:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2011/0269&0285**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notices No: FER0379794
Dated: 19 October 2011

The Information Commissioner's Decision Notices No: FER0390168
Dated: 8 November 2011

Appellant: **Uttlesford District Council**

Respondent: **The Information Commissioner**

Heard at: London Civil Justice Centre

Date of Hearing: **10 May 2012**

Before

Chris Hughes OBE

Judge

and

Michael Hake and N**igel Watson**

Tribunal Members

Date of Decision: **6 June 2012**

Attendances:

For the Appellant: Michael Perry

For the Respondent: Robin Hopkins

Subject matter:

Freedom of Information Act 2000

Environmental Information Regulations 2004

Human Rights Act 1998

Treaty on European Union

Directive 2003/4/EC

Cases:

Ahmed Kamal Balabel, Elsa Balabel v Air India 1988 WL

Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48

R v Derby Magistrates' Court Ex p B [1996] AC 487

AM & S Europe Limited v Commission of the European Communities. Case 155/79.

Ordre des barreaux francophones et germanophone, Ordre français des avocats du barreau de Bruxelles, Ordre des barreaux flamands, Ordre néerlandais des avocats du barreau de Bruxelles v Conseil des Ministres Case C-305/05

Office of Communications v Information Commissioner. C-71/10

DCLG v The Information Commissioner & WR [2012] UKUT 103 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeals and substitutes the following decision notice in place of the decision notices dated 19th October and 8th November 2011.

IN THE FIRST-TIER TRIBUNAL Appeal No: EA/2011/0269&0285
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: 18 May 2012

Public authority: Uttlesford District Council

Address of Public authority: Council Offices, London Road, Saffron Walden, Essex, CB11 4ER

Name of Complainant: Mr P Gadd

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeals and substitutes this decision which stands as the decision notice in place of the decision notices dated 19 October 2011 and 8 November 2011.

Dated this 6th day of June 2012

Judge C G Hughes

REASONS FOR DECISION

Introduction

1. In early 2010 it became a matter of public comment and interest that Uttlesford District Council would during the course of the year be required to consider and decide upon two planning applications in respect of retail developments from two major supermarket chains. The Council made preparations to consider these applications; in the course of these preparations a series of e-mails was sent in February 2010 which became the subject of DN FER0390168 and committee reports where drafted, the preliminary versions of which became the subject of DN FER0379794. The meeting to consider these applications was initially scheduled for November, but adjourned to December 2010.

The requests for information and the decisions of the Information Commissioner

2. The complainant wrote to the Council on two occasions seeking information regarding these planning applications under FOIA.

3. On 18 November he wrote seeking a considerable amount of information organised under 6 bullet points. Following analysis and exchanges between the Council and the complainant the Council dealt with the request under the Environmental Information Regulations and released all the information sought except for two specific sorts of information which fell within the terms of the request:-

    - Emails between the Council and its planning barrister which the Council considered fell within regulation 12(5)(b), and
    - Draft reports relating to the developments proposed by Tesco and Sainsbury which the Council felt were protected from disclosure by 12(5)(b) and 12(4)(d).

4. The Commissioner concluded that the e-mails fell within regulation 12(5)(b) as they attracted legal professional privilege, that the issues they dealt with were still live and the public interest would not be served by disclosure of the e-mails. (DN paragraph 43). He concluded that the draft reports (after the redaction of Counsel's comments) did not fall within the scope of regulation 12(5)(b) but would, once the finished documents had been produced, constitute unfinished documents and thus fell

regulation 12(4)(d). The Council argued that the draft reports were of minimal interest since the final reports had been published and the planning decisions were based on the final reports and not on the drafts. Disclosure of the drafts would highlight differences and distract public focus away from the real issues underlying the decisions; it further argued that the issues were still live and the subject of the planning appeals process. The Commissioner having applied the public interest test concluded that public interest supported the disclosure of the draft reports.

5. On 25 January 2011 made a further portmanteau request which included:-

"Copies of all e-mails, letters, documents and other correspondence of any nature whatsoever between any employees, agents or representatives (including councillors) of UDC and [the Council's chief executive] and relating to the Sainsbury's Application or the Tesco Application.

6. During the course of the handling of the request by the Council a specific group e-mails passing between officers of the Council or between Councillors and officers and relating to whether "certain named councillors should vote on the applications at a forthcoming Development Control Committee meeting" was identified which the Council considered should not be disclosed.

7. The Commissioner considered that these e-mails should be considered under EIR. He concluded that

"It is not necessary for the information itself, i.e. in this case, the contents of the emails in question, to have a direct effect on the elements of the environment or to discuss or record such an effect. The relevant consideration is whether the information is *on* something falling within the subsections of regulation 2(1)."

8. The Commissioner therefore considered that the request was for disclosure of internal communications and it was therefore necessary to consider where the balance of public interest lay. He concluded that:-

"if it is questionable whether some of these members are able to perform their duties i.e. vote on a particular application put to the committee, there is a considerable public interest in knowing why."

9. He noted the purpose of regulation 12(4)(e) (which provides an exemption from disclosure of internal communications) was to protect internal thinking space within

an organisation but concluded that the public interest moves towards disclosure once decisions and policies have been formulated. The e-mails were sent a considerable time before the Committee meeting and by the time the request was received the members had voted. He therefore concluded that the balance lay in disclosure.

The appeal to the Tribunal

10. The Council appealed against both decisions. Mr Gadd elected to take no part in the proceedings.

11. With respect to the draft committee reports the Council maintained that they attracted legal professional privilege and that the refusal of planning permission had been at the time of the request considered likely to be subject to appeal and was indeed the subject of appeal. It argued that:-"The outcome of that appeal is an aspect of "the course of justice"" and therefore attracted privilege. The legal advice remained live, other aspects of the legal advice in this matter had been accepted by the Commissioner as not being suitable for disclosure and in logic the Commissioner should take the same position with respect to this draft reports. The Council also submitted that the positive public benefits of disclosure were limited as the drafts would cause confusion.

12. The Commissioner argued that the draft reports existed separately from the need to obtain legal advice and therefore could not fall within legal professional privilege. In any event the redaction of the draft reports to exclude counsel's comments would mean that it was not possible to determine what advice had been received. He submitted that the public interest in maintaining confidentiality was not strong, distraction was not a significant problem and the process would show the Council in a good light.

13. With respect to the e-mails concerning voting the Council argued that the information they contained did not fall with the definition of environmental information in regulation 2(1), rather they related to the Members Code of Conduct under the Local Government Act 2000 and should fall to be considered under FOIA. The Council relied upon its previous argument under FOIA that disclosure would prejudice the conduct of public affairs. In the event that EIR applied the Council argued the overwhelming public interest in officers being able to advise members on probity issues without the matter coming into the public domain.

14. The Commissioner maintained his stance that the e-mails fell within EIR and submitted that:-

"The task for the Tribunal is to assess the likely consequences of disclosure of this particular information, rather than the likely consequences of routinely disclosing emails relating to councillors seeking advice from officers. In the Commissioner's submission, it is improbable that officers would decline to provide such advice simply because of the disclosure of their emails, approximately a year after their being sent and several months after the resolution of the relevant issue, given the particular facts of this case."

The questions for the Tribunal

15. The Tribunal has to resolve two questions with respect to each set of documents.

16. With respect to the draft committee reports it was not disputed before the Tribunal that they comprised environmental information and therefore fell to be considered under the Environmental Information Regulations. However the Council contended that they should be treated as documents protected by legal professional privilege whereas the Commissioner in his DN paragraph concluded they were not. The Council maintained that the balance of interest on disclosure was firmly in favour of non-disclosure. The Commissioner contended that, irrespective of the question of privilege, the public interest was in favour of disclosure.

17. With respect to the e-mails the Council argued that they were not environmental information and rather should be seen as dealing with questions of probity and governance and as such should be considered under FOIA. The Commissioner in his concluded that they were environmental information. Again the parties disputed where the balance of public interest lay.

Consideration of the issues raised by the e-mails DN FER0390168

18. It is clear that there must be some bounds to the application of EIR. The EIR are intended to delineate a policy space in which information is more widely available to the public than would otherwise be the case. Counsel for the Information Commissioner submitted that the test is one of remoteness. The Commissioner in his DN at paragraph 8 referred to his "relatively broad" interpretation and stated that it

was not necessary for the information itself "to have a direct effect on the elements of the environment."

19. It seems to the Tribunal that the correct method is to adopt a purposive approach to the natural meaning of the words of the Regulations in the light of the aids to interpretation available – most notably the recitals.

20. Recital 6 records the legislative intent to provide interested parties with a single, clear and coherent legislative text – reflecting the importance of legal certainty in the community legal order.

21. Recital 10 summarises the intention of this Directive (which was replacing 90/313/EC):-

    "The definition of environmental information should be clarified so as to encompass information in any form on the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it, on cost-benefit and economic analyses used within the framework of such measures or activities and also information on the state of human health and safety, including the contamination of the food chain, conditions of human life, cultural sites and built structures in as much as they are, or may be, affected by any of these matters."

22. At this point, while noting the breadth of the intention, it is worth noting that the second half of the statement – "… information on the state of human health and safety…etc" is intended to fall within scope only "in as much as they are, or may be, affected by any of these matters" that is a clear example of what Counsel for the Commissioner would consider as "remoteness".

23. The definition in EIR directly transposes the wording of the directive:-

    "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

    (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

24. The logical structure and priorities embedded within the definition are noteworthy. The primary focus is on the elements covered in (a) the physical and biological elements of the natural environment.

25. The matters covered in (b) are the products and by-products of human ingenuity which are "… discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)". The consequence of this is that, for example, a noise, energy or radiation source within an appropriately insulated building does not fall within (b) since the insulation means that it is not making a discharge to the environment.

26. The policies and other matters in (c) are again logically subordinate to the preceding paragraphs and are within the scope of the regulations if they are "affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements." The final clause "measures or activities designed to protect those elements" are measures to protect "the state of the elements of the environment".

27. It is therefore appropriate now to consider the status of the Code of Conduct for Uttlesford District Council. Can it be said to fall within the scope of "policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b)"? Those factors and elements are landscape, biodiversity and harmful releases to the environment. The policies etc. clearly within scope would include such matters as;-

    - A planning policy protecting virgin woodland while permitting the removal of monospecific plantations of fast growing trees for woodpulp
    - Legislation restricting discharges of toxic chemicals to rivers
    - A programme for testing the impact of GMOs at a research station
    - agreements with farmers concerning maintenance of hedgerows, preservation of woodland and provision for ground-nesting birds
    - the dredging of streams to speed drainage of flood water

28. All these policies etc are one step removed from the primary object of concern which is information about the actual state of the environment. While it would be impossible to produce of definitive list of matters falling within (c) the range and type of such matters is clear. It does not seem to the Tribunal that matters relating to the Code of Conduct for Uttlesford District Council are matters falling within the first part of (c). It does not affect the state of the natural environment or issues of pollution control. It is a step further away from the primary focus. To argue that it does is to fly in to face of the principle of legal certainty by extending the meaning of words beyond their normal meanings. It may be noted that it was considered necessary to include as (e) "cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)" this is indicative of the need for legal certainty on an important issue in environmental policy and specifically including it within the regulations because otherwise while (say) a dredging a river would clearly be an activity affecting the "elements of the natural environment" it seems to the Tribunal that a cost-benefit analysis relating the impact of works on dredging a river channel which weighed potential flood damage as against stream biodiversity is far closer to "environmental information" even with a "relatively broad" interpretation than communications concerning the Code of Conduct for Uttlesford Council.

29. If it is not "… activities affecting or likely to affect the elements and factors referred to in (a) and (b)" could the information be "measures or activities designed to protect those elements"? The answer clearly is no. The provisions of the Local Government Act 2000, the Code of Conduct for Uttlesford District Council and similar guidance are not "measures or activities designed to protect [the state of the elements of the environment…]" on the contrary they are measures designed to protect the probity and reputation of public administration – a matter of profound importance which should be addressed properly. The e-mails address questions of probity. They do not contain environmental information as envisaged by the Directive. To view them through the lens of EIR is a distortion of their purpose and an extension of EIR beyond the range of matters it was intended to address. It is too remote. It is to fall into the error of Mr P. Cook:-

    "I am very interested in the Universe - I am specialising in the Universe and all that surrounds it".

30. While that may be a superficially attractive position for a would-be polymath it is likely to impede serious study and the proper analysis of complex issues.

31. It therefore falls to the Tribunal to consider the application for disclosure of these e-mails under FOIA.

32. The advice tendered in the e-mails was submitted in February 2010, however it was "live advice" considerably after that, the voting behaviour of Councillors and the propriety of their reasons for voting may be subject to challenge in proceedings continuing many months after the vote has been cast. It is noteworthy that Parliament, as part of the process of recasting the legislative framework for the conduct of councillors has diminished the possibility that decisions made where some of these issues are engaged may be challenged in the courts – allegations of prejudice on the part of councillors have over many years been a key aspect of much planning litigation. The existence of such a threat and the desire to minimise the risks of such litigation was at the forefront of officers' minds when they tendered the advice they did at the start of 2010.

33. The Council argued to the Commissioner and before the Tribunal that S36(2) FOIA provided grounds for the non-disclosure of the e-mails since to do so would prejudice

the conduct of public affairs. The qualified person (in this case the Council's Monitoring Officer) informed the Commissioner of this and gave his reasoning.

34. The Commissioner disputed that the prejudice to the public interest must be real, actual and of substance and that "mere risk and mere speculation will not suffice." He doubted whether there was such prejudice and that councillors would be deterred from seeking officers' advice when such a disclosure had happened eleven months after the advice was given.

35. The Tribunal was unconvinced by the Commissioner's reasoning. The advice clearly remained live when the request was made; one of the decisions was subsequently appealed. The relationship between councillors and their authority's senior officers is crucial. Of especial importance is the ability of councillors to seek and, if not sought, officers to volunteer advice on issues relating to the Code of Conduct. There is often uncertainty on the part of councillors as to its implications in any given situation, and given the potential for misunderstanding and misapprehension of the facts on both sides; an atmosphere where there is an opportunity for on-going dialogue in confidence will help ensure that appropriate advice is given at an early stage. The Tribunal is satisfied that without this there is a very real risk that this key area of governance will be compromised by fear of disclosure leading to non-communication in both directions, inappropriate conduct by councillors lacking guidance and the significant likelihood of a justified loss of confidence in the council.

36. While the Commissioner has argued that there is a substantial public interest in "questions over the eligibility of a substantial proportion of the Development Committee to vote" the Tribunal is by no means satisfied as to the real weight of that interest when counterposed to the risk to the provision of proper guidance to councillors. The Tribunal is therefore satisfied that the public interest does not favour disclosure. The Tribunal noted that at one stage the Council advanced the argument that the e-mails attracted legal privilege. The argument was not pursued at the Tribunal and therefore has not been considered.

Consideration of the issue of the draft reports DN FER0379794

37. As its starting point the Tribunal considered the public interest in the matter on the basis of the reports being unfinished documents, rather than attracting legal privilege.

38. Although the Commissioner stated "It is not for the Commissioner to argue a point on a public authority's behalf" (DN paragraph 60); the Tribunal considers that in this case the arguments were made out and available to the Commissioner. The Deputy Chief Executive/Monitoring Officer's letter to the complainant dated 11 February 2011 disclosed the "safe space" argument and the impact of disclosure on the planning appeals process and applied them as relevant to both the legal professional privilege provision and the incomplete document provision. The Commissioner wrote on 30 August 2011 stating;-

    "For regulation 12 to apply, the Council will need to demonstrate that the request relates to material which is still in the course of completion or to unfinished documents or incomplete data. It will then need to demonstrate that it has considered the public interest test-outlining in detail the arguments it considered for and against disclosure and why it reached the view that the public interest in favour of disclosure was outweighed by the public interest in favour of maintaining the exception.

39. That seems to the tribunal to be an overstatement of the case. At that stage the Council had already clearly explained the issues and the conclusion it had come to. Whether the Council was right or wrong on the issue of legal professional privilege it had identified clearly the public harm which it envisaged flowing from the disclosure and concluded that the benefits to the public were minimal and in substantial in comparison with that harm. Such an exercise does not require acres of verbiage. The question which the Council had to address was the statutory test. It did so and it explained its reasoning both to Mr Gadd and subsequently at considerable length to the Commissioner (Monitoring Officer's letter 19 September 2011).

40. In considering the disclosure of the draft reports the Tribunal has to consider two distinct issues; the first of which is whether or not the material falls within 12(5)(b):-

    "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

    (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;"

41. Before the Tribunal it was agreed between the parties that "the course of justice" was engaged if the material attracted legal professional privilege.

42. The evidence was that Counsel was instructed to advise on the contents of the reports to be submitted to councillors for decision and the likely appeals which were envisaged even before draft reports were prepared. There were numerous e-mails between the report author and Counsel and comments made by Counsel on aspects of the draft reports. It was understood between the Council, the report author and Counsel instructed on the reports that the reports would be fundamental to the decision, would be the basis of the planning officer's witness statement to any inquiry and would form the basis of the Council's case in any judicial review proceedings. The process of drafting the reports was an iterative process which grew, almost organically, out of the factual matrix, relevant planning policies and legal considerations. This is the standard practice of Councils considering substantial planning applications. The Council's Development Committee would be taking two important decisions of a quasi-judicial nature with a significant possibility of challenge to one or other or both of the decisions.

43. The Tribunal was taken to a number of decisions of the courts and this tribunal on the nature and extent of legal professional privilege. Of greatest assistance were the decision in *Ahmed Kamal Balabel, Elsa Balabel v Air India 1988 WL* and *Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48* in which *Balabel* was cited with approval; both cases related to discovery of documents (disclosure of documents to the other party in proceedings). In *Balabel* Taylor LJ stated:-

"Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgement, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. These purposes have to be construed broadly. Privilege obviously attaches to a document contains legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the

present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

44. In *Three Rivers* the House of Lords unanimously agreed that the material in question was subject to legal professional privilege and should not be disclosed on an application for discovery Lord Carswell stated:-

"The work of advising a client on the most suitable approach to adopt, assembling material for presentation of his case and taking statements which set out the relevant material in an orderly fashion and omit the irrelevant is to my mind the classic exercise of the lawyer's skills. I can see no valid reason why that should cease to be so because the forum is an inquiry or other tribunal which is not a court of law, provided the advice is given in a legal context:"

45. In the Bank of England case the material subject to an application for discovery was a document drawn up by Bank of England staff with the advice of Counsel relating to the approach that would be taken in connection with the Inquiry conducted by Lord Bingham into the collapse of BCCI. This seems to the Tribunal a very similar factual circumstance to the position of the Council in this case, where the legal advice is progressively embedded in the evolving report to go to the Committee. The advice was "what should prudently and sensibly be done in the relevant legal context".

46. The Tribunal is therefore satisfied that the draft committee reports passing between the Council and its legal adviser fall within the scope of legal professional privilege.

47. In weighing the balance Tribunal noted the conclusion in DN FER0379794 at paragraph 61/62 that the public interest lay in disclosure and that the Commissioner argued that the refinement of the reports was part and parcel of the drafting process and would be understood as such; there was a substantial public interest in openness and transparency of the evolution of the positions taken in the final report.

48. However it seemed to the Tribunal that the arguments of the Council (which had been fully developed in correspondence prior to the DN) had considerably more weight. The decisions were to be made by the Councillors sitting in a public committee. They would have before them the reports and not the draft reports the contents of which they were unaware. The Tribunal considered that the priority of public interest would be overwhelmingly the decision, to a considerably lesser extent, the reasoning which the Committee applied (which was patent from the actual reports and minutes of the meeting) of less interest still would be the draft reports.

49. Furthermore the disclosure of factual errors and mistakes of interpretation contained in the drafts would be of little interest and would tend to create some confusion as to the reasoning behind the decision. The recitals to the Directive 2003/4/EC are illuminating in setting out the legislative intent to which the Tribunal must give effectiin interpreting EIR. Of particular relevance to the draft reports are:-

    "17 Public authorities should make environmental information available in part where it is possible to separate out any information falling within the scope of the exceptions from the rest of the information requested.

    20 Public authorities should seek to guarantee that when environmental information is compiled by them or on their behalf, the information is comprehensible, accurate and comparable. As this is an important factor in assessing the quality of the information supplied the method used in compiling the information should also be disclosed upon request."

50. The original request was voluminous and the provision of all the documents requested would have necessitated the provision of multiple copies of similar or identical documents. In this case the redaction of the draft reports to remove Counsel's comments would have removed the specific information which even the Commissioner considered fell within the scope of the exemption relating to the course of justice, however the release of the drafts would have defeated the intent behind recital 20 in that the information disclosed would not have been accurate.
51. A point of substantive concern was however the likelihood that the Council would face challenge by way of appeal or judicial review and the increased vulnerability of the Council by reason of the disclosure of the evolution of its thinking. That would be

of benefit to a challenger, in any such proceedings this gave an advantage to the other party whose reasoning in developing the case would not be known to the Council.

52. The Tribunal noted the presumption in favour of disclosure contained in regulation 12(2); however this is of limited applicability except where the balance of the public interest between disclosing and withholding information is approximately even. Where there is a decisive weight on either side of the balance it is not a matter of significance. The key task is to come to a realistic and informed view of the issues going to the striking of the balance.

53. The Tribunal concluded that, if considered under 12(4)(d) (incomplete documents) the value to the public of minute amount of additional environmental information contained in the drafts was slight and compromised by the fact that some of it was indeed inaccurate – it is important to bear in mind that this is a public decision-making process where all relevant material is placed in the public domain as part of the governance process. The potential harms to the public interest substantially outweigh the essentially illusory interests identified by the Commissioner.

54. It seems to the Tribunal that the frame of analysis adopted by the Commissioner was incorrect and that the specific harm to the public interest identified by the Council in terms of inequality of disclosure in the face of potential planning inquiries and litigation (which should in any event have convinced the Commissioner that legal professional privilege was engaged) is far more substantial than the benefits to the public the Commissioner identified. However this harm is in any event considerably overshadowed by another public harm of more general scope and significance. That is the harm to the rule of law in a free society of the erosion of the scope and indeed the perception of the scope of legal professional privilege. As was stated by Lord Taylor of Gosforth CJ in R v Derby Magistrates Court:

"The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent. Legal professional privilege is thus much more than the ordinary rule of evidence, limited in its application to the fact of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

55. The potential damage to that principle of confidentiality of advice – creating uncertainty as to whether disclosure will be ordered, is a matter of considerable weight. The Tribunal was surprised that the Commissioner indicated during the

hearing that, even if privilege was engaged (which he disputed) he would still maintain the position that disclosure was appropriate.

56. The provision under consideration "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature" is derived directly from the Directive.

57. Since the EIR are a transposition into English law of a Directive it is appropriate to consider the interpretation of the regulations in the light of the jurisprudence of the ECJ. The respect for legal professional privilege is a key common part of the rights recognised in European law. In the competition case *AM & S Europe Limited v Commission of the European Communities. Case 155/79.* it was held:-

"Community law, which derives from not only the economic but also the legal interpenetration of the member states, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognised in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it."

58. More recently, in connection with anti-money laundering legislation in C-305/05 the Court noted the importance of interpreting secondary community legislation (such as Directives) in a way consistent with the EC treaty and the:-

"28…fundamental rights [which] form an integral part of the general principles of law whose observance the Court ensures….

29 … Thus the right to a fair trial, which derives inter alia from Article 6 of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU"

31 According to the case-law of the European Court of Human Rights, the concept of 'a fair trial' referred to in Article 6 of the ECHR consists of various elements, which include, inter alia, the rights of the defence, the principle of equality of arms, the right of access to the courts, and the right of access to a lawyer both in civil and criminal proceedings ..

32 Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations…"

59. While the provisions in C-305/5 related to a duty on lawyers to disclose their clients affairs the distinction between that and requiring the client to disclose legal advice seems to the Tribunal a narrow distinction.

60. The Treaty of the European Union provides (Article 6(3)

"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

61. An interpretation of the Directive and of Regulation 12(5)(b) of the Regulations implementing it which did not accord significant weight to the need to protect the legal order recognised by Article 6(3) of the EU Treaty by properly weighing the significance of legal professional privilege undermines that legal order for the reasons identified by Lord Taylor (op cit). This is not to detract from the provisions of the Directive itself requiring grounds for refusal to be interpreted restrictively, however those provisions have been adopted within the framework of the community legal order and that overarching framework must be respected.

62. In DCLG v The Information Commissioner & WR [2012] UKUT 103 (AAC) the Upper Tribunal in carrying out the balancing exercise under EIR with respect to LPP stated:-

"The effect on the course of justice, in terms of a weakening of confidence in the efficacy of LPP generally, which a direction for disclosure in this case would involve. There are in our judgment no special or unusual factors in this case which justify not giving this factor the very considerable weight which it will generally deserve."

63. The Tribunal is therefore satisfied that both decision notices were wrong in law and for the reasons stated above must be set aside and substituted by this decision of the First-tier Tribunal.

Judge Chris Hughes OBE

Date: 6 June 2012