

# Sheffield Trees Archive

## Redaction Guide

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## 1. Introduction

- 1.1 This guide provides detailed information on applying any Freedom of Information exemption redactions during the processing of documents into the Trees Dispute Archive by Sheffield City Archives staff. It should be read in conjunction with the Trees Dispute Archives Project **Access and Disclosure Protocol**.
- 1.2 The Trees Dispute Archives Project Management Board is overseeing the public disclosure of all relevant documentary information; it has tasked the City Archives with obtaining full disclosure of all relevant documentation and processing this according to international archive cataloguing standards to allow all interested parties to view the documentation themselves.
- 1.3 Sheffield City Council is subject to the Freedom of Information Act 2000 (FOI) and Environmental Information Regulations 2004 (EIR). A limited number of exemptions apply to the documents within the Tree Dispute Archive.
- 1.4 The documents being processed as part of the Tree Dispute Archive are intended for publication; Section 22 of the Freedom of Information Act provides an exemption for information that is intended to be published in the future. Information is exempt if, at the time when the public authority receives a request for it:
- the public authority holds the requested information;
  - the public authority intends the information to be published at some future date, whether that date is determined or not; and
  - in all the circumstances it is reasonable to withhold the information until its planned publication.
- 1.5 Section 22 is a qualified exemption and therefore public authorities must consider whether the public interest in maintaining the exemption is greater than the public interest in disclosing the requested information.
- 1.6 With regard to redactions the project will be informed by the UK National Archives *Redaction Toolkit*<sup>1</sup>.
- 1.7 The following guide to exempt information (other than section 22 and section 40) is provided by the Information Management Team.

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<sup>1</sup> [https://www.nationalarchives.gov.uk/documents/information-management/redaction\\_toolkit.pdf](https://www.nationalarchives.gov.uk/documents/information-management/redaction_toolkit.pdf)

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### 2. Personal information

- 2.1 Section 40 of the Freedom of Information Act 2000 (FOIA) provides an exemption for information which is personal information. Section 40 is an absolute exemption which is not subject to a Public Interest Test.
- 2.2 It is the expectation of the Project Management Board that the identities of currently serving, as well as former, Council Officers, Elected Members, contractors, and individuals from other agencies, will be redacted prior to publication. In addition, work roles / designation and job titles will also be redacted.
- 2.3 Where redaction of identities is required, this will normally be accomplished by the redaction of names, contact details and other personal data such as signatures. In some instances, it may also be necessary to redact other information (for instance a job title and name and address of employer) where this could reasonably be used to identify an individual.

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### 3. Information given in confidence

3.1 Section 41 of the Freedom of Information Act 2000 (FOIA) provides an exemption for information which has been provided to the Council in confidence.

3.2 Information will be covered by Section 41 if:

- it was obtained by the Council from any other person
- its disclosure would constitute a breach of confidence
- a legal person could bring a court action for that breach of confidence
- court action would be likely to succeed

#### **Obtained from any other person**

3.3 In this context the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.

3.4 If the requested material contains a mixture of both information created by the authority and information given to the authority by another person, then, in most cases, the exemption will only cover the information that has been given to the authority.

3.5 However, the contents of a contract between a public authority and a third party generally won't be information obtained by an authority from another person.

#### **A breach of confidence**

3.6 The breach of confidence is a common law doctrine from a 1968 case called *Coco v A N Clark (Engineers) Ltd*, which was about trade secrets. The judge stated that three things are needed for a breach of confidence:

- the information must have the necessary quality of confidence
- it must have been imparted in circumstances importing an obligation of confidence
- there must have been an unauthorised use of the information to the detriment of the confider

#### *Quality of confidence*

3.7 The "quality of confidence" means that the information must not be trivial; someone must have a genuine interest in keeping it secret.

3.8 To have the necessary quality of confidence, the information cannot already be in the public domain; if it is, it wouldn't be confidential.

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### *Obligation of confidence*

- 3.9 An obligation of confidence will exist where the confider gave the information to the Council and explicitly stated that the information was confidential (for example through a letter or a contract) or where it was implicitly obvious from the circumstances that confider intended the information to be confidential. An example of the latter might be where a service user passed information to a Council social worker.
- 3.10 If we are still unsure whether there is an obligation of confidence, the test we have to apply is whether a reasonable person would have realised that the information was being given to him or her in confidence.

### *Unauthorised use to the detriment of the confider*

- 3.11 For commercial information, we will generally have to show that there has been an unauthorised use which has caused detriment to the confider's commercial interests.
- 3.12 For personal or private information about an individual, it isn't necessary to show that there would be a tangible or financial detriment; the fact that an individual's right to privacy or right to a family life under the Human Rights Act 1998 has been comprised is enough to show that there has been a breach.

### **A legal person could bring a court action**

- 3.13 The breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person. This means that we need to consider the expectations of, and the impact on, both the person who gave the information directly to us and any other previous confiders of confidential material within the requested information.

### **Court action would be likely to succeed**

- 3.14 The claim for breach of confidence must be "actionable", which means something more than just arguable; it must be possible to take action and win.

### **Public Interest Test**

- 3.15 Section 41 is an absolute exemption, so there is no public interest test to be carried out under FOIA.
- 3.16 However, in some circumstances, we may still need to carry out a test to determine whether we would have a public interest defence for the breach of confidence.

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3.17 This is a test of proportionality which involves balancing the competing human rights of the right to privacy and a family life on the one hand and the right to freedom of expression on the other.

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### 4 Legal Professional Privilege

- 4.1 Section 42 of the Freedom of Information Act 2000 (FOIA) provides an exemption for information protected by Legal Professional Privilege (LPP). LPP is a fundamental principle of English law which protects confidential communications between lawyers and clients. The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is an essential requirement of the English legal system which helps to ensure complete fairness in legal proceedings.

#### Types of LPP

##### **Litigation privilege**

- 4.2 Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the main purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
- 4.3 Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.

##### **Advice privilege**

- 4.4 Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the main purpose of seeking or giving legal advice.
- 4.5 The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.

#### Parties to the communication

##### **Who is the client?**

- 4.6 Communications with third parties are not covered by advice privilege and are only covered by litigation privilege if they have been made for the purposes of the litigation, so it is important to determine who the lawyer's client is.



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- 4.7 This will depend on the facts of the case, but, in general, 'client' is defined narrowly and will only extend to those members of an organisation who are authorised to instruct lawyers. For instance, all employees in a particular department might be considered to be the client of a lawyer, whereas the remaining staff might be considered to be third parties.

### Who is the lawyer?

- 4.8 A communication will only be covered by legal professional privilege where a lawyer provided the advice. The generic term "lawyer" means a legal adviser acting in a professional capacity and includes solicitors, barristers and legal executives. Other professionals, such as accountants, are excluded, even if they appear to be providing advice on legal matters.

### Communications

- 4.9 A communication under s42 means a document that conveys information. It could take any form, including a letter, report, email, memo, photograph, note of a conversation, or an audio or visual recording. A document does not actually need to be sent for it to count as a communication for this purpose; a document that has been prepared to convey information, but is still on its creator's file, is still a communication. Communications might include draft documents prepared with the intention of putting them before a legal adviser, even if they are not subsequently sent to the adviser. An example might be a witness statement that was prepared, but not actually sent, to a solicitor.

### Previous disclosures

- 4.10 Once it has been established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures. The right to claim LPP will have been lost if previous disclosures to the world at large mean that the information can no longer be said to be confidential. If there has previously been an unrestricted disclosure of the information, or if the information is widely known, the exemption will not apply, as the original holder or owner of the legal advice can no longer expect it to remain confidential.

### Documents marked 'without prejudice' or 'legal professional privilege'

- 4.11 In correspondence relating to litigation, the term 'without prejudice' is often marked on correspondence as part of negotiations on a settlement. This does not automatically mean that LPP applies. This marking means that the information is privileged under the Civil

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Procedure Rules, but does not necessarily mean that it is privileged under s42 of FOIA.

- 4.12 Similarly, just because a document, in particular an email, contains 'legal professional privilege' in the heading, this does not necessarily mean that the contents of the email will be covered by LPP. The content of the email must be assessed to determine whether it falls within the definition of LPP set out above.

### Public interest test

- 4.13 Section 42 is a qualified exemption, subject to the Public Interest Test (PIT). The authority must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. Factors to consider when applying the exemption are set out in the table below.

#### **Factors in favour of maintaining the exemption**

The concept of legal professional privilege and the rationale behind the concept (i.e. ensuring frankness between lawyer and client which goes to serve the wider administration of justice etc.).

Additional weight may be added to the above factor if the advice is:

- recent
- live
- protects the rights of individuals.

#### **Factors in favour of disclosure**

The assumption in favour of disclosure and the rationale behind the assumption (i.e. accountability, transparency, furthering public debate etc.).

Additional weight may be added to the above factor if the following issues are relevant in the particular case:

- large amount of money involved
- large number of people affected
- lack of transparency in the public authority's actions
- misrepresentation of advice that was given
- selective disclosure of only part of advice that was given
- large passage of time between advice that was given and the request being received

### Other considerations

- 4.14 Information which is exempt under s42 may also be exempt under section 41 (the exemption for information provided in confidence).

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The equivalent exception under the Environmental Information Regulations is regulation 12(5)(b), the course of justice and inquiries exception.

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### 5 Prejudice to commercial interests

- 5.1 Section 43 of the Freedom of Information Act 2000 (FOIA) provides exemptions for information which is a trade secret and information which would, or would be likely to, prejudice the commercial interests of any person.

#### **Trade secrets**

- 5.2 The term “trade secret” is not defined in FOIA. The concept of a trade secret has developed through common law and has a fairly wide meaning. It is information which is not simply confidential but confers a competitive advantage to the owner and therefore requires more protection.
- 5.3 A trade secret is information which has not been widely disseminated and is not generally known. It is information which a rival could not easily recreate or discover themselves. Trade secrets can be technical secrets (for example inventions, manufacturing processes or recipes) or business secrets (e.g. plans for the development of products).

#### **Prejudice to commercial interests**

- 5.4 The exemption at section 43(2) is for where disclosure would cause prejudice to commercial interests, not for information which is “commercially sensitive”.
- 5.5 In order to apply the exemption, we have to explain how disclosure would prejudice, or harm, the commercial interests of the Council or any third party. There must be more than a hypothetical or remote possibility of prejudice occurring; the risk must be real and significant.
- 5.6 For example, we might want to argue that disclosing information about a financial transaction with a third party would prejudice our commercial interests in subsequent negotiations with another third party. In order to apply the exemption, we would have to show that there is real risk that the negotiations would be prejudiced. The more similar the information and the more similar the transactions, the more likely it is that there will be prejudice to our commercial interests.
- 5.7 If we can show that there is a real and significant risk of harm to our commercial interests or a third party’s commercial interests, we then have to apply a public interest test.

#### **Public interest test**

- 5.8 Section 43 is a qualified exemption, subject to the Public Interest Test (PIT). The authority must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

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Factors to consider when applying the exemption are set out in the table below.

### **Factors in favour of disclosure**

Openness and transparency – Public authorities should bear in mind the strong case for openness and transparency in their affairs when balancing public interest arguments.

Accountability for the spending of public money – disclosure of commercial information can make public authorities more accountable for how they spend public money. If people have a better understanding of how public money is spent, this may give them more confidence in the integrity of the public authority and in its ability to effectively allocate public funds. Alternatively, it may enable them to make more informed challenges to the spending of public money by public authorities

Promoting competition in procurement via transparency – there is a public interest in encouraging competition for public sector contracts. Greater transparency about the tendering process and the negotiation of public sector contracts may encourage companies to take part in the process and help them improve their bids. This will increase competition and therefore help public authorities to get value for money. Transparency of tender information is therefore beneficial to the whole process and should not deter contractors from making bids for public authority contracts, particularly as the value of these contracts also provides a clear incentive to tender for the work.

Protection of the public – if a public authority is a regulator, it may hold commercially sensitive information about the quality of a product or the practices of an organisation. There are strong public interest arguments in allowing access to information which will help protect the public from unsafe products or dubious practices. This would potentially override any considerations of prejudice to the commercial interests of a company.

### **Factors in favour of maintaining the exemption**

Competition – there is a public interest in allowing public authorities to withhold information which, if disclosed, would reduce its ability to negotiate or compete in a commercial environment.

Reputational damage/loss of customer confidence – disclosure of information may cause unwarranted reputational damage to a public authority or another organisation whose information it holds, which may in turn damage its commercial interests through loss of trade.

Ability to generate income – it is part of the role and duties of many public authorities to generate income. However it is not always in the public interest to place information which explains how that income is

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generated into the public domain. This could inform potential competitors and may lessen any competitive advantage held by the public authority. This may have a significant impact upon the ability of the public authority to operate in the relevant marketplace

Impact on other negotiations – revealing information such as a pricing mechanism can, for example, be detrimental to a public authority's negotiations on other contracts and procurements. If an organisation knows how a public authority costs an item or service for example, then it can exploit this for profit or other gain.

### Consulting with third parties

5.9 Where the disclosure of requested information may potentially prejudice a third party's commercial interests, the Council must consult with the relevant third party about such disclosure at the time of the request. As we only have 20 days to respond to FOI requests, it's important that you respond to the Information Management Team on time so that we can do this as early as possible.

5.10 It is good practice for a public authority at the time a contract is agreed to make a third party aware that any information it provides will be subject to FOIA. This will mean that expectations are managed at the outset.

### Confidentiality clauses

5.11 In some situations, the Council's contract with a third party may include a confidentiality clause in order to prevent the future disclosure of information. Such clauses can be useful in identifying information considered by the two parties to be confidential and therefore not to be made public, but the fact that the clause exists does not automatically mean that we can apply the exemption; we still have to demonstrate that disclosure would prejudice the commercial interest of the Council or the third party and then apply the public interest test.

5.12 In addition, the Council must be wary of circumstances where an organisation attempts to impose a blanket confidentiality clause on all the information contained in a contract. In the event of a complaint to the Commissioner, the whole contract would be reviewed and, where information was not considered to be prejudicial to commercial interests, a confidentiality clause would not prevent its disclosure. The Council cannot contract out of its statutory obligations under FOIA.

### Timing

5.13 When applying the exemption, we need to consider the circumstances as they exist at the time the request is made. For example, information submitted during a tendering process is more likely to be commercially

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sensitive while the tendering process is ongoing, compared to once the contract has been awarded. Circumstances change and with the passage of time, information which has once been refused may be eligible for release at a later date.

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### 6 EIR Exceptions

- 6.1 Requests for information which are about the environment must be dealt with under the Environmental Information Regulations 2004. This is a separate piece of legislation to the Freedom of Information Act 2000 (FOIA) and it defines environmental information quite widely. The reason we have both pieces of legislation is that the UK was required to introduce the EIRs when it was a member of the EU.
- 6.2 The main difference between the two pieces of legislation is that the EIRs have a presumption in favour of disclosure. This means that we need to make a strong argument if we want to apply any of the following exceptions. Note that EIR uses the term “exception” rather than “exemption”.

#### **Internal communications (Regulation 12(4)(e))**

- 6.3 This exception applies to all information which can be classed as an internal communication, although, in practice, the application of the exception will be limited by the public interest test.
- 6.4 Emails sent within the Council will be classed as internal communications. However a communication sent by the Council to another public authority, a contractor or an external adviser will not generally constitute an internal communication. Neither will an email sent or copied (by cc or bcc) by a Council employee to a third party constitute an internal communication, even if the employee also sent or copied it within the Council. An internal email will cease to be an internal communication once a Council employee has forwarded it to a third party.
- 6.5 Although a wide range of internal information will fall within the exception, it will only be in the public interest to withhold information where the Council needs to protect decision making processes. The purpose of the exception is not to prevent all internal communications being disclosed but rather to protect the Council’s internal thinking space. We must balance the public interest in the Council having a “safe space” for discussion with the public interest in openness and transparency.

#### **Course of justice (Regulation 12(5)(b))**

- 6.6 This exception applies to information where disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the Council’s ability to conduct a criminal inquiry. It can apply to:
- court or tribunal records
  - material covered by legal professional privilege. See our guide to the exemption under FOIA for more information.



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- information where disclosure would prejudice investigations and proceedings of either a criminal or disciplinary nature

6.7 This information is subject to a public interest test.

### **Intellectual property (Regulation 12(5)(c))**

6.8 This exception is designed to protect intellectual property rights (IPRs). For more information on IPRs, see our guidance on copyright and intellectual property.

6.9 Disclosure by the Council of a document protected by an IPR won't infringe the IPR as the person who receives the information is still obliged by law to respect the rights of the owner and the owner can seek damages for infringement if they don't.

6.10 However, in order to apply the exception, we have to show that disclosure of the information would cause loss or harm to the rights holder; it isn't enough just to prove that an IPR exists.

6.11 This exception is subject to a public interest test.

### **Confidentiality of commercial information (Regulation 12(5)(e))**

6.12 This exception applies to confidential commercial information which is held by the Council. For the exception to apply, the following criteria must be met:

*The information is commercial or industrial in nature*

6.13 This means it must relate to a commercial activity e.g. the sale of goods. Information about the Council's revenue will not normally be considered to be commercial unless an income stream comes from a charge for goods or services.

*It is legally confidential*

6.14 This means that the information is confidential under the common law duty of confidence, a contractual obligation, or a statutory bar on disclosure. Note, however, that the Council cannot contract out of our obligations under the EIR by inserting or accepting broadly drafted confidentiality clauses; if the information is not inherently sensitive, a confidentiality clause will not protect it from disclosure under the EIR.

*The confidentiality is protecting a legitimate economic interest*

6.15 The Council needs to show that it is more probable than not that disclosure would cause harm to a legitimate economic interest. Such interests include retaining or improving market position, ensuring that

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competitors do not gain access to commercially valuable information, protecting a commercial bargaining position, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income. However, they will not include personal privacy concerns

*The confidentiality will be adversely affected by disclosure*

6.16 If the first three elements can be met, it automatically follows that confidentiality will be adversely affected by disclosure.

*The public interest in maintaining the exception outweighs the public interest in disclosing the information*

6.17 There will always be some public interest in disclosure to promote transparency and accountability of the Council but this has to be balanced against preventing harm to economic interests and preserving the principle of confidentiality.

### **Personal Information (Regulations 5(3), 12(3) and 13)**

6.18 This exception is equivalent to the exemption under FOIA. Regulation 5(3) applies where the information is the personal data of the requester and Regulations 12(3) and 13 are the exceptions which apply where the requester has asked for third party personal data. This exception is not subject to a public interest test. See our FOIA guidance for reference.

Peter Evans  
Archives and Heritage Manager  
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