



First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0097

Heard at Kendal Magistrates Court
On 24 October 2016
Promulgated on 23 November 2016

Before

CHRIS HUGHES
JEAN NELSON
PAUL TAYLOR

Between

IAN KELL

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

SOUTH LAKELAND DISTRICT COUNCIL

Second Respondent

DECISION AND REASONS

1. The Appellant in these proceedings has for some time been trying unsuccessfully to become a member of the Independent Remuneration Panel (IRP) for South Lakeland District Council (the Second Respondent, "the Council"). The Local Authorities (Members Allowances) (England) Regulations 2003 require local authorities to establish an IRP whose functions are to produce a report to the local authority making recommendations for the amount of the various allowances paid to members of the local authority. An

IRP is not a decision-making body, it makes recommendations to the local authority which the local authority then has to consider and decide upon. That deliberation by the local authority on the annual report of the IRP is part of the public decision making of the authority, the report is publicly available, discussed in public by the local authority which is required, before it can make or amend a scheme for the remuneration of its members to "have regard to the recommendations" made in relation to it by an IRP.

2. On 9 December 2014 the Appellant wrote to the Council asking for information about the IRP:-

1. All minutes of the 'independent' remuneration panel (IRP) of SLDC to date and going back to and including the last two meetings with Mr John Lyons as Chair (before his term of office ended).

2. Running times of meetings if not recorded in minutes but recorded elsewhere.

3. Following some delay the Council replied stating that the requested information was already available, however after review it refused to release the information relying on section 36(2)(b) FOIA which provides that:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

.....

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation,"

4. The Appellant complained to the ICO who investigated. He was advised that the Solicitor to the Council was the qualified person. The Solicitor had given an opinion and the Commissioner was asked to consider whether this was reasonable. She concluded that the opinion was a reasonable opinion, this being that members of the IRP needed to be able to have free and frank discussions in their meetings and with the officers and councillors who made representations and provided information to them; that it was important that they do so freely and that publication of the minutes would inhibit this process. She considered the severity of any such impact and the frequency with which it would occur. She weighed the public interest in disclosure, in particular the importance of transparency in the decision-making of public bodies against the risk to the candour and frankness of the proceedings of the IRP and the consequential detrimental effect on the IRP recommendations. She noted that "as the IRP members can only make recommendations and have no final decision-making power, and as their recommendations are published on the Council's website, the Commissioner considers that this provides sufficient transparency without compromising the integrity of the IRP's discussions." She concluded that the Council had correctly applied the exemption.

5. In his appeal the Appellant argued that the Solicitor to the Council was not a qualified person within section 36. The opinion was not reasonable since it was not reasonable to withhold information about public funds. The discussions were not sensitive and so would not be inhibited by disclosure. The public interest required the disclosure of information about the conduct of the IRP since it did not reflect the full range of views of electors but was gerrymandered.
6. In her response the ICO reconsidered the issue of the identity of the qualified person and concluded that the Council's Monitoring Officer was the qualified person rather than the Council's Solicitor. A further opinion was provided consistent with the previous opinion (bundle page 40-42) and the ICO maintained the position set out in the decision notice that disclosure would inhibit future discussions and have a detrimental effect on the robustness of the IRP and its recommendations; the exemption was engaged. The ICO was not convinced that the arguments advanced on the public interest in disclosure were of substance. She noted the steps the Council had taken to broaden the membership of the IRP and to place the recruitment of IRP members in the hands of a council officer and the IRP thus minimising the role of councillors in appointments. She maintained her view that the release of the report of the IRP met the need for transparency. The ICO considered that the regular meetings of the IRP working to an annual reporting cycle of the IRP meant that inhibition would occur regularly and that while some councillors and officers had expressed opinions publicly which had been reported in the local press, that was distinct from a full and frank exploration of the issues with the IRP. The Council supported the ICO's position.
7. In oral submissions the Appellant felt disadvantaged by not seeing the minutes of the meetings. He felt that there should be proper scrutiny of the IRP through disclosure of its minutes
8. Ms Hartley for the Council emphasised that:-
 - the IRP was set up to be independent of the Council by statute and that the minutes of its meetings were kept confidential to the IRP and were not available to the Council and councillors.
 - Councillors invited to attend meetings of the IRP to answer questions would be less likely to attend and speak freely and this would diminish the quality of information.
 - While the issue of recruitment to the IRP underlay the Appellant's concerns he had been content with the outcome of a review of the recruitment process and in any event the minutes of the IRP were not relevant to the recruitment process.
 - All members of the IRP had been clear in the view that disclosure would inhibit their work.

- The report of the IRP disclosed the reasoning and methodology underlying their recommendations which meant that the workings of the IRP were transparent.
 - While the Appellant had argued that other local authorities disclosed IRP minutes, the Council had found only a handful which did so.
 - The length of the meetings was part of the minutes.
9. In replying to the Council the Appellant argued from his experience of failing to be appointed to the IRP despite a number of attempts "*they do recruit to a profile to keep it in the family*". The IRP was "*owned*" by the electorate and the recruitment process stated that the IRP had to be open and seen to be independent; he felt that this was not possible without the minutes being published.
10. In considering this appeal the Tribunal considered the structure of FOIA and that while the overarching intent is to secure public benefit through increased access to information held by public bodies, this is balanced by recognition that disclosure can have deleterious consequences.
11. The qualified person's opinion was that disclosure would both inhibit the ability to have a free and frank debate and also inhibit councillors and officers in making representations and answering questions. This would be detrimental to the quality of the IRP's work. The tribunal shared the ICO's conclusion that these were reasonable concerns and disclosure would be a continuing inhibition given that the IRP met regularly and reported annually. It was noteworthy that such minutes were not routinely disclosed by other IRPs. In this case it is significant that the IRP is a statutory arms-length body providing independent, publicly available, advice to the Council which the Council is required to consider and debate in public before making any decision with respect to councillors' remuneration. The IRP is not the decision-maker. The IRP in its annual report sets out the methodology for its work, detailing how it gathered data, which councillors attended meetings of the IRP to give their views and answers questions and information about comparator authorities. At the Council meeting where the report is considered there is the opportunity for the public to comment. There is full transparency about the reasoning which leads to the decision as to the level of councillors' allowances.
12. The tribunal is satisfied that the ICO was correct in law and has properly struck the public interest balance in this case and the substance of the appeal is dismissed.
13. The decision notice is amended by the replacement of paragraph 11 by substitution of a new paragraph 11:-

"The Council has informed the Commissioner that the "qualified person" in this case is Debbie Storr, Director- Policy and Resources (Monitoring Officer). The

Commissioner is satisfied that Ms Storr is the appropriate qualified person for the purposes of section 36 of FOIA.

14. The tribunal's decision is unanimous.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 22 November 2016