First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0226

Decided without a hearing

BEFORE

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS JOHN RANDALL AND HENRY FITZHUGH

BETWEEN

EMMA BROOKSBANK

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

RYEDALE DISTRICT COUNCIL

Second Respondent

DECISION AND REASONS

The appeal is allowed. Ryedale District Council is to disclose the remaining withheld information within the later of 28 days or an unsuccessful appeal to the Upper Tribunal.

NB Numbers in [square brackets] refer to the open bundle

Introduction

1. This is the appeal by Ms Emma Brooksbank against the rejection by the Information Commissioner (the Commissioner) on 24 September 2018 [1] of her complaint that Ryedale District Council (the Council) had wrongly refused to disclose certain information to her. Ms Brooksbank made her request under the Freedom of Information Act 2000 (FOIA) and the Council initially dealt with it on that basis. However, the Commissioner decided that the relevant legislation was the Environmental Information Regulations 2004 because the information constituted 'environmental information'. The appeal has proceeded on the basis that the Commissioner was correct in that respect.

2. The Council has been added as a party. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended). [2]

The request

3. Ms Brooksbank made the following request of the Council on 5 February 2018:

   '1. The email message sent by Anthony Winship to Edward Legard on 17.59pm on 26th July 2010. The subject of this email was to reject the request in person by Edward Legard to Anthony Winship that the email sent by Julian Rudd on 8th July 2010 at 12.41pm be made public to all members of Ryedale District Council under the Public Interest Disclosure Act. (The email from Julian Rudd of 8th July 2010 was addressed to Edward Legard and Janet Waggott and copied to Paul Cresswell, Gary Housden, Marie-Ann Jackson, Linda Cowling, Robert Wainwright, Keith Knaggs and Graham Price. It was in response to Edward Legard's question to Janet Waggott as to why RDC was in such a hurry to sell WSCP for supermarket development).
   2. An unredacted copy of the contract between RDC and GMI Holbeck for the sale of Wentworth Street car park (in late 2010 or early 2011). Now that the contract has expired, the reason no longer exists for withholding it or claiming that wording has to be redacted.
   3. The specific wording of the briefing question which RDC asked Nathalie Lieven QC to address in January 2012 about the motion which Councillors Legard and Burr sought for the competing retail planning applications to be "called in".
   4. Costs paid by RDC, as follows:
   a. February 2008: the fee paid to WSP Atisreal to provide a retail report on Malton
   b. September 2011: The fee paid to the external solicitor to examine the complaint brought by AR Hemesley against five Malton town councillors
   c. January 2012: The fee paid to Nathalie Lieven QC (see no 3 above)

[1] FS50740060
[2] SI 2009 No 1976

d. September 2012: The fee paid to Roger Tym & Partners for attendance at the Planning Inquiry into RDC's refusal of the livestock market planning application´ (Ms Brooksbank's emphasis).

4. The Council responded on 2 March 2018 **[80]**. In relation to the first three parts of the request, it relied on the exemptions in sections 36 (prejudice to the effective conduct of public affairs), 41 (information provided in confidence), 42(1) (legal professional privilege) and 43 (commercial interests) FOIA. Sections 36, 42 and 43 are qualified exemptions. The Council decided that the public interest in withholding the information outweighed that in disclosing it. It upheld its decision on review on 5 April 2018 **[88]**. It disclosed the information identified in part 4 of the request.

5. After the Commissioner had signalled that the EIR, not FOIA, applied, the Council said it relied instead on the exceptions in regulation 12(4)(e) (internal communications) and (5)(b) of the EIR (course of justice) in relation to part 1 of the request and regulation 12(5)(b) in relation to part 3. In relation to part 2, it switched horses to regulation 12(5)(e) (commercial interests).

<u>Factual background</u>

6. The background is a long-running dispute amongst residents of Malton in Yorkshire and councillors as to which site should be developed as a supermarket. A majority of councillors on the planning committee, supported by key officials, thought that the appropriate site was the Wentworth Street Car Park in Malton (WSCP) owned by the Council, whereas other councillors and many residents felt that the livestock market was more appropriate. The dispute culminated in a judicial review quashing a decision by the Council to grant planning permission to a developer for WSCP. Ms Brooksbank is a resident but not a councillor.

7. The key chronology is as follows:

- **2007**: the owner of the livestock market (and, it appears, 60% of Malton's retail facility), Milton (Peterborough) Estates Company trading as Fitzwilliam (Malton) Estate (FME), submitted a planning application for the site. Officers recommended refusal a year later. It appears that FME did not pursue the application at that time

- **9 July 2009**: the Council invited expressions of interest for the development of WSCP

- **8 July 2010**: Julian Rudd, Economic Development Officer, sent the email to Councillors Edward Legard and Janet Waggott referred to in the first part of the request (the email is now in the public domain and Ms Brooksbank attached a copy to her Notice of Appeal **[27]**)

- **26 July 2010**: Anthony Winship, the Council's head of legal, sent an email to Cllr Legard explaining that all the Council would be deciding at the forthcoming meeting

on 29 July was whether to redevelop the WSCP site – whether planning permission should be granted would be for decision later

- **17 November 2010**: the Council resolved to dispose of WSCP, subject to planning permission

- **4 May 2011**: the Council entered into a contract to sell WSCP to GMI Holbeck Land (Malton) Limited (GMI), subject to planning permission

- **10 May 2011**: FME submitted a revised planning application for the livestock market

- **20 December 2011**: Cllr Legard sought to put a motion that the two planning applications should be called in (i.e. decided) by the Secretary of State rather than by the Council. His principal rationale was that the Council was conflicted as owner of WSCP and because of statements made by officials

- **20 December 2011**: Mr Winship refused to accept the motion, citing advice from the National Planning Casework Unit (annexed to the Council's Response **[76]**) that the Council should only refer applications to the Secretary of State if and when it had issued a minded to approve decision

- **23 December 2011**: Mr Winship informed Cllr Legard by email that further advice would be sought about the legality of his motion and that a Monitoring Officer/Chief Finance Officer's report might be needed for the Council meeting of 12 January 2012

- **Late December 2011 or early January 2012**: the Council sent the Instructions to Ms Lieven the subject of part 3 of the request

- **Early January 2012**: Ms Lieven gave her Advice

- **12 January 2012**: at a meeting of the Council, the Chairman ruled that Cllr Legard's motion was out of order, based on Ms Lieven's Advice (Ms Brooksbank attached an excerpt from a transcript of the meeting to her Notice of Appeal **[33]**)

- **29 March 2012**: the Council granted planning permission for WSCP and refused it for the livestock market

- **29 October 2012**: a planning inspector allowed FME's appeal of the decision to refuse permission for the livestock market

- **19 November 2013**: GMI submitted revised documentation in respect of its application

- **24 April 2014**: the Council once again granted GMI planning permission for a superstore at WSCP

- **15 April 2015**: Cllr Legard wrote to his fellow councillors explaining his concerns about the process which had led to the grant of planning permission for WSCP: the

lack of fairness, integrity and democracy, as he saw it, was one reason behind his decision to step down **[34]**

- **9 July 2015**: Mr Justice Dove quashed the 24 April 2014 decision in *R v (Milton (Peterborough) Estates Co) v Ryedale District Council* [3] on the application of FME (GMI was an interested party)

- **5 February 2018**: Ms Brooksbank made her request

The Commissioner's decision

8. The Commissioner decided that regulation 12(5)(b) of the EIR (course of justice) applied to parts 1 and 3 of the request and that the public interest favoured withholding the information. She did not need to consider whether regulation 12(4)(e) (internal communications) also applied to part 1. She also held that the Council was not entitled to rely on regulation 12(5)(e) (commercial interests) in relation to part 2 because legitimate economic interests would not be adversely affected by disclosure. The Council has not challenged that decision and has presumably disclosed the information.

The pleadings

9. Ms Brooksbank's appeal is limited to part 3 of her request – the 'briefing question' put to Nathalie Lieven QC (the remaining withheld information). To be strictly accurate, in her desired outcome she said she was seeking Ms Lieven's 'response' (i.e. her Advice) as well but she later acknowledged that this fell outside the scope of her request and therefore the appeal.

10. Ms Brooksbank did not dispute that regulation 12(5)(b) was engaged. Rather, she focused on the public interest arguments (see below).

11. In her Response, the Commissioner set out the background and the legal principles relating to regulation 12(5)(b) and maintained her decision both that it was engaged and that the public interest favoured withholding the remaining information. She pointed out Ms Brooksbank did not appear to be challenging the weight the Commissioner had given to the public interest in maintaining the exception.

12. In its Response, the Council addressed in detail the allegations of misfeasance which it considered Ms Brooksbank had made (relevant to the public interest test).

13. Ms Brooksbank submitted a detailed Reply to the Commissioner's Response, again focusing on the public interest arguments.

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[3] [2015] EWHC 1948 (Admin) http://www.bailii.org/ew/cases/EWHC/Admin/2015/1948.html

Discussion

Is the remaining withheld information environmental information?

14. The first issue is whether the Commissioner was correct to decide that the requested information constituted 'environmental information', such that the EIR and not FOIA applied.

15. Regulation 2(1) of the EIR provides:

> *'"environmental information" has the same meaning as in Article 2(1) of the Directive [Council Directive 2003/4/EC], 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;*
> *…*
> *(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)*
> *…'.*

16. The definition is very wide, consistent with the objective of Directive 2003/4/EC (the directive), which it transposed, to facilitate access to information relating to the environment. In *BEIS v Information Commissioner and Henney*, [4] where the precise issue was whether it could be said that a project assessment review of a particular subset of the Government's Smart Meter Programme (SMP) was information 'on' a measure affecting the environment (the SMP), the Court of Appeal looked for a sufficient connection between the information requested and the environment. The Tribunal has done likewise and has concluded that the there is a sufficient connection between the Instructions to Ms Lieven and the environment. The information in the Instructions relates to 'measures' (paragraph (c)) likely to affect the state of 'land' (paragraph (a)).

17. Even if this is wrong, the outcome of the appeal would be the same under section 42 FOIA.

[4] [2017] EWCA Civ 844

Is regulation 12(5)(b) of the EIR engaged?

18. Regulation 12(5)(b) provides:

> *'… a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*
>
> *…*
>
> *(b) the course of justice …'.*

19. Article 4(2) of the directive says that the exceptions listed there (materially identical to regulation 12(4) and (5) of the EIR) must be interpreted restrictively. The requirement is not expressly copied over to the EIR. However, there is no doubt that, however interpreted, 'course of justice' in regulation 12(5)(b) extends to LPP.

20. There are two types of LPP: legal advice privilege and litigation privilege. It is legal advice privilege on which the Council relies. Such privilege attaches to all communications passing between a client and his or her lawyers, acting in their professional capacity, in connection with the provision of legal advice which 'relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law' (*Three Rivers DC v Bank of England (No 6)* [5]). There is no need for litigation to be contemplated or in existence.

21. In the ordinary course of events, Instructions to Counsel to advise on an issue of law (such as the Instructions to Ms Lieven) are clearly covered by legal advice privilege. The issue in the appeal is whether the public interest nevertheless favours disclosure.

The public interest: the legislation

22. Regulation 12(1) provides:

> *'… a public authority may refuse to disclose environmental information requested if –*
>
> *(a) an exception to disclosure applies under paragraphs (4) or (5); and*
>
> *(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'.*

Included in paragraph (5) is the course of justice exception. It follows that, even if disclosure of requested information would have an adverse effect on the course of justice (through setting aside of LPP), it must be disclosed unless the public interest in maintaining the exception outweighs that in disclosing it.

23. Regulation 12(2) then states:

[5] [2004] UKHL 48, [2005] 1 AC 610 per Lord Scott at [38]

'A public authority shall apply a presumption in favour of disclosure'.

The effect of this is that the onus is on a public authority to prove that there is a greater public interest in withholding the information.

The public interest: arguments in favour of withholding the information

24. Caselaw has made it clear that there is a strong public interest built into maintaining LPP, and therefore in upholding the exemption under section 42 FOIA and the exception in regulation 12(5)(b) EIR. This is to enable clients freely to discuss their legal problems with their lawyers without fear that the discussions might become public. In *R v Derby Magistrates Court, Ex p. B* [1996] AC 487, cited by a three-judge Upper Tribunal in *DCLG v Information Commissioner and WR* [2012] UKUT 103 (AAC) (*DCLG*), [6] Lord Taylor of Gosforth CJ said after reviewing the caselaw: [7]

    'The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests'.

    There might, Lord Taylor said, be rare exceptions, but the drawback would then be that 'once any exception to the general rule is allowed, the client's confidence is necessarily lost'. [8]

25. In *DCLG*, where the request related to the disclosure of legal advice, the Upper Tribunal said that 'the words "would adversely affect the course of justice" [in regulation 12(5)(b)] include the effects on the administration of justice generally by reason of a weakening of confidence in the efficacy of LPP which a direction for disclosure in the particular case would involve'. [9]

26. More generally, the Upper Tribunal said this:

    '42. Section 42 of FOIA contains a qualified exemption for "information in respect of which a claim to legal professional privilege could be maintained in legal proceedings". In DBERR v IC & O'Brien [2009] EWHC 164 (QB) Wyn Williams J, on an appeal (which at that time lay to the High Court) from the Information Tribunal, concluded at para. [39] that in previous decisions under s.42 the Information Tribunal had taken the correct approach to the public interest balancing exercise. That approach had been

[6] http://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html (28 March 2012)
[7] P507D
[8] P508C
[9] [51]

summarised in <u>*Rosenbaum*</u> *(EA/2008/0035/ 4.11.2008), in a passage approved by Wyn Williams J, as follows:*

> *"…… the Tribunal does not agree with Mr Rosenbaum that LPP merits only 'some weight' … From the cases referred to above, this Tribunal is satisfied that LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal disclosure must take place."'*

27. The Upper Tribunal expanded on the qualified nature of the exemption:

> '*43. Wyn Williams J. went on at [53] to hold that*
>
> > *"the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."*
>
> *44. In other words, although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption*'.

28. It is clear that the Upper Tribunal intended that the same approach should apply to regulation 12(5)(b) of the EIR.

29. In FER0601925, which concerned the obtaining by a local planning authority of legal advice, the Commissioner considered that there was a real potential that disclosure would result in the authority being discouraged from seeking such advice, particularly in the context of contentious matters such as those relating to planning. That case, like all others relating to LPP, depended on its particular facts, but the Commissioner was right to identify as an important factor in the public interest balancing exercise the potential inhibition a public authority might feel in obtaining legal advice in future were it required to disclose the requested information.

30. In the present case, the Council argues in addition that, although the proposed WSCP development has not taken place, the Instructions to Ms Lieven would be equally relevant to any further development proposal for the site and to the Council's decision-making procedures more generally. It also makes the point that the planning system is transparent and allows members of the public to object to applications, with the possibility of challenging decisions by local planning authorities: there is therefore no need, the Council argues, for legal advice to be disclosed for the public interest to be served.

The public interest: arguments in favour of disclosure

31. Ms Brooksbank has identified a number of factors which she says points to the Instructions being disclosed. Most are disputed by the Council and the Commissioner.

   i. Ms Brooksbank says in her Notice of Appeal that she is in the late stages of writing a book to show how the Council 'consistently acted unlawfully and against the interests of its electorate'. Her objective is to demonstrate that political change needs to start from the bottom and the desired change would be impeded if councils could not be obliged to disclose all the facts 'when the appropriate legal processes have shown that they have consistently and deliberately acted unlawfully'

   ii. More specific to the particular dispute but still with more general relevance, Ms Brooksbank also argues that the fact that the Council was, in her view, 'fatally compromised' pointed towards disclosure. The fatal compromise was because it was both the landowner of WSCP and adjudicator of the planning application contingent on the proposed sale. The Council and the Commissioner both argue, correctly, that there is nothing inherently wrong with a council determining a planning application in relation to land which it owns. Indeed, as the Commissioner points out in her Response the Town & Country Planning General Regulations 1992 usually enable local planning authorities to determine *their own development* proposals on land in which they have an interest. In that case, the potential conflict of interest is even more marked than in the present case, where the Council was the putative seller of land but not the proposed developer. In fact, the Council had, quite properly, asked a neighbouring Council to give planning advice in relation to the WSCP application, thereby creating at least some distance. (Ms Brooksbank argues that the lawyer for the neighbouring council did not show independence but the Tribunal does not have enough information to make a judgement about that).

      In other words, something more than the Council's dual role as landowner and planning authority is required to demonstrate what Ms Brooksbank labels as 'misfeasance'

   iii. Ms Brooksbank, for her part, identifies the 'something more' as part of her (correct) thesis that 'Legal Advice Privilege should be applied where there is a genuine need for advice but never when it is used to aid misfeasance':

      - the context was not simply the Council's dual role as landowner and planning decision-maker. A third party (FME) and a separate site (the livestock market) [10] were also involved. If, as Ms Brooksbank contends, the Council was determined to grant planning permission for WSCP, in order to

[10] In fact, it appears that FME also had plans to develop another of its sites in Malton for a supermarket

realise its full value, it followed that it would not grant permission to FME, whatever the merits of its application, because Malton did not need two new supermarkets. The suspicion – Ms Brooksbank goes further – is that FME's application did not get a fair hearing

- the email from Mr Rudd of 8 July 2010, Ms Brooksbank maintains, made it plain that the Council was in a race to be first with a major retail planning development in Malton. The email explained that there were three potential sites being considered for a new supermarket. Permission for development at the livestock market [11] 'will loose (sic) millions from the value of wscp – our most saleable asset'. Mr Rudd continued: 'In terms of our responsibilities as a land owner and manager of public assets that would be disastrous at a time when our funding sources are disappearing into thin air, particularly when we can raise a lot of cash and give the public a free parking facility on at least part of wscp'.

  Ms Brooksbank believes that this supports her hypothesis that the planning applications for a supermarket in Malton were in effect predetermined.

- Mr Justice Dove was highly critical of the officers' report which led to the April 2014 decision re-granting planning permission for WSCP. He held, for example, that the inspector's decision on FME's earlier successful appeal should have been given to planning committee members for pre-reading, not tabled at the meeting. The judge found that the report significantly misled members about the inspector's conclusions. The officers' statement that the inspector's conclusions were 'not fully reasoned other than pointing to poorer pedestrian links' was a fundamental misrepresentation of his decision, which was in fact fully reasoned and legal impeccable. Applying the sequential test (a planning principle that seeks to identify, allocate or develop certain types or locations of land before others, for example a town-centre site such as the livestock market before an edge-of-town site such as WSCP), the inspector favoured the livestock market 'bearing in mind its ideal location for incorporation within the functioning town centre and its ability to operate as an extension of the town centre, unlike the car park site'. The officers did not, the judge said, provide members with adequate reasons to justify planning permission for WSCP in light of the fact that they were inviting members to reach a contrary conclusion to the inspector's sequential test. The report also omitted any reference to the inspector's conclusions that the livestock market proposal should be seen as creating a 24% positive impact on the town centre's turnover. Finally, the judge held that the officers' conclusion that paragraph 26 of the National Planning Policy Framework did not apply (on the basis that it was not in the town centre) was infected with error.

[11] Or the third site

These are powerful judicial criticisms of the Council's decision to re-grant planning permission for WSCP and led to quashing of the decision

- According to Ms Brooksbank, the Council delayed determining FME's revised application for nearly a year so that (she says) it could be determined at the same meeting as GMI's for WSCP. The Tribunal is not in a position to assess whether that is a fair criticism.

iv. Ms Brooksbank argues that the Instructions to Counsel 'should reveal whether [the Council] were genuinely seeking an independent opinion or seeking corroboration of their existing view'

v. She also says that decisions granting planning permission for WSCP, and refusing it for the livestock market, led to total costs for the Council of just over £2m, a figure obtained from FOIA requests. It appears from the Council's Response that this includes at least the larger part of the £1.29m which Ms Brooksbank says in her Additional Response **[64]** the Council spent in buying the Citizens Advice Bureau (CAB) new premises as a replacement for their accommodation at WSCP. The money was spent, she says, before GMI's planning application was determined, indicating predetermination. Whether or not that is fair, it is clear that the dispute over the siting of a new supermarket in Malton proved very expensive for the local taxpayers – ironically, when the Council's objective in realising the full value of WSCP was to bring in much-needed revenue

vi. Ms Brooksbank suggests that £1800 (in fact, £1500 plus VAT) was a surprisingly low figure for London leading counsel, indicating that the question put to Ms Lieven was 'very simple, certainly not one explaining the complexities of this situation or including any reference to the Council's conflict of interest …'.

The Tribunal's assessment of the competing public interest arguments

32. Ms Brooksbank, of course, has not seen the Instructions to Ms Lieven. The Tribunal has, along with an exchange of emails between Mr Winship and Cllr Legard on 26 and 27 July 2010 (Mr Winship's email of 26 July was included in the first part of Ms Brooksbank's request). The Instructions were prepared by Mr Winship. They canvass two broad issues: (i) whether the Council could invite the Secretary of State to call in the planning applications before it made provisional decisions to grant or refuse; and (ii) whether the Council was conflicted in making the planning decisions because it was the owner of WSCP.

33. Some of Ms Brooksbank's arguments in favour of disclosure are wide of the mark. For example, Mr Justice Dove did not find that the Council had been guilty of deliberate wrongdoing and nor, it seems, did the inspector on the FME appeal. Nor did the judge say that the Council was conflicted as owner of WSCP. In addition, when challenged through legal processes, it was inevitable that the Council would

incur significant legal costs. On the face of it, the Council's decision to relocate the CAB was rational if this enabled a much greater sum to be realised from the sale of WSCP, even if its timing raises questions.

34. Similarly, there is nothing in Ms Brooksbank's point that one would have expected Ms Lieven's fee to be more than £1500 plus VAT had she been properly briefed. The issues raised with her were not legally or factually complicated.

35. The Tribunal has placed the considerable weight required by caselaw on the importance of maintaining legal advice privilege and LPP more generally. However, it has concluded, albeit by a fine margin, that the public interest favours disclosure, for these reasons:

    i. Considerable time has elapsed since the Instructions were sent (and the Advice given). Legal advice privilege is particularly strong where the advice is recent and the issue to which it relates remains current. [12] By contrast, it may be weaker (though still significant) where the advice is old and/or is no longer current. Here, the request was made some six years after the Instructions were sent and some two and a half years after Mr Justice Dove's decision quashing the re-grant of permission to GMI. The Council argues that the subject-matter of the Instructions will remain relevant for any future proposal to develop WSCP and for its procedures more generally. This is not persuasive. The particular factual context of the Instructions is unlikely to be repeated

    ii. In this connection, although public bodies are as entitled to claim LPP as anyone else, the need to protect privilege is less compelling where, as here, the public body is really seeking advice about general points of law and the advice does not depend on a particular set of facts

    iii. In any event, to the extent that the matters canvassed are relevant to how the Council conducts itself in similar situations in the future, there is every reason for both members and residents to understand the broad issues. How calling-in works, and whether and in what circumstances local authorities are constrained from determining planning applications where they own and wish to dispose of the land in question, should not be kept from members or residents

    iv. The Tribunal does not accept that disclosure means that the Council is likely to be deterred from seeking legal advice on related (or other) matters in the future: it will know that LPP will be accorded strong weight and is likely to be decisive, at least while the advice remains live. In any event, the fact is that Parliament has decided that section 42 FOIA should be a qualified exemption, and the European Union and subsequently Parliament has decided that regulation 12(5)(b) (including LPP) should be a qualified exception, and it follows that

[12] See, in this connection, *Kessler v Information Commissioner and HM Commissioners for Revenue & Customs* EA/2007/0043 and *Kitchener v Information Commissioner and Derby City Council* EA/2006/0044

public authorities are aware that there are circumstances in which legal advice and any Instructions to Counsel which precede it may have to be disclosed. A chilling effect on the willingness to obtain legal advice, even if realistically present, cannot therefore be decisive

v. As Ms Brooksbank argues, the context here was not only the Council's dual role as selling landowner and planning application decision-maker but the fact that a third party wished to develop separate sites and would be unlikely to be permitted to do so if permission were granted for the Council-owned site. That argues for maximum transparency

vi. There appears to be no prospect of disclosure of the Instructions making the Council vulnerable to legal action, as the Council claimed (in relation to all the requested information) in its initial response and in correspondence with the Commissioner

vii. It would appear on general principle that members, had they asked for them, would have been entitled to see the Instructions (and the Advice) for the 12 January 2012 meeting so that they could make informed decisions. It does not follow, as Ms Brooksbank argues, that residents such as herself should also have had access to the documents – local authorities are entitled to seek legal advice on a confidential basis – but the fact that the elected representatives, including members opposed to what officers were proposing, could have had access to the Instructions diminishes the weight to be attached to the confidentiality which LPP is designed to protect

viii. The disputes around the planning applications have cost the Council a great deal of money. The inspector overturned the refusal of FME's revised application and Mr Justice Dove was highly critical of the process leading to the re-grant of permission for WSCP. As noted above, the Council, faced with legal challenges, cannot be criticised for defending its position, but the heavy drain on taxpayers' resources nevertheless points to maximum transparency of the processes which led to the challenges

ix. In this connection, whilst it is not for the Tribunal to reach a conclusion as to whether the Council was unlawfully predisposed to grant planning permission for WSCP and refuse it for the livestock market, it cannot be said reading the correspondence that residents' suspicions were fanciful. The inspector on FME's appeal noted that officers had adopted what they described as a 'novel' application of the sequential test, leading them to advise the planning committee that the WSCP site was preferable to the livestock market (at the inquiry, the Council planning witness acknowledged significant flaws in the Council's approach). [13] The inspector awarded costs against the Council on some of the issues – costs are only awarded in planning inquiries where a party

[13] See the quote in paragraph 11 of Mr Justice Dove's decision

has behaved unreasonably. The costs were later agreed at £148,000. [14] The fact that, if the Council was so predisposed, the predisposition may have been motivated by an understandable desire to maximise revenue at a time of a major squeeze on its finances does not diminish the need for light to be shone on how it conducted itself.

x. Although the issues canvassed in the Instructions to Ms Lieven may not have played a central role in the saga, the question-marks about how the Council handled the applications again argues for maximum transparency

xi. The Tribunal observes that, if Ms Brooksbank's expectation is that the Instructions contain a smoking gun, she is likely to be disappointed. Mr Winship explained the background clearly and asked his questions in a methodical manner. However, there can be a public interest in showing that a public authority acted properly in a particular respect, so that unwarranted suspicions can be allayed; there is not only public interest in revealing wrongdoing

xii. Ms Brooksbank's desire to use the dispute as a case-study for more general political philosophy discourse in a book, and to have as complete a bank of information as possible to validate the case-study, carries some public interest, albeit in the Tribunal's judgment only slight.

xiii. Despite this, the overall arguments in favour of disclosure are strong and at least as strong as those in favour of withholding the information, indeed probably marginally stronger

xiv. Under the EIR, there is a presumption in favour of disclosure, which is determinative in a finely-balanced case such as the present one.

Conclusion

36. For these reasons, the appeal is allowed. The decision is unanimous.

Signed

Judge of the First-tier Tribunal
Date: 24 October 2019
Promulgation date: 25 October 2019

[14] See Appendix 2 to Mr Winship's letter of 11 September 2018 to the Commissioner **[123, 140]**