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Ask for: Mark Hynes
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Date: 15 November 2017

Dear Mr Powell

I refer to your letter of 6 November 2017, enclosing purported Directions under section 4A of the Local Government Act 1986 ("the Directions"). I understand that the London Borough of Hackney is likely to be writing to you in similar terms.

The operative part of the Directions is contained in the two bullet points set out in numbered paragraph 4, to which the Directions themselves refer as the "first requirement" and "second requirement", and to which I shall refer as Direction 1 and Direction 2 respectively. Direction 1 is a purported substantive requirement concerned with the frequency of commissioning or publication, and Direction 2 is a purported procedural requirement concerning decision-making by the Council's executive.

In the past, as you know, this authority has expressed the view that a direction in the general nature of Direction 1 would be unlawful in the circumstances of its case, especially if it was given for the reasons expressed in earlier notices. Should it be necessary to do so, we shall consider carefully, with the benefit of legal advice, whether that remains the position so far as the substantive aspect of the Directions is concerned.

However, a prior point arises. Section 4A(5) of the 1986 Act provides that:

"Before giving a direction to an authority, the Secretary of State must give the authority notice in writing of the proposed direction."

As subsections (6) and (7) make clear, the purpose of this notice is to allow the authority to make representations about the proposed direction, which clearly means that the authority must have an opportunity to comment upon the reasons and/or evidence upon which the proposal to make the direction is based. This should hardly be controversial.

However, in this instance the Secretary of State has made the Directions without giving the required notice.

The recital to the Directions claims, at paragraph 2, that the requisite notice was given on 2 December 2016. But that is not so, for the following reasons:

1. The proposed directions of which notice was given on 2 December 2016 were not the same as the Directions that have now been made.
2. In December 2016, the proposed substantive direction called for compliance with the specified sentence in paragraph 28 of the Code "as soon as practicable and in any event by 31 January 2017". The present Direction 1 seeks to control the future actions of the Council by reference to each calendar year commencing on 6 February, from 2018 onwards. It also seeks, although it is unclear whether this is deliberate or merely inept drafting (given that there is no warrant for this in the Code), to control not only the times at which any newssheet is issued, but also the times at which it is "commissioned". Even leaving that latter point aside, Direction 1 differs from the direction of which notice was previously given, both in that it seeks to lay down the precise 12 month periods by reference to which the frequency of publication is to be measured, and also for the fundamental reason that its period of effective operation will begin nearly a year later than was previously contemplated.
3. As for Direction 2, the roughly equivalent requirement in December 2016 was merely that the executive should "consider" the direction within 14 days. Direction 2 now purports to dictate the nature of the decisions that the executive should take.
4. On no view, therefore, are these the same directions of which notice was previously given. They are different not merely in form, but in substance. Indeed, the putting back by a year of the operative date of Direction 1 highlights the particular vice of what the Secretary of State has purported to do. The much later operative date of Direction 1 reflects the fact that the Secretary of State has, for reasons which you have not attempted to explain, "sat on" the matter for nearly a year. Inevitably this means that representations by the affected authorities are out of date. In the case of Waltham Forest, since we elected in December 2016 not to expand upon the representations made in May 2016 (a perfectly reasonable position at the time, since those representations were only 6 months old at the time), this means that it is now some 18 months since the Council has made substantive representations. It is simply not right (as paragraph 9 of your letter does) to describe the Council's letter of 13 October 2017 as a "representation" – rather, that was a response to a specific question raised by yourselves.
5. Indeed, it is worse than that, because the reasons now given by the Secretary of State for Direction 1 rely very heavily upon matters which postdate the December 2016 notice, and upon which there has accordingly been no opportunity for the Council to make representations. We refer, for example, to what is said about the London Assembly report (paragraph 10), and about budgets for 2017/18 and expenditure in 2016/17 (paragraphs 11-13).

We therefore propose that the Secretary of State should agree to take the following steps:

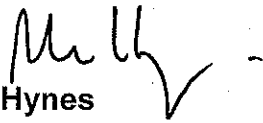
- (i) Acknowledge that his letter of 6 November 2017 cannot stand as a direction, and withdraw it accordingly.
- (ii) If so minded, treat the letter of 6 November 2017 as notice of a proposed direction, upon which the Council will have an opportunity to make representations.
- (iii) If the 6 November letter is treated as notice of a proposed direction, give the Council a proper opportunity to make representations. For the avoidance of doubt, that does not mean 14 days. The 14 day period in the statute is a minimum, not a fixed period. In circumstances in which the Secretary of State has repeatedly procrastinated, without explanation, over a 3½ year period, it is simply unacceptable (and unlawful) to behave as though the matter was one of great urgency.
- (iv) Not only will the Council need proper time to make its representations, it will require further information from the Secretary of State about the decision-making process to date, and about the evidence upon which the Secretary of State purports to rely. Once the Secretary of State has confirmed that he will proceed as set out in (i) and (ii) above, we shall formulate our request for information, and are prepared to undertake to do so within 14 days of that confirmation. We further propose that the Council's time for making representations should be 4 weeks from the date on which the Secretary of State answers that request (or 6 weeks, if the 4 week period would include the Christmas or New Year holiday). This is a reasonable and constructive proposal to which we invite the Secretary of State to respond positively.

If the Secretary of State agrees to proceed as set out above, then the status and reasonableness of Direction 2 are academic, at any rate for the present. However, I should make it clear that the next meeting of the Council's Cabinet is not due to take place until 7 December 2017, and we have no plans to call any special meeting prior to that. Specifically:

- a) The Secretary of State has no power to give a direction which purports to dictate to an authority by whom, or when, decisions shall be taken;
- b) Such a direction is not authorised by section 4A(3)(a);
- c) In any case, it would be wholly unreasonable (to put it mildly) for the Secretary of State to insist upon such a timetable, given the 3½ history of procrastination on his own part. Apart from anything else, the Council is entitled to a proper opportunity to take and consider legal advice. There is no good reason to insist upon such a timetable – quite apart from the clear absence of any true urgency, if the Cabinet were to decide on 7 December 2017 to adopt a quarterly publication schedule with effect from 6 February 2018, there is no reason why that decision should not be put into effect.

We wait to hear from you.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M. Hynes', with a stylized flourish at the end.

Mark Hynes
Director of Governance and Law