



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2012/0178-

0180

**GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

ON APPEAL FROM:

**The Information Commissioner's Decision Notices Nos: FS50421770 FS50426111
FS50416112**

Dated: 25 July 2012

Appellant: Liz Copper

Respondent: The Information Commissioner

2nd Respondent: Stoke on Trent City Council

Heard on the papers: Field House

Date of Hearing: 20 November, 20 December 2012

Before

Chris Hughes

Judge

and

Henry Fitzhugh and Mike Jones

Tribunal Members

Date of Decision: 7 January 2013

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notices dated 25 July 2012.

IN THE FIRST-TIER TRIBUNAL
01802012/0178-0180

Appeal No: EA/2012/0178-

GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: 7 January 2013

Public authority: Stoke City Council

Address of Public authority: Civic Centre, Glebe Street, Stoke on Trent, ST4 1HH

Name of Complainant: Liz Copper

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notices dated 25 July 2012.

Action Required

The Second Respondent provide the disputed information to the appellant within 35 days of this decision

Dated this 7th day of January 2013

Judge C Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. In 2007 Stoke-on-Trent City Council was in discussions with a Mr Chaudry concerning the consideration of leisure services in the city. A dispute arose between the two parties to the discussions which resulted in a mediation meeting in 2011. At the end of the mediation the parties issued a press release confirming that they had reached an agreement.

2. The Appellant, who is a journalist with the BBC, made three requests for information on 20 September 2011. These were all in similar form:-

"I would like all correspondence between the authority and Mr Chaudry or representatives acting on his behalf during 2007."

The other two requests were for correspondence from 2008 and 2011.

3. The Council responded on 18 October 2011. It confirmed that it held the information requested but informed her that in the reasonable opinion of the Council's Monitoring Officer material was exempt from disclosure under section 36 (prejudice to the effective conduct of public affairs). It also sought to rely on legal professional privilege.

The complaint to the Information Commissioner

4. The Appellant complained to the Information Commissioner who on 25 July 2012 issued three similar decisions upholding the decision of the Council not to release the information on the grounds identified by the Monitoring Officer who considered that the disclosure "would be contrary to a strict confidentiality clause within the mediation agreement, and breaking that confidentiality could nullify the mediation outcome and leave open the prospect of renewed litigation." The Council was of the view that such disclosure would also make it harder for the Council to resolve disputes in the future if the other party did not believe that the confidentiality of mediation and other dispute resolution processes would be upheld. The Commissioner weighed the public interest in favour of maintaining the exemption and

disclosure and concluded that in the absence of any wrongdoing the balance of interest lay in maintaining confidentiality.

The appeal to the Tribunal

5. In her appeal the Appellant challenged the impartiality of the Commissioner, suggested that the Council's arguments had not been properly scrutinised, argued that the Commissioner had focused exclusively on the issue of mediation and not considered whether there was any other material which could have been disclosed, and felt that the balance between the competing public interests had not been properly found.
6. The Council's Monitoring Officer in his written statement in evidence on behalf the Second Respondent affirmed his view that the Commissioner was right in giving weight to the risk of the claim for breach of confidentiality and the possibility of reopening of the litigation which the mediation had been used to compromise. He stated "without a renegotiation of the mediation agreement, if a party were to disclose any matter relating to the mediation and/or disclose any documents produced as part of the mediation meeting then such a party would be in breach of clause 3 of the mediation agreement."

Analysis

7. The Tribunal was satisfied that there was no substance in the allegation of bias by the Commissioner and the true issues in the appeal were whether the Commissioner had properly understood the legal issues involved and weighed the public interest correctly.
8. The starting point for the analysis of this case is a consideration of the actual contractual obligations as to confidentiality between the parties and their application at that point in time that the requests for information were made.
9. The parties entered into a standard form mediation agreement which was subsequently varied to allow disclosure of the existence and resolution of the mediation by way of an agreed press statement.

10. The core operative provision in that mediation agreement has correctly been identified by the Monitoring Officer as clause 3 :-

"The parties agree that every person involved in the mediation will keep confidential;

.....

a) all information, whether oral, written or otherwise, produced for or at the mediation, including the terms of any settlement agreement arising from it ; "

11. The basic functions of such terms in a mediation agreement is to protect the parties from each other (in the event that the matter is ultimately litigated neither party is able to rely on material it obtained through the mediation which it is otherwise not entitled to through the normal processes of discovery in civil litigation), and to keep secret the product of any such mediation including the terms of any contract resolving it. What it does not do however is prevent the parties to the mediation using the information they already have as it is not "information produced for or at the mediation" since it was already in existence and in the possession of the relevant party. If a party already has material they are entitled to use it unless other constraints on its use exist. The Appellant's argument that to construe the confidentiality clause otherwise would make a nonsense of FOIA has some merit.

12. The Tribunal is therefore satisfied that the Commissioner and the Council have over interpreted the confidentiality clause in the mediation agreement to encompass far more than it properly should. The parties to the mediation put into the public domain the fact of the mediation and there was already in the public domain knowledge of the issue being considered in the mediation. The confidentiality clause should be interpreted as essentially covering new material generated for the purposes of the mediation or material supplied by one party to the other for the purposes of the mediation which the other party did not hold. Disclosure of material outside these categories would not be a breach of the confidentiality agreement and would therefore not put at risk the effective operation of the Council because in disclosing this material it would continue to abide by the terms of the confidentiality agreement.

13. The Tribunal is therefore satisfied that (subject to qualifications) the Appellant is entitled to "all correspondence between the authority and Mr Chaudry or representatives acting on his behalf during [the years in question]".

14. The qualifications are however significant; the first of these is the material actually generated by the mediation process and therefore caught by the confidentiality clause. The second is legal professional privilege. While the Appellant has argued strongly in favour of a very wide disclosure, in the period in question leading up to the mediation there are letters to and from solicitors which fall within the s.42 exemption. The third is material provided in confidence to the Council and protected by s.41. The fourth is material protected by the Data Protection Act.
15. The Tribunal is satisfied that there has been some public concern about the functioning of the City Council, there has been a report on its governance, there has been some interest in the dispute sufficient to justify a press release. However even weighing all that alongside the general interest in transparency the Tribunal is satisfied that the concerns about the impact of disclosure in breach of the confidentiality agreement are justified, apply with respect to confidential material supplied in the course of this correspondence by Mr Chaudry and apply with even greater force with respect to legal professional privilege and the harm done to the rule of law by breach of that fundamental principle. Here the balance of public interest lies firmly in favour of non-disclosure.

Conclusion and remedy

16. In the light of these considerations the Tribunal directs the disclosure of the closed bundle prepared by the Second Respondent in response to the Tribunal's direction of 20 November 2012 with the exclusion from disclosure of pages 21-23, the unnumbered bullet points 3-6 (beginning "eg" and concluding "pa") on page 41, and with respect to DPA the material disclosed should be redacted to remove the private e-mail addresses and phone numbers of individuals.
17. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 7 January 2012