

Section 44 Northern Ireland Act 1998

1. The Committee for the Environment (the Committee) is a statutory Committee of the Northern Ireland Assembly (the Assembly). It sought advice on the extent and use of the statutory powers under section 44 of the Northern Ireland Act 1998 (the Act) to compel the production of documents held by the Department of the Environment relating to a planning application for a new visitor centre at the Giant's Causeway. This paper sets out the background to the request and a summary of the legal advice provided to the Committee.

Background

2. The Assembly and the statutory committees enjoy a power under the Act to require a person to attend for the purpose of giving evidence and/or to produce documents in his custody or under his control. The power is exercisable in relation to matters which have been transferred to the Assembly or other matters in relation to which statutory functions are exercised by Ministers or Northern Ireland Departments.

3. With regard to procedure, once the witness or the holder of a desired document is identified, it falls to the Speaker to furnish a written notice to that person. The written notice must specify the information sought and the arrangements for its production (sections 44 (7) and (8) of the Act). Failure to comply with a proper notice may constitute a criminal offence as set out in section 45 (1) of the Act.

4. Proceedings for such an offence require the consent of the Director of Public Prosecutions (section 45 (4) of the Act). It is a defence in any such prosecution for the defendant to prove that he had "a reasonable excuse" for his refusal or failure (section 45 (2) of the Act).

5. Section 44 (9) limits the scope of the information/documents which are compellable. The test is set by reference to the standard which will be applied in the courts of Northern Ireland. The provision says

"A person is not obliged under this section to answer any question or produce any document which he would be entitled to refuse to answer or produce in proceedings in a court in Northern Ireland".

The planning application at the Giant's Causeway

6. On 10 September 2007 the Minister announced that she was "of a mind" to approve the planning application by Seaport. In subsequent correspondence with the Committee the Minister explained that the planning application is "still under consideration by Planning Service officials and I have yet to make a decision on the matter". The Minister records in the same letter that she asked Planning Service to "engage with" the developer, the National Trust and Moyle district Council on "a number of issues raised by the proposal" which she considers worthy "further consideration". The 4 matters she identified were:

- i. the impact of the proposal on the World Heritage Site;
- ii. its ability to integrate into the landscape;
- iii. its relationship to other development in the area; and
- iv. the relationship to the existing visitors' centre

7. In her letter of 1 January 2008 to the Committee, the work on the matters was described as "ongoing" and it was indicated that a "final decision" would be made following a "further report from Planning Service on the outcome" of the work.

The request for information by the Committee

8. Following the announcement by the Minister on 10 September 2007 that she was "of a mind" to grant the planning application by Seaport, the Committee sought to gain access to certain documents held by Planning Service in connection with the application. The Minister made available to the Committee at Parliament Buildings certain documents (but not the entirety of the Planning Service file). The papers disclosed to the Committee represented what was available to a member of the general public under the Department's "open file" policy. That policy did not allow access to the entire file held by the Department and, in particular, there were certain identified internal Planning Service documents which were not disclosed despite the several requests by the Committee.

9. The Minister contended that disclosure of the remaining papers was premature but that following the promulgation of her decision, access would be afforded to the Committee to all the appropriate documents.

Legal advice

10. The Committee was dissatisfied with the stance of the Minister and sought legal advice on the powers conferred by section 44 of the Act to call for documents. Some advice was

provided by the Assembly's in-house counsel and some was obtained from an external adviser.

11. Legal advice given to the Committee in November 2007 was that –

1) Any exercise of the power could be amenable to judicial review. It would therefore be prudent of the Committee to ensure that any decision to exercise the power was legal and rational, and that procedural fairness was provided.

2) The Committee should not take into account irrelevant considerations, or fail to take into account relevant considerations. Furthermore, the decision should not be 'so outrageous in its defiance of logic and of accepted moral standards that no sensible person could have taken it'.

3) The Committee should –

- state to the Department and to any person on whom the notice might be served that it intended to consider exercising its power under section 44;
- it should clearly identify the documents or types of documents and the particular matters to which they related;
- it should provide the Department and any person on whom the notice might be served with a reasonable opportunity in which to respond;
- it should adequately consider the response and all other relevant considerations; and it should, when exercising the power, state its reasons for so doing.

12. Further advice from legal advisers in January 2008 was that any attempt to invoke the section 44 powers in this case would fail.

13. The legal advisers considered that there was substance in the Minister's position on prematurity. It was expected that a court would support the need of a Minister to take time and privacy to consider all material considerations and papers in reaching a proper and informed decision. Bearing in mind the constraints in section 44 (9) of the Act, that the test of what is compellable will be that applied in the courts, the Minister would not be expected to disclose at that time the documents she had under her consideration until she had completed her deliberations.

14. If the Minister did receive a notice under section 44 (7) which she did not answer satisfactorily, no proceedings could be brought without the consent of the Director of Public Prosecutions. The view of the legal advisers was that there was no prospect of such

proceedings because it was premature to insist on disclosure of the documents and failure to do so would amount to a "reasonable excuse" within section 45 (2) of the Act.

Conclusion

15. The legal advisers concluded that –

- 1) The powers in section 44 of the Act were not appropriate in the circumstances.
- 2) The documents under active consideration could properly be withheld by the Minister pending her decision.
- 3) A refusal to disclose such documents in advance of her decision was a reasonable position and one which would find favour with the courts and not result in a prosecution.
- 4) The exercise of these powers lies open to scrutiny in the courts.

**Committee for the Environment
February 2008**