

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 19 October 2011

**Public Authority:** Uttlesford District Council  
**Address:** Council Offices  
London Road  
Saffron Walden  
Essex  
CB11 4ER

**Decision (including any steps ordered)**

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1. The complainant has requested Uttlesford District Council ('the Council') to release information relating to the planning applications submitted by Tesco and Sainsbury's.
2. The Commissioner's decision is that Council appropriately relied upon regulation 12(5)(b) of the EIR for the non disclosure of the emails between its planning officer and Counsel and the annotations Counsel made to two draft reports. However, in relation to contents of the draft reports themselves (with annotations redacted), the Commissioner has decided that although regulation 12(4)(d) applies to this information, the public interest in maintaining this exception is outweighed by the public interest in favour of disclosure.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
  - The Council should disclose the six draft reports identified in paragraph 9 of this notice, with any annotations made by Counsel redacted.
4. The Council must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 18 November 2010, the complainant wrote to the Council and requested information in the following terms:

"In accordance with the Act, can you please supply me with copies as soon as possible of the following information relating to the current planning applications by Sainsbury's Supermarkets Limited (UTT/1451/09/FUL) (the "Sainsbury's Application") and Tesco Stores Limited (UTT/1323/09/FUL) (the "Tesco Application"):

- Copies of all e-mails, letters, documents and other correspondence or information of any nature whatsoever from Sainsbury's Supermarkets Limited or any of their agents or anyone else acting on their behalf (together "Sainsbury's") to Uttlesford District Council (including for this purpose both the councillors and the executive function) or any of their agents or anyone else acting on their behalf (together, "UDC", and each such person being a "member of UDC");
- Copies of all e-mails, letters, documents and other correspondence or information of any nature whatsoever from Tesco Stores Limited or any of their agents or anyone else acting on their behalf (together "Tesco") to UDC;
- Copies of all e-mails, letters, documents and other correspondence of any nature whatsoever from UDC to Tesco or Sainsbury's;
- Copies of any file notes, internal memoranda, notes of telephone conversations and meetings, or any similar records prepared by UDC and reflecting any discussion or conversation between UDC and Tesco or Sainsbury's or internally amongst members of UDC and relating to the Sainsbury's Application or the Tesco Application;
- 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 any other employees of UDC and relating to the Sainsbury's Application or the Tesco Application;
- In particular (and although already covered above), copies of all e-mails, letters, documents and other correspondence or information of any nature whatsoever passing between Savills and either any other member of UDC or Tesco or Sainsbury's and copies of any file notes, internal memoranda, notes of telephone conversations and meetings, or any similar records prepared by

Savills or any other member of UDC and reflecting any discussion or conversation between Savills and any other member of UDC or Tesco or Sainsbury's or internally amongst members of Savills and relating to the Sainsbury's Application or the Tesco Application."

6. The Council responded on 16 December 2010. It refused to deal with the entire request under regulation 12(4)(b) of the EIR. However, it stated that in order to assist the complainant it was willing to provide some information on receipt of a fee. Concerning the complainant's request for internal emails and draft reports, the Council confirmed that it considered this information was exempt from disclosure under regulations 12(4)(d) and 12(4)(e) of the EIR.
7. Following an internal review the Council wrote to the complainant on 9 February 2011. It stated that it upheld the application of the exceptions previously cited.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He requested the Commissioner to consider the Council's handling of his request and whether further information should be released under the EIR.
9. During his investigation the Commissioner was informed by the Council that it had considered all six bullet points of the complainant's request and had released all the information requested in these bullet points to the complainant except the following:
  - A selection of emails between the Council and external Counsel, to which the Council has applied regulation 12(5)(b).
  - Draft reports relating to the developments proposed by Tesco and Sainsbury's, to which the Council has applied 12(5)(b) and 12(4)(d). The Commissioner understands there are six drafts in total; two were attached to an email the Commissioner received from the Council on 13 June 2011 and contain annotations from Counsel, two were attached to an email between a planning officer and Counsel dated 12 November 2010 and two were attached to an email between the same planning officer and Counsel dated 10 November 2010.

The Commissioner understands from this that the Council has withdrawn its previous claim on regulation 12(4)(b) (the request being manifestly unreasonable due to its scope) and only wishes to pursue its reliance of

regulations 12(5)(b) and 12(4)(d) of the EIR for the non disclosure of the information described in the above two bullet points.

10. This notice will therefore concentrate on the remaining withheld information listed in paragraph 9 above and the Council's application of 12(5)(b) and 12(4)(d) of the EIR.

## Reasons for decision

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### Regulation 12(5)(b)

11. The Commissioner will first consider regulation 12(5)(b) of the EIR, as this exception has been applied to all the remaining withheld information.
12. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect 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.
13. This exception is also subject to the public interest test outlined in regulation 12(1) of the EIR. Therefore, in addition to demonstrating that the withheld information falls within the definition of this exception the public authority must also demonstrate that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
14. The Council argued that it considers the emails in question and the draft reports to be subject to legal professional privilege and that regulation 12(5)(b) incorporates this legal concept. It explained that the emails in question are private communications between Counsel and a planning officer in the Council relating to the development proposals put forward by Tesco and Sainsbury's and they contain the officer's requests for legal advice and the advice provided by Counsel. The Council confirmed that the draft reports were prepared by the planning officer for submission to the Development Control Committee. Prior to submission to the Development Control Committee, the six drafts passed by email between Counsel and the planning officer. Two of the drafts supplied to the Commissioner contain annotations which were made by Counsel. These annotations contain legal advice and specific comments from Counsel on various matters raised within the drafts.
15. The Council confirmed that although it considered both litigation and advice privilege apply in this case, it felt advice privilege was most appropriate given the circumstances of this case.

16. It is well established that the Commissioner considers the "course of justice" to incorporate the legal professional privilege concept. The first issue for the Commissioner to consider is whether the remaining withheld information is subject to legal professional privilege.

Is the remaining information subject to legal professional privilege?

17. The Commissioner will first address the series of emails between Counsel and the planning officer in the Council.
18. The Commissioner has reviewed the contents of these emails. It is clear that the withheld emails are either from the planning officer to Counsel requesting legal advice on issues relating to the development proposals or emails from Counsel to the named officer providing advice and comments on the matters referred to it.
19. Advice privilege applies to private communications between a legal adviser and his/her client which were written with the dominant purpose of giving or receiving of legal advice. The Commissioner is satisfied that the withheld emails were created with the dominant purpose of requesting or providing legal advice and that therefore the emails are subject to legal professional privilege.
20. Turning to the draft reports, the Commissioner considers there are two separate considerations here; the contents of the drafts themselves prepared by the planning officer and the annotations made to two of the drafts by Counsel (drafts attached to an email the Commissioner received from the Council dated 13 June 2011) which contain legal advice and comments relating to the contents of these two drafts.
21. Dealing with the annotations first, it is quite clear that these annotations contain legal advice and comments from Counsel relating to various matters raised by the planning officer in her initial drafts. As it is clear that the annotations are legal advice, the Commissioner is satisfied that these annotations are subject to legal professional privilege.
22. However, the Commissioner does not consider the contents of the draft reports prepared by the planning officer are subject to legal professional privilege. He considers these drafts exist in their own right as documents prepared by the planning department for submission to the Development Control Committee. Although the drafts passed between the planning department and Counsel prior to final submission to the Development Control Committee, the drafts themselves are not requests for actual legal advice but rather the planning officer's intended submissions to the Development Control Committee detailing the officer's recommendations on the proposals from her perspective as planning officer. He therefore does not consider the draft reports (with annotations redacted) fall within the category of advice privilege.

23. Similarly, the Commissioner does not consider the draft reports are subject to litigation privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Litigation privilege is a little wider in scope to advice privilege as it also incorporates material or information that is gathered to assist or aid the conduct of litigation.
24. The draft reports are neither communications that were created for the dominant purpose of requesting legal advice or material gathered to assist the conduct of litigation. As stated above, the draft reports exist in their own right, as reports prepared by the planning officer to the Development Control Committee detailing her recommendation regarding the proposals put forwarded by Tesco and Sainsbury's.
25. As the Commissioner does not agree that the draft reports themselves (with annotations from Counsel redacted) are subject to legal professional privilege, he has concluded that regulation 12(5)(b) does not apply to this information.
26. However, as stated above, the Commissioner is satisfied that the emails in question and the annotations made by Counsel to two of the drafts reports are subject to legal professional privilege. The Commissioner will therefore go on to consider whether disclosure of this information would have an adverse affect on the elements cited in regulation 12(5)(b) and to what extent. If this cannot be substantiated, the exception cannot apply.

Would disclosure have an adverse affect?

27. In the decision of *Archer v Information Commissioner and Salisbury District Council (EA/2006/0037)* the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out in paragraph 12 above; the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse affect and that any statement that it could or might have such an effect was insufficient.
28. In reaching a decision on whether disclosure would have an adverse affect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Information Tribunal's comments in the case of *Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/0030)* in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse affect. The Tribunal stated that when considering the term



“would prejudice” that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.

29. The Council confirmed that the legal advice it received in respect of both applications was still very much ‘live’ at the time of the complainant’s request and at the time of the completion of its internal review. Between the Council receiving the request and completing its internal review, the final reports prepared by the planning officer detailing her recommendation on both applications had been considered by the Development Control Committee. The Committee members decided to accept the planning officer’s recommendations to refuse Sainsbury’s planning permission but to accept Tesco’s application subject to certain 106 provisions.
30. In relation to the Sainsbury’s application, Sainsbury’s had forewarned the Council that it would appeal should its proposals be refused. The Council confirmed that the withheld information would therefore remain ‘live’ for some time at least until the appeal had been heard. In respect of the Tesco’s application, although planning permission had been granted by the time the Council completed the internal review, this decision was still subject to change as it had not issued its formal Decision Notice granting such permission and was subject to certain 106 provisions. Although less likely, the prospect of appeal was still possible as the Council still had time to reconsider this decision and there was the possibility that Tesco may appeal the 106 conditions.
31. The Council argued that it considers the legal advice it received from Counsel on both applications to be critical evidence supporting each decision, which highlights both the strengths and weaknesses of each case. As the Sainsbury’s appeal was imminent and there was still a prospect that Tesco could appeal, the Council felt disclosure of this information at this stage would adversely affect its ability to defend its decision in either case should it be required to do so. It confirmed that it would rely on the advice it received from Counsel if and when these appeals arose and felt disclosure prior to this process would severely disadvantage its prospects and create a biased appeals process.
32. The Commissioner accepts in this case that the legal advice was still ‘live’. It is evident that one appeal was imminent, as the Council had refused permission and that there was still a possibility of another, as the Tesco’s decision was still subject to change and provisions which could be appealed. Legal advice by its very nature discusses the strengths and weaknesses of a particular case. Disclosure prior to any appeal would reveal the Council’s hand in advance. This would adversely affect the Council’s ability to defend its position when the appeals process took place which would in turn hinder the Council’s ability to receive a fair and unbiased hearing.

33. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)* the Information Tribunal set out the various authorities relating to legal professional privilege and described it as:

“a fundamental condition on which the administration of justice as a whole rests”.

34. The Commissioner accepts that if information subject to legal professional privilege were to be disclosed to the public, this would undermine the common law principle on which it rests. He also accepts that it would adversely affect the Council’s ability to obtain such advice in the future and this would in turn adversely affect its ability to manage its assets effectively and make future decisions.

35. The Commissioner has carefully considered the arguments presented and he is satisfied that in this case it is more likely than not that disclosure of the emails in question and the annotations made by Counsel to two draft reports would adversely affect the course of justice and therefore that the exception provided by regulation 12(5)(b) is engaged.

#### Public interest test

36. As stated in paragraph 13 above, regulation 12(5)(b) of the EIR is subject to the public interest test. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request under the legislation.

37. As stated above, the Council consider disclosure would adversely affect the fairness of any appeals that may be made and stated that such consequences would not be in the public interest. It acknowledged that there was a public interest in the general openness and transparency of the Council and a public interest in gaining access to information which enables members of the public to understand why a particular planning decision is made. However, it considered there was an overriding public interest in maintaining the exception in this case.

38. The Council also stated that it considered there was an in-built public interest in upholding the legal professional privilege concept and the circumstances in this case were not exceptional to warrant overturning such privilege.

39. The Commissioner has given this matter careful consideration. He accepts there is a public interest in disclosing information which enables members of the public to understand more clearly why a particular



planning decision has been made and to challenge such decisions. The Commissioner notes that disclosure would promote public debate on such significant planning proposals and enhance the overall openness and transparency of the Council.

40. However, it is the Commissioner's view that there are stronger public interest arguments in favour of maintaining the exception. Public authorities need to be able to obtain free and frank legal advice. The Commissioner accepts that if disclosure were ordered of information subject to legal professional privilege, this would undermine the Council's ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. In the case of *Kitchener v Information Commissioner and Derby City Council (EA/2006/0044)* the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."

41. It is also the Commissioner's view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR or the Act. This view was supported by the Information Tribunal in the hearing of *Creekside Forum v Department of Culture, Media and Sport (EA/2008/0065)*. The Tribunal stated that:

"Disclosure under [the Act or Regulations] puts public authorities at disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis."

42. There is a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing.
43. In this case the Commissioner accepts that the emails in question and annotations contain legal advice relating to issues which are still live. As stated previously, at the time of this request and the completion of the internal review, an appeal from Sainsbury's was almost certain and there was still a prospect of Tesco appealing too should the Council's decision change or be revised. Disclosure at this stage would have hindered the Council's ability to defend its position effectively if and when these appeals arose. Disclosure would have provided valuable information to the appellants prior to any hearing, which could have been used to advance their position. Disclosure of legal advice on which a public authority will rely prior to an appeals process would jeopardise

the ability of the Council to receive a fair and unbiased hearing, which would not be in the public interest.

44. In the hearing of *Calland v Financial Services Authority (EA/2007/0136)* the Information Tribunal stated:

“What is quite plain from a number of decisions...is that some clear, compelling and specific justification for disclosure must be shown so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential”.

45. In this particular case, it is the Commissioner's view that no compelling arguments have been presented by either party to justify the disclosure of privileged information. He has therefore concluded that the public interest in maintaining this exception outweighs the public interest in disclosing the information.
46. As the Commissioner decided that regulation 12(5)(b) of the EIR does not apply to the draft reports (with annotations from Counsel redacted), it is now necessary for him to consider the Council's application of regulation 12(4)(d) of the EIR.

#### **Regulation 12(4)(d)**

47. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
48. Regulation 12(4)(d) is subject to the public interest. So, in addition to demonstrating that the withheld information falls within the definition of this exception, the public authority must also demonstrate that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
49. The Council argued that the draft reports constitute unfinished versions of the final reports that were ultimately sent to the Development Control Committee for it to make a decision on the planning proposals put forward by Tesco and Sainsbury's. The Council referred to the Information Tribunal hearing of *Secretary of State for Transport v Information Commissioner (EA/2008/0052)* and stated that the Tribunal accepted in this case that draft versions of a report fall within the definition of this exception and continue to constitute unfinished documents or information in the course of completion even when the final version is completed and issued.
50. The Commissioner has reviewed the draft reports and he is satisfied that they do constitute unfinished documents or information in the course of completion. He accepts the view of the Tribunal in the above mentioned

hearing that draft reports are still regarded to be unfinished documents once the final version is published. He is therefore satisfied that regulation 12(4)(d) of the EIR is engaged in this case.

51. As he is satisfied that regulation 12(4)(d) of the EIR applies, he will now go on to consider the public interest test.

#### The public interest test

52. The Council provided no arguments in favour of disclosure. It only explained in limited detail how it considered disclosure was not in the public interest.
53. The Council stated that it considered the draft reports were of minimal interest when the final versions had already been published, particularly when the final versions would be scrutinised and tested at appeal stage. It argued that the Council's decisions to refuse planning permission to Sainsbury's and to grant permission to Tesco subject to certain 106 provisions were based on the final reports prepared by the planning officer not her earlier drafts. The Council considers disclosure of the draft versions would highlight the differences between these versions and the final reports and distract public focus away from the real issues towards matters or comments which did not form part of its final decision.
54. It also argued that the draft reports relate to 'live issues' and any differences between these drafts and final versions would be subject to the appeals process.
55. The Commissioner has given the matter careful consideration. He considers there is a public interest in the disclosure of this information. In this case, he considers disclosure would highlight the specific issues considered by the Council in relation to the planning proposals put forward by Tesco and Sainsbury's and assist the public in understanding more clearly exactly how it reached its decision to grant and reject these applications.
56. It would enhance public debate around these issues and promote the overall openness and transparency of the Council.
57. Although the Council has stated that it considers disclosure of the drafts would distract the public from the real issues being considered, the Commissioner does not consider this argument alone is of sufficient weight to warrant the non disclosure of this information.
58. The Commissioner can envisage cases where the public interest may still warrant maintaining this exception for draft versions of reports even when the final reports have been published. For example in cases where the drafts clearly discuss matters or issues which are not covered in the

59. The Commissioner also considers that there is a public interest in maintaining this exception in cases where the public authority still requires the safe space to finalise its position and present the final report. However, he notes that such arguments are not applicable in this case. This is because the final reports were completed, published and submitted to the Development Control Committee prior to the complainant's request and therefore the need for safe space was no longer required.
60. As stated above, the Commissioner has received very limited arguments from the Council in relation to its consideration of the public interest test for this exception. He wishes to point out that it is not for the Commissioner to argue a point on a public authority's behalf. It is the responsibility of the public authority concerned to provide the necessary arguments and where necessary supporting evidence to support its view.
61. In this case, the Council has provided no compelling arguments to demonstrate that the public interest in maintaining this exception outweighs the public interest in disclosing this information. The Commissioner is mindful of regulation 12(2) of the EIR, which states that a public authority should apply a presumption in favour of disclosure. This means that if there are no convincing arguments to demonstrate that the public interest rests in maintaining this exception, the information should be released.
62. For the reasons explained above, the Commissioner has decided in this case that the public interest in maintaining this exception is outweighed by the public interest in disclosure.

## Right of appeal

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63. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

64. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**