

PRIVATE AND CONFIDENTIAL

Case Reference: SCT 070 STDS

Subject Member: Councillor Jason Kitcat

Complainant: Councillor Ted Kemble

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, assisted by Oliver Dixon, council lawyer, on behalf of the Monitoring Officer for Brighton and Hove City Council into an allegation concerning Councillor Jason Kitcat, and will be presented to a Hearing Panel of the Standards Committee.

DATE: November 2009

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1 EXECUTIVE SUMMARY:

- 1.1 In February 2009 Councillor Ted Kemble made a complaint about the conduct of Councillor Jason Kitcat in posting 5 video clips onto YouTube, comprising footage taken from Brighton & Hove City Council webcast meetings that took place in December 2008 and January 2009.
- 1.2 The Standards Committee Assessment Panel considered that, if proven, the conduct would amount to a breach of the Members Code of Conduct on the following grounds:
 - failure to treat others with respect;
 - failure, when using the resources of the authority –
 - (i) to act in accordance with the authority's reasonable requirements; and
 - (ii) to ensure that such resources are not used improperly for political or party political purposes.
- 1.3 Councillor Kitcat has denied the allegations.
- 1.4 The complaint centred on Cllr Kitcat's not obtaining the consent of Cllrs Mears and Theobald, the two Members featured most prominently in the clips, before posting the clips on YouTube; not informing them of his intention to carry out the posting; and his use of webcast images in which the council owns the copyright.
- 1.5 The investigating officer held interviews with the complainant, the subject member, and Cllrs Mears and Theobald, before considering the evidence and reaching a finding on each count.
- 1.6 Whilst it may have been courteous to seek the prior consent of Cllrs Mears and Theobald prior to the clips appearing on YouTube and/or to have told them about the posting in advance, omitting to do so does not – for the purposes of the Code of Conduct – amount to a failure to treat others with respect.
- 1.7 The investigating officer considers that images sourced from council webcast footage do represent council "resources", not least because copyright in the images is a non-financial asset belonging to the council.
- 1.8 The Webcasting Protocol and Members' Guide in force at the time the YouTube posting took place created an expectation, but nothing more, that if Members wished to access historical footage, they would do so via the council's dedicated webcasting site. Cllr Kitcat's decision not to use that official channel was taken for legitimate technical reasons, and in any event does not breach any express requirement of the relevant protocol.

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- 1.9 Assessed against the council's Practice Note on Publicity and the Use of Council Resources, the investigating officer considers that Cllr Kitcat's use of webcast images was political in nature and was improper, particularly in relation to clip no. 5 due to the highly edited nature of that posting.
- 1.10 Consequently, the report finds that Cllr Kitcat did not breach the Code of Conduct in relation to treating others with respect and using council resources in accordance with the authority's reasonable requirements; but did breach the Code in relation to using council resources improperly for political purposes.

2 COUNCILLOR KITCAT'S OFFICIAL DETAILS:

- 2.1 Councillor Kitcat was elected to office following the Regency Ward by-election on 13 December 2007 and signed his acceptance of office the following day.
- 2.2 Councillor Kitcat is a Green Group member and serves on the following committees:
- Advisory Committee for Executive Licensing Functions.
 - Audit Committee.
 - Council.
 - Health Overview & Scrutiny Committee.
 - Licensing Committee (Licensing Act 2003 functions).
 - Licensing Committee (Non-Licensing Act 2003 functions).
- 2.3 Councillor Kitcat received training in person on the Code of Conduct for Members on 7 January 2008.

3 RELEVANT LEGISLATION:

- 3.1 The council has adopted a Code of Conduct for members, in accordance with section 51 of the Local Government Act 2000
- 3.2 This investigation is carried out under regulation 14 of The Standards Committee (England) Regulations 2008.
- 3.3 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.

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4. BACKGROUND TO THE COMPLAINT AND DECISION OF STANDARDS COMMITTEE ASSESSMENT PANEL:

- 4.1 A complaint was received on 27 February 2009 from Councillor Ted Kemble. A copy of the complaint is attached at Appendix 1.
- 4.2 The complaint relates to five video clips posted by Councillor Kitcat on his YouTube channel. Three of them (clips 1, 2 and 4) feature Councillor Kitcat asking questions of Councillor Mears or Councillor Theobald about matters relating to communal bins, and their responses; one of them (clip 3) features Councillor Kitcat seconding a joint motion on pre-pay meters; and the final one (clip 5) features a short exchange between Councillor Theobald and the Mayor. Clip 4 also appears on Cllr Kitcat's personal website, www.jasonkitcat.com. All clips are from proceedings of meetings of Cabinet and Full Council that took place in December 2008 and January 2009.
- 4.3 Each of those meetings was webcast, and all the video clips were sourced from the council's archive of webcast footage.
- 4.4 Cllr Kemble complained that Cllr Kitcat:
- (i) had failed to treat his fellow councillors with respect, by posting the clips without the prior knowledge or express permission of Councillor Theobald or Councillor Mears; and
 - (ii) had abused council facilities by infringing the copyright in the webcast images
- 4.5 A summary of the video contents is given below.
- 4.5.1 Clip 1
Duration: 5 minutes, 40 seconds
Context: meeting of Full Council on 4 December 2008.
Content: Cllr Kitcat asking Cllr Theobald about an adjudication process between residents unable to agree on the location of a communal bin, followed by Cllr Theobald's response. There is then a supplementary question to Cllr Theobald from Cllr Fryer on recycling rounds, and his response.
- 4.5.2 Clip 2
Duration: 6 minutes, 50 seconds
Context: meeting of Cabinet on 15 January 2009
Content: Cllr Kitcat asking Cllr Mears (answering on behalf of Cllr Theobald) about the measurement of recycling rates in areas with communal bins, and Cllr Mears' response
- 4.5.3 Clip 3
Duration: 4 minutes
Context: meeting of Full Council on 29 January 2009

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Content: Cllr Kitcat making a speech, seconding a joint motion on the treatment of pre-pay energy meter customers

4.5.4 Clip 4

Duration: 10 minutes, 3 seconds

Context: meeting of Full Council on 29 January 2009

Content: Cllr Kitcat asking Cllr Theobald about the extent of any consultation with East Sussex Fire & Rescue in respect of the potential fire risk associated with the siting of communal bins, and Cllr Theobald's response

4.5.5 Clip 5

Duration: 12 seconds

Context: meeting of Full Council on 29 January 2009

Content: Cllr Theobald saying "I mean, sometimes I wish I could have answered these questions". To which the mayor is heard to say, above the background laughter, "So do I, but we have to move on".

- 4.6 At their meeting on 1 April 2009, the Standards Committee Assessment Panel decided that, if proven, the actions complained of would amount to a breach of the Code of Conduct on the following grounds:

Respect

With regard to the allegation relating to disrespect, paragraph 3(1) of the Code of Conduct would apply:

You must treat others with respect.

Use of Council Resources

With regard to the allegation of abuse of council facilities, paragraph 6(b) of the Code of Conduct would apply:

You must, when using or authorising the use by others of the resources of your authority –

(i) act in accordance with your authority's reasonable requirements;

(ii) ensure that such resources are not used improperly for political purposes (including party political purposes)

- 4.7 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. The Panel agreed that the question of disrespect raised a serious concern particularly in relation to short edited clips. They further agreed that the other issues were also significant enough potentially to be a breach of the Code and needed clarification.

- 4.8 In his written submission of 4 August 2009, Cllr Kitcat denied breaching the

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Code of Conduct with respect to each of the allegations made by Cllr Kemble.

5. EVIDENCE GATHERED:

Sources of evidence

5.1 I have taken account of oral evidence from:

- Councillor Kemble (interview date 26 August 2009)
- Councillor Theobald (interview date 28 August 2009)
- Councillors Mears and Oxley (interview date 2 September 2009)
- Councillor Kitcat (interview date 11 September 2009)

5.2 I have taken account of the following documentary evidence:

- Councillor Kitcat's responses to the allegation and the investigating officer's draft report
- All of the webcast clips referred to in the complaint, as itemised at paragraphs 4.6 – 4.10 above
- In relation to clip 5 (see para 4.10), the webcast footage immediately preceding Cllr Theobald's response
- Minutes of the meeting of Council on 29 January 2009

5.3 The following reference material has been used:

- Officer's report on 'Protocol for Webcasting Meetings' considered by the Governance Committee on 23 September 2008 (including Appendix 1 to that report: 'Members' Guide to Webcasting')
- Practice Note on Publicity and the Use of Council Facilities [Part 9.3 of the council's constitution]
- Standards Board for England Case Review 2007
- Standards Board for England Case Review 2008
- Adjudication Panel for England case reference 0429-0434

Details of the complaint by Councillor Kemble

5.4 In his formal complaint letter, Councillor Kemble alleges that "Councillor Kitcat has breached the council's code of conduct and copyright by putting these videos on YouTube without the prior knowledge or express permission of either councillor [Mears or Theobald]." In support of these allegations, he states that Cllr Kitcat –

(i) "has failed to treat his fellow councillors [Mears and Theobald] with the respect they deserve by using their image and their video without their express permission, and [did] so in an underhand and devious manner"; and

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(ii) has committed a “clear breach of trust and an abuse of the council’s facilities.”

- 5.5 During an interview with the investigator on 26 August 2009, Cllr Kemble expressed the view that despite Cllr Kitcat’s relative inexperience as a councillor, he should have been aware of the relevant protocols (i.e. the Code of Conduct and the protocol relating to webcast meetings) and had gone “too far”. Posting the clips without seeking the consent of the relevant councillors was “out of order”. Had Cllr Kitcat sought their consent, he said, there would have been no need for a complaint.
- 5.6 Cllr Kemble said that in his opinion, Cllr Kitcat had chosen to post the clips onto YouTube for political gain, as he was looking to stand as an MEP at the June 2009 European elections; and was seeking to ridicule Cllrs Theobald and Mears on a topic that Cllr Kitcat had been pursuing for some time.
- 5.7 Cllr Kemble made it clear that the basis of his complaint about disrespect was not that the 12-second clip of Cllr Theobald in video no. 5 might be taken out of context; rather, it was Cllr Kitcat’s failure to seek Cllr Theobald’s or Cllr Mears’ consent for the external postings. This, he said, represented a breach of trust.
- 5.8 With regard to the allegation about an abuse of council facilities, Cllr Kemble submitted that Cllr Kitcat had lifted images in which the council owned the copyright and had reproduced them publicly elsewhere, without seeking the council’s permission.
- 5.9 In Cllr Kemble’s view, that Cllr Kitcat had used his own personal PC and broadband connection to carry out the transfer of images onto YouTube did nothing to alter the fact that Cllr Kitcat had infringed the council’s copyright in the images.

Summary of interview with Councillor Theobald on 28 August 2009

- 5.10 Cllr Theobald had not seen the video clips complained of but was aware that certain members of his political group were aggrieved at them appearing on YouTube.
- 5.11 From a personal perspective, Cllr Theobald was not especially concerned about the clips which featured him appearing on an external website. As a high profile politician, he knew that media coverage was part of the job; and that viewers would probably realise that the clip, being so short, was out of context and therefore not to be taken seriously. He was, however, concerned about two more general aspects of posting edited clips from council webcast meetings to sites such as YouTube:

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(i) the possibility that a member of the public might feature in the clip, either in the background or mentioned by the speaker, without that person's knowledge. Cllr Theobald considered this would be particularly unfair if the clip was heavily edited or had been posted purely for political gain; and

(ii) the risk that what a Member said on the webcast might be edited and taken out of context in such a way as to portray them as disrespectful of equality laws. Given the very high viewing figures that a site like YouTube attracts, and the high standards of conduct expected of public figures, a clip distorted on this way could be extremely damaging to the speaker's reputation.

- 5.12 If the webcast protocol or any relevant standing orders in force at the time had prohibited the posting of webcast material onto external sites, then what Cllr Kitcat had done was wrong in Cllr Theobald's view. Equally, he said, it was wrong of Cllr Kitcat to have infringed the council's copyright in the webcast images.

Summary of interview with Cllrs Mears and Oxley on 2 September 2009

5.13 Re the allegation of failing to treat others with respect

- 5.13.1 Cllr Mears said in her view it was unacceptable and disrespectful that Cllr Kitcat had posted the clips without her or Cllr Theobald's consent. On other occasions she had been approached by third parties outside the council seeking permission to use a council webcast image on YouTube, which at least gave her the opportunity to say yes or no. This was not the case with the clips posted by Cllr Kitcat, however, as he had not even told her he was intending to or that had posted the clips. As a result, she felt ignored and to some extent insulted.
- 5.13.2 Cllr Mears considered the edited 12-second clip of Cllr Theobald saying "I wish I could have answered these questions" made him look stupid; hence this too was disrespectful. The edited nature of the clip was deceitful in creating a false impression of council proceedings, as the clip was taken completely out of context; the viewer saw nothing of the debate that took place before or afterwards, or of the prevailing atmosphere or "mood". Furthermore, its presence on Cllr Kitcat's YouTube channel offered Cllr Theobald no opportunity to respond to or debate the matter.
- 5.13.3 Cllr Oxley added that the whole purpose of webcasting was to inform viewers of the true content and style of those meetings covered; publishing a very short clip out of context represented a distortion of the proceedings.
- 5.13.4 In response to Cllr Kitcat's contention that the postings have helped to make council proceedings more open and accessible, Cllr Mears' view

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is that any images of council meetings should comprise the entire item under debate, leaving the viewer to decide which parts to watch.

5.14 Re the allegation of not using the authority's resources in accordance with their reasonable requirements; and using these resources improperly for political purposes

5.14.1 Cllr Oxley considered Cllr Kitcat's conduct an abuse of council facilities (i.e. the webcast archive system). Cllr Kitcat, he said, may well have used his own PC and broadband connection but first had to establish a link to the council's webcast database, which is council owned. Further, he went on, the images displayed on Cllr Kitcat's YouTube channel were originally captured using council hardware and software, and there was nothing in the webcast guide in force at the time that allowed for this. Hence, he concluded, to use the images in this way was inappropriate.

5.14.2 On the issue of potential copyright infringement, Cllr Mears considered that copying council-owned images without the copyright holder's consent was wrong; it was worse still if the images were edited to suit the copier's own purposes, as appeared to be the case here.

5.15 **Councillor Kitcat's response to the complaint**

5.15.1 Councillor Kitcat made a written submission, dated 4 August 2009, in response to the complaint; this is reproduced at Appendix 4. He made further submissions in person during an interview with the investigator on 11 September 2009, the key points of which are set out below.

5.15.2 Motivation for placing the clips on YouTube

Cllr Kitcat explained that he wanted to direct residents to specific points in the webcasts of Full Council or Cabinet meetings in January 2009, to illustrate how he was holding the Administration to account over the communal bins, a topic, he said, that many residents were angry about.

Cllr Kitcat further explained that the council's own webcast system is supposed to offer this facility (i.e. referring viewers to specific parts of the proceedings) but is technically not able to do so. For over a year he had been trying to secure this facility and had contacted a number of people in this regard (see page 1, final paragraph, of Cllr Kitcat's letter of 4 August) but to no avail.

Cllr Kitcat said that, without this facility, the only way he could refer residents to the relevant part of the webcast was to email or write to them and include a link not to the council website but to his personal blog, from where they could access the clips on YouTube instead.

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Cllr Kitcat freely acknowledged that he was politically motivated in posting the clips on YouTube. His purpose was to uphold standards of public life and encourage openness, transparency and accessibility.

5.15.3 Application of the protocol for webcast meetings

During the interview Cllr Kitcat was referred to the protocol for webcast meetings agreed by Members in September 2008, which states that agendas for the meetings from which the clips are taken would have included a notice stating that the meeting may be filmed for live or subsequent broadcast *via the council's website* [stress added]. Cllr Kitcat was invited to say how he reconciled this with his postings of webcast material onto a non-council website.

He pointed out that:

(i) council meetings are public: there is nothing to restrict the public attending or the public taking photos/ video¹. Once the webcast material is posted onto the internet, there are no technical barriers to prevent that material from being copied to other websites.

(ii) web technology rendered the notice ineffective: these were public meetings with fully open access, and members knew that footage would be available on line.

(iii) the notice implicitly recognises the public can view the material on-line – does it make any difference as to the website through which the viewer is watching the footage?

(iv) the situation would have been very different if the clips been altered or doctored in some way; but they were not.

(v) the posting on YouTube amounted to “fair dealing” under copyright law.

(vi) public life needs to have openness: by making the clips available, he had made the meetings more accessible than the council had been able or willing to do. He wanted to enable residents to access their chosen topic on-line rather than sit through an entire meeting, which could last up to 3 hours.

5.15.4 Reaction to the complaint

Cllr Kitcat regarded the complaint as ridiculous and personally motivated by upset caused by the content of his questions at the meetings featured in the clips. In his opinion, no complaint would have been lodged had his questions been framed more positively. He

¹ In fact, the taking of photos or making recordings by members of the public at council meetings is at the Chairman's discretion. See Council Procedure Rule 31

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believed the complaint arose purely because he had been asked publicly and privately to stop asking questions about communal bins and related matters, but had refused. In his view, the complaint was politically motivated: why else was Cllr Kemble the only person to complain, he surmised?

5.15.5 Prior consent

Cllr Kitcat advised that at no time prior to publication had he considered seeking the permission of Cllr Mears or Theobald; nor had he considered simply telling them about his intended publication.

The reason, he said, was the clips were already in the public domain, having been posted onto the internet via the council's webcast facility.

5.15.6 Justification for posting clip no. 5

Cllr Kitcat said that –

(i) he was justified in posting the 12-second clip of Cllr Theobald saying “I wish I could have answered these questions” since these words were an unedited, verbatim record of what the Cllr Theobald actually said;

(ii) the bigger issue is that Cllr Theobald did in fact say those words, and this itself should be of greater concern than the clip being posted on YouTube.

5.15.7 Whether clip no.5 likely to be misleading

Cllr Kitcat disputed the assertion that clip no. 5 might be more likely to mislead viewers as the clip does not give the context in which the statement was made, than inform them about council proceedings.

During the interview it was put to Cllr Kitcat that –

(i) with clips 1 to 4, it is possible for the viewer to see the whole segment from start to finish, but with clip no 5, the viewer does not have the benefit of seeing the lead-in, in which the Mayor ruled that Cllr Theobald would have to give a written response to the question as the person who asked the question was not in the room²; and that

(ii) without images of the lead-in, the visible clip might be considered out of context and misleading.

² The minutes of the Council meeting on 29 January 2009, from which clip 5 is taken, confirm that 3 of the 5 members of public scheduled to ask oral questions of Cllr Theobald did in fact not attend. In each case, the Mayor ruled that Cllr Theobald would have to provide a written answer instead. This prompted him to say, after it became evident the third questioner was absent, “I wish I could have answered these questions [i.e. orally].”

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In response, Cllr Kitcat explained he chose not to include the Mayor's comments as they would be confusing to people who might not understand council procedures.

He added that even if the 12-second clip did not include the proceedings leading up to Cllr Theobald's statement, people viewing the clips on YouTube could obtain contextual background information about the meeting (e.g. time, date, subject) by clicking through the image.

5.15.8 Response to the allegation concerning copyright

Cllr Kitcat held that it was inconsistent for concerns over copyright to have been raised in connection with the video footage but not the copying of minutes (which third parties carried out routinely, he said). He also commented that:

- copyright does not have to be enforced. It would not be in the council's interest to pursue this unless someone is making malicious changes which could be libellous;
- the meetings of Members are for the public good and paid for by public funds;

He confirmed that he did not seek the council's consent to take webcast footage for posting onto YouTube. As a member of the council, he questioned whether their consent was in fact necessary. He also questioned the relevance of copyright in connection with footage taken from publicly accessible meetings.

5.15.9 Response to the allegation of improper use of council resources

Cllr Kitcat maintains that:

- he did not use council resources; the computer/ broadband and blog are his own;
- he did not deprive the council of income or resource
- no one has demonstrated any negative impact on the council.

Cllr Kitcat was asked to comment on the view that he may have used council resources by using footage captured by council recording equipment and stored on council archives. He stated that he had merely taken a capture of the information that is on the webcast. As the information is in digital form, it had an infinite use, and taking a capture did not deplete the council's resources. He distinguished this from using a photocopier where the paper supply is finite.

Cllr Kitcat further took the view that since he did not use council "resources", the complaint against him in relation to paragraph 6 of the code should fall.

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It was put to Cllr Kitcat that the images he had captured might be considered a “resource” as they form part of the council’s intellectual property; and this could be significant for present purposes as the Code of Conduct prohibits Members from using council resources improperly for political purposes.

In reply, whilst recognising that his actions in posting the clips may have been political, Cllr Kitcat stressed they were not party political, as evidenced by their appearance on his personal, not the Green Party, website.

5.15.10 Comments in relation to reference material cited in written submissions

Many of the links and resources cited by Cllr Kitcat in his written submissions encourage the wide dissemination of public information if it is apt or appropriate to do so.

Cllr Kitcat was asked at interview whether, in light of those materials, he considered clip no.5 an “appropriate” way of communicating council proceedings.

He believed that if footage was appropriate for the council’s website, then it shouldn’t matter where it was posted. Having to place the images onto YouTube was not an ideal means of rendering them more accessible, he added, but their presence on YouTube provided a necessary link from his own blog.

5.15.11 Whether acting as councillor or private citizen

Cllr Kitcat argued there was nothing to stop members of the public taking and distributing material from the council’s website. On this basis, he felt the Code of Conduct unfairly discriminated against councillors who acted in this way.

He acknowledged that members of the public who copied material owned by the council might be infringing copyright, but remarked that activity of this sort happens regularly – especially in relation to council minutes – and is tolerated by the council.

In order to post the clips onto YouTube, he explained, he made no use of facilities available exclusively to councillors, i.e. officer resource and certain rights of access to information. His view is he only did what any private individual could have done using webcast footage and the knowledge of how to copy selected clips onto YouTube.

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6. SUMMARY OF THE MATERIAL FACTS:

- 6.1 The clips complained of were posted during the council's first webcasting pilot, which took place between September 2008 and June 2009.
- 6.2 The Governance Committee approved the Webcasting Protocol and Members' Guide to Webcasting in September 2008. It follows that Councillor Kitcat, as a Member, was required to have regard to both of these documents.
- 6.3 In its introduction, the Guide states that the principal reason for webcasting is to increase accessibility, openness and transparency.
- 6.4 The Guide offers advice to Members on the promoting of webcasting. It suggests ways in which members might refer to webcast footage or the council's webcast website in their communications with their political groups, communities and ward constituents.
- 6.5 Public-I, the supplier of software and equipment for council webcasts, confirms that it is not possible to create an external link to a specific point in a webcast meeting. The facility is in development and was not available to Members when Cllr Kitcat extracted the clips complained of.

7. REASONING AS TO WHETHER THERE HAVE BEEN FAILURES TO COMPLY WITH THE CODE OF CONDUCT:

Respect

- 7.1 The Adjudication Panel for England have held that "failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another. The circumstances in which the behaviour occurred are relevant in assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompted the alleged disrespect."³
- 7.2 Was Cllr Kitcat's behaviour "unfair"? The Members' Guide to Webcasting in force at the time was silent as to the copying of footage onto an external website. The section in the guide on 'Promoting Webcasting' envisages that members who wish to refer to webcast footage in their communications would do so via the council's webcasting internet site (www.brighton-hove.public-i.tv), but does not expressly prohibit dissemination via other channels or media.

³ Case tribunal decision ref: APE 0429 – 0434

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Similarly, the Webcasting Protocol states at paragraph 4 that “all archived webcasts will be available to view on the council’s website for a period of six months.” Again this is suggestive that Members were expected to view (and refer others to view) webcast material by that means rather than via some external facility, but does not expressly preclude the latter.

- 7.3 Was his behaviour “unreasonable”? Cllr Kitcat contends that extracting the clips and posting them on YouTube was the only way he could direct readers of his personal website to a specific point in the relevant webcast. Public-i have confirmed that at the time the postings took place, it was not possible to use the council’s webcasting software to achieve the outcome Cllr Kitcat was seeking.

It follows that from purely a technical standpoint, it was not unreasonable for Cllr Kitcat to have posted the clips externally. Indeed, this appears to have been the only method of fulfilling his legitimate role as ward councillor of referring his constituents to what he considered to be relevant clips of council proceedings.

- 7.4 Aside from the technical justification, though, was the behaviour unreasonable due to Cllr Kitcat’s failure to seek or obtain the consent of Cllr Theobald or Mears to the posting; or due to his failure to let them know the posting was about to happen?

Considering that the stated purpose of webcasting, according to the Guide to Members, is to increase accessibility, openness and transparency of the council’s decision-making process, it is difficult to argue against Cllr Kitcat’s assertion that it was reasonable to give the footage the additional reach that YouTube can provide.

Whilst it may have been courteous to have sought the prior consent of Cllrs Mears and Theobald, and at least to have notified them in advance, this in itself does not represent a failure to treat others with respect, assessed against the Code of Conduct.

- 7.5 Was his behaviour “demeaning”? This question is probably only relevant to clip no.5, as the other four clips which comprise this complaint are contextually more complete and less prone to subjective interpretation.

Cllr Theobald said that he wasn’t even aware of the 12-second clip until it was pointed out to him, and even then he considered that footage of this type was something he simply had to tolerate as part of his role as a politician with a high-profile remit. For Cllr Theobald, at least, footage of him saying “I wish I could have answered these questions” was not a cause of major embarrassment. He contrasted this particular clip with a hypothetical scenario in which he had uttered comments which – out of context – could portray him as discriminatory. The latter would have been far more serious to his reputation, and thus a more likely cause of complaint from him personally about a failure to show him respect.

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Would others consider the 12-second clip likely to demean Cllr Theobald? Cllr Mears certainly believed so. Conversely, Cllr Theobald felt that viewers of YouTube would probably realise that a 12-second clip did not tell the full story, and would be unlikely to treat the footage as a meaningful or insightful observation on Cllr Theobald as a politician.

Cllr Kemble himself stated that his complaint was not about whether the conduct ridiculed others (as opposed to the lack of prior consent or notification, which was the issue).

Moreover, as Cllr Kitcat has pointed out, each clip is referenced on the YouTube screen with details of the source of the video (see example at Appendix A11). Hence if a viewer wished to form a more reasoned view as to Cllr Theobald's competence and professionalism, they would have known which meeting the clip was taken from, and an internet search would have taken them to the council's own webcast site where full coverage of that meeting was available.

As to the contention that Cllr Theobald was denied the opportunity of responding to or commenting on the clip in question, Cllr Kitcat has explained that comments and video responses can in fact be posted against all videos on YouTube, thus providing an instant online right of reply. Although Cllr Theobald acknowledged he did not personally access YouTube, the facility to respond online to clip no. 5 did exist and was available to him or a colleague once they had been made aware of the posting.

- 7.6 Cllr Mears was concerned that Cllr Theobald had no ready means of defending himself against any adverse impression that may have been formed of him following publication of clip no.5 on YouTube.

Furthermore, if Cllr Theobald's reputation was tarnished as a result of the clip, the potentially very large audience that YouTube can attract could have had a multiplying effect.

- 7.7 Nonetheless, for the purpose of this investigation, one has to consider these issues against the criteria relevant to the Code of Conduct.

In this respect, there are two important points to bear in mind:

(i) the threshold for disrespectful conduct is higher in relation to allegations about behaviour towards another councillor than for behaviour against an officer or member of the public; and

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(ii) the conduct in this instance did not constitute an “unreasonable or excessive personal attack”⁴, nor was it made in a “malicious or bullying manner”⁵.

For both of these reasons, and for the other reasons given above, I conclude that Cllr Kitcat did not breach paragraph 3 of the Code of Conduct.

Use of council resources

7.8 The question of whether Cllr Kitcat breached paragraph 6(b) of the Code of Conduct hinges on the interpretation of “the resources of the authority”. If it is the case that council resources include the sound and images created during the webcasting of meetings, this investigation should go on to consider whether Cllr Kitcat complied with the Code in relation to their use, namely –

(i) to act in accordance with the council’s reasonable requirements; and

(ii) to ensure that the resources are not used improperly for political or party political purposes.

7.9 In relation to paragraph 6(b) of the Code, the Standards Board for England (SBE) guide for members includes the following examples of “resources”: telephone, computer and other IT facilities. Similarly, the SBE 2007 Case Review indicates that council resources “include services and facilities as well as the financial resources of the authority”. More particularly, it lists as specific examples: IT such as computer equipment and the use of associated software, including the use of such equipment at home.

7.10 Based on Cllr Kitcat’s written and oral submissions, it is settled that he used his own personal computer and broadband connection to extract the clips from the council’s website and to place them on YouTube.

7.11 The issue therefore is whether Cllr Kitcat “used the council’s resources” in sourcing his selected clips from the council’s footage of webcast meetings.

7.12 Cllr Kitcat says that he did not. He contends that because the sound and images are digital, they underwent no depletion or degradation as a result of his copying and pasting. In other words, his actions did not deprive the council of any of its resources.

7.13 However, it is the case that the webcasting hardware and software accessed by Cllr Kitcat to create the clips are council “facilities”, based on the SBE definitions mentioned above.

⁴ Standards Board for England ‘The Code of Conduct - guide for members’, May 2007: page 8 – treating others with respect

⁵ Standards Board for England: Case review 2008, page 6

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- 7.14 It is also the case that the copyright in the sound and images complained of belongs to the council. The copyright is thus part of the council's intellectual property and a non-tangible asset. It could therefore be considered a financial resource of the council.
- 7.15 Whilst Cllr Kitcat's actions in copying the webcast sound and images to an external website may amount to prima facie infringement of the council's copyright, this investigation is not concerned with any civil liability that any such infringement might create. Copyright infringement is not of itself a breach of the Code of Conduct.
- 7.16 Having reasoned that Cllr Kitcat did use a financial resource of the council, two questions then arise:
- (i) whether he acted in accordance with the council's reasonable requirements [paragraph 6(b)(i) of the code]; and
 - (ii) whether he used the resource improperly for political or party political purposes [paragraph 6(b)(ii) of the code].
- 7.17 With regard to the question posed at 7.16(i), this investigation has already established that the Webcasting Protocol and Members' Guide approved in September 2008 do not expressly prohibit the capture and external distribution of council webcast images. That said, the Webcasting Protocol provides for a notice to appear on council agendas and meeting rooms which states "This meeting may be filmed for live or subsequent broadcast *via the council's website*" [emphasis added]. It is therefore implicit that any subsequent broadcast would be channelled via the council's website, and not an external one.
- 7.18 Does an implicit term of the Protocol constitute "a reasonable requirement of the authority"? Probably not. The Protocol creates an expectation as to how footage might subsequently be broadcast, but it falls short of a "requirement". A requirement is a provision that would have appeared as an express term in the Protocol. No such term exists in the Webcasting Protocol or Guide.
- 7.19 On a wider point, how would Cllr Kitcat know what the authority's reasonable requirements are for the use of resources, other than looking at the Webcasting Protocol and Members' Guide? The council has produced a Practice Note on Publicity and the Use of Council Resources, documented at Part 9.3 of the council's constitution.
- 7.20 This Practice Note complements paragraph 6(b) of the Code of Conduct for Members, and sets out the council's requirements in respect of publicity and the use of council facilities; it also provides guidance on their application. At paragraph 4 it states that "councillors should...not use any facilities provided by the council for private purposes or other business (such as party political publicity) which cannot be justified as being part of their role as a councillor".

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- 7.21 Further, paragraph 8 of the Practice Note reminds councillors that the Code of Conduct specifically prohibits the use of resources (such as IT equipment) improperly for political purposes, including party political purposes.
- 7.22 This then prompts the question posed at 7.16(ii), i.e. whether Cllr Kitcat's use of council resources amounted to improper use for political or party political purposes.
- 7.23 By Cllr Kitcat's own admission, he posted the clips onto YouTube for political reasons. Even so, this investigation should examine objectively whether the posting of the clips was political or party political in nature
- 7.24 The Practice Note sets out the following factors to be considered in ascertaining whether council resources have been used for political purposes, although it acknowledges there is no hard and fast rule.

One has to take all relevant considerations into account, including the content and style of the material, the time and circumstances of publication, whether the material refers to a political party or to persons identified with a political party, whether it promotes or opposes a point of view on a question of political controversy which is identifiable as the view of one political party and not of another, and whether the material is part of a campaign, the effect which it appears to be designed to achieve etc. The responsibility is on the councillor concerned to assess the circumstances and avoid using council facilities for anything that may amount to or be perceived as political publicity.

- 7.25 Further assistance in deciding whether resources were used improperly for political purposes is provided by the Standards Board guide for members. For the purposes of this investigation, the relevant part states: "Your authority may authorise you to use its resources and facilities for political purposes in connection with your authority's business...In this case, you must be aware of the limitations placed upon such use for these purposes. Using your authority's resources outside of these limitations is likely to amount to a breach of the Code of Conduct."
- 7.26 As previously noted, the Members' Guide to Webcasting encourages members to promote webcasting and offers three examples of how this might be done. Clearly this requires the member to use council facilities (i.e. the webcasting infrastructure), and were a member to do so in the way envisaged, it would come within the ambit of the council's "authority". Whilst the Guide contains no express limitations on how webcasting might be promoted, an implied limitation is that promotional activity is facilitated using the council's official webcast site, not an external platform. See also paragraphs 7.2 and 7.17 above.

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7.27 Assessed against these factors, I consider that Cllr Kitcat did use the council's IT facilities improperly for political purposes. Most of the clips are about communal bins, a politically contentious issue at the time. The clips are about Cllr Kitcat holding the administration politically to account for the way the bins were introduced, and were intended to highlight what he believed were the administration's deficiencies in that regard, based on feedback from certain residents. Most tellingly, clip no. 5 shows the Cabinet Member responsible for communal bins in an unflattering and politically unfavourable light, and it is hard to avoid the conclusion that this highly abridged clip was selected and posted for political gain.

8 FINDING:

8.1 Based on the facts of the case (and in particular Cllr Theobald's reaction to clip no.5) and the reasoning set out above, the investigator finds that Cllr Kitcat did not treat others with disrespect and therefore did not breach paragraph 3 of the Code of Conduct.

8.2 Based on the facts of the case and the reasoning set out above, the investigator finds that Cllr Kitcat did use council resources in accordance with the council's reasonable requirements and therefore did not breach paragraph 6(b)(i) of the Code of Conduct.

8.3 Based on the facts of the case and the reasoning set out above, the investigator finds that Cllr Kitcat did use council resources improperly for political purposes and therefore did breach paragraph 6(b)(ii) of the Code of Conduct.

Appendix A

Schedule of evidence taken into account

Case No: SCT 070 STDS

Core documents

Doc No	Description	Page
A1	Councillor Kemble's letter of complaint, 27 February 2009	
A2	Councillor Kitcat's written response to complaint, 4 August 2009	
A3	Councillor Kitcat's response to draft investigation report, 16 October 2009	

Notes of interviews with witnesses

Doc No	Description	Page
A4	Notes of interview with Councillor Kemble, 26 August 2009	
A5	Notes of interview with Councillor Theobald, 28 August 2009	
A6	Notes of interview with Councillors Mears and Oxley, 2 September 2009	
A7	Notes of interview with Councillor Kitcat, 11 September 2009	

Other documentary evidence

Doc No	Description	Page
A8	Report to Governance Committee, 23 September 2008, on Protocol for Webcast Meetings	
A9	Extract from minutes of Council meeting of 29 January 2009	
A10	Screenshot of clip no.1, (for the purpose of showing the contextual information to the right of the video image)	