From: Nick Smith
Sent: 09 October 2009 09:32
To: 'Fitchie, Andrew'
Subject: RE: Legal Privilege and tie documentation

Thanks Andrew

We should certainly discuss these issues, especially re the CEC reporting.

As an aside, I am of the view that the Cairns FOI decision was flawed. I recommended appeal (as did my SOLAR colleagues), but that option was not taken forward. Unfortunately this may cause some difficulties as you mention.

Kind regards

Nick

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Please note that I am not in the office on a Monday

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 08 October 2009 16:02
To: Nick Smith
Subject: FW: Legal Privilege and tie documentation

FOISA Exempt and legally privileged

Nick

The context and the wider advice. Applicable to CEC's involvement as asset owner and banker.

kind regards

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From: Fitchie, Andrew
Sent: 10 September 2009 19:08
To: Susan Clark; Dennis Murray
Cc: Steven Bell; Jordan, Stuart; Moffat, Hazel; 'Stewart McGarrity'; 'Richard Jeffrey'; Graeme Bissett
Subject: Legal Privilege and tie documentation

Legally Privileged and FOISA Exempt

Susan

Referring to our conversation yesterday and Steven's earlier e-mail in which he forwarded an extract from Deloitte's review.

We agree with Deloittes view on the need to shelter **tie's** internal documentation in the most effective and sustainable way from any "fishing exercise" conducted by BSC or other parties to cause discomfort or damage and we have ourselves advised on this in terms of individual FOISA requests in the past.

Legal professional privilege

Absolute protection from disclosure (either under FOISA or under the court rules of disclosure) will attach to all DLA Piper and Counsels' advice and opinions and similar communications given to **tie** and to CEC (as clients) that are concerned with DRP and any matters which are in contemplation of or directly connected to the DRP process. Likewise, communications from **tie**/CEC direct to DLA Piper on these matters will be under the umbrella. For unfortunate reasons, this covers commentary from us on a great deal of what might otherwise have been routine contract administration traffic.

Note that this privilege shield can be diluted or inadvertently but entirely waived by (i) the inclusion of or detailed reference to legal advice (or parts of it) in **tie** or CEC management papers or internal reporting (ii) wider distribution within **tie/CEC** to personnel who are not immediately involved in decision-making (ii) third parties not engaged by **tie** to assist on the DRPs.

For that reason, we would recommend that the distribution of our legal advice is restricted to those **tie**/CEC staff whose function it is to instruct on, contribute to and manage the DRPs. If our advice or Counsel's opinion is required for a wider audience, one way, but not an absolutely secure way, to protect privilege is to make sure that relevant advice is deployed in its original form, accompanied by a covering note from **tie** which explains why the the advice is shared and that this sharing is on strictly confidential basis and no waiver of privilege is intended or to be implied. Clearly, the other way is for the advice to be delivered orally but this is likely to be cost effective and practical only on limited occasions.

The importance of keeping the legal advice and opinions separate from corporate reporting is highlighted by a very recent FOISA Commissioner's decision that went against CEC - where parts of a Counsel's opinion had been referred to on a CEC website and the ruling was that the entire opinion was disclosable, pursuant to a FOISA request. The relevance here is that documentation enjoys FOISA exemption, if it can be shown to enjoy legal professional privilege, in the sense of communications/advice in the context of imminent or on-going legal proceedings.

Confidentiality

The cloak of commercial confidentiality (though this may be enough to exempt under FOISA) is not sufficient to protect internal correspondence from being potentially disclosable under the rules of discovery during contentious proceedings and it is in the area of internal reporting about **tie's** cases, claims and defences and their prospects and strategy for resolving or settling disputes that considerable care is required. Here, I would like some further guidance from specialist colleagues on how to assist **tie** in maximising legitimate and workable protection and I will revert on this early next week.

Duty to disclose

Under the first stages DRP, the parties owe a duty to one another (contractual) to disclose what will allow a party to understand the other party's arguments, not really more. In contrast, in court proceedings, the parties owe that duty to the Court and their lawyers are bound by professional duty to advise their client on proper disclosure which encompasses not just what the party considers is useful to its arguments but everything that is relevant to the issues, including material which might be negative to a party's case.. In my experience, this sometimes causes problems where the advisers to the party litigating do not fully understand how, when ,where and why their client generates internal documentation and data - particularly financial reporting.

There is a distinction between adjudication - where the adjudicator has limited powers to require disclosure but, as in our DRP provisions, can draw inference or exclude submissions/arguments because of a failure to disclose relevant material and the Court - which can enforce disclosure and ultimately hold a party in contempt if the non-disclosure is blatant or deliberate. Clearly one of the most frequent areas of delinquency is where a party possesses or controls documents that are unhelpful to its case and either chooses not to disclose these or does not do so out of negligence. lawyers must be diligent here and it will sometimes be very difficult for the counterparty to know that these papers or information sets exist. Onerous request for for disclosure are sometimes used as a weapon in proceedings.

At a very practical level therefore, the job of preparing and managing disclosure is always made very much easier and efficient by the categorisation of client data and archives. Otherwise, many hours are needed to review files and classify material carefully with the inevitable risk that non-disc losable material ends up slipping through and opening an avenue of disclosure that should never have been available to the other party. Equally important is understanding and recording what you are disclosing: as an example, on a large discovery exercise, I once found a set of negatives discarded in a non-descript set of site papers.This turned out to be photos of critical contractors' plant that had arrived on site from another job in totally unusable condition, due to lack of spares, and was never deployed. The photos had been used by the contractor's Project Manager to complain to head office about the state of the plant they had shipped to his job - and were ideal for our client to attack and take apart the contractor's delay claims for stand-by of this equipment that had never left his compound or had but had broken down immediately.

I will revert shortly on this topic with practical suggestions.

kind regards

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