

Decision of the Standards Commission for Scotland

On receipt of a report from the Ethical Standards Commissioner (ESC), the Standards Commission has three options available, in terms of Section 16 of The Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act). These are: (a) to direct the ESC to carry out further investigations; (b) to hold a hearing; or (c) to do neither.

In this case, the Standards Commission determined to **do neither**.

Background

The Standards Commission is a statutory body established under the Ethical Standards in Public Life (Scotland) Act (the 2000 Act). The 2000 Act created an ethical standards framework, under which councillors and members of devolved public bodies in Scotland are required to comply with Codes of Conduct. It provides that complaints about breaches of these Codes are to be investigated by the ESC and adjudicated upon by the Standards Commission.

Report to the Standards Commission

Following his investigation into a complaint (reference LA/NA/3586) concerning an alleged contravention of the Councillors' Code of Conduct dated July 2018 (the Code) by a councillor of North Ayrshire Council (the Respondent), the Acting ESC referred a report to the Standards Commission, on 2 March 2022, in accordance with section 14(2) of the 2000 Act.

The complaint relates to an incident which is alleged to have taken place in relation to an ongoing dispute about parking on, and access to, a public lane behind the complainer's property. The complaint is split into two issues. The complainer alleged, in respect of issue one, that the Respondent intimidated her during a discussion about where she parks her car. Issue two concerns an allegation that the Respondent was "improperly influenced" by a local business owner to revise the regulations relating to the access of heavy goods vehicles to the public lane in question.

In his report, the Acting ESC investigated whether the Respondent's conduct would amount to a contravention of paragraphs 3.2, 3.6 and 6.3 of the Code, which state:

Paragraph 3.2: You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor.

Paragraph 3.6: Bullying or harassment is completely unacceptable and will be considered to be a breach of this Code.

Paragraph 6.3: You may be lobbied by a wide range of people including individuals, organisations, companies and developers. As a general rule, it is an essential element of the democratic system that any individual should be able to lobby the Council or a councillor. However, particular considerations apply when you are dealing with applications under regulatory powers such as planning and with matters of a quasi-judicial nature such as the determination of certain licence applications. If you are lobbied on such matters you should make it clear that you are not in a position to lend support for or against any such application that you will have a responsibility for making a decision on in due course. Representations to councillors on such applications should be directed, by the councillor, to the appropriate department of the Council. This does not prevent you from seeking factual information about the progress of the case.

In his investigation report, the Acting ESC advised that:

1. With regards to issue one, there was a discussion between the complainer, the Respondent and a local business owner in early May 2021, in the back lane behind the complainer's property. The complainer's daughter was also present. There was contradictory evidence in relation to the tone of the discussion, that resulted in the Acting ESC being unable to conclude whether or not the Respondent's demeanour

was intimidatory towards the complainer. Despite examining further contradictory evidence in relation to the content of the discussion, the Acting ESC was persuaded that the Respondent told the complainer not to park her car in the back lane, and that the complainer felt intimidated by the incident, even if that was not the intention of the Respondent.

2. The fact that the Respondent told the complainer not to park her car in the back lane could not be considered to be objectively discourteous or disrespectful, or sufficiently serious or offensive, and thus the Acting ESC did not consider that the Respondent was in breach of the Code. The Acting ESC considered that even if the Respondent had been in breach of the Code, these comments would attract enhanced protection to freedom of expression under Article 10 of the European Convention on Human Rights, given the conversation in question concerned a matter of public interest, being the right to park in a public lane.
3. With regards to issue two (being an allegation that the Respondent was “improperly influenced” by the local business owner to revise the regulations relating to the access of heavy goods vehicles to the back lane), the Acting ESC contacted the Council’s Roads Team, who confirmed that the Respondent was not involved in the decision to change the wording of the signs. The Roads Team did confirm that the Respondent got in touch with them to discuss the situation on behalf of the local business owner, the Acting ESC noted that it was acceptable and appropriate for a councillor to make such an enquiry on behalf of a constituent.
4. Given the Respondent was uninvolved in the decision to change the signs, there was no question that he could be “improperly influenced” by the local business owner. The facts of issue two were therefore not proven.

Having considered the various factors of the complaints and the evidence gathered, the Acting ESC concluded that the Respondent’s conduct did not amount to a breach of the Code.

Reasons for Decision

Having considered the terms of his report, the Standards Commission did not consider that it was necessary or appropriate to direct the Acting ESC to undertake any further investigation into the matter.

In making a decision about whether to hold a Hearing, the Standards Commission took into account both public interest and proportionality considerations, in accordance with its policy on Section 16 of the 2000 Act. A copy of the policy can be found at: <https://www.standardscommissionscotland.org.uk/cases>.

In assessing the public interest, the Standards Commission noted that a breach of the respect and fairness and impartiality provisions in the Code could have the potential to lower the tone of political discourse and to bring the role of a councillor, the Council’s committee system and the Council itself into disrepute. In this case, however, the Standards Commission was of the view that, on the face of it, there was no evidence of any such breach of the Code.

The Standards Commission noted that holding a Hearing (with the associated publicity) could promote the provisions of the Code, if it was found that the Respondent’s conduct amounted to a breach of the Code. There could, therefore, be some limited public interest in holding a Hearing. Regardless of this, the Standards Commission was, however, also required to consider whether it would be proportionate to do so.

In considering proportionality, the Standards Commission noted that the Acting ESC, in his report, had reached the conclusion that the Respondent’s conduct did not amount, on the face of it, to a breach of the Code. Having reviewed the evidence before it, the Standards Commission found no reason to depart from that conclusion. This was because the Standards Commission noted that other than her contention that the Respondent had called her into the lane, the complainer had not provided any other indication as to why she considered his behaviour to be intimidatory. The Standards Commission noted, however, that the

complainer's daughter's recollection was that it had been the local business owner who had called the complainer into the lane. The Standards Commission further noted that there was no obligation on the complainer to have joined the Respondent in the lane. While the Standards Commission noted that the complainer's daughter contended that the Respondent had behaved in an aggressive manner, the Acting ESC's report made no mention of this allegation being supported by the complainer. In any event, it was refuted by both the Respondent and the local business owner.

In further considering proportionality, the Standards Commission noted that it would be obliged, at a Hearing, to consider the application of Article 10 of the ECHR in respect of issue one, which concerns the right to freedom of expression. Article 10 is a qualified right and may be limited by a restriction such as the imposition of a sanction for a breach of a Code of Conduct, provided such a restriction is:

- responding to a pressing social need;
- for relevant and sufficient reasons; and
- proportionate.

The Standards Commission noted that the Courts have held, however, that enhanced protection of freedom of expression applies to all levels of politics including local. As such, there was little scope under Article 10(2) for restrictions on political speech or on debate on questions of public interest. In a political context, a degree of the immoderate, offensive, colourful and emotive, that would not be acceptable outside that context, is tolerated. An Advice Note on the approach the Standards Commission takes when issues that concern the application of Article 10 and the right to freedom of expression arise can be found at:

<https://www.standardscommissionscotland.org.uk/education-and-resources/professional-briefings>.

In this case, the Standards Commission noted that even if the Respondent's conduct in relation to issue one was found to be disrespectful or discourteous at a Hearing, it was highly likely that he would enjoy the enhanced protection to freedom of expression afforded by Article 10, given the conduct concerned a matter of public interest and concern (being a discussion about parking on, and access to, public land). On that basis, the Standards Commission noted that it was very unlikely that the conduct in question, if established, would be found to be sufficiently offensive, gratuitous or egregious as to justify a restriction on the Respondent's right to freedom of expression.

In respect of issue two, the Standards Commission had no reason to depart from the conclusion of the Acting ESC.

The Standards Commission noted that the option to take no action had been included in the 2000 Act to ensure that neither the ethical standards framework, nor the Standards Commission, was brought into disrepute by spending public funds on unnecessary administrative or legal processes in cases that did not, on balance, warrant such action.

Having taken into account the above factors, and in particular the fact that it was not satisfied, on the face of it, that the conduct in respect of either issue could amount to a breach of the Code, the Standards Commission concluded that it was neither proportionate, nor in the public interest, for it to hold a Hearing. The Standards Commission determined, therefore, to take no action on the referral.

It should be noted that this means no decision has been taken or is to be taken on whether the Respondent's conduct amounted to a breach of the Code.

Date: 7 March 2022



**Lorna Johnston
Executive Director**