

# Confidentiality of proceedings (regulation 12(5)(d))

## Environmental Information Regulations

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1. The Environmental Information Regulations 2004 (EIR) give rights of public access to environmental information held by public authorities.
2. An overview of the main provisions of the EIR can be found in the [Guide to the Environmental Information Regulations](#). This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations, and to promote good practice.
3. This guidance explains to public authorities how the exception in regulation 12(5)(d) works and what is meant by the

confidentiality of proceedings and discusses some of the factors to consider in the public interest test.

## Overview

Environmental information may be exempt from disclosure under Regulation 12(5)(d) if disclosing it would adversely affect the confidentiality of a public authority's proceedings where the confidentiality arises from statute or common law. The term 'proceedings' is not restricted to meetings, but it does imply some formality.

The exception can only apply if it is more probable than not that the adverse effect would occur. Also, for disclosure to adversely affect the confidentiality of proceedings, the information must be part of the business of those proceedings. The adverse effect can also be on the proceedings of another authority.

Even where the exception applies, the public authority must still make the information available unless the public interest in maintaining the exception outweighs the public interest in disclosure in all the circumstances of the case. There is a presumption in favour of disclosure.

Public interest arguments for the exception must relate to the need to protect the confidentiality of the proceedings. If information is exempt from disclosure under other legislation, this does not prevent disclosure under EIR but it may indicate a public interest in maintaining the exception.

There is always a general public interest in disclosure and there may also be more specific arguments for disclosure depending on the circumstances.

In determining the balance of public interest, a key factor is how far the information would add to public understanding.

Information cannot be exempt under regulation 12(5)(d) if it relates to information on emissions.

Non-exempt information must be disclosed, unless it cannot be separated from exempt information.

There is no 'neither confirm nor deny' provision for regulation

## What the EIR say

### **12.—**

(5) ... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

...

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

## Interpretation of 'proceedings'

4. This exception relates to information that, if disclosed, would adversely affect the confidentiality of an authority's proceedings. The first question to consider is what is meant by 'the confidentiality of the proceedings'.
5. Definitions of 'proceedings' in the Oxford English Dictionary include:
  - doings, actions
  - a legal action or process
  - a record or account of the activities of a society or of papers submitted to it
6. These definitions suggest that 'proceedings' can cover a range of activities; however, the Commissioner considers that the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is 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.

In each of these cases the proceedings are a means to formally consider an issue and reach a decision. 'Proceedings' could

include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality. What constitutes an authority's proceedings may be set out in statute or in its constitution or standing orders.

7. This approach is in line with the Information Tribunal's comments in *Benjamin Archer v the Information Commissioner and Salisbury District Council* ([EA/2006/0037](#), 9 May 2007) ("Archer"):

*"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."* (paragraph 68)

8. However, 'proceedings' should not be defined so widely as to mean any meeting a public authority holds, as these would not necessarily have the required degree of formality. The following examples show the possible extent and the limits of the definition.

#### **Example**

Decision Notice [FER0408840](#) concerned a request to Northumberland Care Trust (NCT). Northumbria Healthcare Foundation NHS Trust (the Trust) had a contract with NCT to deliver healthcare services. The Trust wished to set up an Emergency Care Centre. This required approval from NCT and as part of this process the Trust submitted a business case to NCT. NCT received a request for the information in the business case. They withheld the information with reference to regulation 12(5)(d) and another exception.

NCT said that *"it had interpreted "proceedings" in this case to include formal meetings, held in private, at which NCT discussed whether to approve the Trust's business case"*. The Commissioner was *"minded in this case, with regard to the particular circumstances, to accept the Trust's interpretation"* (paragraph 14)

In this case the meetings met the definition of proceedings, but the Commissioner found that disclosure would not adversely affect their confidentiality, and so the exception was not engaged.

#### **Example**

Decision Notice [FER0098306/7](#) concerned a request to the Department for Environment, Food and Rural Affairs (Defra) for

papers from meetings held between Defra ministers and representatives of Tesco and Asda. The meetings included a dinner Defra held for representatives of UK supermarkets. Defra withheld the information with reference to exceptions including regulation 12(5)(d). In this case the Commissioner did not accept that these meetings constituted 'proceedings'. He did not "*believe that the term is so wide in its meaning as to include any business conducted by a public authority or its officials.*"

9. Furthermore, 'proceedings' covers more than just meetings; for example, it could refer to an investigation by the Local Government Ombudsman into a complaint against a local authority, or an audit carried out by a District Auditor, both of which are governed by formal rules.

### Confidentiality provided by law

10. The fact that the confidentiality of the proceedings must be "provided by law" supports the view that the proceedings must have a certain level of formality to be covered by regulation 12(5)(d). An authority cannot simply decide for itself that the proceedings of a particular meeting are confidential; there must be a legal basis for this.
11. The EIR implement [EU Directive 2003/4/EC](#) on public access to environmental information, which in turn implements the Convention on Access to information, public participation in decision making and access to justice in environmental matters (the Aarhus Convention). The [Implementation Guide](#) to the Aarhus Convention says:

*"The confidentiality must be provided for under national law. This means that public authorities may not unilaterally declare a particular proceeding confidential and stamp documents "confidential" in order to withhold them from the public. National law must provide the basis for the confidentiality."* (page 59)

12. The confidentiality may be provided in statute or derived from common law.

### Statute law

13. Where information is exempt from disclosure under other legislation, as in the example below, this does not *in itself* prevent disclosure under the EIR. This is because under

regulation 5(6) EIR, "any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply".<sup>1</sup> However, the fact that there is a prohibition on disclosure in the other legislation may well mean that the confidentiality of the proceedings is 'provided by law' (depending on the wording of that legislation), which means that regulation 12(5)(d) is engaged. If so, the public authority must then consider the balance of public interest.

### **Example**

Decision Notice [FER0374428](#) concerned a request to the Local Government Ombudsman (LGO) for a copy of a complaint submitted to them, and associated correspondence. The information was withheld with reference to regulation 12(5)(d). In section 32(2) of the Local Government Act 1974 there is a statutory prohibition on the disclosure of any information which was obtained in the course of or for the purposes of an investigation by the LGO. The Commissioner accepted that this section "*acts as a statutory prohibition on disclosure of information obtained in the course of or for the purposes of an investigation and is satisfied that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – c) of section 32(2)*" (paragraph 19).

So in terms of regulation 12(5)(d), the confidentiality of the LGO's proceedings was 'provided by law'. As disclosure would adversely affect the confidentiality of these proceedings (see Adverse effect below), the exception was engaged.

This decision was appealed to the First-tier Tribunal (*Group Captain Dalley v the Information Commissioner* [EA/2011/0180](#), 15 February 2012). The First-tier Tribunal accepted at paragraph 9 of their judgment that the exception was engaged.

### **- The Local Government Act 1972**

14. Under the Local Government Act 1972 (LGA 1972) Part VA, council meetings are open to the public, and councils are required to make agendas, reports and minutes of council meetings available. However, there are exemptions if this would involve disclosing confidential or exempt information. Confidential information is defined in LGA 1972 section

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<sup>1</sup> The EIR differ in this respect from the Freedom of Information Act (FOIA), as information is absolutely exempt under section 44(1) FOIA if its disclosure is prohibited by or under any law.

100A(3); the categories of exempt information are defined in Schedule 12A Part 1. There are some similarities between the categories of exempt information in Schedule 12A Part 1 and the exceptions in EIR (as well as the exemptions in the Freedom of Information Act). Also, under Schedule 12A Part 2, information falling into these categories is exempt "if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information." The LGA 1972 does not prohibit disclosing these categories of exempt information, but it provides possible exemptions from a general duty to admit the public to meetings and to make information available. It enables councils to exempt certain categories of information from disclosure depending on the balance of public interest. So, the Commissioner's view is that the exemptions in Schedule 12A Part 1 do not constitute confidentiality 'provided by law' in terms of EIR regulation 12(5)(d).

**Example**

In *Chichester District Council v the Information Commissioner and Lynne Friel* (EA/2010/0153, 16 March 2011) the Council argued that regulation 12(5)(d) applied to information discussed in a closed meeting under LGA 1972. The Tribunal however noted "*its doubt that a discretionary power to withhold information for one purpose only, would amount to confidentiality "provided by law" such as to defeat the obligations under the EIR.*" (paragraph 19)

15. In the context of LGA 1972, confidential information (as distinct from exempt information) is defined in section 100A(3) as:

"a) information furnished to the council by a Government department upon terms (however expressed) which forbid the disclosure of the information to the public; and

(b) information the disclosure of which to the public is prohibited by or under any enactment or by the order of a court;"

16. Section 100A(2) says that the public *shall* be excluded from a meeting if it is likely that such information would be disclosed to them. It also says that "nothing in this Part shall be taken to authorise or require the disclosure of confidential information in breach of the obligation of confidence." So, where a council meeting is considering confidential information as defined in

LGA 1972, the confidentiality of the proceedings is provided by law.

### **Common law**

17. The confidentiality of the proceedings may also be 'provided by law' where they are protected by a common law duty of confidence, even if there is no specific restriction on disclosure under legislation. This would apply, for example, where the proceedings involve negotiations with another party, or information obtained from another party. The information thus obtained must have the quality of confidence –this means it must not be in the public domain already and it must be of importance to the confider and not trivial). There must also be an expectation that it would not be disclosed. The case discussed below illustrates this.

#### **Example**

Decision Notice [FER0380352](#) concerned a request to Defra for copies of correspondence with the Duchy of Cornwall about the drafting of the Marine and Coastal Access Bill. Cabinet Office guidance says that the Prince of Wales' consent must be sought when a bill could affect the interests of the Duchy of Cornwall. So, the correspondence constituted formal proceedings. Defra explained that it had the necessary quality of confidence because both sides had a reasonable expectation that the communications would not be disclosed, based on the convention. The content of the correspondence was not in the public domain and had not been passed to any third parties which would have waived the obligation of confidence. The Commissioner accepted that the legal basis for confidentiality was the common law duty of confidence. He found that disclosure would adversely affect the confidentiality of the proceedings, so the exception was engaged (paragraph 15).

#### **- The Audit Commission Act 1998**

18. The Audit Commission Act 1998 (ACA) provides a right to inspect certain documents. Under section 15(1) ACA, at each audit under the Act, "any persons interested" may "inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them" (apart from material identifying individuals) and make copies. This potentially gives a wide-ranging right to access documents, outside of the Freedom of Information Act (FOIA) and EIR. In the High Court case of *Veolia ES Nottinghamshire Ltd v Nottinghamshire*



*County Council & Shlomo Downen* [2009] EWHC 2382 (Admin), Justice Cranston found that this gave a right to inspect documents that Veolia considered to be confidential, about a contract between it and the council. The Commissioner's view is that the existence of this right does not in itself remove an expectation of confidence for such material. We will only consider whether it has affected an expectation of confidence where the right to access the material in question has actually been exercised.

19. For further discussion of the duty of confidence, see our FOIA guidance on [Information provided in confidence](#).

### Adverse effect

20. Even where the proceedings are confidential in the terms discussed above, the exception is only engaged where disclosing the information would adversely affect that confidentiality. So it is not enough that the confidentiality is provided by law; there must also be an adverse effect on that confidentiality.
21. 'Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure *would* have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If the adverse effect would only be *likely* to occur, or *could* occur, then the exception is not engaged. For further discussion of the test of adverse effect, see our separate [guidance on regulation 12\(1\)](#).
22. The interest that is protected by regulation 12(5)(d) is the confidentiality of proceedings, where that confidentiality is provided by law.
23. The exception is not solely concerned with information that has been prepared *exclusively* for confidential proceedings. There may be circumstances where proceedings deal with information that was originally produced for other purposes but is considered during those proceedings. This could engage the exception if it can be shown that its disclosure would have an adverse effect on the confidentiality of the proceedings. However, this does not mean that simply referring to pre-

existing information during proceedings brings it within the scope of this exception. As noted above, the threshold for adverse effect is a relatively high one. For disclosure to adversely affect the confidentiality of proceedings, the information must form part of whatever constitutes those proceedings such as the business of the meeting or the investigation or a report submitted to a meeting and included on the agenda. This approach is consistent with the presumption in favour of disclosure in regulation 12(2) and the requirement in Article 4 (h) of the Directive that the grounds for refusal must be interpreted in a restrictive way.

### **Other public authorities**

24. The exception refers to the confidentiality of the proceedings “of that or any other public authority”. So, the adverse effect could be to the proceedings of another public authority, rather than the one responding to the request.
25. This may be relevant to parliamentary privilege. Under regulation 3(4), the EIR do not apply at all to the Houses of Parliament “to the extent required for the purpose of avoiding an infringement of the privileges of either House”. If a request is made to either House and disclosing information would infringe parliamentary privilege, then the EIR do not apply. However, if another public authority holds information and disclosing it would infringe parliamentary privilege, that authority is still covered by EIR and would have to respond to a request accordingly. In such a case, it is likely that regulation 12(5)(d) would be engaged, since the confidentiality of Parliamentary proceedings is protected by law and disclosure would adversely affect it. There would also be a very strong public interest in maintaining the exception.
26. Under regulation 2(3), Scottish public authorities are not covered by EIR; there are separate regulations for Scotland. However, under regulation 12(10), for the purposes of paragraph 5(d), “references to a public authority shall include references to a Scottish public authority”. So, when a public authority is considering whether the confidentiality of another public authority’s proceedings would be adversely affected by disclosure, it needs to bear in mind that the other authority could be Scottish.

## The public interest test

27. Once regulation 12(5)(d) has been engaged, the public authority must then carry out the public interest test. Under regulation 12(1)(b), the information can only be withheld if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, regulation 12(2) says that the public authority shall apply a presumption in favour of disclosure.
28. So to decide the outcome of the public interest test, the public authority must:
- consider the arguments for maintaining the exception and for disclosing the information; and
  - attach some relative weight to both.

Our separate [guidance document on regulation 12\(1\)](#) explains in general terms how the public interest test works in the context of EIR. The following comments consider public interest arguments in relation to regulation 12(5)(d) specifically.

### Arguments for maintaining the exception

29. Public interest arguments for maintaining the exception must relate solely to the interest that the exception protects. Arguments about protecting other interests are irrelevant. This was the view of the Information Tribunal In *Office of Communications v the Information Commissioner and T-Mobile (UK) Ltd* ([EA/2006/0078](#), 4 September 2007):

*"It seems to us that for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining that exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content. If that were not the case then we believe that the application of the exceptions would become unworkable."* (paragraph 58)

30. In the case of regulation 12(5)(d), public interest arguments for the exception will relate to the need to protect the confidentiality of proceedings. There is always a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the

obligation is based on statute or common law. For this reason, the grounds on which confidences can be breached are normally limited; a statute that prohibits disclosing information may include certain exemptions from the prohibition, while in common law there may be a public interest defence to a breach of confidence.

31. The fact that the confidentiality is 'provided by law' also implies that there is a public interest in protecting it. Even where the confidentiality is not provided by statute, it may stem from a common law duty of confidence. So, where the exception is engaged there is always some inherent public interest in maintaining it.

**Example**

Decision Notice [FER0348827](#) concerned a request to the Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints (the Ombudsman) for information the Ombudsman received while investigating two complaints.

Article 19 of The Ombudsman (Northern Ireland) Order 1996 (the Order) prohibits the disclosure of information obtained by the Ombudsman except in limited circumstances. So, the confidentiality of the Ombudsman's proceedings was provided by law. The Commissioner found that disclosure would adversely affect confidentiality.

In the public interest test, the Ombudsman argued that the Order creates an expectation of confidence and that if information were disclosed, bodies and individuals would be less willing to provide information to the Ombudsman for fear of disclosure. This in turn would adversely affect the Ombudsman's ability to investigate complaints. The Ombudsman could compel third parties to provide information, but this would not be a good use of public resources and would also discourage the voluntary supply of information. These public interest arguments are about the need to protect confidentiality, so they relate to the interest that the exception is concerned with.

32. The public interest must arise from the need to protect the proceedings that would be adversely affected by disclosure.

**Example**

In Decision Notice [FER0380352](#), referred to above, the proceedings in question were communications between Defra and representatives of the Prince of Wales, as Duke of Cornwall, on

proposed legislation that could affect the Duchy. Defra argued that there was a public interest in confidentiality because of the constitutional convention that correspondence between the heir to the throne and the Government is confidential. In this case, this specific argument was irrelevant because the proceedings were communications with the Duchy, not with the Prince of Wales as heir to the throne. However, there was a public interest argument in the confidentiality of communications between the Government and the Duchy. (paragraphs 18-20)

33. Under regulation 5(6) "any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply"; in that sense, the EIR take precedence over other legislation. So a public authority must consider whether information can be released under EIR, even if that information is exempt from disclosure under other legislation. However, public authorities should consider carefully the existence of another legal barrier as it suggests there is a strong public interest in maintaining the exception.

#### **Example**

Decision Notice [FER0265816](#) concerned a request to a District Auditor for information from his audit of the sale of a golf course by a local authority. The Audit Commission Act 1998 Section 49 prevents the disclosure of information the District Auditor has obtained. In considering the public interest factors for maintaining the exception, the Commissioner said:

*"The Commissioner, when considering factors that favour the maintenance of the exemption, gives due weight to the fact that the legislator has placed in statute (section 49 Audit Act 1998) that information received by a District Auditor, during a relevant investigation shall not be disclosed except in specified limited circumstances."*  
(paragraph 28)

#### **Arguments for disclosure**

34. Unlike the arguments for maintaining the exception, public interest arguments for disclosure do not have to be inherent in the exception. There is always a general public interest in public bodies being transparent and accountable. As our [guidance on regulation 12\(1\)](#) explains, the weight of this general public interest argument is significant; it relates to the purpose of the Directive and the Aarhus Convention.

35. There may also be more specific arguments for disclosure depending on the circumstances. For example, it may be argued that there is a need to ensure that proceedings such as investigations by an Ombudsman or District Auditor are carried out fully and rigorously. More transparency is likely to increase public confidence in these regulatory mechanisms.
36. Where proceedings are covered by an obligation of confidence, the information the public would normally have about them is necessarily limited. This in itself may support the public interest in transparency and disclosure, particularly if there is a suspicion of wrong-doing or maladministration.

### **Attaching weight to the arguments**

37. Once a public authority has drawn up the public interest arguments on both sides, it must then consider their relative weight to decide where the balance of the public interest lies. Our [guidance on regulation 12\(1\)](#) discusses a number of factors that can affect this weighting, all of which could be relevant to this exception.
38. In the context of this exception, the information requested would be confidential and exempt from disclosure were it not for EIR, so one factor that may be significant is the extent to which disclosing the particular information would serve the public interest in disclosure. There may be a public interest in disclosing information about the confidential proceedings of a particular authority, but that does not mean that the public interest in disclosing all information about those proceedings is equally strong. The question is, how far would disclosing *this* information add to public understanding? If it would not substantially add to that understanding because other relevant information is already in the public domain, the weight of that argument may be lessened, compared to the weight of the public interest in maintaining confidences.

#### **Example**

The First-tier Tribunal case of *Group Captain Dalley v the Information Commissioner* ([EA/2011/0180](#), 15 February 2012) concerned a request to the Local Government Ombudsman for information about a complaint made by a third party. The complaint concerned problems with drainage near the appellant's property. He argued that there was a strong public interest in disclosing the

information because it concerned drainage problems, and because of the alleged failure of the local planning authority to deal with them satisfactorily. However, the Tribunal found at paragraph 12 that:

*"release of the requested information will not increase public knowledge of those issues. There is therefore nothing of any significance to be added to the general factors in favour of disclosure mentioned above and expanded upon in the Decision Notice."*

So, they found that the public interest in maintaining the exception outweighed the public interest in disclosure.

## Other considerations

### Emissions

39. Under regulation 12(9), a public authority cannot use regulation 12(5)(d) to withhold information that relates to information on emissions

### Example

Decision Notice [FER0085500](#) concerned a request to the Department for Business Enterprise and Regulatory Reform (DBERR) for a report into a grant application for a proposed biomass generation plant. DBERR tried to withhold the information under regulation 12(5)(d) (among other exceptions) because, *"it believed that it owed an implied duty of confidence to companies that had applied to the Bio Energy Capital Grants Scheme ('BECGS')". The public authority stated that confidentiality of the application process is necessary to ensure that this process works effectively*" (paragraph 9).

However, the Commissioner found at paragraph 43 that:

*"In this case the report is used within the framework of a measure which is likely to affect future emissions, both by contributing to the funding for a facility that would generate emissions, and in the long run reduce the volume of carbon emissions."*

The report related to information on emissions, so under regulation 12(9) the authority could not use regulation 12(5)(d) to withhold it.

## **Separating out exempt information**

40. Regulation 12(11) says:

*"Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information."*

41. This is a reminder that the exceptions in the EIR should be interpreted narrowly. If information that is not exempt from disclosure is held with information that is exempt under regulation 12(5)(d) (or other exceptions), the non-exempt information must be disclosed, unless it cannot reasonably be separated from the exempt information. A public authority should make available all the relevant non-exempt information unless it is not possible to separate it out. The public authority may have to release information in a redacted form, blocking out or removing the withheld information and indicating the exception that has been applied.

## **Neither confirm nor deny**

42. Under the EIR, a public authority can only refuse to confirm or deny whether it holds information if to do so would adversely affect the interests in regulation 12(5)(a) (international relations, defence, national security of public safety) and would not be in the public interest. The EIR differ in this respect from FOIA, where 'neither confirm nor deny' provisions apply to most exemptions. So a public authority cannot use regulation 12(5)(d) to refuse to confirm or deny whether it holds information

## **More information**

43. This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

44. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.



45. If you need any more information about this or any other aspect of freedom of information or data protection, please [Contact us: see our website www.ico.gov.uk](http://www.ico.gov.uk).