



## **FOI Exemptions Guidance**

**(For use by all Service Managers and Service Teams in conjunction with the Procedure for Dealing with Freedom of Information and Environmental Information Regulations Requests)**

### **FOI Exemptions at a Glance**

#### **Absolute (Does not require Public Interest Test)**

- s.21 Information accessible by other means
- s.22 Information intended for future publication
- s.23 Information supplied by or relating to, bodies dealing with security matters
- s.32 Court records
- s.34 Parliamentary privilege
- s.39 Environmental Information
- s.40 Personal Information
- s.41 Information provided in confidence
- s.44 Information whose disclosure is prohibited by law

#### **Qualified (Requires Public Interest Test)**

- s.24 National security
- s.26 Defence
- s.27 International relations
- s.28 Relations within the UK
- s.29 The economy
- s.30 Investigations and Proceedings
- s.31 Law Enforcement
- s.33 Audit Functions
- s.35 Formulation of government policy
- s.36 Prejudice to the effective conduct of public affairs
- s.37 Communications with her Majesty
- s.38 Health and Safety
- s.40 Some Personal Information
- s.42 Legal Professional Privilege
- s.43 Commercial Interests

## FOI EXEMPTIONS

While the Authority is expected to approach requests for information in a positive manner with a view to disclosing the required information, the Freedom of Information Act recognises that there are grounds for withholding information and provides a number of exemptions from the right to know. There are 23 exemptions in all and they fall into two categories – absolute and qualified (**Sections 36 and 40 fall under both categories and are determined by the specific request**). When considering the application of an exemption, staff must ensure that they refer to the detailed guidance available from the Information Commissioner's Office. Links to this guidance can be found at the end of each section.

## ABSOLUTE EXEMPTIONS

Eight of the exemptions set out in the Act are absolute. This means that there is no need for the Authority to consider the public interest test. If the exemption applies, the information requested need not be disclosed and, in many cases, the Authority is not obliged to comply with the duty to confirm or deny whether it holds the information.

### **Section 21 Information is accessible by other means (even if only by payment)**

Section 21 applies to information that is already reasonably accessible to the applicant. It recognises the right of access under the Act is supplementary to the very many ways in which public authorities already provide information to members of the public. For example, section 21 will apply if information is included in the Authority's publication scheme or if the Authority is under a statutory obligation to give out the information to members of the public on request.

Key points:

- The question is whether the information is reasonably accessible **to the applicant**. The Authority needs to be alert to any attributes of an individual applicant which may mean that information is more or less accessible to him than it is to the public at large;
- Section 21 may apply even if a fee is charged for supplying the information;
- There is no exclusion in section 21 of the duty to confirm or deny whether information is held. Even if information is exempt under section 21, the Authority may still have to tell the applicant whether or not it holds the information requested.

### [Information Commissioner Awareness Guidance No 6 Section 21](#)

## **Section 23 Information supplied by, or relating to, bodies dealing with security matters**

Section 23 applies to two categories of information:

1. information supplied directly or indirectly by the security bodies that are listed in section 23(3) (this includes the Security Service, the Secret Intelligence Service and GCHQ). Whether this aspect of section 23 applies in a particular case will turn on the source of the information; and
2. information that relates to one of the security bodies. The application of this part of section 23 will turn on the content of the information.

Key points:

- The fact that a public authority does not hold information supplied by one of the security bodies can itself be information relating to those bodies. If information falls within this exemption, it will very often be important to consider whether it is necessary to rely on the exclusion of the duty to confirm or deny whether the information is held;
- The interaction between section 23 and section 24 (national security) is quite complex and needs to be considered carefully in order to ensure that the relevant public interests are protected;
- It may be necessary to consult the security body concerned if it is anticipated that section 23 might apply;
- A ministerial certification procedure exists where it becomes necessary to rely on this exemption.

## **Section 32 Court records (including tribunals)**

Section 32 exempts information contained in certain litigation documents, court, tribunal and inquiry records and will apply regardless of the content of the information. There are separate and specific regimes for gaining access to court and tribunal records and section 32 ensures that those regimes are not superseded by the FOI Act.

Key points:

- Section 32 will apply only if the Authority holds the information solely because it was contained in one of the specified documents;
- Section 32 applies regardless of the content of the information.

[Information Commissioner Awareness Guidance No 9 Section 32](#)

## **Section 34 Parliamentary privilege**

Section 34 applies to information whose exemption is required in order to avoid an infringement of the privileges of either House of Parliament. The purpose of section 34 is to preserve Parliamentary privilege and protect the position of Parliament.

**Key points:**

- Section 34 will need to be considered where a public authority is required to lay information before Parliament before disclosing it to anyone else.
- If privileged information has been published by Parliament, then section 34 will not apply: exemption is not required in order to avoid an infringement of Parliamentary privilege.
- Section 34(3) enables the Parliamentary authorities to conclusively certify that section 34 applies. Authorities are strongly advised to consult officials from the relevant House before relying on section 34 and to obtain a certificate where necessary.

[Information Commissioner Awareness Guidance No 28 Section 34 \(Currently under review\)](#)

**Section 36 Prejudice to effective conduct of public affairs (only applies to information held by the House of Commons or the House of Lords)**

Section 36 is not subject to the public interest test where it is invoked by the House of Commons or the House of Lords - section 36(7). In cases where information relating to either House is, in the reasonable opinion of a qualified person, considered to be exempt, there is no requirement for the public interest test to be applied to the information.

However, all other public authorities seeking to exempt information under section 36 must apply the public interest test.

[Information Commissioner's Awareness Guidance No 25 Section 36](#)

**Section 40 Personal data, if the applicant is the data subject or disclosure would contravene the principles of the Data Protection Act 1998**

Section 40 concerns personal data within the meaning of the Data Protection Act 1998. Section 40 applies to two distinct types of requests for information:

1. If a request asks for the personal data of the applicant himself, the information is exempt; and
2. If a request asks for the personal data of someone else then that information will be exempt if its disclosure would contravene any of the data protection principles in the Data Protection Act 1998 (or certain other provisions of the Data Protection Act 1998).

**Key points:**

- If information is exempt under section 40 because it is the personal data of the applicant then its disclosure must be considered under the

subject access provisions in the Data Protection Act 1998; the Act may require the disclosure of information which would otherwise have been exempt under the FOI Act.

- For most public authorities that receive requests for personal data of someone other than the applicant, the application of section 40 will in most circumstances turn on whether disclosure of the information to a member of the public would be 'unfair'.
- Officials must be alive to the need to consult experts where the application of section 40 is difficult or unclear: getting a decision wrong may result in breach of the Data Protection Act 1998.
- The majority of section 40 is not subject to a public interest balance.

#### [Information Commissioner Awareness Guidance No 1 Section 40](#)

#### **Section 41: Information provided in confidence**

Section 41 applies to information that has been obtained from another person and whose disclosure to the public would constitute an actionable breach of confidence.

Key points:

- Section 41 will only apply where a person would be able to bring a successful action for breach of confidence as a result of disclosure to the public;
- Section 41 is not subject to a public interest balance imposed by the FOI Act. But, the courts have recognised that a person will not be successful in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence;
- The application of section 41 may require detailed consideration of the law of breach of confidence: expert advice will often be necessary.

#### [Information Commissioner Awareness Guidance No 2 Section 41](#)

**Section 44: Disclosure is already prohibited under another Statute, is incompatible with community obligations, or could result in contempt of court proceedings**

Section 44 applies to three distinct categories of information:

1. If there is an existing statutory bar to the disclosure of information by a public authority then that information will be exempt;

2. If disclosure would be incompatible with a European Community obligation then the information will be exempt; and
3. If disclosure would constitute or be punishable as a contempt of court at common law (for example because it would breach a court order) then it will be exempt.

Key point:

- The Human Rights Act 1998 can be a statutory bar to the disclosure of information if to do so would breach one of the Convention rights that have been incorporated into domestic law;

[Information Commissioner Awareness Guidance No 27 Section 44](#)

## **QUALIFIED EXEMPTIONS**

There are 17 qualified exemptions i.e. exemptions **where the public interest test applies** - would the public interest in withholding outweigh the public interest in disclosing?

### **Section 22: Information intended for future publication**

Section 22 may apply if there is an intention to publish the requested information at some future date. This ensures that the FOI Act does not force public authorities into premature publication of information.

Key points:

- Section 22 may apply even if the specific date for publication has not yet been determined but the proposed publication timetable must be **reasonable** in all the circumstances;
- Section 22 will only apply if a public authority has decided, before the request is received, to publish the information concerned;
- Section 22 is subject to a public interest balance.

[Information Commissioner Awareness Guidance No 7 Section 22](#)

### **Section 24: Safeguarding national security**

Section 24 applies to information whose exemption from the right of access is **required** for the purpose of safeguarding national security: in order to apply section 24, it will be necessary to decide whether any harm to national security might result from its disclosure.

**Key points:**

- In some circumstances it may be necessary to rely on both section 23 and section 24 in order to refuse to confirm or deny whether information is held in order to fully protect the important public interests concerned;
- When considering section 24, authorities should be alive to the need to consult the National Security Liaison Group or other interested parties.
- Section 24 is subject to a public interest balance.
- A ministerial certification procedure exists where it becomes necessary to rely on this exemption.

**Section 26: It would prejudice defence**

Section 26 applies to information whose disclosure would be likely to prejudice:

- a) the defence of the British Islands or any colony; or
- b) the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with them.
- c) In order to determine whether section 23 applies, it will be necessary to establish how exactly these defence matters would be prejudiced by disclosure of the information.

**Key points:**

- It will often be necessary to consult the Ministry of Defence in order to evaluate how and to what extent defence matters would be prejudiced by disclosure;
- Section 26 is subject to a public interest balance.

**[Information Commissioner Awareness Guidance No 10 Section 26](#)**

**Section 27: It would prejudice international relations**

Section 27 applies to the following two categories of information:

- a) Information whose disclosure would be likely to prejudice international relations. (The term "international relations" means relations between the UK and any other state, international organisation or court, or the interests of the UK abroad or the promotion or protection of those interests.)
- b) Confidential information obtained from another state, an international organisation or an international court.

**Key points:**

- Authorities should be alive to the need to consult the Foreign and Commonwealth Office in connection with the application of section 27
- Section 27 is subject to a public interest balance.

#### [Information commissioner Awareness Guidance No 14 Section 27](#)

#### **Section 28 It would prejudice relations within the UK, e.g. between NI Assembly and National Assembly for Wales**

Section 28 applies to information whose disclosure would be likely to prejudice relations between two or more administrations in the United Kingdom. The relevant administrations are: the government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly and the National Assembly for Wales.

##### Key points:

- Where necessary, regard should be had to the Memorandum of Understanding which has been agreed with the four administrations and which includes safeguards to ensure that information shared between administrations is appropriately protected;
- Authorities should be alive to the need to consult the other administration(s) concerned when determining whether section 28 applies, and in particular to be aware that separate freedom of information legislation applies in Scotland;
- Section 28 is subject to a public interest balance.

#### [Information Commissioner Awareness Guidance No 13 Section 28](#)

#### **Section 29: It would prejudice the economy**

Section 29 applies to information whose disclosure would be likely to prejudice the economic or financial interests of the United Kingdom or of any administration in the United Kingdom.

##### Key points:

- Authorities should be alive to the need to consult with HM Treasury when considering this exemption
- Section 29 is subject to a public interest balance;

#### [Information Commissioner Awareness Guidance No 15 Section 29](#)

#### **Section 30: Investigations and proceedings conducted by public bodies**

Section 30 is concerned primarily with preserving the integrity of certain proceedings and investigations which public authorities have the power or duty



to conduct. There are two ways in which the application of section 30 may be triggered:

- a) Where information has at any time been held for the purpose of specified criminal and other investigations or proceedings; and
- b) Where information relates to the obtaining of information from confidential sources and was obtained or recorded for a number of specified investigations or proceedings.

Key points:

- Section 30 can only be relied on by an authority which itself exercises one of the investigation or litigation functions that are specified in the exemption.
- Section 30 is quite a complex exemption and authorities will need to be alert to the precise terms in which its two limbs are expressed.
- Section 30 is subject to a public interest balance.

[Information Commissioner Guidance No 16 Section 30](#)

### **Section 31: It would prejudice law enforcement**

Section 31 is concerned with protecting a wide range of law enforcement interests and its application turns on whether disclosure would be likely to prejudice those interests.

Some interests that are protected by section 31 are drawn quite widely, for example: the administration of justice, the prevention or detection of crime and the operation of immigration controls. But section 31 also applies where the exercise by any public authority of certain specified functions would be prejudiced by disclosure. Those functions include: ascertaining whether a person is responsible for improper conduct, determining the cause of an accident and ascertaining a person's fitness to carry on a profession.

Key points:

- Section 31 only applies in cases where the information does not fall within section 30;
- The structure of section 31 is quite complex and it will be necessary to have careful regard to the important differences between the way in which the various categories of information are framed
- The categories within section 31 may overlap and consideration should be given to all categories that may apply.
- Section 31 is subject to a public interest balance.

## [Information Commissioner Awareness Guidance No 17 Section 31](#)

### **Section 33: Audits of accounts**

Section 33 can only be used by public authorities which have financial audit functions in relation other public authorities or whose functions include examining the efficiency, effectiveness and economy with which other public authorities discharge their functions. Section 33 applies to information whose disclosure would be likely to prejudice the exercise of these functions.

#### Key points:

- Section 33 only applies where one public authority has audit or monitoring functions in relation to another public authority. It does not apply where a public authority has such functions in relation to private sector bodies, nor does it cover internal audit and monitoring;
- Section 33 is subject to a public interest balance.

## [Information Commissioner Awareness Guidance No 18 Section 33](#)

### **Section 35: Formulation of Government Policy**

Section 35 is aimed at protecting the government policy-making process and its proper use is essential to ensuring the delivery of effective government. Section 35 applies to information which relates to:

- a) The formulation and development of government policy;
- b) Communications between Ministers (including Cabinet proceedings);
- c) The provision of advice by the Law Officers (or any request for advice); and;
- d) The operation of any Ministerial private office.

#### Key points:

- Section 35 can only be used by government departments or the National Assembly for Wales;
- Once a policy decision has been taken, statistical information that was used to inform the decision will no longer be protected only on the grounds that it relates to government policy or ministerial communications;
- Departments must be alive to the need to consult with interested departments and, where necessary, the DCA co-ordination unit to ensure that this exemption is properly applied;

- Section 35 It is closely related to section 36 which protects the effective conduct of public affairs but the two exemptions are alternatives and cannot be used cumulatively;
- Section 35 is subject to a public interest balance. Section 35(4) indicates that there is a particular public interest in the disclosure of factual information which is used to inform policy decisions.

#### [Information Commissioner Awareness Guidance No 24 Section 35](#)

#### **Section 36: Prejudice to effective conduct of public affairs**

Section 36 exempts information whose disclosure would be likely to have any the following effects:

- a) prejudice collective Cabinet responsibility;
- b) inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation; or
- c) prejudice the effective conduct of public affairs.

Key points:

- Section 36 can only be used if, in the reasonable view of a "qualified person", disclosure of the requested information would have one of the specified prejudicial effects. For most government departments, this means that a Minister of the Crown must decide that the exemption applies before it can be relied on to refuse a request for information;
- Section 36 can only be used if section 35 does not apply to the information;
- The application of section 36 is subject to a public interest balance.

#### [Information Commissioner Awareness Guidance No 25 Section 36](#)

#### **Section 37: Communications with Her Majesty, etc and honours**

Section 37 applies to two categories of information:

- a) Information relating to communications with Her Majesty, other members of the Royal Family or the Royal Household; and
- b) Information relating to the conferring by the Crown of any honour or dignity.

Key points:

- It is a fundamental constitutional principle that communications between the Queen and her Ministers are essentially confidential in nature: in most situations, the public interest in disclosure is likely only

exceptionally to outweigh the public interest in maintaining this aspect of the exemption;

- In respect of both parts of this exemption, public authorities should be alive to the need to consult relevant departments or private offices;
- Section 37 is subject to a public interest balance.

#### [Information Commissioner Awareness Guidance No 26 Section 37](#)

#### **Section 38: Health and Safety**

Section 38 applies to information whose disclosure would be likely to endanger the physical or mental health or the safety of any individual.

Key points:

- The individual concerned does not have to be identifiable: section 38 can apply where there is a group or class of persons, any or all of whom are likely to have their health or safety endangered by disclosure;
- Section 38 is subject to a public interest balance.

#### [Information Commissioner Awareness Guidance No 19 Section 38](#)

#### **Section 39: Environmental information**

Section 39 exempts environmental information whose disclosure is governed by the Environmental Information Regulations 2004. The Environmental Information Regulations 2004 implement a European Directive and establish a specific regime to enable individuals to access environmental information, including exemptions from that right of access. The disclosure of environmental information must be considered under the Environmental Information Regulations: section 39 therefore exempts this from the rights of access under the FOI Act.

Key points:

- If information is environmental information and is exempt under section 39, public authorities must consider its disclosure under the Environmental Information Regulations 2004; the Regulations may require the disclosure of information which would otherwise have been exempt under the FOI Act.
- Section 39 is subject to a public interest balance, but this should **not** be considered independently of the operation of the provisions in the Regulations.

#### **Section 40: Personal information relating to a third party**

Section 40 concerns personal data within the meaning of the Data Protection Act 1998. Section 40 applies to two distinct types of requests for information:

- a) If a request asks for the personal data of the applicant himself, the information is exempt; and
- b) If a request asks for the personal data of someone else then that information will be exempt if its disclosure would contravene any of the data protection principles in the Data Protection Act 1998 (or certain other provisions of the Data Protection Act 1998).

**Key points:**

- If information is exempt under section 40 because it is the personal data of the applicant then its disclosure must be considered under the subject access provisions in the Data Protection Act 1998; the Act may require the disclosure of information which would otherwise have been exempt under the FOI Act.
- For most authorities that receive requests for personal data of someone other than the applicant, the application of section 40 will in most circumstances turn on whether disclosure of the information to a member of the public would be 'unfair'.
- Officials must be alive to the need to consult experts where the application of section 40 is difficult or unclear: getting a decision wrong may result in breach of the Data Protection Act 1998.
- The majority of section 40 is not subject to a public interest balance.

**[Information Commissioner Awareness Guidance No 1 Section 40](#)**

**Section 42: Legal professional privilege**

Section 42 applies to information that would be subject to legal professional privilege if litigation were in progress. Legal professional privilege covers confidential communications between lawyers and clients and certain other information that is created for the purposes of litigation. Section 42 ensures that the confidential relationship between lawyer and client is protected.

**Key points:**

- Whether information is subject to legal professional privilege is a question of law and it will very often be necessary to consult legal advisers in connection with this;
- Advice from the Law Officers is also governed by section 35 and the Law Officers should be consulted where their advice is the subject of a request;
- Section 42 is subject to a public interest balance. However, given the very substantial public interest in maintaining the confidentiality of legally professionally privileged material, it is likely to only be in exceptional circumstances that this will be outweighed by the public interest in disclosure.

## [Information Commissioner Awareness Guidance No 4 Section 42](#)

### **Section 43: Commercial interests**

Section 43 exempts information whose disclosure would be likely to prejudice the commercial interests of any person. It also includes a specific exemption for trade secrets.

#### **Key points:**

- Section 43 protects not only the commercial interests of third parties but also the commercial interests of the public authority that holds the information;
- Public authorities will need to bear in mind that the commercial sensitivity (particularly the market sensitivity) of information will usually decrease with time;
- Section 43 is subject to the public interest test.

## [Information Commissioner Awareness Guidance No 5 Section 43](#)