



Neutral citation number: [2024] UKFTT 00478 (GRC)

Case Reference: EA/2023/0460.

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights Tribunal**

**Heard on the papers on 16 May 2024.  
Decision given on: 06 June 2024**

**Panel: Brian Kennedy KC & Specialist members Rosalind Tatam & Kate Grimley Evans**

**Between:**

**IAN ABBOTT**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

Noemi Byrd of Counsel by way of written Grounds of Appeal dated 30 October 2023.

The Respondent: by Alec Watson, Solicitor by way of written Response dated 22 December 2023

**Result:** The appeal is dismissed.

**REASONS**

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## **Introduction:**

1. The Appellant appeals under section 57 of the Freedom of Information Act 2000 (“FOIA”), against the Decision Notice with reference IC-248965 - R9H5 dated 4 October 2023 (the DN), issued by the Information Commissioner (“the IC”). The Appellant submitted a request to the Kirklees Council (“the Council”) relating to a specific planning application. The Council refused to provide the requested information citing regulation 12(5)(b) of the Environmental Regulations (“the EIR”).

## **Background:**

2. The complainant made the following information request to the Council on 5 April 2023:  
*“Following on from your response of the 13th of July 2022, (29372) legal advice for E1831, 2021/62/92603) can you confirm whether the legal advice you previously confirmed had been sought by Mathias Franklin, Head of Planning and Development, from external chambers has been shared with any Kirklees Councillors or Kirklees Council officials? If the legal advice obtained by Mathias Franklin from external lawyers has been shared with those above-mentioned persons, then I ask that you supply all emails, reports, minutes and recordings, including the legal advice, relating to this matter. Furthermore, please supply all internal communications made by Kirklees Councillors and Kirklees officials that contributed to the seeking of external legal advice by Mathias Franklin with external lawyers. This includes internal communications between Mathias Franklin and Kirklees legal officers. I must remind you that legal privilege exists between the client and the external lawyer only. If the legal advice obtained has then been shared with other parties, then legal privilege as in effect been waived. The request is made in the public interest”.*
3. The “legal advice” referred to was counsel’s opinion dated 13 October 2021 written by an external barrister practising at the independent bar, in response to formal instructions from the Council to do so.
4. The Council responded on 18 May 2023 and confirmed that it was withholding the information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)). setting out clearly its reasons (See OB Pages: A 181-182).
5. On 5 June 2023 the Appellant asked the Council to review its handling of their request. The Council sent its internal review response on 9 August 2023 which upheld the original position. The Appellant filed a S 50 complaint, and the Commissioner issued his DN on 4 October 2023 wherein he concluded the Council were entitled to rely on Reg. 12(5)(b) to refuse to provide the requested information. The Commissioner, in effect decide that whilst he was informed by the presumption in favour of disclosure in the public interest balance provided for in regulation 12(2)EIR , his view is that the exception provided by regulation 12(5)(b) had been applied correctly by the Council and as the Commissioner has decided

that regulation 12(5)(b) applies to all the withheld information he did not go on to consider the Council's application of regulation 12(4)(e).

6. The Commissioner found the Regulation 12(5)(b) exception to be engaged because:
  - i. the information relates to a large and controversial planning application (for an Amazon Distribution Warehouse), on land identified within the Council's Local Plan as site ES6.
  - ii. the planning application was refused in March 2023; at the time of the Appellant's request the Council considered that the planning application was highly likely to be subject to appeal.
  - iii. the legal advice sought from counsel therefore relates to a matter which was highly likely to be subject to legal proceedings.
  - iv. in any event counsel's advice relates to the wider implications of the development of site ES6.
  - v. counsel's advice obtained will be relevant to the consideration of any future planning application relating to site ES6.
  - vi. the withheld information consists of a confidential communication between a client and a barrister, made for the dominant purpose of seeking and receiving legal advice, and is therefore subject to 'Legal Professional Privilege' (LPP).
  - vii. the Council's duties in this matter constitute a formal statutory obligation within the framework of planning law - disclosing information subject to LPP would interfere with its ability to carry out these duties and have an adverse effect on the course of justice.
  - viii. the Commissioner considered whether the balance of the public interest favours the disclosure of the information, or favours the exception being maintained.
  - ix. the public interest exception is strong due to the general principle of upholding the administration of justice, including not prejudicing legal or statutory proceedings.
  - x. there is no evidence of countervailing / opposing factors such as unlawful activity or negligence on the part of the Council.
  - xi. other mechanisms for public scrutiny already exist within planning law;
  - xii. in any event the Council's decision (against the Officer's recommendation) was to refuse the Planning Application - the grounds for doing so have been published.
  - xiii. in all the circumstances, the public interest is weighed in favour of maintaining the exception (see DN paragraphs [32] to [35]).

### **Grounds of Appeal:**

7. The Grounds of Appeal ("GoA") have been helpfully summarised on behalf of the Appellant thus: The crux of this appeal is that the Commissioner failed to have regard to the statutory and administrative context in which planning decisions are made. This overarching error led the Commissioner into specific errors when he determined that:
  - A: Disclosure of the advice would adversely affect the course of justice [DN/10-22]
  - B: There are no opposing factors present to outweigh the public interest in not prejudicing "legal or statutory proceedings" [DN/32]

C: The remedies provided by “planning law” are sufficient to address the complainant’s concerns [DN/33]

D: It was relevant to his decision that the LPA had refused the planning application, and the grounds for doing so had been published [DN/34] while in his view seeing the Advice will enable residents to know if officers misled the Committee. The publication of the Committee’s decision does not assist with this procedural issue about officer conduct, he argued. Further he argued, the officers should not have recommended approval, since the application is in his view well outside the parameters for the site set the Local Plan (which was approved following the Planning Inspectorate assessment).

E. The “decision reached in the previous decision notice” in relation to the advice “is also transposable here” [DN/36]

### **Legal Framework:**

8. Regulation 12(5)(b) states: a public authority may refuse to disclose information to the extent that its disclosure would adversely affect- (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.

### **Caselaw:**

9. The Commissioner has helpfully summarised the relevant caselaw thus;
10. The ‘course of justice’ test under the EIR is wide-ranging - the withheld information need not reach the high bar of legal professional privilege. Information which refers in general terms to legal issues that a public authority has placed under discussion has been held to engage the exception – see Salford City Council v Information Commissioner & Redwater Developments Ltd (EA/2015/0276).
11. In the Salford case the Tribunal accepted that the disclosure of a general reference to legal issues that the authority had placed under consideration would adversely affect the legal position of the public authority as it would “inhibit the council from seeking general legal advice on the types of issues pertinent to the information in this case...”.
12. There is a clear line of authority from both the Tribunal and the Upper Tribunal confirming that there will always be a strong argument in favour of maintaining legal professional privilege.
13. As the First-tier Tribunal concluded in Bellamy v Information Commissioner & Secretary of State for Trade and Industry (EA/2005/0023): - “...*there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the clearest case...*”

14. As a result, there is a strong, inherent public interest to maintaining the exception wherever it is engaged. The public interest factors that underpin the doctrine of legal professional privilege – that parties should be able to consult their legal advisers in confidence so that they feel able to set out their position with complete candour – will always weigh strongly in the balance whenever Section 42 FOIA or Regulation 12(5)(b) EIR is engaged.
15. The Tribunal, in a long line of cases, has structured its approach to the public interest test for such information in the same way as for other exceptions but given particular weight to the public interest in maintaining the exemption. The Tribunal’s approach in *Bellamy* was endorsed by the High Court in *DBERR v O’Brien v IC*, [2009] EWHC 164 QB, which held that LPP cases “are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question [41] ...
16. The jurisprudence of the FTT further indicates that the factors in favour of maintaining the exemption are not necessarily limited to the general one just indicated, but may include the effect which disclosure would have in the individual case. For example, if the dispute to which the advice relates is still live at the time of the request, it may be considered unfair that the requester should have the advantage of access to the authority's advice, without affording the authority the same advantage.
17. The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight”.
18. Considerable weight should also be attributed to the decision of the three-judge panel of the Upper Tribunal in *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC).
19. The Upper Tribunal in *DCLG* considered the application of regulation 12(5)(b) EIR, and found that the significance of LPP in relation to the public interest test is broadly the same as s.42 FOIA [55].
20. The UT in *DCLG* underlined the importance of the system of LPP to a fair and proper judicial process. The Upper Tribunal considered in *DCLG* that weight should be attributed not only to the need to maintain LPP in that case but also to the more generalised risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of the system of LPP [67].
21. Addressing the public interest balance [72-74] against the undisputed facts and the facts found by the First-tier Tribunal, the UT held that there were no 'special or unusual factors' to justify not giving the 'effect on the course of justice in terms of a weakening of confidence in the efficacy of LLP generally ... the very considerable weight it will generally deserve'

and that that factor, coupled with the unfairness point strongly outweighed' the 'particularly weak' factors in favour of disclosure [74].

22. Further, in *Savic v IC, AGO & CO* [2017] UKUT AACR 26, the Upper Tribunal agreed with the long-standing case law that identified powerful public interest factors served by the exemption: at [31] and found that the balance will be more likely to favour nondisclosure where the information “is relevant to, or might be or might have been of use in, existing, concluded or contemplated legal proceedings”: at [35].
23. In *Cabinet Office v Information Commissioner and Gavin Aitchison* [2013] UKUT [P526]
24. Most recently in *National Highways Ltd v Information Commissioner & Tristram* [2023] UKFTT 895 the Tribunal unanimously found the public interest under Regulation 12(5)(b) of EIR favoured maintaining the exception in respect of Leading Counsel’s advice provided to the public authority relating to the Arundel Bypass.
25. The Tribunal identified a number of reasons to support its conclusion, which – although the case details differ, and we are not bound by its decision - it is respectfully submitted are germane to the current case. The Tribunal held, inter alia (with emphasis added):-

*“In the first place, his decision is flawed by the failure to attach sufficient weight to the crucial role which LPP plays in our justice system and the consequential need for a compelling reason to be shown to justify denying any public body the right to rely on its protection in any particular case. ... LPP carries weight of a different order from that to be attached to other exemptions (see case-law cited in DCLG, para 42). ... to the wider and even more fundamental point that any encroachment on the protection afforded by LPP will inevitably damage the confidence of public bodies in its efficacy.”*

*Second, (the Commissioner) saw the extent of opposition to the Grey route (from residents, the local authority and some special interest groups) and the anticipated cost of the project as key considerations ... This betrays the fundamental nature of the misunderstanding. The fact that a particular plan or project is significant and may have a severe impact on particular groups or communities or on public finances cannot begin to justify the disclosure of privileged advice. If the law were otherwise, LPP would long ago have become a dead letter. What the case-law shows is that any arguable attempt to circumvent LPP must rest on a special factor or circumstance relating to the advice, not to the wider project or controversy with which the advice is concerned.*

*Third, factors or circumstances relating to the QCs' advice (rather than the wider underlying controversy) argued powerfully against, not in favour of, disclosure. ... the advice was recent. .... the matters to which the advices were directed, including in particular the proposed 'Grey' scheme, were 'live' and current. There was (and, we think, is) a strong possibility of the proposal attracting a legal challenge. Lastly, there is no*

*suggestion here that the advice has been misinterpreted or, worse, manipulated or misrepresented by National Highways.*

Fourth, we also see some force in the further point tending against disclosure in LPP cases (discussed by reference to West EA/2010/0120 (15 October 2010), para 13(5)) in DCLG, para 46) that it may be seen as unfair, at least where the dispute remains 'live', if the requester has sight of the public authority's advice and the latter does not enjoy a corresponding advantage....

*The 'precedent' likely to undermine public confidence in LPP consists of the simple fact of an adjudication having been made which derogates from the cardinal principle that LPP will protect the confidentiality of legal advice, absent a weighty and compelling reason to the contrary. Every derogation serves to reduce public confidence in the effectiveness of the protection....*

*The suggestion that a public authority's claim to rest a decision to change its strategy on legal advice amounts to a special circumstance depriving it of LPP protection ... is obviously untenable....*

*We fully accept that she, like many other local residents, is much aggrieved by what has happened and greatly concerned about what may lie ahead. She may be right that National Highways is worthy of blame. ... this helps not at all on the question of LPP. ... in any event, if she is right, her remedy (if any) lies elsewhere, and not in her information request.*

### **The Council's Response:**

26. The Councils position is that the information sought – (written legal advice and associated internal memoranda and correspondence) – is covered by the exception in Regulation 12(5) (b), was commissioned to assist with a live issue that had arisen as part of the planning application and that the request made on April 5 was misconceived and was based on an erroneous assumption made by the Appellant that the legal advice had been shared with Councillors and 'Council officials.
27. The Council argue that it is clear from the wording of the request that the Appellant himself understood the principle of legal privilege, as his request was conditional: *'can you confirm whether the legal advice you previously confirmed had been sought by Mathias Franklin, Head of Planning and Development, from external chambers has been shared with any Kirklees Councillors or Kirklees Council officials? If the legal advice obtained by Mathias Franklin from external lawyers has been shared with those above-mentioned persons, then I ask that you supply all emails, reports, minutes and recordings, including the legal advice, relating to this matter.'*
28. The Council have consistently maintained that the legal advice obtained had been shared no wider than the Council's legal team and the client department and, on that basis, there were no grounds to consider that any privilege had been waived.

29. The Council submit the Commissioner's reasoning is outlined in the DN and the Council is substantially in agreement with the Information Commissioner's reasoning.
30. The Council further submit that whilst the planning application in question has been refused and will not at this stage be the subject of an appeal, it is nevertheless the position of the Council that, as this site is listed on the Local Plan for development, there will be further planning applications made.
31. The Council is of the view that the contents of the advice would be relevant to the determination of any future applications and, as such, should be considered still to be a document subject to legal privilege. Essentially, the legal advice obtained relates to the land itself, rather than the specific warehouse application. It is the position of Council that the matter is still a 'live' one. This point the Council note was accepted by the Commissioner and was referenced in the DN at §20.
32. With regard to the wider principle of there being a strong public interest in maintaining the exception around privilege, the position of the Council is that this is an important principle and one that should not be disregarded lightly.

**The Commissioner's Response:**

33. The Commissioner addresses Grounds 'A' and 'B' together as the challenges are inextricably linked and inter-woven.
34. The Commissioner has recognised in his DN that there is a public interest in public authorities being transparent and accountable in relation for its actions.
35. The Commissioner further acknowledges that there is public interest in the withheld legal advice given that it relates to development plans which have significance for the local community.
36. However, the question for the Tribunal is whether the weight of this factor is sufficient to outweigh the public interest in withholding the legal advice.

**The Commissioner's Arguments in favour of non-disclosure:**

37. The Appellant refers in his grounds of appeal to LPA officers improperly "*withholding legal advice from the SPC*" and [they] "*misled the SPC on a legal matter*". However, these are not factors for the Commissioner or indeed the Tribunal (see [42] of National Highways above). To state the obvious the Commissioner and Tribunal looks at the issue afresh from the question of whether the information requested should be disclosed.



38. The Appellant effectively argues that because planning permission has been refused, revealing the legal advice could do no harm as it played no part in the decision.
39. With respect, the Commissioner submits this argument is flawed because at the date of the Appellant's FOI/EIR request (5th April 2023) the developer still had over 5 months in which to file a statutory appeal, and an infinite period of time in which to submit a revised / new application.
40. The Council advised the Appellant in these very terms when it said, on 9th August 2023, in a letter by way of internal review: - *"This particular planning application is a controversial one and may well lead to an appeal to the Planning Inspectorate now that the application has been refused. There is a 6-month period during which an appeal can be made. It may also lead to a revised application being submitted in an attempt by the developer to address any reasons for the refusal. Due to this, I would very much regard this application as still being a 'live' one. In those circumstances, I am of the view that the public interest test is not met and that it is appropriate to maintain the privilege of the legal advice."*
41. The Commissioner submits it is plain that the course of justice would have been adversely effected generally by disclosure notwithstanding the fact that planning permission had been refused for the discrete application relating to the site.
42. The Commissioner argues objectively, the refusal of planning permission exacerbated rather than lessened the risk/threat of litigation.
43. It is settled law (see *Brendan Montague v. Information Commissioner & The Department for International Trade* [2022] UKUT 104 AAC) that the public interest balance must be assessed on how matters stood at the time of the public authority's decision on a request in accordance with statutory timeframes for compliance in Part I of FOIA (and if the authority issued its response late, the public interest balance should be assessed by reference to the date on which the reply should have been issued).
44. Furthermore, the Commissioner submits the refusal does not alter the Council's responsibilities as Local Planning Authority in relation to regulating the development going forwards.
45. The Commissioner submits that any future applications and/or negotiations would be prejudiced, placing the Council at an unfair advantage in the event of disclosure of the legal advice.
46. The Commissioner accepts as reasonable that if a similar disputed application were to arise in the future, there is a strong possibility that the Council would wish to rely (at least in part) upon the legal advice with regard to its position. Given that disclosure would be to the 'world at large', revealing the Council's position would not be limited only to the Appellant.

47. It is not difficult to see how it would be beneficial to a prospective Planning Applicant to know the Councils position ahead of the usual due process. Or to put it another way, disclosure would confer a disadvantage on the Council's ability to undertake planning duties on behalf of the wider public.
48. Moreover, the Commissioner submits the Appellant has failed in the Grounds of Appeal to take into account the inherent public interest in upholding the principle of LPP and the administration of justice (as acknowledged by the authorities referred to above).
49. The Commissioner submits it would weaken the public's confidence in the legal process if this principle was undermined in this case. In particular, in the DCLG case above, the Upper Tribunal accepted the submission that the risk of the disclosure of legally privileged information, leading to a weakening of confidence in the general principle of LPP was a public interest factor of "*very considerable weight*" in favour of maintaining the exception [72]. The Upper Tribunal added that there would have to be "*special or unusual factors*" in a particular case to justify not giving it this weight [67].

**The Commissioner's Balance of public interest factors:**

50. In weighing the above factors, the Commissioner acknowledges that there is a public interest in the legal advice, given the contentious nature of development at the site.
51. However, there is no shortage of controversial planning applications up and down the land – confidential legal advice is not routinely shared with the public, even in relation to the most bitterly contested applications and decisions.
52. The Commissioner does not consider in this particular case that the public interest factors in favour of disclosure in this case would constitute "*special or unusual factors*" to justify not giving the general principle of LPP the considerable weight in favour of maintaining the exception, or indeed were sufficient to outweigh the other factors in favour of withholding the advice.
53. The Commissioner submits that the facts of this particular case are on all fours with the reasons and conclusion reached in National Highways above, and he was correct to conclude that the public interest in maintaining the exception in relation to this information outweighs the public interest in disclosure.

**The Commissioner addresses Grounds 'C' and 'D' together as the challenges to planning law remedies and the refused planning application are inextricably linked and inter-woven.**

54. The Commissioner accepts that the Appellant holds genuine concerns about the development of site ES6, which is shared by local residents and members of the public. However, he submits that the Appellant has placed too much weight on these factors.

55. Disclosure would not significantly promote transparency of the public authority or any greater public understanding of environmental matters, or more effective public participation in environmental decision-making, when seen in the context of the overall planning process.
56. Although the Commissioner is not an expert in planning matters, it seems apparent that this process involves meaningful public involvement and significant independent scrutiny. The Commissioner notes in particular that:
- a. The Committee and Council meetings are formally constituted and held in public.
  - b. The planning process includes rounds of public consultation, the responses to which the Council is required to take into account.
  - c. The planning process is subject to approval by an independent Planning Inspector appointed by the Secretary of State;
  - d. The Appellant, and any other citizen concerned with the development of Site ES6 is entitled to make representations to the LPA;
  - e. Indeed, the pressure group “Save our Spen” mobilised circa 1955 letters of opposition submitted to the LPA;
  - f. Those representations were in fact ‘successful’ because the SPC turned down the planning application;
  - g. Although the Appellant complains that seeking Judicial Review is costly and time-consuming it is far from clear why he would contemplate doing so in circumstances where his campaign has achieved its desired objective (cf. ‘Supporting Document 9’).
  - h. In any event, there is an in-built conundrum to the stance adopted by the Appellant. It is a fact that planning permission was refused by the SPC absent sight of Counsel’s Advice. It is difficult therefore to see how the public interest is served by disclosure of a document that played no part in the decision-making process.

**Ground E The decision reached in the previous Decision Notice in relation to the advice is also transposable here.**

57. The Commissioner accepts the Council’s assertions that disclosure of the withheld information would adversely affect future applications relating to the land in question.
58. The relevant extract reads as follows: The Commissioner is satisfied from the wording of the request that the withheld information would constitute confidential communications between a client and a professional legal advisor made for the dominant purpose of seeking and/or giving legal advice. He therefore considers the information to be covered by legal professional privilege on the basis of advice privilege. The Commissioner is aware of no evidence suggesting that this privilege has been waived.
59. The Council has explained that the withheld information relates to an ongoing live matter, that being a planning application which has not yet been approved. As the withheld information is subject to legal professional privilege and relates to live matter, the Commissioner is satisfied that disclosure of the requested information would have an

adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

60. It is clear that the central tenets of (i) legal advice, (ii) privilege and (iii) adverse effect were made out in that Decision. Accordingly, the issue of ‘relevance’ is quite the opposite to the Appellant’s assertion.
61. In addition, his complaint about timing (see Grounds of Appeal, para [36]) really takes the argument nowhere.

**Summary of the Commissioner’s Response: -**

62. The Commissioner’s position in a nutshell mirrors the observation by Judge Snelson at [41] of National Highways above where he said: *“Seventh, there is also, we think, nothing in Dr Tristram’s complaint about National Highways not specifying or explaining the advice received in the Briefing Note (or any other published document). One would not expect a public authority to do so. One would expect a public authority to do what National Highways did, which was to set out in broad terms the substantive justification for the proposals it was making. To state the obvious, the fact that it said in the Briefing Note that it was relying on legal advice did not entitle Dr Tristram to sight of the advice”*.
63. Adopting the structure of Judge Snelson’s remarks, the Commissioner’s reflective submission would be phrased thus: There is also nothing in Mr. Abbott’s complaint about Kirklees Council not specifying or explaining the legal advice received in the Officer’s Report (or any other published document). One would not expect a public authority to do so. One would expect a public authority to do what Kirklees Council did, which was to set out in a 122-page report the substantive justification for the proposals it was making.
64. To state the obvious the Commissioner submits, the fact that it was said in the SPC Committee Meeting that it had obtained legal advice did not entitle Mr. Abbott to sight of it.

**The Appellant’s submissions:**

65. The Tribunal have the assistance of a Skeleton argument dated 7 May 2024 provided on behalf of the Appellant and reference to it by counsel at the hearing on 16 May 2024. It provided submissions in support of the Grounds of Appeal and the material issues can be summarised thus:
66. The highly unusual and most troubling aspect of this case, the Appellant submits, is that officers withheld the advice from decision-maker (the SPC). The Appellant surmises that the advice contradicts officers’ recommendation to grant planning permission.

67. The IC, it is argued, has acted unreasonably in reaching a decision without a proper understanding of the legal context which determines what adverse effects could arise from disclosure, and so what weight ought properly to be given to the public interests engaged.
68. The IC has it is submitted, failed accurately to identify what the adverse effects of disclosure would be and has failed to recognise that the effects on the “*course of justice*” in this particular context, on these particular facts, would be positive. His assessment that the effects would be adverse cannot therefore stand, and the decision it is argued, is wrong in law.
69. On the public interest Grounds, the DN relies on an “established view” (DN/19) which fails to take into account the public interest factors at play in the planning law context. The Appellant argues that it is plain that the writer of the DN, and the Lawyer drafting the IC Response to the GoA, are not familiar with planning law or procedure.
70. The IC’s earlier decision notice in respect of the same request [OB/A9] made prior to the LPA’s refusal of planning permission was wrongly taken into account in the October 2023 decision subject to appeal. At DN/36 the IC finds that, despite planning permission having been refused, the “information remains live” and the earlier decision notice is “transposable here”. That fails to take into account the important changes of circumstance between November 2022 and October 2023:
71. Finally, the Appellant submits that for all the above reasons, errors and failings on the part of the IC, she is justified in making an application for costs of this appeal.

**Discussion:**

72. The Tribunal having read the voluminous papers and considered all the evidence and submissions (written and oral), make the following observations:
73. We acknowledge and consider the arguments in the public interest in favour of disclosure as being in the interests of Transparency and Accountability. The Commissioner has also comprehensively expressed his recognition of same.
74. The Information Commissioner’s Office deal daily on an enormous scale with exemptions under FOIA and exceptions under EIR and do so with all public authorities in the United Kingdom. Many concern the most complex areas of Law and procedures, and this includes regular issues in and on planning law and procedures. In this case the Commissioner through its investigation has examined the law and procedures with the Council directly on all material issues pertaining to the Law and procedures involved in so far as they relate to any public interest factors to be considered. It is, in our view inappropriate to suggest that the Commissioner has failed to understand the complexities of planning law and procedure in a manner that provides support for any of grounds of appeal relied upon. The Council were at

all material times fully and well versed in the relevant law and procedures and briefed the Commissioner throughout his investigation into the Appellants' complaint.

75. Ms Byrd asserted it was wrong for legal advice to be routinely withheld from the Committee. In the course of the hearing no evidence whatsoever was provided for this assertion, as was contrary to the Panel's expectations.
76. On examination of the evidence before us the Tribunal find in common with the Commissioner the following material factual circumstances pertaining to this appeal; a) The information requested – which consists of legal advice sought from Counsel and associated internal communications relating to that legal advice - relates to a matter which was highly likely to be subject to legal proceedings.
- b) The advice sought from Counsel relates to the wider implications of the development of the piece of land identified as ES6. The Council stated that the legal advice obtained will be relevant to the consideration of any future planning application relating to that specific site.
- c) We are satisfied that the withheld information consists of a confidential communication between a client and a professional legal advisor, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege and other withheld information of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege. Other withheld information consists of commentary on and discussion of the Council's legal position in respect of the advice regarding land identified for development in the Council's Local Plan.
- d) There is no evidence that the advice was shared within in an unrestricted way. Having considered the available evidence, we are satisfied that the legal advice remains subject to LPP.
- e) We accept that disclosure of information subject to LPP, and in particular legal advice which remains live and relevant, will have an adverse effect on the course of justice even though the specific matter which precipitated the advice may no longer be live, we find that the advice is still relevant to any similar scenarios which may arise in the future concerning the land in question.
- f) We accept that the Council's duties in this matter constitute a formal statutory obligation within the framework of planning law and that disclosing information subject to LPP and discussion around its application would interfere with its ability to carry out these duties and they would thereby be adversely affected.
77. The Tribunal do not find that the requested information was "*withheld*" in any deliberate attempt to conceal the contents and there is no evidence whatsoever before us to support this apparently false assertion which has been made in an accusatory manner. On examination of the evidence before us we can find no reason for the Committee necessarily to be provided with the requested information. We were given no evidence that there is an obligation to do so, and it appears in any event it is not usually done as a matter of course or "routinely" as the Council express it.
78. It is clear that essentially, the legal advice obtained relates to the land itself, rather than the specific warehouse application in question. It is the position of the Council that the matter is

still a *'live'* one. The Tribunal recognise these as highly pertinent matters of fact in this particular appeal. The Tribunal accept the Councils' assertions that disclosure of the withheld information would have an adverse effect on future applications relating to the land in question.

79. As the withheld information is subject to legal LPP and relates to live matter, we are satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore find that the exception at regulation 12(5)(b) is engaged.
80. On the evidence before us (which includes the Closed Bundle) we are satisfied that the Officers had a clear understanding of all material issues before them. There is no evidence, or even suggestion of any misleading or misrepresentation of any material information or matters that would have impeded the Officers in their decision making. There is no evidence of any cover up and on the contrary, the requested information was referred to throughout and in a report made available to the Committee and the public. We do not accept the apparently false assertion that there was any misleading conduct by officers of the Committee.
81. It is not imperative, as asserted on behalf of the Appellant, that in any such requests for information under FOIA or EIR that there be an alternative remedy. The exemptions and exceptions respectively stand alone. In any event there are planning appeals where the law has deemed them necessary.
82. The Tribunal also refutes the argument that the DN, to which the Appellant refers is reference number IC-190089- Z7J5, dated 7th November 2022, is "*not transposable*". We accept that the central tenets of (i) legal advice, (ii) privilege and (iii) adverse effect were made out in the earlier Decision. Accordingly, the issue of 'relevance' is quite the opposite to the Appellant's assertion. We agree that the implications of the earlier DN are "Transposable".
83. The Tribunal find the exception under reg.12 (5) (b) is wider than simply applying to information which is subject to LPP. Even if the information is not subject to LPP, it may still fall within the scope of the exception if its disclosure would have an adverse effect upon the course of justice or the other issues highlighted herein.
84. Further, having considered all the information before us, the Tribunal find the disclosure of the withheld information in the advice subject to LPP, would add little if any material information to what is already in the public domain. It is known that the application was refused and why.
85. On the balance of public interest although we have considered and heard the evidence afresh, we can confirm that we accept and adopt the Commissioners' logic and explanation in his reasoning in the DN and as set out at §§ 23 – 34.

**86.** It follows therefore that we can find no error of law in the DN nor in the exercise of any discretion in coming to the conclusion therein and therefore we must dismiss this appeal.

Brian Kennedy KC

Date: 28 May 2024.