



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2016/0315

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50619051

Dated: 29 November 2016

Appellant: John Coyne

Respondent: The Information Commissioner

2nd Respondent: Liverpool City Council

Heard at: Liverpool Civil and Family Court

Date of Hearing: 14 September 2017

Before

Chris Hughes

Judge

and

Anne Chafer & Paul Taylor

Tribunal Members

Date of Decision: 25 September 2017

Date Promulgated: 25 September 2017

Attendances:

For the Appellant: in person

For the Respondent: no appearance

For the 2nd Respondent: Mr Michael Jones (authorised officer)

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 29 November 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. In May 2012 the first directly elected Mayor for Liverpool took office. In September of that year he was dismissed by his employer, Chesterfield High School (based in Lancashire). On 29 November 2012, under their delegated powers, officers authorised an indemnity to cover the costs of a private firm of solicitors to represent him in proceedings against his former employer. The decision of the Employment Tribunal was delivered on 28 January 2014 this concluded that the dismissal was unfair. The Employment Tribunal's summary of its findings of the reason for dismissal related to his change of circumstances in becoming Mayor, the potential and actual impact of this on his employer, the cost of his employment to the employer and his failure to consult his employer before deciding to seek the mayoralty (ET case no. 2415949/2012 paragraphs 119-126). The Mayor appealed against aspects of the decision to the Employment Appeal Tribunal which dismissed his appeal on 14 April 2015.

The request for information

2. On 27 September 2015 the Appellant requested information:-

"The Council has said "the decision to pay the legal fees was taken by the council chief executive after discussions with the council solicitor and monitoring officer and was not made by Mayor Anderson. In addition, it was a course of action that had the agreement of the District Auditor."

Please disclose dates and records of all decisions, discussions, telephone calls or meetings, copies of all emails and other written communications between and/or including any or all of the following people in connection with the approval of the

payment by the Council of the Mayor's legal costs in connection with his ET and EAT claim against Chesterfield school: the Mayor, council officers and the District Auditor.

The period of interest extends from May 2010 to the present.”

3. The Council refused to provide certain information relying on the exemption in s42(1) FOIA which provides:-

“(1)Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

The complaint to the Information Commissioner

4. The Appellant complained to the Information Commissioner (“ICO”). During the course of the investigation the Council explained the original decision-making process and the searches which had been conducted. The ICO considered that the Council had correctly identified the extent of the information it held and went on to consider whether Legal Professional Privilege (LPP) was engaged by that material and if so where the balance of public interest lay between disclosure and non-disclosure.
5. In considering these issues she noted the Council’s explanation that the Mayor had been dismissed as a result of his election, that the Chief Executive and City solicitor had made the decision to cover his legal costs on 29/11/2012, that there had been continual monitoring of the issue by the City Solicitor thereafter and there had also been discussions with the Council’s external auditors on a number of occasions (DN paragraphs 30-33). She was satisfied that the advice attracted LPP in that it was legal advice obtained by the Council in relation to its decision to apply the indemnity (DN paragraphs 45-48). She concluded that LPP had not been lost through disclosure (DN 49).
6. In considering the arguments for disclosure she noted the general interest in transparency as well as the level of public comment and the apparent novelty of the issue. In support of the maintenance of disclosure she noted the strong public interest in the council seeking legal advice in support of its decision-making and that disclosure may result in less good decisions being made because they are not the subject of legal advice (paragraphs 54/55). She did not consider that the advice was “live” and noted that the public perception of possible wrong-doing and concern about

the expenditure involved were of weight in affecting public confidence in the Council's performance of its public functions. She considered the Council's view that the dismissal could impact on how it approached its governance arrangements. In weighing all the issues she concluded (DN 68-69):-

“Nonetheless, ultimately, the Commissioner must focus her considerations on the substantive content of the information being withheld and the likely affect disclosure might have. To that end, the council sought advice on its legal position regarding the specific matter of indemnity. Undue invasion into the necessary space required for those legal deliberations to be considered must be provided for and the counter public interest arguments so far looked at focus more on the context rather than the substance.

...In this case, with no evidence of wrong doing or actions counter to advice provided, the Commissioner has concluded that, in the light of the factors above, the public interest in disclosing the information in this case does not outweigh the public interest in maintaining the exemption.”

7. In his notice of appeal the Appellant questioned whether LPP was engaged, or if it was whether it should carry much weight given that in his view the Council had chosen to disclose the advice, and whether the public interest in disclosure should have been given more weight. He questioned the purpose of obtaining the advice and argued that the advice had been obtained as a public relations exercise. He considered the Council had been wrong to grant the indemnity. In arguing that there was a public interest in disclosure he stated that he would bring to the tribunal evidence of wrongdoing. He set out his understanding of the decision of the EAT and stated:-

“If the advice is flawed-when tested against known facts already in the public domain- then it provides important evidence of failure.”

8. Prior to the hearing, following the Council's response, he abandoned the first leg of the appeal and restricted his arguments to the weight that LPP should attract and the weight of the competing public interest in disclosure.
9. The ICO resisted the appeal. She maintained her position that the advice had not been disclosed and that a brief reference to, or summary of the advice that did not reveal its substance, did not lead to a loss of privilege and the contents of the appeal did not weaken this reasoning. She changed her position from that set out in her

decision notice that litigation privilege was engaged since she considered that the Council had not made submissions to her with respect to contemplated litigation; however she was satisfied that the legal advice attracted legal advice privilege. With respect to wrongdoing she disputed whether any evidence had been produced and reiterated the general arguments as to the significance of LPP to rights recognised in common law and the ECHR and the specific arguments with respect to avoiding the risk of discouraging public bodies from seeking advice. She concluded:-

“The Commissioner has considered the content of the Legal Advice and has concluded that there is nothing in the specifics of the information that means the balance of public interest would weigh in favour of its disclosure.”

10. The Council resisted the appeal and argued that both legal advice privilege and litigation privilege applied to the advice since at the time it was received in May 2015 there was a realistic prospect of challenge to the Council’s accounts under s28 and 29 of the Local Audit and accountability Act and it was a confidential provision of advice from the solicitors to their client.
11. In his opening submissions to the tribunal the Appellant argued that the basis for disclosure was suspicion of wrongdoing. He acknowledged that he could not find wrongdoing but he wished to establish that he had grounds for a plausible suspicion of wrongdoing. He wished the tribunal to make findings with respect to the correct interpretation of various statutory provisions dealing with local government law.

Decision on a Procedural application from the Appellant

12. The Appellant had submitted a witness statement from Councillor Crone who had, exercising his powers as a councillor, seen the advice. Councillor Crone stated that he did not consider the advice well-reasoned and he wished to give his full reasons at the hearing. Neither the Council nor the tribunal had any questions for the Councillor in the light of his witness statement. The Appellant produced a list of questions that he wished to ask Councillor Crone which explored the content of the advice and Councillor Crone’s perception of that content.
13. The tribunal considered that this approach misunderstood the procedures and functions of the tribunal. In essence the Appellant wished to place Councillor Crone in a position where he could reveal the contents of the legal advice (knowledge of which he had obtained under a clear duty of confidentiality) in public. This would be

to abuse the tribunal proceedings and enable the Councillor, in what would otherwise be a breach of his duty, to reveal the contents of the legal advice without the tribunal having considered whether the advice would properly be disclosed under FOIA.

14. The Appellant then applied for the questions to be put to the Councillor in a closed session, without the presence of the Appellant. The tribunal refused this application. The Appellant could have applied on notice for directions from the Registrar with respect to a closed witness statement from Councillor Crone, this might have given an opportunity to the other parties to consider what that evidence was in advance of the hearing; it would be unfair to the other parties to now proceed on the basis of evidence in chief which had not been proffered in the form of a witness statement. Furthermore the purpose of the questioning was to challenge the quality of the legal advice. That is not the function of the tribunal. If the quality of the legal advice upon which a public authority acts is in question, then the correct way to challenge that advice is to challenge a decision which the public authority takes in the light of that advice through judicial review of that decision.

The appeal to the Tribunal

15. In his argument the Appellant sought to demonstrate a plausible suspicion of wrongdoing and to cast doubt on the LPP. He argued that if the advice contained serious factual errors or took a wrong view of the law, for example as to the scope of s10 of the Local Government and Housing Act (which had been referred to in the employment proceedings) then it should be disclosed. He argued that *“I have a strong suspicion of wrong-doing and the advice if released would help me”*. He argued that the Council had made judgements which had turned out not to be correct but had not acknowledged any mistake, *“I suspect wrong-doing in the absence of any alternative explanation”*. He was concerned as to the probity of the Council’s employed solicitors and the continued possibility of the Council indemnifying members. He considered that the decision to indemnify the Mayor’s claim to the Employment Tribunal was such a mistake suggesting wrong-doing and that the *“decision to go to the EAT appears to have been taken by default...If the Council funded legal action for the Mayor where there was no point of law for the City Council it was wrong. If there is an answer to this it would be in the advice... if the advice doesn’t engage with the appeal it will be flawed, if it talks in general terms it is deficient and there is a public interest in knowing this deficiency.”* He argued that

the indemnity was a misuse of public funds and relied on a comment in the decision of the EAT. He discussed his interpretation of the decisions of the ET and EAT. In response to questioning from the tribunal he acknowledged that he had not been aware of how to challenge the Council's accounts and he had been unaware of the rights of access to information under the Local Audit and Accountability Act 2014 which would have enabled him to do so.

16. In resisting the appeal Mr Jones submitted that LPP continued to be engaged. The advice had arisen out of the new circumstances of an elected Mayor and it related to the delegated decision which had been taken. The Council had faced a potential challenge to the legitimacy of its actions through a challenge to its accounts. It had been discussed with the auditors as part of the preparation to handle any such challenge. It remained relevant and live since the advice would continue to inform any decision the Council made in future with respect to the provision of an indemnity to elected councillors and the mayor. It was entirely legitimate to seek advice on how the Council could use its powers. There was no substance to allegations of wrongdoing. The Council could have been challenged over its accounts and the failure of any attempt to challenge the accounts showed that the interest of the public was not as substantial as the appellant suggested. The Council had been transparent, it had made extensive disclosures, the public interest had been addressed in full and there was no additionality of increasing public understanding from disclosure.

Consideration

17. The granting of the indemnity to the Mayor, the reasons for the granting of the indemnity (clearly set out in the delegated decision of 29/11/2012), its associated cost to the Council, the reasoning of the ET and the EAT are in the public domain. The position of the Mayor and his employment circumstances are fully explored in the decisions of the ET and the EAT. Shortly after the decision of the EAT the Council sought legal advice on its powers to grant indemnities in the light of its governance arrangements, the public interest in the indemnity granted to the Mayor and the clear possibility that the expenditure under the indemnity could be challenged in the Council's annual accounts. It clearly attracts LPP and the view of the Council that this is both litigation privilege in the light of possible formal challenges to items of account and advice privilege in the light of its nature and intended use is clearly correct.

18. The showing of the advice to the Auditor to enable that Auditor to consider his responsibilities with respect to the Council's accounts and the public disclosure of the existence of the advice have not weakened the Council's claim to LPP. The importance of that privilege to public administration is substantial. Good financial and legal advice are the twin tracks upon which modern local government run.
19. The Appellant has argued that he has a plausible basis for a suspicion of wrongdoing. He has relied extensively on his interpretation of the findings of the ET and the EAT. He argues that if the advice were disclosed and he took a different view of the issues in the advice from the firm of solicitors, then this would be evidence of wrong-doing. The tribunal is wholly unconvinced by this argument. His suggestion that the advice was used to pull the wool over the eyes of the Auditor lacks any credibility; the Auditor, in order to carry out the functions vested in the firm, will have considerable knowledge of the Council and its operations. The Auditor was satisfied and did not raise an objection to the accounts of the Council. There are no grounds for suggesting that the advice will assist by revealing wrong-doing. The Council's decision-making is clear and transparent. The Appellant has his own interpretation of the significance of the findings of the ET and EAT, however an examination of the advice leads the tribunal to the conclusion that there is nothing in the advice that will assist him with his concerns.
20. The tribunal is satisfied that the ICO properly characterised the material as attracting LPP. The tribunal is further satisfied that the public interest in maintaining LPP is substantial. There has been transparency from the Council with respect to its decision-making and the Appellant has been unable to demonstrate any grounds for his belief there has been misconduct.
21. The tribunal upholds the ICO's decision notice and dismisses the appeal.
22. Our decision is unanimous.

Judge Hughes

Dated: 25/9/2017

Amended: 13/10/2017