



Northumberland County Council

Mrs J Willis
Interim Executive Director of Finance/Section
151 Officer
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County Hall
Morpeth
Northumberland
NE61 2EF

Your ref:
Our ref:
Enquiries to: Daljit Lally
Email: [REDACTED]
Tel direct: [REDACTED]
Date: 13 May 2022

Via email: [REDACTED]

Dear Jan

Thank you for your letter dated 25 April 2022. I want to respond as fully as I can to your questions. However, to do so I need further information, with which you will, at least in part, be able to provide me. I mention this further below. Consequently, this response is, necessarily, preliminary.

Your letter sets out a different view from that which underpinned our recent discussions. During our meetings no concerns were raised about the information, touching on the questions you raise, with which we were provided. Further, the position relayed to [REDACTED] in October 2021 is the opposite of the opinion you now present. For instance, you may recollect that during one of our meetings we agreed that a company would not have been necessary until the business was established and providing income.

It is plainly necessary to understand the change of position and, thus, I would be grateful if you could indicate how such change has come about and the basis for it. I should note that the legislation provides that I am to be consulted. We are both conscious through our respective experience in local government that the law demands, for there to be fair and effective consultation, that a consultee be sufficiently informed.

Further, I have had an opportunity to seek the advice of Leading Counsel. Not merely am I advised as above (relative to fair consultation) but I am also advised that as Head of Paid Service and Chief Executive I can reasonably seek further information.

Accordingly, I ask please for copies of correspondence or notes of discussion with the external auditors together with any legal advice, internal or external, tendered about this matter. Such information is, in any event, necessary to me in my role as Head of Paid Service.

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I quite understand your particular role, as Section 151 Officer, and, therefore, suggest you redact any advice you have received regarding that role.

The preceding matters indicate why this response is preliminary. I should further note that I have encountered difficulties lately in consequence of illness, a lack of shared information and delays for the approval of legal advice.

I now respond to each of your questions in turn.

1. In relation to the International Business, the County Council received external legal advice that the business must be conducted through a limited company. Why was this not incorporated until 2021?

I am not aware of any legal advice that the business had to be conducted through a limited company prior to the relevant company being established. The company was incorporated, following a report to Cabinet, at the point it became clear the project was expected to receive substantial income. This was based on advice which the Section 151 Officer [REDACTED], the Monitoring Officer [REDACTED], and Executives received from Ward Hadaway in 2018. This position is supported by further legal advice commissioned by the Section 151 Officer and [REDACTED] from [REDACTED] of Monckton Chambers, in September 2020, as set out below.

I am aware of four sets of legal advice received by the Council. I was directly involved in the taking of advice from [REDACTED] Ward Hadaway in October and November 2018 when [REDACTED], [REDACTED] and I sought advice.

A meeting with legal advisors Ward Hadaway on 8 November 2018 discussed joint working with the NHS and the Northumbria Partnership, and the overarching collaboration agreement where Ward Hadaway gave initial advice on forming a company. At that time, the Council was advised that should the Council at some future point seek by itself to deliver international services then a company should be incorporated. [REDACTED] was clear that the company would be required once sufficient income was received to warrant it. The advice note set out some potential company options.

Following on from previous meetings and calls, Ward Hadaway conducted a review of dormant company articles in March 2019 and also advised on the general considerations of setting up a new company – still getting the level of advice needed to be able to inform Cabinet. These general points suggested further consideration, as well as potential updates to the dormant company articles. A further briefing to Cabinet took place in September 2019 and the potential to form a company in due course was agreed.

The Council remained in partnership with Northumbria Healthcare Trust and The Christie throughout this time. The contract the Council signed with [REDACTED] as Stage 2 was underpinned by the detailed work being undertaken by other organisations including the NHS Trusts. A detailed briefing was provided to a Cabinet Briefing meeting with advice from the Section 151 Officer and Monitoring Officer. I believe you have been sent the papers and decision relating to this matter. The advice

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from Ward Hadaway was still being sought and was complex due to ambiguity or uncertainty about forecasts and trading.

The incorporation of a group holding company for Northumberland County Council was made in February 2020. The outbreak of the COVID pandemic delayed new company registrations as they were suspended by Companies House in March 2020. NEHL was registered at Companies House in September 2020.

On 7 August 2020 the Chief Executive/Head of Paid Service was suspended with false allegations being made by members relating to their knowledge of and agreement to international business.

Legal advice was taken from [REDACTED], a specialist barrister, by the Section 151 Officer [REDACTED] and [REDACTED] on 23 September 2020. This advice was set out verbally and was reiterated as per the meeting with [REDACTED] [REDACTED] on 23 September 2021.

The NEHL Cabinet report with supporting business case was considered by Cabinet on 19 January 2021 with approval to proceed. Deliberate targeted behaviour by [REDACTED] [REDACTED] initially prevented NIC Ltd being registered.

A Cabinet report – Northumberland Enterprise Holdings Ltd provided Cabinet with an update on progress and governance and submission of subsidiary business case for Northumberland Integrated Consultancy 21 February 2021 stated “Since the registration of Northumberland Enterprise Holdings Ltd in September 2020, a significant publication on commercial activities in another Local Authority has been published which draws attention to risks associated with governance arrangements for commercial trading companies within a local authority. The report produced by [REDACTED] has highlighted a need to review the arrangements initially proposed to Cabinet in February 2020, to identify and mitigate further risk to the Council based on this Public Interest Report and the legal advice sought on behalf of the Council setting out the recommendations for change.”

Cabinet approved establishment of NIC Ltd as a subsidiary of NEHL 21 February 2021.

During February 2021 [REDACTED] handed over responsibilities to you. In discussions with you, I agreed that a review of international business be undertaken by the internal audit service. This review reported directly to you and raised no concerns.

NIC Ltd was registered at Companies House on the 23 March 2021.

On 08 November 2021 12:25 following advice from [REDACTED] (received on 23 September 2021) you set out the Council’s position to the external Auditor.

You said:

“In outline, the Council’s view, which is informed by QC’s advice, is as follows:

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1. **Section 1 of the Localism Act 2011 provides that a "local authority has power to do anything that individuals generally may do", including for a commercial purpose. Section 4 of that Act imposes certain limits on doing things for a commercial purpose in exercise of that power. In particular, section 4(2) requires that "where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.**
2. **The meaning of "commercial purpose" in section 4 was considered by Mr Justice Warren, sitting in the Upper Tribunal, in R (The Durham Co.) v HMRC and HM Treasury [2017] STC 264. He stated at paragraph 63 that "it is a question of fact, in any particular case, whether the [local authority] is carrying out the relevant activities for a commercial purpose or otherwise than for a commercial purpose."**
3. **This approach was cited with approval by the High Court in R (Peters) v Haringey LBC [2018] EWHC 192 (Admin). Mr Justice Ouseley went on to hold, at paragraphs 135- 136, that "[section 4] requires an overall view to be taken of "the thing" being done, and of the overall purpose for which it is done", that being the "primary" or "dominant" purpose. He noted that "if the purpose which is said to be commercial is simply an incidental or ancillary purpose to the non-commercial purpose, it is correctly seen as part of the non-commercial purpose, and not as a commercial purpose at all."**
4. **Mr Justice Ouseley also made clear that "[section 4] should not be interpreted so as to bring in a requirement for a company to be used where no such requirement had previously existed in respect of the same activity" (paragraph 117). He emphasised that "I do not consider that Parliament, which had already accepted that certain Council activities should be undertaken through a company, intended that those other "things" that could be done already without a company, now had to be done through a company, if they were to be done at all" (paragraph 132).**
5. **Both of these findings are relevant in respect of the Council's international consultancy work.**
6. **First, the Council's international activities did not initially have a dominant commercial purpose. These started out as an exploratory venture, driven by aims of international information exchange, learning, and the improvement of public health as much as by any commercial opportunities. Over time, the commercial aspect of the exchanges became more pronounced. Eventually the Council considered that the dominant purpose had become a commercial one and therefore, on 17 September 2020, incorporated a company to undertake any international consultancy work. It does not follow, however, that all prior activities had a dominant commercial purpose from the outset. As such, the absence of a company before 17 September 2020 does not mean the activities were ultra vires.**
7. **Second, and in any event, the Council's international activities are activities that it could already undertake without a company prior to the Localism Act 2011 coming into force:**
 - a. **Section 2B(1) of the National Health Service Act 2006 provides that "each local authority must take such steps as it considers appropriate for improving the health of the people in its area." Subsection (3) makes clear that such steps include, amongst others, "providing or participating in the provision of training for persons working or seeking to work in the field of health improvement."**
 - b. **This covers the kind of health focused international learning and information-exchange projects at the heart of the Council's foreign efforts. The power to carry out such projects therefore existed prior to the Localism Act 2011.**
 - c. **In the circumstances, section 4 of the Localism Act 2011 imposed no new compulsory requirement for a company to be used.**
 - d. **The fact that the Council ultimately did decide to undertake its international work through a company does not change that position. In any event, as explained above, that decision reflected the evolving purpose of its international activities.**

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8. *In light of the above, the Council considers that none of its international work was ultra vires.*

I hope this assists you in the preparation of the opinion. I would be grateful if you could let me know if you disagree with any of the Council's analysis summarised above and as always, I would be happy to discuss if that would be helpful."

The preceding text indicates the sequence of events, and shows all was properly done and regarded by you as properly done.

2. Why was no formal report taken to the Cabinet to authorise the international business until 2021 when the County Council first entered into the framework agreement and contracts with third parties as long ago as 2018? The summary of information I have set out includes a chronology of the actions taken.

Your letter is incorrect in referring to 2021.

The Executive Team were always advised by the Council's Head of Legal Services who fulfilled the role of Monitoring Officer [REDACTED] advised that, given the arrangements and the partnership, the Council was providing technical services so a report to Cabinet was not required. Framework agreement and contracts were entered into on the advice of the Monitoring Officer and Section 151 Officers, who were fully involved in meetings, advice and briefings. They advised the International Team on oversight and control. The Monitoring Officer advised Cabinet and Officers that the arrangements that were in place were suitable given the requirements of the Localism Act. The Monitoring Officer oversaw the development of contractual documents, the taking of legal advice and counter signed the contracts.

In October 2018 both the Northumbria Healthcare Chief Executive and the Leader of the Council, [REDACTED], gave a commitment to representatives of the [REDACTED] for a 10-year programme of support. Therefore, all contractual arrangements were based on the joint partnership working model. A briefing to Cabinet in November 2018 described why and how and identified progress with next steps including consideration of form.

The joint international service was launched at the House of Lords by Cllr [REDACTED] and the Chairman of the Trust on 11 June 2018. The oversight of the programme was conducted through the Trust's finance and performance committee with a formal audit report being taken in November 2018.

A further briefing was made to Cabinet in September 2019, this included an update on the potential for a company. On 29 April 2020 a paper was taken to a Cabinet Briefing meeting with oversight of the Council's Monitoring Officer for consideration to sign [REDACTED].

Accordingly, the matter was, at all stages, sufficiently reported. Legal advice was taken from [REDACTED] a specialist barrister, by the Section 151 Officer [REDACTED] on 23 September 2020. This advice was set out verbally and was re-iterated as per the meeting with you and [REDACTED] on 23 September 2021.

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The payment was set out and agreed in the Leader's full council report of 6 September 2017 stating "commercial international lead for NCC and system transformation support with Northumberland Commissioning group (CCG)". This was discussed as part of my interview in 2017, and is shown in my contract of employment first received in 2017 from HR.

On 31 October 2017 the then Leader [REDACTED] the then Deputy Leader and [REDACTED] had a discussion in the Chairman's Dining Room at 12md when [REDACTED] confirmed agreement to the allowance by the SAC members. The then leader of the Council, Cllr [REDACTED] the former deputy leader of the Council [REDACTED] and the former HR director [REDACTED] were aware of the international allowance and it had been approved as part of the report in September 2017, approved by the interview panel sub committee of the SAC, which was then reflected in the contract that was shared with members at Full Council on 1 November 2017.

On 1 November 2017 full Council were presented the report of my appointment by [REDACTED] and a copy of the contract (on pink paper) was circulated to all members present (61 in total). [REDACTED] gave out the pink paper which contained my contract which set out the allowance as part of the terms and conditions.

The report of the Leader dated 1 November 2017 along with the pink copy of the contract presented and agreed at the full council meeting confirmed the arrangements including terms and conditions.

In terms of the Pay Policy, the paragraphs assume that chief officers may receive fees and allowances other than basic salary, your view is that this would not include post-appointment allowances. As this allowance was agreed by the SAC as part of the appointment process and as set out to Full Council, the International Allowance would therefore be included as part of the Pay Policy statement. The international allowance has also always been stated both in the transparency data outlined on the Council's website, and in the Accounts for each Financial Period since it has been paid. The transparency data is referred to clearly from the Pay Policy statement.

Accordingly, the international allowance has always been properly authorised and recorded.

I look forward to hearing further from you with the information requested.

Please acknowledge receipt of this letter.

Yours sincerely



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