

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 24 November 2022

**Public Authority:** Oldham Metropolitan Borough Council  
**Address:** Civic Centre  
West Street  
Oldham OL1 1UT

#### **Decision (including any steps ordered)**

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1. The complainant requested from Oldham Metropolitan Borough Council ("the Council") information relating to its decision to remove a plot of land from sale. The Council disclosed some information and withheld the remainder (being a 'confidential briefing note') under regulation 12(5)(b) of the EIR. The Council subsequently revised its position to withholding the information under regulations 12(4)(e), 12(5)(d), and 13.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 12(5)(d).
3. The Commissioner does not require the Council to take any steps.

## Request and response

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4. On 26 March 2021, the complainant wrote to the Council and requested information in the following terms:  
  
"In the first instance please can you make public the decisions related to the decisions for sale, decision to sell and withdrawal. I have had sight of all the bids and I have copy of this."
5. The Council responded on 30 April 2021. It disclosed some information and stated that the remainder was withheld under the exemption provided by section 42 (Legal professional privilege) of the FOIA.
6. Following an internal review, the Council wrote to the complainant on 10 June 2021. It stated that it should have considered the request under the EIR (and not the FOIA) and stated that the information previously withheld under section 42 of the FOIA was now withheld under the exception provided by regulation 12(5)(b) (Course of justice) of the EIR.

## Scope of the case

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled, and specifically that the Council was not entitled to withhold information under regulation 12(5)(b).
8. The Council subsequently revised its position on 12 July 2022, and applied the exceptions provided by regulation 12(4)(e) (Internal communications), 12(5)(d) (Confidentiality of proceedings), and 13 (Personal data).
9. The scope of this case and of the following analysis is whether the Council was entitled to rely upon regulation 12(5)(d) to withhold the requested information.

## Reasons for decision

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### Regulation 12(5)(d) – Confidentiality of proceedings

10. Regulation 12(5)(d) of the EIR says that a public authority may 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.

11. The engagement of the exception rests on three conditions being met.
12. First, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance 'Confidentiality of proceedings (regulation 12(5)(d))<sup>1</sup>', the Commissioner interprets 'proceedings' as possessing a certain level of formality. They will include, but are not limited to: formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision making powers; and legal proceedings.
13. In respect of formal meetings to consider matters that are within a public authority's jurisdiction, the guidance provides the example of an internal disciplinary hearing.
14. The information withheld under this exception is a 'confidential briefing note' that the Council has explained was created by the Internal Audit Team for the purpose of advising senior officers about the conduct of an officer, as part of its disciplinary process.
15. The Commissioner is therefore satisfied that regulation 12(5)(d) of the EIR is engaged because the information relates to the Council's disciplinary process.
16. Second, this confidentiality must be provided by law. The Council has explained that it considers the information to meet the threshold for the common law of confidentiality. This is because the information, which relates to a specific officer and their conduct, was compiled and presented in circumstances imparting a clear obligation of confidentiality, as disclosure to unauthorised individuals would be detrimental to the officer under investigation.
17. Having considered the context in which the information has come to be held, the Commissioner is satisfied that this information is subject to the common law of confidentiality.
18. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1626/eir\\_confidentiality\\_of\\_proceedings.pdf](https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf)

19. The Council has explained that individuals who have contributed to a disciplinary investigation will reasonably expect such contributions to be treated as confidential and not disclosed to the public. Should this not be so, it would deter individuals from contributing to such investigations. The Council has further explained that, as the investigation relates to a specific officer, public disclosure would directly impact them.
20. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) has therefore been found to be engaged.
21. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability.
22. The Commissioner recognises in this case that there is a public interest that public authorities are appropriately open and transparent about their decision-making processes. This is particularly so in respect of concerns about the conduct of officers.
23. However, the Commissioner also recognises that there is a strong public interest in ensuring that the Council is able to conduct disciplinary investigations effectively and with the cooperation of officers. Should such officers not expect information they provided to be treated confidentially and only communicated to officers with a need to view, this would undermine the Council's ability to investigate such matters.
24. In the circumstances of this case, the Commissioner also understands that the Council has confirmed to the public that the substantive matter has been investigated. The Commissioner considers that such confirmation addresses the public interest in the public having confidence that complaints about officer conduct are investigated.
25. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure.
26. As the Commissioner has found that the Council is entitled to withhold the information under regulation 12(5)(d), he has not considered it necessary to consider the other exceptions cited by the Council.

## Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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

**Signed .....**

**Daniel Perry**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**