



Appeal Number: EA/2006/0037

The Environmental Information Regulations 2004

Heard on:
19 December 2006 and
20 February 2007

Decision Promulgated: 9 May 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Anisa Dhanji

and

LAY MEMBERS

Marion Saunders and Paul Taylor

BETWEEN

BENJAMIN ARCHER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

SALISBURY DISTRICT COUNCIL

Additional Party

DECISION

The Decision Notice of the Information Commissioner dated 7th June 2006 is hereby substituted with the Decision Notice below.

The Environmental Information Regulations 2004

BETWEEN

BENJAMIN ARCHER

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

SALISBURY DISTRICT COUNCIL

Additional Party

SUBSTITUTED DECISION NOTICE

For the reasons set out in the Tribunal's determination, the Council must provide to the Appellant, a copy of the First Part of the Joint Report (as defined in paragraphs 3 and 53 of the determination), within 14 days from the date of promulgation of this determination.

Signed

Date: 9 May 2007

Anisa Dhanji

Deputy Chairman

REASONS FOR DECISION

Introduction

1. This is an appeal by Major Benjamin Archer (“the Appellant”) against a Decision Notice issued by the Information Commissioner (“the Commissioner”) dated 7 June 2006, in relation to the refusal by the Salisbury District Council (“the Council”) to provide certain information requested by the Appellant.

The Request for Information

2. On 5 January 2005, the Appellant requested the Council to provide him with the Minutes of the Council’s Southern Area Committee Meeting of 1 August 2002 (“the Minutes”).
3. On 28 January 2005, the Council provided the Minutes but since they were already in the public domain, the Council believed that the information the Appellant was seeking was in fact the joint report of the Head of Development Services and the Head of Legal and Property Services (the “Joint Report”), which is referred to in the Minutes. The Council considered the Appellant’s request as a request for the Joint Report and informed the Appellant of this. However, the Council decided not to disclose it, on the basis of the exemptions in sections 30, 31 and 42 of the Freedom of Information Act 2000 (“FOIA”).
4. The Appellant then made a complaint under the Council’s internal complaints procedure. The Council reviewed the matter, but maintained its decision not to disclose the Joint Report.

Factual Background

5. It may be useful at this point to set out something of the background to the Appellant’s request. It has not been necessary, however, for the purposes of this appeal, for the Tribunal to be fully apprised of all the factual details, and no doubt, this has influenced the extent to which the parties have put these details to the Tribunal. The Tribunal’s determination is not dependent on the completeness or accuracy of the brief outline which now follows.

6. In 1999, the Appellant's wife bought a Grade 2 listed building known as "the Footes", in the village of Coombe Bissett. The building dated back to the 17th century. She obtained planning permission to substantially redevelop the property. In December 2001, whilst it was being redeveloped, there was a fire. The next day, a conservation officer from the Council met the project manager responsible for the redevelopment. The Council says that it was agreed at that time that the building had been lost and that the remains should be made safe, but that instead of making them safe for further consideration, the remains were completely cleared, including the one remaining wall that was not considered to be unsafe.
7. A number of enforcement notices were then issued by the Council. The Council also issued a listed buildings enforcement notice S/02/2391 ("the Listed Buildings Notice"), in respect of the alleged removal of the fire-damaged remains of the Footes without listed buildings consent. The Council indicated that it was also considering legal action against the Appellant's wife for demolishing a Grade 2 listed building. In addition, a number of further planning applications were made and refused, including an application for retrospective listed building consent to demolish what remained of the Footes.
8. The Appellant's wife appealed against some or all of the enforcement notices and refusals to grant planning permission. In addition to an appeal against the Listed Buildings Notice, there were two planning appeals, and two enforcement notice appeals. The details of the particular issues under appeal and the outcomes in each case are not before the Tribunal in any comprehensive form. Destruction of the building also appears to have given rise to a number of other issues, including further planning applications by the Appellant's wife, and a police investigation as to the cause of the fire. It appears that arson is considered to have been a possible cause, although no charges were brought.
9. In May 2003, before the appeal against the Listed Buildings Notice was heard, the Council withdrew the notice. Mrs Archer applied for costs. In an Inquiry by the Planning Inspectorate in June 2003, costs were awarded against the Council. The Planning Inspectorate found that the Council's decision to issue the Listed Buildings Notice was unreasonable and that by withdrawing the

notice, the Council had effectively conceded that it had not been expedient to issue it at the outset.

10. Apart from the Listed Buildings Notice, the Council also withdrew an enforcement notice S/02/2405, alleging the change of use of the back part of the land for storage of earth, chalk and demolition waste and the front part of the land for the storage of a metal container (the "Storage Enforcement Notice"). Mrs Archer applied for costs, but the Planning Inspectorate found that the Council had good reason to take this enforcement action and that it had correctly withdrawn it as soon as it no longer had effect. Accordingly, he considered that an award of costs was not justified.

The Complaint to the Information Commissioner

11. On 4 April 2006, the Appellant made a complaint to the Information Commissioner against the Council's decision not to disclose the Joint Report.
12. The Commissioner obtained a copy of the Joint Report and considered its contents. He also made inquiries of both the Council and the Appellant, and considered the exemptions that the Council had invoked. For the reasons set out in his Decision Notice, he concluded that the exemptions in sections 30, 31 and 42 of FOIA, were engaged and had been properly applied, and that accordingly, the Council had been entitled to withhold the Joint Report.

The Appeal to the Tribunal

13. By a letter dated 25 June 2006, the Appellant appealed to the Tribunal against the Decision Notice. His grounds of appeal are as follows:
 - The Council's main argument for not releasing the information is that there are still a number of enforcements outstanding. He wished to know whether the information he requested could be released when all enforcements are met.
 - The Council had placed enforcements which were without foundation or reason. One enforcement in particular, namely, to rebuild the carcass of a burnt out building (which the Tribunal understands to be a reference to

the Listed Buildings Notice), was subsequently dropped. The enforcement was damaging to his wife's mental health (as she felt that a custodial sentence might result), and wasted a vast amount of local taxpayers' money. It is in the public interest to be made aware of how such poorly framed enforcements can be made.

14. It is clear from other communications received from the Appellant, in particular his submissions dated 28 November 2006, that his challenge to the Decision Notice extends beyond these specific grounds. The Commissioner acknowledges this in his submissions dated 28 November 2006, and also acknowledges that since the Appellant is not legally represented, it would not be right to limit the scope of this appeal to the matters in paragraph 13. We agree that properly construed, the Appellant's appeal is against the entirety of the Commissioner's decision and we have determined the appeal on this basis.
15. The Tribunal joined the Council as a party pursuant to Rule 7 of the Information Tribunal (Enforcement Appeals) Rules 2005.
16. Pursuant to Rule 16 the Tribunal has determined this appeal on the basis of the written submissions and evidence, without an oral hearing. This was at the request of the Commissioner and the Council (the Appellant expressed no preference). Having regard to the nature of the issues raised, the Tribunal was satisfied that the appeal could be properly determined without an oral hearing.

Evidence and Submissions

17. All documents and submissions received have been considered, even if not specifically referred to in this determination.
18. In accordance with the Tribunal's Practice Directions of March 2006, provision was made by way of directions, for the Joint Report and any other documents which the Commissioner or Council considered ought not to be disclosed to the Appellant, to be provided to the Tribunal on a confidential basis, together with an explanation as to why any such other documents ought not to be disclosed. Similarly, provision was made for submissions by the Council and/or

Commissioner relating to such documents to be kept confidential from the Appellant.

19. By further directions dated 22 December 2006, the Tribunal sought copies of documents referred to in the Joint Report, as well as other documents relating to the Council's withdrawal of the enforcement in respect of the Listed Buildings Notice. Submissions were also invited as to whether any such documents should be considered as coming within the scope of the Appellant's request. Again, the Council and Commissioner were given an opportunity to make submissions on a confidential basis if they considered the documents and/or the submissions should not be provided to the Appellant.
20. In response the Council identified and provided the Tribunal with the following:
 - A report by Mr S Hawkins dated 28 February 2002, relating to a retrospective application for listed building consent, for the demolition of what remained of The Footes;
 - A resolution dated 15th April 2003 headed "Refusal of Listed Building Consent (Demolition)";
 - A joint report of the Principal Solicitor and Principal Planning Officer (Enforcement) dated 17 December 2002, to the Council's Southern Area Committee;
 - A memorandum from the Council's Principal Solicitor dated 14 March 2003;
 - Counsel's Opinion dated 9 May 2003; and
 - Two reports from the Principal Planning Officer (Enforcement) dated 14 May 2003 and 22 May 2003, respectively.

The first two of these documents are publicly available. However, the Council's position is that the other documents should not be disclosed because they come within certain exceptions in the Environmental Information Regulations

("EIR"). It has not been suggested that the fact that the Council has these documents should not be disclosed.

21. The Tribunal has considered whether some or all of these documents come within the scope of the Appellant's request. If they do, the Tribunal must consider whether the Council's reasons for non-disclosure are justified.
22. The Tribunal recognises that often, a person seeking information will not be able to identify or describe precisely the document containing the information he is seeking. He may not even know it exists, much less whether it contains the information he wants. In such cases, the best he may be able to do is to frame his request by reference to the information he is seeking rather than by reference to a specific document, and to rely on the public authority to identify the document(s) containing the information, or to seek clarification from the applicant pursuant to its duty to assist and advise.
23. In the present case, the Appellant has framed his request by reference to a specific document. As noted, this document was already in the public domain. The Council deduced, therefore, that the Appellant was seeking a different document, namely, the Joint Report. The Appellant has not disputed this, nor has he indicated that he has requested anything else.
24. The fact that there may be other documents which might be of interest to the Appellant or relevant to the same subject as the Joint Report does not mean that they should be regarded, automatically, as coming within the scope of his request. Each case will turn on its own facts, but in the present case, the Tribunal considers that the documents referred to in paragraph 20 above, are not within the scope of the Appellant's request.
25. The Tribunal has also considered whether procedural fairness requires that the Appellant should have sight of the documents referred to in paragraph 20, which now comprise part of the evidence in this appeal. However, to disclose the documents to the Appellant on that basis would thwart any proper consideration of whether the Appellant would be entitled to them pursuant to any request he might make under the appropriate legislation. Accordingly, the Tribunal has not required those documents to be served on the Appellant.

26. Directions were also made on 22 December 2006, for the Council to provide:
- copies of all Enforcement Notices (or similar), issued by the Council between January 2002 to date, in respect of The Footes;
 - a schedule setting out compliance (and where practicable, the dates of such compliance) and non-compliance, in relation to the Enforcement Notices referred to in (a) above; and
 - a summary of what steps, if any, the Council has taken to prosecute Major Archer or his wife in relation to the demolition of a listed building, and the date on which any such step was taken, or if not taken, then the date by which any such steps became or will become, time-barred.

We will refer to the evidence submitted in response to these directions, when setting out our findings, below.

Issues and Findings

27. We turn now to the substance of the appeal. The first question for the Tribunal is whether the Appellant's request has been considered under the correct legislation.

FOIA or EIR?

28. The information requested, namely the Joint Report, identifies breaches of planning laws in respect of the Footes and makes recommendations for possible courses of action.
29. When the Council refused the Appellant's request, it did so under the FOIA. The Council has confirmed, quite candidly, in its 28th November 2006 submissions, that it did not consider the Appellant's request under the EIR. In his Decision Notice, at paragraph 4.2, the Commissioner recognised that the requested information could be regarded as environmental information under the EIR. However, he considered that the outcome of this particular complaint would be the same under FOIA or the EIR, and therefore, he determined the complaint by reference to FOIA. When making his request, the Appellant

referred to the FOIA, but of course the obligation does not rest with the person requesting the information to identify the correct legislation.

30. The EIR implements Council Directive 2003/4/EC on public access to environmental information. It creates a duty on public authorities to make environmental information available on request (regulation 5(1)). “Environmental information” is defined in regulation 2(1) in the following terms:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

31. By directions dated 22 December 2006, the Tribunal invited the parties' submissions as to whether the Appellant's request comes within the scope of the EIR, and if so, how the exceptions referred to in the Council's submissions dated 28 November 2006, apply, on the facts of this case.
32. In the submissions received from the Commissioner and the Council, both appear to accept now that the Joint Report does constitute “environmental information”. We consider that this is plainly right. The information in question

relates to possible prosecution or enforcement action for breaches of planning legislation, and it is therefore information on measures affecting land and landscape under regulations 2(1)(a) and (c).

33. The information may also come within the scope of “environmental information” on other basis, but it makes no difference to this appeal whether the information comes within the scope of the EIR under one or more parts of the definition in regulation 2(1). What is important is that if the information comes within the scope of the EIR, then, as the Tribunal pointed out in **Kircaldie v Information Commissioner**, it is exempt information under FOIA (pursuant to section 39), and the public authority is obliged to deal with the request under the EIR.

Has the Council complied with its obligations under the EIR?

34. The next question is whether, in dealing with the Appellant’s request, the Council has complied with its obligations under the EIR.

35. Under the EIR, a public authority which holds environmental information must make it available on request (regulation 5(1)). It must make the information available as soon as possible, and no later than 20 days after receiving the request. If it refuses to do so, it must make its refusal within the same time frame. Under regulation 14(3), it must also specify the reason for its refusal including:

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

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

36. The fact that the Council considered and refused the Appellant’s request under the FOIA rather than the EIR means, inevitably, that where the requirements of the FOIA and EIR differ, the Council will not have complied with the provisions of the EIR. We do not criticise the Council for this. We recognise that when the Appellant made his request on 5th January 2005, both the FOIA and EIR had only just come into force, and that the Council is likely not to have had any real experience in dealing with such requests. We accept that the Council dealt with

the Appellant's application under the FOIA, in good faith. Nevertheless, it is appropriate that we record a finding that the Council did not comply with all the applicable requirements. In particular, they did not comply with regulation 14(3) which requires a public authority, that refuses a request for environmental information, to specify the EIR exceptions relied on.

37. Following the Tribunal's directions of 22 December 2006, both the Council and Commissioner have identified the exceptions under the EIR which they say apply on the facts of this case. The first issue we must consider is whether the EIR exceptions can be relied on at all at this stage, given that they were not relied upon when the Council refused the Appellant's request, and were also not relied on before or by the Commissioner.

Can EIR exceptions be relied on at this stage?

38. As already noted, when the Council refused the Appellant's request, it did so only on the basis of exemptions under the FOIA. The Commissioner, whose decision is under appeal, also made his decision on the basis of FOIA exemptions.
39. The Tribunal's jurisdiction on an appeal from a Decision Notice is not limited only to considering the issues dealt with in the Decision Notice. Regulation 18 of the EIR provides that the enforcement and appeals provisions of FOIA apply for the purposes of the EIR, with certain modifications. Accordingly, section 58(1) of FOIA applies to an appeal from a Decision Notice, whether under the FOIA or the EIR. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that the Decision Notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. It follows, therefore, that the Tribunal has the jurisdiction to consider matters, including exceptions, even if they were not considered by the Commissioner in his Decision Notice.
40. That is not to say, however, that the Tribunal should, as a matter of course, consider exceptions that are raised for the first time during an appeal. The

purpose of the EIR, like the FOIA, is to provide for the disclosure of information, and clearly it could not be right for a public authority to refuse to disclose information and only properly consider and identify the basis for non-disclosure, if any, after an applicant has incurred the delay, and often, the cost of an appeal. That could not have been parliament's intention. On the other hand, we consider that to require a public authority which failed to claim a relevant exception to disclose the information, without any regard to the circumstances or consequences, also could not have been parliament's intention.

41. The situation where a request for information was initially refused on the basis of FOIA exemptions, but EIR exceptions are then relied on during the course of an appeal, was considered by the Tribunal in **Kircaldie v Information Commissioner**. The information that had been requested in that case was legal advice on the implications of night flights on an agreement under the Town and Country Planning Act 1990. The public authority had refused the request under FOIA. The Tribunal found that the information was in fact caught by the EIR. As to whether the public authority was able, on appeal, to rely on exceptions under the EIR or whether it was barred from doing so because it had originally relied on exemptions under FOIA, the Tribunal decided (paragraph 44), that the public authority could rely on EIR exceptions where they were closely related to the FOIA exemptions on which it had originally relied. The public authority there had originally relied on section 42 of FOIA (exemption for legal professional privilege), and the Tribunal held that on this basis, the public authority was able to rely on regulation 12(5)(b) of the EIR. The Tribunal indicated, however, that it would not necessarily take the same approach where the EIR exception had no relationship to the original exemption(s) claimed under FOIA.
42. In the present case, it is difficult to say that the EIR exceptions now being invoked (12(4)(e) and 12(5)(b) and 12(5)(d)), are all closely related to the FOIA exemptions previously relied on (sections 30, 31 and 42). There is certainly a close relationship between regulation 12(5)(b) and section 30 (investigations and proceedings conducted by public authorities), and 31 (law enforcement), in that they all deal with investigations and proceedings by a public authority.

There is also a relationship between regulation 12(5)(b) and section 42 (legal professional privilege), in that the public interest factors being relied on in relation to 12(5)(b) are based on the Joint Report being subject to legal professional privilege. However, it is more difficult to see the close similarities between 12(4)(e), for example, and the FOIA exemptions initially relied on.

43. The Commissioner has submitted, based on the Tribunal's decision in **Bowbrick v The Information Commissioner**, that it is not in fact necessary to show that the EIR exceptions now being invoked are closely related to the FOIA exemptions previously relied on. In **Bowbrick** (which was decided after **Kircaldie**), the Tribunal decided (paragraphs 34-57), that a public authority which had failed to identify a particular FOIA exemption until after there had been a complaint to the Commissioner or an appeal to the Tribunal, was not thereby prevented from relying on that exemption (albeit that the failure to identify the exemption when first responding to the request would be a breach of the procedural requirements).
44. Although **Bowbrick** is a case involving only the FOIA, the Commissioner argues that the Tribunal's decision is equally applicable where, as here, a public authority had considered a request under one legislation when it should have considered it under another. He says that the Council should, therefore, be able to rely on any properly applicable exception under the EIR, even if it is not closely related to an exemption previously identified under FOIA. It should be noted, however, that the circumstances in **Bowbrick** were quite different in that the information requested was only discovered after the appeal process had begun. It is difficult, therefore, to see how any exemption could have been claimed at an earlier stage.
45. In our view, the principle that emerges from **Kircaldie** and **Bowbrick** in respect of situations where a party seeks to invoke, on appeal, an exception not relied on previously, is that each case must be considered on its own facts. In the present case, we note that at the time of the Appellant's request, the legislation (both the FOIA and EIR) had only just come into force, and the Council's experience of the legislation is likely to have been limited. That should have been less the case, of course, for the Commissioner, particularly since his

Decision Notice was not issued until June 2006. We note, however, that the Commissioner did identify that the EIR could apply, but took the view that he did not need to consider the EIR as well as the FOIA, overlooking the fact that as the Tribunal pointed out in *Kircaldie*, if the information comes within the scope of the EIR, the public authority is obliged to deal with the request under the EIR. However, the Decision Notice in the present case was issued a few weeks before *Kircaldie*. In these circumstances, and bearing in mind that the Appellant has not been prejudiced because he has had an opportunity, before this Tribunal, to make submissions in respect of the EIR exceptions now being invoked, we find that those exceptions can be relied on in this appeal, even though they were not relied on by the Council in refusing the Appellant's request, nor by the Commissioner in his Decision Notice. Our view might well be different, however, were the same situation to arise today, since public authorities and the Commissioner can now be expected to have much greater experience of the relevant legislation.

How do the Exceptions Relied on Apply to the Joint Report?

46. Under regulation 12(1) of the EIR, a public authority may refuse to disclose environmental information requested if:

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

47. In its submissions dated 28 November 2006, the Council has said that if the EIR applies, it relies on the exceptions in regulations 12(4)(e), 12(5)(b) and 12(5)(d). These are also the regulations relied on by the Commissioner in his submissions dated 1 February 2007. They provide as follows:

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

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

12 (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 -

(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;

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

48. In effect, information requested must be disclosed unless (1) it comes within these exceptions; and (2) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. It is worth noting here that unlike the FOIA, the EIR contains an express presumption in favour of disclosure (regulation 12(2)).

49. We turn now to consider the specific exceptions relied on.

Regulation 12(5)(b)

50. Under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that its disclosure 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”*.

51. There are several points to note here. First, it is not enough that disclosure should simply affect the matters set out in paragraph 50 above; the effect must be *“adverse”*. Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure *“would”* have an adverse effect - not that it could or might have such effect. Fourth, even if there would be an adverse effect, the information must still be disclosed unless *“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”*. All these issues must be assessed having regard to the overriding presumption in favour of disclosure. The result, in short, is that the threshold to justify non-disclosure is a high one.

52. The first question in this case is whether disclosure of the Joint 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”*. If not, the exception does not apply.

53. We have considered the contents of the Joint Report. Obviously, we are constrained in what we can say about the contents since that is the very subject of this appeal. We can safely say however, that the first part of the report, from paragraphs 1 - 7 (the "First Part"), sets out the background including the alleged breaches regarding the Footes, the history and existing situation and the planning policies. From paragraph 8 onwards (the "Second Part"), the Joint Report sets out the possible enforcements and prosecutions the Council could bring in respect of those breaches, the strength and weakness of the Council's position in each case, including certain evidentiary matters, and recommendations as to the courses of action to be followed.
54. The Council say that they were investigating the planning history in relation to the Footes and that it could have led them to institute criminal proceedings under section 9 of the Planning (Listed Buildings and Control) Act 1990. Under section 9, a person is guilty of a criminal offence if they execute or cause to be executed any works for the demolition or alteration of a listed building unless the work is authorised by listed building consent. They also say that that under section 179 of the Town and Country Planning Act 1990 (as amended), a failure to comply with an enforcement notice is a criminal offence.
55. The Council asserts that disclosure of the Joint Report would adversely affect its ability "to conduct an inquiry of a criminal ... nature". Two arguments have been made (although perhaps not as fully as they might have been), as to how this could occur. First, it is said that the Joint Report discloses the Council's strategy when dealing with certain breaches of planning law, and that to disclose the document would adversely affect the Council's position in future cases where it may wish to adopt a similar strategy. We find that while this may be a sustainable argument, there is simply not sufficient evidence before the Tribunal to reach such a finding, bearing in mind, in particular, that the test is "*would* adversely affect", and not "*could*" or "*might*".
56. Second, it is said that disclosure would have allowed the Appellant to have anticipated the Council's strategy in dealing with the breaches in respect of the Footes, and that this constitutes an adverse affect on the ability of the Council "to conduct an inquiry of a criminal ... nature". We accept that the Joint Report

would have disclosed the Council's strategy and its view of the strength and weakness of its position, and that this would have caused the adverse effect that the Council asserts. We note here that the regulations only require that disclosure should have an adverse effect; the extent of the adverse effect is not relevant at this stage (although it may well be relevant when it comes to applying the public interest test).

57. We have considered whether the position may have changed since the date of the request (leaving aside, for the moment, whether we can or should be taking into account events since the date of the request). We are satisfied, from the evidence submitted, in response to the directions referred to in paragraph 26 above, that although the Council have not brought any prosecution with regard to the unauthorised demolition of the listed building, such prosecution is not time barred. We are also satisfied that certain requirements in the enforcement notices remain outstanding, and therefore, enforcement action is still a possibility. Indeed, in his grounds of appeal and submissions, the Appellant acknowledges that all steps for compliance are not yet complete. Accordingly, the possible courses of action set out in the Joint Report are still of relevance, and therefore, the adverse effect of disclosure, remains.
58. We find, however, that the adverse effect arises only in respect of the Second Part of the Joint Report. Even though the Joint Report is not actually set out in two parts, the purpose and subject matter of the First Part (paragraphs 1 to 8), is simply to provide a factual background for the legal advice that follows and it is not inseparable from the Second Part. Most, if not all that factual background, may be in the public domain or known to the Appellant. Although we recognise that the Appellant's interest is in the Second Part, nevertheless, his request is for the Joint Report *per se*, and consideration ought to have been given to whether any part of the Joint Report should be disclosed. We are satisfied that no adverse effect arises from disclosure of the First Part of the Joint Report. Accordingly, subject to whether non-disclosure of the First Part of the Joint Report is justified on the basis of any other exceptions relied on, we find that the First Part must be disclosed.

59. Having found that the Second Part of the Joint Report comes within the scope of regulation 12(5)(b), the next question is whether “*the public interest in maintaining the exception outweighs the public interest in disclosing the information*”. The Tribunal has said, in a number of cases (for example, **Hogan and Oxford City Council v Information Commissioner**), that when assessing the public interest considerations, what is relevant are the public interest factors specifically associated with that particular FOIA exemption. The same must be equally true for EIR exceptions.
60. The public interest in disclosing the information has been set out by the Appellant in compelling terms. He says that a Council should be accountable for its decisions, and that if it uses a considerable sum of taxpayer’s money to issue enforcements which it then does not pursue, it is in the public interest to know why. We accept this and we also accept that there is a general public interest in the decisions of planning authorities on the part not only of those seeking to develop land, but also those who are affected by such developments.
61. However, there is also a strong public interest in maintaining the exception. The Second Part of the Joint Report contains legal advice which was given to enable the Council to decide on the appropriate course of action in respect of the various alleged breaches of planning laws regarding the Footes. We are satisfied that under common law principles, the Second Part of the Joint Report is subject to legal professional privilege. The FOIA contains a specific (albeit qualified) exemption in respect of legal professional privilege (section 42). The EIR does not. However, there are clear public interest considerations which arise in relation to legal professional privilege, and these have to be assessed as part of the balancing exercise required by regulation 12(1)(b).
62. The extent to which legal professional privilege can be relied on to justify non-disclosure of information, and the public interest factors in relation to legal professional privilege, have been considered by the Tribunal in a number of cases, most notably in **Bellamy v Information Commissioner**, which contains a helpful review of the relevant principles and authorities. Underlying the concept of legal professional privilege is the recognition that there is a

compelling public interest in a party being able to obtain informed legal advice in confidence, and that in order to do so, a party must be free to disclose to his adviser all relevant facts, without fear that they may later be disclosed. The risk, otherwise, is that the completeness or candour of the legal advice will be compromised, or that a party may be deterred from obtaining legal advice altogether. In the case of a public authority, it could mean that it would make decisions, using public funds, and on matters relating to investigations and enforcements, without being properly informed of the relevant legal position.

63. However, neither the FOIA, nor the EIR, expressly or by implication, provides an absolute exemption for legal professional privilege. It follows that there may be cases where information which is subject to legal professional privilege at common law, will fall to be disclosed under the FOIA or EIR, although as the Tribunal said in ***Bellamy***, the strong public interest in maintaining legal professional privilege means that strong countervailing considerations need to be adduced to override that public interest.
64. We find that the present case is not one where there are correspondingly strong countervailing considerations. The legal advice contained in the Joint Report was specifically given to enable the Council to consider the options available to it in respect of the various alleged breaches of planning law, and to decide on the appropriate courses of action. There is a very strong public interest in the Council being able to obtain frank legal advice based on a consideration of all the relevant facts, before deciding whether or not to embark on legal proceedings, and for such advice to be given unfettered by concerns about disclosure. There is clearly also a public interest in the Council being held to account for the decisions it makes, but disclosure of the legal advice is not the only means to achieve that. Indeed we note that the Appellant's wife has successfully obtained an award of costs against the Council from the Planning Inspectorate on the basis of his finding that the Council's decision to issue the Listed Buildings Notice was unreasonable. In all the circumstances of this case, therefore, we find that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

65. We do not need to consider what the position might be if the advice had become 'stale' through the passage of time or other circumstances, because, for the reasons set out in paragraph 57 above, we find that issues on which the legal advice was given are still 'live'. The Appellant has asked, in his grounds of appeal, whether the Joint Report can be released when all enforcements are met. We note that in his letter to the Council dated 7 June 2006, the Commissioner put the Council on notice that it is possible that he would reach a different conclusion on a future similar request for information. We agree with the Commissioner, however, when he says in his Reply (paragraph 22), that neither the Commissioner nor the Tribunal can say whether the Joint Report ought to be disclosed at some specific future date. That is a matter to be considered based on the circumstances at that time, as and when the Appellant makes any future request.
66. In short, we find that the non-disclosure of the Second Part of the Joint Report is lawful. Since the real issues in this case relate to the Second Part of the Joint Report, we recognise that this effectively determines this appeal. However, other EIR exceptions have also been invoked, and we must go on to consider them, albeit that we will do so more briefly.

Regulation 12(5)(d)

67. Under regulation 12(5)(d), a public authority can refuse to disclose information to the extent that its disclosure would adversely affect "*the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law*". Like 12(5)(e), this is a prejudice-based exception, ie, there must be an adverse effect, and the refusal to disclose is only permitted to the extent of that adverse effect
68. The EIR contains no definition of "proceedings". We consider that "proceedings" would include legal proceedings. It would also include a formal meeting of the Council at which deliberations take place on matters within the Council's jurisdiction.
69. To the extent that the proceedings here are legal proceedings, confidentiality is provided for by common law in relation to legal professional privilege.

Disclosure would clearly affect that confidentiality, and the public interest weighs in favour of maintaining the exception for the same reasons as given above, in relation to regulation 12(5)(b).

70. To the extent that the proceedings here are the deliberations at the Council's Southern Area Committee meeting on 1 August 2002, the Minutes of that meeting are already in the public domain. However, it is not clear to us from the evidence whether the Joint Report was which was discussed at the meeting, was prepared exclusively for the discussions at the meeting, and we are not satisfied, therefore, that it qualifies as "proceedings". Accordingly, we do not find that regulation 12(5)(d) applies to the Joint Report in this respect.

Regulation 12(4)(e)

71. Under regulation 12(4)(e), a public authority can refuse to disclose information to the extent that *"the request involves the disclosure of internal communications"*.
72. Unlike 12(5)(e), this is a class-based, not a prejudice-based exception. In other words, for the exception to be engaged, it is only necessary to show that the information comes within that class (here, internal communications); it is not necessary to show that any adverse effect would arise from its disclosure. The Joint Report is a communication from the Head of Development Services and the Head of Legal and Property Services to the Southern Area Committee of the Council. It is clearly an internal communication, and therefore, it comes within the scope of regulation 12(4)(e).
73. The question then is whether *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*.
74. The public interest in favour of disclosure is clear – the public have a legitimate interest in assessing the workings of public authorities and the basis on which they apply policy and make decisions, particularly where, as here, the implementation of the decisions involve the use of public funds, and where the decisions are on matters of public concern. The public interest in maintaining

the exemption are those factors we have set out above in relation to regulation 12(5)(b) which we consider apply equally here. For the same reasons as set out there, we find that they outweigh the public interest in disclosure.

Conclusions

75. The findings set out above lead to the following conclusions:

- The Commissioner was wrong in law to have made his decision on the basis of the FOIA, rather than the EIR;
- As a result of having considered the Appellant's request under the FOIA rather than the EIR, the Council failed to comply with the procedural requirements of the EIR, in particular, regulation 14(3) as regards specifying the relevant EIR exceptions; and
- The Council must disclose the First Part of the Joint Report to the Appellant.

Signed

Date: 9 May 2007

Anisa Dhanji

Deputy Chairman