



**Tribunals Service**  
**Information Tribunal**

**Information Tribunal Appeal Number:**

**EA/2008/0013**

**Information Commissioner's Ref:**

**FER0120148**

**Environmental Information Regulations (EIR)**

**Hearing upon the Papers**

**27<sup>th</sup> November 2008**

**Decision Promulgated**

**15<sup>th</sup> December 2008**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Fiona Henderson**

**And**

**LAY MEMBERS**

**Rosalind Tatam**

**And**

**Jenni Thomson**

**BETWEEN**

**AJ MAIDEN**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**BOROUGH COUNCIL OF KING'S LYNN AND WEST NORFOLK**

**Additional Party**

**Subject matter:**

Environmental Information Regulations 2004

- Public interest test, Reg 12(1)(b)
- Legal professional privilege Reg 12 (5)(b)

**Cases:**

*Bellamy v IC and Secretary of State for Trade and Industry EA/2005/0023*

*Pugh v IC and MOD EA/2007/0055*

*Rudd v Information Commissioner and the Verderers of the New Forest EA/2008/0020*

*Fulham Leisure Holdings Ltd v Nicholson Graham and Jones (a firm) [2006] 2 All ER 599.*

*Archer v IC and Salisbury District Council EA/2006/0037*

*Hogan & Oxford City Council v Information Commissioner EA/2005/0026 & EA/2005/0030*

**Decision**

For the reasons set out in the Tribunal's determination, the substituted decision is that the Tribunal allows the appeal in part and amends the Decision Notice FER0120148 dated 8<sup>TH</sup> January 2008 as set out below. The information has already been provided to the Appellant and the Tribunal does not direct that any further steps be taken.

**Information Tribunal**

**Appeal Number: EA/2008/0013**

**SUBSTITUTED DECISION NOTICE**

**Dated 15<sup>th</sup> December 2008**

**Public Authority: Borough Council of Kings Lynn and West Norfolk**

**Address of Public Authority: Kings Court, Chapel Street,  
Kings Lynn, Norfolk, PE30 1EX**

**Name of Complainant: Mr J Maiden**

**Balancing the Competing Considerations**

**52** In the circumstances of this case, the public interest lies in favour of disclosing the latest legal opinion of the external barrister dated 24 January 2006.

**The Decision**

The Council did not deal with the request for the latest opinion of the external barrister dated 24<sup>th</sup> January 2006 in accordance with the EIR in that it incorrectly applied the exception under 12(5)(b) to withhold the information. ....

**Steps Required**

**55a** The latest opinion of the external barrister dated 24<sup>th</sup> January 2006 having been already disclosed to the Appellant in May 2008 the Public Authority is not required to take any steps in relation to this part of the information request.

Dated this 15<sup>th</sup> day of December 2008

Signed

Fiona Henderson

Deputy Chairman, Information Tribunal

## **DECISION**

### **Background**

1. This appeal is concerned with Mr Maiden's request on 17 September 2006 to the Borough Council of King's Lynn and West Norfolk (the Council):

*"Earlier this year it was announced that [the Council] was seeking Counsel's opinion on matters relating to The Green and the Pier at Hunstanton.*

*Is this latest Legal Advice available to the public under the FOI Act? When it is made public, please send me a copy."*

As set out in the Judgment of 2<sup>nd</sup> September 2008, the Tribunal is satisfied that this advice is the Opinion of Alexander Booth dated 24<sup>th</sup> January 2006.

2. The Council refused this request, by email entitled "legal opinion" dated 29<sup>th</sup> September 2006:

*"The Counsel's opinion is not publicly available, and will not be available under the Freedom of Information Act, by virtue of s.42 Legal Professional Privilege.*

*s.42 is a "qualified" exemption; the Council considers the exemption is justifiable because the Council must be able to obtain frank and candid legal advice safely and sufficiently."*

A fuller explanation for the Council's assertion that the public interest lay in withholding the advice was provided in an email dated 3<sup>rd</sup> October 2006 which set out the response of Mrs Nicola Leader the Council's Legal Services Manager and Monitoring Officer (see para 13 below).

3. Mr Maiden requested an internal review on 5<sup>th</sup> October 2006 and the Council upheld its refusal on the same grounds in a review dated 22<sup>nd</sup> January 2007.

### **The Complaint to the Commissioner**

4. The background to this case is that 4 previous legal advices and the instructions upon which 2 of them were based in relation to the Green and Pier at Hunstanton had

already been disclosed by the Council. During the currency of this complaint the Council agreed voluntarily to disclose the instructions in relation to the other 2 advices as set out in the letter dated 29<sup>th</sup> January 2007 letter to the Commissioner indicating that the Council was willing to disclose the instructions to 2 barristers (but not Mr Booth):

*“on the basis that this is an unusual set of circumstances in that the resultant opinions have previously been released. Their disclosure does not however, set a precedent in preventing the Borough Council in applying legal professional privilege to further instructions and opinions from counsel.”*

Additionally a parallel request by Mr Maiden for disclosure of the instructions to Mr Booth was considered at the same time by the Commissioner.

5. From the papers before the Tribunal, the chronology set out in the Decision Notice is erroneous. A full analysis of the actual chronology is set out in the Judgment dated 2<sup>nd</sup> September 2008 and is not repeated here. The Tribunal is satisfied that Mr Maiden’s email dated 24<sup>th</sup> May 2007 constitutes a request to the Commissioner to investigate the refusal of the request for the “latest legal Advice”:

*...I must now ask for your intervention in order to read the advice of the most recent Counsel appointed by the Borough Council...*

6. In his Decision Notice No. FER0120148 dated 8<sup>th</sup> January 2008, the Commissioner ruled against the Council in relation to the parallel request, ordering disclosure of the instructions to Counsel in relation to the “Latest Legal Advice”. However, he upheld the refusal to disclose the advice itself.
7. In coming to this Decision, the Commissioner found that the requests should have been dealt with under the *Environmental Information Regulations* (EIR) being covered by regulation 2(1)(c) (information affecting or likely to affect the environment or a measure designed to protect the environment) and the appropriate exemption was that set out in regulation 12(5)(b) EIR (disclosure would adversely affect the course of justice).

8. During his investigation the Commissioner viewed the legal advice and received representations from the Council in relation to their reliance upon regulation 12(5)(b) of the EIRs. He concluded the following:

- The information contained within the Barrister's advice is legally privileged,
- Privilege had not been waived in relation to the advice, despite the repetition of some of the instructions to Counsel within the Opinion (privilege had already been waived in relation to the instructions). This was because the repetition of the instructions did not give away the substance of the advice provided.
- It was more likely than not that disclosure of the legal advice would adversely affect the course of justice. It would adversely affect the Council's ability to obtain legal advice in respect of other decisions it may make in the course of its duties in the future, because it would undermine the relationship between a client and lawyer.
- There was a significant public interest in favour of maintaining the exemption.

### **The Appeal to the Tribunal**

9. Mr Maiden appealed to the Tribunal on 16<sup>th</sup> February 2008. At the telephone directions hearing of 13<sup>th</sup> May 2008 at paragraph 1, the Council were ordered to:

*"...serve [a reply indicating whether they opposed the appeal and if so on what grounds] by 4pm on 25th May 2008 or the Tribunal will presume that they do not contest this appeal and consent to disclose the disputed material".*

10. The Council did not serve a reply but in an email dated 23<sup>rd</sup> May 2008 to the Commissioner and copied to Mr Maiden but not the Tribunal, Mrs Leader stated:

*"I have become increasingly concerned about the resources needed to deal with Mr Maiden's appeal... Legal services in a small borough Council such as ours is a finite resource. I do not consider that diverting resources from projects that are of benefit to the whole community to deal with one individual's obsession is an appropriate use of taxpayers money or a sustainable use of our services. Whilst **I stand by the***

*Council's original decision and support the ICO's decision, limited resources means that I have made the decision to release the information to Mr Maiden...*"(emphasis added).

11. The disputed information, namely the opinion of Alexander Booth dated 24<sup>th</sup> January 2006 instructed on behalf of the Council in relation to the Green and Pier at Hunstanton, has now been disclosed to Mr Maiden.

#### The questions for the Tribunal

12. Mr Maiden's Grounds of Appeal were clarified at the telephone directions hearing of 13<sup>th</sup> May 2008 in which the issues that fell to be determined by the Tribunal were limited at paragraph 4 to the following:

- a) *Whether privilege (or the ability to withhold the information) was waived by the repeated assurances by the Additional Party that they would disclose the disputed information (namely the 5<sup>th</sup> legal opinion).*
- b) *Whether the fact that the Additional Party had already disclosed 4 previous advices on the same or a closely related issue deprives them of the right to "cherry pick" and withhold this disputed information.*
- c) *Whether it is more likely than not that disclosure of the legal advice would adversely affect the course of justice.*
- d) *Whether the Commissioner was correct to find that the public interest in maintaining the exemption under Regulation 12(5)(b) of the Environmental Information Regulations outweighed the public interest in disclosure.*

#### Evidence

13. The Tribunal has had sight of Mr Booth's legal advice, a statement from Mrs Leader on behalf of the Council dated 17<sup>th</sup> October 2008, and various correspondence between the parties. The Council set out its reasoning in an email dated 3<sup>rd</sup> October 2006 which quoted Mrs Leader's response to Mr Maiden's questioning of why this

advice was not being disclosed when 4 previous advices relating to the same topic had been disclosed:

*“the s.42 exemption to the Freedom of Information Act applied to all of the legal opinions you have previously received however, for reasons that I do not fully understand or appreciate, my predecessor, Mr Aley agreed to waive the legal professional privilege in respect of those documents.*

*I am not bound by his previous decisions.*

*I recognise that there is an inherent public interest argument that local authorities must be open and transparent in the decisions they take in order to promote accountability and that it may be in the public interest to disclose information if to do so would help determine whether an authority was acting properly, however, I believe that there is a stronger public interest in protecting the established principle of confidentiality in communications between lawyers and their clients. Indeed, the principle of legal professional privilege promotes respect for the law, encourages clients to seek legal advice and allows for full and frank exchanges between lawyer and client.*

*I believe that it is vital that public authorities are able to obtain full and frank legal advice to aid in compliance with their legal obligations. The very nature of legal advice inevitably means that the advice will highlight the strengths and weaknesses of any particular case. If legal advice contained by the Council is routinely disclosed, the Council would be reluctant to seek advice as it could contain information which may damage its' position and such a state of affairs could result in the Council being less able to properly comply with its legal obligations”.*

### **Legal submissions and analysis**

- a) Whether privilege (or the ability to withhold the information) was waived by the repeated assurances by the Additional Party that they would disclose the disputed information (namely the 5<sup>th</sup> legal opinion)?

14. From Mr Maiden's email to Mr Harding (Chief Executive of the Council) dated 15<sup>th</sup> July 2007 it is not in dispute that in February 2006, Mr Harding wrote to Ms Ward,



Vice Chairman of the Hunstanton Civic Society listing eleven points that would be included in the instructions to Mr Booth. The letter also indicated that when the advice had been obtained it would be *“be "reported to Cabinet and made public as indeed was the report of the actual investigation undertaken by [Philip Kratz] Taylor Vintners Solicitors."*

15. The Tribunal has not had sight of that letter but its contents are not in dispute and it is an apparent reference to the same letter upon which the Commissioner deemed that privilege in relation to the instructions had been waived. In his submissions the Commissioner relied upon the arguments as set out in the Decision Notice for concluding that privilege had been waived in relation to the instructions, but not the Opinion itself, as the substance of the advice was not disclosed.

16. After the refusal of the request but prior to the issue of the Decision Notice, Mr Harding provided an explanation for the failure to make public the advice, in his email to Mr Maiden dated 30<sup>th</sup> July 2007 in which he stated:

*“With respect to the advice sought from external counsel this was procured as indicated but it has been the subject of further questions from the Performance Portfolio Holder which has necessitated further work on the part of officers which has subsequently delayed the publications of Counsels advice.”*

17. This appears to suggest a different reasoning from that set out in the letters of 20<sup>th</sup> November 2006 to the Commissioner from Chris Marshall (Senior Support and Information Officer Legal Services) who said:

*“there are no plans to publish any further information”.*

and 5<sup>th</sup> March 2007 to the Commissioner from Mrs Leader:

*“When the Chief Executive made the statement in his letter to Ms Ward [that the advice would be disclosed], he did so without first taking advice from myself or colleagues involved in this matter.”*

*The opinion has been disclosed to the extent that I summarised its contents to the Leader of the Council and the relevant Portfolio Holder who together with the Chief Executive subsequently determined that they did not wish for the information to be published.”*

This letter does not suggest that it was to be published once further work has been done, but suggests that the decision to disclose had been reversed. We now learn from Mrs Leader's witness statement dated 17<sup>th</sup> October 2008 that since the Decision Notice, privilege in relation to the advice was waived by its inclusion in an open report (Mr Maiden asserts that this was in February 2008 and no party has sought to disagree). Full disclosure of the advice was given to Mr Maiden in May 2008. The Additional Party has not provided any explanation for the decision to waive privilege.

18. In terms of the assurances being repeated, the assurance in the letter of the 21<sup>st</sup> February 2006 predates the information request and that in the email of 30<sup>th</sup> July 2007 post dates the refusal but not the Decision Notice. There is no evidence before the Tribunal that there were any other assurances.

19. The Tribunal notes that when this indication was given it purported to be on the basis that the advice had not been received by Mr Harding, although the Tribunal notes that the advice is dated 24<sup>th</sup> January 2006 and the letter to Ms Ward is apparently dated 21<sup>st</sup> February 2006. On the basis of the wording of the letter of the 21<sup>st</sup> February 2006 the Tribunal is satisfied on a balance of probabilities that the information had not been considered by Mr Harding at the date that the assurance was given. Neither is there any suggestion that the assurance was given within the terms of a response to a freedom of information request. The Tribunal is satisfied that of itself an indication that information (that has not been considered) would be provided at some unspecified future date and not within the context of a freedom of information request is not sufficient to bind the authority within the terms of the EIRs. Some of the exemptions are absolute and cannot be voluntarily breached. The Tribunal is satisfied that this assurance is a relevant matter to consider when assessing whether there would be an adverse effect or where the balance of public interest lies, but is not of itself sufficient to trigger disclosure under the Act.

b) Whether the fact that the Additional Party had already disclosed 4 previous advices on the same or a closely related issue deprives them of the right to "cherry pick" and withhold this disputed information?

20. The facts of this case are that in relation to this topic there have already been 4 sets of legal opinions which have been disclosed to Mr Maiden in their entirety. They are

separate advices, from differing lawyers in response to individual instructions. They are not qualifications of the same piece of advice and although there is a general overlap on the topic they are not advice upon identical matters. Mr Maiden does not seek to argue that the contents of the 5<sup>th</sup> advice are therefore disclosed and hence privilege waived pursuant to the contents of the earlier 4 advices. Mr Maiden's principal assertion is that in disclosing some advice on a general topic and not others the Council is providing an incomplete picture.

21. From the correspondence before the Tribunal it is apparent that the Council do not consider that the prior disclosure of 4 advices on the same general topic binds them in relation to the information request for the latest legal advice:

- 3<sup>rd</sup> October 2006 email quoting Mrs Leader's response to Mr Maiden's questioning of why this advice was not being disclosed when 4 previous advices relating to the upon the same topic had been disclosed:

*"the s.42 exemption to the Freedom of Information Act applied to all of the legal opinions you have previously received however, for reasons that I do not fully understand or appreciate, my predecessor, Mr Aley agreed to waive the legal professional privilege in respect of those documents.*

*I am not bound by his previous decisions.*

- 29<sup>th</sup> January 2007 letter to the Commissioner indicating that the Council is willing to disclose the instructions to 2 barristers (but not Mr Booth):

*"on the basis that this is an unusual set of circumstances in that the resultant opinions have previously been released. Their disclosure does not however, set a precedent in preventing the Borough Council in applying legal professional privilege to further instructions and opinions from counsel."*

22. The Commissioner relies upon the case of Rudd v Information Commissioner and the Verderers of the New Forest EA/2008/0020 a case which considered the disclosure of legally privileged information under the EIRs. In that case the Tribunal differently constituted had followed the guidance set out in Fulham Leisure Holdings Ltd v

Nicholson Graham and Jones (a firm) [2006] 2 All ER 599. which defined the relevant process to follow as being:

- Identify the transaction in respect of which the disclosure has been made,
- This might be “*advice given by counsel on a single occasion*”
- Or it might be wider than that immediately apparent in which case the whole of the wider transaction must be disclosed.
- After the above disclosure “*further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed...*”

23. The Tribunal in Rudd noted that:

“In applying these principles to the facts in Fulham Mann J defined the transaction as “*the advice given by Mr Briggs and by DJ Freeman respectively..*” He refused to order further disclosure “*save that there shall be disclosed such later advice as was given by **Mr Briggs or by DJ Freeman which is an alteration, amplification or extension** of the advice already disclosed*”.

24. That Tribunal found that the application of these principles in the Fulham case limited the Transaction:

“*both in relation to the lawyers who gave the advice (in that it was not all advice given to the recipients by the named lawyers) and the topic itself (in that it would not require the disclosure of any other advice received on the same topic by any other lawyers)*”.

25. This Tribunal agrees with the analysis of the case law set out in the Fulham case and Rudd and applies the principles to this case as follows:

- The Transaction can be defined as the legal advice provided by Alan Booth on 24<sup>th</sup> January 2006 to the Council in response to the instructions already disclosed.
- There is no evidence that the **Transaction** encompasses more than the privileged advice.
- The Tribunal is satisfied that the legal advice that the Council sought from other lawyers in relation to the four other previous advices are different transactions in that they come from different sources and have different remits. The fact that they are on the same or a similar topic is not conclusive.

26. The Tribunal has not been asked to view the earlier advices, however having seen the disputed advice, the Tribunal is further satisfied that this is not a case where a wider disclosure is necessary to avoid unfairness or misunderstanding of what has been disclosed. In Mr Booth's advice reference is made to earlier advices by way of context, but there is no evidence that his advice reconsiders or qualifies the advice already given.

27. Additionally the Tribunal accepts the principle set out in Rudd where the Tribunal found that:

*"[ it did not] accept that there is any authority for suggesting that a second advice becomes disclosable by virtue of an earlier disclosure, regardless of the circumstances in which it was obtained, the timing or source of the legal advice. To draw the thread to its natural conclusion, a party cannot know when a first disclosure is made what subsequent advice may be ."*

28. The Tribunal is satisfied that this ground is not made out. However, it notes that the fact of the disclosure of the 4 advices is a relevant matter to be taken into consideration when considering grounds c and d.

29. Although the Ground of Appeal advanced specifically refers to the Additional Party, Mr Maiden also argues that the Commissioner has "cherry picked" in that he has ordered the disclosure of the instructions to Counsel but not the advice itself, which provides an incomplete picture. Whilst not a ground of appeal that the Tribunal is required to determine, the Tribunal makes the following observations.

30. The Commissioner found that privilege had been waived in relation to the instructions and it was upon that basis that he found that there would be no adverse effect in relation to the disclosure of the instructions (in that it had already happened, so the disclosure under the EIRs would not alter the situation). In her letter to the Commissioner dated 20<sup>th</sup> February 2007 Mrs Leader set out the Council's position that:

*"Even if you find that legal professional privilege has been waived in respect of the Instructions I do not consider that it must naturally follow that it must be in the public interest to disclose the advice or opinion that is produced in response to the instructions because to adopt such an approach would I believe erode the principle of*

*legal professional privilege.... It is the opinion which it is important to protect in that it is this document which will disclose any potential claims against an authority. If opinions are going to have to be released simply because a member of the public has obtained details of instructions then I believe that Councils will be discouraged from taking advice when this would in fact result in them being able to comply with and discharge their public duties more efficiently”.*

31. The Commissioner found that the incorporation of the instructions into the introduction to the advice did not breach the privilege of the advice itself, as:

- It did not reveal the substance of the advice,
- It was administratively convenient but not a necessary part of the advice in that clarification of the instructions could have taken place in separate correspondence.
- The introduction could therefore be treated as a separate document.

Having viewed the disputed information, the Tribunal agrees with the Commissioner’s analysis. The disclosure of the instructions does not provide an incomplete or misleading picture in the way that for example the disclosure of some of the instructions but not others might, being a separate entity from the advice.

c) *Whether it is more likely than not that disclosure of the legal advice would adversely affect the course of justice?*

32. It is not in dispute that legal advice is capable of falling within the exception of 12(5)(b) EIRs. In relying upon regulation 12(5)(b) the Council’s arguments in their explanation of their initial refusal dated 3<sup>rd</sup> October 2006 apply:

*“If legal advice contained by the Council is routinely disclosed, the Council would be reluctant to seek advice as it could contain information which may damage its position and such a state of affairs could result in the Council being less able to properly comply with its legal obligations”.*

33. The Tribunal takes issue with Mrs Leader’s reference to legal advice being “routinely disclosed” in the context of considering a request under FOIA or EIR. The disclosure under EIRs is not routine, it is upon consideration of the adverse effect test and the public interest test. The arguments advanced by Mrs Leader appear to be general and

to address the issue of routine disclosure rather than the disclosure of this advice under EIR in the circumstances that already exist. In particular the Tribunal is concerned to note that the Council has never provided evidence of:

- Whether there has been any adverse effect in relation to the initial disclosure of the 4 previous advices on the same topic?
- Whether at the time of the request there would have been any **additional** adverse effect in relation to the disclosure of this 5<sup>th</sup> advice bearing in mind the earlier disclosures?
- Whether the indication from Ray Harding that the 5<sup>th</sup> legal advice would be disclosed had impacted upon the attitude of the Council in seeking legal advice after February 2006?
- Whether in light of earlier disclosures of legal advices relating to The Green and Pier at Hunstanton the advice was written in contemplation of disclosure?
- Whether there was any evidence of an adverse effect when the 5<sup>th</sup> legal opinion was disclosed (and if not whether there was a change in circumstances between September 2006 and February 2008 which would explain that)?

34. In light of the Tribunal's findings in relation to ground d) (below) the Tribunal is satisfied that it is not appropriate to adjourn to seek further evidence upon the point, but the Tribunal remarks that in relation to the unusual circumstances of this case the Tribunal would have expected clearer evidence upon this point. The Tribunal is also surprised that the Commissioner did not address the issue of the context of the 4 prior disclosures in coming to his conclusions upon the point.

35. The Tribunal adopts the approach as set out in *Archer v IC and Salisbury District Council EA/2006/0037* which held that an adverse effect has to be identified and then the Tribunal must be satisfied that disclosure "would" have an adverse effect not "could" or "might". In *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and EA/2005/0030* – the definition of "would" in the context of the words "would prejudice" was considered. In that case "would" was defined as more probable than not. The Tribunal is satisfied that the *Hogan* definition of "would" is transferrable, and hence applicable in this case. Further the Tribunal is satisfied that the adverse effect must relate to the disclosure of **this** advice and that an **additional**

adverse effect would have to be identified beyond any negative consequences that had already flowed from the disclosure of the earlier advices.

36. The Tribunal does however, take into account the following factors:

- Just because one advice is disclosed upon a topic does not automatically mean that all subsequent advices will fall to be disclosed on the basis that “the damage has already been done” and any adverse effect can be deemed to have already come to pass.
- Additionally it is possible for a cumulative effect to build up, in that the more often advices are disclosed, the more reluctant the Council may become to seek legal advice or to keep a record of legal advice sought.
- There had been a change in the Legal services Manager and Monitoring Officer and it is arguable that the “adverse” effect of the previous disclosures could be mitigated by the different approach taken by Mrs Leader, in that her refusal to disclose the 5<sup>th</sup> legal opinion might inspire confidence in the Council that future legal advice would remain confidential.

37. In concluding it is likely that there would be some small additional adverse effect by the disclosure of this 5<sup>th</sup> legal opinion. The Tribunal takes into consideration the assertions from the Council in Mrs Leader’s letter to the Commissioner dated 20<sup>th</sup> February 2007(in the context that there has been a change in personnel and approach within the Council’s legal department):

*“.... It is the opinion which it is important to protect in that it is this document which will disclose any potential claims against an authority. If opinions are going to have to be released.... I believe that Councils will be discouraged from taking advice when this would in fact result in them being able to comply with and discharge their public duties more efficiently”.*

d) Whether the Commissioner was correct to find that the public interest in maintaining the exemption under Regulation 12(5)(b) of the Environmental Information Regulations outweighed the public interest in disclosure?

38. A Public Authority is only entitled to rely upon an exception under regulation 12 to the extent that:



*12. - (1) (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

*(2) A Public Authority shall apply a presumption in favour of disclosure.*

39. In the case of *Bellamy v ICO and Secretary of State for Trade and Industry EA/2005/0023* the Tribunal conducted a review of the Higher Courts case law. *Bellamy* concluded:

*“35: As can be seen from the citation of legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. ... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case, of which this case is not one”.*

40. This Tribunal notes the presumption in favour of disclosure explicit in regulation 12 and reminds itself that it is NOT an absolute exception and consequently there will be circumstances where the public interest in disclosure will equal or outweigh the inbuilt weight (derived from the higher case law) that attaches to legal professional privilege.

41. This Tribunal has considered the disputed information, and notes the following public interest factors in favour of upholding the exception

- At the date of the request the information was still current, relating to an unresolved matter being dealt with by the Council.
- Disclosure would show the strengths and weaknesses of the Council’s position reducing its strategic options,
- the principle of legal professional privilege:
  - promotes respect for the law,
  - encourages public authorities to seek legal advice,

➤ allows for full and frank exchanges between lawyer and client.

- Disclosure may discourage Councils from seeking advice or from keeping a proper record of that advice.
- Disclosure under FOIA or EIR puts public authorities at a disadvantage vis a vis private individuals who are not subject to disclosure of legal advice on this basis.
- Full and frank legal advice aids public authorities in compliance with their legal obligations.

42. The Tribunal considers these in the main to be “generic” arguments as to the importance of legal professional privilege, and largely superceded by the facts of this case. The Commissioner and Council have never properly addressed the issue of what impact the disclosure of 4 previous advices on a similar topic has had in relation to their general arguments and whether in this context they continue to have any significant weight.

43. In favour of disclosure the Tribunal notes that the public interest factors to be considered are those relevant to the benefits of disclosing information, not just the benefits of disclosing legally privileged information (*Pugh v IC and MOD EA/2007/0055*). Additionally there are the inherent public interest arguments that local authorities must be open and transparent in the decisions they take as this:

- Promotes accountability,
- Helps the public to determine whether an authority was acting properly,
- Improves future decision making,
- Gives the public the ability to challenge decisions,
- Upholds public confidence that decisions have been lawfully reached,
- Reassures the public that appropriate advice is sought and acted upon,
- Provides the public with access to information which they need in order to understand the reasons why decisions have been taken.

44. Additionally in this case there are 4 advices already disclosed in relation to the same broad topic, failure to disclose this advice:

- has an undermining effect as if the Council has something to hide,
- is inconsistent.

Further there was a specific expectation of disclosure in the light of the undertaking given by Mr Harding it is in the public interest that Public Authorities:

- keep their promises,
- do not make rash undertakings,
- Should not be allowed to “spin out” public involvement by promising disclosure and then reneging without clear justification.

45. The Tribunal further notes that there is significant local public interest in this matter (as evidenced by the involvement of the Hunstanton Civic Society and the existence of petitions with over 100 signatures) consequently the Tribunal rejects Mrs Leader’s contention in her letter of 23<sup>rd</sup> May 2008 that this information request relates to “*one man’s obsession*”. Additionally the competing roles of the Council (as custodians of public property but also having planning and developmental responsibilities) adds to the importance of the Council being seen to fulfil all its public duties.

46. The Commissioner argues that the fact of the disclosure of the Opinion in May 2008 ought not to affect the analysis of the balance of public interest as decided around the date of the original request, because it post dates the decision and circumstances are subject to change. However, the fact is that the material has now been disclosed presumably because it is now considered by the Council to be in the public interest. In the absence of any evidence to show that there has been a material change in circumstances (see paragraph 48-9 below) which has affected the balance of public interest, it is evidence in support of the Appellant’s contention that the balance of public interest lay in favour of disclosure at the date of the original request.

47. In concluding that at the date of the request the public interest in disclosure substantially outweighed the public interest in upholding the exemption the Tribunal has considered the facts and the law as apply to this case and is not setting a precedent for the inevitable disclosure of legal advice if previous advices on a similar topic have already been disclosed.

### **Other Matters**

48. The Tribunal is most concerned at the attitude displayed by the Council in relation to this matter. The Council having been joined has failed to abide by any of the directions save under threat of a costs order. The Tribunal has not been provided with timely, accurate or complete information. The Tribunal has had no clear explanation for the inconsistencies apparent from the Council's dealing with the matter in particular the Tribunal has had no proper explanation of the way in which the public interest had shifted so that it was in the public interest to disclose the information in February 2008 but not at the date of the request.
49. The Tribunal notes the assertion (in Mrs Leader's email of 23<sup>rd</sup> May 2008) that the decision to disclose the matter was purely resource led. It has now come to light (in Mrs Leader's witness statement of 17<sup>th</sup> October 2008) that there had already been at least a partial waiver of privilege in relation to the disputed material:
- "by May 2008 the Additional Party's cabinet Committee had considered an open report in relation to the subject matter of the Opinion which contained some of the legal advice previously withheld".*
- Mr Maiden states that this was in February 2008 and the Council have not disputed this date. This waiver of privilege was not mentioned at the time that the disclosure was made. From Mrs Leader's statement it is clear that the fact of waiver of privilege influenced the decision to disclose the Opinion to Mr Maiden and to leave it out of the explanation provided to the Commissioner and hence the Tribunal was a material omission.
50. Additionally whilst the Tribunal would not expect all Public Authorities to review previous refused information requests when deciding to make public information that has been previously withheld, the Tribunal considers it disingenuous that the Council continued to defend an earlier decision to withhold information for 3 months without disclosing that the material (or at the very least part of it) was now in the public domain.

**Conclusion and remedy**

51. The Tribunal is satisfied that the public interest in disclosure substantially outweighs the public interest in upholding the exemption and allows the appeal upon this basis. All other grounds are dismissed. In light of the fact that the Appellant has had the disputed information provided to him already, the Tribunal does not require the Public Authority to take any further steps.

52. Our decision is unanimous.

Signed:

Fiona Henderson  
(Deputy Chairman)

Dated this 15th day of December 2008