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Standards, Procedures and Public Appointments Committee

Comataidh Inbhean, Dòighean-obrach is Cur-an-dreuchd Poblach

Confidentiality of reports from the Commissioner for Ethical Standards for Public Life in Scotland.



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Standards, Procedures and Public Appointments Committee

The remit of the Standards, Procedures and Public Appointments Committee is to consider and report on—

- (a) the practice and procedures of the Parliament in relation to its business;
- (b) whether a member's conduct is in accordance with these Rules and any Code of Conduct for members, matters relating to members interests, and any other matters relating to the conduct of members in carrying out their Parliamentary duties;
- (c) the adoption, amendment and application of any Code of Conduct for members; and
- (d) matters relating to public appointments in Scotland; and
- (e) matters relating to the regulation of lobbying.



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Background

1. The Commissioner for Ethical Standards in Public Life in Scotland (“the Commissioner”) is responsible for investigating complaints about the conduct of MSPs. Following an investigation, a report is made to the Standards, Procedures and Public Appointments Committee containing findings of fact and a conclusion about whether a member has breached the Code of Conduct for MSPs or the provisions of the Interests of Members of the Scottish Parliament Act 2006. The Committee considers such reports in private before reporting to the Parliament stating whether it agrees with the Commissioner and what sanctions, if any, it recommends the Parliament impose on an MSP who has breached the Code or the Act.
2. If details about either a complaint or the contents of the subsequent Commissioner's report appear in the public domain before the Committee has considered and reported on the matter, the Committee may have to carry out its responsibilities against a backdrop of external comment, speculation and judgement. Furthermore, the publicity and media coverage resulting from such a breach of confidentiality may act as a disincentive to making a formal complaint, particularly if it is of a sensitive nature.

Introduction

3. The Code of Conduct contains Rules that restrict the extent to which MSPs can disclose information about details of complaints, including the identity of the complainer and the identity of the MSP complained about, until the Committee concludes its investigation and reports to Parliament. The disclosure rule in the Code of Conduct (at Section 9, paragraph 1) states:

“Members must not disclose, communicate or discuss any complaint or intention to make a complaint to or with members of the press or other media prior to the lodging of the complaint or during Stages 1 and 2 of the procedure for dealing with complaints (this procedure is set out in the guidance on the Code of Conduct (the Code)).”

4. The Code (at section 7, paragraphs 12 to 15) also sets out circumstances in which Members should treat committee documents as confidential as follows—

“12. All drafts of committee reports, and committee reports which, although agreed by a committee and no longer in draft, have not yet been published, should be kept confidential, unless the committee decides otherwise. In addition, the following should be treated as confidential—

- briefing provided to members by Parliamentary staff for particular members' information only;
- documents produced during a private session of a committee;
- evidence submitted to a committee sitting in private from a witness which it has been agreed can be treated as confidential;
- any other documents or information which the committee has agreed should be treated as confidential; and · minutes of private discussions.

13. Unless the Parliament or the relevant committee has agreed otherwise, such documents should not be circulated, shown, or transmitted in any other way to members of the public (including those in Cross-Party Groups), media or to any member of any organisation outwith the Parliament, including the Scottish Government, nor to other MSPs who are not members of the committee or committees for whom the material was intended.

14. Members must not provide the media with off the record briefings on the general contents or 'line' of draft committee reports or other confidential material or information. Disclosures of this kind can also seriously undermine and devalue the work of committees.

15. Unless the Parliament or the relevant committee has agreed otherwise, members must not disclose any information to which a member has privileged access, for example, derived from a confidential document or details of discussions or votes taken in private session, either orally or in writing.”

Breaches of the disclosure Rule

5. The SPPA Committee has publicly expressed its concerns about the fact that the disclosure requirements of the Code of Conduct (Section 9, paragraph 1) have been breached in the past.

6. The Session 4 SPPA Committee published a report in 2015 on a complaint about James Kelly MSP, who had been found to have breached the disclosure Rule. The report highlighted the impact that a breach of the disclosure rule could have on an investigation and reminded all Members of the importance of the rule—

“The Committee takes all breaches of the Code seriously. The Rule covering disclosure is important because it allows investigations by the Commissioner and the Committee to be concluded in the absence of external partisan comment.

The Committee condemns, in particular, any breaches which risk causing reputational damage to another member in advance of a proper investigation.

It is the responsibility of every member to understand and conform to the Code. The Committee reminds James Kelly, and all other members, that members must not disclose, communicate or discuss any complaints or intention to make a complaint to or with members of the press or other media prior to the lodging of the complaint or during Stages 1 and 2 of the procedure for dealing with complaints.

The Committee has agreed that it will communicate with all members to draw their attention to the importance that the Committee places on this part of the Code of Conduct.”¹

7. Following the publication of the report, an email was duly issued to all MSPs reminding them of the relevant Rule.

8. At the beginning of the current parliamentary session in 2016, the Committee considered another breach of the disclosure Rule. In its report on the complaint against Neil Findlay MSP, who had also been found in breach of the Rule, the Committee remarked—

“This Committee regrets that lessons do not appear to have been learned since this reminder² was issued and we intend to issue a letter by way of further reminder to all business managers asking them to remind members of the rules regarding disclosure of complaints.

Repeated breaches of the rule on disclosure of complaints are a matter of regret to the Committee and we deplore the misuse of the complaints process by MSPs as a means of exchanging public criticism.”³

9. Following this report, a letter was issued by the Committee to all Business Managers asking them “to remind members once more of the rules regarding disclosure of complaints”.

10. The Committee, in its latest report into the complaint against Mark McDonald MSP, stated that—

“The Committee considers it unacceptable that the confidentiality requirements have been flouted more than once during the course of this complaint. This is disrespectful to the process and those involved, as well as to the Committee and the Parliament. Whilst the Committee’s decision relates solely to the complaint regarding Mark McDonald, the Committee will return to the issue of confidentiality.”⁴
11. Following the publication of its report, the Committee wrote to James Dornan MSP about his contact with the media regarding the details of the complaint. James Dornan’s response to the Committee confirms that he did share with the media information about his complaint against Mark McDonald. Mr Dornan accepted that this was in contravention of the Code and apologised to the Committee. His letter is attached at Annexe A.
12. The Committee agreed not to sanction James Dornan on this occasion but to issue this report as a way of reminding all MSPs about the rules on disclosure of complaints.
13. In future, the Committee will take any further breaches of the Code seriously and intends to sanction any member found to be in breach unless there are valid mitigating circumstances. The Committee would also like to make it clear that it will not consider ignorance of the rules on disclosure as a mitigating factor in any future consideration of a breach of the disclosure provisions or the imposition of sanctions relating to that breach.
14. In the meantime, the Committee has asked that Scottish Parliament staff and staff in the Commissioner’s office only have access to information on an investigation strictly in accordance with a “need to know” principle, and that there should be the utmost clarity in all documentation and correspondence about confidentiality requirements.

Confidentiality and Disclosure Rule changes

15. As stated above, the Committee believes that reporting of and commentary about details of complaints prior to and during the Committee's consideration can unhelpfully overshadow the Committee's work and may discourage victims from coming forward in the future.
16. Several reports appeared in the media during the Committee's consideration of the complaint made against Mark McDonald in 2018. One of these reports appeared at a point in the process before the report had been circulated to the Committee. There was also substantial media and social media coverage of the Commissioner's report – including the publication of images from the report – prior to the Committee's publication of its report.
17. As a result, the Committee agreed to review the Code of Conduct with the aim of strengthening its confidentiality and disclosure rules. The changes resulting from this review will need to be agreed by the Parliament and the Committee will seek to use that opportunity to again stress the importance of not disclosing information relating to the Commissioner's investigation of the Committee's consideration of a complaint report and potential sanctions.

Conclusion

18. The Committee reminds all members of the requirements under the Code of Conduct not to disclose, communicate or discuss any complaint or intention to make a complaint to or with members of the press or other media prior to the lodging of the complaint or during Stages 1 and 2 of the procedure for dealing with complaints.
19. Members are also reminded of their obligations under Section 7 of the Code to keep certain Committee material confidential.
20. The Committee intends to take action against future breaches of these Code of Conduct provisions and will not view ignorance of the Rules as a mitigating factor in deciding what action to take against a Member.

Annex - Letter from James Dornan MSP to the Standards, Procedures and Public Appointments Committee

10 August 2018

Dear Convener,

Complaint to the Committee

Apologies for the delay in replying to your letter dated 29th June.

I can confirm that at time of sending my complaint to the Standards, Procedures and Public Appointments Committee I also sent it to sections of the media. My reasoning for doing so – without any disrespect for Members of the Committee which I hold in the highest of regards – was that I had concerns about the reaction of Parliament authorities to the events which were unfolding.

I wish to stress that I now accept that this was not the correct thing to do, and for that I do apologise.

As you accept, the latter communications with sections of the press on release of the report was not, and could not, have been released by me.

This correspondence has not been shared with any third party.

Kind Regards,

James Dornan MSP

Glasgow Cathcart constituency

- 1 Scottish Parliament, Standards, Procedures and Public Appointments Committee, 7th Report, 2015 (Session 4): Complaint against James Kelly MSP.
- 2 This is a reference to the reminder previously issued by the Committee in its report on James Kelly in Session 4.
- 3 Scottish Parliament, Standards, Procedures and Public Appointments Committee, 2nd Report, 2016 (Session 5): Complaint against Neil Findlay MSP.
- 4 Scottish Parliament, Standards, Procedures and Public Appointments Committee, 5th Report, 2018 (Session 5): Complaint against Mark McDonald MSP.

