

Committee: Overview & Scrutiny	Date: 6 January 2015	Classification: Unrestricted	Agenda Item: 7.1
Report of: Meic Sullivan-Gould Interim Monitoring Officer		Title: Reference from Council – Judicial Review on the Best Value Inspection Wards Affected: ALL	

1. Summary

- 1.1 This report outlines the unsuccessful judicial review proceedings brought against the Secretary of State for Communities and Local Government in connection with his decision to appoint Pricewaterhouse Coopers LLP (PwC) to undertake a Best Value Review of some of the Council's functions.

2. Recommendations

- 2.1 That the committee note the report.

3. Background

- 3.1 On the 4th April 2014, the Secretary of State for Communities and Local Government (DCLG) appointed PwC to undertake a best value inspection of the London Borough of Tower Hamlets pursuant to section 10 of the Local Government Act 1999 (as amended by the Local Audit and Accountability Act 2014).
- 3.2 On 30th June 2014, the Council sought permission from the High Court to bring Judicial Review proceedings in respect of the above decision. On 13th November 2014, permission was refused.
- 3.3 On 10th September 2014, a motion was put to the Council meeting by Cllrs Golds and Aston and it was resolved:
That this Council instructs:-
- The Overview and Scrutiny Committee to review the process whereby the decision to seek a Judicial Review was implemented.
 - The Overview and Scrutiny Committee, in conjunction with the Head of Paid Service, engage a completely Independent legal advisor to provide assistance to the Committee when this is considered
 - That a report by Overview and Scrutiny be prepared and presented to the full Council for consideration.
- 3.4 On 4th November 2014, the Overview and Scrutiny Committee received a report from the Service Head, Democratic Services concerning the above resolution and accepted the reference.

4. Outline of Proceedings

4.1 Chronology

Date	Event
31.03.2014	BBC News – Article ‘London borough Tower Hamlets could face inspection’
31.03.2014	The Interim Monitoring Officer emails Paul Rowsell at the Department of Communities & Local Government (DCLG)
04.04.2014	DCLG Press Release regarding the decision of the Secretary of State for Communities & Local Government (SoS) to instruct Pricewaterhouse Coopers LLP (PwC) to undertake a best value inspection of the Council.
04.04.2014	The Council received letter from the DCLG regarding the inspection & a letter from PwC detailing the framework of the inspection
10.04.2014	The Council wrote to the DCLG for further information as to the reasons for SoS’s decision
17.04.2014	DCLG respond to the Council’s letter seeking clarification as to reasons
08.05.2014	The Council writes to the DCLG again seeking further information as to the reasons for the SoS’s decision
12.05.2014	The Section 151 Officer writes to the DCLG regarding the costs of the inspection
14.05.2014	DCLG respond to the Council’s second letter seeking clarification as to reasons
28.05.2014	DCLG respond to the Section 151 officer regarding the costs of the inspection
02.06.2014	Mayor Rahman writes to the SoS regarding concerns about the inspection costs and seeks further clarification as to reasons for the inspection
02.06.2014	Letter before Claim is sent to the DCLG
19.06.2014	DCLG response to the Letter before Claim is received by the Council
01.07.2014	Application for permission to Judicially Review the SoS’s decision is issued at the Court
24.07.2014	The DCLG serve their Grounds of Resistance to the Council
29.08.2014	The Council’s application for permission is refused by Mr Justice Parker in writing
05.09.2014	The Council makes its application for an oral permission hearing at the Court
11.09.2014	PwC issue the Council with factual extracts of their final report for the Council to respond to
24.09.2014	The Council’s response to the factual extracts is sent to PwC
04.11.2014	The DCLG publish the PwC report dated 16.10.2014
14.11.2014	Oral permission hearing at the High Court before Mr Justice Goss. The Council’s application for permission is refused.

4.2 Correspondence with DCLG and Pre-Action Letters:- Appendix One.

4.3 Application and Supporting Evidence – Appendix Two.

4.3 Initial Permission Refusal and Renewal Application – Appendix Three.

Note: A confidential and legally privileged synopsis of Counsel's legal advice in this matter has been made available to the members of the committee.

5. Commentary

5.1 The Local Government Act 1999 introduced a statutory duty on “Best Value Authorities” (like the Council) to make arrangements to secure continuous improvement in the way in which its functions are exercised having regard to a combination of economy, efficiency and effectiveness and to consult about those arrangements. Until 4th April 2014, the responsibility for undertaking and appointing inspectors as to the delivery of that duty was vested in the Audit Commission under the Local Government Act 1999. On that day, the Secretary of State took to himself the powers to appoint Inspectors to undertake Best Value Audits (The Local Audit and Accountability Act 2014 (Commencement No. 1) Order 2014 which brought into effect section 34 and Schedule 10 of the Local Audit and Accountability Act 2014 and amended the 1999 Act.) It follows that the Secretary of State's decision to launch the PwC Audit was unprecedented.

5.2 In a Press Release on 4th April 2014, it was stated that the Secretary of State had “appointed inspectors to look into allegations of governance failure, poor financial management and fraud” at the Council and did not mention compliance with the Best Value Duty. It was a concern that the Secretary of State was using his new powers to initiate Best Value Inspections for a purpose that was not authorized by statute eg to uncover criminal activity, like fraud. Advice was sought from Leading Counsel (Jonathan Swift QC, 11 KBW Chambers) who advised that there should be an interrogation of the DCLG reasons before concluding whether there had been a misuse of powers. Correspondence was therefore drafted seeking an explanation of the specific reasons for the Inspection.

5.3 Prior to 4th April 2014, Best Value authorities subject to inspection were liable to pay fees against a statutory scale of fees established by the Audit Commission in consultation with the Secretary of State and local government associations. The above regulations repealed that provision and replaced it with an unlimited liability for paying inspection fees. Assurance was sought that the level of fees would be in line with that previously charged for Best Value Governance Inspections (eg at Doncaster MBC, the fee had been £90,000) or otherwise would be being controlled by the Secretary of State in the public interest. No such assurances were forthcoming but in May 2014 the Department estimated that the fee would be £1,000,000 “assuming full co-operation by the Council”. Following the publication of the PwC Report, the DCLG has submitted a demand for £998,440 (plus VAT) in respect of the Inspection Fee.

6. Why Litigate?

6.1 In the absence of clear reasons, it was difficult to address the proper scope of the inspection. This meant e.g. that officers did not know what was a legitimate information request and one that was outside the proper scope of the investigation. This was an important concern, both having regard to the cost of the inspection but also the potential criminal liability which might attach for non-compliance with a request.

- 6.2 The only way to ensure that there was proper scrutiny of the Secretary of State's decision-making and to limit the Council's liability for the then unquantified costs of the inspection was to seek permission for a Judicial Review of that decision. Counsel had been engaged to advise on the approach of the Council to the decision. Jonathan Swift QC had been selected as he had great experience (as Senior Treasury Counsel) of advising Government Ministers and Departments on Judicial Review matters.
- 6.3 Judicial Review proceedings must be commenced within three months of the decision being challenged. From April to June, Council Officers sought to engage in a dialogue with the DCLG as to the specific issues that were of concern but to no avail. It was considered that during the Pre-Election Period there should be no decision as to what action should be taken but to allow any new Administration to have the opportunity to review the position before litigation was commenced. At a Conference with Counsel on 23rd June, the Mayor approved the commencement of the proceedings having received advice that there was a substantial chance of success. That assessment was being maintained throughout the process. The action was commissioned by the Interim Monitoring Officer on 26 June 2014. The renewal of the application was undertaken by the Service Head, Legal Services on 5 September 2014 following consultation with the Mayor and Head of Paid Service and endorsed at Conference with Counsel on 11 September 2014.
- 6.4 The prospective cost of a judicial review action had been estimated at around £40,000 while the liability at stake was unlimited but estimated at £1,000,000. If the Secretary of State had been misadvised to proceed then that liability would be eliminated. On a risk v reward assessment, the action was clearly justified. In the event, permission was not granted and the Council's costs are substantially less than originally estimated. The Council's costs were £29,745 for Counsel's fees; the Council will also pay £8,500 to Treasury Solicitors for the Secretary of State's costs and has paid £490 on Court fees. The total spend on the Judicial Review proceedings is therefore expected to be £38,735 excluding VAT.

7. LEGAL COMMENTS

- 7.1 The Council is empowered (under section 222 of the Local Government Act 1972) to institute proceedings where it is considered expedient for the promotion or protection of the interests of the inhabitants of its area. Under the Local Government Act 2000, this is an executive function exercisable by the Mayor or under his delegation. Article 14 of the Council's Constitution authorises the Director of Law, Probity and Governance (currently exercisable by the Head of Paid Service and the Interim Monitoring Officer) to make such decisions and under Part 3 of the Constitution Corporate Delegation A.13 enables any Director or Service Head to authorise proceedings.

8. COMMENTS OF THE CHIEF FINANCIAL OFFICER

- 8.1 This report sets out for Overview and Scrutiny Committee's consideration information regarding the process whereby the decision was taken to seek a Judicial Review of the Secretary of State for Communities and Local Government's appointment of PwC to undertake a best value inspection of certain council functions.
- 8.2 The report makes reference (para 6.2) to advice from Counsel, regarding the likelihood success of a Judicial Review.

- 8.3 Section 12 of the Local Government Act 1999, as amended by the Local Audit and Accountability Act 2014 states that an inspected authority must pay the reasonable fees of an inspector. Prior to the 2014 Act the fees were prescribed by the Audit Commission. Tower Hamlets was the first council to be inspected under the new regime. The cost of the inspection, now known to be £998,440 (compared to that of Doncaster MBC which cost some £90k) must be borne by the Council. Whilst this can be provided for from general reserves, this is a very significant opportunity cost. In this regard paragraph 6.4 of the covering report sets out the relative risk/ reward of the decision to consider litigation.
- 8.4 Costs were estimated at £40,000. Actual costs are set out in para 6.4 above. These will be funded from corporate contingencies. Other costs are primarily the opportunity cost of officer time.

LOCAL GOVERNMENT ACT, 1972 (AS AMENDED) SECTION 100D

LIST OF "BACKGROUND PAPERS" USED IN THE PREPARATION OF THIS REPORT

Background paper	Name and telephone number of and address where open to inspection
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None