

## 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 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/OI/3588) concerning an alleged contravention of the July 2018 version of the Councillors' Code of Conduct, being the version of the Councillors' Code in place at the time (the Code) by a councillor of Orkney Islands Council (the Respondent), the Acting ESC referred a report to the Standards Commission, on 7 June 2022, in accordance with Section 14(2) of the 2000 Act.

The complaint concerned allegations that in a letter to a local newspaper on 29 July 2021, an email of the same date, and a Facebook post on 21 July 2021, the Respondent misrepresented the Complainer's position regarding parking permits in Kirkwall and failed to treat him with respect.

In his report, the Acting ESC investigated whether the Respondent's conduct would amount to a contravention of paragraph 3.2 of the Code, which states:

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

In his investigation report, the Acting ESC advised that:

1. It was not in dispute that the Complainer wrote a letter to the Editor of a local newspaper about the Council's proposal to amend existing Traffic Orders. This letter and a response from the Respondent were both published on 29 July 2021. The Respondent's letter was introduced as a response from him, in his capacity as a councillor. In his letter, the Respondent named the Complainer and stated that the Complainer "who purports to being a supporter of these bays –forgot to put in his objection to the move, so can he admit he also made a mistake... or does that just not happen?". The Acting ESC advised that the Complainer considered this misrepresented his position and implied he was untrustworthy and disingenuous.
2. Having considered the terms of the letter, the Acting ESC stated that he did not consider it to be discourteous or disrespectful to the Complainer or that it was designed to demean him.
3. In an email to the Complainer of 29 July 2021, the Respondent stated that he would "happily make a public apology" for misrepresenting his position in the letter to the local newspaper. The Acting ESC did not consider that the Respondent, by offering an apology and failing to do so, had been disrespectful or discourteous to the Complainer. The Acting ESC found that while "robust language" was used by the Respondent in the email, it was not rude. The Acting ESC further noted that a failure by a councillor to

do something that they have said they may or will do in a private conversation would not amount to a breach of the Code.

4. In a Facebook post, dated 22 July 2021, the Respondent stated that there was “a good chance common sense will prevail despite swipes from the sidelines from the likes of [the Complainer]”. The Acting ESC considered that, given the Respondent named the Complainer in the post at a time when the Complainer’s interest in the parking permit issue might not have been widely known, and given that it could be inferred from the post that the Complainer did not have common sense and that negative connotations could be inferred from the phrase “swipes from the sidelines”, the Respondent had failed to treat the Complainer with courtesy and respect. As such, the Acting ESC concluded that there had, on the face of it, been a breach of paragraph 3.2 of the Code. The Acting ESC considered, however, that the Respondent would be entitled to the enhanced protection of freedom of expression afforded to politicians commenting on matters of public concern under Article 10 of the European Convention on Human Rights (ECHR). The Acting ESC advised that, in his view it would be difficult to justify a restriction on the Respondent’s enhanced right to freedom of expression, as the Respondent’s conduct was not sufficiently serious, offensive or abusive.

### **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 provisions in the Code could have the potential to lower the tone of political discourse and to bring the role of a councillor, or even the Council itself into disrepute.

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 concluded that there had not been any breach of the Code in respect the letter published in the newspaper and failure to make a public apology. Having reviewed the evidence before it, the Standards Commission found no reason to depart from that conclusion. This was because, in respect of the Respondent’s letter, the Standards Commission considered the ESC’s report made a reasonable assessment and the Standards Commission considered the threshold required for a breach of paragraph 3.2 of the Code was not reached. The Standards Commission, in reaching this view, noted that the letter from the Complainer that was published in the newspaper on 29 July 2021 had been viewed in advance of that date by the Respondent (as a result of it being shared with him by the newspaper and Orkney Islands Council). The Standards Commission considered that the criticism of the Council’s initial decision regarding the parking bays included in the complainer’s letter could reasonably be interpreted as suggesting that he was supportive of the parking bays being retained. The Standards Commission considered that the Respondent, had made this assumption about the Complainer’s perspective and wished to respond to the criticism of his (the Respondent’s) role in the parking bay approval as contained in the Complainer’s letter to the newspaper. The Standards Commission was of the view that this had led the Respondent to offer a counter criticism by suggesting that the complainer ‘forgot to put in his objection’ and should apologise.

The Standards Commission also agreed with the Acting ESC that there is no explicit requirement in the Code for councillors to do what they have said or suggested they might regarding an apology. The Standards

Commission did not consider the failure in this instance, by the Respondent, to go beyond publicly offering to apologise could amount to a breach of the Code's respect provisions.

Therefore, as the Standards Commission did not consider the first two issues could, on the face of it, amount to a breach of the Code, it determined it was not proportionate for these issues to be the subject of a Hearing.

The Standards Commission agreed with the Acting ESC that, on the face of it, the Facebook post could be reasonably perceived as being discourteous or disrespectful, particularly as the Respondent knew the Complainer did not like Facebook and as the Facebook post was made before the Complainer's letter was published so his views and the full context of the exchange contained within the correspondence were not available to the wider public. However, in considering proportionality, the Standards Commission noted that it would be obliged, at a Hearing, to consider the application of Article 10 of the ECHR, 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 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.

In this case, the Standards Commission noted that even if the Respondent's conduct 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 Facebook post concerned a matter of public interest (being the debate surrounding parking permits in Kirkwall). The Standards Commission agreed with the Acting ESC that it was very unlikely that the conduct in question would be found to be sufficiently serious, offensive or abusive as to justify a restriction on the Respondent's right to freedom of expression.

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>.

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.

In this case, the Standards Commission noted the Facebook post did not appear to reach a wide audience. The Standards Commission noted that it was, in any event, superseded by the publication of both the Complainer's and Respondent's letters together in the newspaper the following week, which limited its impact and practical consequence.

Having taken all factors into account, including the nature of the potential breach and the likelihood of the Respondent's conduct being protected by his enhanced right to freedom of expression, 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.**

The Standards Commission agreed, however, that the Respondent should be reminded of the importance of adhering to the respect provision as set out in the Code, in order to ensure public confidence in the role of a councillor and the council itself is maintained. The Standards Commission noted that, as someone in a position of authority, the Respondent would be expected in all circumstances to be able to make political points in a courteous and respectful manner, without resorting to personal slights.

**Date:** 20 June 2022



**Member**