

EXEMPT AND EDITED INFORMATION DOCUMENTS
UNDER LAND REGISTRATION ACT 2002
AND LAND REGISTRATION RULES 2003

Unless otherwise stated references to section numbers are to sections of the Land Registration Act 2002 and references to rule numbers are to rules in the Land Registration Rules 2003

The Open Register

1. Ignoring the exceptions for the moment, the openness of the register is enshrined in section 66(1) which provides that any person may inspect and make copies of:-
 - (a) the register of title;
 - (b) any document kept by the registrar which is referred to in the register of title (but not, presumably, another document which is only referred to in a document which is itself referred to in the register);
 - (c) any other document kept by the registrar which relates to an application to him; and
 - (d) the register of cautions against first registration.

2. There is obviously plenty of scope for documents within these categories to contain commercially sensitive information. Lease terms are an obvious example (particularly now that leases for more than 7 years are registrable, as are leases of whatever length if there is more than three months before they will take effect in possession), as are overage and option provisions. It is also worth noting that the register will contain details of positive covenants (r.8(1)(f)).

Prejudicial Information

3. The Rules therefore provide a mechanism by which prejudicial information can be edited

out of documents that would otherwise be exposed to public scrutiny. The relevant definitions are in r. 131.

4. The original document (i.e. including the prejudicial information) is termed an “exempt information document”. That is confusingly similar to the term “edited information document”, which is the document with the prejudicial information removed. Broadly, the exempt information document is not open to public inspection, whereas the edited information document is open.
5. “Prejudicial information” means (r. 131 again):-
 - (a) “information that relates to an individual who is the applicant [for exempt status] and if disclosed to other persons (whether to the public generally or specific persons) would, or would be likely to, cause substantial unwarranted damage or substantial unwarranted distress to the applicant or another, or
 - (b) “information that if disclosed to other persons (whether to the public generally or specific persons) would, or would be likely to, prejudice the commercial interests of the applicant [for exempt status]”.
6. It may be noteworthy that the individual prejudice under (a) has to be “substantial unwarranted” damage or distress, whereas prejudice to commercial interests under (b) contains no such requirement. Presumably the test under (b) is easier to satisfy than that under (a).

7. One is also left to guess at the degree of probability required by the phrase “or would be likely to”. A high degree of probability appears to be indicated.

The Application for Exempt Status

8. When an application for exempt status is made, the registrar must designate the relevant document as exempt if he “is satisfied that the applicant’s claim is not groundless”: r.136(3). Presumably, therefore, he must be positively satisfied that the claim is not groundless. This does not fit particularly well with the notion that the applicant needs to demonstrate that there is a likelihood of prejudice. Running the two together, the registrar must designate if he is satisfied that it is not groundless for the applicant to allege the likelihood of prejudice. Only time will tell precisely how rigorously this is applied in practice, but for the present the registrar’s approach seems likely to be that (even though likelihood of prejudice appears to set a high threshold), the evidential standard (“not groundless”) is low. It may therefore prove to be relatively easy to obtain exempt designation.
9. When making an application for exempt status, it is important to bear in mind that the actual application is made on EX1 with reasons stated in EX1A. The EX1A is, for obvious reasons, itself exempted from public inspection: r. 133(2)(c). The EX1, and any other letters or documents, are not exempt. It is therefore essential that the reasons for the application (which might betray the nature of the prejudicial information) appear nowhere other than in EX1A.
10. R. 136(4) provides that the registrar may cancel an application if designation could

prejudice the keeping of the register. As explained in Practice Guide 57, this will be the case if an attempt is made to edit out information that must appear on the register, for instance details of restrictive covenants, easements or options. The Practice Guide also indicates that no purpose will be served by editing out the transfer price, since that information will still appear on the register pursuant to r. 8(2).

11. What is not clear is what one does if dissatisfied with the registrar's decision. The usual route of complaint would be to the adjudicator, but to all intents and purposes his jurisdiction (s.108) is limited to resolving objections to applications (see s.73). Whether by design or not, this does not appear apt to cover situations in which it is the applicant himself who is dissatisfied with the registrar's decision. Can it really be true that the applicant's only remedy is by way of judicial review?

Applications for Copies of Exempt Documents

12. Notwithstanding that a document is designated as exempt, any party may apply to see it. Basically, r.137(4) provides that the registrar "must" provide a copy of the exempt document if he decides:-
 - (a) that none of the information excluded from the edited document is prejudicial; or
 - (b) that all or some of the edited information is prejudicial, but that the public interest in providing the exempt material outweighs the public interest in not doing so.

Head (a) may be clear enough, but head (b) leaves matters wide open. Given that the driving force behind the policy of an open register appears to have been the perceived

public interest in operating on a level playing field with as much financial information as possible available, there is some risk that the registrar will readily conclude that the public interest in disclosure of financial information outweighs the public interest in not doing so (particularly bearing in mind that the interests of person who obtained exemption in the first place do not appear to come into the equation other than in a most indirect way as part of the public).

13. The concern must be that the actual test for what is prejudicial information is a relatively difficult one to satisfy. Even if the registrar is relatively relaxed about granting exempt designation (see para 8 above), experience may show that on an application under r. 137 the registrar (or the adjudicator) may be more inclined to conclude that the information is not prejudicial. If that conclusion is reached then not only does the r.137 applicant get the information, but the exempt designation is removed in its totality so that the original document becomes available for all to inspect: r.137(5).
14. Despite the mandatory language of r. 137(4), the registrar will generally have given notice under r. 137(3) to the person having the benefit of exempt designation. Section 73(1) gives anyone the right to object to an application: the person having the benefit of the exemption is highly likely to make such an objection to an application for disclosure. Unless satisfied that the objection is groundless (s. 73(6)), which is a strong thing to decide, the registrar must not determine the application until the objection has been disposed of (s.73(5)) and must refer the matter to the adjudicator if it is not possible to dispose of the objection by agreement (s. 73(7)). So, whatever r. 137(4) may appear to say that the powers and duties of the registrar are in relation to an application for disclosure, the matter will effectively

have to be referred to the adjudicator (with the possibility of appeal from him to the High Court) if an objection is made and not withdrawn. That leaves open the question of what one's remedy may be if the registrar decides that one's objection is groundless: judicial review again?

15. One final thought. It may often be obvious what sort of material has been edited out of an edited information document, giving an applicant for disclosure a decent chance of being able to describe why he needs to see the suppressed material and why the matter falls within one or other of the heads in r. 137(4). On the other hand, there will be other instances in which (perhaps due to some nifty drafting) it will not be apparent what has been omitted. How, in those cases, is the r. 137 applicant to develop any worthwhile argument in support of his application?

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