

Confidentiality and the public interest

The Adjudication Panel for England has reached a landmark decision on the impact of European human rights legislation on the rules governing disclosure of confidential information in the Code of Conduct. In the case of Westminster City Councillor Paul Dimoldenberg, it ruled that the Code of Conduct should allow for the disclosure of confidential information when it is in the public interest.

Councillor Dimoldenberg was alleged to have disclosed confidential information in breach of paragraph 3(a) of the Code of Conduct, but argued in his defence that he acted in the public interest. He leaked confidential documents about the council's former leader, Dame Shirley Porter, to a BBC journalist on three separate occasions in 2003. The documents concerned the council's attempts to recover £27 million in compensation from Dame Shirley for gerrymandering in the 'homes for votes' scandal. The councillor said he was acting in the public interest to encourage the council to recover the money.

The ethical standards officer considered that Councillor Dimoldenberg had breached paragraph 3(a) of the Code of Conduct by disclosing the confidential documents and referred the matter to the Adjudication Panel for England for determination by a tribunal.

INTERPRETING THE CODE

At first glance, paragraph 3(a) of the Code of Conduct seems relatively straightforward. It states that a member must not:

...disclose information given to him in confidence by anyone, or information acquired which he believes is of a confidential nature, without the consent of a person authorised to give it, or unless he is required by law to do so...

It seems to follow that a breach of paragraph 3(a) would be committed whenever information was disclosed which was given in confidence or which the member believed was confidential when acquired, regardless of the legal or contractual status of the information. The status of the information and the circumstances surrounding its disclosure would be taken into account when deciding the seriousness of the breach and what sanction to apply – including any arguments that the information had been disclosed in the public interest.

However, many of our stakeholders and other commentators believed that considering a public-interest defence in relation to the sanction did not go far enough. They argued that a public-interest defence should be relevant to whether there had been a breach of the Code at all.

It was also unclear to what extent the paragraph was compatible with human rights legislation. At best, they appeared to sit uncomfortably together.

The Standards Board for England and its Board members had similar reservations, and the possible introduction of a public-interest defence was one of the issues recently consulted on in the review of the Code of Conduct.

HUMAN RIGHTS

Councillor Dimoldenberg argued at the tribunal that he was entitled to disclose confidential information under human rights legislation. He also sought the ruling of the Adjudication Panel on a preliminary issue: would his public interest defence only go to what sanction, if any, should flow from the breach, or could it mean he had committed no breach of the Code at all? The debate centred on Article 10 of the *European Convention on Human Rights*, which states:

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Adjudication Panel for England found that paragraph 3(a) of the Code of Conduct failed to take the right to freedom of expression properly into account. It also criticised the paragraph for failing to allow consideration of the circumstances surrounding a disclosure of confidential information when determining whether there had been a breach, and concluded:

...paragraph 3(a), in order to be compatible with Article 10, should be read so as to allow for the disclosure of information of a confidential nature in circumstances where it is appropriate in the public interest to do so.

In other words, it is necessary to take into account the circumstances surrounding the disclosure of confidential information when determining whether there is a breach of the Code of Conduct – particularly whether the member acted in the public interest.

But it is important to recognise that there may be many competing public interests. Article 10(2) acknowledges that, in certain circumstances, there may be an overriding public interest in maintaining confidence and preventing the disclosure of confidential information. The Adjudication Panel for England observed that each tribunal has to

conduct a “balancing exercise”, with the “public interest in maintaining confidence” weighed against “a countervailing public interest favouring disclosure”.

IN THE PUBLIC INTEREST?

The tribunal then turned to the particular facts of Councillor Dimoldenberg’s case to determine if his actions could be judged to have been in the public interest. The tribunal found that Councillor Dimoldenberg had taken a personal and persistent interest in ensuring that the council took action to recover the money owed by Dame Shirley. As part of the council’s pursuit of the debt, diverse orders were obtained against named third parties. Those orders were subject to gagging orders by a sequence of High Court judges, prohibiting disclosure not only of the contents of the orders but also of their existence. Councillor Dimoldenberg was fully aware of the existence and nature of those orders when he shared documents and information on the gagging orders with a BBC journalist and two other individuals.

The tribunal was satisfied that, in disclosing the confidential information, the councillor had exercised his right to freedom of expression afforded him by Article 10 of the *European Convention on Human Rights*. To determine whether the disclosure had been in the public interest, it took the full range of facts into consideration, applying the balancing act that it earlier described.

The tribunal found the following facts to be in favour of permitting disclosure in the public interest:

- the councillor had the right to freedom of expression under Article 10(1) of the *European Convention on Human Rights*
- Councillor Dimoldenberg was a journalistic source – section 12(4) of the *Human Rights Act 1998* states that the court must have particular regard to the importance of freedom of expression in matters of journalism
- it is important to maintain a free press and protect the media’s watchdog role, particularly on matters of public concern
- the BBC journalist had given Councillor Dimoldenberg an assurance that the information was required as ‘deep background’ only
- the public had an interest in the inactivity of Westminster City Council to recover the money
- Councillor Dimoldenberg was untroubled in disclosing the information and his motives were not self serving or wanton

The tribunal weighed those points against the following facts:

- it is necessary for councillors to comply with the statutory declaration of office – and consequently the Code of Conduct – in order to be able to receive confidential information
- there was a risk that disclosure would have hindered the recovery of the surcharge or that active steps in the recovery process would have been revealed
- the High Court had imposed Restriction on Communication Orders, which are rarely given; they were considered, deliberate, specific restrictions imposed only for the

length of time necessary to aid the recovery of the sums owed by Westminster City Council

In the end, the tribunal decided that the overriding public interest was in helping with the recovery of the money, rather than exposing the council's alleged inactivity. It regarded the High Court gagging orders as proportionate restrictions on freedom of expression given the ability of Dame Shirley to move money out of the reach of the council. The tribunal therefore concluded that Councillor Dimoldenberg had breached the Code of Conduct when he disclosed the confidential information. It concluded:

...in this case the Article 10 right of freedom of expression was rightly subject to an Article 10(2) exception and whilst the threshold is a high one to cross, because of the recognised importance of press freedom, it was the responsibility of Councillor Dimoldenberg in the light of the Restriction on Communication Orders to prevent the disclosure of information relating to the third party disclosure orders that he had received in confidence. As a consequence, the case tribunal concludes that Councillor Dimoldenberg was not acting in the public interest in passing confidential information to a journalist in order to expose Westminster City Council's inactivity in recovery of the surcharge and that in disclosing the confidential information he breached paragraph 3(a) of the Code of Conduct.

The case tribunal noted that Councillor Dimoldenberg did not gain financially or politically by his actions and that the disclosure did not harm the council's recovery process. It therefore decided not to impose any sanction.

FUTURE CASES

The Standards Board for England is currently examining how it should approach cases similar to this in future, and will be looking to clarify the meaning of paragraph 3(a) in the review of the Code of Conduct. It is also planning to issue guidance in this area.

It is clear just from this case that a public-interest defence can raise complex issues of fact and law. There is no one definition of the public interest which can be applied to all cases. Each case may bring with it many unique aggravating and mitigating factors. And clearly, monitoring officers and other advisors may well need a working knowledge of European and domestic law on confidentiality, breach of confidence and related areas, in order to advise properly in this area.

In the long term, the Standards Board for England will want to ensure that members are best placed to distinguish information which is genuinely in the public interest from that which may simply be politically advantageous, balancing the public's right to receive information with an authority's need to maintain confidentiality in certain areas if it is to function in the public's best interest.