

## Environmental Information Regulations 2004

### Decision Notice

**Date: 22 October 2009**

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

### Summary

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The complainant asked the Council for a copy of an Environmental Risk Strategy Report it held in respect of a local derelict mill. The Council refused the request, citing regulations 12(5)(b) and 12(5)(f) of the EIR. On appeal it reviewed and upheld its decision in respect of regulation 12(5)(b) and additionally cited regulation 12(5)(a) and 12(5)(c). It subsequently withdrew all claims that regulations 12(5)(b), (c) or (f) applied and supplied the complainant with a copy of the report, with three brief redactions in respect of information covered by regulation 12(5)(a). The complainant challenged the redactions; however the Commissioner found that the redacted information was covered by the exception. The Commissioner found breaches of regulation 5(1) and 5(2) in respect of the Council's failure to provide information not covered by 12(5)(a).

### The Commissioner's Role

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1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## Background

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2. The requested information was an Environmental Risk Strategy Report which contained, in an annex, a register of potential hazards, created in February 2007 by a private consultant acting on behalf of the owner of the derelict mill. A copy was subsequently provided to the Council, however the Council had no responsibility for commissioning the report or for its content.
3. When dealing with the complainant's request the Council cited regulations 12(5)(a), (b), (c) and (f) as applying in respect of the entire report, however it subsequently withdrew most of these claims and came to rely solely on a claim that regulation 12(5)(a) applied in respect of a small amount of information. This Decision Notice therefore only considers the applicability of 12(5)(a) and does not examine the arguments advanced in support of the other exceptions.
4. The nature of the redacted information is such that consideration of the reasons for the decisions made by both the Council and the Commissioner will reveal its content. Therefore, to ensure the exception is maintained, some sections of this Decision Notice are dealt with in confidential annexes.

## The Request

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5. On 11 June 2007, the complainant, acting for a local residents' association, emailed the Council with the following request:

*"We understand...that a working document from the Environment Agency may now be available outlining a strategy to deal with contamination at the Fletchers Mill site. Please could you send us copy of this report or at least a written summary of its findings."*
6. The Council replied by email the same day, undertaking to provide "a statement in a letter relating to the content" of the report within a few days. An internal email dated 22 June 2007 indicates that it treated the request as an EIR request, with a start date of 11 June 2007.
7. After a further exchange of correspondence, the Council wrote to the complainant on 5 July 2007, assuring him that the Council was working with other agencies to ensure the site's safety. The letter constituted a Refusal Notice and explained that the Council would not provide a copy of the report or make a statement about its contents because the

information was excepted from disclosure under regulations 12(5)(b) and 12(5)(f) of the EIR.

8. The letter included details of the complainant's right of appeal against the decision and also of his right to complain to the Information Commissioner.
9. On 30 July 2007 the complainant appealed against the decision, arguing that the public interest in local residents having access to information relating to public health matters should override all other concerns.
10. The Council replied on 14 August 2007. It withdrew its claim that 12(5)(f) applied, but upheld its decision to apply regulation 12(5)(b). The Council also argued that regulation 12(5)(a) should be applied in respect of the report, stating that disclosure would severely compromise its ability to act to ensure public safety at the site. It argued that its duty to protect public safety outweighed the public interest in allowing public access to information about the site.

## **The Investigation**

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### **Scope of the case**

11. On 7 September 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the Council's decision not to disclose the Environmental Risk Strategy Report.

### **Chronology**

12. On 7 May 2008 the Commissioner wrote to the Council setting out the complainant's concerns and asking to see a copy of the Environmental Risk Strategy Report. The Council replied, supplying a copy of the report on 23 May 2008, and advised that it had written to the authors, Wardell Armstrong LLP, to ask whether they objected to its release, commenting that the report may be subject to intellectual property rights (regulation 12(5)(c)). It later advised that the authors refused to consent to the disclosure.
13. On 22 July 2008 the Commissioner wrote to the Council regarding the exceptions. He asked a number of detailed questions about the application of each exception. The Council failed to answer the questions, and instead sent the complainant a revised, updated

version of the report, dated July 2008, in September 2008. The complainant said that the revised report did not satisfy his request and reiterated that he wished to have a copy of the original report, produced in February 2007.

14. On 16 December 2008 the Council emailed the Commissioner expressing concerns that releasing the original report would not be in the public interest, and claiming that its stance was supported by the Environment Agency. It subsequently provided a letter from the Environment Agency dated 19 January 2009 confirming its opposition to the release of the report.
15. Following a telephone conversation on 23 February 2009, the Council wrote to the Commissioner on 26 February 2009. It withdrew its claim that regulation 12(5)(c) applied in respect of the report and conceded that it was now in a position to release the majority of the report with the exception of two brief sections, which it excepted under regulation 12(5)(a).
16. The two redacted sections contained information which the Council claimed should be withheld under regulation 12(5)(a) because disclosure would adversely affect international relations, defence, national security or public safety. Annex A contains a description of all the withheld information.
17. The Council acknowledged that there was significant local interest in the matter, and that letting local people have access to information which would help them understand and participate in the debate about the site was a public interest argument in favour of overriding the exception and releasing the information. However it considered there were stronger public interest arguments for maintaining the exception. Both sets of arguments are outlined in Annex A.
18. On 10 March 2009 the Information Commissioner asked the Council to send a copy of the report, with redactions, to the complainant, and to supply a fresh Refusal Notice outlining the reasons for the redactions.
19. The Council then identified a further short section of the report which it considered should be redacted under regulation 12(5)(a) (detailed in Annex A). The complainant eventually confirmed receipt of the report, with three redactions, on 18 April 2009. He challenged the redactions and stated that the Council's refusal to supply the report in its entirety was fuelling local concerns about the safety of the site.

### **Findings of fact**

20. See Annex B

21. The Council released the report to the complainant in April 2009, complete save for three redactions. The Council claimed that regulation 12(5)(a) applied in respect of each of the redactions.

## Analysis

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### Exceptions

#### Regulation 12(5)(a)

22. The Council initially cited regulation 12(5)(a), (b), (c) and (f) as grounds for withholding the report in its entirety. It subsequently dropped 12(5)(b), (c) and (f). After the Commissioner's intervention it accepted that it was inappropriate to apply the exception 12(5)(a) to the entire report, and ultimately identified three sections it considered were covered by the exception.
23. Regulation 12(5)(a) applies in respect of information the disclosure of which would adversely affect international relations, defence, national security or public safety. The Council's arguments as to why the Regulation applies are set out in Annex C.
24. The Commissioner is satisfied that the Council has demonstrated that there are reasonable grounds for concluding that the disclosure of the requested information would have an adverse effect on international relations, defence, national security or public safety and that the exception is therefore engaged.
25. Nevertheless, the EIR require that where an exception is engaged, consideration is given as to whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In doing so, public authorities are expected to apply a presumption in favour of disclosure. The public interest arguments that have been considered in this case are set out in Annex C.
26. The Commissioner considered the arguments advanced by the Council and is satisfied that in this case the public interest arguments in favour of maintaining the exception are stronger than those favouring the disclosure of the information.

### Procedural Requirements

27. The complainant made his request for the report on 11 June 2007. The Council refused the request on 5 July 2007, and when he asked for an

internal review, refused the request again on 14 August 2007, citing regulation 12(5)(a).

28. It subsequently accepted that regulation 12(5)(a) could not be applied to withhold the entire report and supplied a redacted version, which the complainant confirmed receipt of on 18 April 2009. By failing to supply information not covered by regulation 12(5)(a) at the time of the internal review the Council breached the requirement at regulation 5(1) of the EIR, and by failing to provide it within 20 working days after the receipt of the request it breached regulation 5(2).

### **The Decision**

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29. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- The Council correctly applied the exception at regulation 12(5)(a) in respect of the three redactions it made to the report.

30. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The Council incorrectly applied the exception at regulation 12(5)(a) to withhold the report in its entirety. This led to a breach of regulation 5(1) and regulation 5(2) of the EIR.

### **Steps Required**

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31. The Commissioner requires no steps to be taken.

## Right of Appeal

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32. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 22nd day of October 2009**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### The Environmental Information Regulations 2004

#### Regulation 5 - Duty to make available environmental information on request

**Regulation 5(1)** Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

**Regulation 5(2)** Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

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#### Regulation 12 - Exceptions to the duty to disclose environmental information

**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), 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.

**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (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;
- (c) intellectual property rights;
- ...
- (f) the interests of the person who provided the information where that person –



- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
- (iii) has not consented to its disclosure;

**See also confidential legal annex**