



# A conspiracy theorist's phone, disclosure, and the challenges posed by BIM files.

**Whilst they might not seem immediately related, the Alex Jones defamation case on the Sandy Hook school shooting raises interesting issues regarding the disclosure of BIM files.**

An essential principle of the client/lawyer relationship is the privileged status of information shared between them. This information might be contained in traditional media, such as hard copies of letters or more sophisticated digital drawing files. Two recent and strikingly different cases highlight the potential for the inadvertent disclosure of privileged information and the importance of correctly understanding what might be contained in a hard or digital file.

In the recent case of *Pickett v Balkind*,<sup>1</sup> the claimant's lawyer disclosed an unredacted letter to the defendant in support of a request for an adjournment. This letter was disclosed in relation to two paragraphs to support the reasons for the adjournment. However, the letter indicated that the claimant's legal advisor had been involved in drafting the experts' joint statement. Such involvement was a breach of the TCC Guide.

In addition, the claimant's expert report included an opinion that relied upon a previously undisclosed report prepared by a third party. Having relied upon the contents of this third-party report, the defendants sought the disclosure of the report. The claimants attempted to reassert privilege in respect of both the letter and the earlier report. This was refused by HHJ Paul Matthews, who determined that the claimant's actions had disclosed both the third-party report and the full content of the letter.

The case is strikingly similar to the precedent set by *Great Atlantic Insurance Co v Home Insurance Co*.<sup>2</sup> In this case Counsel relied upon two paragraphs of a document which also included discussions about the plaintiff's legal strategy.

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<sup>1</sup> [2022] EWHC 2226 (TCC)

<sup>2</sup> [1981] 1 WLR 529



In both these cases, the accidental disclosure is related to written material which could have been identified before issuing. Whilst the content of a letter or report might be quite transparent, the information contained within a digital file may not be obvious.

In the Alex Jones case, the disclosure of privileged information occurred when his attorney released a file containing a full copy of Alex Jones's phone data. It is unclear how this file came to be released. It could, for instance, have been as simple as someone failing to understand what the file was and what it contained.

Whilst the content of a file titled "*Alex\_Jones\_Phone\_Backup*" might be quite apparent, a file titled "*AJ00032*", stored in a location with potentially thousands of other documents might be less so. The lack of transparency in naming is even more significant for the construction industry, where defined naming conventions such as BS EN ISO 19650<sup>3</sup> result in file names being alphanumerical strings that have some meaning to construction professionals but less to those outside the industry.

Whether it was disclosed in error or intentionally but without an understanding of what it contained, the issue in the Alex Jones case was the nature of the content disclosed in the single file. Not only would the file contain text messages, emails, and pictures, but it would also provide all the corresponding metadata for that information. Metadata is defined as<sup>4</sup> "*Data about Data*" and "*It may include (for example) the date and time of creation or modification of a word-processing file, or the author and the date and time of sending an email.*".

The nature of the file and volume of data contained in Mr Jones' phone backup might reasonably be compared to a Building Information Modelling ("BIM") file. Both are single files that cannot be opened and viewed without specialist software, and both contain multiple sets of information with all the associated metadata.

A designer's BIM file can potentially contain almost all of its data for a project and, if standard practice is followed, far more information than was ever shared with other parties during the life of a project. The metadata within a BIM file also represents far more than "*the date and time of creation or modification of a word-processing file*".

As such, it is standard practice that when a designer shares BIM information, the master<sup>5</sup> BIM file is stripped back, and only a discrete subset of the information is provided within the shared<sup>6</sup> BIM file. Limiting the information in this fashion allows the shared data to be verified, and, in turn, the associated risk of issuing the information is understood.

Should a dispute arise the information in a master BIM file could be beneficial to an opposing team because it can contain design options, calculations, user access records, and clash detection analysis, which relate to a designer's in-house design process rather than its contract deliverables. Designers and their legal teams therefore need to be aware of the information that might be contained within a master BIM file and take steps to identify what might already have been shared and ensure that the content of what is to be disclosed is fully understood.

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<sup>3</sup> BS EN ISO 19650-1:2018 Organization and digitization of information about buildings and civil engineering works, including building information modelling (BIM). Information management using building information modelling - Concepts and principles

<sup>4</sup> As defined by the Ministry of Justice Practise Direction 31B (7)

<sup>5</sup> Master in this context refers to the designers' working files from which 2D and 3D information are extracted. In the normal course of business, this master information is unlikely to be shared with third parties.

<sup>6</sup> This issued file containing a validated subset of information is the defined contractual BIM deliverable for a designer working within a collaborative BIM environment.

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Unlike phone data, where it would be self-evident that a file would include copies of text messages, it would not be self-evident to a legal team what information might be contained in a master BIM file. In a large project, the volume of information and the number of different ways BIM files can store data is such that even an experienced user might not know what the full content of a master BIM file includes. The consultant and legal team need to recognise the potential risks when releasing a master BIM file if it is released in a dispute.

The issue related to BIM files is no different from any other disclosed file. It is one of knowing exactly what information is being issued. However, when compelled to release a master BIM file, can a party effectively redact the file to limit the information, or will the courts enforce the release of all the embedded data?

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