

## Public authorities' duty to co-operate

The Environment Act 2021 (the 'Act') establishes that public authorities<sup>1</sup> are under a duty to co-operate with the Office for Environmental Protection (the 'OEP'). Section 27(1) of the Act provides:

*"A person whose functions include functions of a public nature must co-operate with the OEP, and give it such reasonable assistance as it requests (including the provision of information), in connection with the exercise of its functions under this Act."*

This short briefing note explores the meaning of this duty and the OEP's expectations of public authorities regarding co-operation.

### Meaning and examples

The duty requires that public authorities both co-operate with the OEP and give it such reasonable assistance as it requests in connection with the exercise of its functions.

The duty applies across all of the OEP's functions – scrutiny, advice and enforcement. There are stronger obligations on public authorities to provide information requested by the OEP in the context of its enforcement functions (see, for instance, ss. 35 (information notices) and 36 (decision notices) of the Act).

The duty is a general one. However, the precise nature and content of co-operation and assistance will be case-specific. Instances of co-operation may include:

- Providing information to the OEP to help its preparation of reports into the implementation of environmental law or the government's environmental improvement plans and targets
- Meeting the OEP to discuss the public authority's experience of the implementation of particular environmental laws
- Providing data about the status of the natural environment
- Co-ordinating activities or work programmes with the OEP, such as where a public authority may comment or advise on government proposals in an area where the OEP is also being asked to advise
- Candidly providing information to help the OEP determine whether to investigate a complaint it receives or undertake an investigation of its own volition.

### *Meaning of "reasonable assistance"*

This duty is cast widely, and Parliament has made clear in the Act the considerable public interest in the OEP being able to independently scrutinise public authorities' implementation of, and compliance with, environmental law. The duty therefore

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<sup>1</sup> Section 27(2) clarifies that the duty extends to all public authorities other than: courts, tribunals, Parliament, the Northern Ireland Assembly, the Scottish or Welsh Parliaments, the Scottish or Welsh Ministers, people exercising a parliamentary function and bodies which only perform Scottish or Welsh devolved functions.

requires a high level of co-operation and assistance from public authorities. Co-operation with the OEP is also in a public authority's own interests. For instance, it provides an early route for engagement that will save effort in the long-run. The OEP aims to work in an open, partnering manner with public authorities to achieve Parliament's and the Government's objectives of greater environmental protection and enhancement.

Public authorities must give "reasonable" assistance to the OEP. Considering the context above, there is a low bar for when assistance the OEP may request should be regarded as reasonable. What is reasonable will, though, vary from case to case. A number of factors could be relevant to the reasonableness of a request. For instance: the scale of the assistance requested; the implications for the OEP's ability to effectively exercise its functions; and the nature and extent of the public authority's existing obligations to perform the task/provide the information required.

### **The duty to co-operate and public authorities' confidentiality obligations**

Confidentiality should not itself normally be a reason not to provide information the OEP requests. Contractual confidentiality provisions generally allow for disclosure where required by law, for example. Subject to exceptions, the OEP must keep any information received from public authorities confidential - see below.

The Act provides that no obligation of secrecy imposed by statute or otherwise will prevent the provision of information to the OEP if sought in connection with an OEP investigation or other enforcement activity. This does not apply to information sought by the OEP for the purposes of its other functions.

The Act also makes clear that a public authority is not required to provide information to the OEP where it would be entitled or required to withhold inspection in civil proceedings on the grounds of privilege (or, in Scotland, confidentiality of communications), public interest immunity or due to data protection legislation. Regarding data protection, this may mean that before sharing information a public authority may redact personal data and/or agree with the OEP to enter into a data sharing agreement.

### **OEP disclosure of information received from public authorities**

The Act establishes that 'environmental information' provided by public authorities to the OEP is presumed to be held in connection with confidential proceedings. This means that it can be protected from disclosure in response to information requests. The Act also provides that, subject to exceptions, the OEP must not disclose information provided to it pursuant to the duty to co-operate or in response to an OEP information or decision notice (s.43(1)).

This general rule should provide comfort to public authorities. However, as the Act establishes exceptions to this rule, the OEP cannot guarantee that information will never be disclosed. For instance, the OEP may disclose information where the public authority consents or where the OEP has concluded that it will not take any further steps in relation to the matter.