Freedom of information: extending transparency to the private sector

Heather Rogers QC

Copyright 2015 One Brick Court - All Rights Reserved

Fish Legal v Information Commissioner

- [2015] UKUT 0052 (AAC)

- CJEU – Case C-279/12 - [2014] QB 521

"[42] According to settled case law, the need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an **autonomous and uniform interpretation throughout the European Union**, which must take into account the **context of that provision** and the **purpose of the legislation** in question."

Copyright 2015 One Brick Court - All Rights Reserved

Fish Legal - CJEU

1 In order to determine whether entities such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd can be classified as legal persons which **perform "public administrative functions"** under national law, within the meaning of article 2(2)(b) of Parliament and Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 09/313/EEC, it should be examined **whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law**.

[the "special powers" test – UKUT (below)]

Copyright 2015 One Brick Court - All Rights Reserved

Fish Legal - CJEU

2 Undertakings, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, which provide public services relating to the environment are **under the control** of a body or person falling within article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as "public authorities" by virtue of article 2(2)(c) of that Directive, if they **do not determine in a genuinely autonomous manner the way in which they provide those services** since a public authority covered by article 2(2)(a) or (b) of the Directive is in a position **to exert decisive influence on their action** in the environmental field.

[the "control test" – UKUT (below)]

Copyright 2015 One Brick Court - All Rights Reserved

Fish Legal – in the UKUT

“[110].....The extent to which the CJEU’s judgment will result in bodies being classified as public authorities is unclear and undecided, but potentially wide. As Judge Jacobs noted in his reference, the reasoning in these cases is potentially relevant to other privatised, regulated industries that deliver a once publicly owned service: electricity, gas, rail and telecoms. It will have to be applied to those and other bodies as and when cases arise. The outcome cannot be assumed for the purposes of deciding the cases before us.”

Copyright 2015 One Brick Court - All Rights Reserved

Fish Legal – in the UKUT

- The special powers test was satisfied [104-130]. The control test (a "demanding" one "that few commercial enterprises will satisfy") not [131-155].

- As society changes, so also there are changes in what constitutes "state power" [113]. "The boundaries between State and the private sector are less clear cut, varying from Administration to Administration, from Department to Department, and from country to country." The CJEU had identified an "an autonomous test of public authority for the whole of the EU that can achieve broadly consistent results across the various industry structures and across the varying views of the proper role of the State over time."

- Similar point noted in *Smartsource* [2010] UKUT 415 (AAC), [2011] JPL 455 at [105-106]: "...the notion of a "public authority" is both place- and time-specific...". UKUT in *Fish Legal* declined to comment on *Smartsource* [137].

Copyright 2015 One Brick Court - All Rights Reserved

Fish Legal - applied

National Asset Management Agency v Commissioner for Environmental Information [2015] IESC 51 (Supreme Court Ireland)

- NAMA was a public authority exercising public administrative functions. While obliged to act commercially, it had “special powers”: it was established under statute, which conferred substantial powers of compulsory acquisition, of enforcement, to apply to the High Court to appoint a receiver and to set aside dispositions; and which restricted or excluded certain remedies against it. “The establishment and operation of NAMA is a significant part of the executive and legislative response to an unprecedented financial crisis. The scope and scale of the body created is exceptional. Indeed if it were not so it would not be in a position to carry out the important public functions assigned to it in the aftermath of the financial crisis.”
- See [47-50]

Copyright 2015 One Brick Court - All Rights Reserved

FOIA – the scope

- General right of access to information "held" by a "public authority".

- FOIA public authorities are listed in the Schedule to the Act (with the power to extend the list s4) or may be designated by the SoS (s5) or are publicly owned companies (s6): s3(1).

- Information has to be "**held by**" the authority (other than on behalf of another person) or held by another person "**on behalf of**" the authority: s3(2).

Copyright 2015 One Brick Court - All Rights Reserved

Is the information within FOIA

- Power to designate under s5: exercised by statutory instrument
  2011/2598 (ACPO, Financial Ombudsman Service, UCAS)
  2015/851 (3x Network Rail companies)

UCAS v ICO [2014] UKUT 557 (AAC), [2015] ELR 112

- Designation was to ensure that bodies (whatever their formal legal status) exercising functions of a "public nature" are under FOIA [41]
- Information relating to the designated function (provision and maintenance of a central application and admission service) fell within FOIA. The fact that it was also "commercial" information did not take it outside the scope of the Act – though there would be relevant exemptions – and, in this case, s43(2) applied.

Copyright 2015 One Brick Court - All Rights Reserved

What is “information”?

Independent Parliamentary Standards Authority v ICO
[2015] EWCA Civ 388, [2015] 1 WLR 2879

- “[33] ..the very fact that detailed exemptions are provided within the complex analytical framework of FOIA shows that “information” itself does not need to be narrowly construed: on the contrary, there is no reason why effect should not be given in this respect to the purpose of the statute by construing it in as liberal a manner as possible.”

- Court considered the dividing line between “the record itself” and the “information” [41-45].

- The authority must comply with the requirement of communicating the information [51-52].

Copyright 2015 One Brick Court - All Rights Reserved

The importance of the exemptions

- Range of exemptions under FOIA include:-

- Section 43 “commercial interests” (trade secrets or where disclosure would, or would be likely to, “prejudice the commercial interests” of any person)

- Section 42 “legal professional privilege”

- Section 41 “information provided in confidence” (where disclosure of information obtained from another person would be an actionable breach of confidence)

- Section 40 “personal information”

Copyright 2015 One Brick Court - All Rights Reserved

The protection of commercial interests

R (Veolia ES Nottinghamshire Ltd) v Nottinghamshire County Council [2010] EWCA Civ 1214, [2012] PTSR 185

- Disclosure in the context of the Audit Commission Act 1998 (any interested person could inspect the accounts to be audited and specified documents "relating to" them).
- The court gave "relating to" a wide interpretation - but then read in a qualification to exempt confidential commercial information. Such information "may well constitute the life blood of an enterprise" [111].
- The exercise was fact and case specific [125-131].

- Note the difference of judicial approach to whether disclosure should be limited (for the purposes of the audit only): Rix LJ [157]. Etherton and Jackson LJ considered that point should not be decided in this case [163-167]

Copyright 2015 One Brick Court - All Rights Reserved

Fact and case specific

- Numerous examples

- **London Legacy Development Corporation**
  ICO Decision Notice: 3 September 2015
  Concession Agreement between LLDC and West Ham United FC.
  Section 43(2) and section 41.

- **Natural Resources Wales v Information Commissioner**
  [2013] UKUT 0473 (AAC)
  Balancing of interests (Reg 12) was for the First Tier Tribunal.

Copyright 2015 One Brick Court - All Rights Reserved

Importance of the culture and context

ICO

- Outsourcing and freedom of information – guidance document
- Transparency in outsourcing – a roadmap.
  - Better contracts
  - Transparency by design
  - Legislation
  - Standard Contract Terms

https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/03/ico-calls-for-greater-transparency-around-government-outsourcing/

Government

- Model Contract Terms
- Public Contracts Regulations 2015

Copyright 2015 One Brick Court - All Rights Reserved

....culture and context

- March 2015 – "transparency principles" - Transparency of suppliers and government to the public
- August 2015 - Procurement Policy Note 13/15: increasing the transparency of contract information
- https://www.gov.uk/government/publications/procurement-policy-note-1315-increasing-the-transparency-of-contract-information

- Consultation is open (to December 2015) on the Open Government plan for the UK
- http://www.opengovernment.org.uk/engage/open-government-project/

- Independent Commission on FOI (July 2015) will be announcing a call for public evidence (15 September 2015) – watch that space https://www.gov.uk/government/organisations/independent-commission-on-freedom-of-information

Copyright 2015 One Brick Court - All Rights Reserved

The effect of Article 10

Kennedy v Charity Commission [2014] UKSC 20, [2015] AC 455

- Lord Mance considered the Strasbourg cases in detail [57-101]. Rejected the argument that a new "direction of travel" in Strasbourg created a wider right. "[94] ...The Grand Chamber statements are underpinned not only by the way in which article 10.1 is worded, but by the consideration that the contrary view—that article 10.1 contains a prima facie duty of disclosure of all matters of public interest—leads to a proposition that no national regulation of such disclosure is required at all, before such a duty arises. Article 10 would itself become a European-wide freedom of information law. But it would be a law lacking the specific provisions and qualifications which are in practice debated and fashioned by national legislatures according to national conditions and are set out in national Freedom of Information statutes."

- Lord Toulson at [143-151] & Lord Sumption at [154].

Copyright 2015 One Brick Court - All Rights Reserved

The effect of Article 10 (continued)

- See also the analysis of ECtHR cases in **BBC v Sugar (No 2)** [2012] 1 WLR 439 by Lord Brown. He concluded:-
  "[94] ....article 10 creates no general right to freedom of information and where, as here, the legislation expressly limits such right to information held otherwise than for the purposes of journalism, it is not interfered with when access is refused to documents which *are* held for journalistic purposes."

- The Strasbourg cases (old and new) are listed and examined in **Kennedy**: that Sup Ct decision is now the subject of an application to the ECtHR.

- **Magyar Helsinki Bizottság v. Hungary** is pending before the ECtHR Grand Chamber (hearing listed for 4 November 2015). Article 19's intervention:-

https://www.article19.org/data/files/medialibrary/38015/MAGYAR-brief-Final.pdf

Copyright 2015 One Brick Court - All Rights Reserved

- Compare the Inter-American Court of Human Rights: *Claude-Reyes v Chile* & *Gomes Lund v Brazil.*
  - Article 13 of the American Charter on Human Rights, and Article 19 of the Universal Declaration, both refer to the right "to seek", as well as to "receive", information.
  - Though Art 10 ECHR does not include "to seek", that ought not to make any difference. Compare the development (in Strasbourg and domestic law) of the right to protect "reputation" as a key aspect of Art 8, even though no express reference to reputation in Art 8.1.

- Note for reference: ***Thesing, Bloomberg Finance v European Central Bank*** [2013] 2 CMLR 8 – discussion of Art 10 ECHR and Art 11 of the EU Charter of Fundamental Rights [69-81]

Copyright 2015 One Brick Court - All Rights Reserved

Case law impact where simple, clear statement

R (Guardian News & Media) v Westminster Magistrates Court ("GNM")
[2012] EWCA Civ 420, [2013] QB 618

- GNM sought access to documents before the court in extradition case. The CA considered comparative jurisprudence: principle stated in clear terms:-
  "85. In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. ... The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

Copyright 2015 One Brick Court - All Rights Reserved

- GNM based on long-established and fundamental common law principle (“open justice”) – no comparable “peg” for extension of FOI rights (absent any new ECtHR principle).

- www.cfoi.org.uk: useful source of information on FOI.

- Clauses 16-17 of the Transparency and Accountability Bill
  Attempt to extend by statute: would have included “specified disclosure provisions” into any contract with a public authority or any sub-contract.
  All “information relating to the performance of the contract” held by the contractor or sub-contractor, or any person on their behalf, would be deemed to be held on behalf of the public authority for FOIA and/or the EIR.
  http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0028/15028.pdf

Copyright 2015 One Brick Court - All Rights Reserved

- www.onebrickcourt.com
- clerks@onebrickcourt.com
- hxr@onebrickcourt.com

Heather Rogers QC
28 September 2015

Copyright 2015 One Brick Court - All Rights Reserved