



Tribunals Service
Information Tribunal

Information Commissioner's number: EA/2007/0074
Information Tribunal Appeal Number: FS50120004

Determined on the papers

Decision Promulgated
23 June 2008

BEFORE

DEPUTY CHAIRMAN

Peter Marquand
and

LAY MEMBERS

Jenni Thompson
Andrew Whetnall

B E T W E E N:

MR CHRISTOPHER BODDY

Appellant

AND

THE INFORMATION COMMISSIONER

Respondent

AND

NORTH NORFOLK DISTRICT COUNCIL

Additional Party

Representations:

For the Appellant: In person
For the Respondent: Ms Jane Oldham, Counsel
For the Additional Party: Mr Damien Welfare, Counsel

DECISION

The Tribunal dismisses this appeal for the reasons set out below.

Reasons for Decision

Summary Background

1. The Appellant is seeking access to the legal advice obtained by North Norfolk District Council (“the Council”) concerning certain land in Cromer, Norfolk. The following properties are mentioned in this Decision:
 1. North Lodge, this is now in the ownership of Cromer Town Council, and formerly contained the offices of the Additional Party;
 2. North Lodge Park, in which North Lodge stands;
 3. The Watch Tower, which is a privately owned property; and
 4. The Rocket House, which is a visitor facility built on the seafront in 2003/2005.
2. Mr Boddy’s grandfather owned the land upon which the Rocket House development took place. This land was conveyed to the then Urban District Council of Cromer on the 13th March 1933.

The request for information

3. By letter to the Council dated 26th April 2005, Mr Boddy made the following request:

“North Lodge and North Lodge Park

It has come to my attention that you have taken Counsel’s advice about the legal aspects of developing the above property.

Under the Freedom of Information Act I should be grateful if you would send me a copy of the advice that you have received ...”

4. On the 29th April 2005 the Council refused to provide the information claiming that it was exempt from disclosure because it was legally privileged, relying on the exemption in section 42 of the Freedom of Information Act (FOIA). It seems that the Appellant took no further action at that stage, but the correspondence is relevant because on the 21st February 2006 the Appellant wrote to the Council by letter headed “North Lodge Park” and referred to his letter of the 26th April 2005. The Appellant asked the Council to reconsider its previous decision, as he said there had been decisions taken with regard to the future of North Lodge. The Appellant concluded with the sentence:

“I respectfully request that you now release the Counsel’s Opinion relating to the development of North Lodge and North Lodge Park.”

5. The Council replied on the 1st March declining to provide the information and again relying on the exemption in section 42 FOIA, namely that information was subject to legal privilege. The Council went on to state that it considered the public interest test was satisfied in favour of maintaining the exemption.
6. The Appellant, having corresponded with the Information Commissioner’s office, (“the Commissioner”) used the complaints procedure of the Council by letter of the 23rd March 2006. This letter was headed “North Lodge and North Lodge Park – Freedom of Information Requests”. The text of the correspondence referred to North Lodge and the “Park”. By letter of the 12th April 2006, the Council again refused to provide the information on the same basis as previously. The Appellant wrote again to the Council on the 16th April 2006 with the letter headed “North Lodge and North Lodge Park – Freedom of Information Request”. The text of that letter questioned the Council’s decision and again includes references to North Lodge Park and North Lodge. On the 16th May 2006 the Council wrote to Mr Boddy a further time declining to provide the information and again relying on the same exemption under FOIA.

7. Mr Boddy therefore complained to the Commissioner by letter dated 21st May 2006. The Commissioner undertook an investigation and this resulted in a Decision Notice, dated 11th July 2007.
8. The Commissioner's Decision may be summarised as follows:
 1. The Council had incorrectly relied upon FOIA and instead it should have applied the Environmental Information Regulations 2004 ("EIR"). However, the Commissioner went on to consider the complaint as if it had been dealt with by the Council under EIR.
 2. The Commissioner concluded that the information sought by the Appellant was subject to legal privilege. Furthermore, the public interest was in favour of maintaining the exception.

In the circumstances, the Commissioner's decision was that the Council had correctly relied upon Regulation 12(5)(b) of EIR to withhold the information requested.

Appeal to the Tribunal

9. The Appellant lodged a Notice of Appeal on the 2nd August 2007. The Tribunal joined the Council as a party having considered the Notice of Appeal and the Commissioner's Reply. The Council served a Reply and a telephone Directions hearing was held.
10. At the Directions hearing on 29th October 2007, the Tribunal identified the issues to be determined in the Appeal (see below). It became apparent in considering documents lodged for the Appeal and at the hearing that the Appellant was of the view that his request also encompassed legal advice pertaining to the Rocket House. However, at that hearing the Council was unable to confirm the dates of, and extent of, any legal advice that it held in relation to the Rocket House. The Council offered to supply the Tribunal with further information to enable the Tribunal to decide whether or not it would hear, as a preliminary issue, the question of the extent of the request that the Appellant had made. The Council provided the Tribunal with a statement from its Legal Services Manager dated 2nd November 2007.

11. Unfortunately, towards the end of the proposed timetable for this Appeal it became clear that the Appellant and Commissioner had not received a copy of that statement because the Council was under the impression that it was a statement for the Tribunal only. The Tribunal permitted the Council to provide an amended document, making a decision under Rule 30 of the Information Tribunal (Enforcement Appeals) Rules 2005 (SI2005/14) because of their misunderstanding of the basis for the production of the statement dated 2nd November 2007. The parties were then provided with a copy of a partially redacted statement and further submissions were received by the Tribunal from the parties once that statement had been disclosed. Those submissions, together with the submissions and bundle of documents prepared in accordance with the Directions, have been considered by the Tribunal.
12. The Tribunal was also provided with copies of Counsel's Opinions dated 24th January 2005 and September 2005. These were not made available to the Appellant as this was necessary to preserve the confidentiality of the disputed information. The Tribunal has considered all the documents provided to it, even if they are not referred to in this Decision.
13. The Opinion dated September 2005 had not been identified by the Council at the time of the Commissioner's original investigation. We accept the explanation for this and draw no adverse inferences from this. We have considered this opinion from September 2005 and as if it had been identified as part of this Appeal. Although the Council disclosed this Opinion to the Tribunal on a closed basis it did not disclose it to the Commissioner. We do not believe in the light of our conclusions and ability to look at the facts afresh that this is necessary now, but it would have been preferable for that to have occurred.

Issues for the Tribunal

14. In the Directions dated 3rd December 2007 the Tribunal identified the issues for the Appeal as follows:

- a. Was the Appellant's request dated 26th April 2005 properly interpreted by the North Norfolk District Council and the Information Commissioner as relating only to North Lodge and North Lodge Park, as opposed to North Lodge and North Lodge Park as well as the Rocket House?
- b. Had legal professional privilege ceased to exist in relation to the information requested by the Appellant?
- c. Did the Information Commissioner correctly apply the test for the application of the exception in Regulation 12(5)(b) of the Environmental Information Regulations?
- d. Did the Information Commissioner correctly apply the public interest test in Regulation 12(1)(b) to the Environmental Information Regulations?

No argument was raised that EIR was the wrong regime to apply to the facts of this case.

The Tribunal's Jurisdiction

15. The Tribunal's remit is governed by the Freedom of Information Act (FOIA) and in particular section 58, which is also applied to appeals concerning environmental information as well by regulation 18 of EIR. Section 58 is set out below:

"58 – Determination of Appeal.

1. *If on an appeal under section 57 the Tribunal considers –*
 - a. *that the Notice against which the appeal is brought is not in accordance with the law, or*
 - b. *to the extent that the Notice involves an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other Notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

- (2) *On such an appeal, the Tribunal may review any finding of fact on which the Notice in question was based."*

16. The starting point for the Tribunal is the Decision Notice of the Commissioner, but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence, may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether FOIA and/or EIR have been correctly applied. In cases involving the public interest test, a mixed question of law and fact is involved. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion on the same facts, that would involve a finding that the Decision Notice was not in accordance with the law. The Tribunal's powers are the same under FOIA and EIR.

The first issue: "Was the Appellant's request properly interpreted?"

17. The issue identified by the Tribunal referred to at paragraph 13(a) refers to the request from 2005. The request that is the relevant one for this Appeal is dated 21st February 2006. The Tribunal read the issue in paragraph 13(a) as referring to the request of 21st February 2006, which in any case referred back to the request dated 20th April 2005.
18. The heading of the Appellant's letters and the references to North Lodge and North Lodge Park are set out in paragraphs 3-6 above. The land upon which the Rocket House development took place was owned by the Appellant's grandfather and conveyed to the Urban District Council of Cromer on 13th March 1933 and the Tribunal were provided with a copy of the conveyance. The Appellant also provided copies of correspondence and legal proceedings brought by the owners of the Watch House to enforce covenants in a conveyance from 1928. In those proceedings the Appellant was a Defendant as was the Council, which had become the owner of the land subsequently. The Tribunal was provided with photographs of the properties referred to in paragraph 1 above and an official copy of the Register of Title from the Land Registry relating to North Lodge Park, which showed the owner as North Norfolk District Council. All the

properties referred to above are in close proximity to one another, however, it is clear they are distinct and separate properties.

19. The Council confirmed that it held three Counsel's Opinions in relation to the Rocket House development, dated 10th February 2004, 25th February 2004 and 2nd April 2004. In relation to North Lodge and North Lodge Park the Council confirmed that it held two Counsel's Opinions, dated 24th January 2005 and September 2005. The second of these Opinions had been filed with the Title Deeds rather than on a legal file and only came to light as a result of preparing for the final hearing. (See further below for the Tribunal's considerations of those Opinions).
20. By emails dated the 10th April 2007 and 18th April 2007 Mr Boddy corresponded with the Commissioner and raised concerns that the Council had been "economical" with identifying the Counsel's opinion released to the Commissioner. By letter of the 15th May 2007 Mr Boddy enclosed the letter from the Council dated the 9th May 2007, responding to a letter of his. That letter from the Council is headed "North Lodge Park and the Rocket House development". One of the paragraphs in that letter states: "*You are well aware that the District Council sought legal advice regarding the impact of restrictions in title deeds prior to proceeding with the developments at North Lodge Park and the Rocket House.*" The Commissioner, in an email to the Council, raised a query about whether the Rocket House and North Lodge and North Lodge Park had separate legal advice and this was confirmed by the Council in a letter of the 18th May 2007 stating: "*In respect of the Rocket House, this building, which is situated away from North Lodge Park, was developed by the Council a number of years ago. The Council sought separate legal advice on the redevelopment of the Rocket House. The Rocket House and North Lodge Park, including the North Lodge building are two entirely different matters and not connected in any way.*"
21. In considering this first issue it is helpful to consider EIR, in particular Regulation 5(1), which is as follows:

"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.”

22. Furthermore, Regulation 9 is relevant

“(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).”

23. In other words, an applicant for information under EIR is entitled to have made available to him or her, the information requested (Regulation 5(1)). There is an obligation on the public authority to which a request has been made to advise and assist the applicant and this would include advice and assistance on the identity of the information sought. However, that obligation is limited to advise and assist the applicant “...so far as it would be reasonable to expect the authority to do so.” The wording here means the Tribunal should apply

an objective assessment of the reasonableness of any advice and assistance provided.

24. The Appellant's submissions, on this aspect of the case, are that the letter from the Council, dated 9th May 2007, makes it clear that Counsel's opinion was sought at the outset on the two developments together. In a letter dated 13th September 2007, in response to the Commissioner's Reply, he states that his intention was that his request should encompass the Rocket House development and that it was inextricably part of North Lodge and North Lodge Park. The Commissioner's submissions on this aspect of the case are that a request for information should be read objectively and that the Code of Practice on the discharge of obligations of Public Authorities under the EIR by the Department of the Environment, Food and Rural Affairs specifically warns against consideration of motive or interest in information, when providing advice and assistance. This request is clear and, in any event, the Council did not accept that the Rocket House was linked to North Lodge and North Lodge Park in the way the Appellant suggests. The Council also submits that the request was clear and unambiguous. Furthermore, they reject any suggestions made by the Appellant that covenants in relation to the Rocket House, were integral to proposed developments at North Lodge Park. In relation to the letter of the 9th May 2007 from the Council to Mr Boddy, they maintain that this merely records that the Council sought legal advice regarding the impact of restrictions in title deeds, before proceeding with the development at those two sites. There is no reference to the advice having been obtained "together".
25. The Tribunal's conclusions on this aspect of the appeal are that the correct approach to the law is that a request for information ought to be "taken at face value", i.e. it should be read objectively. The Tribunal's view is that the obligation in Regulation 9 has two aspects to it in this context. First, when a request is made a judgment needs to be made on whether it is reasonable to provide advice and assistance in light of the wording of that request. Secondly, if advice and assistance is required then the public authority must provide it to a reasonable extent. Therefore, if the request is unclear or ambiguous, then the obligation on the public authority to provide advice and assistance comes into play and the request should be clarified with the applicant

for information. However, we would qualify this by saying that if an applicant had been in discussions or correspondence with the public authority about a particular matter, say, for example, in this case the applicant in 2005/2006 had been discussing issues relating only to the Rocket House and then subsequently made a request headed “North Lodge and North Lodge Park”, then we would expect the public authority to take into account the contemporaneous dealings with the applicant to clarify the information that was being requested.

26. It seems to the Tribunal that in this case applying an objective test the request made in 2005 and repeated in 2006 was absolutely clear and unambiguous. The Counsel’s advice that the Appellant sought related to North Lodge and North Lodge Park. In the Tribunal’s view there is no evidence of a course of dealings between the Appellant and the Council that should have raised, in the Council’s “mind”, the issue that the request was related to the Rocket House. This issue of the Rocket House does not appear in the correspondence until well after the initial refusal by the Council. The Tribunal also does not conclude on the evidence that the Rocket House is so closely connected to North Lodge and North Lodge Park such that the Council ought to have reached the conclusion that the request also encompassed any Counsel’s opinions about the Rocket House. It is obviously unfortunate for the Appellant if he intended to obtain the separate advices about the Rocket House as well, but in the circumstances of this case, we do not see that there can be any legal obligation on the Council to “second guess” what was a clear request. Therefore, the Tribunal upholds the Commissioner’s decision to proceed in relation to the legal advice pertaining to North Lodge and North Lodge Park only.

The second issue: “Had legal professional privilege ceased to exist in relation to the information requested by the Appellant?”

27. In the letter dated 2nd August 2007 that accompanied The Appellant’s Notice of Appeal, he stated that legal privilege had ceased to exist “because of wrongdoing” and that this test, which in his view, was appropriate, had not been applied. In the bundle of documents available to the Tribunal, a letter of the 1st March 2007 from one of the Council’s solicitors, confirmed that Counsel’s opinion on North Lodge Park had not been disclosed to the public and the Tribunal had the

benefit of the extract of the minutes of the 7th March 2005, confirming that North Lodge Park was discussed in a part of the meeting from which the press and public had been excluded.

28. The Tribunal has had access to the two opinions from Counsel in relation to North Lodge and North Lodge Park. We are of the view that the information contained in those documents is advice on the Council's legal position. This is what the Council had obtained them for.
29. In Three Rivers District Council and Others v. Governor and Company of the Bank of England [2004] UKHL48, the House of Lords made it clear that legal professional privilege went further than just privilege in relation to a case involving litigation. The question is whether the advice relates to the rights, liabilities, obligations or remedies of a client either under private law or public law. If it does so relate, then the question to be asked is whether the communication falls within the policy underlining the justification for legal advice privilege. Furthermore, is the occasion on which the communication takes place, and is the purpose for which it takes place, such as to make it reasonable to expect the privilege to apply? The criteria are objective. In the Tribunal's view these tests are met in relation to the two advices from Counsel.
30. One of the circumstances in which privilege is lost (waived), is when the information has been put into the public domain. There is no evidence before the Tribunal that this has occurred on this case.
31. Furthermore, in R v. Derby Magistrates Court ex parte B [1995] 4 All ER 526, the Court rejected the argument that any public interest could override the client's interest in legal professional privilege and Lord Taylor of Gosforth CJ stated: "*I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established*". In other words, the submission made by Mr Boddy that "wrongdoing" waived the privilege, has to be rejected by the Tribunal under this issue. The case R v. Derby Magistrates preceded FOIA, which of course has introduced a public interest test, which means that legal advice has the potential to come into the public domain and we will deal with that below, and in our view, any question

of “wrongdoing” needs to be considered as a matter of the public interest test and not as a waiver of privilege.

32. Accordingly, the Tribunal considers that legal privilege has not ceased to exist in relation to the Counsel’s two Opinions.

The Third Issue: “Was the correct test applied in the application of Regulation 12(5)(b) of EIR?”

33. Regulation 5(1) of EIR is quoted in paragraph 21 above and it gives a right of access to an applicant to environmental information held by a Public Authority, subject to certain exceptions. In Kirkaldie v. The Information Commissioner and Thanet DC (EA/2006/001) the exception in Regulation 12(5)(b) was applied to information that is subject to legal professional privilege and there is no issue on its application in this case.

34. The relevant text from the Regulations is as follows:

“ ... a public authority may refuse to disclose information to the extent that its disclosure would adversely effect –

(a) [not relevant]

(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) ...”

35. As in Kirkaldie and other cases, the Tribunal is of the view that in relation to claiming this exception, the relevant consideration is whether the disclosure would adversely affect the course of justice by the release of the information that is subject to legal professional privilege.

36. The Commissioner at paragraphs 23-33 of the Decision Notice, considered the application of this exception to the information. The Commissioner considered what adverse effect would apply and stated:

“The Council confirmed that the dominant purpose for obtaining Counsel’s opinion was for advice on the rights and obligations of the Council in relation to North Lodge and North Lodge Park. It

confirmed that the Council needed the advice on whether the proposed developments or any future development would affect the rights of the current tenants of North Lodge building and Park and litigation was anticipated in respect of the Council's ability to sell the North Lodge."

The Commissioner recorded the Council's general concern that disclosure of this legal advice would undermine the relationship between client and lawyer and inhibit free exchange of views, but also specifically that issues in relation to North Lodge and North Lodge Park were live topics, for example, the proposed car park within North Lodge Park. The Commissioner recorded that the Council had obtained the advice at a time when litigation was anticipated and that there remained a possibility of litigation. The Commissioner concluded that the Counsel's advice, if disclosed, would undermine the important principle in maintaining legal professional privilege and adversely effect the Council's ability to manage its assets effectively and make future decisions. As the time limit for litigation had not expired and the Council anticipated continued litigation, the Commissioner accepted there would be an adverse effect for the Council. The Commissioner set out that this conclusion had been reached having interpreted the word "would" in the exception 12(5)(b) as meaning the adverse effect must be at least "more probable than not" and referred to the Tribunal case of Hogan & Oxford City Council v. The Information Commissioner (EA/2005/0026 and EA/2005/0030).

37. The Tribunal has considered the two Counsels' opinions in the course of this appeal, which as we have stated, have been disclosed to the Tribunal on a closed basis i.e. not given to the Appellant. There has been no dispute about whether or not the information is subject to legal privilege, and it is advice from Counsel on the Council's rights and liabilities. The advice concerns various legal issues about North Lodge and North Lodge Park and various rights over the land. [We do not wish to disclose any of that information, given our conclusion in this case] but as with all legal advice, it sets out the strengths and weaknesses of various positions giving the barrister's opinion on the legal position. The Tribunal is of the conclusion that in this case disclosure would adversely affect the course of justice. There is the possibility of litigation and it would not be fair for there not to be a level

playing field. In other words, it would be open knowledge to any prospective party in litigation what the Council viewed as strength and/or weaknesses of its particular position on the matters as set out in the advice. For the avoidance of doubt, it should not be taken that the advice contains anything that indicates the Council was not entitled to take any particular action that it did or did not take or that it took any particularly “risky” decisions. We do not want our comments to be interpreted in that way as it would be wrong. Our conclusion is that the Commissioner did apply the test in Regulation 12(5)(b) correctly, in particular, considering whether or not the Counsel’s opinion was subject to legal professional privilege, and whether the disclosure would adversely effect the course of justice.

The fourth issue: “Did the Commissioner correctly apply the public interest test?”

38. Paragraphs 34-39 of the Decision Notice deal with the question of the public interest test. The Commissioner identifies that a public authority must apply a presumption in favour of disclosure and that only where there is no overriding public interest in maintaining the exception, should information not be released. The Commissioner refers to the Tribunal case of Bellamy v. The Information Commissioner and The Secretary of for Trade and Industry (EA/2005/0023) and notes the considerable local interest in the development proposals of North Lodge Park. The Commissioner has set out the public interest factors in favour of disclosure as follows:

1. Considerable local interest in the proposals to develop North Lodge and North Lodge Park.
2. The Appellant’s wish to see the Council’s legal advice in order to understand fully the Council’s decision making and its legal justification.
3. The promotion of public debate and the accountability and transparency of public authorities.

The Commissioner also sets out the public interest factors in favour of maintaining the exception as:

1. Disclosure would undermine the Council's need to obtain full and frank legal advice in a timely fashion in the future with confidence the advice would be freely given without consideration of its wider disclosure.
 2. The disclosure would inhibit a frank discussion with the lawyer because of the possibility of subsequent disclosure.
 3. Legal advice highlighting strength and weaknesses of a particular position if routinely disclosed under EIR would place public authorities at a disadvantage.
39. The Tribunal has noted from the documents before it that North Lodge and North Lodge Park are a matter of particular interest to Cromer residents. A local newspaper article was available as well as references through the documents to public meetings and the possibility of a car park being developed. The Appellant has also provided materials about conveyances, as referred to above and restrictive covenants.
40. The Commissioner's submissions support the extracts that we set out above from the Decision Notice, as do those of the Council. The Appellant has made various submissions about why, in his view, the public interest is in favour of disclosure. These can be summarised as follows:
1. The request for the copies of Counsel's advice arise from intense public interest to keep North Lodge Park, which is a public park within a listed conservation area, as a recreational area free from development.
 2. Restrictive covenants established by the Cromer Protection Commissioners and others around 100 years ago exist and there is evidence from the development of the Rocket House in breach of restrictive covenants.
 3. The proposals for a car park at North Lodge and the park have resulted in a public outcry and although car parking plans have been postponed, the people of Cromer need the advice in order to deal with future proposals by the Council.
 4. The Council has misled the public by stating that restrictive covenants have been removed or destroyed and they have not made any applications to the Lands Tribunal.

5. The car parking proposals are linked to the Council's need to comply with requirements of external funders.
 6. There is distrust amongst members of the public because of the way the Council has conducted matters. It is necessary to get access to the legal advice in order to understand the authority underpinning the Council's actions.
 7. The Council is doing what it wants and ignoring the law and the expressed will of the people.
 8. Open spaces will be lost to developers if covenants can be disregarded and public authorities, such as the Council, can operate in secret without legitimate open public examination.
 9. The Council has been aware that "they will be committing wrongdoing by breaching restrictive covenants"; and
 10. Failing to disclose the legal advice is obstructive practice and the Council is seeking to avoid litigation over its breaches of the law.
41. Even if an exception applies in EIR, Regulations 12(1)(b) requires the Public Authority to disclose the information 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) also states: *"A public authority shall apply a presumption in favour of disclosure."* A different Tribunal in the case of Bellamy stated when considering this issue: *"There is a strong public interest inbuilt into the [legal professional] privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."*
42. It is correct that legal professional privilege is a fundamental part of the administration of justice, but the Tribunal notes that EIR requires each case to be considered on its facts (i.e. all the circumstances) and that there is a presumption in favour of disclosure. It is necessary to look at the public interest in maintaining the exception and the public interest in disclosing. It is only if the public interest in maintaining the exception outweighs the countervailing public interest that a public authority will be entitled to withhold the material. In other words, if the public interest is equally balanced, then disclosure must take place.

43. It is the Tribunal's conclusion that the Commissioner applied the correct test and looking at the materials before the Tribunal and applying the test, we come to the same conclusion as the Commissioner, namely the public interest in maintaining the exception does outweigh the public interest in disclosure.
44. In general terms, all the matters of which Mr Boddy complains are capable of being litigated or dealt with in other legal proceedings, if that were necessary. For example, if an individual felt that their rights over their land had been interfered with by the Council, then they would be able to take their own proceedings. Anyone affected by the Council's decision in relation to North Lodge and North Lodge park would have the ability to seek judicial review of the Council's decision. There is nothing in the complaints that Mr Boddy makes that take those matters outside that position so as to reach a significant public interest factor in favour of disclosing information. In particular, the Tribunal does not find any evidence of wrongdoing by the Council or the Council misleading the public.
45. Mr Boddy, and no doubt other members of the public in Cromer do not agree with the decisions that have been taken by the Council and may be of the opinion that certain restrictive covenants exist and have been disregarded by the Council. The fact that the Council is of a different opinion and has reached different conclusions through its own processes does not mean that the Council is misleading the public in the sense that it would raise a public interest in favour of disclosure. Nor does it mean that the Council has done anything wrong in a criminal sense. If that were the case, that would be likely to be a significant factor in favour of disclosure. For the avoidance of doubt, neither of Counsel's opinions state that what the Council has done or intends to do are in breach of any criminal law nor do those opinions categorically state that the Council should not take any particular proposed steps. Furthermore, if Mr Boddy, or any group of individuals wish to challenge the Council over the steps that they have taken, they would be able to take their own legal advice and therefore there is no reason here to take the facts of this case as amounting to a public interest in favour of disclosure.

46. The Tribunal understands that Mr Boddy may be particularly concerned about the Council's motives and the decisions that they have taken or are going to take. However, that does not of itself amount to sufficient reason to state that the public interest is in favour of disclosure.
47. The Tribunal has noted that the Commissioner has referred to some of the public interest factors in favour of maintaining the exception without specifically addressing them to this particular Council and instead referred to them as if they are general matters in relation to "public authorities". In our view the public interest factors that are set out by the Commissioner in favour of maintaining the exception do apply to this Council in this case. Taking into account all of the circumstances of this case, it is the Tribunal's view that the public interest factors identified by the Commissioner and by the Council do outweigh the public interest factors in favour of disclosure. Accordingly, on this fourth issue, we dismiss the appeal.

SUMMARY

The Tribunal's unanimous conclusion is that this appeal should be dismissed in its entirety for the reasons set out in this Decision.

Signed:

Peter Marquand
Deputy Chairman

Dated: 23 June 2008