

Recent environmental information cases in the Tribunals

Richard Turney

Key issues in Tribunal jurisprudence

- What is “environmental information”?
- A public authority?
- Engagement of exceptions

DfT, DVSA and Porsche Cars GB Ltd v Information Commissioner and John Cieslik

[2018] UKUT 127 (AAC)

- Information request from Vehicle and Operation Services Agency about Porsche Cayman cars
- Applied BEIS v IC [2017] EWCA Civ 844
- Main question was what was the “measure” in question
- Found that none of the safety measures related to the environment and accordingly not environmental information

Lancashire Fire and Rescue Service v IC EA/2018/0084

- Requests for information relating to emergency procedures for the Preston New Road fracking site
- Preliminary issue whether the information was “environmental information” for the purposes of the regulation 2(1) EIR
- Applying BEIS v IC [2017] EWCA Civ 844, FTT held that all the information sought was environmental information
- All of the information sought was “on” an “activity” which was likely to affect the environment, even if some of the information was not directly related to fracking activity

Ryan v IC

EA/2018/195

- Request related to information about negotiations on the disposal of land in Dartford by Kent County Council to Tesco
- Held that information was environmental information because “the measure in question is the Council’s approach to negotiations about land”
- Although there was a “significant public interest in understanding what happened with this deal”, the Tribunal found that the regulation 12(5)(e) exception applied

Poplar HARCA v IC

EA/2018/0199

- Issue was whether housing association was a public authority for the purposes of EIR

- Questions:

“i) Has Poplar been entrusted with the performance of services under a legal regime?

ii) Are those services of public interest?

iii) Has it, for the purpose of performing those services, been vested with special powers?”

Poplar HARCA v IC EA/2018/0199 continued

- Held not a public authority because not empowered to perform public functions (even if in fact it did)
- Other tests were satisfied on the facts
- Some regret in minds of Tribunal – clearly sceptical about the way the relevant test applied in *Fish Legal v IC* [2014] QB 521

- Request for all impact assessments of badger culling on protected species and sites
- Withheld by NE on grounds of public safety (regulation 12(5)(a)) on the basis that it could be used (with other information) to identify participants and cull zones with a risk to private property and the health and safety of individuals from protest activity
- Evidence heard in closed session on public safety risks
- Evidence also given by an anti-cull activist as to the nature of protest activities

Natural England v IC EA/2017/0160 continued

- Tribunal satisfied that the information would assist in identifying cull zones, but not satisfied that disclosure of the information would have caused direct or actual harm to public safety or an increased risk of harm to such an extent that it could be said to affect public safety
- Found that the incidences of harassment were “at the low end of future risk” and that damage to property, whilst more likely, was of less consequence

Rickard v IC

EA/2017/0187

- Request relating to a waste management contract which included the procurement of a controversial energy from waste facility in Cornwall
- Withheld by local authority on grounds of commercial confidentiality (regulation 12(5)(e))
- Held to be environmental information, applying BEIS
- Summarised test:

“(i) the information has to be commercial or industrial in nature; (ii) it has to be subject to a duty of confidence provided by law; (iii) the confidentiality has to be required to protect an economic interest; and (iv) that economic interest, and therefore its confidentiality, has to be adversely affected by disclosure of information.”

Rickard v IC EA/2017/0187 continued

- Noting conflicting principles:

“86. ... On the one hand is this imperative for some confidentiality. On the other is the imperative for transparency and accountability in public affairs so that, in the present context, residents and council taxpayers can assess on an informed basis whether their political representatives are spending wisely the money given to them in trust and ensuring the best interests of residents...

87. Finding accommodation for these conflicting principles is no easy task. There is no empirically correct answer and reasonable people may arrive at different conclusions...

89. The benchmark, in the Tribunal’s view, is that as much information should be publicly available as possible, without (short of compelling reasons) imperilling the very commercial sensitivities on which PFIs are founded...”

Carrabino v IC

EA/2017/0010

- Primary issue was whether the exception in regulation 12(5)(b) (adverse effect on the course of justice) was engaged
- Issue related to information held in respect of decision to serve noise abatement notice (i.e. before appeal proceedings had commenced in magistrates' court)
- Found that exception was engaged in respect of all of the information
- Considerable emphasis placed on ability of magistrates to control own procedure/evidence
- “Very limited” public interest in disclosure

Conclusions

- Broad approach to environmental information – but see Porsche case
- Perhaps an artificially restrictive approach to “public authority”
- Exceptions seem relatively easy to engage, but still a public interest/weighting test