



## **FIRST-TIER TRIBUNAL**

### **GENERAL REGULATORY CHAMBER**

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| <b>Appellant:</b> Trevor Roy Nunn | <b>Tribunal Ref</b> EA/2011/0307            |
| <b>Respondent:</b>                | <b>The Information Commissioner</b>         |
| <b>Before:</b>                    | <b>NJ Warren<br/>P Taylor<br/>R Enderby</b> |

### **DECISION**

1. Our majority decision is that this appeal fails.
2. On 6 April 2011 Mr Nunn submitted the following request for information to the local government ombudsman (LGO):-

“For the reporting year 2009/10 only. Please supply any and all information you received from the authorities concerned, or the complainants involved, that prove the authorities concerned complied in full with the recommendations made in the reports you issued finding maladministration leading to injustice.”

The LGO (formally the Commission for Local Administration in England) refused the request and, after unsuccessfully contesting this before the Information Commissioner, Mr Nunn now appeals to the Tribunal.
3. It is first necessary to explore the statutory scheme which establishes and governs the procedure of the LGO. This is to be found in sections 23-34 Local Government Act 1974.
4. The LGO deals with complaints about local authorities in respect of maladministration or failure to provide services. LGO investigations are conducted in private. The LGO has a discretion whether or not to investigate a matter. The LGO has extensive powers to require the production of information and documents from both local and central government. On completion of an investigation the LGO may, if satisfied with a local authority’s actions or proposed actions issue a statement of reasons. Otherwise the LGO must prepare a report of the results of the investigation. With very rare exceptions, the report must not mention any person by name or contain any particulars likely to identify any person. See Section 30(3).
5. If the report is adverse to the local authority, it is laid before them and the authority then has three months in which to consider the report and to notify the LGO what

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**Decision Continued****Appellant:** Trevor Roy Nunn**Date of decision:** 19 April 2012**Tribunal Reference Number:** EA/2011/0307

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action it has taken or proposes to take in response. No doubt most matters are resolved at this stage. Sometimes the local authority fails to reply to the LGO; comes up with an unsatisfactory proposal; or fails to implement a satisfactory one. If this happens, the LGO makes a further report and the process is repeated. If the local authority is again in default then the LGO may require it to publish a statement about the affair in local newspapers. The LGO has power to publish reports (see Section 31B) but still subject to the conditions of anonymity mentioned earlier.

6. Then Section 32 confers absolute privilege in respect of the laws of defamation and in respect of the disclosure of information states:-

“32(2) Information obtained by a Local Commissioner or any person discharging or assisting in the discharge of a function of a Local Commissioner in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed except:-

(a) for the purposes of the investigation and of any report statement or summary under section 30, 31 or 31B above.... ”

The other exceptions are not relevant here. (This version of Section 32, which differs slightly from those contained in the papers, has been taken from the current edition of Halsburys Statutes.)

7. The Freedom of Information Act 2000 contains an absolute exemption from its scope if disclosure of information by the public authority is prohibited by another enactment (s.44). This appeal therefore raises a short point of law, but one which we have found difficult to resolve. Does information received after the issue of the LGO's report amount to information received “in the course of or for the purposes of an investigation” and thus come within the scope of Section 32(2)?

8. We have found it convenient to approach this problem by dividing the process into three parts:-

- (a) The period before an investigation starts when the LGO is considering whether or not to investigate.
- (b) The period from the start of the investigation up until the issue of the report.
- (c) The period after the issue of a report, perhaps including a second report, when the LGO's proposed remedy is either accepted by the LA or the subject of further discussion.

Looking at the 1974 Act, what is the Parliamentary intention in respect of each of these three periods?

9. In respect of period (a), it could be argued, and we understand has indeed been argued in other cases, that if, for what ever reason, the LGO decides not to investigate, then Section 32(2) can have no application at all. There is no “investigation” to which it can relate.

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**Decision Continued****Appellant:** Trevor Roy Nunn**Date of decision:** 19 April 2012**Tribunal Reference Number:** EA/2011/0307

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10. We all agree, however, that the policy of the statute requires Section 32(2) to operate during period (a) whether or not a full investigation follows. It remains information received “for the purposes of” an investigation, even though none results. The apparent logic of the language must give way to the logic of the statutory scheme read as a whole.
11. In respect of period (b) there is neither doubt nor dispute. The citizen and the LA can speak confidentially to the LGO because the information they pass on is received “in the course of” the investigation.
12. What did Parliament intend in respect of period (c)?
13. One of us accepts Mr Nunn’s submission on this point. It is plain from the current version of Section 30(1) that by the time the report is issued the investigation has been completed. By definition, information received later than this cannot be in the course of the investigation; nor can it be for the purposes of the investigation because it has finished. Subject to further investigation of a point raised by the LGO concerning the costs of retrieving information, that member would have allowed the appeal on this ground.
14. The majority, whilst recognising the force of that reasoning, take a different view and have accepted the submission of the Information Commissioner. It seems to the majority that, on analysis, the appellant’s submissions are not as simple as they seem at first sight, when construing this part of the statute as a whole.
15. This is because it is clear that once material comes within the ambit of Section 32(2), it remains there. There is no mechanism to “undo” the protection afforded when the investigation comes to an end. The exceptions to Section 32(2) in respect of the report and of any second report show that the confidentiality, once achieved, continues. If it did not do so, there would be no need for the exceptions.
16. It follows that the appellant’s submission involves attributing to Parliament a rather complex intention in respect of confidentiality during period (c). To the extent that information passes to the LGO which duplicates information already given, that information retains its confidential nature; it is only new information which loses the Section 32(2) protection.
17. It might be thought that such an obscure intention, had it existed, might have been more obviously expressed. This is especially so because of the practical difficulties involved. To take a simple example, supposing the LA simply writes to the LGO to say:-

“Thank you for the report. I am writing to confirm that in accordance with the recommendation we have re-tarmaced the pathway to the play ground and paid Mrs Smith £150 in respect of her out of pocket expenses.

What is open to disclosure? The identity of Mrs Smith remains within Section 32(2). It is difficult also to refer to the pathway without revealing, at least by implication, information already disclosed during periods (a) and (b).
18. Nor, from a policy point of view, can we discern anything about the “remedy” stage of the process which should lead to it being treated any differently for these

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purposes. No doubt information is exchanged in respect of potential remedies in the course of periods (a) and (b) as well. If there are difficulties at stage (c) and the LGO has to mediate some sort of agreement, then the arguments in favour of retaining confidentiality seem, if anything, stronger.

19. Having considered the original wording of the scheme, the majority conclude that Parliament intended the process to be confidential throughout. Parliament did not intend to distinguish, in this respect, new information received at stage (c). Such information, in our judgment, is still received “for the purposes of the investigation” and is therefore covered by Section 32(2). None of the amendments since then, in the majority view, indicate an intention to achieve a different result.

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| Signed: | NJ Warren         | Date: | 19 April 2012 |
|         | Chamber President |       |               |