

Judicial Review—costs of a third party disclosure application (*R (on the application of Good Law Project Ltd) v Secretary of State for Health & Social Care; Good Law Project Ltd v Bell*)

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Public Law analysis: This decision followed Mr Justice Fraser interlocutory decision in *Good Law Project Ltd, R v Secretary of State of Health*, where he considered applications for disclosure made by the Good Law Project (GLP). Shortly before the hearing, the parties agreed that an eminent academic, who had volunteered as an unpaid advisor to the Secretary of State for Health and Social Care (the SSHSC) during the coronavirus (COVID-19) pandemic, would disclose his emails concerning relevant government business. Given the unusual factual circumstances and how various applications had played out and been conducted, Fraser J departed from the general costs rule in respect of disclosure orders against non-parties CPR 46.1(2) by ordering that each party bear its own costs. Written by Jonathan Lewis, barrister Henderson Chambers.

R (on the application of Good Law Project Ltd) v Secretary of State for Health & Social Care; Good Law Project Ltd v Bell [\[2021\] EWHC 2783 \(TCC\)](#)

What are the practical implications of this case?

Fraser J observed that ‘custody of electronic communications in a fast moving technological world can present a range of legal issues that are not routinely encountered’ (at para [27]). This decision illustrates the difficulties that can arise when government business is conducted on private email accounts. Such email correspondence, depending on the circumstances, may be disclosable in judicial review proceedings.

Private parties might have concerns that providing disclosure might breach duties of confidentiality or breach their obligations under the General Data Protection Regulations. In those circumstances, a party might be reluctant to provide disclosure. However, the practical way forward, if those concerns are the only obstacle, is for the disclosing party to consent to an application for disclosure (as is what happened in this case, albeit far too late).

What was the background?

When the pandemic struck, the SSHSC asked an eminent academic (the Professor) to become involved in, among other things, a project to obtain lateral flow tests for conducting antibody testing on the population at large. The Professor was not an employee of the SSHSC nor was a civil servant (at para [13]). The Professor’s terms of appointment did however require the Professor to comply with the seven principles of public life (the Nolan Principles). These include accountability and openness. The Professor was not given a governmental or departmental email account and just used university email account to conduct governmental business.

The Professor identified Abingdon as a suitable company and recommended it to the government. GLP judicially reviewed the award of certain contracts to Abingdon for the manufacture and supply of rapid coronavirus antibody tests. One of GLP’s grounds related to state aid, said to have been provided to Abingdon by the SSHSC both upon the award of the contract, and throughout its life.

In these proceedings, the SSHSC decided to offer standard disclosure to GLP (which is not routinely used in judicial review proceedings). The Professor was identified at an early stage in this process as

a custodian. However, the SSHSC did not disclose any of the Professor's emails, and GLP sought disclosure of them. The SSHC's position was that these emails were not within the Professor's 'control'. The Professor's employer's stance was that it would not allow the disclosure of the emails. The Professor simply followed its guidance (at paras [21] and [22]).

The disclosure application was considered by Fraser J in *Good Law Project Ltd, R v Secretary of State of Health* [2021] EWHC 2595 (TCC). On that occasion, Fraser J considered that fairness dictated that if GLP wanted disclosure of the Professor's emails, it ought to make an application for third-party disclosure against him.

What did the court decide?

Fraser J began by setting out the relevant provisions of the CPR, beginning with the overriding objective (CPR 1.1) (at para [7]). He noted that, as the power to award costs (CPR 44.2(1)) is a discretionary one, and as such, the court must seek to give effect to the overriding objective when exercising it (at para [8]).

CPR 31.17(3) sets out the requirements for a third party disclosure order—the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties, and disclosure is necessary in order fairly to dispose of the claim or to save costs. If those jurisdictional hurdles are surmounted, the court has a discretion whether to make such an order. Fraser J relied upon *Henry v News Group Newspapers Ltd* [2011] EWHC 1364 (QB) (at para [9]) as establishing that this particular jurisdiction is exceptional and intrusive in nature.

CPR 46.1(2) sets out the general rule in respect of orders for disclosure against non-parties. It provides that the general rule is that the court will award the person against whom the order is sought that person's costs of the application and of complying with any order made on the application. However, the court may make a different order under CPR 46.1(3), having regard to all the circumstances, including at (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application.

Fraser J considered the Professor's employer refusal to voluntarily provide the emails was 'wholly unreasonable and needs to be taken into account when considering the correct costs order' (at para [22]). As it happened, the university changed its stance the day before the hearing and offered to provide the disclosure sought (at para [23]). Its initial refusal 'made the procedural mechanism adopted essential so that the matter could be considered by the court fairly' (at para [24]).

While acknowledging that he had not heard full argument on the point, Fraser J found that the university's initial refusal to provide disclosure was potentially wrong (at para [25]). This was so particularly given that the Professor had agreed to submit himself to the scrutiny necessary to ensure accountability, and also only to withhold information if there were 'clear and lawful reasons for so doing'. He suggested that if a disclosure order had been made against the SSHSC, it is one that the Professor ought to comply with to the extent that it related to emails conducting this type of government business (at para [25]).

Fraser J observed that if the university had adopted a 'pragmatic and reasonable approach', then the vast bulk of the costs of the application would have been avoided (at para [26]). He did not 'see why "the wishes of the University" should be seen as trumping the interests of justice' (at para [28]). He suggested it might be sensible for such advisers in the future, as a matter of routine, to be provided with government email accounts (at para [27]).

Fraser J departed from the general costs rule under CPR 46.1(2) which would have resulted in the Professor and university having their costs (at para [29]). He considered that it was not reasonable to oppose the application for disclosure (at para [30]). On the other hand, he considered that GLP's application was originally far too wide and was eventually narrowed a great deal (at para [32]). He decided that each party should bear its own costs (at para [32]), that being a 'just outcome in all the circumstances, given the highly unusual features of this application'. The SSHSC offered to bear the costs of the disclosure exercise itself (at para [33]). Fraser J sanctioned it being carried out by solicitors and a third-party electronic disclosure provider appointed by the SSHSC (at para [37]). He considered that confidentiality issues could be resolved by the establishment of a confidentiality ring. He noted that nothing 'untoward' should be read into the costs order made (at para [39]).

Case details

- Court: Technology and Construction Court
- Judge: Mr Justice Fraser
- Date of judgment: 22 October 2021

Jonathan Lewis is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysiscommissioning@lexisnexis.co.uk.

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