ITEM NO: 6

REPORT TO:	**STANDARDS COMMITTEE**
DATE:	13 December 2011
REPORT OF:	Sandra Stewart - Borough Solicitor (Monitoring Officer)
SUBJECT MATTER:	**BLOGGING AND SOCIAL MEDIA GUIDANCE UPDATE**

REPORT SUMMARY:

Standards for England recently amended their guidance for Members using blogging and social media, following an Upper Tribunal case (MC v Standards Committee of LB Richmond [2011] – **Appendix 4A**) in which the judge made comments about the meaning of the phrase "*acting as a representative of your authority*" in paragraph 2(1)(b) of the Code.

To inform the Standards Committee about a recent ruling of the Upper Tribunal (Administrative Appeals Chamber) which considered the circumstances under which a member can be said to be acting in their official capacity and Standards for England's updated guidance in respect of blogging which was received by the Council on the 7 November 2011.

The Upper Tribunal in the case of MC v Standards Committee of LB Richmond-upon-Thames (Case No. GLGSE/111/2010) allowed an application for leave to appeal to the First-Tier Tribunal.

The case concerned a decision by the standards hearing sub-committee of the London Borough of Richmond made in respect of the Appellant, then a councillor. The sub-committee had determined that the councillor had breached paragraphs 3(1) (respect for others) and 3(2)(b) (bullying) of the Members' Code of Conduct through his behaviour towards council officers and was suspended for 28 days.

The Upper Tribunal was of the opinion that the body considering the complaint (i.e. the standards committee or, on appeal, the First-Tier Tribunal) should have considered the issues which were raised in relation to official capacity. In this case there was a failure to consider the facts which questioned whether the councillor was acting in his official capacity.

The Model Code of Conduct 2007 ("**Model Code**") at para 2(1) provides:

Subject to sub-paragraphs (2) to (5), you must comply with this Code whenever you-

(a) conduct the business of your authority (which, in this Code, includes the business of the office to which you are elected or appointed); or

(b) act, claim to act or give the impression you are acting as a representative of your authority, and references to your official capacity are construed accordingly.

Making reference to para 2(1)(b) of the Model Code and the question of determining whether a member is acting, claiming to act or giving the impression that he is acting as a representative of the authority, Judge Ward in the Upper Tribunal commented:

………When one is acting (etc) "as a representative" of an authority is ..... a matter for determination by the tribunal of fact (i.e. a standards committee, or, on appeal, the First-tier Tribunal). I do however consider that, reading the Model Code as a whole, it is evident that "representative" is not to be equated to "member". The Model Code uses both terms and must be taken to have done so deliberately. Accordingly, merely to act, claim to act or give the impression one is acting (etc) as a member is in my view of itself not sufficient unless there is material on which the tribunal of fact can properly conclude that one is acting (etc) specifically "as a representative" of the authority.

Where official capacity is raised as an issue in cases it would appear that the Upper Tribunal is going to expect the body hearing the case to address official capacity in future by making reference to the conduct of the member that amounts to acting as a representative of the authority. Standards for England have stated that this could have significant ramifications for member's activity on blogs, twitter and other internet sites as well as in election or other political material:

It is unlikely that most blog, etc postings will contain content that holds the member out to be acting as a representative of the authority rather than simply a member unless that content in some way gives the impression that the member is speaking for the council. However, depending on the circumstances such communications might be regarded as conducting the business of the office of member. This is because it is reasonable to regard communicating with constituents at large about issues of local political interest as being part of the business of the office of a councillor.

Taking into account the case, Standards for England have suggested that this could have serious implications for the interpretation of a member's activity on blogs, twitter and other internet sites. As such, they have considered and revised their guide to blogging (**Appendix 4B**) as amended.

RECOMMENDATION(S) For noting.

FINANCIAL IMPLICATIONS: There are no significant financial issues arising from this

(Authorised by Borough Treasurer)	Report.
LEGAL IMPLICATIONS:	These are set out in the report.
(Authorised by Borough Solicitor)	
RISK MANAGEMENT:	Standards Committees should be aware of the National position in order that consistency of approach is taken in respect of setting and advising on local ethical and standard issues.
LINKS TO COMMUNITY PLAN:	Support the current arrangements for ethical and corporate governance of the Authority to ensure that the public can have confidence in accountability of elected Members and the maintenance of high ethical standards.
ACCESS TO INFORMATION:	**NON-CONFIDENTIAL** **This report does not contain information which warrants its consideration in the absence of the Press or members of the public**
REFERENCE DOCUMENTS:	MC v Standards Committee of L B Richmond [2011] UKUT 232 (ACC): http://www.osscsc.gov.uk/Aspx/view.aspx?id=3281; • Standards for England's revised quick guide to blogging: http://www.standardsforengland.gov.uk/Guidance/TheCodeofConduct/CodeGuidance/Onlineguides/Quickcodeguides/BloggingQuickGuide/ Standards Board for England Events which can be obtained from the public website: Any background papers or further information can be obtained from the Council's Borough Solicitor and statutory Monitoring Officer by contacting 0161-342-3028 or by e-mail Sandra.Stewart@tameside.gov.uk

APPENDIX 6A

MC v Standards Committee of LB Richmond [2011] UKUT 232 (AAC) (14 June 2011)

Local government standards in England

IN THE UPPER TRIBUNAL Case No GLGSE/1111/2010

ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: In person

For the Respondent Ms Estelle Dehon of Counsel, instructed by Director of Law and Administration, London Borough of Richmond- upon-Thames

Decision: The appeal is allowed. The decision of the First-tier Tribunal on 26 February 2010 under reference LGS/2010/0486 involved the making of an error of law and is set aside. Acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I substitute the decision which the First-tier Tribunal ought to have given.

That is that the appellant is given permission to appeal to the First-tier Tribunal from the decision of the respondent given following the written representations hearing conducted by its Standards Hearing Sub-Committee on 25 January 2010, such permission being limited to:

(a) whether when sending the emails described below as the "September email" and the "December email" on 26 September 2008 and on 2 December 2008 respectively, he was acting in "official capacity" for the purpose of the Code of Conduct;

(b) whether he was in breach of para 3(1) of the Code by sending a letter dated 12 January 2009 to the Chief Executive and/or by previously circulating a draft to a small number of individuals.

(c) the sanction imposed, insofar only as it falls to be reconsidered in consequence of any decision reached under (a) or (b)

The file is to be placed as soon as possible before a judge of the First-tier Tribunal, duly authorised in that regard, for case management directions.

REASONS FOR DECISION

1. The appellant, then a councillor of the London Borough of Richmond-upon-Thames ("the council"), had been adjudged by the Standards Hearings Sub-Committee ("the sub-committee") of the respondent Standards Committee following its meeting on 25 January 2010 to have breached paragraphs 3(1) (respect for others) and 3(2)(b) (bullying) of the Members' Code of Conduct through his behaviour towards Council officers and was suspended for 28 days, a period which has been served.

2. In such a type of case, a right of appeal lies, with permission of the First-tier Tribunal, to the First-tier Tribunal under regulation 21 of the Standards Committee (England) Regulations 2008 (SI 2008/1085) ("the 2008 Regulations"). The regulation further provides:

"(4) In deciding whether to give permission to appeal the First-tier Tribunal shall have regard to whether, in its opinion, there is a reasonable prospect of the appeal being successful (either in whole or in part).

(5) Permission to appeal or to suspend a sanction may be given in relation to the whole or any specified part of the finding or sanction."

Permission was refused by Judge Laverick on 26 February 2010. Permission to appeal against that refusal of permission was itself refused by Judge Bird QC on 31 March 2010.

3. The appellant, still wishing to get his appeal heard on the merits by the First-tier Tribunal, applied to the Upper Tribunal for permission to appeal against the decision of 26 February 2010. At that time, there was a substantial measure of legal uncertainty as to whether the right of appeal conferred by section 11 of the Tribunals, Courts and Enforcement Act 2007 extended to an appeal against such a decision and it was suggested to him that he might wish, in parallel, to lodge an application for judicial review, which he subsequently did. That application was subsequently transferred to the Upper Tribunal.

4. I gave permission to appeal on limited grounds, discussed at [6] below. I likewise gave limited permission to apply for judicial review, while reserving the question of delay.

5. In early 2011 a three judge panel issued its decision in *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC) determining that the right of appeal under section 11 extended to any decision other than an "excluded decision" (as defined). The decision of 26 February 2010 is not an "excluded decision", so the appellant has, as the respondent accepts, a right of appeal. As he had an alternative remedy, the application for judicial review falls away and is formally dismissed by a short separate decision.

Limited grounds on which permission given

6. The two grounds on which I gave permission were:

(a) whether in the decision of 26 February 2010 Judge Laverick had erred as to the meaning of "official capacity" and the application of *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin) to the emails sent on 26 September and 2 December 2008 which were among the subjects of complaint

> (b) whether that decision had, for reasons set out more fully in my determination, been in error in refusing an opportunity to appeal against a finding that the letter dated 12 January 2009, sent to the Chief Executive and previously circulated as a draft to a limited number of individuals and said to contain immoderate or intemperate language, was in breach of the Code.

I refused permission to appeal on a number of other grounds.

Right of appeal to the First-tier Tribunal under regulation 21 of Standards Committee (England) Regulations

7. As a preliminary, it is necessary to examine the nature of the exercise to which the requirement of regulation 21 of the 2008 Regulaitons for permission provides the filter.

8. Section 53 of the Local Government Act 2000 ("the 2000 Act") requires, with immaterial exceptions, every "relevant" local authority (as the Council is) to establish a standards committee to have the functions conferred by Part III of that Act. A standards committee must include at least two members of the authority and at least one person who is not a member or an officer of the authority or any other. It must be chaired by a person falling within the latter category. The section makes further provision, which I need not set out, for the composition and membership of the standards committee. It may fairly be summarised as saying that a standards committee has an independent element but cannot be seen as independent of the local authority.

9. The First-tier Tribunal (General Regulatory Chamber – Local Government Standards in England) is the statutory successor to the former Adjudication Panel for England and its judges and members transferred in under the provisions of the 2007 Act. Under the now-repealed section 75(7) of the 2000 Act, "such members of the Adjudication Panel for England as the Lord Chancellor thinks fit must possess such qualifications as may be determined by the Lord

Chancellor." While I am not aware of any formal, published determination, in practice some members had legal qualifications and others experience of local government. The Adjudication Panel for England was, as its name suggests, a national body. These matters have not so far as I am aware changed significantly following the transfer pursuant to the 2007 Act.

10. The right of appeal created by regulation 21 of the 2008 Regulations from a standards committee to (now) the First-tier Tribunal does nothing to limit the grounds of appeal nor is there anything to be found in the enabling legislation. That right of appeal is therefore not limited save by the requirement for permission. At least some cases proceed by way of a rehearing of the issue afresh (such as LGS/2009/0470 *Barnbrook*).

Right of appeal to the Upper Tribunal under section 11

11. The right of appeal against the decision to refuse permission under regulation 21 is, however, limited to error of law by virtue of section 11 of the 2007 Act.

The factual background

12. It is necessary to set out a limited part of the facts. I draw liberally on what are described as "Relevant undisputed facts" in the sub-committee's decision notice for this purpose.

13. The LGBT Forum ("the Forum") was set up as a result of a joint initiative by the members, including the council, of the Community Safety Partnership ("CSP"). It was developed by members of the borough's lesbian, gay, bisexual and transgender community as a consultative forum. The CSP supported the forum inter alia by providing the services of a clerk for the meetings.

14. The constitution of the forum provides for two types of membership:

a. Full membership: open to any member of the LGBT community living or working in Richmond; and

b. Associate membership: open to representatives of agencies, such as the police or the council, who may or may not be members of the LGBT community."

15. The appellant was a full member of the Forum, as was a Mr E, a council officer.

16. A Mr K was also a full member. He commenced employment with the council on 15 September in the CSP. One of his duties as a result was acting as clerk to the Forum. Mr K agreed with his line manager a protocol to enable him to remain as a full member of the forum whilst still acting as clerk.

17. By September /October 2008, some conflict had arisen between the members of the steering group of the Forum. Some form of that conflict was between the appellant and a Mr H.

The September email

18. It is not in dispute that the appellant, using his private email address, on 26 September 2008 sent Mr K an email ("the September email") to his private email address, in the following terms:

> "A little bird tells me that you were behind [Mr H's] complaint against me on the grounds of indirect discrimination. If this is true, … there are some very serious questions to be asked and answered as at the time you were a prospective employee of the Council. I will be seeking a meeting with [Mr K's line manager] and [a councillor and the Cabinet Member with responsibility for, inter alia, the CSP] on my return to discuss."

The email was sent just over a week after Mr K began his employment with the council.

The December email

19. On 2 December 2008 the appellant sent an email to Mr E, copied to the council's Chief Executive and the Head of Human Resources. It began:

> "For the avoidance of doubt, I am writing to you in my capacity as Vice Chair of the LGBT Forum. I apologise for using my Councillor e-mail pathway, but it is the most convenient under the circumstances."

The e-mail concerned Mr E's decision to sign a request for an Extraordinary General Meeting of the Forum to take place to fill vacant positions on the Steering Group and to dissolve the Steering Group as it was then constituted. The appellant indicated that this was "a ruse" simply to remove him from the Steering Group. The e-mail concluded:-

> "What concerns me now is that you, an employee of the Council, have put yourself in a position where you are in direct confrontation with an elected member of the Authority in very contentious circumstances. We both attend the Forum in our private capacity. However, you are still an Officer and I am still a Councillor and I believe your actions to be inappropriate for an Officer. Can I respectfully suggest – as a way out of this – that you withdraw your name as a signatory to the motion calling for the EGM?
>
> In the meantime, I am copying this to the Chief Executive and the Head of HR for advice and guidance on our respective positions."

The letter

20. In his letter of 12 January 2009, the appellant made clear that he was writing as a councillor (and, on this, unlike the two emails, the question of capacity is not in issue.) He made various allegations in the letter concerning the conduct of various council officers. He also made what were viewed by the sub-committee as "allegations of criminal misconduct against two private individuals participating in the LGBT Forum." Before he sent the letter, he sent a draft to four other people who had attended the EGM:

- a (different) Mr H "for comments and accuracy only"
- a Mr B to "proof read" the letter so "it could not be misinterpreted"
- a Mr C for "advice on the content (for both clarity and suggestions)"
- a Mr J "for clarification on some matters".

The Sub-Committee's approach to official capacity

21. They found that the appellant was a full member of the Forum. There was "no formal link" between the council and his membership of the Forum. The Members' Protocol on IT use stipulates that the council email address is provided predominantly for council business, but may be used for personal or business use. The appellant contended that he always made it clear when using his council e-mail in which capacity he was writing. The sub- committee, while not disputing this in general terms, was able to identify what was described as an example of an email about Forum business signed by the appellant with the designation "Councillor" and particulars of his electoral ward and the office of Mayor he had held the previous year. Evidence from the minutes suggested that on a number of occasions the appellant was involved in Forum matters as a councillor, but that against that, in September 2007 he had "reconfirmed" that he wished to be considered as a full member (i.e. as attending in his personal, rather than official, capacity.) The sub-committee accepted evidence from Mr K about the routes which would be open to people in general to complain about his conduct via the council complaints procedure, which would not, at least as the first step in the process, involve a one-to-one meeting with his line manager or with the responsible Cabinet member.

22. The sub-committee took legal advice, noted guidance from the Standards Board for England about the *Livingstone* case and also the decision of the Adjudication Panel for England in APE 0458 *Sharratt*, which had observed that

> "The dedication of many councillors to activities in public life means that often their social and professional lives are shaped by their roles as councillors and in turn shape how they approach those activities. However while they may always be conscious of their office as

councillor and carry out a wide range of activities in which that is a factor in their thinking, no reasonable observer would conclude that they are carrying out the business of the office of councillor; a test which, in the light of the decision in *Livingston*e, should be narrowly construed."

They reminded themselves that the question of capacity had to be asked in relation to each alleged breach of the code.

Official capacity: September e-mail

23. The sub-committee accepted that this was sent from the appellant's personal email address. However, they concluded that the direct reference to Mr K's employment with the council, combined with the threatened route of complaint, would lead a reasonable observer to conclude that the appellant was writing in his capacity as a councillor. A lay person could not have taken the route of seeking the meeting suggested in the email. Nor could a lay person have based a complaint to a line manager and cabinet member on actions by a person in his personal capacity before he was employed by the council.

Official capacity: December e-mail

24. The SSC concluded that although the first paragraph indicated that he was writing in his capacity as Vice Chair of the LGBT forum, this was negated by the remainder of the e-mail. In particular, the final paragraph, indicating that the appellant was copying in the Chief Executive and Head of HR "for advice and guidance on our respective positions" did not make sense unless the appellant was writing in his capacity as a councillor.

Capacity: the appellant's grounds in his application to Judge Laverick

25. The appellant's grounds ran to some 15 typed pages, of which 4 were taken up with the issue of capacity. They can be summarised as follows:

a. On the correct test of "official capacity" (which the appellant took as being set out in a Standards for England case review), the test was not met in that both emails were written in private capacity as was his attendance at meetings of the Forum

b. He made a number of criticisms of the weight placed by the sub-committee on the evidence before it and of their conclusions on that evidence, providing particularised examples of the matters a true understanding of which ought in his view to lead to a different conclusion.

Capacity: Judge Laverick's grounds for refusing permission

26. Judge Laverick dealt with the point in the following terms:

"I have no difficulty in accepting that he was not representing the Council at the LGBT Forum; the decision against which he is appealing made no contrary finding. Mr Justice Collins in *Livingstone* said "official capacity will include anything done in dealing with staff." The Standards Committee's decision related to the Appellant's actions in dealing with staff. The claim that a Councillor should not be [regarded] as taking such action in an official capacity because a member of the public could have written in similar terms cannot be sustained in the light of that dictum from Collins J."

Ms Dehon invites me to conclude that this shows that Judge Laverick, insofar as he was required to conduct a fact-sensitive analysis, did so. I do not accept this. The decision proceeds: (1) the dictum said X; (2) X applied here; (3) therefore the dictum closes off contrary arguments. Judge Laverick's decision suggests that he viewed the dictum as determinative. The question accordingly was whether the appellant's argument was indeed so closed off by the dictum that it was correct in law to refuse permission on this ground alone.

27. *Livingstone* concerned a complaint made in respect of remarks made by the former Mayor of London when approached by a reporter from the Evening Standard as he left after an evening function had ended. The case was under the 2001 Model Code, which was not then in the form of

the 2007 Code with which the present case is concerned, though there were similarities. Collins J swiftly despatched (at [20]) the notion that the remarks were uttered in Mr Livingstone's official capacity. However, on the then Code, that was not the end of it. Para 4 provided that (emphasis added): "A member must not in his official capacity <u>or any other circumstance</u>, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute." Paragraph 5 created a further provision extending to "any other circumstance", dealing with securing an improper advantage or disadvantage. The issue for Collins J was whether the "any other circumstance" wording in para 4 could be applied to Mr Livingstone's conduct, for which purpose it was necessary to determine whether or not such a provision was within the powers of the enabling legislation under which it was made, section 52 of the 2000 Act. He held that:

"27.Conduct which is regarded as improper and meriting some possible sanction will often be constituted by misuse of a councillor's position. He may be purporting to perform his functions if, for example, he seeks to obtain an advantage by misusing his position as a councillor. Such misuse may not amount to corruption; it may nonetheless be seen not only to be improper but to reflect badly on the office itself. If the words 'in performing his functions' are applied literally, it may be said that such misuse, and other misconduct which is closely linked to his position as such may not be covered.

28 It follows that conduct which is outside his official capacity can be covered by the words in s.52 and so can properly be within the Code of Conduct. Accordingly, I do not think that the words 'or any other circumstance' mean that the Model code is to that extent ultra vires. That phrase must receive a narrow construction so that any other circumstance will not extend to conduct beyond that which is properly to be regarded as falling within the phrase 'in performing his functions'. Thus, where a member is not acting in his official capacity (and official capacity will include anything done in dealing with staff, when representing the council, in dealing with constituents' problems and so on), he will still be covered by the Code if he misuses his position as a member. That link with his membership of the authority in question is in my view needed. This approach is very similar to that adopted in Scotland and in my judgment accords with the purpose of the Act and the limitations that are appropriate. It is important to bear in mind that the electorate will exercise its judgment in considering whether what might be regarded as reprehensible conduct in a member's private life should bring his membership to an end in due course. Equally, it is important that the flamboyant, the eccentric, the positively committed — one who is labelled in the somewhat old fashioned terminology, a character — should not be subjected to a Code of Conduct which covers his behaviour when not performing his functions as a member of a relevant authority.

29 It seems to me that unlawful conduct is not necessarily covered. Thus a councillor who shoplifts or is guilty of drunken driving will not if my construction is followed be caught by the Code if the offending had nothing to do with his position as a councillor. Section 80 of the Local Government Act 1972 provides for disqualification for election to a local authority of those who have within 5 years before the date of election been convicted of any offence which has resulted in a sentence of 3 months imprisonment (whether or not suspended) or more. Parliament could for example have provided that conviction of any offence carrying imprisonment whatever the sentence should lead to consideration of some punitive action by the Standards Board. It seems to me that if it is thought appropriate to subject a member of a local authority to a code which extends to conduct in his private life, Parliament should spell out what is to be covered.

28. Thus the phrase "any other circumstance" was to be interpreted as covering activities which were <u>apparently</u> within the performance of a member's functions, even though they were not, such as misusing a member's position. The dicta in [29] of *Livingstone* on which Judge Laverick relied is not binding authority that "official capacity will include anything done in dealing with staff, when representing the council, in dealing with constituents' problems and so on", for that is not what Collins J was deciding upon.

29. I respectfully consider that its purpose was to provide an illustrative (and indicative – note his use of the words "and so on") guide to illumine the main point that Collins J was making – that acts not in official capacity at that time might nonetheless be caught under "any other circumstance". Clearly a member – for instance a cabinet member with a particular portfolio – may well have dealings with staff and would then be in official capacity, just as is a member who represents the Council or takes up a constituent's problem. I do not read Collins J's judgment as intending to lay

down a rule that whenever A, who is a member, has dealings with B, who happens to be an officer, in any context and regardless of circumstances, he is thereby acting in official capacity.

30. Livingstone was cited in *R(Mullaney) v The Adjudication Panel for England and others* [2009] EWHC 72 (Admin). *Mullaney*, discussed further below, said that a fact-sensitive analysis was required when considering "official capacity". The context in which *Livingstone* was mentioned was of some of the more important activities which might emerge from such an analysis as falling within official capacity. Thus, *Livingstone* was consistent with *Mullaney*, but I do not read *Mullaney*, either directly through the judgment itself or through the endorsement of the decision of the reasoning of the tribunal (set out in Part 2 of the Annex to the judgment) as approving Collins J's dictum in *Livingstone* as providing a definition of official capacity.

31. I conclude that by rejecting the appellant's application for permission to appeal in relation to capacity on the ground that the matter of necessity fell to be decided against him on the basis of the dictum of Collins J alone, the decision of 26 February 2010 was, subject to questions of materiality, in error of law.

Was the error in relation to capacity material?

32. *Mullaney* was a case which, like *Livingstone*, was based on the 2001 Model Code of Conduct. Charles J observed:

"*81 The Code defines "official capacity" and it is clearly therefore the definition that is determinative rather than the view of anyone on what actions are carried out in an official capacity as a free standing description.*

82 The most relevant part of the definition here is:

"conducts the business of the office to which s/he has been elected or appointed".

These are ordinary descriptive English words. Their application is inevitably fact sensitive and so whether or not a person is so acting inevitably calls for informed judgment by reference to the facts of a given case. This also means that there is the potential for two decision makers, both taking the correct approach, to reach different decisions. In the context of judicial review this brings into play, or reinforces the points that if the statutory decision makers have taken the correct approach in law their experience and knowledge as the persons chosen to be the decision makers is relevant to the irrationality argument (and indeed to arguments that they are wrong).

33. Accordingly, I turn to the definitions in the 2007 Code, with which we are concerned. The scope so far as relevant is defined by the Local Authorities (Model Code of Conduct) Order 2007 SI 2007/1159. The authority's own Code was, so far as material, in like form.

By para 1(1) of the Schedule:

"(1) This Code applies to **you** as a member of an authority".

Para 2 provides:

"(1) Subject to sub-paragraphs (2) to (5), you must comply with this Code whenever you—

(a) conduct the business of your authority (which, in this Code, includes the business of the office to which you are elected or appointed); or

(b) act, claim to act or give the impression you are acting as a representative of your authority,

and references to your official capacity are construed accordingly.

(2) Subject to sub-paragraphs (3) and (4), this Code does not have effect in relation to your conduct other than where it is in your official capacity.

[(3) and (4) are concerned with criminal offences and so are irrelevant here]

(5) Where you act as a representative of your authority—

(a) on another relevant authority, you must, when acting for that other authority, comply with that other authority's code of conduct; or

(b) on any other body, you must, when acting for that other body, comply with your authority's code of conduct, except and insofar as it conflicts with any other lawful obligations to which that other body may be subject."

34. It is instructive to compare the equivalent provisions of the 2001 Code:

"1.(1) A member must observe the authority's code of conduct whenever he –

(a) conducts the business of the authority;

(b) conducts the business of the office to which he has been elected or appointed; or

(c) acts as a representative of the authority,

and references to a member's official capacity shall be construed accordingly."

Para 2(1)(a) of the 2007 Code, albeit in a re-cast form, is thus directly derived from para 1(1)(a) and (b) of the 2001 Code.

35. The Model Code now in use was issued after, and so with knowledge of, the judgment in *Livingstone*. It should be taken to have drawn the line which it now does advisedly, having regard to that decision, under the principle *in Barras v Aberdeen Sea Trawling and Fishing Co Ltd* [1933] AC 402 at 411. Under *Livingstone* matters which were not within official capacity, but which involved the misuse of a member's position, were within "any other circumstance". A materially identical formulation as to "official capacity" in the 2007 Code carries with it the same limitation. This does not in any way conflict with the fact –sensitive approach envisaged by *Mullaney*, but does define the scope for its operation in the light of the replacement of the 2001 Code by the 2007 Code.

36. The test under para 2(1)(a) is accordingly whether in writing the two emails and making the threats complained of in the manner he did, the appellant was, as a matter of ordinary English, (actually) conducting the business of his authority, including the business of the office of councillor to which he had been elected? This requires a fact-sensitive approach: see *Mullaney.* If it was said to be part of the business of the authority to make or receive complaints in relation to what officers were doing in their private capacity (in one case prior to taking up a post with the council), I am unable to discern compelling evidence for such a view. However, what about the business of his office as councillor? Merely because the appellant was asserting he would use routes open to members but not to others does not of itself provide an answer to this question: the same might well be true of those whose conduct would, on the *Livingstone* test, only have fallen within "any other circumstance" under the 2001 Code. The appellant sat on the Forum as a full member (i.e. as an individual), not as the appointee of the authority. He emailed Mr K from a private email address, to a private email address, and the evidence was that Mr K considered that he replied in a private capacity. The appellant said in the email to Mr E that he was emailing him in a private capacity and was permitted to do so, while using his member email facility, by the relevant protocol. There was evidence that Mr E viewed the email as "not a staffing matter". There was, accordingly, an issue requiring to be considered by a tribunal of fact and one which to put it at its lowest was reasonably capable of more than one answer.

37. That para 2(1)(a) of the 2007 Code should be interpreted in this way is in my view further confirmed by the introduction of para 2(1)(b), which, in its reference to "act, claim to act or give the impression you are acting", does not have a direct equivalent in the 2001 Code. It is only through the introduction of para 2(1)(b) that Ms Dehon's submission that the 2007 Code broadened out the scope of "official capacity" is correct. The concepts behind, and scope of, para 2(1)(a) remained unaltered for the reasons given at [35] above.

38. Ms Dehon sought to rely on a "reasonable observer" test. This is derived, I believe, from the First-tier Tribunal's decision in *Sharratt*, cited at [22] above, but is in my view not a correct reading of that decision. In any event, whether a person is or is not within para 2(1)(a) of the Code is a matter for objective determination. Questions of appearance are relevant, if at all, under para 2(1)(b).

39. Accordingly, was the appellant acting, claiming to act or giving the impression that he was acting as a representative of his authority so as to fall within para 2(1)(b)? As a preliminary, I

accept that while para 2(5) refers to acting "as a representative" on other authorities or bodies, it is not to be understood as exhaustive of the circumstances in which a person may be found to be so acting, but merely states what is to happen when one is acting as a representative in those particular circumstances. When one is acting (etc) "as a representative" of an authority is therefore a matter for determination by the tribunal of fact (i.e. a standards committee, or, on appeal, the First-tier Tribunal). I do however consider that, reading the Model Code as a whole, it is evident that "representative" is not to be equated to "member". The Model Code uses both terms and must be taken to have done so deliberately. Accordingly, merely to act, claim to act or give the impression one is acting (etc) as a member is in my view of itself not sufficient unless there is material on which the tribunal of fact can properly conclude that one is acting (etc) specifically "as a representative" of the authority.

40. Ms Dehon submits that a member of a local authority will be seen as equivalent to the authority. There is a range of legal structures within local government. There is also a wide variety of political contexts. An individual member may have a powerful place within the executive or may be a member of a relatively powerless minority party. Suffice it to say that Ms Dehon's submission, as a general proposition, is too widely stated.

41. Ms Dehon submits that the view which I am taking on this point would weaken the provisions regarding claiming to act or giving the impression of acting. That may be so in the sense that it is conceptually possible for there to be persons who claim to act as a member but not as a representative but that is where those who made and endorsed the coming into force of the 2007 Code by way of SI 2007/1159 intended that the line should be drawn. The Code was the subject of widespread consultation required by section 49 of the 2000 Act (and see also the history of the proposed removal of the words "any other circumstance" in *Livingstone*, para [22]).

42. The appellant can only be liable to sanctions under the Code in respect of the September and the December emails if his actions fell within its scope. The sub-committee might usefully have addressed the wording of para 2 more overtly in its decision. I do not need to decide whether its approach in that regard amounted to an error of law, as the right of appeal under regulation 21 of the 2008 Regulations is not so limited. What is in my view clear is that when the wording of para 2 is sufficiently considered, it is clear that the appellant has an arguable case with a reasonable prospect of success on the evidence that the context of his actions fell outside the scope of either limb of para 2(1) of the 2007 Code. His case was in my view sufficient to meet the threshold that permission should have been granted under regulation 21 of the 2008 Regulations. The (as I have held, misconceived) reliance of the 26 February 2010 decision on the dictum of Collins J to prevent him from arguing the point before the First-tier Tribunal was thus material.

The Sub-Committee's approach to the letter

43. As noted above, there is no significant dispute that this letter was written in official capacity. The sub-committee records that it took legal advice and noted the emphasis on tribunal decisions on the use of intemperate language as a sign of disrespect. It continued (in terms which are the subject of dispute):

"The Sub-Committee finds that the second, third, fourth and fifth paragraphs on page three of the letter contains serious allegations that are expressed in very intemperate language. Paragraph two on page three suggests that two identifiable officers colluded in threats, intimidation and bullying against [the appellant]. It is expressed in immoderate language.

Paragraphs three, four and five on page three are even more flagrantly disrespectful. They contain strong allegations of criminal wrongdoing against members of the public, expressed in an insulting way that goes far beyond what is necessary to express the Councillor's opinions about the conduct of the people in question.

The Sub-Committee finds that it was disrespectful, and so was in breach of para 3(1) of the Code, to circulate a letter containing such serious allegations expressed in such intemperate language, even though the circulation was to a limited audience."

The letter: the appellant's grounds in his application to Judge Laverick

44. These were at times infelicitously expressed, in that they attempted to link a number of arguments to the concept of qualified privilege which in my view were not capable of being so linked. However, in a tribunal context, it may be inappropriate to confine consideration to the possibly legally erroneous label put on a ground by a party, particularly one who had the benefit of no, or, as in this case, limited, legal representation. A tribunal may have an obligation to follow up points which are visible from the material before it. In my view, once the references to qualified privilege were stripped out from where they did not belong, the grounds put forward on this issue by the appellant may fairly be summarised as follows:

(a) the letter was subject to qualified privilege, which should also provide a sufficient defence to an alleged breach of the Code;

(b) the circulation of the letter was for a legitimate reason, i.e. for its accuracy and veracity to be checked.

(c) the alleged use of immoderate or intemperate language was not sufficient to constitute disrespect

(d) there is a right to freedom of speech unless what is said is unlawful

(e) the letter's purpose was to complain about perceived "abuse" of the Freedom of Information Act by officers and the appellant believed in the truth of the facts in it and was not reckless as to them

The letter: Judge Laverick's grounds for refusing permission

45. Judge Laverick rejected the "qualified privilege" argument and the point based on the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights. He was correct to do so. He did not in terms deal with the grounds which I have summarised as (b), (c) and (e) above.

46. In *Mullaney*, Charles J indicated at [83] that the same approach that he had outlined in relation to "official capacity" at [82] also applied to treating others with respect. Within that, however, he provided guidance as to the correct approach to determining whether there had been a lack of respect where a councillor asserted that the acts complained of had been done in the public interest. In *Mullaney*, the councillor had trespassed in order to produce a video intended to "shame" the local authority's planning department into doing something about a property whose state had been raised as a subject of concern by one of his constituents. Charles J said:

> 94. To my mind at the heart of the Claimant's position is the point that he was in his view acting on public interest grounds to get something done about the state of the building. But in his actions and his attempts to justify them on such grounds and in thus in the public interest he has ignored, or failed to give any proper weight to, other aspects of the public interest.
>
> 95. In many, if not most cases, in which issues of public interest arise there is more that one aspect of the public interest that arises for consideration. Here it is perhaps axiomatic that when a councillor is acting in his official capacity those actions will, or will often be, founded on an aspect of the public interest. But Parliament has recognised by statute that there is a public interest in Councillors maintaining defined standards in performing the business of the office to which they have been elected. It follows that the statute, and the Code, envisage that there can be a breach of the Code by a Councillor in performing the business of his office in furtherance of a public interest, and thus on public interest grounds, that something be done. Tunnel vision on, or justification simply by reason of, that public interest is therefore inappropriate and a balance has to be struck between the various relevant aspects of the public interest in all the relevant circumstances of the case.
>
> 96. The concept of "treating others with respect" is one that allows the balance to be performed, as does "bringing his office into disrepute" used in paragraph 4 of the Code."

47. At times, difficult and controversial matters, possibly involving the criticism of others, may have to be committed to paper and the circulation of drafts to those to whom it is legitimate to send them

may be an essential part of that process. I am in respectful agreement with what is said in *Mullaney* and thus merely to say, even on a well-founded basis, that a member was acting in the public interest does not mean that the member's actions were not in breach of the Code. But what was required here was, as *Mullaney* makes clear, a balancing exercise, considering whether the steps taken were in the public interest and whether the circulation of the draft to the four individuals for the purposes stated was a proper, reasonably incidental step to that, and balancing that against such matters as the content and the language used. I can see no indication that such a balancing exercise was carried out by the sub-committee. It is entirely arguable that a different decision might be reached on appeal. This will require further facts to be found as to the appellant's purposes in sending the letter of 12 January and in previously circulating it.

48. It follows that the decision of 26 February was in my view in error of law in failing to address the grounds which I have summarised above as (b), (c) and (e). Those points were reasonably apparent, despite the appellant's misguided link to qualified privilege. Again, the appellant's case is in my view arguable with a reasonable prospect of success and so is appropriate for permission to be given under regulation 21(4).

49. I did raise when giving permission to appeal and in argument whether it might also be open to the appellant to run a further argument that the language was not immoderate or intemperate as claimed on the basis that the First-tier Tribunal was capable of operating in such a context as a tribunal of fact and so that it might be open to its members to take a different view from that taken by the sub-committee, even if there was no identifiable flaw in the sub-committee's approach. I do not need to resolve this, because when the matter is heard by the First-tier Tribunal they will have to carry out a balancing exercise which will inevitably result in their having to reach their own view on the language and content of the letter.

50. I am conscious that in this decision, already long enough, I have not referred to every argument put to me about a number of previous decisions of the First-tier Tribunal or its statutory predecessor. It seemed to me that these could be at best helpful illustrations of some factual situations that might be encountered and of possible approaches to dealing with them and they have been taken into account in compiling this judgment.

51. It remains for me to apologise to the parties that it has taken me much longer than I had anticipated at the oral hearing to issue this decision, owing to other pressing work commitments.

CG Ward

Judge of the Upper Tribunal

14 June 2011

APPENDIX 6B

Blogging Quick Guide

Blogging and social networking are effective methods for councillors to interact with constituents and support local democracy. Used effectively, they can engage those who would not normally have access to local councillors and politics.

Standards for England support the use of such media and encourage councillors to get online. You should think about what you say and how you say it, in just the same way as you would when making statements in person or in writing,

You will also need to think about whether you are acting as a councillor, or giving the impression that you are representing your authority. To make sure you comply with the Code of Conduct (the Code) and to ensure your use of online media is well received we suggest the following general hints.

Deleted: seen to be

Deleted: e

Deleted: acting in your official capacity as a councillor

Do

- set appropriate privacy settings for your blog or networking site – especially if you have a private, non-political blog
- keep an eye out for defamatory or obscene posts from others on your blog or page and remove them as soon as possible to avoid the perception that you condone such views
- be aware that the higher your profile as a councillor, the more likely it is you will be seen as acting in your official capacity when you blog or network
- ensure you use council facilities appropriately; if you use a council provided blog site or social networking area, any posts you make are likely to be viewed as made in your official capacity
- be aware that by publishing information that you could not have accessed without your position as a councillor you are likely to be seen as acting in your official capacity
- make political points, but be careful about being too specific or personal if referring to individuals. An attack on individuals may be seen as disrespectful, whereas general comments about another party or genuine political expression is less likely to be viewed as disrespect.

Deleted: will

Deleted: will

Don't

- blog in haste.
- post comments that you would not be prepared to make in writing or face to face
- use council facilities for personal or political blogs.

When the Code may apply

Bear in mind the Code when you blog or use social networking sites. You should pay particular attention to the following paragraphs of the Code:

- Disrespect
- Bullying
- Disclosure of confidential information
- Disrepute
- Misuse of authority resources

However, it is difficult to give definitive advice on the application of the Code as each blog and social networking page is different. The content of a blog or other social networking tool and the circumstances surrounding its creation will determine whether or not it might be covered by the Code.

Ethical use of online social media is not limited to what is covered in the Code. We encourage members to respect the **Ten General Principles of Public Life**. While your conduct may not be a

breach of the Code it may still be viewed as less than exemplary and attract adverse publicity for your office and authority.