



The Limits of Freedom of Information

A guide to the exemptions of the Freedom of Information Act and the Environmental Information Regulations

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Introduction

Although the Freedom of Information Act (FOIA) allows you right of access to most information held by public authorities, some information remains protected. This booklet briefly explains those protections, known as exemptions, and how authorities should apply them. Parts 4 and 5 go in to a little more detail on the most contentious exemptions – those concerning policy making and commercial information – while part 6 looks at the separate regime governing environmental information.

Part 1

Exemptions – the basics

There are two types of exemption, absolute and qualified. Some of these, almost all qualified ones, require a judgement to be made on whether release of the information will prejudice the interests specified in the particular exemption. This is known as the ‘prejudice test’ and sometimes as the ‘harm test.’

The word ‘prejudice’ in the FOIA has been controversial, drawing criticism from open government campaigners. The then Government’s original white paper on freedom of information used the term ‘substantial harm’, which would have made it more difficult to refuse disclosure, but this was diluted to ‘prejudice’ by the then Home Secretary Jack Straw. The Scottish Freedom of Information Act, however, uses the term ‘substantially prejudice.’

Some of the exemptions overlap, for example, information might be exempt because it affects the country’s defence – see section 26 of the Act – and, by extension, national security – see section 24.

Sometimes only part of the information contained in a document will be exempt. In those circumstances an authority can release the document with the exempt sections blanked out.

Part 2

Absolute exemptions

The eight categories of information covered by absolute exemptions are listed below. If the information requested falls into one of these categories the authority can deny the request without having to make a judgement on whether it would be in the public interest to do so. The authority is also relieved of its duty to confirm or deny the information it has.

- **Information accessible by other means** – see section 21 of the Act. This exemption is designed to spare public authorities unnecessary work. It applies to information already published, for example, via the authority's website.
- **Information from state security bodies such as MI5, MI6 and GCHQ** – Section 23. This is an obvious exemption designed to protect the secrecy of these organizations.
- **Court records** – section 32. The release of court records remains at the discretion of the courts themselves.
- **Information covered by parliamentary privilege** – see section 34. As there is no strict legal definition of parliamentary privilege, this is rather a grey area. Broadly, it covers information relating to the proceedings of both houses of Parliament. However, much of this information is routinely published, most obviously the transcripts of proceedings in Hansard. Background reports and data presented to Parliamentary committees tend to be covered by privilege.
- **Information that could prejudice the effective conduct of public affairs** – see section 36. This only applies to information held by the House of Lords or House of Commons. If it is held by other public authorities it is subject to the public interest test – see below.
- **Personal data** – see section 40. Such information is covered by the [Data Protection Act](#) and is generally only available to the person who is the subject of the information.
- **Information provided in confidence** – see section 41. This applies to disclosure that would 'constitute a breach of confidence actionable by that other person.' This exemption is particularly important in relation to commercially sensitive information provided by [private suppliers](#). The exemption may be open to legal challenge - see 'Commercial information' section below.

- **Information whose disclosure is legally prohibited** – see section 44. There are three types of prohibitions: other UK legislation, for example, section 6 of the Human Rights Act 1998 and section 21 of the Local Government Finance Act 1992; EU obligations, including various commercial regulations; and the common law of contempt of court.

Part 3

Qualified exemptions

These are sometimes known as 'balanced exemptions', or 'public interest test exemptions.' All require a judgement to be made on whether the public interest in releasing the information outweighs that in withholding it. A separate judgement must be made on whether it is in the public interest to confirm or deny what information is held. In some cases an authority will judge it to be in the public interest to confirm what it has, but not to release it.

The public interest is, of course, a rather vague concept, but the Information Commissioner has issued helpful guidance. It states: Generally speaking, the public interest is served where access to the information would:

- further the understanding of, and participation in, the debate of issues of the day
- facilitate the accountability and transparency of public authorities for decisions taken by them
- facilitate accountability and transparency in the spending of public money
- allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions
- bring to light information affecting public safety.

There are seventeen categories of information subject to qualified exemptions which are divided into two sub-classes: 'prejudice test' exemptions and 'class' exemptions.

Prejudice test exemptions

These require an initial judgement to be made on whether release of the information will prejudice the interests specified. If it's judged that there is such prejudice the public interest test must be applied, but if there is not the public interest test is unnecessary.

Prejudice test exemptions apply to information that could prejudice:

- **The country's defence** – see section 26.
- **International relations** – see section 27. This also covers confidential material obtained from other governments.
- **Relations within the UK** – see section 28. This covers relations between the UK Government, the Scottish Parliament and the Welsh and Northern Irish Assemblies.
- **The country's economic interests** – see section 29.
- **Law enforcement** – see section 31. This includes information that might prevent the detection of a crime or the apprehension of offenders. It could therefore include details of internal investigations that may lead to criminal prosecutions.
- **Audit functions** – see section 33. This applies to those public authorities with the power to audit the activities of others.
- **The effective conduct of public affairs** – see section 36. This applies to all public authorities except the Houses of Parliament, which under the same section have an absolute exemption. There is further discussion of this exemption below.
- **Health and safety** – see section 38. This applies to information whose release could prejudice the health and safety of the public or employees.
- **Commercial interests** – see section 43.

Class exemptions

These require no prejudice test and only a public interest test. These exemptions apply to information concerning:

- **Material intended for future publication** – see section 22 of the Act. This applies to, for example, draft reports. Public authorities refusing to release information for this reason will have to argue it is reasonable to expect the applicant to wait for publication. In October 2014 a further exemption was introduced under section 22 for information derived from continuing research that is intended for future publication.
- **National security** – see section 24. This excludes information from, or relating to, national security bodies such as MI5, MI6 and CGHQ, which is covered by an absolute exemption.
- **Investigations and proceedings by public authorities** – see section 30. This is intended only for bodies such as the police and HM Customs & Excise, which have statutory powers to investigate and prosecute.
- **The formulation of government policy** – see section 35. Further details below.
- **Communications with the Queen**, and relating to honours – see section 37.
- **Environmental information** – see section 39. This is covered by separate regulations known as [Environmental Information Regulations](#), which allow access to this information, subject to a range of exemptions.
- **Personal information** – see section 40. Most personal information is subject to an absolute exemption under section 40 of the FOIA. However, some information could, in theory, be released, subject to the public interest test. This clause interacts with the complex provisions of the DPA's section 10 and requires specialist interpretation. It's thought the type of information that might be released would include personal information relating to an official's public role.
- **Legal professional privilege** – see section 42. This applies, for example, to internal legal advice documents.

Many qualified exemption decisions are the subject of appeals to the Information Commissioner and the Information Tribunal, with most arguments focusing on the terms 'public interest' and 'prejudice.'

Part 4

The policy exemptions in detail – sections 35 & 36

Since they go to the heart of policy-making and public administration, these sections are the most likely to provoke controversy and the most heated ‘public interest’ debates. The media in particular commonly wants to use the FOIA in order to gain access Government departments’ internal documents.

Section 35 applies to central government and the Welsh and Northern Irish assemblies. It covers: (i) the formulation or development of Government policy’ (ii) ministerial communications, including cabinet proceedings; (iii) advice by government law officers; and (iv) the operation of ministerial offices. There will be strong public interest grounds for withholding such information while policy decisions are still pending. Once decisions have been made, the Act allows for background statistical information to be released. Ministers and their officials will often be reluctant to release internal communications and advice documents even at this stage, but rulings in other countries have found in favour of disclosure.

Section 36 is more complex, as it requires a prejudice test as well as public interest test. Designed to protect the ‘effective conduct of public affairs’, it applies to information not covered by section 35. That information is exempt if ‘in the reasonable opinion of a qualified person disclosure of the information would, or would be likely to’ either: (a) ‘prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown’ and analogous conventions within the Northern Ireland Assembly and the National Assembly for Wales; or (b) ‘inhibit: (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purpose of deliberation; or would otherwise prejudice the effective conduct of public affairs.’

If all these clauses except the final one are to apply, public authorities must evaluate the impact of the disclosure of the information, rather than its actual content. In reality it will often be difficult to separate the two, but there may be situations in which the very fact of

disclosure will discourage officials, or advisors, from giving candid views and advice, no matter how uncontroversial their opinions. However, it is not enough that disclosure would result in someone's temporary embarrassment.

The doctrine of collective understanding, referred to in (a) above, arises from the long-standing convention that government decisions are taken collectively, with each member of the Government being both party to, and committed to, them. Disclosure it would be prejudiced if disclosure would, for example, reduce the effectiveness of a final decision taken by ministers, or inhibit discussions between Ministers. The exemption would therefore most likely apply to information which revealed the positions individual Ministers had taken on issues of Government policy.

Whereas (a) applies to central government and the Welsh and Northern Ireland assemblies only, (b) applies to all public authorities. In respect of the two 'free and frank' clauses, guidance published by the Department for Constitutional Affairs (DCA) says public authorities considering disclosure should ask:

- Would it make it more likely that the person or any other offering advice will be unwilling to do so in future?
- Would it inhibit that person or any other from offering unwelcome advice?
- Would it make it more likely that the person being advised will not ask for advice in future?
- Would it have a similar inhibiting effect on other people in future?
- Would it make it more likely that advice will be given that is materially different because of the possibility of disclosure?
- Will it make people less likely to engage in discussion (oral or written) as part of the deliberative process?
- Would it distort or restrain that discussion?
- Would it result in pressure being brought to bear on officials to provide particular advice?

As for information that could 'otherwise prejudice the effective conduct of public affairs', the Government made clear during parliamentary debates on the FOIA, that it was a catch-all, applying to circumstances not covered elsewhere in the Act, in which it would be necessary to withhold information in the interests of good administration. The DCA guidance makes it clear that, because this clause is so broadly expressed, a clear explanation should be given whenever ever it is used to justify non-disclosure.

Regarding the public interest test, according to the DCA guidance, some of the considerations which may weigh in favour of disclosure are:

- That open policy making may lead to increased trust and engagement between citizens and government.
- The desirability of citizens being confident that decisions are taken on the basis of the best available information.
- That the information would expose wrongdoing on the part of government.

Some of the factors which may weigh against are:

- That ministers and officials need space in which to develop their thinking and explore options in communications and discussions with others.
- There needs to be a free space in which it is possible to 'think the unthinkable' and use imagination, without the fear that policy proposals will be held up to ridicule.
- Ministers and officials need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects.

Although some of these factors apply directly only to central government, the general principles are relevant to all public authorities. Information Commissioners, or their equivalents, in other countries have sometimes ruled that information should be released, even when it was likely to undermine the candour of official communications. In cases where they have ruled against disclosure to protect candour, they have sometimes ordered that other background information should be released.

Whatever the decisions reached, section 36 requires that they be made by a 'qualified person'. In the case of central government departments, this person is generally a minister. He or she should not delegate the decision to another person.

Part 5

The commercial exemptions in detail – sections 41 & 43

Section 43 applies to trade secrets and to information that could otherwise prejudice a company's commercial interests. It is most relevant to information relating to any private sector involvement with public authorities.

It could be difficult to draw the line between the protection of legitimate commercial interests and the public's right to know how its money is spent. However, the FOIA makes a presumption in favour of disclosure, so, in theory, if the balance is a very fine one, the Information Commissioner, the Information Tribunal and the courts should come down in favour of disclosure. Experience from other countries with FOI legislation suggests they do.

Often commercial information provided by companies to public authorities is covered by confidentiality clauses. Such information is subject to the absolute exemption set out in section 41, but the Lord Chancellor's FOIA Code of Practice makes it clear that public authorities should only accept such clauses if absolutely necessary. Furthermore, there is a well-established legal principle that the duty of confidence does not apply when there is a public interest in disclosing serious wrongdoing or dangers to public safety.

Timing will often be an issue in respect of confidential information. Such information usually becomes less commercially sensitive with time, for example, a bid for a government contract might be highly sensitive prior to the contract being awarded, but much less so afterwards. Likewise, trade secrets are often only of limited duration.

Part 6

The Environmental Information Regulations

The EIRs' exemptions – which are known as exceptions – are set out in regulations section 12(5). They are narrower than their FOIA equivalents, there are fewer of them, and, crucially they are all qualified – or 'public interest' – exemptions, rather than absolute. The 'harm test' applied in some of these qualified exemptions is also more stringent. Information can only be withheld if it would 'adversely affect' the subjects specified, rather than simply 'prejudice' them ('prejudice' being the term used in the FOIA).

Taken together these factors mean that, in theory, it is easier to access information than under the FOIA. However, as the freedom of information campaigners have pointed out, some documents will be covered by both the EIRs and the FOIA, which could undermine the EIRs' more liberal regime.

The 'adversely affect' test applies to information involving:

- International relations.
- Defence and national security.
- Public safety.
- The course of justice, including court proceedings and internal inquiries.
- Intellectual property rights.
- Legal confidentiality of any proceedings within a public authority.
- Commercial confidentiality designed to protect legitimate economic interests.
- Voluntarily supplied information from people who have not consented to its disclosure.
- The environment to which the information relates.

The other main balanced exemptions concern:

- Requests that are 'manifestly unreasonable' or 'too general'.
- Incomplete or unfinished information such as draft reports or other work in progress.
- Internal communications from within the authority.
- Personal data that does not breach the Data Protection Act.

To find out more...

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