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Submissions in Respect of the Appeal Hearing on 17th December 2009.

The last paragraph of the Councillor's submission was deleted on the instruction of the Monitoring Officer on the grounds that it may include defamatory statements.

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Cllr John Illingworth: Access to Information Appeal

I am seeking access to the whole of the “working file” for the Council Annual Meeting held in May 2003. Since October 2008, I have been seeking information about the history of the Council’s constitutional changes after local government modernisation, but I only become aware of the existence of this “working file” in the last few weeks.

During the autumn of 2008 the Council supplied me with dated copies of documents that purported to be the constitutions approved each year between 2001 and 2008. It subsequently became apparent that the constitution dated 19 May 2003 had in fact been assembled some time after the event. I was later told, again wrongly, that the Council had not retained any significant records of the 2003 Annual Meeting, but it is now obvious that considerable information has in fact been kept.

These dates are important, because my original request for this information was inside the six year time limit for the retention and automatic inspection of Council documents. It is also important that the information initially supplied to me by the Council was incorrect.

Rights to information are additive. In other words, if a document is available by any legal route, then it must be produced. It cannot be withheld because it would not be available by a different route. This situation is made very clear in the wording of the primary legislation, and it also reflects common sense. Once the genie is out of the bottle, it is not easy to put it back!

I say that the information in this “working file” might well be embarrassing to the Council but it is neither confidential nor exempt. The information that I requested in October 2008 included the revision history of the Council’s constitutional changes. We now know from witness statements in the High Court that this revision history includes handwritten comments on documents, and the use of typing correction fluid. It is therefore necessary to inspect the original papers. An abstract or a photocopy will not do.

It is also necessary to see the whole of the bundle of papers in the “working file”, and not the censored or redacted set that has so far been supplied to me.

This information is held by the Council; it was produced by the Council and is wholly under the Council’s control. The entire bundle should therefore be freely available under the Freedom of Information Act. It is not subject to copyright restrictions, and it is neither confidential nor exempt. It should not contain any personal information that might be subject to the Data Protection Act. In the unlikely event that it does contain significant personal details, which have not already been published by the Council, then these could be redacted from the individual sheets of paper, but this provides no excuse for a blanket ban.

These documents directly relate to Council business, both in 2003 and currently, and should therefore also be available to elected members under ss.100 (A) to (F) the Local Government Act 1972 [as amended] and the corresponding provisions in the “modernisation” legislation more recently in force, such as Statutory Instrument SI 2006 No 88.

It can also be argued that an elected member’s rights to inspect Council documents under Common Law are stronger than their rights under the Local Government Acts. If we cannot see the relevant papers then this makes all our decisions insecure and unsound. The decision about relevance must be for the member. We cannot have a situation where the executive decides what is relevant, because the members would then be unable to hold the executive to account.

It has been suggested to me that the information might be legally privileged, but a moment’s reflection shows this to be a fatuous and nonsensical suggestion. These papers do not reflect a privileged discussion between a lawyer and their client, but are the factual record of actual events in 2003. The Council cannot use arguments based on legal privilege to blank off historical episodes that took place in full public view, long before the current legal action was started.

Cllr John Illingworth
9 December 2009



Report of the Chief Democratic Services Officer

Report to Access to Information Appeals Committee

Date: 17th December 2009

Subject: Refusal to Grant Access To Working Papers In Relation To The Annual Meeting Of Council 2003

Electoral Wards Affected:

Ward Members consulted
(referred to in report)

Specific Implications For:

Equality and Diversity

Community Cohesion

Narrowing the Gap

1.0 Purpose Of This Report

- 1.1 This report sets out the background to a refusal by the Chief Democratic Services Officer to grant access to a Member to a file of working papers in relation to the 2003 Annual Meeting of Council.
- 1.2 A full copy of the contested file is provided as Addendum A to this report. Some documents within the file are considered to be confidential.

2.0 Background Information

- 2.1 On 22nd October 2009 Councillor Illingworth requested that the Chief Democratic Services Officer provide him access to a file of working papers in relation to the 2003 Annual Meeting of Council.
- 2.2 As Members may be aware, decisions taken at this meeting are the subject of ongoing legal proceedings. The Chief Democratic Services Officer therefore sought legal advice before deciding how to respond to Councillor Illingworth's request.
- 2.3 Appendix A sets out the advice which was received from Legal, Licensing and Registration (LLR). This was contained in an e-mail to Councillor Illingworth (and others) on 26th October 2009. Copies of the related e-mail correspondence can be made available to the Committee if Members wish to have further information regarding the context and progress of this matter.
- 2.4 Following further consultation with the Chief Officer (LLR) regarding which documents should be provided to Councillor Illingworth, the Chief Democratic

Services Officer requested the Head of Governance Services to meet with Councillor Illingworth to provide him access to this file on a discretionary basis. The decision to do this was based on a desire to demonstrate to Councillor Illingworth that there were no matters of consequence contained in the file whilst, at the same time, complying with the relevant legislation and related legal advice which clearly establishes that Councillor Illingworth had no actual right to the information concerned.

- 2.5 On the specific instruction of the Chief Democratic Services Officer, the Head of Governance Services provided Councillor Illingworth with copies of those documents which were not considered to be confidential.
- 2.6 There were, however, a number of random documents within the file which were, after careful consideration (see para 2.7) considered to be confidential. These included:
- 2.6.1.1 Various handwritten notes and memory joggers recorded by officers supporting the meeting;
 - 2.6.1.2 Various correspondence about the composition of Committees and which members should or should not be allocated to places on them;
 - 2.6.1.3 Draft papers regarding potential changes to Council Procedure Rules which had not been progressed
- 2.7 A superficial reading of these documents would indicate that there was quite probably nothing particularly confidential contained in them. However, it is not possible to be absolutely sure and, more importantly, officers are concerned that a precedent to allow access to such information may, in future, lead to the inadvertent disclosure of damaging information.
- 2.8 Acting under instruction from the Chief Democratic Services Officer, the Head of Governance Services skimmed through these confidential papers with Councillor Illingworth in order to demonstrate the types of information contained, by way of explanation as to why the information was considered to be confidential and in order to assure him as to the fact that nothing of substance was contained in the particular documents.
- 2.9 Councillor Illingworth subsequently indicated that he wished this matter to be referred to the Access to Information Appeals Committee.
- 2.10 In subsequent e-mail correspondence, Councillor Illingworth has sought to broaden the scope of his request for the information in question. This precipitated further advice from Governance Services and Legal Licensing and Registration, details of which are contained in Appendices B and C respectively. Again, the related e-mail exchange can be provided for context if necessary.
- 2.11 In addition, the Chief Officer (LLR) has provided an additional commentary on Councillor Illingworth's request (see Appendix D).

3.0 Recommendation

- 3.1 The Access To Information Appeals Committee is asked to consider Councillor Illingworth's report in the light of information provided in this report and any submissions made by Councillor Illingworth.

Legal Advice 26th October 2009

To: John Illingworth/MEM/LCC@Leeds_City_Council
From: Mark Turnbull/CED/LCC
Date: 26/10/2009 12:11PM
cc: Andy Hodson/CED/LCC@Leeds_City_Council, Ian Walton/CED/LCC@Leeds_City_Council, Nick de la Taste/CED/LCC@Leeds_City_Council, nicole.jackson@leeds.gov.uk, Paul Rogerson/CED/LCC@Leeds_City_Council, Peter Marrington/CED/LCC@Leeds_City_Council
Subject: Re: Access to Council AGM records

Cllor Illingworth,

I think I ought to clarify the legal position in relation to your request, although I guess most of those on your circulation list will be aware already. The legal requirement is to keep reports open to public inspection for 6 years from the date of the meeting, and "background papers" for 4 years from the date of the meeting. In relation to the 2003 Council AGM those periods have expired of course, but in any event the term "background papers" has a specific definition in the local government legislation. That definition does not include an officer's working drafts or notes, nor would e-mail correspondence relating to an agenda item necessarily fall into this definition. Under the legislation, "background papers" are documents relating to the subject matter of a report which disclose "facts or matters" on which at least an important part of the report is based, and which have been relied on to a material extent in preparing the report. As a result, although they have not yet been examined in detail, I anticipate that most of the items which are contained in the officer file relating to the 2003 Council AGM would not have constituted "background papers" for these purposes, and so would not have been open to inspection under the local government legislation.

As Nick de la Taste has explained, the issue is whether as a Member you have a "need to know" the contents of these items, and even if so whether any need to know you might have is limited or outweighed by one or other of the "public interest" factors set out in the council's constitution. As Nick has said, this decision is a matter for him in the first instance, having taken legal advice.

As you know from our discussion on Friday afternoon, my own view is that the justifications you have put forward for this request (including your e-mail below) plainly arise from the legal challenge which the council is defending, and it could not reasonably be said that a Member has any duty to take part in legal proceedings to which the council is a party. I think the only possible exception to this would be where a Member with special knowledge of relevant facts, was asked by the council to give evidence on its behalf.

I was left with the impression at our meeting that you accepted that position, albeit somewhat reluctantly. I did say however, that Stuart had agreed to go through the items in the file, and advise Nick on which items he thought could reasonably be disclosed to you on a discretionary basis.

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John Illingworth/MEM/LCC

Advice From Governance Services

Ian Walton
<Ian.Walton@leeds.gov.uk>

02/12/2009
12:42

To: John Illingworth <John.Illingworth@leeds.gov.uk>

cc: Andy Hodson <Andy.Hodson@leeds.gov.uk>, Mark Turnbull
<Mark.Turnbull@leeds.gov.uk>, Nicole Jackson
<Nicole.Jackson@leeds.gov.uk>

Subject: FW: Appeal against Refusal of Access to Council AGM records

Dear Councillor Illingworth,
Thank you for confirming your availability for the appeal hearing on 17th December as contained in your response this morning. With regard to the subject of the appeal I again confirm that it is "to be provided with copies of all working papers associated with the Annual Council meeting in 2003".

I note that you also seek in your response to again extend the grounds of the appeal. You seek to extend it in similar terms to those referred to in the exchange of correspondence below. The exchange makes the position quite clear as to what we are seeking to proceed to the appeal on and what has been referred to the Assistant Chief Executive (Corporate Governance) for consideration. It is also clear that the matters over and above the current accepted parameters could become the subject of a separate appeal.

If you cannot accept that the appeal progresses on the clear grounds upon which it was lodged then please let me know. We will then take advice from the Chair of the Panel as to whether the appeal can proceed on a basis which is completely different than the one upon which we commenced arrangements.

I think that I have previously made the point that we can only arrange appeals when we actually know what the grounds of the appeal are.

Regards

Ian Walton

Principal Governance Officer

2474350

Legal Advice – 2nd December 2009

Cllor Illingworth,

If I could just comment on this e-mail exchange. Having now seen Ian's response, I agree entirely with what he says. Looking back at the earlier e-mail correspondence in October, the reasons which you presented for having a "need to know" were variously your ongoing request for scrutiny of the Council's information management systems, your belief that the documents were "public" documents, and the need to settle an issue about the accuracy of the Council's photocopying of documents in the Technoprint case. So I think to introduce a further reason after the officer decision, that you believe you need to make comparisons with the documents disclosed in the case, in itself goes beyond the scope of this appeal. In addition, as it begs the question whether you are entitled to the witness statements and exhibits from the case, that takes matters way beyond this appeal.

For the record though, I have no doubt that to suggest individual elected Members are under a duty to check personally that the Council has made full and proper disclosure in a court case is plainly wrong, and it follows that no need to know could arise in relation to these documents on that basis.

I also think it would be inappropriate for the committee, if that is what you intend, to make any sort of inquiry into the issue whether full disclosure was made or not. It would be beyond the committee's remit to do so, and in any event neither the other party nor the Court has suggested that the Council has fallen short in this respect.

Regards

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STATEMENT OF THE CHIEF OFFICER (LEGAL, LICENSING AND REGISTRATION)

I, STUART ANTHONY TURNOCK, will say as follows:

1. I am employed by the Council as Chief Officer (Legal, Licensing and Registration). I have held this position since April 2003, although it was previously entitled Chief Legal Services Officer. I joined the Council in 1996 as Assistant Director of the Legal Services Agency and in 2002 became Senior Assistance Director. I am a qualified solicitor having been admitted as such in June 1976.
2. I am responsible for the Council's provision of legal services. A different part of the organisation has responsibility for the maintenance of the Constitution.
3. As is well-known, a challenge to part of the Council's Scheme of Delegation was launched in the High Court by a Mr Mark Snee and Technoprint.plc. That challenge is resisted and the case proceeded to a High Court hearing in London, on 28 October 2009. The outcome of that hearing is not known at the date of this statement. It is also not yet known whether there will be a further hearing required, as that is dependent upon the judgment, yet to be delivered.
4. The preparation of the case has been carried out within Legal, Licensing and Registration and the day-to-day conduct of the case has been handled by one of the service's qualified solicitors. Counsel was instructed to attend the hearing.
5. In one of the witness statements in support of the Council's case, reference was made to a working file relating to the Annual Meeting of May 19, 2003.
6. Mr Snee requested a sight of this file and arrangements were made for him to attend our offices where he could be given access to it. I, together with the solicitor having the conduct of the case met with Mr Snee. He was shown what was in the file and was informed that it was considered that some of its content was confidential. Mr Snee was shown each of the confidential documents so he could be satisfied as to its nature but not so as he could read its content. Mr Snee expressed himself content with that arrangement. He requested a copy of some of the documents which were not considered confidential and these were provided.
7. Mr Snee was told that the whole file would be taken to the hearing so that it was available if required, and that was done. I attended the hearing together with the solicitor who had the conduct of the case. Prior to the commencement of the hearing the barrister for Mr Snee asked if the file had been brought to court, and he was told that it had been. That was the only mention that was made of the file, at Court. There was no request for further inspection of it. No complaint has been made that there are documents in it which are relevant to the case and which the Council should disclose. If that was thought to be the case an application would be made to the Court, in accordance with the Procedure Rules. No such application has been made.
8. No suggestion has ever been made by or on behalf of Mr Snee or Technoprint to the effect that the Council are concealing documents improperly.

9. The Solicitors' Code of Conduct provides as follows –

Rule 11.01 Deceiving or misleading the court

- (1) You must never deceive or knowingly or recklessly mislead the court or knowingly allow the court to be misled.
- (2) You must draw to the court's attention:
 - (a) Relevant cases and statutory provisions; and
 - (b) Any material procedural irregularity.
- (3) You must not construct facts supporting your client's case or draft any documents relating to any proceedings containing:
 - (a) Any contention which you do not consider to be properly arguable; or
 - (b) Any allegation of fraud unless you are instructed to do so and you have material which you reasonably believe establishes, on the face of it, a case of fraud.

Rule 11.02 Obeying court orders

You must comply with any court order requiring you or your firm to take, or refrain from taking, a particular course of action.

10. It can be seen that it is a very serious allegation to suggest anything has been done which would be a breach of that Rule. It would amount to a disciplinary offence which could potentially lead to a solicitor being struck off the roll.

This statement is true to the best of my knowledge and belief.

Dated the 7th day of December 2009

SignedStuart Turnock.....

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