 In light of the above, we do not recommend that any further action is required. Further we are of the opinion that this matter can reasonably be resolved without the need for a hearing, which in our view would not be in the public interest nor a beneficial use of Council resources. As stated above, the sanctions/actions available following a hearing and a finding of breach fall significantly short of the consequences that have come to bear quite independently of the standards process.



2 MEMBER DETAILS

- 2.1 Councillor Leo Pollak ("the Councillor") has been an elected Member of the Council since 2014. He is a member of the labour group on the Council.
- 2.2 In June 2018 he was appointed to the role of Cabinet Member for Social Regeneration, Great Estates and New Council Homes, and held this role until September 2020, from which time he held the role of Cabinet Member for Housing. The Councillor resigned from his Cabinet role in February 2021.
- 2.3 The Councillor states that he is aware of the Council's Code of Conduct for Members and understands the standards of conduct required by Members of the Council, and the overarching ethical framework.
- 2.4 The Councillor's current appointments include:
- 2.4.1 Appointments Committee (reserve);
 - 2.4.2 Council Assembly;
 - 2.4.3 Environment Scrutiny Commission; and
 - 2.4.4 North East multi-ward forum.


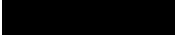
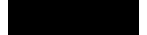
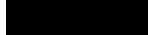
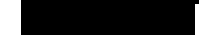
3 THE COMPLAINTS

- 3.1 This report concerns both a self-referral made by the Councillor through the Council's standards regime ("the Referral"), and a complaint made against the Councillor by [REDACTED] ("the Complainant") on 21 March 2021, alleging that the Councillor had breached the Council's Code of Conduct for Members ("the Code"). A copy of the Complainant's Complaint is attached to this report as **Schedule 1** ("the Complaint").
- 3.2 Both the Referral and the Complaint share the same base facts, however the Complaint focuses on a number of posts on Twitter that relate to the Complainant's campaign group, and two statements made in support of a planning application.
- 3.3 For ease of reference, we have summarised both the Referral and the Complaint as follows:
- 3.3.1 The Councillor set up a Twitter account @SouthwarkYIMBY ("the Account") in November 2017 through which he made anonymous posts on Twitter regarding housing issues and proposed developments in the Council's area. The Account also retweeted housing related posts from other Twitter users including those made by the Councillor using his named account.

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- 3.3.2 During the latter part of 2020 and in February 2021 the Councillor used the Account to post tweets directly relating to two campaigns regarding specific proposals for development, being the Priory Court development (@courtcampaign), and a development proposed on the Elim estate (@BallcourtGarden).
- 3.3.3 In February 2021, the Councillor was contacted by the South London Press who stated that they believed that he was behind the Account, which he admitted.
- 3.3.4 The Councillor then resigned from his role as Cabinet Member for Housing, issuing a written apology which he also read out at the meeting of the Council Assembly on 24 February 2021, a copy of which is attached at **Schedule 2** to this report;
- 3.3.5 Upon becoming aware that the Councillor was behind the Account, the Complainant made  Complaint. In that Complaint  refers to a tweet posted on 11 February 2021 in response to tweets made by the @BallcourtGarden twitter account (managed by the Complainant), and which stated as follows:

Southwark YIMBY @SouthwarkYIMBY Feb 11, 2021

*@BallcourtGarden @Leo_Pollak @LeatherMktCBS @LeathermktJMB 
 @SouthwarkLabour    This is pathetic nimbyism. Looking at the planning documents it's clear a lot of consultation with estate residents has gone into these proposals.*

Does the controller of this twitter account live on the estate?



- 3.3.6 The Complainant states that the above tweet was aggressive, and that the use of the phrase 'nimbyism' was offensive.  further states that the tweet was clearly intended to undermine the integrity of the campaign group, and that the Councillor's behaviour was not only dishonest, but lacked all of the required qualities set out in the Council's Code.
- 3.3.7 The Complainant also suspects that two anonymous comments made in support of the planning application for the development on the Elim estate, posted on 12 February 2021, may have also been made by the Councillor prior to it being disclosed that he was behind the Account. Those comments stated as follows:

1. (Supports)

Comment submitted date: Fri 12 Feb 2021

I would like to bring your attention to a group of NIMBY minded individuals that have nothing better to do with their time. This group of individuals have started their own marketing campaign labelling that this development will bring "gang violence" and "concrete ghettos" to the area.

They must be stopped more social housing is needed, their aggressive tone is only to put fear into people and bully them to change their view for their own needs.

I can only hope that you allow this development to go ahead and don't be manipulated by individuals who's only cause is negative behaviour with no substance (sic).

2. (Supports)

Comment submitted date: Fri 12 Feb 2021

Dear Sirs

Bevan Brittan 

London is in desperate need of more housing, I appreciate that local NIMBYs will agree to this but reject any proposals that affect their area.

I would strongly encourage you to support this development. As a homeowner in the local area I do not care if the development works cause some minor nuisance or even lowers the price of my flat. We. need. housing.

It is the height of selfishness for people already in homes to deny that opportunity to others. From receiving (sic) marketing against this proposal the grounds themselves are so incredibly spruious (sic)

1) lack of consultation - it is frankly none of our business, we have homes, we benefited from development in the past. How dare we try and stop others from benefitting

2) Overcrowding - this is frankly nonsense, there are huge amounts of accessible space in the local area, what we need is homes

3) Air Pollution - there are a multitude of ways to deal with air pollution, denying much needed housing is not one of them

(As an aside trying to claim, as this aggressively anti development note that I have been sent does, that building new houses can increase "gang related crime" is as risible as it is offensive)

I would strongly urge you to back these proposals, they are not too tall, or too large, new development should not be limited by the height or size of old development.

I am frankly disgusted by other residents who wish to pull the ladder up behind them and deny much needed housing.

3.3.8 The Complainant states if the above comments were made by the Councillor, this demonstrates behaviour contrary to all of the principles of the Code.

3.3.9 Following his resignation and apology to Council, the Councillor self-referred his conduct to be considered via the Council's standards framework, stating that he knew that he should not have used the Account, and that this was a serious and silly error, for which he apologised.

4 RELEVANT PARTS OF THE CODE OF CONDUCT

4.1 All Members must uphold high standards of conduct and behaviour and act in accordance with the Committee on Standards in Public Life's seven principles of public life ("the Nolan principles"), which are reflected in section 28 of the Localism Act 2011 and set out at Part 1 of the Council's Code.

4.2 The Council's Code is contained within the Council's constitution, a copy of the Code is attached as **Schedule 3** to this Report.

4.3 The Complaint alleges that the Councillor has failed to act in accordance with all of the Nolan principles (as set out in the Council's Code), and paragraphs 2-8, 10 and 11 also set out in Part 1 of the Code, and which provide particular examples of conduct required by Members.

5 PROCESS OF INVESTIGATION AND EVIDENCE GATHERED

5.1 In accordance with the Council's Arrangements for Dealing with Standards Allegations under the Localism Act 2011 (a copy of which is attached at **Schedule 4** to this report), the Council's Monitoring Officer reviewed the Complaint and the Referral, and having consulted the Council's Independent

Person, it was determined that they should be referred for external investigation. Accordingly the Monitoring Officer appointed David Kitson, Partner at Bevan Brittan LLP to undertake the investigation.

- 5.2 Meetings then took place to speak separately to the following individuals, and notes of those conversations are attached to this report as indicated:
- 5.2.1 Councillor Leo Pollak – **Schedule 5**
- 5.2.2 [REDACTED] – **Schedule 6**
- 5.2.3 [REDACTED] – **Schedule 7**
- 5.3 The notes of interview are not a verbatim record and are not intended to capture everything that was discussed. They are intended to capture the key points raised. Both the Councillor and the Complainant have confirmed by email that they are happy with the content of their respective interview notes. [REDACTED] has not provided confirmation that [REDACTED] is happy with the content of the draft note sent to [REDACTED] for review, however we stated in our covering email that if we did not receive a response by a specified date we would assume that [REDACTED] was happy with it.
- 5.4 Contact was also made by email with [REDACTED], who is a prominent campaigner against a proposed development at Priory Court, and is responsible for the @courtcampaign Twitter account with whom the Councillor had engaged using the Account.
- 5.5 Unfortunately [REDACTED] declined our request to discuss matters with [REDACTED] on the basis that we had been engaged by the Council, and were in [REDACTED] view therefore associated with them.
- 5.6 The Councillor also provided both ourselves and the Council with access to the archive of the Account, enabling us to review all of the tweets, replies and retweets posted throughout its tenure. A copy of the tweets made by the Account is attached as **Schedule 8** to this report. A copy of the replies made by the Account is attached as **Schedule 9** to this report, and a copy of the retweets made by the Account is attached as **Schedule 10** to this report.
- 5.7 In order to determine whether there has been a breach of the Code, this Report will draw upon the Complaint and the Referral, supporting documents, notes of the interviews as set out above, the additional documentation and information provided, relevant Council protocols, and publicly available information including documents on the Council's website.

6 OFFICIAL CAPACITY

- 6.1 It is necessary to first consider whether the Councillor was acting in his capacity as a Member of the Council at the relevant times.
- 6.2 Section 27(2) of the Localism Act 2011 provides:
- In discharging its duty under subsection (1) [promotion and maintenance of high standards of conduct], a relevant authority must, in particular, adopt a code dealing with the conduct that is expected by members and co-opted members of the authority **when they are acting in that capacity.***
- 6.3 This is reflected in Part 1 of the Council's Code which refers to behaving in accordance with the Nolan principles "when acting" as a Member of the Council.
- 6.4 There is presently no case law on the interpretation of "acting in [the] capacity" of a Member or co-opted Member under the Localism Act 2011, however there are a number of cases under the previous regime and in relation to which similar wording was used, and which are still relevant.
- 6.5 In applying the Code it is important to understand the underlying purpose of the same, or in other words, the intention of Parliament in enacting the underlying legislation. Albeit with reference to the previous regime (but in absence of any such judicial commentary on the current regime, still being

relevant), the purpose of the legislation was explained by His Honour Judge McKenna in [R v \(on the application of Dennehy\) v London Borough of Ealing \[2013\] EWHC 4102 \(Admin\)](#) at paragraph 9 of the judgment as follows:

The intention of the legislation is to ensure that the conduct of public life at the local government level does not fall below a minimum level which engenders public confidence in democracy as was recognised by Beatson J, as he then was, in R (Calver) v The Adjudication Panel for Wales [2012] EWHC 1172 (Admin)...when he held that there was a clear public interest in maintaining confidence in local government whilst at the same time bearing in mind the importance of freedom of political expression or speech in the political sphere.

6.6 What can also be said is that there is a clear intention as set out in the Localism Act 2011, and reflected in case law under the previous regime, that the Code should not apply to elected Members at all times. This is in contrast to other codes of conduct such as the code of conduct for solicitors, which applies to solicitors at all times both in a professional and private capacity. Parliament could have determined that the Code applied at all times, however it chose not to do so. There is therefore a line between what is considered to be undertaken in the capacity as an elected Member, and that which is undertaken outside of that capacity.

6.7 There is however no specific definition as to where that line is drawn. The legislation itself does not seek to provide any test or clarification on the issue, however the case law under the previous regime provides some assistance. At paragraphs 77 to 80 of the case of [R \(on the application of Mullaney\) v Adjudication Panel for England \[2009\] EWHC 72 \(Admin\)](#) Charles J stated the following:

77. ...I accept that in construing and applying the Code, art 10, and in particular the impact of the Code on the ability of Councillors to hold and impart views on a variety of topics including their views on matters of public interest and political opinion, needs to be considered. I also recognise that those who seek and obtain election as Councillors are likely to have a history of interest in such matters and to hold and wish to express views on them.

78. The question therefore arises against that background, which supports a narrow approach to the application of the Code and thus the trigger to its application, whether Councillors are acting in a personal or political capacity in contrast to their "official capacity" (as defined).

79. I acknowledge that there would be advantage in certainty as to where the line is to be drawn between these activities and thus as to when the Code applies and when it does not. But to do that the language of the Code would have to be explained and thus added to, paraphrased or qualified and it seems to me that given that it uses ordinary English words (and is based on ordinary English words used in the statute, namely "in performing his functions" see s 52(2)) this would be inappropriate and would potentially lead to the error being made of applying guidance as to the application of a test as if it was itself such a test.

80. It has been pointed out in a number of areas that this should not be done. For example in the South Yorks case at 29C and 31H to 32A) Lord Mustill says:

"The courts have repeatedly warned against the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision. I will try to avoid such an error. –

The parties could reasonably expect that since the test for which the Respondent's contend has been rejected another would be proposed in its place. I am reluctant to go far in this direction because it would substitute non statutory words for the words of the Act which the commission is obliged to apply, and partly because it is impossible to frame a definition which would not unduly fetter the judgment of the commission in some future situation not now foreseen..."

6.8 In consequence the words used are to be given their ordinary English meanings and applied to the facts and circumstances of the complaint under investigation. Of particular note from the above excerpt is the recognition that those who seek and obtain election are likely to have a history of interest in matters of public and political interest and to hold and wish to express views on them, and that the

Code must be construed against that background, with the Court stating that this supports a narrow approach to the application of the Code.

6.9 The use of social media by elected Members and the distinction between acting in the capacity of a Member and acting in a private capacity has been the source of much debate and difficulty. It cannot be the case that any use by an elected Member of social media at any time regardless of context and content is subject to the application of the Code, however how far the Code applies to the use of social media by elected Members is not a straight forward distinction to make, and very much depends on the particular facts and circumstances.

6.10 The Local Government Association (LGA) has produced basic guidance for members in relation to their use of the internet and social media. At section 2 of the guidance on [“Basics on communicating with residents, colleagues and officers”](#) it states:

“It is recommended that councillors are clear in their communications whether they are making contact in their official councillor role or in a private capacity. However, councillors should bear in mind that if communications are made public, even if they are sent in a private capacity, that the media and the wider general public may not make the distinction.”

6.11 In the same LGA guidance but under the part concerning [“Councillors and social media”](#) the following appears at section 3:

“Councillors are personally responsible for the content they publish on any form of social media. Publishing or allowing to be published (in the form of a comment) an untrue statement about a person which is damaging to their reputation may incur a defamation action for which you will be personally liable. The same applies if you pass on any similar untrue statements you receive...”

... The code of conduct for members and relevant legislation continues to apply online and in social media. If you are referring online in any way to your role as a councillor, you are deemed to be acting in your “official capacity” and any conduct may fall within the code.”

6.12 The LGA has also recently produced detailed guidance on the application of its model code of conduct which can be accessed at the following address:

<https://www.local.gov.uk/publications/guidance-local-government-association-model-councillor-code-conduct>

6.13 Of particular relevance are the following excerpts:

The Code of Conduct applies to you when you are acting in your capacity as a councillor which may include when:

- *you misuse your position as a councillor*
- *your actions would give the impression to a reasonable member of the public with knowledge of all the facts that you are acting as a councillor...*

...Acting as a private individual

For something to fall within the code there must be a clear link to a local authority function or your role as a councillor. For example, an argument with a neighbour which does not relate to local authority business would not engage the code, even if your neighbour happens to know you are a councillor and therefore complains to the local authority about being treated disrespectfully...

...It is not always immediately apparent in which capacity you are acting, therefore in situations where there may be ambiguity it may be helpful if you can make clear to people in which capacity you are engaging with them...

...In what circumstances might I give the impression to a reasonable member of the public that I was engaged on local authority business?

When you use or attempt to use your position as a councillor to seek to gain an advantage for yourself or someone close to you or to disadvantage someone this is an attempt to misuse your position and therefore falls within the scope of the Code of Conduct.

A number of factors will need to be taken into account to determine whether or not you had used or attempted to use your position as a councillor.

For example:

- *writing to someone on local authority headed paper or using a local authority email address may lead someone to assume you were writing in your capacity as a councillor*
- *handing out a business card where you describe yourself as a councillor may also lead to that assumption*
- *wearing official local authority regalia...*

...Social media postings

Simply describing yourself as a councillor in a social media posting or at the top of your page or in your username or profile, for example, does not of itself mean that every posting you make is covered by the Code. There must be a link within the individual posting or thread to your role as a councillor or to local authority business. However, even if you do not describe yourself as a councillor you may fall within the scope of the code if you are discussing local authority business.

For example, a posting which is simply discussing a recent football match is not covered by the code even if you have described yourself as a councillor. However, if you make a posting threatening a fellow councillor or officer that would fall within the code even if you have not described yourself as a councillor as it relates to local authority business or your role as a councillor.

Each matter would need to be looked at on a case-by-case basis...

...To help avoid some of these issues, some councillors have found it helpful to have separate social media profiles for personal and local authority use, though even the strictest privacy settings are no guarantee that posts or actions will remain private. As a rule of thumb, never post anything online you would not be comfortable saying or sharing in a public meeting. If your local authority has guidance on the effective use of social media this can help...

- 6.14 Further, the Committee on Standards in Public Life's 2019 report on Local Government Ethical Standards ("the Report") acknowledged that the scope of application of the Code is presently narrow, and that this "makes it difficult to effectively deal with some instances of poor behaviour, particularly in relation to social media use. The question of public and private capacity raises significant questions about the privileges and responsibilities of representatives. Democratic representatives need to have their right to free speech and expression protected and not unduly restricted; but equally the public interest demands that they meet certain responsibilities in that role." (see page 37)
- 6.15 The Report can be accessed via the following address:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777315/6.4896_CO_CSPL_Command_Paper_on_Local_Government_Standards_v4_WEB.PDF
- 6.16 Relevant case law provides that the application of the words of the Code is fact sensitive. At paragraph 82 of the *Mullaney* case Charles J states:

“...These are ordinary descriptive English words. Their application is inevitably fact sensitive and so whether or not a person is so acting inevitably calls for informed judgment by reference to the facts of a given case. This also means that there is the potential for two decision makers, both taking the correct approach, to reach different decisions...”

- 6.17 As per paragraph 78 of the *Mullaney* judgment (see paragraph 6.7 of this report), there is a distinction to be drawn between acting in a personal or political capacity, in contrast to acting in an official capacity.
- 6.18 It is therefore appropriate to look at the facts surrounding the allegation to ascertain whether in making posts using the Account the Councillor was acting in his capacity as a Member of the Council.
- 6.19 Although there is doubt arising from case law as to whether the Code can apply where a Member is purporting to act, or giving the impression of acting, as a Member of the Council, we have considered these possibilities for completeness.
- 6.20 In the first instance we have considered whether the Councillor was acting in his formal capacity as a Member of the Council when using the Account. We would consider that acting in a formal capacity as a Member of the Council would ordinarily require the Member to be carrying out official duties, or undertaking the business of the Council. The posts were not made as part of the Councillor's official duties, nor in direct consequence of undertaking the business of the Council. They were however related to social housing generally, as well as in certain instances (including those referred to in the Complaint) relating to specific developments and schemes being pursued or supported by the Council.
- 6.21 What is clear is that the Councillor did not disclose his identity, but in fact proactively sought to keep it from his audience. Nor was there anything overt or obvious to indicate that he was behind the Account. Further, having reviewed the content of the posts, particularly those which involved the Councillor creating content (therefore the posts and replies made through the Account rather than the retweets), there does not appear to be anything in their content that was not already public knowledge, or in other words there does not appear to be anything within the same that would only be known by the Councillor in consequence of his role as an elected Member of the Council, or his role on the Cabinet as Executive Member for Housing.
- 6.22 In relation to the majority of the Councillor's tweets and retweets, these referred to more general issues such as social housing need in the London area, wider housing policy, or schemes in other Boroughs. In these instances we do not find that the Councillor was acting in his official capacity because of the more general nature of the posts.
- 6.23 However, in relation to those posts where the Councillor refers directly to schemes in which the Council had an interest, whether through its own direct involvement in or through giving support to schemes, the position is much more difficult, and is finely balanced. This is not only because of the facts of the matter, but also in consequence of the uncertainty around when the Code of Conduct applies.
- 6.24 The tweet about which the Complaint was made, did refer to a specific development at the Elim estate, and in relation to which the Councillor had been publicly supportive through his role as Executive Member for Housing. Other tweets that the Councillor authored (rather than retweeted) referred to the proposed Council development at Priory Court.
- 6.25 Although as stated above, there was nothing in the Councillor's tweets that was not already public knowledge, or which was only known to the Councillor in consequence of his role on the Council, the tweets were seeking to affect public support for specific developments which the Councillor had actively and overtly supported. Indeed by his own admission, one of the reasons that the Councillor sought to use the Account was to address what he felt were false statements about the Priory Court and Elim estate ballcourt developments which he felt could significantly undermine them, and which he had not been able to address adequately using his named account. In other words his intention was the same, both when he was acting overtly using his named account, and when he was acting covertly, and that was to address misinformation, and influence public opinion and support for the developments.

- 6.26 Some of the retweets posted using the Account, particularly those where the Councillor retweeted posts from his named account, did refer to other schemes and developments within the Borough that he had been involved in as part of his official role. Although by retweeting he was not adding anything new to those posts, which were attributable to identifiable individuals (including himself) anyway, by the same reasoning above it could be said that he was seeking to create further awareness of and support for the official business that he had undertaken. Again although finely balanced, we find that the Code also applied to these types of post.
- 6.27 For completeness, we have gone on to consider whether the Code applied to the residue of the tweets (those not relating to specific schemes and developments in which the Councillor had been involved in his official capacity) by way of the Councillor purporting to act in his official capacity, or whether he was giving the impression that he was acting as a Member of the Council.
- 6.28 On the basis that the Councillor was acting anonymously, we are of the opinion that the Councillor was not purporting to act in his official capacity as a Member of the Council.
- 6.29 Finally we have considered whether, when using the Account and in relation to the residue of tweets, the Councillor was giving the impression that he was acting in his capacity as a Member of the Council. This requires an assessment from the perspective of the reasonable person with knowledge of the relevant facts.
- 6.30 We would also again refer to paragraphs 77 and 78 of the judgment in the *Mullaney* case, which for ease of reference are as follows:
- 77. ...I accept that in construing and applying the Code, art 10, and in particular the impact of the Code on the ability of Councillors to hold and impart views on a variety of topics including their views on matters of public interest and political opinion, needs to be considered. I also recognise that those who seek and obtain election as Councillors are likely to have a history of interest in such matters and to hold and wish to express views on them.*
- 78. The question therefore arises against that background, which supports a narrow approach to the application of the Code and thus the trigger to its application, whether Councillors are acting in a personal or political capacity in contrast to their "official capacity" (as defined).*
- 6.31 It is apparent that the Councillor's interest in and commentary about council housing and addressing social housing needs predates him being a member of the Council by a number of years. On the basis of the above excerpt, simply because the Councillor is now an elected Member does not automatically mean that any views that he seeks to impart about matters of public interest and political opinion are made in his capacity as an elected Member. The *Mullaney* case requires a "narrow approach to the application of the Code and thus its trigger to its application".
- 6.32 Naturally where the Code applies, the judgment as to whether the activity is ethical or appropriate falls to be considered pursuant to the Code and the Nolan principles. Behaviour that takes place in a private capacity is not judged pursuant to the Code of Conduct, but can of course still be considered to be inappropriate or unethical by the same standards. Simply because it might be considered to be improper, does not bring that behaviour within the purview of the Code. There must be a link with the individual's role as an elected Member which goes beyond general matters of public interest and political opinion.
- 6.33 It is also important to note that until it was disclosed that the Councillor was behind the Account, those who engaged with it and who might be considered to have been the audience, were completely unaware that the tweets were being made by the Councillor. Viewing these residual tweets in that context, and in light of their more general nature, it is difficult to see how it could be considered that the Councillor was giving the impression that he was acting in his capacity as a Member of the Council, or that their content was inappropriate.
- 6.34 Even if the reasonable person were aware that the Councillor was behind the account, it would not automatically mean that the tweets were being made in the capacity of Member of the Council.

- 6.35 The closest analogy that could be drawn here is where an elected Member operates a private account, which although identifies them, does not state that they are an elected Member, and may even contain a disclaimer which states that the views posted are personal views etc. Of course that would not automatically mean that the Code did not apply, and there would be a requirement to assess the facts and circumstances, however that the account did not identify the individual as an elected Member, and contained a disclaimer would be relevant considerations in assessing whether the Code applied. In this situation it would also be appropriate to consider the content of what was being said, because if the Member was posting information that they would only have had access to because of their role, and/or was commenting on specific Council business and decisions, then this would lend itself towards a finding that the Code did apply.
- 6.36 There was nothing in the tweets that the Councillor could only have been aware of by way of his position on the Council, and (with the exception of those tweets relating to specific schemes and developments with which the Councillor had been involved in a formal capacity) they were more general in nature. Further, although the fact of the Councillor acting anonymously does not act as a trump card to disapply the Code, it is relevant on the facts.
- 6.37 Having taken into account all of the above considerations, we are of the view that on the balance of probabilities the Councillor was not giving the impression that he was acting in his capacity as a Member of the Council in relation to the residual tweets, and that in consequence the Code of Conduct did not apply.
- 6.38 To summarise, we have found that (albeit very finely balanced) the Code:
- 6.38.1 did apply to the Councillor in relation to those tweets about Priory Court and the Elim estate ballcourt;
 - 6.38.2 did apply in relation to other tweets and retweets that referred to schemes and developments in which the Councillor had been involved in his official capacity; but
 - 6.38.3 did not apply in relation to the residue of tweets by the Account as these were more general in nature.

7 FINDINGS

- 7.1 Of particular importance to our findings is the fundamental right to freedom of expression pursuant to Article 10 of the European Convention of Human Rights, given effect under Schedule 1 of the Human Rights Act 1998 (HRA), which states:

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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- 7.2 As can be seen by way of Article 10(2), the right to freedom of expression is not absolute, and can be constrained where to do so is necessary for a number of reasons, and where such restrictions are prescribed by law.

- 7.3 In the case of [Heesom v The Public Services Ombudsman for Wales \[2014\] EWHC 1504 \(Admin\)](#) Mr Justice Hickinbottom identified the following principles derived from (principally) European case law on Article 10 in the context of the political sphere:
- 7.3.1 Article 10 ECHR affords an "enhanced" level of protection in the political sphere, including local politics;
- 7.3.2 In the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated;
- 7.3.3 Because politicians enjoy "enhanced" protection as to what they say, they are subject to wider limits of acceptable criticism. They are expected to have thicker skins and have more tolerance to comment and criticism than ordinary citizens;
- 7.3.4 "Enhanced" protection applies not only to politicians but also to those who comment upon politics and politicians because the right protects the public interest in a democracy of open discussion of matters of public concern;
- 7.3.5 The protection afforded by Article 10 ECHR is not limited to expressions or critiques of political views but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others;
- 7.3.6 Comments involving a value judgment will be tolerated even if untrue, so long as they have some – any – factual basis; and what amounts to a value judgment as opposed to a fact will be generously construed in favour of the former; and
- 7.4 It follows that where an individual is acting in a private capacity, the right to freedom of expression does not carry with it as high a level of protection, however even in a private capacity the threshold as to what might be considered to be proportionate interference with that right is set at a relatively high level.
- 7.5 We would also refer to the very recent decision of the High Court in the case of [Robinson v Buckinghamshire Council \[2021\] EWHC 2014 \(Admin\)](#). Very briefly the facts of this case were that a member of a Parish Council, Councillor Robinson, had been found to be in breach of the Code of Conduct following comments that he had posted on his blog regarding other members of the Parish Council, as well as decisions that they had made. Councillor Robinson sought to challenge the finding by way of judicial review, on the basis that the finding was (among other things) in breach of his Article 10 rights. In allowing the claim, Mrs Justice Lang stated the following at paragraph 94 of the judgment:
- "...the Claimant was entitled to the enhanced protection afforded to the expression of political opinions on matters of public interest, and the benefits of freedom of expression in a political context outweighed the need to protect the reputation of the other councillors against public criticism, notwithstanding that the criticism was found to be a misrepresentation, untruthful, and offensive. Although no further action was pursued against the Claimant, beyond recommending that he apologise, it was a violation of Article 10 to subject the Claimant to the complaints procedure, and to find him guilty of a breach of the PC Code..."*
- 7.6 Dealing first with the tweets that referred to specific developments and schemes in which the Councillor had been involved in a formal capacity, we do not find that the content of those tweets (mainly retweets) amounted to a breach of the Code.
- 7.7 With reference to the tweets that the Councillor authored and which referred to Priory Court and the Elim estate ballcourt, we are of the view that on balance the content of the Councillor's tweets did not amount to a breach of the Code of Conduct either. Although the content was at times provocative, those with whom the Councillor was engaging had voluntarily chosen to involve themselves publically in matters of public concern, and the enhanced protection afforded by Article 10, as well as the higher thresholds of tolerance expected, applied to both the Councillor, and those third parties.

- 7.8 For us it is not the content of the tweets that is of concern. The retweets and other tweets regarding specific developments and schemes are generally inoffensive and uncontroversial. With reference to the tweets regarding Priory Court and the Elim estate ballcourt, as we have stated above their content was at times provocative, but did not amount to breach. The use of the acronym 'nimby' is not we would suggest particularly offensive in nature, although it does of course seek to convey what might be considered to be a selfish attitude on the part of those who are alleged to fall within that description. There are certainly much more offensive words and descriptions that might be adopted in the context of a situation involving opposing views, and we would go as far as to state that if the Councillor had posted the same content via his own identified account this would not have constituted a breach of the Code. This is specifically because of the Article 10 rights and higher thresholds that apply (both to the Councillor and those who have chosen to publicly comment on matters of political concern).
- 7.9 The main issue arises in the context of acting anonymously. Whilst this would not be of particular note where the person acting anonymously was not also in a position of authority, it is the fact that in this instance the person behind the anonymous Account was in such a position that raises with it a degree of concern. We are of the view that a person in such a position should give very careful consideration as to whether acting in such a manner is appropriate, particularly where they are seeking to comment upon specific matters that relate to their role as an elected Member of the Council.
- 7.10 Although we do not find that the content of the tweets falling within the scope of the Code constituted a breach, we do find that by acting anonymously the Councillor has breached the Code.
- 7.11 The Councillor gave two reasons to explain why he had acted anonymously. The first reason was because he had previously sought to overtly address alleged misinformation and influence public opinion in relation to the proposals in a number of ways, including via his named Twitter account, but that this had not been successful. This had caused the Councillor to become concerned that the misinformation would undermine social housing schemes which were desperately needed in the borough.
- 7.12 The second reason given by the Councillor was that he and other Members of the Council had been subjected to aggressive and provocative behaviour in response to their activities in the past. In particular the Councillor referred to the behaviour of ██████████, who he stated routinely shouts at and intimidates people and disrupts meetings (including Council meetings). The Councillor referred to ██████████ having shouted at a Councillor and ██████████ in the street, causing them to be scared to leave their home, and ██████████ having been abusive and aggressive towards a Member at a meeting to discuss the Priory Court proposals.
- 7.13 When we interviewed ██████████, ██████████ stated that ██████████ (who ██████████ lives in close proximity to) had been aggressive and offensive towards ██████████ on a number of occasions. ██████████ referred to ██████████
- 7.13.1 on one occasion shouting at ██████████ in the street when ██████████ was with ██████████ and that this had resulted in ██████████ being very scared;
- 7.13.2 having shouted at ██████████ (who is also a Member of the Council);
- 7.13.3 shouting in ██████████ during a Council planning meeting, after which Officers had made ██████████ apologise;
- 7.13.4 having followed ██████████ out of a community meeting in Peckham late at night, shouting in ██████████ making ██████████ feel vulnerable;
- 7.13.5 at a public meeting shortly before the Covid pandemic, berating and abusing ██████████ throughout – ██████████ states that several people came up to ██████████ afterwards saying that ██████████ should report ██████████ behaviour;
- 7.13.6 at another meeting standing outside leafleting telling passers-by that ██████████ was inside; and

7.13.7 shouting at [REDACTED] when [REDACTED] attended at Priory Court in February 2021 for a discussion with residents – [REDACTED] states that others present told [REDACTED] to stop as there was a realisation that [REDACTED] had stepped over the mark.

7.14 We must make it clear that [REDACTED] has not commented on the above allegations regarding [REDACTED] behaviour. We did contact [REDACTED] requesting an interview however (as was [REDACTED] right), [REDACTED] refused to speak to us on the basis that we had been engaged by the Council, and were in [REDACTED] view therefore associated with them.

7.15 Although we cannot therefore make any judgement regarding the alleged behaviour, we have no reason to disbelieve the Councillor or [REDACTED] when they stated that they were both genuinely concerned about [REDACTED] behaviour towards them. In this context we can also understand why the Councillor might be concerned about his safety and the safety of his family given what was stated by [REDACTED] (who lives close to [REDACTED] and that at the time he posted the tweets, he was also considering moving to accommodation close to where [REDACTED] lives. Although again we must make it clear that we do not condone the Councillor's behaviour, which he himself states was inappropriate and contrary to the Code, we accept that these concerns were genuine and go towards mitigation for his actions.

7.16 Notwithstanding the higher threshold of tolerance required by those in public office, and making no comment in relation to the allegations regarding [REDACTED] there is and has been for some time a growing national concern in relation to behaviour towards public figures, and whether a change in the law is required. Physically aggressive behaviour should not have to be tolerated.

7.17 We do however find that in relation to those tweets to which the Code applied, the Councillor's behaviour was in breach of the Nolan principles of 'openness' and 'leadership', as well as paragraphs 10 and 11 as set out in the Council's Code, and which provide as follows:

OPENNESS: Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

LEADERSHIP: Holders of public office should promote and support these principles by leadership and example.

10. Always treating people with respect, including the organisations and public I engage with and those I work alongside.

11. Providing leadership through behaving in accordance with these principles when championing the interests of the community with other organisations as well as within this authority.

7.18 For completeness, we would also add that there is insufficient evidence to determine whether the two anonymous comments made in support of the planning application for the development on the Elim estate, posted on 12 February 2021, were made by the Councillor.

8 ACTIONS

8.1 Section 28(11) of the Localism Act 2011 states the following:

If a relevant authority finds that a member or co-opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—

(a) *whether to take action in relation to the member or co-opted member, and*

(b) *what action to take.*

- 8.2 It is widely acknowledged that, unless there are extreme circumstances, the actions available following a finding of breach are very limited. Paragraph 60 of the Council's Arrangements (a copy of which is set out at **Schedule 4** to this report) sets out the sanctions/actions that are open to the Council upon a finding of breach as follows:
- a) *censure or reprimand the member;*
 - b) *recommend that council assembly censure or reprimand the member;*
 - c) *recommend to the member's group leader that he/she be removed from any or all committees;*
 - d) *recommend to the Leader of the council that the member be removed from the cabinet, or removed from particular portfolio responsibilities;*
 - e) *instruct the Monitoring Officer to arrange training for the member;*
 - f) *removal from all outside appointments to which he/she has been appointed or nominated by the authority*
 - g) *withdraw facilities provided to the member by the council, such as a computer, website and/or email and internet access; or*
 - h) *exclude the member from the council's offices or other premises, with the exception of meeting rooms as necessary for attending council, committee and sub-committee meetings.*
- 8.3 The Councillor clearly acknowledged when interviewed as part of this investigation, that his actions were not appropriate, and that his behaviour was contrary to the Code. He has also repeatedly expressed remorse for his actions, including via the statement he made to Council after he had admitted that he was behind the Account, and by way of his self-referral through the standards regime.
- 8.4 We also acknowledge that the Councillor had genuine concerns about his safety and his family's safety, which although not justification for his actions, do go towards mitigation for the same.
- 8.5 It should also be noted that the Councillor resigned his role on Cabinet, a role which he is passionate about, and has suffered public criticism and condemnation for his actions, including significant personal hardship and turmoil. In our opinion any sanctions that could be applied in relation to this matter fall significantly short of the consequences that have resulted quite independently of this process.
- 8.6 Although it took longer than was ideal, the Councillor has now written an apology to the Complainant, which was received on 24 June 2021. Following receipt of our draft report, the Councillor informed us that he has now also sent a written apology to [REDACTED]
- 8.7 The Councillor is clearly passionate about social housing and the significant issues arising in this context. Seeking to further his views by way of anonymous postings through the Account was ill considered and inappropriate, which he wholeheartedly acknowledges. It is likely that the Councillor will have learnt a number of valuable lessons from this unfortunate episode.
- 8.8 In light of the above, we do not recommend that any further action is required. Further we are of the opinion that this matter can reasonably be resolved without the need for a hearing, which in our view would not be in the public interest nor a beneficial use of Council resources. As stated above, the sanctions/actions available following a hearing fall significantly short of the consequences that have come to bear quite independently of the standards process.

9 COMMENTS ON DRAFT REPORT

- 9.1 A copy of the draft report was provided to both the Complainant and the Councillor for their comments prior to being finalised. Although very finely balanced that report concluded that the Code did not apply

to the Councillor's tweets as a whole, but made it clear that we did not condone the Councillor having sought to make use of an anonymous account, and were of the view that this was both inappropriate and ill considered.

- 9.2 The report also made it clear that:
- 9.2.1 even if the Code had applied, it was not the content of the tweets that was of concern, but the fact that the Councillor had acted anonymously; and
- 9.2.2 even had there been a finding that the Code had applied, and that there had been a breach, the sanctions/actions available fell significantly short of the consequences that had resulted independently of the standards process.
- 9.3 It is of course uncommon for findings set out in a draft report to change prior to the report being finalised, however this investigation has involved consideration of very technical and difficult areas of law, with a lack of authoritative precedent on when the Code applies. Considerations and arguments have been finely balanced throughout, and in this context we determined of our own volition to revisit and give further in depth thought to the issue of whether the Code applied, and if so to what extent. This is not to state that our previous view was incorrect, indeed as per paragraph 82 of the *Mullaney* case "...there is the potential for two decision makers, both taking the correct approach, to reach different decisions..." and we again repeat that the matter is very finely balanced.
- 9.4 Our view that the Councillor's behaviour in acting covertly was both inappropriate and ill-considered has not changed, however this is now considered to be a breach of the Code on the basis that we are now of the opinion that the Code did apply in certain respects, however it remains our view that no further action is required in consequence of this report.
- 9.5 In response to the draft report the Councillor informed us that he had, since speaking to us, provided a written apology to [REDACTED] which we have reflected in the report.
- 9.6 In response to the draft report the Complainant asked that we record the following further comments:
- 9.6.1 The Complainant disagrees that the Councillor was "seeking to further his views", and states that he was instead seeking to influence the discourse around social housing in Southwark while he was a Cabinet Members for Housing;
- 9.6.2 The Complainant refutes all allegations made by the Councillor that he spread misinformation about the Elim Estate development, and that such allegations are untrue;
- 9.6.3 The Complainant states that at no point has he been aggressive or abusive to anyone in connection with the [REDACTED] campaign; and
- 9.6.4 The [REDACTED] has gone on record many times as being a strong opponent of Elim Estate development plans, including on The Guardian ("Local councils under fire for plans to build homes on play areas" 02/06/2021).

10 NEXT STEPS

- 10.1 This final report is now being provided to the Council's Monitoring Officer for consideration in accordance with the Council's Arrangements.