**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2012/0117**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FER0422498**

**Dated:** **8th. May, 2012**

**Appellant:** **Wirral Metropolitan Borough Council**

**Respondent:** **The Information Commissioner**

**Determined on the papers:** **22nd. October, 2012**

**Before**

**David Farrer Q.C.**

**Judge**

and

**Anne Chafer and Jean Nelson**

**Tribunal Members**

**Date of Decision:** **06th. December, 2012**

**Representation:**

The Appellant : Damien Welfare

For the Respondent: Helen Davenport

**Subject matter:**

Environmental Information Regulations, 2004, Regulations 12(4)(d),12(4)(e), 12(5)(b) and 12(5)(e).

**Cases:**

*Mersey Tunnel Users Association v ICO*, EA/2009/0001,

*Department for Education and Evening Standard v ICO*, EA/2006/0006.

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and quashes the requirements set out at paragraphs 3 and 4 of the Decision Notice.

Dated this 6th. day of December, 2012

David Farrer Q.C.
Tribunal Judge

## REASONS FOR DECISION

Introduction

1 In June, 2008, the Appellant authority ("WMBC") decided to review its parks and countryside service. A Parks and Countryside Services Procurement Exercise (PACSPE) was launched. In due course, Cabinet, the body within WMBC to which officers reported on PACSPE, variously decided that a single provider for all relevant services should be engaged, if the financial case for doing so was made out, that tenders should be invited and that there should be no in – house bid for the contract. Changes of administration involved clear changes of thinking during the three years that this review was taking place. A deterioration in WMBC`s finances during the recession also influenced, to a significant degree, the development of PACSPE.

2 Invitations to tender were issued early in 2011 to selected contractors, including one initially excluded from the list due to doubts, later dispelled, as to its financial resilience. Tenders were evaluated by various departments of WMBC, reflecting the wide range of issues and concerns involved in the grant of a long – term contract for the external provision of such services.

3 A final report was submitted to Cabinet on 22nd. September, 2011. It was published on the WMBC website, save for exempt appendices which contained commercially sensitive information as to the competing tenders. They were, however, accessible to all elected members of WMBC. The final report was the culmination of a series of ten earlier drafts accompanied by intensive

consultation among WMBC officers, which included advice on various legal aspects of the proposals, exchanges of comment and opinion on the content of the report to be submitted and vigorous contributions from a political adviser or advisers.. An important question for Cabinet was whether these services should be delivered by a single external provider at all.

4 Such issues provoke vigorous political debate, often along party lines and such was the case within WMBC. It underwent several changes of administration between 2010 and 2012 and was run by minority administrations for much of that time.

5 In the event, Cabinet decided that no contract should be awarded. The issue was referred under standing orders to the Overview and Scrutiny Committee (the "O and S committee") and then to the full Council.

The request for information

6 On 23rd. September, 2011, the day after the report was submitted to Cabinet, Councillor Green, a Conservative member of WMBC, made a request for information in these terms –

*"Can I have all of the background papers relating to the PACSPE report, for the sake of clarity this should include PACSPE related emails between yourselves [and four named officials]."*

That request clearly covered all the preceding draft reports and background papers associated with them, which had been prepared by political assistants.

7 WMBC responded by letter dated 14th. October, 2011 invoking, in respect of all the information within scope the exceptions provided for by EIR regulations 12(4)(d) (unfinished documents) and 12(4)(e) (internal communications). It maintained that position on review. It is plain that the information requested here is environmental information and therefore subject to the Environmental Information Regulations, 2004 ("the EIR"). That was common ground from the outset.

8 Councillor Green complained to the Commissioner ("the ICO"). In ensuing negotiations with the ICO, WMBC further invoked the exceptions enacted in regulation 12(5)(b) (legal professional privilege) and regulation 12(5)(e) (commercial sensitivity).

9 By his Decision Notice, the ICO allowed the claim to the exemptions provided by regulation 12(4)(d) and (e) and 12(5)(b) in respect of some information. He took no decision as to the 12(5)(e) exemption related to the appendices since he had already upheld the refusal to disclose them by reference to regulation 12(5)(b). That left all the draft reports, background papers and two sets of internal e mails, one dating from April, 2011 and the other September, 2011 which he ordered to be disclosed. He accepted that the exceptions provided for in regulation 12(4)(d) and (e) were engaged as WMBC contended but concluded that the presumption in favour of disclosure was not overridden.

10 In later submissions, the ICO conceded that legal professional privilege applied to four further September e mails and that the public interest favoured the maintenance of the exception.

11 The appeal to the Tribunal

WMBC appealed to the Tribunal on a number of grounds which were subsequently developed in written submissions. Fundamental to its case was the argument that the timing of this request exposed the officers who had discussed and contributed to the final report to a public scrutiny of abandoned ideas, disagreements later resolved and provisional opinions not fully thought out even

before the outcome of PACSPE had been determined. Nothing would be more likely to inhibit frank and creative discussion of the issues to be set out in the report than the threat that the whole debate would be published and its authors interrogated on earlier and divergent opinions within days of the issue of that final report and whilst the outcome was undecided..

12 WMBC further argued that the public interest in disclosure was clearly outweighed by the interest in keeping confidential the background memoranda prepared by political advisers. This argument was developed in a supplementary submission by reference to Regulation 21(4) of the *Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000* ("the 2000 Regulations") which excepted from the general duty of disclosure imposed by those regulations and their predecessors on local authorities

"*any document or part of a document if, in the opinion of the proper officer, that document or part of a document contains or is likely to contain . . . . the advice of a political adviser or assistant".*

It conceded that this did not confer upon such memoranda immunity from disclosure since EIR Regulation 5(6) provides that the duty of disclosure under EIR prevails over any statutory provision or rule of law which would prevent disclosure of such information. Nevertheless, it powerfully supports the public interest in maintaining the exception. This regulation has since been superceded by a similar provision.

13 WMBC further contended in its grounds of appeal that the ICO had erred in his judgement of the documents to which privilege attached.

14 The ICO accepted that the exceptions enacted in Regulations 12(4)(d) and (e) were engaged in respect of the draft reports and 12(4)(e) as to the memoranda. His case was that the final report had been published so the job was done. The public had a strong legitimate interest in seeing how that report had been arrived at and what facts had been presented or omitted from the options submitted to the cabinet. This was particularly the case where the conduct of a similar project

HESPE, ( The Highways and Engineering Services Procurement Exercise) had given rise to concerns from the district auditor and substantial sums of public money were involved.

The questions for the Tribunal

15 They are –

(i) As to the draft reports and the memoranda, does the public interest in maintaining the exception outweigh the public interest in disclosure ?

(ii) As to the e mails passing among WMBC staff, does legal professional privilege attach to them or any of them ( Regulation 12(5)(b))?

(iii) If it does, does the public interest in maintaining that privilege outweigh any public interest in disclosure.

(iv) Given that they are also "internal communications" (Regulation 12(4)(e)), does the public interest in maintaining that exception outweigh any public interest in disclosure ?

Our Decision

The draft reports

16 As regards the draft reports and the assistants` memoranda, we define the issues in this way because there is no dispute that they are, in the one case, unfinished documents and in both, internal communications. Accordingly the exceptions enacted in Regulation 12(4)(d) and (e) are engaged and the issue is where the public interest lies.

17 We proceed from the presumption in favour of disclosure, the application of which is required by Regulation 12(2).

18 In our judgement, three features of this case are of critical importance to any decision as to the public interest, so far as unfinished documents or internal communications are concerned –

(a) The final report to Cabinet of 22nd. September, 2011 was immediately made available to the public;

(b) Councillor Green`s request was made within twenty – four hours of publication of the final report and within days of the preparation of the draft reports, the submission of the background memoranda and the exchange of the September e mails among the officers involved. This factor may be the more significant where the political complexion of the ruling group on a council fluctuates but is a weighty consideration whatever the state of party politics in an elected body.

(c) The decision of Cabinet did not conclude the matter. It was referred thereafter to the full Council.

19 The public is undoubtedly entitled to know what facts and arguments are presented to an elected body by its professional staff, when it is required to take an important decision affecting local amenities and the commitment of large sums of taxpayers` money over a long period. If the elected members have been deprived of important data or if plausible arguments against a recommended course of action have been simply ignored, their constituents, and indeed any other interested party should be able to judge that such is the case.

20 Draft reports are not submitted to Cabinet. The ten drafts (numbered up to 8 then "final draft") were prepared and modified between 7th and 15th. September, 2011. Modifications reflected in part the memoranda which, though undated, were evidently prepared and submitted within that period.

21 It follows that members of Cabinet were not influenced by any inclusion or omission of data or argument contained in any of those drafts. The public was shown what Cabinet was shown. There is, moreover, no hint – nor would we expect any hint – within the drafts, of a scheme to hide relevant material from members of Cabinet. Indeed, the final published report is a balanced document, which requests decisions on the two critical issues:

Should WMBC contract with a single external provider?

If so, which, having regard to the key factors listed in the report?

22 The ICO spoke in the Decision Notice (paragraph 24) of the need to

*"allow the public to trace the evolving picture of what information the drafters of the report felt should be included in, and equally omitted from, the final version"*.

If, as we have no reason to doubt on the material before us, the drafters were acting in good faith, it is not obvious what public interest would be served by such an exercise or such comparisons.

22 We strongly endorse the comment made in *Mersey Tunnel Users Association v ICO*, EA/2009/0001, at paragraph 27:

*"We consider that there may be little, if any, public interest in disclosing a draft which is an unfinished document, particularly if a finished or final version has been or is likely to be made public …Presenting work in a draft form before a final discussion is made allows a public authority to consider matters at an early stage and to comment upon the final form such a report would take ."*

We add that there may also be, as in this case, in our view, a strong public interest in protecting such draft reports from exposure because of the risk of fruitless public debate and interrogation of officials as to unadopted positions and abandoned arguments.

23 The other powerful public interest in maintaining the exception as regards the draft reports is linked to the question of timing. The request was made about one week after the completion of the final draft and just over two weeks after the first. Disclosure, especially if linked to disclosure of the requested e mails, would have exposed every member of staff involved in the drafting to immediate publicity and questioning as to his or her role and opinions, when a vigorous political debate was underway and when there was no final decision on the issues in the report.

24 Just as with senior civil servants, we are entitled to expect a candid and robust expression of views from senior council officials preparing an important report to their authority. Nevertheless, the prospect of instant disclosure of the details of a difficult and controversial process might be expected to discourage frank and outspoken proclamations of their views, so as to weaken the quality of their discussions. It is one thing to face disclosure of such matters long after the day is done and the dust has settled, quite another when the battle is still raging.

25 Broadly similar issues arose in the context of s.35(1)(a) of FOIA in *Department for Education and Evening Standard v ICO*, EA/2006/0006. There the Tribunal, ordering disclosure of the minutes of meetings of senior civil servants formulating policy, observed at paragraph 75 (vii) that –

*"In judging the likely consequences of disclosure on officials` future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote - Trevelyan reforms."*

26 The same applies, in our opinion, to local authority officials of the standing involved here. Nevertheless, there is a marked contrast between the vulnerability and sensitivity of a reasonably fearless and independent - minded official two years after the discussion took place and the policy was adopted (which was broadly the position in DFES) and at the moment that the report is published and when the crucial decision still hangs in the balance. At paragraph 75(iv) of the DFES appeal, the Tribunal stated –

"*Ministers and officials are entitled to time and space, and in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy*".

We agree with WMBC that such a principle applies equally to policy formulation within a local authority, if bold and creative debate is to be

encouraged. Furthermore, such time and space will often extend to and even well beyond the moment of decision.

27 Accordingly, we discern little public interest in following the trail of internal discussions which led to the final report but powerful interests to justify upholding the exceptions in Regulation 12(4)(d) and (e). Alert to the presumption in favour of disclosure, we nevertheless reject the ICO`s argument and find that WMBC has made good the case for applying these exceptions.

The background papers (memoranda)

28 The memoranda prepared by political assistants are internal communications. We do not consider that the arguments discussed above in relation to draft reports apply equally to political comment on the drafts. A political assistant is unlikely to feel threatened by the prompt publication of robust political views that he has expressed or of advice that he has given.

29 However, to disclose them when the draft reports are withheld would significantly expose the content of the drafts.

30 Publication of forthright views on officers` drafts, if such featured in the memoranda, could well create friction with those officers which would not have developed, had their circulation been restricted to the drafters.

31 We also accept the argument that, since Parliament, for reasons that are not entirely clear to us, provided in Regulation 21(4) of the 2000 Regulations, for the exclusion of such documents from the general duty to disclose local authority records, subject to the primary imperative of EIR, that is a significant pointer to the public interest in maintaining the exception.

32 We see very little public interest in their disclosure. We conclude, therefore that, in this case also, the presumption is clearly overridden.

The e mails

33 We turn finally to those e mails which remain subject to the ICO`s order to disclose. Following certain concessions helpfully made by the ICO, the e mails which, as we understand it, remain the subject of dispute are as follows ( adopting the numbering in the disputed document bundles) –

1(a), 1(c) – (f), 1(h) – (k), (all dated April, 2011), 1(n) and 1(o)( September, 2011).

The content of the bundles does not seem consistent with this analysis but that may not be significant in the light of our findings.

34 The April e mails are of no discernible public interest, relating as they do to the procedural issues linked to the reinstatement of one company on the short list of invitations to tender and the timing of the issue of such invitations. None appears to attract legal professional privilege, whether litigation privilege or advice privilege. The fact that they "lead up to" a privileged document (1(l)) does not confer privilege upon them.

35 They are internal communications and it may well be that those involved would not expect such communications to be disclosed to the public in any event. Even applying the presumption, we can find no public interest in disclosure but some modest interest in maintaining the exemption to reassure officers that such matters will not normally be exposed to public gaze when they refer to sensitive material, such as matters relating to potential tendering contractors.

36 As to 1(n) and 1(o), these three e mails clearly involve an exchange of communications regarding possible legal issues relating to the decisions to be taken by Cabinet. As such, they engage the exception in Regulation 12(5)(b) as they attract legal advice privilege.

37 There is no public interest in disclosure of such privileged material, such as to outweigh the powerful intrinsic interest in respecting lawyer – client

confidentiality.

38 We find, furthermore, that the sensitivity of the matters raised is an overriding factor in the balancing of public interests on the question of disclosure of these documents in so far as they are internal communications. We can find little or no public interest in disclosure, notwithstanding the presumption.

Conclusion

39 For these reasons we allow this appeal and quash the requirement to Disclose any of the documents specified in the Decision Notice.

40 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

06th. December, 2012