

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 22 January 2013

Public Authority: Suffolk Coastal District Council
Address: Melton Hill
Woodbridge
Suffolk
IP12 1AU

Decision (including any steps ordered)

1. The complainant has requested information related to a high profile prosecution under the listed building legislation in respect of Darsham House. The Commissioner's decision is that Suffolk Coastal District Council ('the council') has correctly applied the exceptions at regulations 12(5)(f), 12(5)(b) and 13. The Commissioner does not require any steps to be taken.

Background

2. The information requested relates to a high profile prosecution under the listed building legislation in respect of Darsham House which attracted press and public interest. One of the three defendants was, at the time of the request, the leader of Westminster City Council. The matter was sent for trial at Ipswich Crown Court but the judge at a preliminary hearing decided that the case should not be allowed to proceed on abuse of process grounds (in that the judge believed that the case was brought contrary to the council's policy).

Request and response

Q15

3. On 15 March 2011 the complainant made a request for information devised as 19 questions, question 15 of which was as follows:

"Q15. Will you now release your report DC 04/09, because following Judge Goodin's "Abuse of Process" ruling on 13 November 2009 it is patently no longer in the public interest (if it ever was) to delay publication until 13 November 2012? If you will not release report DC 04/09 earlier than 13 November 2012 will you confirm how the Local Government Act 1972 allows you to override the Freedom of Information Act 2000 and withhold the information?"

4. The council responded on 4 May 2011 and provided a redacted version of the report DC 04/09 applying the exceptions at Regulations 12(4)(e), 12(5)(b), 12(5)(f) and 13.
5. The complainant requested an internal review on 29 June 2011. The council responded on 28 September 2011 in which it released some information which was previously redacted but maintained reliance on the exception at Regulations 13 and because the report 'contains information stemming from confidential conversations with a third party and this party has not consented to the release of the information'.

Q22

6. On 29 June 2011, in a letter requesting an internal review of the 15 March 2011 request and also asking eight related questions, the complainant made the following request:

"In the meantime, please will you also now release the relevant report(s) to committee in November 2008 (no longer listed on your website) referred to in section 1.3 of DC 04/09, and also release the resolution of the Development Control Committee similarly referred to [Q22]?"

7. The complainant requested an internal review on 24 August 2011, even though he had not yet received a response, in the event that a full un-redacted version would not be provided.
8. The council responded to the request on 25 August 2011 and provided a redacted version of the report DC 13/08 applying the exceptions at Regulations 12(4)(e), 12(5)(b) and 13.
9. The council provided its internal review response on 23 February 2012. It released some information which was previously redacted but appeared to maintain reliance on the exceptions at Regulations 12(4)(e), 12(5)(b) and 13.

Q23

10. On 29 June 2011, in the letter referred to in paragraph 5 above, the complainant made the following request:

“With regard to Question 17, you confirm that the result of the case was formally reported by you to the Development Control Committee, but that your report was exempt from disclosure because it recorded legal advice. I do not accept this reason for non-disclosure. In view of the abuse of process ruling I believe it in the unqualified public interest that the formal report(s) to the Development Control Committee the 13 November 2011 ruling should be made publicly available. Please will you therefore release it [Q23]?”

11. The council responded on 12 August 2011 stating that the request raises identical issues to those considered in Q15 but released a copy of the minutes of the meeting and a redacted copy of the report DC 01/10 applying the exceptions at Regulations 12(5)(b) and 12(5)(f).
12. The complainant requested an internal review on 24 August 2011. The council provided its internal review response on 23 February 2012 in which it maintained reliance on the exceptions at Regulations 12(5)(b) and 12(5)(f).

Scope of the case

13. The complainant contacted the Commissioner on 30 May 2012 to complain about the way his requests for information had been handled. His complaint was specifically related to what he, and subsequently the council and the Commissioner, refers to as questions 15, 22 and 23. Therefore this decision notice relates only to those specific parts of the requests made on 15 March 2011 and 29 June 2011.
14. In response to the Commissioner's enquiries relating to the application of all of the exceptions cited by the council, the council stated that the primary exception relied upon is regulation 12(5)(f) and suggested that 12(5)(b) is engaged in addition. Therefore, the Commissioner has considered the application of the exceptions at 12(5)(f) and 12(5)(b).
15. The Commissioner has also considered the exception at regulation 13 to information which does not engage the exceptions at 12(5)(f) or 12(5)(b) and to which the council had initially stated was personal data.

Reasons for decision

Regulation 12(5)(f)

16. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely

affect the interests of the person who provided the information where that person

- i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - iii) has not consented to its disclosure;
17. The withheld information in this case is the redacted sections of three Development Control Committee reports as follows:
- In relation to Q15, report DC 04/09 dated 2 November 2009.
 - In relation to Q22, report DC 13/08 dated 3 November 2008.
 - In relation to Q23, report DC 01/10 dated 3 February 2010.
18. In its response to Q15 to the complainant, the council stated that the report contains information (i.e. the full details of the change in circumstances referred to in the public minutes of the meeting) which was given to the council confidentially by a third party during the course of proceedings. In its response to Q23 to the complainant, the council stated that the same principles apply to the February 2010 report.
19. In this case, although the reports were produced by the council, the majority of the withheld information within those reports is inextricably linked to information supplied by a third party. However, the Commissioner considers that the following information was not provided by the stated third party and therefore the exception at 12(5)(f) cannot apply to that information:
- Report DC 04/09 - paragraphs 1.2 & 7.3
 - Report DC 13/08 - paragraphs 1.12 & 1.13 (i.e. all the withheld information in that report)
20. In respect of the remaining information, the Commissioner is satisfied that the third party was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority. The nature of the information and the circumstances in which it was provided are such that it is clear that it was supplied voluntarily. The reasons for this are detailed in paragraph 1 of the confidential annex.

21. The Commissioner is not aware of any circumstances such that the council, or any other public authority, is 'entitled' (as per the wording of the exception) to disclose the information, apart from under the EIR.
22. The Commissioner also notes that the council contacted the third party involved to seek consent to release the information related to the confidential conversations but consent was refused.
23. Having determined that sub-paragraphs i) to iii) of regulation 12(5)(f) are satisfied, the Commissioner has considered whether disclosure would adversely affect the interests of the provider of the information.
24. It is the Commissioner's view that the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. It operates on the principle that if those who provide information on a voluntary basis suffer as a consequence of providing that information, they will not be so willing to volunteer information in the future. Therefore, to engage the exception it is necessary to demonstrate that disclosure would result in some adverse effect on the provider of the information.
25. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudice based exemption under the Act:
 - Under regulation 12(5) for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse'.
 - Refusal to disclose information is only permitted to the extent of that adverse effect. Therefore if an adverse effect would not result from disclosure of part of a particular document or piece of information, then that information should be disclosed.
 - It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner*¹ in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond

¹ Appeal number EA/2005/0026 & 0030

any doubt whatsoever, prejudice must be at least more probable than not.

26. In its response to the Commissioner's enquiries, the council provided further details as to why disclosure of the redacted information would adversely affect the interests of the person who provided the information. These details are contained within paragraph 2 of the confidential annex to this decision notice.
27. The council stated that the third party is entitled to expect confidentiality in the matter, that he is extremely concerned about the prospects of this information being disclosed, and that the adverse effect on him as a public person is quite significant. It also stated that the third party's solicitors have requested prior warning of any potential disclosure so that they can consider injunction proceedings against the council.
28. Although the council did not provide information to the Commissioner to demonstrate that the information is held in confidence, the Commissioner is satisfied that there would have been an implied obligation of confidence, that the information has the necessary quality of confidence, in that it is not trivial and, as far as the Commissioner is aware, is not readily available by other means.
29. For the reasons detailed in paragraphs 3 and 4 of the confidential annex, the Commissioner is satisfied that disclosure would result in detriment to the confider.
30. The Commissioner is therefore satisfied that there would be an adverse effect on the interests of the provider and that the exception is engaged.
31. The exception is subject to a public interest. Therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
32. When carrying out the test the Commissioner must take into account that regulation 12(2) of the EIR provides a specific presumption towards disclosure.

Public interest arguments in favour of disclosing the requested information.

33. The council stated that disclosure would enhance the transparency of decision making by public bodies, confidence in the administration of justice and probity. It stated that these factors are particularly important in a large scale case involving significant expenditure which was dismissed because it was considered to be an abuse of process.

34. The complainant has stated that there is public interest in the information as the prosecution was expensive to the taxpayer and ruled abusive by the court. He stated that unredacted copies of the three documents would show, in full, the decision process leading to the 'flawed and abusive' prosecution which cost the taxpayer almost £400,000. He suggests that the public should be allowed to see full reports so that it is put beyond any doubt whether or not Councillors were incorrectly advised, or even misled, into bringing 'this apparently pointless and vexatious case' and of its subsequent cost consequences.
35. The Commissioner considers that there is public interest in transparency and accountability, in good decision making by public bodies (which in this case specifically relates to the decision process in deciding whether or not to prosecute for a listed building offence), in upholding standards of integrity, in ensuring justice and fair treatment for all.

Public interest arguments in favour of maintaining the exception

36. The council submitted that in favour of maintaining the exception it can be argued that the adverse effect on the interests of the person who supplied the information would not be insignificant and that disclosure of information given to the council in such circumstances would have a bad effect on the council's probity. Furthermore, disclosure would discourage other people from giving information to prosecuting bodies in similar cases. It stated that these factors are very strong indeed and that in this case they outweigh the factors in favour of disclosure.

Balance of the public interest arguments

37. The Commissioner considers that there is a potential public interest in transparency where there is a suspicion of wrong doing on the part of the public authority. He notes that the complainant believes that the prosecution was flawed and Councillors may have been incorrectly advised, or even misled, into bringing the prosecution. This allegation appears to stem from the fact that the judge at the preliminary hearing ruled the prosecution an 'abuse of process'. The Commissioner understands that the term 'abuse of process' is a legal principle whereby the court can refuse to allow a trial to go ahead if it is satisfied that, even though a defendant might be guilty, he or she would not receive a fair trial or the overall circumstances of the case are such that to allow it to go ahead would be fundamentally unfair and contrary to the values of our justice system. In this case, the judge found that it would be fundamentally unfair to the defendants to allow the prosecution due to an email exchange between the council and the Chief Executive of Westminster City Council which suggested that a prosecution would only be brought where the subject matter of the damage was not covered by an Enforcement Notice.

38. The content of the withheld information does not relate to the suspicion of wrong doing in any way; it neither confirms nor refutes it. Therefore, although there can be public interest in transparency where there is a suspicion of wrongdoing, it is not relevant on the facts of this particular case. It is not the Commissioner's role to comment on whether or not there has been any wrongdoing. However, he notes that within the disclosed sections of report DC 01/10, the council refer to the 'abuse of process' ruling and state that advice indicated that the defendant's allegation of abuse of process was not well founded.
39. The Commissioner considers that even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions; there is always an argument for presenting the full picture in a decision making process and allowing people to reach their own view. However, the Commissioner notes that although the withheld information under consideration relates to whether the committee members determined whether to continue with the prosecution or authorise the lead officers to deal with the case in an alternative way, it does not relate to the original decision to prosecute or whether Councillors were incorrectly advised or misled, and therefore the public interest is reduced.
40. As stated above, the Commissioner considers that the purpose of this exception is to protect the voluntary supply of information to public bodies that might not otherwise be made available. Paragraph 5 of the confidential annex details why the Commissioner considers that there is significant public interest in the maintaining the exception in this particular case in order to protect the voluntary supply of information to public bodies.
41. When attaching weight to the public interest arguments, the Commissioner has considered the likelihood of adverse effect, the severity of the adverse effect, the age of the information and the timing of the request, the specific information and the public interest in disclosure and information already in the public domain. These are considered under the relevant headings below.

Likelihood of adverse effect

42. As detailed above, to engage the exception, it must be more probable than not that the adverse effect would occur. The greater the likelihood above this 'more probable than not' threshold, the greater the public interest in maintaining the exception.
43. In this case, although the adverse effect would only be on one person, that being the third party who supplied the information, it is possible

that the opportunity for the adverse effect to arise could occur frequently if the withheld information was in the public domain.

Severity

44. The adverse effect, as detailed in the confidential annex, could have a severe impact on an individual.
45. The severity and likelihood together indicate the impact of the adverse effect which in turn affects the weight to be attached to the arguments in favour of maintaining the exception. In this case, as the impact of the adverse effect could be severe, the Commissioner has placed significant weight on the arguments for maintaining the exception.

Age of the information and timing of the request

46. The Commissioner notes that the information was just over a year old at the time of the request. However, more importantly, he also notes that at the time of the requests and responses, the person who would be impacted by disclosure held the highest political position in Westminster City Council. Therefore, the weight to attach to the public interest in disclosing information which would aid transparency into a prosecution decision relating to him would be increased.

The specific information and the public interest in disclosure

47. In assessing the weight of arguments for disclosure, it is important to consider how far disclosing the requested information would further the public interests identified. In this case, although the information may be relevant to a subject of public interest, it does not add greatly to public understanding in the decision making process as it does not relate to the original decision to prosecute or whether Councillors were incorrectly advised or misled, and therefore the public interest in disclosure is reduced.

Information already in the public domain.

48. As far as the Commissioner is aware, the withheld information is not otherwise in the public domain. Therefore, there is a greater public interest in disclosure and as it would provide the full picture but, on the other hand, it increases the public interest in maintaining the exception as the identified adverse effect would not occur without disclosure and withholding the information protects the voluntary supply of information to public bodies that might not otherwise be made available.

Conclusion on the balance of the public interest arguments

49. Although the Commissioner accepts that the subject of this request is of a particular public interest because it relates to the prosecution of a senior political figure in relation to listed building offences, taking all the above in to account, along with the information contained in the confidential annex, he considers that, on balance, the public interest in maintaining the exception outweighs the public interest in disclosure in this case. Therefore, the council is entitled to withhold the following information under the exception at regulation 12(5)(f):

- Report DC 04/09 - paragraphs 4.1, 4.2, 4.5, 4.7, 6 & 6.1
- Report DC 01/10 - paragraphs 1.3 & 1.5

Regulation 12(5)(b)

50. As the Commissioner found above that the following information does not engage the exception at 12(5)(f), he has considered the application of the exception at 12(5)(b) to that information:

- Report DC 04/09 - paragraphs 1.2 & 7.3
- Report DC 13/08 - paragraphs 1.12 & 1.13 (i.e. all the withheld information in that report)

51. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect on 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.

52. The council has stated that a prosecutor, following an unsuccessful prosecution, should be circumspect in the comments it makes and the information that it releases about an acquitted defendant. In particular, it stated that paragraph 1.12 of report DC 13/08 contains information about the conduct of the investigation, specifically the actions taken by investigating officers and by persons under investigation and that paragraph 1.13 of the same report refers to counsel's assessment of one of the defences/mitigating factors that might have been judged by the court in the event of a trial and in particular the court's likely judgement of the differing roles of the prospective defendants. The council stated that there are additional matters of concern over and above the usual factors relating to legal advice. It explained that this is a case which concluded without anyone being convicted, but also without a trial having taken place and stated that in this context, 'the course of justice' requires that a prosecuting authority should not always release information about evaluations of evidence which were quite properly made at the time but have not been tested by a trial as to release this

information would adversely affect the course of justice in general and also the interests of the persons referred to in the text. It also stated that by the same token the release of particular facts about the investigation (paragraph 1.12) would also adversely affect the course of justice and the interests of the persons referred to.

53. In relation to report DC 04/09, the council stated that the disclosure of some of the information in the report would adversely affect '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'. It explained that the report was made to decision makers responsible for the council's conduct of a criminal prosecution whilst that prosecution was still underway and it contains legal advice which is the subject of legal professional privilege. It stated that the premature disclosure of this advice and the related contents of the report, even after the case has concluded, would inhibit the ability of decision-makers to receive full and frank professional advice and hence would prejudice the proper conduct of criminal proceedings in similar matters. The Commissioner notes that the council did disclose some legal advice that it felt may be disclosed without significant public harm and where the council concluded that the public interest in disclosure outweighs the public interest in maintaining the exception.
54. Although the council did not specifically state that the information in report DC 13/08 paragraph 1.13 was subject to legal professional privilege, it did state that the content relates to legal advice provided to the Committee and the Commissioner notes that all three reports were considered to be exempt from the Access to Information provisions on the basis of Paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972 in that they include information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The Commissioner has therefore deemed it appropriate to consider whether the exception at regulation 12(5)(b) applies to all the information detailed in paragraph 50 by virtue of the legal professional privilege doctrine.
55. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*² as;

² Appeal no. EA/2005/0023

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)

56. There is no specific exception within the EIR referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.

57. In the case of *Kirkaldie v ICO & Thanet District Council*³ the Tribunal stated that,

“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”. (paragraph 21)

58. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase ‘course of justice’.

59. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse effect on the course of justice.

60. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

³ Appeal no. EA/2006/0001

61. The withheld information under consideration is included in reports to the Development Control Committee which reveal discussions between the council and its legal advisers. The Commissioner understands that litigation was being contemplated at the time of the first report and was underway at the time of the second report.
62. Having viewed the withheld information, the Commissioner is satisfied that it records the communications from an external legal firm to the council made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation and is therefore subject to legal professional privilege. The only exception to this is the information contained in report DC 04/09 at paragraph 1.2 which merely provides background information to the case and does not contain any element of legal advice. Therefore, this specific piece of information does not engage the exception at 12(5)(b) and is considered below under the exception for personal data.
63. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the information was not publicly known at the time of the request and there is therefore no suggestion that privilege has been lost.
64. The Commissioner has therefore gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice.
65. In *Archer v ICO & Salisbury District Council*⁴ the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice, the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.
66. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*⁵ in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an

⁴ Appeal no. EA/2006/0037

⁵ Appeal no's. EA/2005/0026 & EA/2005/0030

adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.

67. The Commissioner notes that legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
68. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
69. The Commissioner has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by the request when making his decision in this case.
70. The council stated that this is a case which concluded without anyone being convicted, but also without a trial having taken place and stated that in this context, 'the course of justice' requires that a prosecuting authority should not always release information about evaluations of evidence which were quite properly made at the time but have not been tested by a trial as to release this information would adversely affect the course of justice in general and also the interests of the persons referred to in the text. The Commissioner also notes that at the time of the request the council retained the option of dealing with the matter via enforcement notices.
71. The Commissioner has seen the withheld information and considered the council's argument and is satisfied that disclosure would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information and would provide an indication of the arguments, strengths or weaknesses which the council might have had, unbalancing the level playing field under which adversarial proceedings are meant to be carried out. The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.
72. Regulation 12(1)(b) requires that where the exception in regulation 12(5)(b) is engaged then a public interest test should be carried out to

ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

73. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

74. The Commissioner considers that the public interest arguments considered in paragraphs 33 – 35 in relation to the exception at regulation 12(5)(f) above are also relevant to the consideration in respect of this exception.
75. The Commissioner agrees with the council's submission in favour of disclosing the information as its release would promote accountability and transparency and provide the public with the full picture.
76. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. He has noted the Tribunal's comments in *Foreign & Commonwealth Office v ICO*⁶ which considered the public interest in relation to the section 42 exemption of the FOIA. During its deliberations the Tribunal said;

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..." (paragraph 29).

The Tribunal went on to state that such arguments of misrepresentation should be supported by 'cogent evidence' (paragraph 33).

77. However, having reviewed the withheld information, and considered the circumstances of the case, the Commissioner has not found any evidence of the above factors and therefore does not place weight on the argument that the information should be disclosed in order to determine whether the council has acted appropriately.

⁶ Appeal no. EA/2007/0092

Public interest arguments in favour of maintaining the exemption

78. In favour of maintaining the exemption the council stated that prosecuting authorities should be circumspect in the information and opinion that they reveal in cases which did not end in conviction and that the fact that a person has not been convicted must be respected, and care taken to avoid a situation where the release of information leads to inferences, including unfair ones, being drawn about them. It stated that it could be argued that the adverse effect on persons referred to in the information is not negligible and that disclosure of the information would undermine the course of justice in a broad sense because it would undermine the confidence of persons subject to investigations in the conduct of prosecuting authorities and might indirectly cause those authorities not to make full and frank evaluations of evidence if they thought that those evaluations would be disclosed.
79. The Commissioner has given the council's arguments significant weight as legal professional privilege is one of the guarantees of a fair trial and the Commissioner would not expect privilege to be waived in cases where disclosure might prejudice the ability either of the authority itself or any third party to obtain legal advice.
80. The Commissioner and the Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the Bellamy case, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
81. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
82. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing fundamental principle of English law. The Tribunal recognised this in the Bellamy case when it stated that:
- "...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 most clear case..."

83. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

84. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
85. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
86. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information. Therefore, the council is entitled to withhold the following information:
- Report DC 04/09 – paragraph 7.3
 - Report DC 13/08 - paragraphs 1.12 & 1.13

Regulation 13

87. Regulation 13 provides that environmental information is exempt from disclosure if it is the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

88. Consideration of this exception is a two-stage process; first, the information in question must constitute the personal data of an individual aside from the requester and, secondly, disclosure of that personal data must be in breach of at least one of the data protection principles.
89. In this case, the withheld information in report DC 04/09 at paragraph 1.2 consists of one sentence relating to the personal circumstances of two of the defendants prior to the sale of Darsham House. The Commissioner is of the opinion that the information is clearly personal data.
90. The Commissioner is satisfied that disclosure of this of information would breach the first data protection principle in that it would be unfair. In reaching this opinion the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.
91. The Commissioner has therefore decided that the council is entitled to withhold the information this information under regulation 13.

Right of appeal

92. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

93. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
94. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF