IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0060**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0464266

Dated: 25 March 2013

Appellant: Ms. A Adams

Respondent: Information Commissioner

Public Authority: Camden Council

Heard at: Field House, London

Date of hearing: 13 August 2013

Date of decision: 20 August 2013

Before

Angus Hamilton

Judge

and

Richard Fox

and

Narendra Makanji

Subject matter: Regulation 12(5)(b) of the EIR

Cases considered: Department of Communities and Local Government v IC & WR [2012] UKUT 103 (AAC) ('DCLG')

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 25 March 2013 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1 Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information if its disclosure would adversely effect the course of justice, the ability to receive a fair trial or the ability to conduct an inquiry of a criminal or disciplinary nature. It is also subject to the public interest test under regulation 12(1)(b): in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. Under regulation 12(2) there is a presumption in favour of disclosure.

The Commissioner's Decision

2 The Information Commissioner in his Decision Notice (DN) of 25 March 2013 has correctly set out the chronology leading up to this appeal.

The Appeal to the Tribunal

3 On 27 March 2013 the Appellant submitted an appeal to the Tribunal (IRT). In the Grounds of Appeal Ms Adams contended that the course of justice would be adversely affected by withholding the information rather than by disclosing it. Ms Adams also contended that the public interest test favoured disclosure especially given that there was evidence of impropriety on the part of council officials.

The Questions for the Tribunal

4 The Tribunal decided that the questions for them to consider were, first, whether the exemption in Regulation 12(5)(b) of the EIR was properly relied upon and, secondly, whether the public interest in maintaining the exception outweighed the public interest in disclosure or vice versa.

Evidence & Submissions

5 This matter was considered by the Tribunal by way a hearing on the papers alone. Written submissions were received from the Commissioner, from the appellant and from the public authority.

6 Both Camden Council and the Commissioner relied heavily upon the decision of the Upper Tribunal (UT) in DCLG in contending that the Commissioner's Decision Notice was correct. The Tribunal agreed that the Upper Tribunal's decision, which is of course binding on a FTT, was highly relevant to this appeal. The Tribunal did, however, consider that it was unhelpful of both the Commissioner and Camden not to have provided full copies of all the authorities referred to in their submissions as part of those submissions. The Tribunal were particularly concerned that a full copy of DCLG appeared not to have been provided to Ms Adams thereby potentially depriving an unrepresented litigant of the opportunity to consider the implications of this important case for herself.

Conclusion

6 The Tribunal had considerable sympathy for Ms Adams' appeal but considered themselves to be bound by the decision of the Upper Tribunal in DCLG. The Tribunal could not find any significant or material difference between the essential facts in DCLG and the present appeal. Indeed the Tribunal considered the two matters to be strikingly similar in many important respects. A copy of DCLG has been annexed to this judgement to facilitate understanding of the Tribunal's decision.

7 There appeared to be no dispute between the parties in this case that the information sought was covered by legal professional privilege (LPP). In then deciding whether this material was, as a result, covered by the exception in Regulation 12(5)(b) of the EIR – that is whether disclosure of the information would 'adversely affect the course of justice' - the Tribunal felt bound by the

analysis in paragraph 67 of DCLG:

> 'we do find that at the material time disclosure **would have had an adverse effect on the course of justice by reason of the weakening of general confidence in the efficacy of LPP** which a direction to disclose advice given in the circumstances of this appeal would cause. There were in our judgment no particularly special or unusual factors of this case which would have justified public authorities and their legal advisers in thinking, were disclosure in this case to be directed, that they would not be at risk, in the broad generality of cases, of having to disclose communications seeking or giving legal advice.'

8 The only situation which the Upper Tribunal (UT) in DCLG appeared put forward where the 'general confidence in the efficacy of LPP' might not be undermined was where the advice given was particularly old or stale (paragraph 55 DCLG). The Tribunal did not consider the passage of time in the present appeal between the giving of the advice (October 2011) and Ms Adams' application (July 2012) was such as to render the advice old or stale.

9 The Tribunal therefore concluded that the exemption in Regulation 12(5)(b) of the EIR was properly relied upon.

10 The Tribunal then went on to consider the 'public interest test'. The Tribunal again felt bound by the analysis in DCLG at paragraphs 72-73. The Tribunal considered that all the factors raised by the UT at Paragraphs 72-73 were pertinent factors – with some small adaptation – to be considered in the present appeal. The Tribunal noted the weight given by the UT in DCLG to the public interest in maintaining LPP:

> The effect on the course of justice, in terms of a weakening of confidence in the efficacy of LPP generally, which a direction for disclosure in this case would involve. **There are in our judgment no special or unusual factors in this case which justify not giving this factor the very considerable**

weight which it will generally deserve.

11 The Tribunal also reviewed the issues taken into account by the Commissioner in considering the public interest test (paras 24-41 DN). The Tribunal considered that the Commissioner had properly evaluated the competing public interests. The Tribunal also considered that the Commissioner had given proper weight in this balancing exercise to the presumption in favour of disclosure in Regulation 12(2) EIR.

12 The Tribunal also considered whether the allegation made by Ms Adams of impropriety on the part of council officials was a factor which might tip the public interest test in favour of disclosure – particularly given that such a suggestion was absent in the DCLG case. The Tribunal did not consider that Ms Adams had adduced any persuasive evidence of impropriety. The Tribunal did not consider that a misdescription of the precise nature counsel's advice was indicative of impropriety or 'bias and/or corruption'.

13 The Tribunal therefore concluded that on balance the public interest test favoured withholding the sought information. The appeal is therefore dismissed. This decision is unanimous.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge Date: 20 August 2013

IN THE UPPER TRIBUNAL **Case No.** GIA/2545/2011
ADMINISTRATIVE APPEALS CHAMBER

1. This is an appeal by the Department for Communities and Local Government ("DCLG") against a decision of a First-Tier Tribunal (Information Rights) made on 19 July 2011. For the reasons set out below that decision was in our judgment wrong in law and we set it aside. In exercise of the power in s.12 of the Tribunals, Courts and Enforcement Act 2007 we make the findings of fact set out below and re-make the First-Tier Tribunal's decision as follows:

> **The appeal against the decision of the Information Commissioner set out in the Decision Notice dated 22 November 2010 under reference no. FER0288590 is dismissed.**

Introduction

2. This appeal raises issues as to the significance which should properly be attached to legal professional privilege (LPP), (a) in determining whether the qualified exception from disclosure in regulation 12(5)(b) of the Environmental Information Regulations 2004 (EIR) applies, and if so (b) in weighing the competing public interests for and against maintaining the exception. Section 42 of the Freedom of Information Act 2000 (FOIA) contains a specific qualified exemption for information in respect of which a claim to LPP could be maintained. The EIR do not, but reg. 12(5)(b) does contain a qualified exception applicable where the information "would adversely affect the course of justice …..". There have been a significant number of cases in which FTTs have considered the proper approach to s.42, and to reg. 12(5)(b) where information subject to LPP is involved. One case under s.42 has been considered on further appeal to (as the appeal route then was) the High Court. As far as we are aware no case under reg. 12(5)(b) involving LPP has been considered at a higher level than the FTT.

3. In the present case the local planning authority refused planning permission for the erection of an anemometer mast intended to measure wind speed and direction. The applicant appealed, and the Planning Inspectorate (PINS), an executive agency of DCLG, determined that the appeal should be decided on the basis of written representations, without a hearing or public inquiry. Mr Robinson, the Second Respondent in this appeal, sought, unsuccessfully, to persuade PINS to reverse that decision. PINS obtained advice from an in-house legal adviser in relation to one aspect of Mr Robinson's contentions, and referred to and relied on that advice in its response to Mr Robinson. He sought disclosure of the advice under the EIR, which PINS refused, in reliance on reg. 12(5)(b). The IC upheld that refusal, but the FTT reversed that decision, on the basis that, if and so far as reg. 12(5)(b) applied, the balance of public interest favoured disclosure. The chairman of the FTT gave permission to DCLG to appeal to the Upper Tribunal.

4. We held an oral hearing of the appeal on 16 March 2012, at which Mr Alan Bates of counsel, instructed by the Treasury Solicitor, appeared on behalf of DCLG and Miss Laura John of counsel appeared on behalf of Mr Robinson.

5. We have been provided with a copy of the requested information, and of certain other documents which had also been provided by DCLG to the IC and the FTT but not to Mr Robinson or his advisers. We have taken that information into account, but consider that we are able sufficiently to indicate what significance we have attached to it without

giving any further clues as the content of the legal advice than have already been disclosed. It has not therefore proved necessary for us to set out any part of our reasons on a "closed" basis – i.e. on the basis that they be provided only to the IC and DCLG.

The Access to Environmental Information Regime

The Environmental Information Regulations 2004

> 5(1) ……….. a public authority that holds environmental information shall make it available on request.
>
> 12(1) ……….. 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.
>
> (2) A public authority shall apply a presumption in favour of disclosure.
>
> (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;
>
> ………………………………………….

6. The EIR were enacted in compliance with the UK's obligations under Directive 2003/4/EC on access to environmental information. The recitals to the Directive include the following:

> (1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.
>
> (16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. …..

7. Article 4.2 of the Directive provides that Member States may provide for a request for information to be refused "if disclosure of the information would adversely affect …..." and the situations then specified are the same as those specified in reg. 12(5) of the EIR. At the end of Article 4 is a provision as follows:

> "The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal."

The adjudication and appeal framework

8. Regulation 18 of the EIR provides that the enforcement and appeal provisions of FOIA apply for the purposes of the EIR. By section 50 of FOIA any person may apply to the IC for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the EIR. Under s.57 FOIA either the requestor or the public authority can appeal to the FTT against a decision notice of the IC. By s.58:

> "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."

9. Section 11 of the Tribunals, Courts and Enforcement Act 2007 gives a right of appeal on a point of law, with permission, to the Upper Tribunal from a decision of the FTT. By s.12 of the 2007 Act, if the Upper Tribunal sets aside the FTT's decision as wrong in law, it must either remit the case to the FTT with directions for its reconsideration, or re-make the decision. In re-making the decision the Upper Tribunal may make such findings of fact as it considers appropriate.

The role of PINS

10. PINS is the executive Agency, within the responsibility of DCLG, which processes planning appeals. By s.319A of the Town and Country Planning Act 1990 the Secretary of State for Communities and Local Government must determine whether the most appropriate procedure for determination of a planning appeal is (a) at a local inquiry, (b) at a hearing or (c) on the basis of written representations. The Secretary of State must publish the criteria which are to be applied in making such determinations.

11. The published criteria ("the Criteria") provide as follows:

> *Written representations*
> If your appeal meets the following criteria, the most appropriate procedure would be written representations:
>
> 1. the grounds of appeal and issues raised can be clearly understood from the appeal documents plus a site inspection; and/or
> 2. the Inspector should not need to test the evidence by questioning or to clarify any other matters; and/or
> 3. an environmental impact assessment (EIA) is either not required or the EIA is not in dispute.
>
> *Hearing*
> If the criteria for written representations are not met because questions need to be aside, for example where any of the following apply ………… the most appropriate procedure would be a hearing if: …………………………..
>
> *Inquiry*
> If the criteria for written representations and hearings are not met because the evidence needs to be tested and/or questions need to be asked, as above, the mot appropriate procedure would be a local inquiry if:

1. the issues are complex and likely to need evidence to be given by expert witnesses; and/or
2. you are likely to need to be represented by an advocate, such as a lawyer or other professional expert because material facts and/or matters of expert opinion are in dispute and formal cross-examination of witnesses is required; and/or
3. legal submissions may need to be made.

NOTE: Where proposals are controversial and have generated significant local interest, they may not be suitable for the written representation procedure. We consider that the LPA is in the best position to indicate that a hearing or inquiry may be required in such circumstances."

The facts

12. On 27 April 2009 Fring Wind Energy Ltd submitted an application for planning permission for the erection (for a temporary period of up to 3 years) of an 80 metre high anemometer mast on land at Fring, near Docking in north-west Norfolk. The mast was to be supported by taut thin steel guy wires at a radius of some 40 metres from the mast. It was to be located some 5 kilometres from the Norfolk Coast Area of Outstanding Natural Beauty. The local planning authority was King's Lynn and West Norfolk Borough Council ("the Council").

13. The purpose of the mast was to collect data relating to wind speed and direction in order to assess the viability of building a wind farm on land at Fring. For that reason the proposal attracted substantial local opposition.

14. Mr Robinson represents a local residents' association formed to assist local residents, of whom there are some 1500, in opposing the planning application. The association had the support of the Parish Councils of Docking and Bircham, and of Fring parish meeting.

15. On 16 June 2009 the Council issued a "formal screening opinion" to the effect that the mast would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location, and therefore that no environmental impact assessment (EIA) would be required under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. It was accepted in the application for permission, and the screening opinion confirmed, that an EIA would be required in relation to any subsequent application for planning permission for a wind farm.

16. On 24 June 2009 the Council refused planning permission, and on 9 July 2009 Fring Wind Energy Ltd appealed.

17. On 9 July 2009 Mr Robinson wrote to PINS requesting that a public inquiry be held in order to determine the appeal. The letter stated that, if PINS were to determine that the appeal should be decided on the basis of written representations, permission to proceed for judicial review would be sought. On 27 July 2009 the Council wrote to PINS stating that in view of the amount of public interest surrounding the appeal the Council considered that the appeal should be heard "either via a public inquiry or at the very least through an informal hearing, in order to address the issues in a public forum."

18. On 4 August 2009 PINS wrote to interested parties stating that it had decided that the planning appeal should proceed on the basis of written representations, for 5 reasons:

(1) the issues related to the impact of the development on visual amenity;

(2) there was no evidence that would require cross-examination;

(3) most of the letters in support of an inquiry gave no reason other than that the writer had a desire to be heard;

(4) all views could be adequately stated via written representations;

(5) the Inspector could and would take all written submissions into account when coming to a decision.

19. In a letter to PINS dated 5 August 2009 Mr Robinson set out detailed reasons why an inquiry should be held. On 6 August 2009 PINS replied to a letter from Henry Bellingam MP, who had supported the request for an inquiry. The letter of 6 August sought to answer the points which had been made in support of an inquiry.

20. On 14 August PINS sought legal advice from an in-house legal adviser in relation to the procedure to be adopted for the appeal.

21. On 17 August the Council requested PINS to reconsider its decision in respect of the procedure to be adopted.

22. On 18 August the PINS in-house adviser gave, in written form, the advice which became the subject of the request for information.

23. Further correspondence from Mr Robinson and his solicitors to PINS, seeking to persuade PINS to change its decision, followed. While that correspondence was proceeding Mr Robinson made, on 18 September 2009, a detailed written representation in the planning appeal.

24. The main points which were made by Mr Robinson and his solicitors in support of their contention that, having regard to the Criteria, a procedure limited to written representations was inappropriate were, in outline, as follows:

(1) That substantial local opposition to the mast and possible wind farm development had been generated;

(2) That the Council's view was that a public inquiry or at least a hearing should be held;

(3) That there had been defects in the consultation process prior to the grant of permission which had meant that the views of interested parties had not been properly taken into account;

(4) That decisions of the European Court of Justice supported the view that under the EIA Directive, in determining whether an environmental impact assessment was required, multiple applications for separate developments should properly be dealt

with as a single whole. In determining whether an EIA was required, the mast and the wind farm should therefore have been considered as a whole.

(5) Even if the mast were considered on its own, an EIA was required because the guy wires would be a danger to birds, and in particular pink-footed geese feeding in the locality. Case law shows that the attachment of conditions (such as a requirement for bird deflectors to be fixed to the wires) to a grant of planning permission cannot be used as a substitute for, or to circumvent, the necessity for an EIA.

(6) That in the light of the above there would be complex legal arguments, requiring legal representation, and factual issues which required examination of witnesses. The hearing would be likely to last 3 days.

25. On 1 December 2009 PINS wrote to Mr Robinson's solicitors stating that it remained the view of PINS, for the reasons set out in its letters of 6 August 2009 to Mr Bellingham and 24 August to Mr Robinson, that the appeal was suitable to be decided by written representations. The letter of 1 December included the following:

> "In determining the appeal the Inspector can only deal with the specific planning merits of the proposal before him and not some possible future proposal. I note your comments on the impact of European law in this respect. However, I have taken legal advice which has confirmed that our approach on this point is correct.
>
> I note your comments about natural justice and the right to put points at a hearing. However, while I understand your reasons for making such an argument, the Courts have made clear that the written representation method complies with the right to be heard. There is no statutory right for parties to present oral evidence. I am not persuaded therefore that determining this case through written representations would constitute a breach of natural justice, given that the pertinent issues in this case relate to the visual impact of the anemometer."

26. By letter dated 10 December 2009 Mr Robinson requested PINS to provide the legal advice referred to in the letter of 1 December. The request was stated to be made under FOIA. PINS replied on 18 January 2010. PINS stated that as the information related to a planning appeal, they had treated it as a request under the EIR. The request was refused under the exception in reg. 12(5)(b), on the grounds that the advice was protected by LPP and that "as this is a case where the advice may be relied on in any subsequent litigation, we consider that it is appropriate for us to exercise this exception."

27. On 19 January 2010 Mr Robinson wrote to PINS requesting an internal review of the decision not to provide the information.

28. On 15 February 2010 the Inspector allowed the planning appeal and granted permission for the erection of the mast for a period of up to 3 years, subject to a condition relating to the attachment of bird deflectors on the guy wires, which the Inspector (in agreement with the Council's view) considered "would provide an effective form of mitigation so as to minimise the risk of collisions". The Inspector further stated:

> "In my opinion, whilst the mast is intended to establish whether a wind farm project would have a viable wind resource, it would not constitute an integral part of an inevitably more substantial development. I am therefore satisfied that this proposal, and any future wind farm application, could proceed independently without frustrating the aims of the [EIA Regulations] or the relevant European Council Directive."

29. On 11 March 2010 PINS wrote to Mr Robinson stating that the decision to refuse to provide the information had been upheld on internal review.

30. In Mr Robinson's witness statement dated 13 May 2011 (prepared in connection with the appeal to the FTT), he said that when the Inspector's decision was issued the residents' association was advised that they had a good case for what he believed would have been a judicial review, but was actually a statutory appeal of the Inspector's decision. However, it was not until some 2 weeks before the (6 week) time limit for such an appeal expired that they knew that they would have to fight such an appeal without seeing the legal advice which they had requested. By that time it was "reluctantly decided that preparing for a statutory appeal would be too rushed, and presented a costs risk that we could not take. Once we had taken the decision not to mount a statutory appeal, we were considerably disheartened, and on the same basis decided we could not attempt a judicial review."

31. The complaint by Mr Robinson to the Information Commissioner was made on 10 May 2010.

The Information Commissioner's decision

32. The IC decided that the information need not be disclosed, for the following reasons:

(1) The information requested constituted "environmental information" within reg. 2(1)(c) of the EIR, on the ground that it was "information ……on measures ……and activities affecting or likely to affect" "the state of the elements of the environment". (It was not suggested to the FTT or to us that that was wrong. We proceed on the basis that it was right).

(2) Regulation 12(5)(b) was engaged because disclosure of the information "would adversely affect the course of justice" in that "if PINS were to be required to disclose its legal advice then that would adversely affect its ability to protect its position in any relevant proceedings." So long as the possibility existed of challenging the grant of planning permission in the Courts, "it would have been unfair and have put PINS at a disadvantage in preparing for any proceedings there might have been to have to disclose in advance confidential advice that was legally professionally privileged." Even once the likelihood of legal proceedings had been diminished the information "might still be relevant to future proceedings for any subsequent planning application relating to the Fring area or to possible applications for anemometer masts elsewhere."

(3) The balance of public interest should be considered as at the date of the information request on 10 December 2009. At that time the balance of public interest favoured withholding the information. The IC's view was that "there will always be a strong element of public interest inbuilt into the LPP exception…… the public interest in allowing public authorities to discuss their legal rights and obligations with their legal advisers in confidence is very strong." "Additional weight may be added to the public interest in maintaining the exception and withholding the advice if the advice is: recent, live and is still being relied upon. At the time of the request, the advice was four months old and therefore recent; it was also still being relied upon by PINS and so was still live. These factors point strongly to maintaining the exception." The IC considered the

strength of the factors in favour of disclosure, but considered that they were outweighed by the factors pointing the other way.

The FTT's decision

33. The FTT decided the appeal on the basis of written submissions, and without a hearing. The Tribunal had before it a "closed bundle" (not provided to Mr Robinson or his advisers) which included a copy of the requested information and a "closed" submission on behalf of the Information Commissioner containing submissions in relation to the significance of the content of the legal advice.

34. By its decision, made on 19 July 2011, the FTT allowed Mr Robinson's appeal and directed disclosure of the requested information. (That direction has of course been stayed pending the outcome of this appeal).

35. It is necessary to set out almost the entirety of the FTT's reasoning in the section of the Statement of Reasons headed "Conclusion and remedy".

> 59. The Tribunal has had the benefit of being able to consider the exact content and nature of the advice itself.
>
> 60. Even applying the existing case law and Tribunal decisions in respect of LPP – in respect of the FOIA regime – it would be hard to conclude that this particular information engages the equivalent FOIA exemption.
>
> 61. However this is a request under the EIR regime and the Tribunal has dealt with it on that basis.
>
> 62. Factually, the advice itself is so slight as to be almost invisible. There is always the danger that, simply because advice or comment comes from a lawyer, it is raised to a higher status than it deserves. The Tribunal concludes that this is one of those situations.
>
> 63. The Appellant's Counsel's contention that the advice revealed nothing more than PINS would have had to explain to the public in the course of an enquiry or in the Grounds of Resistance in a judicial review of its decision to determine the Planning Appeal by written representations is, in this instance, remarkably close to the mark.
>
> 64. If the advice in question had involved a proper and detailed analysis of the legal situation facing PINS and the options open to them, then it is likely that the Tribunal's conclusions would be very different. But that is not this case.
>
> 65. The Tribunal finds the IC failed to pay sufficient regard to the fact that the information requested was environmental information. Directive 2003/4/EC – in particular recital (16), Article 3 and Article 4(2) – requires that access to environmental information is intended to be the general rule.
>
> 66. The Tribunal concludes that the EIR regime is a more permissive regime than FOIA, a purely domestic regime. The IC's analogy with the Iraq War legal advice and the *Mersey Tunnel* case transposes the approach taken with FOIA without any consideration of whether the public interest threshold required modification in an environmental context.
>
> 67. The Appellant's counsel suggested that the IC had set a threshold that was so high that – short of an environmental disaster like the Deepwater Horizon explosion – it would never be met in practice. That is a colourful example but it highlights a real danger.

68. It is not consistent with either the Directive, or for that matter FOIA, to carve out what amounts to a *de facto* absolute exemption for legal advice. Nor is it consistent with the presumption in favour of disclosure expressly articulated in Regulation 12(2) EIR.

69. The information being requested was used by PINS as the basis for depriving the Appellant and members of the public of their ability to participate effectively in environmental decision-making. Considering the information itself, even if this exception was fully engaged ….. then the public interest balancing test could not produce a result that would prevent disclosure.

70. Where the information requested is the very basis upon which members of the public are deprived of their ability to participate in a planning decision – both by understanding the legal premise of the Inspector's decision, and by having the opportunity to challenge it – the public interest in disclosure of that information is extremely compelling. One of the objectives of the entire access to environmental information regime is to facilitate such participation (Recital (1) of Directive 2003/4 EEC).

71. The IC recognised the public interest in public authorities acting transparently. In this instance he failed to recognise that where the actions of the public authority appeared to depart from published guidelines which are themselves adopted to promote transparent decision-making, the public interest and transparency around that departure – and the reason for it – becomes a very significant factor in the balancing operation that has to be conducted.

72. The Tribunal has carefully considered the significance of the possibility of the requested information being used to PINS' disadvantage in litigation. If PINS had faced a judicial review it would have been required to outline its position in any response, and there is nothing in the information that amounts to a detailed analysis of the case and the legal options open to PINS. The Tribunal concludes, on the balance of probabilities, that the requested information would have become public in any event.

73. The Appellant points out that if PINS intended to rely on this legal advice in approaching the application of the Criteria in future situations then the public interest in disclosure was in fact enhanced.

74. The Tribunal concludes, applying the presumption in favour of disclosure as set out in Regulation 12(2) EIR, that – even if the Regulation was fully engaged – the public interest elements in this case are sufficiently compelling to override the considerations that usually favour withholding legal advice.

Legal professional privilege

36. We can confine our consideration to the branch of LPP known as legal advice privilege, under which communications between a client and his lawyer, for the purpose of obtaining or giving legal advice (whether or not in relation to actual or contemplated litigation) are privileged from production. In other words, the client will not be required by a court to disclose them, unless one of the very limited exceptions (such as waiver) applies. We do not need to consider the similar protection also afforded, under the branch of LPP known as litigation privilege, to other documents (e.g. communications with third parties) brought into being for the purposes of litigation. The relationship between the two branches was succinctly stated by Lord Scott in *Three Rivers v Governor of the Bank of England* [2004] UKHL 48, [2005] 1 AC 610, at [27]:

> "…..legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances or for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the advice would fall into both of the two categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted: …………… On the other hand it has been held that litigation privilege can extend to communications between a lawyer and a lawyer's client and a third party or to any document brought into existence for the dominant purpose of being used in litigation. The connection between legal advice sought or given and the affording of privilege to the communication has thereby been cut."

37. The development of the doctrine of legal advice privilege, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in *Reg v Derby Magistrates Court, Ex p. B*, [1996] AC 487, and then summarised by him as follows at p.507D:

> "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 lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

38. Lord Taylor went on (at p. 508C) to reject a submission that, by analogy with the doctrine of public interest immunity, there might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance:

> "But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."

39. As Lord Lloyd said in the *Derby* case (at p.509D):

> "….the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases, because the balance must always come down in favour of upholding the privilege, unless, of course, the privilege has been waived."

40. As far as we are aware it has never been judicially doubted that the same principle applies in relation to advice sought or obtained by a public authority in relation to its public law rights and obligations. Indeed, in the *Three Rivers* case Lord Scott said, at [36]:

> "It is clear …… that …. legal advice privilege must cover also advice and assistance in relation to public law rights, liabilities and obligations."

41. At [41] Lord Scott agreed with counsel on behalf of the Attorney General that, for example, advice given by parliamentary counsel to the Government in relation to the drafting and preparation of public Bills would qualify for legal advice privilege.

The approach to the exemption under FOIA for documents subject to LPP

42. Section 42 of FOIA contains a qualified exemption for "information in respect of which a claim to legal professional privilege could be maintained in legal proceedings". In *DBERR v IC & O'Brien* [2009] EWHC 164 (QB) Wyn Williams J, on an appeal (which at that time lay to the High Court) from the Information Tribunal, concluded at para. [39] that in previous decisions under s.42 the Information Tribunal had taken the correct approach to the public interest balancing exercise. That approach had been summarised in Rosenbaum (EA/2008/0035/ 4.11.2008), in a passage approved by Wyn Williams J, as follows:

> "……the Tribunal does not agree with Mr Rosenbaum that LPP merits only "some weight" ………… From the cases referred to above, this Tribunal is satisfied that LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal disclosure must take place."

43. Wyn Williams J. went on at [53] to hold that

> "the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."

44. In other words, although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption.

45. Mr Bates accepted that the weight which should properly be given to the exemption in any event, by reason of the risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of LPP, may vary from case to case. If, for example, the requested information is very old, or relates to matters no longer current, a disclosure may damage that confidence to a lesser extent than if the information was recent, or relates to matters still current. We consider that he was right so to accept.

46. The jurisprudence of the FTT further indicates that the factors in favour of maintaining the exemption are not necessarily limited to the general one just indicated, but may include the effect which disclosure would have in the individual case. For example, if the dispute to which the advice relates is still live at the time of the request, it may be considered unfair that the requester should have the advantage of access to the

authority's advice, without affording the authority the same advantage: *West* EA/2010/0120 (15 October 2010), at [13(5)].

The proper approach to regulation 12(5)(b) of the EIR in respect of information subject to LPP

47. By reg. 12(5)(b) a public authority may 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." There is, as we have said, no express exemption in respect of information for which the public authority could claim LPP.

48. A number of points about the application of reg. 12(5)(b) generally were made in *Archer* EA/2006/0037 (9 May 2007) at para. 51:

> "……First, it is not enough that disclosure should simply affect the matters [specified in reg. 12(5)(b)]; 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 be disclosed unless *"in all the circumstances of the case the public interest in maintaining the exemption 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."

49. The FTT's reasoning in the case before us, and the submissions made to us, give rise to two questions. First, what is the significance of LPP in determining whether disclosure of environmental information would "adversely affect the course of justice"? Secondly, if reg. 12(5)(b) is engaged because the requested information is subject to LPP, is the approach which has been adopted by FTTs in relation to the public interest balancing exercise under s.42 broadly appropriate under reg. 12(5)(b)? Although the written submissions of counsel had diverged, particularly in relation to the first of those questions, at the end of the day there was little, if any, difference of approach. It is nevertheless necessary for us, in order to decide whether the FTT went wrong in law, and if so what decision to substitute, to set out what we consider to be the applicable principles. As we have noted, these have not yet been considered at a level higher than the FTT.

(i) The significance of LPP in determining whether reg. 12(5)(b) is engaged

50. Mr Bates and Miss John were at one in submitting that, in determining whether disclosure "would adversely affect the course of justice", the IC or tribunal is not limited to considering the effect (if any) on the course of justice in the particular case in which disclosure is sought. The IC or tribunal can and must take into account the general effect which a direction to disclose in the particular case would be likely to have in weakening the confidence of public authorities generally that communications with their legal advisers will not be subject to disclosure. In our judgment that submission is correct.

51. As Mr Bates submitted, whether there would be an adverse effect on the course of justice must be determined by reference to the features of the national justice system, which includes in the case of the UK the particular strength and scope of LPP. It is therefore irrelevant that, for example, in some European countries the concept of LPP may not extend to advice given by in-house advisers. In our judgment, even construing reg. 12(5)(b) restrictively, as we are required to do, the words "would adversely affect the

course of justice" include the effects on the administration of justice generally by reason of a weakening of confidence in the efficacy of LPP which a direction for disclosure in the particular case would involve. Decisions of the FTT have proceeded on that footing: see, for example, *Creekside Forum* EA/2008/0065 (28 May 2009) at paras. [27] to [29], applying the approach in *Rudd* EA/2008/0006.

52. In *West* the FTT stated at [9] that "it may be arguable that regulation 12(5)(b) cannot apply in a case where there is no prospect of litigation and pure "legal advice privilege" is relied on". Although we do not need to decide that, because the advice in the present case was given at a time when litigation was very much a possibility, we doubt whether the requirement that the course of justice would be adversely affected means that the advice must have been given in a litigious context. It seems to us to be sufficient that confidence in its efficacy, outside a litigation context, would be weakened.

53. In his grounds of appeal Mr Bates submitted that where environmental information is protected by LPP reg. 12(5)(b) is *necessarily* engaged, because a direction for disclosure would necessarily weaken public confidence in the efficacy of LPP to some extent. However, in his written submissions in reply, and in his oral submissions, Mr Bates accepted that, in determining whether there would be any and if so what effect on the course of justice generally, one must take into account all the circumstances of the particular case in which disclosure is sought. As we understood it he accepted that it would be possible to conclude that the course of justice would not be adversely affected if disclosure were to be directed only by reason of particular circumstances, (e.g. that the legal advice is very stale), such there would be no undermining of public confidence in the efficacy of LPP generally. Miss John's submission was to that effect – i.e. that whether s.12(5)(b) is engaged, in the case of information protected by LPP, must be decided on a case by case basis. We proceed on that basis, although, in view of our findings below, it is not necessary for us to decide whether the fact that the information is protected by LPP necessarily means that reg. 12(5)(b) is engaged.

54. It is in our judgment clear that the factors which can be taken into account in determining whether the course of justice would be adversely affected by disclosure include adverse effects on the course of justice in the particular case, such as that it would be unfair to give the requester access to the public authority's legal advice, without the public authority having the corresponding benefit: see, for example, *West* at para [10]. However, it would of course have to be borne in mind, when considering the significance of an adverse effect on the course of justice in the particular case, that the exception is only engaged if the course of justice <u>would</u> be adversely affected. We agree with the decision in *Maiden* EA/2008/0013 that this means that, at the material time, the adverse effect must be more probable than not.

(ii) The public interest balancing test where reg. 12(5)(b) applies

55. The jurisprudence of the FTT is that, where reg. 12(5)(b) is engaged by reason of an adverse effect on the course of justice arising from the fact that the information is protected by LPP, the significance of LPP in relation to the public interest balancing test is broadly the same as where s.42 of FOIA is engaged. See, for example, *Archer* at [61] to [63], *West* at [13]. In our judgment that is correct, subject, as Miss John reminded us, to the potentially important qualification in reg. 12(2) that in the case of environmental information a public authority must apply a presumption in favour of disclosure. That presumption is given force and significance by the recitals to the Directive which we have set out above.

The grounds of appeal

56. The first ground of appeal is that the FTT erred in its approach to the question of whether or not the exception in regulation 12(5)(b) applied. In our judgment the FTT did go wrong in law, in relation to this question, in the following respects.

57. First, it did not in our judgment make sufficiently clear whether it found that the exemption was or was not engaged. It is not clear what it meant by saying that the exemption was not "fully engaged" (see paras. 69 and 74 of the Statement of Reasons). That expression seems to be a reference back to para. 60, where the FTT said that "it would be hard to conclude that this particular information engages the equivalent FOIA exemption". That in turn appears to be based on the Tribunal's findings in paras. 62 to 64 as to the nature and scope of the advice, and in particular the statement in para. 62 that "the advice itself is so slight as to be almost invisible."

58. Secondly, if and in so far as the FTT was saying that LPP did not apply because of the nature of the advice, in our judgment it was plainly wrong. The entirety of the document in which the advice was given was in our judgment plainly subject to LPP.

59. Thirdly, the FTT in our judgment went wrong in law in not making clear whether, in determining (in so far as it did so) whether reg. 12(5)(b) was engaged, it took into account the general effect on the course of justice, in terms of undermining LPP in relation to environmental information, which a direction to disclose would have. A similar point arises in relation to the second ground of appeal (see below).

60. The second ground of appeal is that the FTT erred in relation to the public interest balancing test by failing to recognise the strong public interest in maintaining the confidentiality of LPP-protected communications. The only express reference to that factor in the critical paras. 59 to 74, where the FTT expressed its conclusions, was in para. 74, where the Tribunal said that even if reg. 12(5)(b) was fully engaged "the public interest elements in this case are sufficiently compelling to override the considerations that usually favour withholding legal advice." Miss John submitted that the FTT had attached weight to the effect on confidence in LPP generally. She emphasised that, in addition to the reference in para. 74, the Tribunal had in paras. 47, 48 and 55 referred to the IC's and DCLG's submissions as to the general effect of disclosure on future relationships between clients and their lawyers.

61. In our judgment, however, the FTT went wrong in law in not making clear whether it attached any, and if so what, weight to that general factor. It is true that the Tribunal referred in para. 74 to the "considerations that usually favour withholding legal advice". However, that is naturally read in the context of the preceding two paragraphs, in which it referred (para. 72) to the "possibility of the requested information being used to PINS' disadvantage in litigation", and (para. 73) to the possible use of the advice in similar situations in the future. There is no indication of any weight being given to the general importance of protecting such advice.

62. The third ground of appeal is that, in carrying out the public interest balancing test, the FTT erred in its identification and analysis of the factors said to weigh in favour of disclosure. For reasons which it is more convenient to set out below, in the course of making our own findings of fact, the FTT did in our judgment also go wrong in law in the course of identifying those factors.

63. Miss John's general submission in relation to the second and third grounds was that the FTT had not gone wrong in law, and that these grounds were simply an attempt to persuade the Upper Tribunal to interfere with the FTT's findings of fact. For the reasons which we given in this decision, we do not accept that submission.

Our substituted decision

64. Mr Bates submitted that, if we were to set aside the FTT's decision, we should re-make that decision rather than remitting the matter to a fresh FTT. Miss John did not object to us adopting that course. Although the making of findings of fact in an information rights case is an exercise to which the composition of a FTT, with its lay members with particular experience of such issues, is particularly suited, we do consider it appropriate, in the circumstances of this case, to accept the invitation to re-make the FTT's decision. In the course of deciding this appeal it has in any event been necessary for us to consider much of the evidence, which would have to be reconsidered by three fresh minds if we were to remit the matter, and the nature of the disputed information, and the significance of its disclosure or non-disclosure, make the fact-finding and public interest balancing exercise one which in this case is particularly appropriate for those with legal qualifications and experience.

65. As noted above, the FTT's decision was made on the basis of the documentation before it, which included written submissions. We did not hear argument directed specifically to the findings of fact which we should make on the issues whether reg. 12(5)(b) is engaged, and if so what the outcome of the public interest balancing exercise should be, although many of the submissions to us were of course directly relevant to those matters. In deciding what findings to make we are therefore thrown back, as a starting point, to considering the written submissions which were made to the FTT on behalf of Mr Robinson, the IC and DCLG, and the reasoning in the IC's Decision Notice. We observe that much of the reasoning of the FTT, in its crucial paragraphs 59 to 74, in fact consisted of an acceptance of the points which had been argued by Miss John in her written submission on behalf of Mr Robinson.

66. The IC proceeded on the footing that the date as at which to apply the public interest balancing test is the date of the information request, in this case 10 December 2009 (para. 42 of the IC's Decision Notice). FTTs have generally proceeded on the basis that both the question whether an exception applies and the public interest balancing test should be considered on the basis of the facts as at either that date or the date when the request was refused, and not some later date such as the date of the IC's Decision Notice, or the date of the FTT's decision. (See, for example, *Creekside* at [36]). We proceed on the same footing, neither side having made submissions to the contrary. Our decision would not have been any different if we had used one of those later dates.

(i) *Would disclosure of the information adversely affect the course of justice?*

67. In our judgment the answer to that question is plainly "yes". The advice was given at a time shortly after proceedings for judicial review had been threatened (see paras. 17 and 22 above). At the time when the information was requested, and when the request was refused, proceedings (either by way of judicial review or, if the planning appeal was successful, by way of statutory appeal) were still very much a possibility. We do not consider that it was probable that there would be some such proceedings, and we therefore do not find that it was probable that there would be some adverse effect on the course of justice in relation to proceedings concerning this planning application. But we

do find that at the material time disclosure would have had an adverse effect on the course of justice by reason of the weakening of general confidence in the efficacy of LPP which a direction to disclose advice given in the circumstances of this appeal would cause. There were in our judgment no particularly special or unusual factors of this case which would have justified public authorities and their legal advisers in thinking, were disclosure in this case to be directed, that they would not be at risk, in the broad generality of cases, of having to disclose communications seeking or giving legal advice.

68. We have already commented on the FTT's finding (para [62]) that "the advice itself is so slight as to be almost invisible." As we have said, there can in our judgment be no doubt that the whole of the document in which the advice is contained would be protected from disclosure by LPP.

69. We should also comment on what the Tribunal said in paras. 63 and 64 of the Statement of Reasons, which for convenience we set out again:

> "63. The Appellant's Counsel's contention that the advice revealed nothing more than PINS would have had to explain to the public in the course of an enquiry or in the Grounds of Resistance in a judicial review of its decision to determine the Planning Appeal by written representations is, in this instance, remarkably close to the mark.
>
> 64. If the advice in question had involved a proper and detailed analysis of the legal situation facing PINS and the options open to them, then it is likely that the Tribunal's conclusions would be very different. But that is not this case."

70. That point was taken up again in para. 72, where the Tribunal concluded that, had there been litigation, on balance of probabilities the information would have become public in any event.

71. In order to avoid any possible misunderstanding, we would observe here that Miss John had not of course seen the advice. Her submission (referred to in para. 63 of the FTT's Reasons) had been framed along the lines that there were two possible scenarios, namely (i) that the advice merely outlined reasoning to support the conclusion that no EIA was required and (ii) that the advice detailed the strengths and weaknesses of its conclusion that no EIA was required. Miss John went on to make submissions as to whether there would be an adverse effect on the course of justice under each scenario. We do not consider that the FTT's finding that the advice revealed nothing more than PINS would have had to explain in any event was reasonably open to it. As Mr Bates rightly submitted, what PINS would have had to explain, which it had in fact already sought to do in correspondence, was the reasoning which led it to decide that the appropriate procedure for the planning appeal was by way of written representations. That is not the same as having to disclose the precise terms of the legal advice received. Disclosure of the advice itself will or may reveal matters such as how firmly it is expressed, what research has been done etc.

(ii) The public interest balancing test

(a) Factors in favour of maintaining the exception

72. The main factors in favour of maintaining the exception are in our judgment the following.

(a) The effect on the course of justice, in terms of a weakening of confidence in the efficacy of LPP generally, which a direction for disclosure in this case would involve.

There are in our judgment no special or unusual factors in this case which justify not giving this factor the very considerable weight which it will generally deserve.

(b) Unfairness to PINS in having to reveal the terms of the advice which it received, when Mr Robinson and those seeking to overturn PINS' decision would not have to do so. As we have noted, at the time when the advice was given, and when the request was refused, legal proceedings were a distinct possibility.

(b) Factors in favour of disclosure

73. The factors in favour or arguably in favour of disclosure are in our judgment as follows.

(a) It was common ground that the advice was environmental information, in relation to which there is a presumption of disclosure. The procedure for and outcome of the planning appeal had attracted considerable local interest, mainly because the mast was designed to obtain data to be used in determining the viability of a wind farm.

(b) The advice was one of the factors which PINS had taken into account in deciding not to change its decision as to the appropriate procedure for determining the planning appeal. There was a public interest in ascertaining what advice had been acted on, whether it was correct and whether it had been properly taken into account. Knowledge of these matters was of significance in relation to the particular case, but also of possible wider interest in relation to the approach to be adopted by PINS in relation to other planning applications involving or arguably involving development in stages. There is also a general interest in securing that decisions taken by public authorities are as transparent as reasonably possible, particularly when those decisions relate to the manner in which the public may participate in environmental decision-making.

(c) The advice was of some potential assistance to Mr Robinson and his residents' association in determining whether, and if so how, to take matters further. However, having seen the advice, we have to say that we do not consider that disclosure of it would have significantly assisted Mr Robinson and his residents' association in determining whether to launch judicial review proceedings, or pursue a statutory appeal against the grant of planning permission. It would of itself neither have strengthened nor weakened the force of the points which they were seeking to make. Seeing the advice would in no way have diminished the need to obtain their own advice, or rendered doing so less expensive, if they were minded further to explore whether they had a case in law for seeking to upset PINS' decision by reason of that point. In addition, we bear in mind that we were told by Mr Bates that PINS also obtained additional advice orally. If that is the case, the advice in written form which would have been revealed if disclosure had been directed would have revealed only part of the picture.

(d) The FTT placed on the disclosure side of the scales a point which it made in paras. 69 to 71 of the Statement of Reasons, which again was an acceptance of submissions which had been made by Miss John:

> "69. The information being requested was used by PINS as the basis for depriving the Appellant and members of the public of their ability to participate effectively in environmental decision-making. Considering the information itself, even if this exception was fully engaged ….. then the public interest balancing test could not produce a result that would prevent disclosure.

> 70. Where the information requested is the very basis upon which members of the public are deprived of their ability to participate in a planning decision – both by understanding the legal premise of the Inspector's decision, and by having the opportunity to challenge it – the public interest in disclosure of that information is extremely compelling. One of the objectives of the entire access to environmental information regime is to facilitate such participation (Recital (1) of Directive 2003/4 EEC).
>
> 71. The IC recognised the public interest in public authorities acting transparently. In this instance he failed to recognise that where the actions of the public authority appeared to depart from published guidelines which are themselves adopted to promote transparent decision-making, the public interest and transparency around that departure – and the reason for it – becomes a very significant factor in the balancing operation that has to be conducted."

In our judgment those paragraphs involved an error of law on the part of the FTT. The FTT was not in our judgment entitled to conclude that members of the public had been deprived of the ability to participate effectively in environmental decision-making. The questions whether an EIA was necessary and whether it was appropriate to proceed by way of written representations alone were the very issues which Mr Robinson had been arguing with PINS. It was in our judgment outside the jurisdiction of the Tribunal to seek to resolve those issues, and in any event it did not come close to justifying this statement.

The way in which the submission (apparently accepted by the Tribunal in its paragraphs 69 to 71) had put to the FTT on behalf of Mr Robinson (see paras. 48 and 50(a) of Miss John's Amended Grounds of Appeal) was that the legal advice was the basis of PINS' conclusions (a) that there were no complex issues of law requiring legal submissions and (b) that an EIA was not required. It was contended that situations where there were complex issues of law, or where an EIA was "in dispute", were situations mentioned in the Criteria as not appropriate for written representations. However, the FTT was not in our judgment entitled to find, as it appears to have done, that the nature of the legal argument as to whether an EIA in respect of a wind farm development was required in respect of the mast application was something which could not properly be dealt with on written submissions alone.

There were of course other reasons why Mr Robinson contended that, applying the Criteria, a public inquiry was necessary. For example, it was contended that an EIA was necessary even if the mast was considered on its own (owing to the potential risks to birds etc), and that there was substantial public opposition, and that the Council considered that there should be a hearing. But PINS had not said that the legal advice related to any of those matters. The letter from PINS to Able Bishop dated 1 December 2009 clearly stated that the advice related to the question whether the Inspector could, in determining the appeal relating to the mast, take into account the fact the planning merits of a possible future wind farm development.

(e) We note that in Annex 2 to his decision, provided only to PINS, the IC set out a further factor, relating to the content of the requested information, which he saw as favouring disclosure. The reasoning in Annex 2 involved drawing an inference, from the content of the advice, as to whether a particular factor had been taken into account by PINS, and rejecting PINS' evidence to the IC that it had been. We do not agree that the IC

was right to draw that inference and therefore do not agree that it represented a factor in favour of disclosure. In our judgment the IC's reasoning overlooks that, as stated in the letter from PINS dated 1 December 2009, the legal advice related to the question whether, in determining whether planning permission should be granted for the mast, it was necessary to have regard to the environmental implications of a possible future wind farm.

(c) Our conclusion in relation to the balancing test.

74. In our judgment the public interest in maintaining the exception strongly outweighs the public interest in disclosing the information. The factors in favour of disclosure were, in the particular circumstances, relatively weak, and if disclosure were to be directed in this case the loss of confidence in the efficacy of LPP in respect of environmental information would necessarily be considerable. The presumption in favour of disclosure is therefore rebutted.

Overall conclusion

75. For the above reasons we therefore allow this appeal and make the decision set out in paragraph 1 above.

Lord Justice Carnwath, Senior President

Charles Turnbull, Judge of the Upper Tribunal

David Farrer QC, Judge of the Upper Tribunal

28 March 2012