

PRIVATE AND CONFIDENTIAL

Case Reference: BHC-005376

Subject Member: Former Councillor Averil Older

Complainant: Ms Holly Smith

This report represents the findings of an investigation carried out under regulation 14 of The Standards Committee (England) Regulations 2008 by Brian Foley, Standards and Complaints Manager, on behalf of the Monitoring Officer for Brighton and Hove City Council into an allegation concerning former Councillor Averil Older, and will be presented to a Hearing Panel of the Standards Committee.

DATE: 01 September 2011

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1.0 Executive Summary

- 1.1 The complaint is about the conduct of former Councillor Averil Older at the Council Budget Meeting on 03 March 2011. Ms Older was a serving councillor at the time but has since stood down.
- 1.2 Ms Smith made a number of complaints on 11 March 2011 about the conduct of various councillors at that meeting.
- 1.3 It is generally accepted the meeting was highly charged.
- 1.4 Ms Smith alleged that Ms Older took photographs of members of the public seated in the gallery. She complained that Ms Older was asked to stop doing so by people around her but Ms Older laughed and continued to take photographs.
- 1.5 There is no evidence from other persons to support Ms Smith's allegation.
- 1.6 However, Ms Older does accept that she was asked to stop taking photographs. She says that she only took one photograph and has supplied that to the Investigating Officer.
- 1.7 That photograph is slightly incongruous in that it would appear members of the public were unaware it was being taken. It is possible, that other photographs were taken or that at the very least Ms Older was giving the impression that she was taking photographs of the public. Ms Older had not sought the consent of people in the gallery before photographing them, nor had any been given.
- 1.8 The Investigating Officer has concluded that
 - a. there has been a breach of the Members Code of Conduct in respect of Paragraph 3(1): "*You must treat others with respect.*"
 - and,
 - b. there has been no breach of Paragraph 5: "*You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.*"
- 1.9 This complaint will now be referred to a Consideration Panel of the Standards Committee prior to being referred to a Full Hearing (Determination Panel) of the Standards Committee to decide the outcome.

2.0 Relevant legislation

- 2.1 The council has adopted a Code of Conduct for members, in accordance with section 51 of the Local Government Act 2000.
- 2.2 This investigation is carried out under regulation 14 of The Standards Committee (England) Regulations 2008.
- 2.3 Disclosure of information of parts of the report and of the documents in the schedule of evidence may be an offence under section 63 of the Local Government Act 2000.

3.0 Background to the complaint and Decision of Standards Assessment Panel

- 3.1 A complaint was received from Ms Smith by email on 11 March 2011.
- 3.2 Ms Smith's complaint refers to the Council Budget Meeting held on Thursday 03 March 2011.
- 3.3 Ms Smith made five complaints about the conduct of various members at that meeting.
- 3.4 Ms Smith stated that former Councillor Older stood directly in front of the public and was taking photographs of members of the public sitting there.
- 3.5 Ms Smith said that one person asked her to stop taking photographs.
- 3.6 Ms Smith was seated directly behind that person and was concerned that she too would be in the photographs being taken by Averil Older.
- 3.7 In her complaint Ms Smith stated that the actions of Averil Older might be subject to Harassment laws.
- 3.8 Ms Smith thought the actions of Councillor Older were deliberately provocative and that she seemed to be trying to antagonise people.
- 3.9 At their meeting on 31 March 2011 the Standards Committee Assessment Panel decided that if proven the allegation could amount to a breach of the Code of Conduct on the following grounds.

Paragraph 3(1)

You must treat others with respect.

Paragraph 5

You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.

- 3.10 In accordance with the council's local assessment procedures, before the complaints could be assessed the assessment panel had to decide if the complaints met each of the initial tests. The assessment panel were satisfied that the complaints were against a named member of the council and that the member was in office at the time of the alleged misconduct and the code of conduct was in force at the time of the alleged misconduct.
- 3.11 The Assessment Panel decided unanimously that the complaint against then Councillor Older should be referred for investigation.
- 3.12 In light of their decision, the Panel instructed the Monitoring Officer to carry out an investigation; in turn, the Monitoring Officer instructed the Standards and Complaints Manager to proceed on his behalf.

4.0 Evidence gathered

Evidence in support of the complaint as supplied by Ms Smith

- 4.1 Ms Smith's written evidence is as set out in her original complaint and is summarised in paragraphs 4.4 to 4.8 above (see also Appendix 1).
- 4.2 Ms Smith was invited to offer further written evidence. None was supplied.
- 4.3 Ms Smith met with the investigator on 23 June 2011. (Appendix 2)
- 4.4 Ms Smith stated former Councillor Older was striding around in front of the gallery. She was holding her phone out at nearly arms length and the camera lens was pointed at members of the public. Ms Smith could not be certain if Ms Older was filming or taking individual photographs.
- 4.5 Ms Smith drew a diagram to show that she and a group of five friends were seated directly to the left of the Chair in the front two rows of the gallery. Ms Smith was sat adjacent to the wall.
- 4.6 Ms Smith said that her friends were politely asking Ms Older to stop what she was doing but she did not. Ms Smith said she kept standing there and was laughing.
- 4.7 Ms Smith said the sequence of events was as described in her letter of complaint. One of the group made it clear he objected to Ms Older's behaviour and asked her to stop; Ms Smith said he told her he was a law student and that he could bring a charge against her.

- 4.8 Ms Smith said Ms Older laughed in his face.
- 4.9 The Investigating Officer asked Ms Smith if she could clarify exactly when this incident occurred. Ms Smith said she thought it was at the beginning but she could not remember precisely because of the time that has passed. Ms Smith was however pretty clear that it had been during one of the start ups. Ms Smith commented that there had been many interruptions and the meeting kept stopping and starting.
- 4.10 The Investigating Officer viewed the webcast and was able to confirm there had been many interruptions with the Chair finding it necessary on occasions to warn some members of the public that they might be removed. There were several pauses when security were called. However, the webcast cameras were not at any time directed towards the audience. It was therefore not possible to verify unequivocally if Ms Older had been acting in the way described and if so at what time during the meeting.
- 4.11 Ms Smith added that she thought there may have been an additional occasion when Ms Older took photographs when there were fewer people in the gallery.
- 4.12 The Investigating Officer asked Ms Smith for examples of how she thought Ms Older had antagonised people in the gallery.
- 4.13 Ms Smith was quite clear that people were upset when Ms Older ignored their request to stop taking photographs and by her laughing at those people who made this request.
- 4.14 The Investigating Officer asked Ms Smith how she could be certain the person she was referring to was former Councillor Older.
- 4.15 Ms Smith explained that at first she and her friends did not know who the councillor was. However, they viewed the website and recognised Ms Older from her photograph.
- 4.16 Regarding the question of other witnesses. It was agreed that Ms Smith would approach those people initially to see if they would be willing to provide evidence in support of her complaint. It was agreed that it would be helpful to have a short statement from some of those people but not essential.
- 4.17 None of the other witnesses referred to by Ms Smith have shown a willingness to be involved in the complaint.

Averil Older's response to the complaint

- 4.18 Averil Older provided an email response to the complaint on 26 May 2011 (Appendix 3). Ms Older was invited to meet with the Investigating Officer to discuss the allegation but declined the opportunity.
- 4.19 Ms Older denied that she had stood directly in front of the members of the public and was taking photographs from the start of the meeting.
- 4.20 Ms Older does however admit taking one photograph and has supplied a copy of that photograph. (Appendix 4).
- 4.21 Ms Older said this photograph was taken towards the end of a long extremely disruptive meeting, when for about the seventh time there was an adjournment and the police were speaking to the members of the public in the gallery.
- 4.22 Ms Older accepts that someone did ask her to stop taking photographs and she states that she did so.
- 4.23 Ms Older said that she thought there were about a dozen people there at that time but she did not hear anyone say they were a law student.
- 4.24 Furthermore Ms Older says she did not 'laugh in his face', it is assumed Ms Older is referring to the person who asked her to stop taking photographs.
- 4.25 Ms Older said she did not find the situation at all funny but extremely serious. She said the business of the Council Budget setting was unable to proceed because of constant interruption from the public. Ms Older said the disturbances began within a few second's of the vicar's prayers before the meeting had even begun.
- 4.26 Ms Older said she had not done anything with the photograph she had taken.
- 4.27 Ms Older promptly supplied that photograph to the Investigating Officer. Ms Smith is visible in the photograph.
- 4.28 The photograph appears to have been taken from the chamber rather than from directly in front of the gallery. There is no indication that Police Officers are present. The photograph appears to have been taken from the benches where members sit. One elected member is not in their seat and is partially caught in the photograph. The people in the picture are facing in many different directions. No one is obviously looking into the lens.
- 4.29 It would seem quite possible that most people would not have been aware the photograph supplied to the Investigating Officer had actually been taken.

Comments Obtained from Legal Services

- 4.30 The Investigating Officer took advice from a Senior Lawyer of the Council with regard to the issues of complaint. (Appendix 5)
- 4.31 It was noted that for matters of the type described the following pieces of legislation can be considered:
- Public Order Act 1986
 - Protection from Harassment Act 1997
- 4.32 The view of the Council's lawyer was that it is acceptable to use cameras in public spaces however it is generally accepted that a person should not take photographs of individuals without their permission.
- 4.33 Pointing a camera in the face of a person may be deemed to be a nuisance. In some circumstances this may result in damages, an injunction or a restrictive order to stop the nuisance.
- 4.34 However, in the instance described this would probably not be actionable. This is because we are looking at a 'one off' incident and a single photograph.
- 4.35 In a confrontational situation or a fraught meeting the use of a camera is likely to be seen as a form of harassment or nuisance. It is almost certainly provocative.
- 4.36 The Council's lawyer drew upon an example of similar behaviour at a tenant association meeting. It is likely that the action of taking a photograph in the manner attributed to Ms Older would result in a warning that the conduct is unacceptable, inappropriate and inflammatory and that action would be taken if it occurred again.
- 4.37 Ms Smith said that she thought a case of harassment could be brought. The Council's lawyer advised that the conduct may be perceived as an act of harassment if it is calculated to cause distress or if it is deemed to be oppressive by impact; this is a subjective measure based on what the recipient feels.
- 4.38 In summary the legal view was that in relation to Anti-Social Behaviour and nuisance it is the case that Judges repeatedly hand down warnings about the inflammatory nature of using cameras and other recording equipment as part of a dispute on the basis that the intention behind recording is to provoke a reaction.
- 4.39 However, it is unlikely that a criminal charge would come about as a consequence of the described action. As a single act it would not sit comfortably as an action within the civil court regime. If the conduct had

formed part of a repeated action that might have led to an arguable legal case.

5.0 **The Material Facts**

- 5.1 The Council's Budget Meeting was held on 03 March 2011.
- 5.2 At that time Ms Averil Older was a serving councillor. She did not stand for re-election in May 2011.
- 5.3 Many members of the public attended the Council's Budget Meeting. The gallery was full and the ante-room was used to provide a live webcast.
- 5.4 From the outset there were many disturbances emanating from the public gallery.
- 5.5 Such was the level of disturbance that it had not been possible to complete 'prayers' with the public present.
- 5.6 The Chair stopped the meeting in the region of seven times to speak to some members of the public about their behaviour. The Chair considered it necessary to call security on occasions.
- 5.7 Ms Smith observed Ms Older taking photographs of members of the public.
- 5.8 Ms Older accepts that at least one person asked her to stop doing so.
- 5.9 There is uncertainty regarding precisely how many times Ms Older was asked to stop taking photographs.
- 5.10 There is uncertainty regarding the exact point in the meeting when Ms Older was using the camera function on her mobile phone.
- 5.11 Ms Older admitted that she did take a picture and has supplied a copy of that photograph.
- 5.12 The picture is of members of the public in the gallery. Some people are seated, others are standing, and some are moving around. It would appear therefore that this photograph was either taken at the beginning of the meeting or during a break.
- 5.13 Ms Smith felt antagonised by Averil Older's actions; she thought the action of taking photographs, or appearing to take photographs was provocative.

- 5.14 Had the actions described occurred at a tenant meeting it is probable that the person taking the photographs would have been warned about their conduct.
- 5.15 It is however unlikely that the actions described, as a one off event, would reach the threshold where legal action could be taken.

6.0 Reasoning as to whether there have been failures to comply with the Code of Conduct

- 6.1 The sections of the Code of Conduct which relate to this complaint are:

Paragraph 3(1)

You must treat others with respect.

Paragraph 5

You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.

- 6.2 There are no examples in Standards for England case reporting to draw upon which directly compare with this complaint.
- 6.3 The basic principle with regard to paragraph 3(1) is whether there has been a dispute about a matter of principle or whether there is conflict at a personal level which amounts to disrespect. In general a negatively expressed statement about a line of argument will not be considered disrespectful even if it is forcefully and quite rudely expressed. However, a statement made about a person delivered with the same force might be deemed to be disrespectful if it passes a certain threshold. It should be noted that the threshold is higher for conflicts between elected members compared to those between an elected member and a member of the public.
- 6.4 In deciding whether there has been a breach of Paragraph 3 the Investigating Officer has taken into account the effect former Councillor Older's actions had on Ms Smith. It is not possible to know what effect her actions had on other members of the public as no statement has been made. However, from Ms Smith's account members of the public did object to Ms Older taking photographs.
- 6.5 Ms Smith gained the impression from Ms Older that she was either filming or taking a series of photographs of members of the public sat in the gallery. Ms Older admits she had taken at least one photograph and agrees she was asked to stop. From Ms Smith's account of events it is likely there were several requests of this kind.

- 6.6 The Council's lawyer advised that conduct might be perceived as an act of harassment if it is calculated to cause distress or if it is deemed to be oppressive by impact. He has described this as a subjective measure based on what the recipient feels.
- 6.7 Ms Smith described Ms Older's actions as deliberately antagonistic, she thought her actions were incredibly disrespectful.
- 6.8 There is no question that the atmosphere at the Council Budget Meeting on that day was already highly charged and it is possible that action of the type described could have made the situation worse.
- 6.9 The Investigating Officer is of the view that Ms Older's action in taking pictures, or appearing to take pictures of members of the public without their permission and after being asked to stop doing so was antagonistic and was disrespectful to those people who were affected.
- 6.10 The view of the Investigating Officer is that there has been a breach of Paragraph 3(1) of the Code of Conduct.
- 6.11 With regard to Paragraph 5.
- 6.12 In general terms, disrepute can be defined as a lack of good reputation or respectability.
- 6.13 Standards for England guidance suggests that in the context of the Code of Conduct, a member's behaviour in office will bring that member's office into disrepute if the conduct could reasonably be regarded as either:
- Reducing the public's confidence in that member being able to fulfill their role; or
 - Adversely affecting the reputation of members generally, in being able to fulfill their role.
- 6.14 The allegation that Ms Older was taking photographs of members of the public against their wishes was an incident isolated to one particular highly charged meeting. There is no evidence to suggest there has been a pattern of recurring incidents of this type.
- 6.15 There is nothing to suggest in the evidence or findings of fact to suggest that this one off incident would have adversely affected public confidence in Ms Older carrying out her role of local councillor.
- 6.16 There is no evidence to suggest that Ms Older's actions as described affected the reputation of members in general.
- 6.17 The Investigating Officer is therefore of the view that there has been no breach of Paragraph 5 of the Code of Conduct.

7.0 **Finding**

7.1 The finding of this investigation as set out above is that:

- a. In respect of Paragraph 3(1) there has been a breach of the Code of Conduct, and
- b. In respect of Paragraph 5 there has been no breach of the Code of Conduct.