REPORT

Complaint number LA/WL/1882
concerning an alleged contravention of
the Councillors’ Code of Conduct
by
Councillor Frank Toner
of
West Lothian Council
## CONTENTS

1.0 Introduction

2.0 Outline of the Complaint and the Response

3.0 The Investigation

4.0 Consideration of the Evidence

5.0 Findings and Conclusion

Appendix A The Complaint

Appendix B The Response

Appendix C List of Persons Interviewed

Appendix D Register of Interests relating to Councillor Frank Toner

Appendix E West Lothian Council note on the remit of the St John’s Hospital Stakeholder Group

Appendix F Minute of the St John’s Hospital Stakeholder Group meeting on 16 December 2015

Appendix G Minute of the St John’s Hospital Stakeholder Group meeting on 20 January 2016

Appendix H The respondent’s representations on the Proposed Report

Appendix I The Commissioner’s comments on representations on the Proposed Report
1.0 Introduction

1.1 Complaint number LA/WL/1882 alleges a contravention of the Councillors’ Code of Conduct (“the Code”). The Code was issued by the Scottish Ministers in terms of section 1 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (“the 2000 Act”) and came into effect on 1 May 2003. A revised edition of the Code was issued on 21 December 2010.

1.2 The complaint has been lodged by Councillor Janet Campbell (“the complainant”) who alleges a contravention of the Code by Councillor Frank Toner (“the respondent”). The respondent is an elected member of West Lothian Council (“the Council”).

1.3 It is alleged that the respondent has contravened the Councillors’ Code of Conduct, and, in particular, the provisions on General Conduct set out in section 3, and on Declaration of Interests contained in section 5.

With regard to General Conduct paragraphs 3.1 and 3.2 of the Code state:

3.1 The rules of good conduct in this section must be observed in all situations where you act as a councillor, including representing the Council on official business.

3.2 You must respect the chair, your colleagues, Council employees and any members of the public present during meetings of the Council, its Committees or Sub-Committees or of any Public Bodies where you have been appointed by, and represent the Council. You must comply with rulings from the chair in the conduct of the business of these meetings.

With regard to Declaration of Interests paragraphs 5.1 to 5.6 of the Code state:

6. It is very important to note that the rules of good conduct set out in Section 3 must be observed in all situations where councillors are acting as councillors, including representing the Council in official business.

7. Paragraph 3.2 provides that you must respect the Chair, your colleagues, Council employees and any members of the public present and provides some examples of the type of meetings to which this provision applies. However, as stated above, paragraph 3.1 provides that the rules of good conduct set out in Section 3 must be observed in all situations where councillors are acting as councillors, including representing the Council on official business and the list of meetings to which this provision applies should be viewed as illustrative, rather than exhaustive. The effect of the provision is that councillors must respect the Chair, colleagues, Council employees and any members of the public in all situations where they act as councillors including – but not restricted to – meetings of the Council, its committees and sub-committees or of any public bodies where they have been appointed by, and represent the Council.
5.1 The key principles of the Code, especially those which specify integrity, honesty and openness are given further practical effect by the requirement for you to declare interests at meetings which you attend. The rules on declaration of interest, along with the rules which require registration of interests, are intended to produce transparency in regard to interests which might influence, or be thought to influence, your actions as a councillor.

5.2 It is your responsibility to make decisions about whether you have to declare an interest or make a judgement as to whether a declared interest prevents you from taking part in any discussions or voting. You are in the best position to assess your personal circumstances and to judge how these circumstances affect your role as a councillor in regard to a particular matter. You can, of course, seek advice from appropriate Council officers or from other sources which may be available to you. In making decisions for which you are personally responsible you are advised to err on the side of caution.

5.3 You may feel able to state truthfully that an interest would not influence your role as a councillor in discussion or decision-making. You must, however, always comply with the objective test (“the objective test”) which is whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a councillor.

5.4 Much of the content of the rules set out in this section of the Code refers to Council or Committee meetings. The principles relating to declaration of interests are not confined to such meetings. You must apply these principles no less scrupulously in your dealings with Council officers, at meetings with other councillors, including party group meetings, meetings of Joint Boards and Joint Committees and any other meeting, formal or informal, where you are representing your Council.

5.5 Interests which require to be declared (if known to you) may be financial or non-financial. They may or may not cover interests which are registrable in terms of this Code. Most of the interests to be declared will be your personal interests but, on occasion, you will have to consider whether the interests of other persons require you to make a declaration. The paragraphs which follow deal with; your financial interests; your non-financial interests and the interests, financial and non-financial, of other persons.

5.6 You must declare, if it is known to you, ANY FINANCIAL INTEREST (including any financial interest which is registrable under any of the categories prescribed in Section 4 of this Code and any interest as defined in a specific exclusion defined in paragraph 5.18).

There is no need to declare:-

(i) an interest where a general exclusion, as defined in paragraph 5.18, applies but an interest where a specific exclusion applies must be declared; or
(ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

You must withdraw from the meeting room until discussion of and voting on the relevant item where you have a declarable interest is concluded other than in the following circumstances.

There is no need to withdraw in the case of:-

(i) an interest covered by a general exclusion or a specific exclusion; or
(ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

5.12 You must declare if it is known to you ANY NON-FINANCIAL INTEREST of:-

(i) a spouse, a civil partner or a co-habitee;
(ii) a close relative, close friend or close associate;
(iii) an employer or a partner in a firm;
(iv) a body (or subsidiary or parent of a body) of which you are a remunerated member or director;
(v) a person from whom you have received a registrable gift or registrable hospitality; or
(vi) a person from whom you have received registrable election expenses.

There is no need to declare the interest unless it is clear and substantial.

There is only a need to withdraw from the meeting if the interest is clear and substantial.

1.4 The respondent has signed a declaration of acceptance of the office of councillor under the Local Authorities (Councillors) (Declaration of Acceptance of Office) (Scotland) Order 1990, as amended, in terms of which the respondent has undertaken to meet the requirements of the Councillors’ Code of Conduct in the performance of his functions in that office.

1.5 For the purpose of this investigation, I was assisted by Mr Jon Miller, Investigating Officer.

1.6 This Report has been prepared for submission to the Standards Commission for Scotland in terms of section 14(2) of the 2000 Act. The Report was submitted in proposed form to the respondent for any representations. Details of the representations received and the extent to which the representations have been accepted or otherwise are set out in Appendices H and I. Minor amendments have also been made.

2.0 Outline of the Complaint and the Response
The Complaint

2.1 The complaint is set out in a letter and attachment which are included as Appendix A to this Report. The complainant alleges that on 20 January 2016, as a member of the St John’s Hospital Stakeholder Group, the respondent a) accused an NHS Lothian officer of lying; and b) participated in the consideration of a review of child health and medical paediatric inpatient services in Lothian, without declaring his financial interest as a remunerated employee of Mr Neil Findlay, MSP, who had interested himself in the progress of the review by means of a request to NHS Lothian for information under the Freedom of Information (Scotland) Act 2002.

2.2 This complaint was initially made by Councillor Campbell on 3 March 2016 in respect of Councillor Toner’s participation in discussion of the Royal College of Paediatrics and Child Health (“RCPCH”) review at the meeting of the Board of NHS Lothian on 3 February 2016. This is subject to a separate report under reference NHS/Lo/1872. On 3 March 2016 Councillor Campbell submitted a letter to the Commissioner requesting that the scope of the initial complaint be widened to include the respondent’s conduct at the Stakeholder Group meeting on 20 January 2016. The complaints are distinguished by the application of the Code of Conduct for Members of Lothian NHS Board in regard to the meeting on 3 February 2016, and the Councillors’ Code of Conduct in regard to the 20 January 2016 Stakeholder Group meeting. Accordingly they have been reported as separate issues.

The Response

2.3 The response is set out in an email from Councillor Toner which is attached as Appendix B to this Report. The respondent refutes both aspects of the complaint.

3.0 The Investigation

3.1 To establish the background to the complaint, the Investigating Officer sought and received information from the Council and NHS Lothian.

3.2 Having considered the documentary evidence, the Investigating Officer proceeded individually to interview the complainant, the respondent and relevant witnesses. The interviews took place on 29 March, 5 April and 21 April 2016. A list of those interviewed is attached as Appendix C.

4.0 Consideration of the Evidence

4.1 The complainant, Councillor Janet Campbell, has been an elected member of West Lothian Council for eight years. She represents the Broxburn, Uphall and Winchburgh ward as a member of the SNP group. Councillor Campbell is a member of the Health and Care Policy Development and Scrutiny Panel, and the Social Policy, Policy Development and Scrutiny Panel.

4.2 The respondent, Councillor Frank Toner, has been an elected member of West Lothian Council for four years. He represents the East Livingston and East Calder ward as a member of the Labour group. Councillor Toner is
Vice-Chair of the Social Policy, Policy Development and Scrutiny Panel and also sits on the Culture and Leisure Policy Development and Scrutiny Panel, Education Executive, Development Management Committee, and Leisure Advisory Committee. On 10 May 2012 Councillor Toner was appointed by the Council as a non-executive director of the Board of NHS Lothian, and as one of three elected members representing the Council on the St John’s Hospital Stakeholder Group. In both capacities the respondent has been active in supporting the retention of the children’s ward at St John’s Hospital, and in expressing concern about the process and progress of the review of paediatric services referred to in this Report. On 30 May 2016 Councillor Toner tendered his resignation from the Board with immediate effect.

4.3 In March 2012 the respondent took up remunerated employment as a trainee parliamentary assistant for Mr Neil Findlay, MSP. In that role he works for 14 hours spread over two days each week. On 20 October 2012 the respondent’s remunerated employment was inserted in his register of interests which is attached as Appendix D.

4.4 The remit of the St John’s Hospital Stakeholder Group is set out in a West Lothian Council note which is attached to this Report as Appendix E. In essence its purpose is to strengthen communications and promote shared understanding among stakeholders with an interest in St John’s Hospital. The current membership comprises an equal number of West Lothian Councillors and Lothian NHS Board members, together with representatives of St John’s Hospital staff and patients. The Stakeholder Group is not a committee of the Council and has no decision-making powers. It is currently chaired by the Chair of the Lothian NHS Board.

4.5 The issue of child health and paediatric inpatient services at St John’s Hospital, Livingston, has been a topic of public concern for several years. This was heightened by staff shortages which led to the temporary closure of the children’s ward in 2015 and contributed to the decision by NHS Lothian to commission an independent review of child health and medical paediatric inpatient services in Lothian by the RCPCH. The original timescale envisaged a completion date of April 2016 but the report is now expected to be considered at the June meeting of the Lothian NHS Board.

4.6 Mr Neil Findlay MSP was elected to the Scottish Parliament in 2011, and re-elected in 2016 as a Scottish Labour member for Lothian Region. Mr Findlay served as a West Lothian councillor from 2003 to 2012. On 29 May 2013 he was appointed Shadow Cabinet Secretary for Health and Wellbeing. Mr Findlay has taken a close interest in the RCPCH review and its completion date. He initiated a campaign under the title ‘Protect Our St John’s Children Ward’ which is included in his website together with the material recovered through his Freedom of Information request to Lothian NHS.

4.7 Referring to the extension from the original completion date for the report, Mr Finlay is quoted in a Herald press report on 6 November 2015 as saying:

“This delay stinks. The review of paediatrics has to report before the end of the financial year but now we are being told it is being delayed because of the Scottish elections and that it won’t report until June a month after people have cast their votes. This is an outrageous situation that looks
very much as if the review has been politically motivated by ministers and the health board to hide what may come from this review from the voters. The people in West Lothian should be able to make an informed choice at the next election and our local SNP representatives should be judged on their record, and that of the government they support.”

On 12 November 2015 Mr Findlay contributed to First Minister’s Questions in the Scottish Parliament when he sought a guarantee that paediatric services would be retained at St John’s Hospital and again referred to the delayed completion of the RCPCH review.

On 17 January 2016 the Falkirk Herald reported him as saying that he had “grave concerns” over the future of St John’s Hospital. In regard to the RCPCH review he stated: “It was originally said the review would report within the current financial year. Now, mysteriously, the review will report just a few days after the election”.

4.8 On 24 November 2015 a parliamentary researcher acting on behalf of Mr Findlay (apparently outwith the knowledge of the respondent) submitted a Freedom of Information request to NHS Lothian seeking the following:

- a copy of any correspondence, letters, emails, briefings etc, between senior management at NHS Lothian and MSPs, and/or Government Ministers and/or civil servants and/or special advisors in relation to the current review into paediatric services across Lothian;

- a copy of any correspondence, letters, emails, briefings etc, between senior management and NHS Lothian and the Cabinet Secretary for Health and Wellbeing in relation to the current review into paediatric services across Lothian; and –

- a copy of any correspondence, letters, emails, briefings, terms of reference given to the review team etc, between NHS Lothian and any member of the review team currently charged with reviewing paediatric services across Lothian.

NHS Lothian responded to the request on 22 January 2016.

4.9 At interview, the respondent stated that he was unaware of this request until 26 January 2016 when he had seen a reference to it in an article in the Herald newspaper. He stated that he was only aware in general terms of Mr Findlay’s interest in seeking the retention of the children’s ward at St John’s Hospital, saying: “I just knew he has an interest in making sure the ward is retained at Livingston”. The respondent said that while working for Mr Findlay he had had no involvement at all in his employer's involvement with the RCPCH review and that Mr Findlay had “absolutely not” asked him to raise the matter when attending meetings of the Stakeholder Group, the Council or NHS Lothian.

4.10 On 16 December 2015 the respondent attended a meeting of the Stakeholder Group at St John’s Hospital. A paper was considered on the RCPCH review. A verbal update was given which included references to an online survey which was due to be launched on 17 December 2015, and progress on developing a public engagement plan. The minute, which is attached to this Report as Appendix F, records that the respondent, Councillor Toner, asked about the delay in appointing a public
engagement expert and the potential for further delay if the review team felt it necessary to make a second visit following their planned three-day visit in January. The respondent noted that the review team had indicated an ability to complete the review by April 2016, prior to the Scottish Parliament elections, and expressed a view that the delay was therefore unnecessary.

4.11 On 20 January 2016 the respondent attended a Stakeholder Group meeting at the Howden Park Centre, Livingston. On this occasion five members of the review team were present together with 22 members of the public. The RCPCH review was the principal item on the agenda.

4.12 In accordance with normal practice, the Chair reminded members that they should declare any financial or non-financial interests, identifying the relevant agenda items and the nature of their interests. The minute records that the respondent declared a non-financial interest as a non-executive member of Lothian Health Board, as Chair of the West Lothian Community Health and Care Partnership, and through his involvement with the West Lothian Integration Joint Board. He did not declare an interest in relation to his remunerated employment by Mr Neil Findlay, MSP.

4.13 **The first allegation:** Following an introduction by the NHS Lothian Chief Officer, University Hospitals and Support Services (the Chief Officer), who had taken the lead in commissioning the review, an address was given by a member of the review team who referred to the target completion date. The minute of the meeting, which is attached to this Report as Appendix G, states that the speaker stated that the review process normally took six to eight months but the complexity of the Lothian-wide review would require another visit in February, and possibly again in March 2016, to engage with patients and the public.

4.14 The next contribution was by the respondent, who pursued the issue of the completion date for the review. The minute records Councillor Toner’s contribution as follows:

‘Cllr Toner questioned how long it would take to conduct the review noting that a period of 6 to 8 months had been suggested. He advised that the report to the Health Board had stated that this would be concluded by April 2016. Subsequently it had been advised that the process would take longer and Cllr Toner sought clarity on when the review report would be available to the Board and the Stakeholder Group’.

4.15 The review team representative responded by advising that the revised timescale reflected the complexity of the process, given that it was not being conducted over a single site, and that NHS Lothian had given a key message about the need for public engagement which had led to the creation of a questionnaire and programme of focus groups.

4.16 The minute continues:

‘Cllr Toner commented that when the initial Board paper had been produced it had intimated an April 2016 conclusion to the review and he questioned therefore who was lying as the service itself had not become
more complicated and that the variable factors had been known about when the Board paper had been produced’.

4.17 The Chair then intervened to say that nobody was lying and that if such an allegation was being made it should be addressed elsewhere.

4.18 The Chief Officer stated at interview that, having taken the lead in commissioning the review, he felt that the implication of lying was being directed at him. He responded to Councillor Toner’s comments immediately after the Chair’s intervention. The minute states that the Chief Officer ‘expressed significant concern about any accusation of lying’ and that ‘he made no apology for the desire to ensure proper public engagement was undertaken’.

4.19 At interview, the respondent said that his reference to ‘lying’ was not directed at any particular person but a rhetorical question in the sense that one of the organisations involved in the review was not in his view telling the truth about the reason for the delay. He did not think that the Chief Officer was particularly ‘fussed’ about the remark and stated that the nature of the discussion at the meeting was confrontational but not to the extent that relationships broke down. He said: “It wasn’t me ranting and raving, I was probing in questions, who’s telling the truth?”

4.20 At interview the Chair stated that he could not recall precisely the words used by the respondent. There was an inference of ‘lying’ but he did not think that it was expressed as a direct accusation towards him or the Chief Officer. The Chair did however recall that the Chief Officer, who was sitting beside him, was ‘fizzing’ and this prompted him to put a cautionary hand on the officer’s sleeve before making his own intervention.

4.21 Asked at interview for his reaction to Councillor Toner’s remark, the Chief Officer stated that he had been shocked at “an approach I had not seen before”. He thought members of his staff and the review team had been embarrassed and noted that the comment had been made in the presence of members of the public. On reflection, he was content to leave matters as they were and focus on the provision of paediatric services.

4.22 **The second allegation:** The principal item for consideration at the meeting of the Stakeholder Group was the RCPCH review. This had been clearly stated at the outset by the Chair. Councillor Toner made no reference to his employer’s interest in the review and made no declaration of interest in that respect.

4.23 In addition to the respondent’s questioning the reasons for the extended timescale for completion of the report detailed in paragraphs 4.14 and 4.16 above, the minute records him as having made the following contributions:

'Cllr Toner commented that the public needed to have confidence in the review process the complexities of which should have been known about when the initial Board paper had been written. Cllr Toner advised that he wanted assurances about competencies and whether the Health Board and the RCPCH understood the paediatric service.

Cllr Toner commented on the extent of the wider public engagement and referred to comments made by the Medical Director in the Herald on 6
November 2015 about delays in the process due to politics. Cllr Toner noted that the review timescale meant that the report would not be published until after the Holyrood elections in May 2016. He questioned whether either the Health Board or the RCPCH had had any contact or engagement with the Cabinet Secretary about reporting timelines.

Cllr Toner questioned who the public engagement expert from the RCPCH was as it had previously been reported that one of the delays in the review process had been the unavailability of the RCPCH public engagement expert. It was reported that [the] initial expert had become permanently unavailable and this expert role was now being undertaken by [a member of the review team] who was not a direct employee of the RCPCH. Cllr Toner commented if it had been known that there were issues around the initial expert there could have been the possibility of seconding a member of West Lothian Council staff to undertake this role.

4.24 At interview, the respondent stated that he had not given any consideration to his employer's interest in the RCPCH review, and that he was unaware of the Freedom of Information request to NHS Lothian. He stated that the questions he had put at the meeting on 20 January 2016 were similar to his approach at the previous Stakeholder Group meeting and at the subsequent meeting of the NHS Lothian Board on 3 February 2016.

4.25 The complainant stated at interview that she had not been present at the Stakeholder Group meeting on 20 January 2016, but had learned of the respondent's input from the SNP Group Leader. The matter had been discussed at an SNP Group meeting and, although no formal decision was taken, it was understood that the complainant, as opposition spokesperson for health and care, would lodge a complaint with the Commissioner.

4.26 The respondent stated at interview that he suffered from dyslexia which impacted negatively on his ability to appreciate the content of complex reports and other papers placed before him. Councillor Toner requested that this be taken into account in the context of his understanding of the requirements of the Code in regard to declaration of interests.

5.0 Findings and Conclusion

5.1 The complainant alleges that Councillor Frank Toner has contravened the Councillors’ Code of Conduct, as outlined in paragraphs 1.3 and 2.1 of this Report.

5.2 The complainant alleges that on 20 January 2016, as a member of the St John’s Hospital Stakeholder Group, the respondent a) accused an NHS officer of lying; and b) participated in the consideration of a review of child health and medical paediatric services in Lothian, in respect of which Mr Neil Findlay, MSP, had submitted requests for information under the Freedom of Information (Scotland) Act 2002, without declaring his own financial interest as a remunerated employee of Mr Findlay.

5.3 The first allegation: The issue to be determined is whether the conduct of the respondent in questioning the reason for the delay in completion of the RCPCH review, and in particular his use of the word ‘lying’, was such as to constitute an absence of respect towards an identifiable individual or
individuals, and thus breach the terms of paragraphs 3.1 and 3.2 of the Councillors’ Code of Conduct.

5.4 In this regard I make the following findings of fact:

- The St John’s Hospital Stakeholder Group is a body to which elected members are appointed to represent West Lothian Council. The appointees are acting in their role as councillors, and representing the Council on official business while attending meetings of the Stakeholder Group, which falls within the category of meetings to which paragraph 3.2 of the Code refers.

- On 20 January 2016 the respondent attended the meeting of the Stakeholder Group at St John’s Hospital, Livingston at which discussion took place on the RCPCH review of child heath and medical paediatric inpatient services in Lothian.

- The respondent participated in the discussion on the RCPCH review as recorded within the minute of the meeting. The accuracy of the minute is accepted by the respondent.

5.5 The term ‘respect’ is not defined within the Code but such conduct is generally demonstrated by the observance of courtesy and regard for the feelings of others. I consider that an attribution of ‘lying’ – with its connotation of dishonesty – is inherently disrespectful.

5.6 The context in which the respondent used that term was his perceived lack of clarity in the explanation given to justify a date for the completion of the review beyond the original completion target of April 2016. The respondent had expressed a view at the previous Stakeholder Group meeting, in December 2015, that the delay was unnecessary. At the meeting on 20 January 2016 he referred to the initial report to the Board of NHS Lothian which had intimated an April 2016 conclusion date, and did not consider that the factors to be considered within the review had changed.

5.7 The reasons for the delay, principally the complexity of conducting a review over more than one site in Lothian, and the requirement for public engagement, were in my view adequately explained by both the NHS Lothian Chief Officer and a representative of the review team, whose contributions preceded the respondent’s suggestion of lying. The respondent’s comment related to that explanation. I regard it as an inappropriate choice of word and one which could have caused offence if directed at a named or otherwise identifiable individual. The Chief Officer concluded that it was directed at himself and the minute records him as expressing ‘significant concern’ at the accusation. I noted however that, while no apology or retraction was made by Councillor Toner, he made no subsequent comment of a similar nature and complied with the Chair’s advice.

5.8 At interview the Chief Officer, who has made no complaint to my office, stated that he was content to treat the respondent’s reference to lying as an isolated example of the respondent adopting a poor choice of word, rather than being personally offensive or a serious example of disrespect.
5.9 Having regard to all the circumstances, I considered that the respondent’s use of the word ‘lying’, expressed in the form of a question, referred more to his confusion over the justification for the delayed completion of the report rather than constituting an accusation against a particular individual or individuals. I did not consider that it was such as to breach the threshold of disrespect contemplated by the Code. I find accordingly that Councillor Toner has not breached paragraph 3.2 of the Code.

5.10 The second allegation: In assessing whether the respondent should have declared an interest in relation to his participation in the discussion of the RCPCH review, I reviewed the relevant provisions contained in section 5 of the Code, and the involvement of Councillor Toner’s employer in questioning elements of the review via a request for information from NHS Lothian and other publicly available statements illustrating Mr Findlay’s interest in the review.

5.11 In this regard I make the following findings of fact:

- A request for background information on the RCPCH review of child health and medical paediatric inpatient services in Lothian was submitted to NHS Lothian by a representative of Mr Findlay’s office on 24 November 2015.

- In attending the meeting of the St John’s Hospital Stakeholder Group on 20 January 2016, the respondent declared a non-financial interest as a non-executive member of the Lothian NHS Board, as Chair of West Lothian Community Health and Care Partnership, and through his involvement with the West Lothian Integration Joint Board. He did not declare a financial interest arising from his employment by Mr Neil Findlay MSP.

- The principal business to be considered at the Stakeholder Group meeting related to the structure, progress and timescale of the RCPCH review.

- The respondent contributed to the discussion on the RCPCH review and raised matters which were analogous to concerns raised publicly by his employer of which he was aware.

5.12 The relevant provisions on declaration of financial and non-financial interests are contained in section 5 of the Code. Paragraphs 5.1 to 5.4 serve as an introduction and highlight the intention to produce transparency in regard to interests which might influence, or be thought to influence, a councillor’s actions. In making their judgement on this question councillors are advised to err on the side of caution and required to comply with the objective test –

> Whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision-making in your role as a councillor.

5.13 Paragraph 5.6 of the Code requires the declaration of financial interests which are registrable under any of the categories prescribed in section 4 of the Code. The respondent has included within his register of interests an entry under category one (remuneration) as a paid employee of Neil
Findlay, MSP, who has himself taken an active interest in the retention of paediatric services at St John’s Hospital and in the RCPH review.

5.14 The scope of Mr Findlay’s Freedom of Information request was wide-ranging in seeking information on contacts between NHS Lothian and civil servants, MSPs, the Cabinet Secretary and Ministers, and between NHS Lothian and the RCPH review team. It did not however specify any issue relating to the completion date of the review, or delays in achieving that target. Mr Findlay had, however, raised the delayed completion date in remarks published in the press on 6 November 2015, contributed to First Minister’s Questions on 12 November 2015 when he sought the retention of paediatric services at St John’s Hospital, and was again quoted in a press report on 17 January 2016 – three days before the Stakeholder Group meeting to which this Report refers - when he expressed grave concerns about the future of the hospital and again commented on the extended completion date for the RCPCH review.

5.15 The complainant has drawn no distinction as to the generality of the respondent’s participation in the discussion of the review at the Stakeholder Meeting on 20 January 2016 or the specific issues of delay which he raised. The contention therefore is that Councillor Toner by virtue of being a remunerated employee of Neil Findlay, MSP, and knowing of his employer’s interest in the review, should have had regard to the objective test and considered whether he should have made a declaration under paragraph 5.6 of the Code.

5.16 The respondent’s statement in his written response to the complaint expressed a belief that he had no financial interest to declare. In making that statement however he considered only whether the discussion on the RCPCH review raised any issue which could have given rise to a financial impact on himself or his employer. Having concluded that no such benefit or detriment could arise, the respondent judged that there was no requirement to make a declaration. In so doing, however, he neglected to consider how his participation in the discussion could be perceived from an external perspective. That is the thrust of the objective test, albeit subject to an assessment of the relevant facts and reasonableness.

5.17 The concerns of Mr Findlay were reflected in the respondent’s contribution to the Stakeholder Group meeting when the minute records him as having commented that the review timescale would not be published until after the Holyrood elections, and questioned whether either the Health Board or the RCPCH had engaged with the Cabinet Secretary about reporting timelines. Having regard to the objective test, the evident interest shown by his employer in the retention of paediatric services at St John’s Hospital and the RCPCH review, and the degree to which these were reflected in the respondent’s own contributions to the meeting of the Stakeholder Group, I am of the view that the respondent should have declared his financial interest as a remunerated employee of Mr Findlay. I do not consider that absence of knowledge of Mr Findlay’s Freedom of Information request to NHS Lothian at the date of the Stakeholder Group meeting was sufficient to justify his failure to declare that interest.

5.18 In considering their requirement to make a declaration, councillors are urged to err on the side of caution. It is also appropriate to note that the Code clearly states that the rules on declaration are intended to produce transparency in regard to interests which might influence, or be thought
to influence, their actions. The requirement for declaration is not therefore dependent on an actual influence being demonstrated.

5.19 Declaration is not required if the interest is so remote or insignificant that it could not reasonably be taken to fall within the objective test. In this case the interest of Councillor Toner’s employer in the RCPCH review had been evident for some time prior to the meeting, and was political in nature. I do not consider it to have been remote from the thrust of the respondent’s criticism and questioning at the meeting, and therefore fell to be considered against the objective test. The respondent failed to comply with the objective test, failed to declare his financial interest arising from his employment, and participated in the consideration of the agenda item. Accordingly I find that he has breached the terms of paragraphs 5.3 and 5.6 of the Code.

5.20 Paragraph 5.12 of the Code requires the declaration of non-financial interests of an employer unless the interest is so remote or insignificant that it could not reasonably be taken to fall within the objective test. It was evident that Mr Neil Findlay, MSP, had expressed significant and repeated concerns about the scope and timescale for completion of the RCPCH review, and the retention of paediatric services at St John’s Hospital. Those concerns were known to the respondent when he participated in the meeting of the Stakeholder Group on 20 January 2016 and as an employee of Mr Findlay his employer’s interest should have been declared. The respondent did not make such a declaration and I find accordingly that Councillor Toner has breached the terms of paragraph 5.12 of the Code.

5.21 In relation to LA/WL/1882, I have come to the conclusion that, having regard to the findings in section 5 and in particular paragraphs 5.11 to 5.20 of this Report, Councillor Frank Toner has contravened the terms of paragraphs 5.3, 5.6 and 5.12 of the Councillors’ Code of Conduct.

Bill Thomson
Commissioner

Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

12 August 2016