



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**Appeal No. EA/2012/0223**

**BETWEEN:-**

**MR JOHN MAIDEN**

**Appellant**

**- v -**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**DECISION UNDER RULE 8(3)**

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1. There has for some years been a dispute between the Hunstanton Pier Company and the local authority for the Hunstanton area (the Borough Council of King's Lynn and West Norfolk). This has resulted in litigation. The Appellant in these proceedings, Mr Maiden has been involved in this litigation. On 18 October 2011 Mr Maiden wrote to the Council and requested information in the following terms:  
  
*"(i) I want to know if your Legal Services Manager, Mrs Nicola Leader, obtained an independent legal opinion, after 15 July 2009, on which she based her instructions to Knights Solicitors.*  
  
*(ii) A copy of the instructions and other correspondence which must have passed between Mrs Leader and Knights Solicitors, after the Honourable Mr Justice Nicol had refused the application for permission to apply for judicial review on 3 April 2009."*
2. The first part of the request was complied with, however the Council refused to comply with the second part. The matter was referred to the Respondent in these proceedings (the Information Commissioner – IC). He concluded that the request fell within the scope of the Environmental Information Regulations (EIR).
3. The Council argued that the request was for material which attracted legal professional privilege, the material related to litigation which was still current and the request fell within Regulation 12(5) of EIR which provides (so far as is relevant):-

*“... 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...”*

4. Where this exemption is engaged it is subject (by Regulation 12(1)(b)) to a public interest test and the request may be refused if:-

*“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”*

5. The IC carried out a balancing exercise weighing those factors which support disclosure including:-

*“The general public interest inherent in the legislation; the importance of transparency and accountability in relation to the council’s decision-making and the public interest in being assured that decisions are made on the basis of good quality legal advice. “*

He noted that there was public interest in the question and that had been a previous decision in favour of disclosure of legal advice relating to an aspect of the dispute (in somewhat different circumstances).

6. He weighed these factors against those supporting the non-disclosure. These were that the advice was generated in the course of litigation, the material might disclose the strengths and weaknesses of the Council’s position, the material was still current at the time of the request and Mr Maiden had threatened legal proceedings against the Council.
7. He concluded that the public interest in transparency was more than outweighed by the adverse effect disclosure would have on the course of justice especially since further litigation was possible in which the Council’s position would be prejudiced by the public availability of this legal advice. He concluded that:-

*“The Commissioner considers that there would need to be compelling evidence of, for example, maladministration or misuse of public funds to provide a sufficient counterbalance to this impact rather than simply a contrary view. In the absence of such arguments or evidence the Commissioner considers that there is a stronger weight to the arguments for maintaining the exception.”*

8. In this appeal there has been no argument that the material in question does not attract legal professional privilege (which is clear from the terms of the request) or that the request for information does not fall within the scope of EIR. Mr Maiden left it to this Tribunal to determine whether the matter fell within FOIA or EIR and advanced no argument either way, accordingly for the purposes of this decision I accept that the correct frame of analysis is EIR.
9. In his appeal Mr Maiden has sought to address how the public interest balance is struck and has argued that properly considered it would favour disclosure. He has provided some fraction of the history of litigation and decision-making around the issue and sought to draw inferences profoundly damaging to a senior officer of the Council and asserted that the decision to withhold information was taken by that officer to protect that officer’s reputation.
10. Mr Maiden has failed to grasp that a litigant may adjust the position that it takes in litigation in the light of an evolution in understanding of the factual and legal issues raised by the case. He is critical of decisions of the Council and seeks to draw highly

defamatory inferences from them. He draws inferences from the time set aside by a Judge for the consideration of an application. He draws inferences in the absence of a scintilla of evidence to justify those inferences. As the IC correctly stated in his response to this appeal that this is:- *“pure speculation on the part of the Appellant with no basis in fact.”*

11. In his decision notice the IC concluded that there needed to be a clear compelling and specific justification for making the disclosing the information. The position in law in a very similar case was analysed by the Upper Tribunal in *DCLG v The Information Commissioner & WR [2012] UKUT 103* where the Upper Tribunal stated their first reason for not ordering disclosure was:-

“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.”

12. I am satisfied that there are no grounds to distinguish this case from *DCLG v IC & WR*. The Appellant has produced no submissions to suggest that there is any prospect of his appeal succeeding and accordingly I strike out this appeal under Rule 8(3)(c) of the Tribunal’s rules.

Signed:

C Hughes  
Judge

Dated: 14 February 2013