

Local authority ordered to disclose legally privileged material under the Environmental Information Regulations 2004

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In the recent case of *Brooksbank v Information Commissioner and another* (EA/2018/0226), the First Tier Tribunal (Information Rights) (FTT(IR)) ordered a Local Authority to disclose its instructions to Queen's Counsel to advise the Council in respect of a planning decision under the Environmental Information Regulations 2004; despite the fact that such instructions would ordinarily be protected by legal professional privilege.

The instructions in question had been prepared in 2011 by Ryedale District Council, and concerned the development of a new supermarket in the town of Malton, Yorkshire. Two applications for planning permission to develop a supermarket had been received by the council which had to resolve whether to grant permission for the supermarket to be built on the former livestock market or on the Wentworth Street Car Park, which was owned by the council.

A councillor proposed that the two decisions should be called-in by the Secretary of State because of the inherent conflict of interest between the Local Authority's interests as local planning authority and as the owner of one of the proposed sites. The council sought legal advice on the councillor's motion and prepared written instructions to Counsel to advise on this point.

At a reconvened council meeting the Chairman ruled that the motion to call-in was out of order and the council proceeded to grant planning permission for the development of the Wentworth Street Car Park site.

The decision to grant planning permission was subsequently quashed in *R v Milton (Peterborough) Estates Co and Ryedale District Council* [2015] EWHC 1948 (Admin). A member of the public (Ms Brooksbank) later requested disclosure of the instructions, but the council withheld these relying on the exception contained within regulation 12(5)(b) of the Environmental Information Regulations 2004.

The Environmental Information Regulations derive from EU Directive 2003/4/EC (Directive), and were implemented with the aim of facilitating access to information relating to the environment. The Directive was implemented with the policy intention that providing the public with access to environmental information would increase awareness of issues that affect the environment and public participation in decision making where it impacts upon the environment.

Regulation 2(1) of the Environmental Information Regulations defines environmental information for the purpose of the regulations as follows:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the

interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

...

(d) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)

The FTT(IR) found that the information contained within the instructions to Counsel related to 'measures' likely to affect the 'state of the land', and therefore constituted "environmental information".

Regulation 5 provides the public with the right to access such information, and accordingly Ms Brooksbank's request for access to the council's instructions was within her statutory right to environmental information.

However, the Environmental Information Regulations also contains a number of exceptions to the general right of access. In particular, the exception provided in 12(5)(b) relates to "the course of justice", and can be invoked where a public authority can demonstrate that the disclosure of specific information would adversely affect the course of justice. This is widely accepted to include information which is covered by both forms of legal professional privilege.

There are two types of legal professional privilege; legal advice privilege and litigation privilege. In this case, the council argued that the instructions to Counsel were protected by legal advice privilege. This form of privilege applies to all communications between a client and their legal adviser, acting in their professional capacity, in connection with the provision of legal advice. There is no requirement for litigation to be contemplated or in existence for legal advice privilege to apply.

Whilst the tribunal accepted that legal advice privilege clearly applied to the instructions, the FTT(IR)'s decision in this case emphasised the importance of the test contained within Regulation 12(1). This provides that the exceptions to disclosure only apply where a public authority can show that the public interest in withholding the information outweighs the public interest in disclosing it.

The tribunal ultimately concluded that in this case the public interest favoured disclosure (albeit "by a fine margin"). The following factors were all considered by the tribunal as it weighed the public interest for and against disclosure:

- The instructions had been prepared and the legal advice provided a number of years prior to the request for disclosure being made. The tribunal noted that legal advice privilege is particularly stronger where the advice is recent and the issues to which it relates are still current. Conversely it may be weaker (though still significant) where the advice was old and/or is no longer current.
- Protection of legal privilege was less compelling where the public authority was seeking advice surrounding general points of law and the advice did not depend upon a particular set of facts.
- There was a clear public interest in members and residents understanding how the council might conduct itself in similar situations in future, how calling-in works and whether and in what circumstances local authorities are constrained from determining planning applications where they own and wish to dispose of the land in question.
- The Tribunal did not accept that disclosure would deter the local authority from seeking legal advice in future and in any event, any deterrent effect could not be determinative as Parliament had clearly determined that Regulation 12(5)(b) should provide a qualified exception.
- There was a need for "maximum transparency" as the council's decision to grant planning permission in respect of its own site meant that a third party would be unlikely to be granted permission to develop an alternative site for the same purpose and on the basis that the council had incurred significant costs in defending its actions, which would need to be met by taxpayer funding.

Critically, the tribunal observed that under the Environmental Information Regulations, there is a presumption in favour of disclosure, which is determinative in finely balanced cases such as was the case here.

As this case was decided by the FTT(IR), the decision will not set a binding precedent. Nonetheless, the decision serves as an important reminder to public authorities that, although the courts accept that there will always be a strong public interest in maintaining legal privilege so that public bodies are not deterred from freely discussing emerging issues with their legal professionals and taking formal advice as necessary, this right is not absolute.

Where a public authority is considering relying upon “the course of justice” exception to refuse an application for the disclosure of environmental information they will need to carefully weigh the public interest in favour of disclosure against the public interest against it, bearing in mind as it does so that in finely balanced cases the presumption in favour of disclosure contained in Regulation 12(2) Environmental Information Regulations will usually be determinative.

Contact

Natasha Davison

Senior Associate

natasha.davison@brownejacobson.com

+44 (0)330 045 2568

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