

City of Edinburgh Council

10:00am, Thursday, 26 August 2021

Report in relation to a legal case

Executive/routine Executive
Wards
Council Commitments

1. Recommendation

1.1 To note the contents of this report.

Nick Smith

Service Director: Legal and Assurance and Council Monitoring Officer

Contact: Kevin McKee, Head of Legal Services and Deputy Monitoring Officer

Legal and Assurance Division, Corporate Services Directorate

E-mail: kevin.mckee@edinburgh.gov.uk | Tel: 0759 061 6424

Report

Report in relation to a legal case

2. Executive Summary

- 2.1 On 23 June 2021 Sheriff Noble issued his judgment in the case of *John Travers v City of Edinburgh Council*.
- 2.2 On 24 June 2021 the Council instructed the Monitoring Officer to "*report to all members of Council explaining the detailed conclusions of the court case and why the Council resisted the action it has now been instructed to carry out*". The instruction referred to was to deliver to Mr Travers a copy of the report prepared by PwC dated June 2016 ("the PwC Report") referred to in the judgment. The PwC Report has been the subject of a previous Monitoring Officer Report to Council on 30 June 2016 (on a B agenda).
- 2.3 At the outset it is worth confirming that both Chief Executive and the Monitoring Officer have always maintained significant sympathy for Mr Travers and his family for what they have been through. The outcomes of the PwC report were very concerning and, as members will be aware, resulted in a formal section 5 report to Council in June 2016 citing maladministration. The actions of certain ex-Council officers as detailed in the PwC report were unacceptable. The Council takes this opportunity to again reiterate that it takes whistleblowing seriously and seeks to encourage whistleblowers to come forward and will protect them appropriately when they do so.
- 2.4 The Council's position, verified by extensive external legal advice, was that it could not accede to what Mr Travers wanted without placing the Council at significant risk of being in breach of its data protection obligations and other obligations (as detailed in the confidential B agenda supplementary report). The Council accepts the Sheriff's judgement that the full unredacted PwC Report should now be provided to Mr Travers. The granting of an order requiring the release of the report by a court means that the Council will not be in breach of its data protection obligations by doing so.

- 2.5 A supplementary confidential report is provided to Council under B Agenda, detailing further relevant information which was considered by officers during the course of this case. This information is confidential and/or legally privileged.

3. Background

- 3.1 This report does not cover the detail of the PwC Report or the historic circumstances that gave rise to it. These matters were covered in the Monitoring Officer Report to Council dated 30 June 2016 citing maladministration and which was considered on a B agenda.
- 3.2 Mr Travers had for some time asserted that he was entitled to a full and unredacted copy of the PwC Report following the completion of the investigation that was undertaken by them. The Council did not have sufficient evidence to support Mr Travers' assertion. The reasons for this are more fully explained below.
- 3.3 Mr Travers raised proceedings against the Council in Edinburgh Sheriff Court in order to secure a full and unredacted copy of the PwC Report. His claim was based on what he asserted was his contractual right to be issued with a full and unredacted copy following discussions that had taken place between Mr Travers and the (then) Monitoring Officer on 18 November 2015 during the course of which Mr Travers asserted that he was advised he would be provided with a copy of the final PwC Report. Having taken comprehensive external legal advice, the Council defended Mr Travers' action on two main grounds.
- 3.4 The first ground was that the Council did not owe a contractual duty to provide Mr Travers with a copy of the PwC Report. The Council's former Monitoring Officer, who Mr Travers claimed promised him a copy of the report, could not recall making such a promise and considered it unlikely that he would have done so. Contemporary documentary evidence also indicated that no such promise appeared to have been made. The Council therefore considered that it did not have sufficient evidence that the alleged contractual obligation existed to justify voluntary release of the report to Mr Travers. See the confidential supplementary B agenda Report for further details of the potential consequences of doing so.
- 3.5 The second ground was that for the Council to agree to provide Mr Travers with an unredacted version of the PwC Report, the contract would have been contrary to public policy because it would involve the Council actively breaching Data Protection legislation. The PwC Report contains significant amounts of personal data belonging to Mr Travers and also to a number of other third parties who assisted PwC in their investigation. Given the sensitive nature of the issues considered in the course of the PwC investigation, individuals who had participated in the investigation did so on the reasonable understanding that their data would be used in relation to the Council's interests in the matters raised in the course of the

investigation. In summary, release of the PwC Report in full to Mr Travers would have involved the unauthorised release of a large amount of this third party personal data. The release of this data would have exposed the Council to potential claims of breach of statutory duty from the third parties whose data is included within the PwC Report. It is the second of these grounds which was the principal reason for the Council resisting the action raised by Mr Travers. Both of the Council's grounds for resisting Mr Travers' action are explained further in the main section of this report.

- 3.6 In his judgment Sheriff Noble concluded that, having considered the evidence, on the balance of probabilities he decided that the Council did in fact owe a contractual obligation to provide Mr Travers with an unredacted copy of the PwC Report. He also decided that given the existence of such an obligation, Data Protection legislation did not bar Mr Travers from receiving an unredacted copy of the PwC Report if the court so ordered its release.
- 3.7 In response to the Sheriff's judgment, a copy of the unredacted PwC Report has now been provided to Mr Travers.

4. Main report

- 4.1 The first ground of Mr Travers' claim was based upon discussions that took place between Mr Travers and the (then) Monitoring Officer in November 2015. On the basis of witness and documentary evidence, the view taken by the Council was that the available evidence did not support the existence of a binding contract between the Council and Mr Travers. This view was confirmed by external legal advice from Brodies LLP and a senior QC. For these reasons the Council resisted the first ground of Mr Travers' claim. The Council considered that any decision as to whether such a commitment was made would ultimately have to be made in court given the conflicting accounts and evidence available.
- 4.2 The Council's current Monitoring Officer had previously provided Mr Travers with a summary of the main findings of the PwC Report by email on 28 June 2016. In the absence of any other right to the information being established then Mr Travers had to be treated as any other requester of information and the relevant legislation (FOI and DPA) was applied.
- 4.3 On 29 August 2016 the Council provided Mr Travers with a redacted copy of the PwC Report in response to a subject access request. The intention of this, together with the summary outcomes email referred to above, was to provide Mr Travers with information on the findings of PwC and also provide access to his own personal data as contained within the PwC Report without breaching the Council's obligations to third parties under Data Protection legislation. Accordingly, by August

2016, Mr Travers had been provided with the summary outcomes, as well as all information from within the PwC report which related to him and his family.

- 4.4 The decision to provide Mr Travers with a redacted version of the PwC Report followed specialist external legal advice on the Council's duties under Data Protection legislation regarding third party personal data. See also the supplementary B agenda report in this regard. In summary, the Council was advised that the only way for the Council to release the full and unredacted report to Mr Travers without being at significant risk of breaching Data Protection legislation (and consequent action from an aggrieved party or the regulator), was if it was ordered to do so by a court.
- 4.5 On 6 October 2016, the Council also provided a comprehensive Freedom of Information response to Mr Travers' agents, providing detail on why the remainder of the report was not being provided to him.
- 4.6 In the event the Sheriff, taking account of evidence presented by Mr Travers and other witnesses, concluded on the balance of probabilities that Mr Travers had been advised at the November 2015 meeting that he would receive a copy of the PwC Report on the conclusion of PwC's investigations. The Sheriff also concluded that in that event, the Data Protection legislation did not bar Mr Travers from receiving an unredacted copy of the PwC Report should the court make such an order.
- 4.7 For the sake of completeness, Council is advised that, in an attempt to avoid litigation, both parties had proposed alternative methods of dealing with the Data Protection issues. Please see the confidential report under B agenda for further detail in this regard.
- 4.8 There is no doubt that in this case the Council found itself in an invidious position. There was genuine sympathy for what Mr Travers and his family had been through over a number of years. However, unfortunately in this particular situation, the Council was unable to provide Mr Travers with what he had requested because: (i) it did not have sufficient evidence of an obligation to do so; and (more importantly) (ii) it would have placed the Council at significant legal risk in relation to Data Protection obligations (and other obligations (see the confidential B agenda report)) if it had acceded to what he wanted. The Council's position was informed by specialist external legal advice (independently from two different firms), and advice from its appointed QC.
- 4.9 The Council's defence of Mr Travers' action was undertaken in good faith and on the basis of advice of having reasonably good prospects of success in court.

5. Next Steps

- 5.1 Following the judgment, Mr Travers has now been provided with an unredacted copy of the PwC Report.

6. Financial impact

- 6.1 No direct impact arises as a consequence of this report.

7. Stakeholder/Community Impact

- 7.1 No direct impact arises as a consequence of this report.

8. Background reading/external references

- 8.1 None

9. Appendices

- 9.1 None