Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 24 September 2009

Public Authority: Brighton & Hove City Council
Address: Kings House
Grand Avenue
Hove
BN3 2LS

Summary

The complainant requested copies of correspondence between council officers related to the drawing up of the report concerning the King Alfred development at Brighton & Hove. In particular he requested correspondence which provided advice/opinions on the council's recommendation to approve and its compliance with planning guidelines.

The council withheld the information via the exceptions at regulations 12(4)(b), 12(4)(e), 12(5)(b), 12(5)(f) and 13(1) of the EIR.

The Commissioner found the council to have incorrectly applied the exceptions. He also found that it had failed to comply with regulations 5(1), 5(2) and 14(3)(a) of the EIR. The Commissioner ordered disclosure of the information.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background Information

2. The King Alfred planning application was for a mixed use development on the seafront at Hove to be constructed by the Karis / Ing consortium. It comprised 750 residential units in twin towers and eight other buildings, a sports and swimming centre, retail outlets, restaurants and cafes, public spaces, doctors' surgery, police office, public toilets and basement car parking. The cost of the development was estimated to be £270 million.

3. Some weeks before the council's decision was made to approve the scheme a number of the authority's planning officers expressed their professional concern about the development in a memorandum to the assistant director of city planning.

4. The assistant director responded with a paper containing proposals supplied by the head of the council's legal section.

The Request

5. On 16 July 2007 the complainant requested the following information from the council:

'all emails and correspondence from officers to officers within the planning department relating to the drawing up of the King Alfred planning report (March 2007). In particular I am interested in emails providing advice/opinions on the recommendation (minded to approve) and on the application's compliance with the council's planning guidelines.'

6. In a refusal notice of 14 August 2007 the complainant was informed that the information was exempt from disclosure by virtue of s36(2)(b) and s36(2)(c) of the Freedom of Information Act.

7. The complainant appealed on 17 August 2007 and on 28 August 2007 the council's internal review upheld the decision to withhold the information. The review stated that the request *could also* be considered under the EIR and that regulations 12(4)(b) (manifestly unreasonable) and 12(4)(e) (internal communications) were engaged.

The Investigation

Scope and chronology of the case

8. The complainant wrote to the Commissioner on 25 September 2007 to complain about the council's refusal to disclose the information.

9. The complainant pointed out that the council had argued that it was not in the public interest to disclose the information whilst at the same time maintained the request was unreasonable owing to the time it would take to locate the emails. It seemed that the public interest decision to support non disclosure had been taken by the council without actually looking at the emails.

10. On 30 September 2008 the Commissioner informed the council that it was unclear from its internal review whether or not the authority had replaced its reliance on the s36 exemption with that on regulations 12(4)(b) and 12(4)(e). He advised the council that he considered planning matters to be environmental information as defined by regulation 2(1) of the EIR and asked it to clarify its position. The council confirmed to the Commissioner that it was no longer reliant on the s36 exemption in order to withhold the information. It concurred with the Commissioner that the requested information was environmental information and confirmed that the authority was reliant on the exceptions at regulations 12(4)(b) and 12(4)(e) in order to withhold it.

11. In his letter of 30 September 2008 the Commissioner queried the council's application of regulation 12(4)(b). It had maintained in its review that the request was manifestly unreasonable because it was estimated that it would take a day for just one officer to identify the relevant emails, filter out non-relevant parts of the correspondence and check for third party information. The council argued that if that time was multiplied by the number of officers involved with the additional load of the lead officer taken into account, responding to the request would severely disrupt the everyday work of the authority.

12. The Commissioner considered that a more detailed explanation was required as to how the authority had reached this conclusion. He therefore requested:

(i) the number of emails estimated by the council to constitute a day's retrieval by one officer

(ii) the number of officers by which the time taken to carry out the task had been multiplied

(iii) an explanation of the lead officer's additional load which the council submitted would contribute to severe disruption of the everyday work of the council

(iv) the total number of days arrived at by the council in its calculation of the time that it considered would be necessary to supply the requested information.

13. On 21 October 2008 the council replied that work connected to the proposed development spanned a number of years and that 26 planning officers would have contributed directly or indirectly to the preparation of the planning report. The council maintained that all 26 of the planning officers were likely to have sent an email or other correspondence on the topic to a colleague in the city planning team. The council further argued that within the department there were in total 106 planning and administrative staff who might have sent such an email.

14. The council maintained that in addition to searching the departmental project files, the individual electronic and paper records for each of the 106 members of staff would need to be searched. It said that the search would need to encompass 'live data' (only accessible by searching through an individual's electronic folders) as well as data in historic caches. This search would need to include records generated by four planning officers who had left the council and whose electronic communications had been archived. The council submitted that as there was no single correspondence title, a comprehensive search would need to involve a manual trawl of all correspondence generated over the relevant time frame.

15. The council said it had not been possible to come up with a precise estimate of the number of man-hours that this retrieval work would entail because there was no precedent for it. Despite this the council said it was clear that in totality a very significant dedication of resources would be required to fulfil the task.

16. The council argued that its planning department was extremely busy dealing with around 4000 planning applications a year. It maintained that the work of the

department would be severely disrupted and that its statutory obligations could be jeopardised if officers were diverted from their routine tasks to deal with the request. Consequently the council considered the request to be manifestly unreasonable.

17. The council further argued that apart from the potential disruption there was the question of cost to consider in answering the request. It submitted that the work involved in locating the information, retrieving it and extracting it from other documents far exceeded the appropriate limit and would be a disproportionate use of public funds.

18. The Commissioner informed the council on 21 November 2008 that he was not persuaded by the council's explanation that the exception at 12(4)(b) applied. Whilst 26 planning officers may have been involved with the project, he considered that the search function on a personal computer takes only a matter of seconds to call up each individual's emails. The Commissioner was not convinced by the council's suggestion that a search of electronically archived folders takes that much longer than the search of 'live' electronic folders. Neither was he convinced by the argument that in the absence of a correspondence title, a 'manual trawl' would be required. The Commissioner considered that, at the very least, the keying in to the search function of obvious headings such as the planning reference number or 'King Alfred planning report' would bring up the results.

19. The Commissioner further advised the council that he was not persuaded by the argument that the extent to which a public authority may be busy constituted a valid reason for failing to carry out an adequate search for requested information under the EIR.

20. He advised the council that if it wished to rely on the exception at 12(4)(e) he would need to examine the information to which the exception applied. He asked that the authority provide him with the emails that had been requested for the first and last years of the period in question so that he could make an initial assessment of the appropriateness of the exception.

21. On 11 December 2008 the council responded that 29 (as opposed to 26) separate planning officers were now identified as having direct involvement with the report. It also maintained that the period it would need to search stretched from the year 2001 to 2007. The council said it had run a test on the email account of just one of these officers on the authority's Lotus Notes operating system which was in use during the period in question and the search term 'King Alfred' had yielded 2543 results for the period 2004 to 2007 alone. It estimated that to copy the contents of an email into another document would take 15 seconds per email. The council concluded from this that for just one account alone, using one search term and searching within a limited time frame, it would take in the region of ten and a half hours to complete the task. The council maintained that the planning officers concerned would also have to check each document in order to verify that it fell within the terms of the request. It submitted that this exercise only dealt with electronically held information and did not take into account the paper files. The council reiterated that a fully comprehensive search would involve a total of 106 planning and administrative staff.

22. The council went on to suggest that if the Commissioner were to accept that regulation 12(4)(b) was engaged there would be no need for him to determine the reasonableness of the authority's reliance on the exception at regulation 12(4)(e). The council stated that whilst its arguments to withhold the information via regulation

12(4)(e) had been based to some extent on hypothesis its arguments had been informed by the Assistant Director whose awareness of the issues involved enabled assumptions to be made as to the impact of the emails' disclosure.

23. Lastly, the council informed the Commissioner that it was not possible to interrogate the council's database by year alone. It argued that fulfilling his request for information from the first and last years of the period in question would entail a full interrogation of the database by individual names and all that that entails.

24. The Commissioner advised the council that:

(i) The premise upon which the council had based its case for refusal to locate the information was questionable.

(ii) He was not persuaded that the whole of the council's 106 planning and support staff would have been involved in emailing each other with professional advice and opinion on the compliance of a single planning report.

(iii) The council's proposition that an information search would need to span six years was an overstatement of what was required. The Commissioner considered the appropriate search period to be from the date that the planning application was registered to the date of the planning decision - this equated to the period between 27/10/06 and 12/7/07.

(iv) The council should have provided the applicant with advice and assistance to narrow the request on similar lines to that suggested above. He considered that the council had breached regulation 9 of the EIR by failing to provide the relevant advice and assistance.

(v) In the Commissioner's view it was unlikely that the council would not know which of its officers had been assigned to or had been involved in the professional consideration of the planning application. He identified six key planning positions and advised the council to provide the relevant emails corresponding to those positions for the period 27/10/06 to 12/7/07.

(vi) The Commissioner informed the council that he would consider the appropriateness of the exception at regulation 12(4)(e) on receipt of this information.

25. On 21 January 2009 the Commissioner advised the council that he would need to issue an Information Notice requiring provision of the information if the authority did not respond to his request.

26. On 28 January 2009 the council informed the Commissioner that it had identified a core group of six planning staff and that it had compiled the relevant correspondence for the narrowed search period of 27/10/06 to 12/7/07 as he had suggested.

27. The authority provided the Commissioner with two files of correspondence from that period. The first file of internal correspondence related mainly to the input and process of drawing up the planning report. The council agreed to release that information to the complainant. It submitted that the contents of the second file were exempt from disclosure by virtue of the exceptions at regulations 13 (personal data), 12(5)(b)

(course of justice) and12(4)(e) (internal communications). The council later submitted on 17 February 2009 that the exemption at 12(5)(f) (voluntary supply) also applied.

Findings of fact

28 The information that was withheld by the council comprises the planning officers' memorandum, two emails in response from the assistant director of city planning and a communication containing proposals from the head of its legal section.

Analysis

Procedural matters

29. – The council failed to provide requested information to the complainant. In failing to do so the council breached regulation 5(1) of the EIR.

- The council failed to provide requested information to the complainant within 20 working days of the date of request. In failing to do so the council breached regulation 5(2) of the EIR.

30. The council sought to rely upon exceptions it had not cited to the complainant. By seeking to rely on the exceptions at regulation 12(5)(b), regulation 12(5)(f) and regulation 13 it failed to comply with regulation 14(3) of the EIR.

Exceptions

Regulation 12(4)(b)

31. The council maintained that the request was manifestly unreasonable. While the EIR does not define the term 'manifestly unreasonable', the Commissioner takes the view that 'manifestly' implies that a request should be obviously or clearly unreasonable. He considers that the concept 'manifestly unreasonable' is largely comparable to the types of request which are encompassed by the 'vexatious or repeated' provisions of the Act. Although there is no specific exception in relation to the cost limit for compliance under the EIR, a request may be deemed manifestly unreasonable where complying with the request would incur unreasonable costs for the public authority or an unreasonable diversion of resources. However, the Commissioner takes the view that in such instances the public authority should as part of the duty to provide advice and assistance invite the applicant to rephrase the request in order to reduce the cost involved to a reasonable level.

32. In the Commissioner's view the request is not comparable to requests that might be encompassed by the 'vexatious or repeated' provisions of the Act.

33. He considers the council's interpretation of the request to have been unnecessarily wide. The request is clearly particularised by its specific requirement for advice/opinion on the recommendation to approve and on the report's compliance with planning guidelines. As indicated earlier in this decision notice, the Commissioner is not persuaded by the council's case that 106 officers would have been emailing each other for six years about a recommendation to approve a particular report. It is even

more unlikely that all these officers would have been doing this for six years prior to the actual report being drawn up and the recommendation being made.

34. It is unlikely that the council would not have known which planning officers were specifically assigned to or involved in the professional consideration of the planning application. In the Commissioner's view the council would have known that the relevant group of officers numbered around six rather than one hundred and six.

35. The arguments deployed by the council failed to demonstrate that the request was manifestly unreasonable. The Commissioner's decision therefore is that the exception at 12(4)(b) is not engaged.

36. Because the exception is not engaged the Commissioner is not required to consider the public interest test.

Regulation 12(4)(e)

37. The council relied on the exemption at regulation 12(4)(e) in order to withhold the requested information.

38. The Commissioner is satisfied that the information falls within the scope of regulation 12(4)(e) in that the request involves the disclosure of internal communications. However, he has considered the names of individual planning officers under regulation 13; see below. His analysis of the information withheld under regulation 12(4)(e) therefore excludes those names.

39. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12 states that a public authority may refuse to disclose environmental information if (a) an exception to disclosure under (4) or (5) applies; and (b) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) of the EIR directs public authorities to apply a presumption in favour of disclosure.

40. The Commissioner considered the public interest arguments put forward by the council in favour of maintaining the exception and those in favour of disclosure.

Public interest arguments in favour of maintaining the exception

41. In its arguments to the Commissioner the council submitted that:

(a) disclosure would discourage planning officers from raising concerns or participating in free and frank discussion for fear that at some later date their views would be publicly disclosed. The council maintained that this would have a detrimental effect on the quality of the decision making process and in turn affect the public interest.

(b) disclosure would inhibit planning officers from challenging an approach or a perceived view and inhibit their ability to receive formal re-assurance of a position.

(c) disclosure of views expressed could be taken out of context and used by others to influence the development process in an attempt to gain advantage and undermine the local planning policy framework. For instance:

(i) the views of planning officers could be used as material considerations in the planning appeal process in the formal setting of an appeal.
(ii) the views could be used to undermine a planning officer's negotiating position on a development proposal.
(iii) the views could be used to present the planning officer as biased at consultative events such as public meetings.

(d) disclosure of a view held at a point in time could set a precedent that in turn could impair trust between the local planning authority (the council) and other stakeholders in the planning process.

(e) a fundamental component of the planning process is the compilation of a report which summarises the positive and negative aspects of a proposal and submits a corporate recommendation to the planning committee. Public knowledge of an officer's view that differed from the corporate recommendation could influence the debate at committee stage and call into question the weight given to considerations which had been taken into account in framing the recommendation.

(f) the planning committee's decision to go ahead with the scheme was made in March 2007. If wider disclosure of the information took place now it could mislead the public and undermine confidence in the planning process. For example, concerns expressed in the information are not examined in detail or resolved in the documentation.

(g) the planning application was controversial and the subject of a considerable amount of debate

(h) disclosure has the potential to impact negatively on the thinking and actions of stakeholders involved in subsequent schemes on the same site and on proposals in other locations which may raise similar issues.

42. With reference to the council's submission at 41(a):

(i)The Commissioner is not persuaded by the authority's generalised use of the 'chilling effect' argument. The council proposes that disclosure will result in a future loss of frankness which will affect the quality of all future council decision making. However, it does not explain how disclosure in this particular instance might have such a wide ranging effect. The Information Tribunal has given little weight in its decisions to general arguments about wide ranging 'chilling effects' which are not specifically related to the information in question. In *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* for instance, the tribunal adopted two points of general principle which were expressed in the decision of *HM Treasury v Information Commissioner (EA/2007/0001)*. These were, 'that it was the passing into the law of the FOIA that generated any chilling effect, no civil servant could thereafter expect that all information affecting government decision making would necessarily remain confidential…Secondly, the tribunal could place some reliance in the courage and independence of civil servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.'

(ii) Whilst there may be occasions when the Commissioner might accept that a wider 'chilling effect' could occur, he does not accept such arguments as general 'arguments of principle'. In his view a public authority needs to make a convincing case as to why

disclosure of the information in question would have this wider effect. In this instance the council failed to provide the necessary arguments or evidence to support the case.

(iii)The Commissioner considers that the reverse of the council's argument can in fact apply. This is that far from producing a 'chilling effect' leading to poorer quality decision making, the knowledge that the content of discussion might be subject to future disclosure could actually lead to a more informed and better quality discussion taking place. For instance, in this particular instance, it could be argued that if the council had been aware that the planners' concerns and the council's response would be disclosed in the future, that awareness might have led to a different and improved outcome.

43. With reference to the council's argument at 41(b):

The submission at 41(b) constitutes a speculation on the part of the authority rather than a reasoned argument against disclosure. It fails to address how or why disclosure of the information might result in the alleged inhibition and fails to provide any evidence to substantiate the council's opinion.

44. With reference to the council's argument at 41(c):

In the Commissioner's view the possibility that information may be taken out of context by the public is not a valid ground for a public authority to refuse disclosure. If there was any likelihood that the information might be taken out of context, then the solution would be for the council to provide some form of explanation or for the council to put the information into a proper context rather than withhold it. His view is consistent with the Tribunal's decision in *Baker v Information Commissioner & DCLG (EA/2006/0043)* which stated that:

'the strength of the argument in favour of disclosure and against maintaining the exemption is that disclosure will enable the public to form a view on what exactly happened and not on what it can otherwise only guess at.'

(i) In its argument at 41(c)(i) the council suggested that the information could be used to undermine the local planning framework in the event of a formal planning appeal. In the Commissioner's view, if the professional concerns of the planning officers are valid then usage of the information would seem to be in the public interest rather than the reverse. If they were found to be invalid then the proper course of action would be for the authority to explain this to the public rather than withhold those concerns.

(ii) In 41(c)(ii) the council provided no evidence to support the suggestion that the concerns expressed by planning officers could be used to undermine a planning officer's negotiating position on a development proposal. The concerns expressed in this instance relate solely to a specific development. They are not applicable to development proposals in general.

(iii) In 41(c)(iii) the council failed to demonstrate how the concerns expressed by planning officers might be used to present those officers as biased at consultative events such as public meetings. The council provided no evidence or supporting argument to substantiate that contention.

45. With reference to the council's argument at 41(d):

(i) The Commissioner does not agree that disclosure of a view held at a point in time would set a precedent which in turn could impair trust between the planning authority and other stakeholders in the planning process. This is similar to the argument at 41(c)(ii) which attempts to suggest a common transference of issues from the specific to the general. In the Commissioner's view, every decision to disclose information is specific to the particular facts and circumstances under consideration. His view is endorsed by the High Court judgment in *Export Credits Guarantee Department v Friends of the Earth (17 March 2008)* which commended as a statement of principle that, 'Whether there may be significant indirect and wider consequences from the particular, disclosure must be considered case by case'.

(ii) The Commissioner considers that even in the event that the content of the information were to affect public trust as suggested by the council, rather than trust in the planning authority being impaired by disclosure, it is more likely that trust would suffer if the public deemed that safety and environmental concerns had been concealed by the council.

46. With reference to the council's argument at 41(e):

The Commissioner is not persuaded by this argument. If the concerns expressed by the planning officers do not warrant serious consideration then there is no reason for the authority to fear disclosure. If they do warrant serious consideration then presumably that consideration should be addressed in the corporate report. If the consideration is sufficiently addressed in the report there would be no reason for the authority to fear additional exposure elsewhere. Alternatively, if the concerns warrant serious consideration but are not addressed in the report then there would be a strong public interest case for disclosure elsewhere and the weight given to considerations which had been taken into account in framing the report's recommendation should be called into question.

47. With reference to the council's argument at 41(f):

(i) The Commissioner is not persuaded by this argument. It is similar to the argument at 41(c) which supposes that disclosure of the information will be taken out of context by the public. As with that argument, if there was any likelihood that the information might be taken out of context, then the solution is for the council to provide some form of explanation or for it to place the information into proper context rather than withhold it.

(ii) It is also similar to its argument at 41(d) which purports that trust in the planning authority would be impaired by disclosure. As with that argument, the Commissioner considers it more likely that confidence in the planning process would be undermined if the public believed that professional concerns had been concealed by the council.

48. With reference to the council's argument at 41(g):

In the Commissioner's view the fact that the planning application was controversial and the subject of public debate are important reasons for enabling full disclosure of the available information. If there are concerns about the development these should be addressed. In such circumstances it is entirely in the public interest that full

transparency and disclosure of all the relevant issues are afforded and that the information is not restricted to that which the authority alone might decide as being fit for public consumption.

49. With reference to the council's argument at 41(h):

The Commissioner does not accept this argument. If the concerns expressed by the planning officers are legitimate then it is in the public interest that stakeholders who may become involved in similar schemes on the same site or in other locations should not be prevented from knowing about those concerns. With regard to stakeholders who may become involved in dissimilar schemes there is no reason on the part of the authority to fear disclosure as again (see 44(ii)), the concerns relate specifically to a particular development and are not applicable to development schemes in general.

Public interest arguments in favour of disclosing the information

50. The Commissioner considers that public interest arguments in favour of disclosure include the following:

(a) Disclosure enables a greater public understanding of the decisions made by the council. It allows the public to see the 'fuller picture' concerning its decision making and affords transparency of debate in the planning process.

(b) It provides public accountability for the decisions that are taken by the council.

(c) It promotes public participation in matters relating to the environment and allows the public and local businesses to have a say in how their area is developed.

.(d)The maintenance of high standards in the area of local authority planning is essential to ensure the right balance between building development and environmental sustainability. It is not in the public interest for standards to be lowered.

(e) The professional concerns of planners involved should be investigated properly. There should be proper accountability to the public in terms of both process and outcomes in this regard.

(f) The council's subsidy of the development is substantial. It is particularly important that any concerns as to the appropriateness of the application are made fully transparent when significant costs to the council tax payer are involved.

(g) The matter has been reported extensively in the media. Local newspapers have publicised the council's acknowledgement that planning officers had complained to the city planner about the development decision. The fact that the issue has already been widely reported weakens arguments against disclosure which are based on the detrimental effect that public disclosure may have on the council.

(h) There is a strong inherent public interest in releasing environmental information. It is increasingly recognised that in order to protect the environment it is important for people to have access to environmental information to be able to participate in environmental decision making and have access to justice. In the words of the European Directive (2003/4/EC):

'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.'

Balance of the public interest arguments

51. The Commissioner has weighed the competing public interest arguments in this case and has concluded that the public interest in maintaining the exception at regulation 12(4)(e) does not outweigh the public interest in disclosure.

Regulation 12(5)(b)

52. The council relied on the exception at regulation 12(5)(b) in order to withhold the paper written by the head of its legal section. It submitted to the Commissioner that disclosure of the paper would adversely affect the course of justice or the authority's ability to conduct enquiries of a disciplinary nature. It maintained that the paper was 'legal advice' and that it was subject to legal professional privilege.

53. There is no specific exception within the Regulations referring to information that might be subject to legal professional privilege. However, the Tribunal has previously decided that regulation 12(5)(b) can encompass such information. In *Kirkaldie v Information Commissioner and Thanet District Council (EA/2006/001)*, it considered that the regulation "exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial." It continued that in order to do this, the exception, "covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

54. To assess whether the 12(5)(b) exception is engaged on grounds that the communication is legal advice protected by legal professional privilege, the Commissioner has applied the following test:

(a) does the communication constitute 'legal advice'? - if it does:

(b) does it attract legal advice privilege or litigation privilege?

(c) would disclosure of the information adversely affect the course of justice or the ability of the council to conduct an inquiry of a disciplinary nature?

55. Because the Commissioner's analysis of the council's application of the 12(5)(b) exception necessarily includes references to some of the withheld information, it has been detailed in a confidential schedule. The schedule has been supplied to the public authority only at this stage.

56. The Commissioner's decision is that the exception at regulation 12(5)(b) is not engaged.

Regulation 12(5)(f)

57. During the course of the Commissioner's investigation the council submitted that the exception at regulation 12(5)(f) applied in order to withhold the information. It maintained that both the employer and employees involved in the exchange of correspondence were subject to the protection afforded by the exemption.

58. Regulation 12(5)(f) applies to information where disclosure would have an adverse effect upon:

(a) the interests of a person who voluntarily provided the information to the public authority

(b) where that authority is not entitled to disclose that information apart from under the regulations

(c) where the provider has not consented to the authority disclosing it.

59. The purpose of the exception at 12(5)(f) is to protect the voluntary supply to public authorities of information that might not otherwise be made available. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the provider. It is clear from the wording of the exception that the public authority's interests are excluded from consideration. The information to which the exemption was applied was internally created and not supplied by a person or organisation separate to the authority. The Commissioner therefore does not consider that regulation 12(5)(f) has been applied appropriately and in his view the exception is not engaged.

60. Because the exception at 12(5)(f) is not engaged the Commissioner is not required to consider the public interest test in respect of this.

Regulation 13

61. During the course of the Commissioner's investigation the council submitted that the exception at regulation 13 applied in order to withhold the information. The council submitted that the correspondence constituted personal data of which the applicant was not the data subject. It maintained that disclosure would be unfair and contravene the first data protection principle because the planning officers and assistant director had not contemplated that their views would be disclosed. Whilst the council did not specify the relevant sub section in its argument to the Commissioner, the exception that applies is at 13(2)(a)(i).

62. The Commissioner asked the council if it had asked the individuals involved for their views on disclosure of the correspondence. The council stated that it had not requested their views.

63. At the Commissioner's request the council agreed to canvass the views of the individuals that were still employed by the authority and provide the responses to the Commissioner. The council received responses from eight of the individuals involved.

The Commissioner found that six of these had either declared no objection to disclosure or requested that their names be redacted prior to disclosure. Two expressed a preference for non disclosure.

64. In the Commissioner's view, the correspondence constitutes personal data in so far as individuals can be identified by name from the information.

65 The first data protection principle states that personal data shall be processed fairly and lawfully. In considering whether disclosure of individuals' names would be unfair, the Commissioner has taken into consideration the reasonable expectations of the individuals as to what would happen to their personal data. Whilst several of the planning officers declared no objection to disclosure some have asked that their names be redacted. The Commissioner has therefore decided that it would be consistent with the first data protection principle to redact all the planning officers' names. The number of officers who signed the memorandum however should be disclosed by the council.

66. The Commissioner considers that public identification of the planning officers will not be possible if their names are redacted and in that event the remainder of the information would not constitute their personal data. This analysis is consistent with the judgment of the House of Lords in *CSA v Scottish Information Commissioner (2008) UKHL 47* where it was agreed that anonymising data in this way so that individuals are no longer identifiable enables the information to be released.

67. In light of the above, the Commissioner finds that regulation 13(2)(a)(i) provides an exception to disclosure for the names of the planning officers. In his opinion disclosure of these names would not increase the public's understanding of the matter in question. However, with regard to the two senior officers who responded to the memorandum on behalf of the council, the Commissioner considers it fair for the names and job titles of those employed by public authorities at senior management levels to be disclosed. The Commissioner observes that the council has already acknowledged the name and job title of one of these individuals (the assistant director) in the local press. There are references within the information to other individuals who hold senior posts in the council which the Commissioner also considers fair to be disclosed.

The Decision

68. The Commissioner's decision is that the council did not deal with the request for information in accordance with the EIR. It failed to comply with its obligations under regulation 5(1) which requires that environmental information shall be made available on request.

The council incorrectly applied the exceptions at regulations 12(4)(b), 12(4)(e), 12(5)(b), 12(5)(f) and 13(2)(a)(i) in order to withhold the information. However, the names of the planning officers cited in the correspondence were correctly withheld under regulation 13(2)(a)(i).

The council incorrectly concluded that the public interest favoured withholding the information to which the exception at regulation 12(4)(e) was engaged.

The council failed to meet the requirements of regulation 5(2) by not disclosing the information within 20 working days of receipt of the request.

The council failed to comply with regulation 14(3) by seeking to rely upon exceptions it had not cited to the complainant.

Steps Required

69. The Commissioner requires that the council shall within 35 calendar days of the date of this decision notice disclose the memorandum dated 2 March 2007 expressing the planning officers' concern, the two emails in response from the assistant director and the paper from the head of the council's legal section that was enclosed. The names of the planning officers are to be redacted from the correspondence.

Failure to comply

70. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

71. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 24th day of September 2009

Signed ……..

Graham Smith
Deputy Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Environmental Information Regulations

Regulation 2 states that:

> (1) In these Regulations - …"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –
>
> > (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> >
> > (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
> >
> > (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
> >
> > (d) reports on the implementation of environmental legislation;
> >
> > (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
> >
> > (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Regulation 5 states that:

> (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
>
> (2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
>
> (3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.
>
> (4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.

(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 9 states that:

(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

(4) Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.

(5) The provisions referred to in paragraph (4) are –

(a) regulation 5(2);

(b) regulation 6(2)(a); and

(c) regulation 14(2).

Regulation 12 states that:

(1) Subject to paragraphs (2), (3) and (9), 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.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

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

(a) international relations, defence, national security or public safety;

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

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person -

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Regulation 13 states that:

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998[7] (which relate to manual data held by public authorities) were disregarded.

(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or

(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act.

Regulation 14 states that:

(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including –

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

(5) The refusal shall inform the applicant –

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.

Confidential Schedule to Decision Notice – FS50178071

Public Authority: Brighton & Hove City Council

Regulation 12(5)(b)

1. On 28 January 2009 the council submitted that the exception at regulation 12(5)(b) applied to a paper headed, 'Role of planning officers in the preparation and presentation of committee reports'. The council maintained that its disclosure would adversely affect the course of justice or the authority's ability to conduct enquiries of a disciplinary nature. It said that because the communication was from the head of its legal section it constituted legal advice and was subject to legal professional privilege (LPP). The Commissioner notes that the council did not consider the paper to be 'legal advice' when it first refused the information or when it later reviewed the matter.

2. There is no specific exception within the Regulations referring to information that might be subject to LPP. However, the Tribunal has previously decided that regulation 12(5)(b) can encompass such information. In *Kirkaldie v Information Commissioner and Thanet District Council (EA/2006/001)*, it considered that the regulation "exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial." It continued that in order to do this, the exception, "covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

3. To assess whether the 12(5)(b) exception is engaged on grounds that the communication is legal advice protected by LPP, the Commissioner has applied the following test in this instance:

(a) does the communication constitute 'legal advice'? - if it does:

(b) does it attract legal advice privilege or litigation privilege?

(c) would disclosure of the information adversely affect the course of justice or the council's ability to conduct an inquiry of a disciplinary nature?

Does the information constitute legal advice?

4. The definition of legal advice in the common law is the giving of a formal opinion regarding the substance or procedure of the law by an officer of the court such as a solicitor or barrister. In-house lawyers are encompassed within the definition provided that they act in their capacity as a lawyer and not in their executive or compliance capacity for the organisation which employs them.

5. In order to withhold the advice under 12(5)(b) it has to be 'legal advice' rather than advice merely 'supplied' by a lawyer. In this instance the Commissioner has questioned whether the communication constitutes 'legal advice'.

6. The Commissioner notes that nowhere in the communication does it refer to or state that it is 'legal advice'. The communication is not labelled 'confidential'. It comprises the author's own proposals with his declared intention that these are helpful to

colleagues. The author makes clear that his views on the matter are a 'personal opinion'.

7. In the Commissioner's view, a 'personal' opinion is entirely different from a 'legal' opinion.

8. The Commissioner also notes that on distribution of the communication to the planning officers, the assistant director's covering email states that the response was not intended for use in any formal sense.

9. The only indication of any reference to a legal perspective that the Commissioner has been able to derive from the communication is that by the author to his own proposals (in relation to contributing to council reports) being in accordance with the law. However, the Commissioner considers this to be axiomatic - council reports should always be within the law.

10. It is clear to the Commissioner that the aim and intention of the communication was to persuade the planning officers of the appropriateness of continuing to work normally. The Commissioner recognises that the author, in his post as head of the legal section, has corporate responsibilities within the council. In those circumstances one would not expect any other point of view to be disseminated. This raises the question of whether the author provided advice in his capacity as a corporate executive of the council or as a lawyer. Advice from a lawyer on a purely operational or business matter is unlikely to be priviliged.

11. In order to assist his consideration of the matter the Commissioner requested the following information from the council:

(a) An explanation of why the advice was considered to be 'legal' as opposed to 'ordinary' advice.

(b) An explanation of what was considered to be the relevant legal context of the advice.

(c) An indication of the areas of the advice which were believed to concern the substance or procedure of the law.

(d) Whether the advice was deployed in litigation and if so provision of the detail of that litigation.

12. With reference to 11(a) the council submitted that the advice was 'legal advice' because it entailed:

- interpretation of documents and procedures

- interpretation of the town planners' code

- consideration of the council's constitution

- report writing protocols

- staff terms and conditions

However, the council failed to explain why any of these interpretations or considerations were 'legal' ones. In the Commissioner's view the reasons submitted as to why the communication was 'legal advice' could be equally ascribed to 'ordinary' advice supplied by any officer or manager within the council.

13. With reference to 11(b) the council submitted that the advice was given in the legal context of:

(i) an internal grievance

(ii) a pending planning application.

With regard to (i) the Commissioner established that no formal grievance had been raised by the planning officers. Even if a formal grievance had been raised, the reason why its occurrence would have designated the communication to be 'legal advice' (as opposed to 'ordinary' personnel advice) was unexplained by the council.

With regard to (ii) the council failed to explain why the pending of a planning application should mean that the communication constituted 'legal advice' as opposed to 'ordinary' operational or planning advice. Planning departments deal with such applications on a daily basis. Whilst planning matters may fall under the general umbrella of planning legislation, the everyday management of such matters is not 'legal advice' per se.

14. With reference to 11(c) the council failed to identify any area of the communication which concerns the substance or procedure of the law. The council submitted the view that all of the communication was exempt on the basis that it was difficult to disentangle 'legal' from 'ordinary' advice. The Commissioner does not accept this explanation. If the exception from disclosure is to stand on the basis that privilege applies to information that is specifically considered to be legal advice, then the differentiation between 'ordinary' and 'legal' advice is precisely what is required.

15. With reference to 11(d) the council confirmed that the advice in the communication was not deployed in litigation.

16. Owing to the Commissioner's concerns regarding the sufficiency of the council's explanations with regard to his queries at 11(a), (b) and (c), he asked the authority to amplify its argument in respect of these. He was unconvinced by the authority's response.

17. The council failed to amplify its argument as requested by the Commissioner. Instead it submitted a generalised list of issues which it maintained had been considered and addressed. The list comprised the following:

(i) the position under employment law in the context of professional practice regarding what are reasonable instructions

(ii) the position under the council's constitution eg Who is the author of the report? Who has the final say? What happens when different people hold different views?

(iii) interpretation of the Royal Town Planning Institute's (RTPI) code of professional practice and the consequences which might flow from requiring staff to act in breach of their code.

(iv) the position where impartiality of the process was compromised by political pressure possibly undermining the soundness of the planning decision and thereby allowing it to be challenged on 'Wednesbury' grounds.

18. With reference to the council's response at 17(i) the Commissioner is not persuaded that consideration of whether work instructions are reasonable requires specific legal acumen. This sort of consideration is commonly undertaken from an organisational perspective by line managers and personnel officers in all work places. Whilst the council purported that it had considered the position under employment law it failed to provide any evidence to indicate that any aspect of employment law had been addressed. The communication itself contains no reference to employment law at all.

19. The council submitted at 17(ii) that it had addressed the position under its constitution. However, the council did not provide any evidence to support this submission. The communication only referred to the council's report writing procedure. The communication outlined the standard position whereby reports to members are submitted in the name of the relevant departmental director. The communication confirmed that a director has editorial control to modify reports so long as the essence of the contributors' opinion is not altered. Because the procedure delegates presentation of reports to a lead officer the communication maintained that individuals need not have a problem about holding different views as they could leave any questions to the lead officer to answer.

20. These are hardly 'constitutional matters'. The Commissioner is not persuaded that simply suggesting differing views can be accommodated by a report writing procedure legitimately warrants the epithet of 'constitutional interpretation'.

21. The council submitted at 17(iii) that interpretation of the RTPI's code of professional practice was a 'legal' matter. The Commissioner is not convinced by this. The 'interpretation' only extended to the suggestion that because the council's report writing procedure could accommodate differing views it could thereby accommodate the code's requirements.

22. The Commissioner is not persuaded that simply suggesting that officers are not precluded by their code from contributing to a report because the report writing procedure allows differing views warrants the epithet of 'legal' consideration.

23. With reference to its submission at 17(iv) the Commissioner asked the council to explain why it considered impartiality of the planning process might have been compromised. It replied that if pressure had been exerted on planning officers to agree a particular line then the planning report's recommendation would not be based on independent professional judgement. The Commissioner considers this to be an obvious observation to make. He does not believe that mere communication of the observation justifies the attribution of 'legal advice'.

(*Commissioner's note – The term 'Wednesbury' simply refers to a significant legal case involving a cinema in Wednesbury which was granted a licence by the local authority on condition that no children under 15 were admitted on Sundays. A court*

ruled subsequently that such a condition was unacceptable and outside the power of the local authority to impose. The term has since been used where a decision may be considered so unreasonable that no reasonable authority could have made the decision it did.)

24. Again with reference to 17(iv), the Commissioner sought clarification from the council as to what it meant by 'political pressure'. The council initially replied that this was an issue it had to be alert to because if it were true it would have compromised the impartiality of the planning decision, contaminated it with irrelevant considerations and allowed it to be challenged. When the Commissioner pressed the council further it transpired that no political pressure had in fact been applied. The Commissioner construes from this that any need on the part of the council to consider a possible challenge on grounds of unreasonableness due to contamination of the planning decision by political pressure did not arise. In short, the context submitted by the council to justify the description of legal consideration on its part and subsequently its claim for legal professional privilege did not in fact exist.

25. The communication does not discuss any legal issues nor does it contain any reference to points of law or case law. The communication is clearly an open letter to the planning officers outlining the council's view on how their concerns might be accommodated.

26 The Commissioner has taken into account the House of Lords' judgment in the case of *Three Rivers and others v Governor and Company of the Bank of England (2004) UKHL 48* which emphasises that legal advice privilege does not cover all documents passed between lawyer and client. In that judgment Lord Scott stated:

"*to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship (would be) too wide."*

27. In the Commissioner's view there is doubt as to whether the communication could constitute legal advice when:

(a) It is apparent that the communication was sent in a compliance and executive capacity.

(b) The communication was stated by the author to be his personal view only.

(c) The council failed to satisfactorily explain the relevant legal context of the communication.

28. However, in the event that the communication was to be regarded as 'legal advice', the Commissioner has gone on to ascertain whether LPP applied in order to test the appropriateness of the council's argument for withholding the information.

Legal professional privilege

29. LPP is a common law concept shaped by the courts over time. It is intended to protect confidential communications between a lawyer and client provided that there is a relevant legal context. The Tribunal in *Calland v Information Commissioner and FSA*

(EA/2007/0136) decided that LPP can extend to communications with in-house lawyers.

30. LPP belongs to the client. The client can choose to waive LPP and disclose the information in the interests of transparency.

31. There are two categories of LPP – litigation privilege and legal advice privilege.

Is the privilege claimed litigation privilege?

32. Litigation privilege can only exist where the dominant purpose of the communication is to obtain or give advice in aiding the conduct of litigation. For these purposes the litigation must have already commenced or there must be a real likelihood of litigation at the time the communication was made.

33. The courts have held that there must be a 'real likelihood' of litigation rather than a 'mere possibility' for the privilege to apply. A 'general apprehension of future litigation' or a 'distinct possibility that sooner or later someone might make a claim' is insufficient.

34. In this instance, the council did not claim litigation privilege. Indeed it has confirmed to the Commissioner that the communication was not deployed in litigation. The Commissioner has therefore gone on to consider whether advice privilege would be involved.

Is the privilege claimed advice privilege?

35. Advice privilege protects confidential communications between a lawyer and his client but not communications with third parties. The communication needs to be confidential and for the purpose of seeking and receiving legal advice in a relevant legal context.

36. It is important to establish who 'the client' is. The client can only be the individual or individuals tasked with seeking and obtaining legal advice from a lawyer. The definition of 'the client' does not extend to everyone within a particular organisation that may be seeking the advice. Communications between a lawyer and / or his client with employees outside the lawyer/client 'relationship' will generally not be privileged.

37. The client in this instance is the assistant director who requested the communication from the council lawyer. However, the latter's response was not written 'in confidence' to the assistant director. Whilst it was communicated to the assistant director in the first instance, it was clearly intended for the attention of a third party - the planning officers. Indeed the author indicated in his communication that he hoped the planning officers would find his communication helpful.

38. The planning officers themselves had not requested the communication from the council lawyer. In that respect they are not his client. This consideration is consistent with the decision in *Three Rivers District Council v Governor and Company of the Bank of England (No 5) (2003) EWCA Civ 474* where the Court of Appeal held that the client was the small team set up to deal with the inquiry rather than the whole bank. Correspondence between lawyers and other employees in the organisation was not deemed to be covered by legal advice privilege.

39. The Commissioner notes that no restriction was placed on the communication's circulation beyond the client. It was disseminated in its entirety to all those who had signed the planning officers' memorandum. Both the client and the author of the communication would know from the planning officers' memorandum that those who had signed it were also expressing concern on behalf of others. It seems inconceivable therefore that client and author would not have expected the communication to be additionally distributed to those others as well. Both client and author would also know that the memorandum's central concern with RTPI compliance meant that any suggestion of accommodating that concern would inevitably be passed to that professional body for its confirmation or otherwise. By no stretch of interpretation could the Royal Town Planning Institute be considered the client.

40. In light of the above the Commissioner concludes that the communication was not intended to be a confidential communication between a lawyer and his client. It was intended as an open letter for the benefit of multiple third parties. As such it does not attract legal advice privilege.

41. Whilst the Commissioner questions whether the communication constitutes 'legal advice' and has decided that it is not in any event subject to LPP, he has gone on to consider whether disclosure of the information would adversely affect the course of justice as he would with any complaint concerning information withheld via regulation 12(5)(b).

Would disclosure of the information cause an adverse effect?

42. Regulation 12(5) of the EIR requires the council to demonstrate that disclosure of the information 'would adversely affect' the course of justice. The Tribunal in the case of *Archer v Information Commissioner and Salisbury District Council EA/2006/0037* held that it must be satisfied that disclosure "would" have an adverse affect not that it "could" or "might". The definition of " would" in the context of the phrase "would prejudice" was considered in the case of *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and EA/2005/0030* where the Tribunal held that "would" must be demonstrated as more probable than not. The Tribunal has agreed with the Commissioner that the *Hogan* definition of "would" is transferable to the EIR. The Commissioner has therefore gone on to consider whether the council in this instance has demonstrated that sufficient probability of adverse effect would arise from disclosure of the communication.

43. When the council introduced the argument that the communication was subject to the exception at 12(5)(b), it submitted that disclosure would adversely affect the course of justice or the council's ability to conduct enquiries of a disciplinary nature. However, the council did not explain how or why it considered that disclosure would have this effect. The Commissioner therefore asked the council to amplify its explanation and provide any evidence it had to support its case.

44. The council replied that in its view the course of justice would be adversely affected by disclosure because conceivably the decision to give planning permission for the development might have been subject to an appeal. The council said it considered that in the event that an appeal was lodged, the existence of an internal grievance about the recommendation to give planning permission would have adversely affected the council's ability to defend that appeal.

45. The Commissioner is not persuaded by the council's argument:

(a) The council's argument only suffices to illustrate why a resolution of the planning officers' concerns was required by the council in order that those concerns might not be utilised to assist a possible appeal by others against the planning decision. It does not explain why disclosure of the communication itself would have the effect of hindering the ability to defend an appeal. Whilst there is a brief reference to the officers' reservations within the communication, the planning officers' concerns are actually expressed in the memorandum and not in the communication. The memorandum itself is not subject to the 12(5)(b) exception.

(b) The council failed to demonstrate that either the prospect of an appeal or the likelihood of hindrance to a defence of an appeal was more probable than not. Its argument can only be entertained to the extent that the suggested adverse effect *'could'* or *'might'* arise. This is inconsistent with the Tribunal's need to be satisfied that disclosure *'would'* result in adverse effect.

46. The council also maintained that disclosure of the communication would undermine the client / lawyer relationship within the authority and thereby adversely affect the council's ability to bring or defend internal proceedings of a disciplinary nature.

47. The Commissioner is not persuaded by the council's argument at paragraph 46:

(a) The notion that the council might need to "defend" proceedings of a disciplinary nature brought against it is unconvincing. It is possibly an allusion to the council's earlier submission that the planning officers had raised a grievance against the council. However, the Commissioner has addressed that issue at paragraph 13(i) of this schedule. The wording in regulation 12(5)(b) specifically concerns the ability of an authority to "conduct" a disciplinary inquiry and not its ability to "defend" one.

(b) The inference of the council's argument at paragraph 46 appears to be that there was a possibility of bringing internal disciplinary proceedings against the planning officers. Whilst the Commissioner recognises the important principle of justice that parties should be able to obtain legal advice without fear of that advice being disclosed to an opposing party, in this particular instance there was no 'opposing' party per se. The council's communication was wholly intended to be disclosed to the other party – the planning officers.

(c) There were no proceedings of a disciplinary nature. The council failed to demonstrate that either the prospect of disciplinary proceedings or the likelihood of an inability to conduct such proceedings was more probable than not. The council's argument can only be entertained to the extent that the suggested adverse effect 'might' arise as a result of disclosure. This is inconsistent with the Tribunal's requirement for satisfaction that an adverse effect 'would' arise as a result of disclosure.

(d) Disclosure of the communication would not have undermined the relationship between lawyer and client as maintained by the council as it is evident that both lawyer and client (the assistant director) had always intended that the communication be disclosed.

48. Although the Commissioner asked the council for evidence to support its argument that disclosure would have an adverse effect upon the course of justice, the authority replied that tangible evidence was unnecessary to support its reliance on the exception.

49. In the Commissioner's view, the council has failed to demonstrate that disclosure would have an adverse effect upon the course of justice. Accordingly his decision is that the exception at regulation 12(5)(b) is not engaged. Because the exception is not engaged, the Commissioner is not required to consider the public interest test.