

EIR Reg 12(5)(b) – Exception: legal professional privilege

Malcolm Kirkaldie v IC & Thanet District Council

EA/2006/0001

4th July 2006

Cases:

Dunlop Slazenger International Ltd v Joe Blogges Sports Ltd [2003] EWCA Civ 901

Facts

The Appellant made a request to Thanet District Council (TDC) to view the legal advice regarding the night flying policy at Kent International Airport (KIA). TDC refused under FOIA on the grounds that the information was exempt as legal professional privilege (LPP) and the public interest favoured maintaining the exemption.

The IC found that the information was exempt under s.42 FOIA and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. Therefore, the decision was upheld.

Findings

FOI or EIR

TDC sought legal advice as to the enforceability of a s.106 Agreement under the Town & Country Planning Act 1990, land use and other planning matters relating to the way KIA operated. The Tribunal found such information came within the definition of environmental information under Reg 2 EIR as it was the sort of measure which “is likely to affect the elements and factors set out in the definition such as “air, atmosphere and noise” as well as measures or activities designed to protect these elements such as a night flying policy. Therefore the Tribunal found that s.39 FOIA applied and the case should be dealt with under EIR.

Validity of request

The request for information was made before the information was held by TDC. However, TDC issued a refusal notice 6 days after the information became held. Under Reg 5 EIR TDC had 20 days to comply with the request or issue a refusal notice. Also under Reg 9 TDC were obliged to provide advice and assistance to Mr Kirkaldie, for example, to make a new request if necessary. Pragmatically TDC did so, albeit under FOIA rather than EIR. The Tribunal therefore considered the request as a valid request under EIR.

Legal Professional Privilege

The Tribunal firstly had to consider whether a refusal notice issued under the wrong legislative provision still enables the public authority to claim an exemption or exception under the correct law, particularly where the exemption or exception is the same or similar. Reg 12(5) provides a similar exemption to s.42 FOIA in relation to LPP. The Tribunal allowed TDC to switch the exemption to the correct provisions. However the Tribunal found that in similar circumstances it would not necessarily

allow other EIR exceptions to be claimed if there was no similar FOIA exemptions already claimed. If the exception is engaged then under Reg 12(1) it is necessary to consider the public interest test (PIT).

Waiver of Legal Professional Privilege

Privilege can be waived where there is a partial disclosure. If the contents are quoted or summarised, there is waiver (*Dunplo Slazenger International Ltd v Joe Blogges Sports Ltd* [2003] EWCA Civ 901). Publication of privileged information to the general public will deprive the information of any privilege which previously existed. Waiver is an objective, not a subjective principle and therefore it is irrelevant whether a party intended to waive privilege for a particular document. In this case at a full TDC public Council meeting on 13 January 2005 the Chairman informed the meeting that legal advice had been taken and summarised the main opinion given. The Tribunal found that LPP had been waived and that the exception had not been engaged and therefore did not need to consider the PIT.

Conclusion

The Tribunal found that the Appellant made a valid request under the Environmental Information Regulations 2004 (EIR) and that the legal professional privilege exception did not apply. The Tribunal, therefore, required that Thanet District Council allow the Appellant to view and examine the legal Opinion.