



Tribunals Service

Information Tribunal

Case No: EA/2006/0091

**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER SECTION
57 OF THE FREEDOM OF INFORMATION ACT 2000**

Determined on the papers on 8th May 2007

Promulgation date: 7 June 2007

BEFORE THE INFORMATION TRIBUNAL

Peter Marquand, DEPUTY CHAIRMAN

Steve Shaw and Michael Hake, LAY MEMBERS

B E T W E E N :

MR ROBIN PHILIP BURGESS

Appellant

v.

THE INFORMATION COMMISSIONER

Respondent

and

STAFFORD BOROUGH COUNCIL

Additional Party

Written Representations:

For the Appellant: In person

For the Respondent: Solicitor for the Information Commissioner

For the Additional Party: Richard Kimblin, Counsel

DECISION

The Tribunal dismisses the appeal for the reasons set out below. The Tribunal has come to the decision that the information sought by Mr Burgess is subject to legal professional privilege, which has not been waived by the Council. The disclosure is more likely than not to adversely affect the course of justice and the public interest in favour of maintaining the exception outweighs the public interest in favour of disclosure, despite the presumption in favour of disclosure set out in Regulation 12(2) EIR. The Stafford Borough Council is not obliged to disclose to Mr Burgess the information he seeks.

REASONS FOR DECISION

Background

1. The central facts in this case concern a fence at 37 Glebe Lane, Gnosall, Staffordshire. The owners of this property ("the Developers") erected a 1.9 metre high fence and retrospectively applied for the planning permission that was required. This was refused by Stafford Borough Council's ("the Council") Development Control Committee on 07.01.2004. The Council issued an Enforcement Notice dated 25.08.2004 requiring the fence to be reduced in height or removed and this was then appealed by the Developers to the Planning Inspectorate, under the relevant statutory scheme. The Planning Inspector dismissed the appeal and his decision is recorded in a letter dated 03.02.2005 ("the Appeal Decision").
2. Mr Burgess is a neighbour of the Developers and had been in correspondence with the Council about the fence. By letter dated the 16th March 2005, the Council informed Mr Burgess that it was seeking "additional legal interpretation" of the Appeal Decision. This was expanded upon in letters dated the 23rd March 2005 and 11th May 2005 to Mr Burgess as the Council had concerns over what constituted "adjacent" in the context of the General Permitted Development Order 1995 (GPDO). The GPDO sets out, amongst other matters, the exceptions from the requirement to obtain planning permission.
3. Mr Burgess is seeking the written legal advice from a barrister (also known as "counsel") provided to the Council in relation to the Appeal Decision. This is referred to in this judgment as "the Barrister's Report".

The request for information

4. By letter dated the 16th May 2005 and re-confirmed on the 23rd May 2005, Mr Burgess requested that he was forwarded, "*A copy of the Barrister's report and the Brief served by the Council. I make this request under the Freedom of Information Act 2000 and require the documents be submitted within 20 working days.*" The Council replied on the 26th May 2005 refusing his request, claiming that legal professional privilege meant that it was exempt from disclosure under the Freedom of Information Act (FOIA), that "... *the advice is still current ...*" and that it would not be in the public interest to disclose the information. Mr Burgess then complained to the Information Commissioner ("the Commissioner") by letter dated the 3rd June 2005 in

relation to the Barrister's Report. The response of the Commissioner, dated the 13th June 2005 was a general one but as a result of information provided, Mr Burgess realised that he had not been advised of the right under FOIA to ask the Council to review its original decision and he therefore did so by letter dated 16th June 2005. The Council replied by letter of the 7th July 2005 reaffirming its previous decision, claiming the exemption in section 42 of FOIA (i.e. legal professional privilege) but also stating that the disclosure may be exempt under section 31 FOIA as it might prejudice the exercise of the Council's law enforcement functions, as it was considering enforcement action in relation to the disputed fence. The letter concluded by stating:

"It would not be in the public interest to disclose advice on enforcement action at this stage".

On 16th July 2005 Mr Burgess wrote to the Commissioner appealing against the Council's decision on review.

5. On the 12th October 2005 the Council wrote to Mr Burgess, informing him that following reduction in the height of the fence, no further enforcement action was to be taken in relation to the fencing at 37 Glebe Lane and a copy of a report to the Council's Development Control Committee, dated 21st September 2005 was included with that letter. Mr Burgess replied to the Council on the 24th October 2005 repeating his request for the Barrister's Report in the following terms: *"As there are no longer legal proceedings pending by the Council regarding the case to which the report relates I re-submit my request to receive a copy of the report."* On the same day Mr Burgess wrote to the Commissioner in similar terms, pointing out the change in circumstances as the Council was no longer considering legal proceedings.
6. On the 22nd November 2005 the Council again refused to provide the Barrister's Report, (having treated the letter as a "further request") in the following terms: *"The Barrister's advice obtained in relation to this matter contained confidential legal advice between the Barrister and the Council and is the subject of legal professional privilege. The Council must be able to control legal advice in confidence. Further the advice remains relevant to the Council's enforcement functions, therefore, it remains the position that the Council does not consider that it is the public interest to disclose the advice in this case."*
7. On the 1st December 2005 the Commissioner wrote to Mr Burgess, apologising for the delay in dealing with his complaint and on the 24th March 2006 and 14th May 2006 Mr Burgess made enquiries of the progress of his complaint and these were replied to

on the 16th June 2006 when the Commissioner's office apologised for the delay. Samantha Bracegirdle, Senior Complaints Officer at the Commissioner's office wrote to Mr Curran, legal services manager of the Council, by letter dated the 1st August 2006 and stated that the Commissioner was of the view the Environmental Information Regulations (EIR) were the appropriate regime rather than FOIA and requested a copy of the Barrister's Report. Ms Bracegirdle also requested confirmation that the issues that the legal advice concerned were now closed, and no further action was contemplated by the Council. The Council replied on the 8th August 2006 repeating its claim for the exemptions and stated there was possible further legal action. On the 22nd August Ms Bracegirdle wrote again to the Council revising the Commissioner's view on which part of EIR was the appropriate one in relation to legal advice and informing them that rather than Regulation 12(5)(d) it was Regulation 12(5)(b).

8. On the 26th September 2006 Ms Bracegirdle wrote to Mr Burgess and the Council giving her preliminary view that the Barrister's Report was exempt from disclosure and that it was not in the public interest to disclose information to Mr Burgess. However, Mr Burgess confirmed on the 1st October 2006 that he still wanted the Barrister's Report and therefore the Commissioner issued a Decision Notice, dated the 14th November 2006, which concluded: "*The Commissioner's decision is that the Public Authority dealt with the request for information in accordance with the EIR.*"
9. The reasons for that decision can be summarised as follows:
 - a. The information sought by Mr Burgess was subject to legal professional privilege and the privilege had not been waived.
 - b. The exception in EIR 12(5)(b) covered legal professional privilege.
 - c. The public interest in favour of maintaining the exception outweighed the public interest in favour of disclosure.
10. For completeness, the Council had claimed the exemption in section 31 FOIA in relation to their possible enforcement action, but the Commissioner did not consider this, having reached the conclusion set out above and it is not pursued in this Appeal.

The Appeal to the Tribunal

11. Mr Burgess appealed to the Tribunal on the 22nd November 2006. It is important to note that he stated the basis of his appeal was:

- a. The Council had waived the privilege as in July 2005 Councillor Williamson had offered the Barrister's Report to Mrs Burgess.
 - b. The Developers were employees of the Council.
12. The Tribunal has dealt with these points below and the issues to be determined in the Appeal are set out below.
13. The Tribunal joined Stafford Borough Council as a party to the Appeal and with the agreement of all parties, the Appeal has been determined without a hearing on the basis of written submissions from the parties and an agreed bundle of documents. In addition, the Tribunal was provided with a copy of the Barrister's Report, which is in fact two documents, but these were not made available to Mr Burgess. This was in order to preserve the confidentiality of the disputed information. Although the Tribunal may not refer to every document in this judgment we have considered all the materials before us.

The Issues

14. At a Directions hearing the Tribunal limited the issues in the Appeal as follows:
 - a. Whether confidentiality had been waived by the Council through their disclosure of the Barrister's Report to Councillor Williamson and his handling of the report?
 - b. Whether the Commissioner was correct in law and fact in finding that Regulation 12(5)(b) of the EIR applied in relation to the withheld information?
 - c. Whether the public interest test was properly applied by the Commissioner in relation to the application of the Regulation 12(5)(b) exception?

The relevant statutory provisions

15. The Tribunal's remit is governed by EIR regulation 18, which applies FOIA as the relevant enforcement and appeals provisions. The relevant section is 58 and this is set out below:

"58.— Determination of appeals.

(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 involved 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 and hears evidence, which it is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of 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 EIR has been correctly applied. In cases involving the public interest test in Regulation 12(1)(b) 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 will involve a finding that the Decision Notice was not in accordance with the law.

Has privilege been waived by the Council?

17. At the Directions hearing the Tribunal formulated the question at paragraph 14(a) using the word “confidentiality” but legal professional privilege is a particular form of confidentiality and that is the issue that we have to look at first. The Tribunal has seen in full the Barrister’s Report dated the 24th March 2005 and 4th May 2005. The Tribunal’s conclusion is that it is clear that the information in both documents were obtained by the Council from the Barrister to advise it on the meaning of “adjacent”, in particular in relation to the specific property, 37 Glebe Lane, but also the advice is of general application. The second advice is dependent on the first and considers how the Council took its decision in relation to 37 Glebe Lane and the application of the legal tests to the particular facts.
18. There are two issues to look at in this section: first, has privilege been lost because the Barrister’s report was handed to Councillor Williamson and secondly, whether privilege has been lost because of Councillor Williamson’s handling of the Barrister’s Report. Mr Burgess’ submissions are that that privilege has been lost. The Council and the Commissioner maintain that this is not the case.

19. In their letter of the 26th May 2005 the Council made it clear to Mr Burgess that the discussions including the Barrister's Report before the Development Control Committee would remain confidential. This is confirmed by the agenda for that meeting on 08.06.2005. In fact, the Council deferred a decision and decided that a site visit should take place and again the agenda for that visit confirms that the information is to be confidential and not for publication. The minutes of the visit on 8th July 2005 also record the confidential nature of the proceedings. The witness statement of Mr Ian Curran, Legal Services Manager of the Council also states that the meetings were confidential and that the Barrister's Report was only disclosed to relevant planning and legal officers and elected members of the Council and all these persons were involved in the Council's Developmental Control regulatory functions.

20. Specifically, Mr Burgess has provided evidence from Mrs Burgess that on the 8th July 2005 at a meeting at her house, Councillor Kenneth Williamson offered to provide her with a copy of the Barrister's Report. However, Mrs Burgess declined the offer and did not take the Report. The fact that there was a discussion between Councillor Williamson and Mrs Burgess is confirmed by statements from Valerie Sixsmith and David Sixsmith, although neither of those people are able to give any evidence about what document Councillor Williamson was offering Mrs Burgess and in any event, neither of them are able to give first hand evidence of an offer being made. In a statement from Councillor Williamson, he denies having offered the Barrister's Report to Mr or Mrs Burgess. He states that he has visited Mr Burgess' property on numerous occasions but cannot remember whether one of those was on the 8th July 2005. However, in relation to other discussions Councillor Williamson does recall offering Mr Burgess a copy of a statement that he had prepared for a presentation to the Development Control Committee but Councillor Williamson states: "*This was on the condition that any reference to the confidential legal advice would be removed before it was given to him.*" Councillor Williamson says that he is well aware of dealing with confidential information as he is a local magistrate. Councillor Williamson confirmed that he received the advice as an elected member of the Council and that "*at no time discussed the contents of that advice or offered a copy of this advice to the Appellant or anyone else outside the Council.*"

21. As the Tribunal has already stated in the background section above, it is clear that by the 12th October 2005 the Council had concluded that no enforcement action was to be taken against the developers at 37 Glebe Lane.

22. Mr Burgess' submissions on the issue of waiver privilege fall into two parts. First, once the Council was not going to proceed with enforcement action against the developers of 37 Glebe Lane, the legal privilege was lost. This was not one of the

issues identified by the Tribunal at the Directions hearing (see paragraph 14 above). Nevertheless, the Tribunal has considered these arguments. Secondly, the disclosure to Councillor Williamson amounts to a waiver of privilege and that his role was to represent the residents of the Parish, as their Borough Council are not, as a member of the Development Control Committee. Furthermore, the offer of the advice to Mrs Burgess amounts to a waiver of privilege. The Council's submissions are that Councillor Williamson is an elected member of the Council and as such, he is entitled to receive legal advice without that constituting a waiver. Councillor Williamson's version of events ought to be believed, but in any event, there was no waiver because the papers did not come into Mrs Burgess' possession. The Commissioner did not accept that conclusion of the litigation meant the privilege was lost and the other arguments put forward by the Commissioner were essentially identical to those of the Council, although put forward independently.

23. The Tribunal does not have sufficient evidence to conclude, on the balance of probabilities, that Councillor Williamson offered to Mrs Burgess or Mr Burgess a copy of the legal advice that is the subject matter of this Appeal. However, what is clear is that even if such an offer was made, it was declined by Mrs Burgess. Furthermore, the Tribunal concludes that the Council took careful steps to maintain the privilege in the legal advice and it was only disclosed to those elected members of the Council and those who otherwise required sight of it for the purpose of performing their duty.
24. The Tribunal's conclusion on this point is that the Council has not waived legal professional privilege in the Barrister's Report. The advice was obtained by the legal officers of the Council to enable the Council to make decisions. It is a necessary part of that, that the Councillors, as elected members, will see that advice and need to consider it when coming to a conclusion. Therefore, we do not find that there is any waiver of privilege by the disclosure of the advice to Councillor Williamson. Furthermore, we do not consider that if Councillor Williamson offered the legal advice to Mrs Burgess that that amounts to a waiver of privilege. We have already indicated above that we cannot reach a conclusion on whether or not he did offer the advice but, in any event, it was not provided to Mrs Burgess. In those circumstances there has, as a matter of fact, been no disclosure of the advice and in those circumstances we do not view the actions, if they took place, to have amounted to a waiver.
25. As to the argument put forward by Mr Burgess that because the litigation had been at an end the legal advice was not subject to professional privilege the Tribunal was referred to various authorities, including R v. Derby Magistrates Court ex parte B [1995] 4 All ER 526 and Three Rivers District Council and Others v. Governor and Company of the Bank of England [2004] UKHL 48. In R v. Derby Magistrates Court

the argument was that privilege was not absolute in that there were public interest factors that might justify the use of privileged material and Lord Taylor of Gosforth CJ reviewed the authorities on waiver of privilege. Lord Taylor stated: “... *the principle [that a relevant public interest might outweigh the client’s interest in asserting privilege] seems to conflict with the long-established rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client: once privileged, always privileged. It also goes against the view that the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings, and whether by the prosecution or the defence, and that the refusal of the client to waive his privilege, for whatever reason, or for no reason, cannot be questioned or investigated by the Court. ...*” Lord Taylor continued to review the cases stating: “*The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent. Legal professional privilege is thus much more than the ordinary rule of evidence, limited in its application to the fact of a particular case. It is a fundamental condition on which the administration of justice is as a whole rests.*”

26. Lord Taylor went on to reject the argument that public interest could override the client’s interest and stated: “*I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established.*”
27. In Three Rivers the House of Lords had to consider the extent of legal professional privilege and whether it went further than just litigation. Lord Scott, at paragraph 34, stated: “*None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients’) consent, there will be cases in which the requisite candour will be absent. ...*” Further on the Judgment at paragraphs 35-45 Lord Scott considers the scope of legal advice privilege and states: “*In cases of doubt the Judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public*

law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the Judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. 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 must, in my opinion, be an objective one.”

28. The Tribunal has considered the Barrister’s Report in this Appeal and has concluded above that it is subject to legal privilege. In the light of the above authorities it is clear that once a document is privileged it remains privileged unless there has been a waiver, which we have already concluded there has not been. The advice in this case is a mixture of advice concerning “*liabilities, obligations or remedies*”, potential litigation and advice that may be useful in the context of, as yet, unforeseen or as yet unthought-of litigation. Objectively it is reasonable to expect privilege to apply. Accordingly, the Tribunal does not accept Mr Burgess’ argument that the advice is no longer privileged because the proposed enforcement action at 37 Glebe Lane is no longer in contemplation.

Is Regulation 12(5)(b) the correct exception?

29. The parties have agreed that the EIR contain the appropriate regime to consider whether or not the Council is obliged to provide this information to Mr Burgess. For completeness, the Tribunal views the subject matter of this Appeal as coming within the definition of environmental information in Regulation 2(1)(a) and (c), namely “(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;*” and “(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 to try and protect those elements;*” The Barrister’s Report concerns the landscape and it will affect the Council’s policy towards the issues it addresses.
30. Regulation 5(1) requires a public authority to make environmental information available on request. However, Regulation 12 provides exceptions from the duty to disclose and is as follows:

“(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 paragraph (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) *[Is not relevant to this case]*

(4) *[Is not relevant to this case]*

(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) *....*

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

The remainder of the regulation is not relevant.

31. Mr Burgess raises no points on this issue and the Council and the Commissioner both support the application of Regulation 12(5)(b) to this information.

32. In Kirkaldie v. The Information Commissioner and Thanet District Council EA/2006/001 4th July 2006, the Tribunal considered whether EIR 12(5)(b) applied to information that was subject of legal professional privilege concerning the variation of an existing agreement. Although in that case the Tribunal decided that privileged had been waived, it did have to consider whether the Commissioner had been correct in relying on the legal professional privilege exemption in FOIA (section 42). In considering Regulation 12(5)(b) the Tribunal stated: *“The purpose of this exception is reasonably clear, it 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 right of individuals or organisations to a fair trial. In order to achieve this, it covers legal professional privilege, particularly where a public authority is, or is likely, to be involved in litigation.”*

33. Although we are not bound by this decision we agree with it. The Tribunal is of the view that Regulation 12(5)(b) is the appropriate exception to be relied upon in the context of this Appeal. As Lord Taylor of Gosforth CJ, in the extract quoted above, stated, legal professional privilege is a key element in the administration of justice (see paragraph 25 above), which is in our view part of the activities that will be encompassed by the phrase “course of justice” and advice on the rights and liabilities of a public authority are key to that, whether or not litigation is actually in progress.

34. However, the Tribunal needs to go further as it is a requirement of the exception in Regulation 12(5) that the disclosure “would adversely affect” the course of justice (in contrast to the position under the FOIA exemption in section 42).
35. Mr Burgess’ point is again as the current litigation is over there is no adverse affect. The Commissioner makes the general point that disclosure of legal advice is likely to lead to prejudice to public authorities in obtaining advice on their legal rights and obligations. The Council, on the other hand, makes specific submissions about these pieces of advice. The Council has pointed out in the evidence of Mr Curran “*That although the current situation had been decided on, the advice could still be used if future activities occurred at that site.*” The Tribunal has considered the Barrister’s Report in detail and although it deals with the specific issues at 37 Glebe Lane, it could be applicable to other circumstances in the Tribunal’s view, as indicated above.
36. The advice of a barrister is, of course, his/her professional opinion on what a Court is likely to conclude in a particular set of circumstances. As a result of a disclosure there is a potential for a negative effect in that it deprives a public authority from arguing a more favourable position and taking a chance of a better outcome than the one that has been included in the advice.
37. We have not had any submissions on what meaning should be given to “would adversely affect” but the Tribunal has considered the decision of a differently constituted Tribunal in the case of Hogan v. Oxford County Council EA/2005/0026 & 0030 dated 17.10.2006 when looking at the meaning of “would or would be likely to prejudice” in the context of the exemptions in FOIA. The Tribunal’s conclusion is that similar principles apply here namely:
- a. “Would” means “more likely than not”
 - b. The adverse affect must be “real, actual or of substance.”

Furthermore, the Tribunal also considers that any disclosure is effectively made to the general public as a whole as disclosure may not be made subject to conditions governing the subsequent use of the disclosed information. This was also considered to be the case in Hogan.

38. In the circumstances of this Appeal the Tribunal is satisfied that it is more likely than not that disclosure of the legal advice would adversely affect the course of justice. We have had in mind Regulation 12(2) and the presumption in favour of disclosure when considering the exception and have taken it to require, in this part of the application of Regulation 12, that in any case where there is doubt of the applicability

of the exception that doubt must be resolved in favour of the disclosure i.e. the exception does not apply. The Tribunal has concluded the disclosure would prejudice the Council's ability to maintain the position that it takes on in similar circumstances where there may be an issue over the meaning of "adjoining" and subsequent enforcement actions. This may be for properties within the Council's area of responsibility in general but also potentially those within and around the area of 37 Glebe Lane: this is a real adverse affect.

39. The Commissioner, in the Decision Notice, does not consider in relation to the application of Regulation 12(5)(b) the question of "would adversely affect" and to that extent we find the decision wrong in law but for the reasons we have given above, we have come to the conclusion that Regulation 12(5)(b) does apply.

Was the public interest test properly applied?

40. The Commissioner concluded that the public interest in maintaining the exception in this case outweighed the public interest in disclosure. Mr Burgess' submissions can be summarised as follows:
- a. Planning principles should be applied fairly and equally and by not declaring the Barrister's Report the Council is not acting in that way.
 - b. Public money has been expended on obtaining the advice and it therefore should be made available.
 - c. Disclosure would not undermine the Council's ability to defend itself in cases of actual litigation (as opposed to this case where there is no litigation). The Council should have appealed the planning inspector's decision rather than obtained an "additional legal interpretation".
41. The Council's position is that the burden is on the Appellant, legal professional privilege is of fundamental importance and that the Appellant's public interest factors do not approach, or still less, pass, the "clear cut case" test set out in the Information Tribunal case of Bellamy v. The Information Commissioner and DTI EA2005/0023, dated 4th April 2006. The Commissioner's submissions are similar on the importance of public interest and maintain that the only potential public interest factor raised by the Appellant related to whether the developers at 37 Glebe Lane were employees of the Council. Otherwise the Commissioner states that the Appellant, Mr Burgess, has not raised any public interest factors that might outweigh the interest in maintaining the exception.

42. The question of whether or not the developers at 37 Glebe Lane were employees of the Council, we think can be disposed of fairly shortly. Mr Curran, in his statement, clarifies that one of the developers was working at the Council's main offices but was not an employee in the contractual meaning of the word. This is relevant because where someone making a planning application is a serving member or officer of the Council, then the application is "called in" (i.e. not dealt with by the Council's officers) but in any event, this particular matter did go to the Development Control Committee (i.e. as if it had been 'called in'). The Tribunal does not see that the employment status of the developers at 37 Glebe Lane is relevant to the public interest issue in relation to legal professional privilege.
43. Regulation 12(1), as set out above insofar as it is relevant, requires first, the relevant exception to be identified (in this case 12(5)(b) as stated above) and then consideration of whether "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". However, in contrast to FOIA, there is an additional requirement in Regulation 12(2), namely the public authority must apply a presumption in favour of disclosure and the Tribunal considers this must also be applied in assessing the competing public interests. In other cases before the Tribunal the public interest test to be applied under FOIA in section 2(2)(b), which is identical in wording to Regulation 12(1)(b) (apart from using the word "exemption" rather than "exception"), has been considered. However, although it has been stated under FOIA the default setting is in favour of disclosure and there is an assumption of disclosure being in the public interest (see Guardian News and Brooke v. The Information Commissioner EA/2006/0011 & 0013 dated 08.01.2007) in the Tribunal's view the express provision of a presumption in favour of disclosure is significantly different. Bearing this in mind and using the factors set out in Guardian News and Brooke and taking into account Regulation 12(2) EIR the following are applicable:
- a. The presumption is in favour of disclosure and therefore this must be rebutted by the factors that are against disclosure.
 - b. If the public interest in favour of maintaining the exception is equally balanced against the public interest in disclosure, then the exception will not exclude the duty to disclose.
 - c. Competing interests must be assessed on a case-by-case basis because Regulation 12(1)(b) requires the exercise to be considered "in all the circumstances of the case".
 - d. The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exception diminishes over time.

- e. In considering public interest factors in favour of maintaining the exception, they relate to the particular interest which the exception is protecting.
 - f. The public interest factors in favour of disclosure are not so restricted and can take into account the general public interest in the promotion of transparency, accountability, public understanding and involvement in the democratic process.
44. At paragraph 35 of Bellamy v. The Information Commissioner and DTI referred to above, the Tribunal stated: *“There is a strong element of public interest inbuilt into the privilege itself [legal professional privilege]. At least equally strong counter-weighing considerations would need to be adduced to override that inbuilt public interest. It may well be that in certain cases, of which this might have been one were the matter not still live, for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight. The Tribunal places no great, if any, store upon the fact that the constituency of which Mr Bellamy forms part may be small, since it may well be that in any given case there is a sufficient public interest, even though the actual number of individuals are affected by an issue, may be numerically low. Nonetheless, 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 for the most clear case, of which this case is not one.”* The Tribunal has already referred to the Three Rivers above, which emphasises the importance of the public interest in legal professional privilege. Nevertheless, Parliament through the enactment of FOIA and EIR, has both done exactly what the House of Lords in R v. Derby Magistrate said was required to change the absolute nature of legal privilege, it has added a public interest balancing exercise. The Tribunal wants to make it clear that legal privilege is not an absolute exception and furthermore, it is not enough in each case simply to assert that the Tribunal's previous decision in Bellamy effectively makes the exception an absolute one: that is not correct.
45. The Tribunal has considered the following public interest factors in favour of disclosure:
- a. The general interest in accountability and transparency of decision making (which includes Mr Burgess' point on fair and equal application referred to in paragraph 40 (a) above).
 - b. The need for the reasons for the decision in this case to be available to Mr Burgess and other members of the public. In this point the Tribunal notes that the Council provided Mr Burgess with a letter dated the 12th October 2005 with the reasons for the decision and a copy of the report to the Development Control Committee dated the 21st September 2005. Mr

Burgess also had available to him a copy of the planning inspector's Appeal Decision of the 3rd February 2005 stating his reasons for determining the Appeal, which included *"to be adjacent to a highway a fence need not be contiguous with it; in my opinion it is a matter of fact and degree to be determined in each case."*

- c. The Council should be seen to be acting appropriately and with probity on the issues before it. The Tribunal notes that there is no evidence that the Council has not been acting otherwise than in good faith and honestly.
 - d. The current issue of enforcement in relation to 37 Glebe Lane is no longer a live issue.
46. The Tribunal has considered the factors in favour of maintaining the exception as follows:
- a. There is a strong public interest in maintaining legal professional privilege, for the reasons set out in Bellamy and the other cases referred to above.
 - b. Public authorities should be able to obtain free and frank advice and to be able to give full information to its legal advisors, including matters that would otherwise adversely affect public authority's position (for the avoidance of doubt we make no comment one way or the other as to whether there is in fact any such issue within the legal advice, we are merely using it by way of example).
 - c. The Council's position on future cases would be undermined as the advice considers the Council's legal rights and liabilities as referred to elsewhere with in this judgment. Not enough time has elapsed to make the advice stale. The Council is entitled to a "level playing field" in any future litigation.
47. We have had very much in mind in our deliberations the factors set out in paragraph 43 above. We are of the view that the Commissioner's Decision Notice is wrong in law in that it does not specifically refer to the presumption in favour of disclosure as required by regulation 12(2), nor does it appear to apply such a presumption, although, the Commissioner has considered the competing public interests.
48. The Tribunal is of the view, notwithstanding the presumption in favour of disclosure, that the public interest in maintaining the exception does outweigh the public interest in disclosure. It is the Tribunal's view that the Council has given reasons for its decision, and in any event, there is another mechanism by which a failure to give reasons could be challenged by any person (judicial review), there is no suggestion of dishonestly or improper conduct on the part of the Council nor is there any evidence that the Council has not made available the "test" or bases upon which they determine planning applications of this nature. If there was evidence to suggest any

of those factors alone or in combination, then that would seem a circumstance where the public interest might favour disclosure but otherwise we do not see why the principle of legal professional privilege, which is so important, should be overridden in the circumstances of this case. In particular, in relation to the factors advanced by Mr Burgess, we do not consider that the fact that public money was spent on obtaining the advice is, in itself, a public interest factor in favour of disclosure. The fact that the Council relied upon the public interest in order to obtain the advice, does not mean that, automatically, the public interest is in favour of disclosure of the advice. We also do not think that the Council's decision not to appeal the planning inspector's Appeal Decision is relevant. In any case, there was nothing to appeal as the decision was in the Council's favour. Ultimately, this advice concerns the height of a fence and its position next to a road. We consider the public interest in maintaining the exception does outweigh the public interest factors in favour of disclosure notwithstanding the presumption in favour of such disclosure.

49. However, we also find that in considering the public interest factors the Commissioner erred in law in that one of the factors that should have been considered was the fact that the litigation concerning enforcement at 37 Glebe Lane was no longer a live issue. Part of the reason for this may have been the considerable delay by the Commissioner in investigating this complaint. We have set this out in the background and it is clearly difficult to justify no correspondence and no apparent activity in relation to the claim between June 2005 and August 2006. It is during that time that Mr Burgess pointed out the change in circumstance by correspondence in October 2005. This change in circumstance seems to have been acknowledged by the Commissioner in correspondence but was not included as a relevant factor in the Decision Notice and we are of the view that this was the request that the Commissioner should have focused on, as it was artificial to rely on the first request made by Mr Burgess in May 2005.

CONCLUSION

50. The Tribunal dismisses the appeal for the reasons set out below. The Tribunal has come to the decision that the information sought by Mr Burgess is subject to legal professional privilege, which has not been waived by the Council. The disclosure is more likely than not to adversely affect the course of justice and the public interest in favour of maintaining the exception outweighs the public interest in favour of disclosure, despite the presumption in favour of disclosure set out in Regulation 12(2) EIR. The Stafford Borough Council is not obliged to disclose to Mr Burgess the information he seeks.

However, the Tribunal finds that the Information Commissioner was wrong in law in that:

1. He failed to consider the request as at October 2005 given that the Council was not considering enforcement proceedings; and
2. He failed to apply the “would adversely affect” part of the test for the exception contained in Regulation 12(5)(b); and
3. He failed to apply the presumption in favour of disclosure in Regulation 12(1)(b) EIR.

Signed:

Peter Marquand
Deputy Chairman

Dated: 7 June 2007