

Blakeley, Chris (Councillor)

From: Norman, Bill D. **Sent:** Thu 22/10/2009 20:06
To: Green, Jeff E. (Councillor)
Cc: Councillors; Chief Officers; Lester, Jim L.; Degg, Emma J.; Lyon, Rosemary A.; MacLaverty, Paula K.; Pennington, Abigail; Watts, Margaret
Subject: RE: Extraordinary Council - 12 October 2009
Attachments:

Dear Councillor Green

Thank you for your email sent on 15 October 2009. I apologise for the length of time it has taken me to respond.

Before I come to the specific points you have raised in your email, I think it would be useful to share with you my view as to the role of Members and officers in a local authority and to restate the advice previously given as to the exceptional nature of the obligation of confidentiality attached to the draft Report by Sue Charteris. This area of law is clear but complex and this advice needs to be considered as a whole, rather than particular sentences or phrases selected in isolation. For ease of reference, I will use numbered paragraphs for the remainder of this email.

1. All officers are employed by the Council. All officers are accountable to the Chief Executive as the Head of Paid Service. It is the duty of all officers to serve and support all 66 Councillors. It is also the duty of all officers to use their best endeavours to implement Members' duly made decisions. This includes decisions taken by full Council, decision-making committees (such as the Planning Committee), or by the Executive (the Cabinet, or individual Portfolio Holders exercising delegated authority). In implementing any such decisions, officers are obliged to use their best endeavours to achieve the outcomes duly approved by Members.
2. The decisions relating to the Strategic Asset Review ('SAR') (including the decision to close 11 libraries) were controversial and consistently opposed by your Group (and a number of other Councillors). However, the SAR (including the proposal to close 11 libraries) was approved at Council (albeit on a majority vote). At that point it became the duty of all Council officers to use their best endeavours to take forward and implement the SAR.
3. The decision to close 11 libraries was referred to a Public Inquiry by the Secretary of State. Throughout the Library Inquiry process, the proper role of officers was to use their best endeavours to defend the Council's decision to close 11 libraries, including preparing a response to Sue Charteris on her draft Report.
4. It is important for me to emphasise that this obligation upon officers to defend the Council's decision to close libraries does not mean that officers are to behave in a manner that might be described as partial (in the sense of improperly preferring the views of one group of Members to those of the another group). The obligation on officers' is to use their best endeavours to implement Members' duly made decisions. The key question is: 'What was the decision of the majority of Members at Council?' Not: 'What party or parties do they represent?'
5. Another important role of officers in local government is to provide advice to Members. Such advice may be provided to Members collectively, or in political groups, or to individual Councillors. Such advice must be full and frank and, where provided to individual political groups or to individual Councillors, must not then be divulged to other political groups or other Councillors, without agreement. In this role officers have provided advice on the Library Inquiry Procedure Rules and on the Council's Constitution. This advice has been (and remains) available to all 66 Members and all political groups whenever requested.
6. In local government law, the phrase 'confidential information' has a narrow and very specific legal meaning. This is contained in Section 100A of the Local Government Act 1972. This provides that 'confidential information' includes 'information furnished to the Council by a Government department upon terms (however expressed) which forbid the disclosure of the information to the public'. Sue Charteris was appointed by the Secretary of State to conduct the Libraries Inquiry and so legally her requirements as to confidentiality are the requirements of the Secretary of State (i.e. a Government department). As such, they are legally enforceable. It is therefore important to consider the exact wording used by Sue Charteris in her letter to me of 27 July (copied to all Members with my email of 13 October).
7. In the first paragraph of her letter she states that:

'I have included two numbered copies of the report which are not for circulation beyond the people who you will be obtaining comments from.'

In the second paragraph of her letter, Sue Charteris asks me to:

'... assure absolute confidentiality of the report's findings and conclusions at this stage.'

8. As I explained in my previous email, because the draft Report is 'confidential information' in the narrow legal sense described above, I am legally precluded from sharing the document with anyone in breach of the terms of the 27 July letter from Sue Charteris. I am thus legally prohibited from passing the draft Report to anyone unless I was seeking comments from them to assist me in responding to Sue Charteris. Section 100A of the Local Government Act 1972

makes it expressly clear that nothing in the 1972 Act either requires me (or authorises me) to disclose the draft report in breach of the obligation of confidence. In this regard, as I said in my earlier email, 'confidential information' is unlike 'exempt information' to which Members may be entitled to be given copies.

9. In my previous email I listed the Members and officers to whom I circulated the draft Report. I also explained that my response to Sue Charteris was a combination of factual corrections, clarifications and legal arguments: as such, it was wider ranging than mere 'fact checking'. The officers who were provided with a copy of the draft Report were those colleagues most involved in the preparation of the Council's case for the Public Inquiry, plus the Chief Executive and Deputy Chief Executive. Emma Degg's involvement was as a second tier officer and she made a major contribution to the factual corrections and clarifications contained in my response. Those Members who were provided with copies of the draft Report received them in their capacity as senior Cabinet Members and, in the case of Councillor Moon, as Portfolio Holder for Culture, Tourism and Leisure. Those Members were passed a copy to enable them to comment on specific references to Cabinet decisions or actions contained in the draft Report and to ensure that my overall response was consistent with their reasons for deciding to close 11 libraries.
10. The decision as to who received a copy of the draft Report was mine and, as I said at Council on 12 October, I accept full responsibility for it. In the end, it was a judgement-call, made in good faith. As I have said previously, the decision was based exclusively on my belief as to who I needed input from to enable me to respond to Sue Charteris; it was not influenced by an evaluation of any individual's ability to respect confidences.
11. I must add at this point that in my previous email I inadvertently omitted one name from the list of persons to whom I copied the draft Report. The list was accurate and complete regards Members and officers. However, the draft Report was also sent by me to Richard Clayton QC for clarification of some of the legal matters he had raised during the Public Inquiry. (He was not asked to advise on the issues of confidentiality or disclosure of the draft Report.) I can only apologise to you and all other recipients of my previous email for my omission of Richard's name.
12. I have also considered the common law prima facie right of Members to inspect documents held by the Council. However, this is limited to where a Councillor has a 'need to know'. The prima facie right arises from the duty on Members to keep themselves informed of Council business relating to their role as a Councillor. As the draft Report (which, of course, was neither produced nor owned by the Council) was not the subject of any Council decision, there was no need for all Councillors to see the draft Report and hence no right to see the draft Report on a 'need to know' basis.
13. In your email you asked me for guidance regarding officers who have told you direct untruths. Under the Officers' Code of Conduct, employees are required to perform their duties 'with honesty, integrity, impartiality and objectivity'. Telling a direct untruth clearly conflicts with the requirement for honesty. Equally, however, all of us who have received copies of the draft Report have been conscious of the exceptional obligation of confidentiality attached to it. I do not say this to justify the telling of an untruth: it does not.
14. Save for the matters raised with Richard Clayton QC (see above), no other external legal or professional services were used in developing the Council's response to the draft report. The total professional fees of Richard Clayton QC in relation to the Library Inquiry (including advising on the response to the draft Report) were £31,161.88 (plus VAT, which the Council recovers). Of this, £525 (plus VAT) related to advice in connection with the draft Report. No advice has been sought from Mr Clayton since 31 July 2009. I know that you have previously criticised my decision to instruct Leading Counsel in this matter. However, as was made clear by the Council resolution on 12 October 2009, the decision not to close the 11 libraries has a £830,000 in year consequence for the authority, plus additional buildings maintenance implications. In this context and given the absence of any previous Public Inquiry under the Libraries and Museums Act 1964 (the 1991 Derbyshire Inquiry was a voluntary, non-statutory affair), I believe it was reasonable to instruct an experienced QC to help defend Council's decision to close 11 libraries.
15. The Council received from Sue Charteris a reply to my comments upon her draft Report. My comments and the reply from Sue Charteris are covered by the same terms as to confidentiality as the draft Report. The Council has not been provided with a copy of the final Report by Sue Charteris: that has, however, been sent to the Secretary of State. As indicated in the letter of 27 July from Sue Charteris, DCMS and the Council have been in contact to discuss arrangements for publication of the Secretary of State's Decision. Whilst I was told by DCMS, on 15 September, that they could not give me a timetable for publication, subsequent communications with DCMS around the end of September suggested that publication was probably imminent.
16. All persons provided with copies of the draft Report by me were made aware of the obligation of confidentiality attached to it. I have not checked with everybody listed in my previous email whether they have shared the draft Report or its recommendations with anyone. I am aware, however, that at least one officer has shared the draft Report with those very senior colleagues in their Department from whom they required advice or assistance, but always subject to the obligation of confidentiality. Breach of the obligation by an officer would potentially be a disciplinary matter. Breach of the obligation by a Member would potentially be a breach of the Members' Code of Conduct.

I apologise for writing to you at such length. However, the issues you have raised are important but complex and required a considered answer. If any of what I have said is unclear, please let me know and I will do my very best to explain the matter better.

Regards

Bill

Bill Norman

Director of Law, HR and Asset Management

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Please save paper and print out only what is necessary

From: Green, Jeff E. (Councillor)
Sent: 15 October 2009 12:13
To: Norman, Bill D.; Councillors
Cc: Chief Officers; Lester, Jim L.; Degg, Emma J.; Lyon, Rosemary A.; MacLaverty, Paula K.; Pennington, Abigail; Watts, Margaret
Subject: RE: Extraordinary Council - 12 October 2009

Mr Norman.

I have raised with you and the Chief Executive on many occasions my concerns over how this matter is being handled. I have also asked you why Lesley and I were not deemed suitable to be included in the fact checking exercise and my sincere belief that our knowledge (charged as we are with representing the largest number of Wirral residents) was essential to checking any of the facts Sue Charteris wanted scrutinising in her report.

Now you have provided a list of those you did deem suitable to see this report, can I to begin with, ask you to provide me with your reasoning (based on the list you have provided) regarding:

What role you thought Emma Degg should play in the fact checking exercise? (Of course I understand that Emma develops and manages the Council's media strategy – but if she was given a copy of the report for that reason it would suggest that it was sent to her to provide expertise on a handling strategy rather than any direct expertise she could provide on the accuracy of any facts contained in Sue Charteris' report)

What role you thought the Cabinet Member for the Environment should play in the fact checking exercise? (Of course I understand Gill is the Deputy Leader of the Liberal Democrat Group – but if she was given a copy of the report for that reason it would suggest that it was sent to her because of her 'political' position rather than any expertise she could provide on the facts contained in the report).

I would also welcome your guidance on what the current policy is regarding officers who have told me direct untruths in that a number of the people listed below have told me directly that they had not seen the report and one listed below told me they had seen it but it did not contain recommendations?

Whether external legal or professional services were used in developing the Council's response to the draft report?

Whether the Council has had any direct communication with the DCMS regarding the Council's response to the draft report and when an announcement (prior to the Cabinet's change of policy) was due or would be made?

I would also like to know from you whether you have checked with the people listed as having seen the report under the 'obligation of confidentiality' whether they have shared the content of the report or its recommendations with anyone and if they had what the consequences would be?

Regards

Jeff Green

Leader Wirral Conservative Group

From: Norman, Bill D.
Sent: 13 October 2009 18:03
To: Councillors
Cc: Chief Officers; Lester, Jim L.; Degg, Emma J.; Lyon, Rosemary A.; MacLaverty, Paula K.; Pennington, Abigail; Watts, Margaret
Subject: Extraordinary Council - 12 October 2009

Dear Councillor

Following last night's Extraordinary Council meeting, please find attached a copy of the letter dated 27 July 2009 from Sue Charteris to me. The letter enclosed two copies of the draft Report prepared by Ms Charteris following the two day Wirral Libraries Public Inquiry.

The 27 July letter makes it clear that the draft Report was provided to me on the basis of a specific obligation of confidentiality. Because Sue Charteris was appointed by the Secretary of State to conduct the Libraries Inquiry, her requirements as to confidentiality are the requirements of the Secretary of State and are legally enforceable. This has the effect of making the draft Report 'confidential information' for the purposes of Part 5A of the Local Government Act 1972.

Confidential information is different to 'exempt information'. With exempt information, Members *may* resolve to exclude the press and public from meetings; but it is a matter for their discretion. (In addition, Part 5A of the 1972 Act provides for all Members generally to have an entitlement to receive exempt reports.) Confidential information is different: the Council *must* comply with the terms upon which the information is provided. Section 100A(2) of the 1972 Act expressly makes clear that nothing in Part 5A authorises or requires the disclosure of confidential information in breach of the obligation of confidentiality.

In line with the terms of the obligation of confidentiality in the 27 July letter, I have only circulated the draft Report to those Members within the Cabinet and those officers from whom I needed comments prior to responding to Sue Charteris. That response by me to Sue Charteris is also covered by the same obligation of confidentiality. The obligation of confidentiality remains in place and no Member or officer should publicly discuss the contents of the draft Report prior to the Secretary of State's decision being published.

As was pointed out last night, the 27 July letter does not list the names of who may see the draft report. As the recipient of the letter, that judgement fell to me and I accept personal responsibility for my decision in that regard (this was not a matter on which I took any external legal advice). However, I wish to emphasise that my decision was absolutely not intended to be a reflection as to any individual Member's ability to respect confidences.

I was asked last night to list those persons to whom I have shown a copy of the draft Report. Although I do not believe that there is any legal obligation on me to disclose this information, equally I understand the exceptional level of interest in this matter. I have therefore decided to provide that information.

In order to enable me to respond to Sue Charteris on the contents of her draft report (which was a combination of factual corrections, clarifications and legal arguments) copies of the draft report were provided to the following persons:

Steve Maddox, Chief Executive

Jim Wilkie, Deputy Chief Executive

Alan Stennard, Director of Regeneration

Ian Coleman, Director of Finance

Howard Cooper, Director of Children and Young People

Jim Lester, Head of Cultural Services

Emma Degg, Head of Tourism and Marketing

Rosemary Lyon, Interim Head of Legal and Member Services

Councillor Steve Foulkes, Leader of the Council

Councillor Simon Holbrook, Deputy Leader of the Council

Councillor Phil Davies

Councillor Gill Gardiner

Councillor Bob Moon

Under the Public Libraries (Inquiry Procedure) Rules 1992, the Final report by Sue Charteris will either be published with the Secretary of State's Decision letter, or will be available on request by any person who appeared at the Inquiry and asked to be notified of the Decision (which I believe will include a number of Councillors who spoke at the Inquiry). Given that the Final report **will** become public knowledge, in my view there cannot be any 'public interest' justification for disclosing the contents of the Report prior to the Secretary of State's Decision. In the light of this, any Councillor who breaches the obligation of confidentiality would also be likely to be in breach of the Members' Code of Conduct.

If any Member wishes to have more information of the legal framework for my decision, or on the Public Libraries (Inquiry Procedure) Rules, please let me know.

I have no objection to this email being shared with the press or public. However, the attached letter was written by Sue Charteris and I ask that you seek her permission before disclosing it to anyone else.

Regards

Bill

Bill Norman

Director of Law, HR and Asset Management

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