July 2015

Exempt Information in Council Reports, Licensing Act Applications involving Representations and Mediation, Licensing Fees Course

Welcome to the July edition of the Bulletin. This considers the question of Committee reports in the closed part of a Licensing Committee meeting. It also looks at the continuing question of determining Licensing Act applications after mediation.

With the Elections (both local and national) now receding, and Councils settling into their stride, it is also an opportune time to consider a Licensing Fees course, and the details are attached.

We hope you have a good summer.

Exempt Information in Council Reports

Council meetings must be held in public, and that includes meetings of Committees and Sub-committees. That is the starting point for all meetings of the Council under s100A of the Local Government Act 1972 ("LGA 1972")[1].

It is possible for a meeting to be held in the absence of the press and public if a resolution to exclude them and move into private session is passed in accordance with s100A(4) on the basis that the meeting will be considering exempt information, as defined in s100I. Such a resolution must be based on one of the descriptions of exempt information contained in Schedule 12A to the LGA 1972, and once that resolution has been passed, the subsequent session is usually

[1] Meetings of the statutory Licensing Committee are not meetings covered by the LGA 1972 and are governed by The Licensing Act 2003 (Hearings) Regulations 2005 SI 2005/44 as amended by The Licensing Act 2003 (Hearings)(Amendment) Regulations 2005 SI 2005/78 and The Gambling Act 2005 (Proceedings of Licensing Committees and Sub-committees)(Premises Licences and Provisional Statements)(England and Wales) Regulation 2007 SI 2007/173.

referred to as Part 2 or Part B, and the reports for those items are exempt reports, as they do not have to be published in the usual way for public inspection.

This approach is usually taken by the non-statutory Licensing Committee[2] and its sub-committees when considering matters concerning existing and potential hackney carriage and private hire drivers, operators and (occasionally) proprietors. This is because they will be appearing before the committee as there is some element of their application that means that they do not fall within the Councils policy (in which case the matter could usually be determined by officers under delegated powers) and therefore fall to be determined by the Committee.

The usual justification for excluding the press and public is one of the paragraphs of Schedule 12A which describe exempt information. These include ''information relating to any individual'' (para 1) and ''information which is likely to reveal the identity of an individual'' (para 2).

Once the resolution has been passed, no reporting of the matter can take place, and the usual detailed minutes need not be produced, although there must be a written summary of the proceedings which provides a reasonably fair and coherent record without disclosing the exempt information (see s100C).

It can therefore be seen that if the Council decide to treat an application for or consideration of an existing licence as exempt information, then none of that exempt information can be revealed. This would include any information that would identify the person if either paragraphs 1 or 2 was used as the basis of the exempt information. In these circumstances it would appear that the written summary would only be able to refer to ''an applicant'' or ''an existing licensee'', or possibly, if slightly more information is felt to be warranted, ''a male/female applicant'' or ''an existing male/female licensee''. Even using initials would be sufficient to identify the person, especially in the closed community of licensees.

It does remain open to the Council not to treat such applications as being exempt information and therefore to hear all such matters in public, as the process contained in section 100(4) is discretionary. This approach is taken by a small number of authorities, and in those cases full details of the applicant or licensee can be made public, although not any further information covered by the Data protection Act such as criminal convictions, medical concerns etc. If those matters are to be discussed, it would still be necessary for the resolution to be passed and the Committee/sub-committee to exclude the press and public, unless the applicant/licensee consented to such information being disclosed.

[2] For the need for each Local Authority to have 2 distinct Licensing Committees, see Bulletin February 2014

Licensing Act Applications involving Representations and Mediation

There are continuing difficulties[3] encountered in how to determine applications for Premises Licences under the Licensing Act 2003 ("LA 2003") where relevant representations have been made[4].

As is well known, in the absence of relative representations, any such application is granted by officers subject to conditions which are consistent with the application and operating schedule, and the relevant mandatory conditions[5].

Where relevant representations have been received, the matter can only be determined by the licensing committee[6].

The difficulty arises when relevant representations have been made, and successful mediation has taken place. The idea of mediation was first introduced in the second edition of the S182 Guidance issued by the Department of Culture, Media and Sport in June 2006[7] and has remained a feature ever since[8].

There is no doubt that mediation has been a great success in many cases, and Licensing Officers have often facilitated compromises that have left both the applicant and those who have made representations satisfied with the outcome.

The problem arises when the time comes to grant the application, which is now different from the application which was originally made.

This is a continuing issue, but was recently brought to light by the following example.

An application was made to vary an existing Premises Licence. Amongst a number of matters, the proposed operating schedule stated as a suggested condition:

> "*Hire SIA Door Staff for Friday/Saturday Evenings*"

Without having made a relevant representation (or indeed any representation at all) and in the absence of the licensing authority, the Police entered into negotiations with the applicant and both sides agreed that there should be a condition attached to the licence in the following terms:

> "*The premises will employ a minimum of 1 SIA Door Staff on Friday and Saturday evenings from 8pm until 4am"*.[9]

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[3] This matter was considered in *"P.H. Law"* Volume 15 in January 2009

[4] This also applies to applications for variations (not minor variations) and to applications for club premises certificates and variations to those.

[5] See 18(2) LA 2003

[6] See 10(4) LA 2003

[7] See paragraph 5.68A

[8] See paragraphs 9.31 to 9.34 of the March 2015 Guidance

[9] It is interesting to consider, as an entirely different point, whether this condition is effective.

The Police then argued that they did not need to make a representation or attend a hearing in order to ensure that the condition as negotiated was applied to the licence. The Police reasoning was that the latest edition of the S182 guidance (March 2015) was amended to reflect changes and that paragraph 9.2 is now clearer that a hearing is not required when representations are made but subsequently withdrawn, and that licensing authorities should not hold hearings for uncontested applications. Paragraph 9.38 states that any conditions added to the licence must be those imposed at the hearing **or those agreed when a hearing has not been necessary** [original police emphasis].

The Police argued that the changes to the Guidance were made to stop the situation of responsible authorities and applicants agreeing conditions but still needing to go to a hearing, and in this particular case they had agreed this condition with the applicant in line with the operating schedule.

Unfortunately this approach is not correct, and the revised Guidance does not indicate that such an approach is lawful.

There is nothing in the new guidance to alter the requirements of the legislation. Any alteration to the application can only be made by the Licensing Committee/Sub-committee following relevant representations. A representation that is withdrawn is not a representation[10], and then the application would be granted by officers as it was made as there is no ability to alter an application.

This was made clear in *Mathew Taylor v Manchester City Counci*[11]. The case concerned the application for a variation of a premises licence, but as the process for variation is identical to the process for a new application, the principal remains the same. The court was very clear in the judgment given Hickinbottom J where he stated[12]:

> "70. The scheme provides no mechanism for amending an application once made, and neither the Act nor the regulations, nor the Secretary of State's Guidance nor the Council's own Statement of Licensing Policy, makes any mention of the possibility of amendment. Clearly, a power to amend that would defeat or undermine the object of the procedural provisions relating to advertisement and right of responsible authorities and interested parties to make representations could not conceivably be implied; and neither Mr Phillips nor Miss Clover suggested otherwise.
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> 71. However, the scheme has no express power enabling an applicant to amend an application to vary; and, in my judgment, properly construed, the regulatory scheme does not as such allow or envisage any amendment to an application to vary once it has been made."

Accordingly in a situation such as this, the police must make a representation, and the matter must be determined by members at a licensing committee/sub

[10] S18(7)(b) LA 2003
[11] [2012] EWHC 3467 (Admin) [2013] LLR 179
[12] [2012] EWHC 3467 (Admin) [2013] LLR 179 at paras 70 - 71

committee meeting, although that does not necessarily have to be a hearing as the parties can agree that hearing is not necessary. A hearing is where the parties appear before the committee/subcommittee and argue the matter. A meeting is a committee/subcommittee meeting which enables the members to determine the matter by means of approving an agreed compromise.

The revised guidance does not alter the position detailed in *"P.H. Law"* 6 years ago[13] January 2009 and it remains as follows.

Section 10(4) of the LA 2003 prevents an officer determining various applications under delegated powers (section 10(1) & (2)) where there are relevant representations, police notices etc.

Section 18(3) says where relevant representations are made the authority must hold a hearing, unless all parties agree a hearing is not necessary, and 18(2) says where no relevant representations have been made, authority must grant the application subject to conditions consistent with the operating schedule.

Accordingly, if the relevant representations are withdrawn, they are no longer relevant representations and section 18(2) applies. However, if the relevant representations stay on the table, section 10(4) applies and the determination must be made by the committee or sub-committee, but the need for a hearing (but not member determination) can be waived by all the parties who have mediated the agreed conditions.

The bottom line is that in these circumstances, there must be a meeting of the sub-committee (or committee) to make the determination based on the mediated agreement. As there will be no "hearing" this could either be a very short meeting for one application, or alternatively, a large number of applications could be determined in a relatively short time.

Indeed this position has been reinforced by the *Matthew Taylor* case which confirms that an application once made cannot be altered.

It is arguable that if an application is altered and then granted by officers, the grant will be void as no valid application was considered. The alternative argument is that the application itself was valid, but the grant was made ultra vires the powers of the officers and is once again void. It is therefore vital that Licensing Authorities have the correct procedures in place.

[13] *"P.H. Law"* January 2009

Licensing Fees Courses

After the Summer, local authorities will start to consider their Licensing Fees for the next year, and this course will prove invaluable.

With the dust starting to settle around the Supreme Court decision in *Hemming*[14], and the announcement by the Government that locally set fees for the Licensing Act 2003 are apparently on indefinite hold, this is the ideal time for local authorities to ensure that their licence fees are lawful. As challenge to the fees (often well after the fees have been levied and used) is relatively easy, it is vital that authorities are well placed to justify their fees and therefore successfully resist any such challenges.

This course considers the principles and processes required to assess and then set lawful licence fees, in an inclusive manner which involves discussion and practical exercises.

It is ideally run in-house for one authority, and the key attendees are ideally to following (plus as many others who would find the Course useful):

- Chair and Deputy Chair(s) of the Licensing Committees
- Other Licensing Committee Members
- Portfolio Holder for Licensing
- Portfolio Holder for Finance
- Licensing Officer
- Head of Service for the Licensing Department or Section
- Finance Officer
- Legal adviser
- DSO

Further details are given on the attached flyer. If you are interested in running such a course, please contact us at the office (01629 735566 or james@jamesbutton.co.uk) and we can provide further information and possible dates.

James Button

24th July 2015

For further information please contact James Button on 01629 735566 or james@jamesbutton.co.uk

[14] *R (app Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council* [2015] UKSC 25. Foe more details see Bulletin April 2015

Licensing Fees
Setting, Justifying, Levying

A One Day Course

Facilitated by: **James Button** BA., Solicitor, CIoL.- Principal

Confident that the licence fees that your Authority sets and levies are lawful, and that you can resist any challenge?

Do you understand the Westminster Court of Appeal judgment and its impact?

This course enables consideration of:

* **your licence fees**
* **the legality of those fees**
* **the political dimension to fee setting**
* **the consequences of getting the fees wrong**

Key personnel who would benefit from this course:

* **Chair (and other members) of the Licensing Committees**
* **Portfolio Holder for Licensing**
* **Portfolio Holder for Finance**
* **Licensing Officer**
* **Head of Service for the Relevant Department**
* **Finance Officer**
* **Legal adviser**
* **DSO**

Fully considers the decision of the Supreme Court in Hemming

Session 1 – Licensing Fees – The Legal Position

* ***What fees can be charged?***
* ***How do you determine the fees?***
* ***What can and cannot be taken into account?***

Session 2 – Legal Position contd.

* ***Impact of the EU Services Directive***
* ***R (App Hemming) v Westminster - what does it mean?***

Session 3 – Practical Exercises

* ***How will you set fees?***
* ***How will you find the correct information?***
* ***How will you justify them?***

Session 4 – Worked Example of Fee Setting

* ***How one authority set its fees***
* ***How long it took***
* ***How they have used the process since***

"Jim Button tackles the difficult subject of setting licensing fees and presents the information in a readily understandable format for both experienced professionals and beginners alike. The course represents excellent value for money and avoids the Council making what could be costly errors"
Nigel J Marston, Licensing Manager, South Somerset District Council.

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