

**Ministry of Defence  
Access to Information**

## **Guidance Note E5: Other FOI exemptions (absolute and qualified)**

If considering using any exemption you are advised to consult the MOJ and ICO guidance at <http://www.dca.gov.uk/foi/guidance> and <http://www.ico.gov.uk>

Read also *Guidance Notes A3: Summary of the FOI Act* and *E1: Withholding information*.

### **1 S.25 Ministerial Certificates under s.23 and s.24: supplementary provisions**

S.25 makes supplementary provision to the certification process under s.23 and s.24, for evidential purposes. This is covered in *Guidance Note E6: Ministerial certificates*.

### **2 Absolute Exemptions**

2.1 Although absolute exemptions do not require a request for information to be subject to a public interest test, each request must be considered on its own merits. A decision to withhold information under an absolute exemption must therefore be justified and recorded as it may be appealed to the Information Commissioner. Exemptions may not apply to the whole of the information requested and consideration should be given as to whether it is feasible to release some information, or to help the applicant in other ways.

### **3 S.32 Court records, etc.**

3.1 S.32 exempts, as a class, information contained in specific types of record. The duty to confirm or deny that the requested information is held does not arise in relation to such information. It exempts information which is held by a public authority solely by virtue of the fact that it is contained in documents filed with, or placed in the custody of a court, or served upon, or by, the public authority, for the purposes of such proceedings, or which a court has created, for the purpose of such proceedings (e.g. bench memoranda).

3.2 S.32(2) extends the exemption to information recorded or obtained by a public authority for the purposes of its functions relating to statutory inquiries (including those to which the Tribunals of Inquiry (Evidence) Act 1921 applies) and to arbitrations. In either case, evidence could be given to the inquiry or arbitration by third parties and the inquiry could create documents of its own. MOD could hold this information, either because it was a party, or because it held inquiry papers.

3.3 S.32(4) contains a definition of 'court', which is the same as that in s.19 of the Contempt of Court Act 1981, thereby bringing in tribunals and other bodies exercising the judicial powers of the State. This section also applies to the judicial functions of coroners and documents relating to any particular inquest, or post-mortem examination. It does not apply to information, which a public authority holds otherwise than in the documents specified, even though the information may relate to, and be deployed in connection with, particular proceedings.

### **4 S. 34 Parliamentary privilege**

4.1 S.34 exempts information if this is required for the purpose of avoiding an infringement of the privileges of either House of Parliament. The duty to confirm or deny that the requested information is held does not apply insofar as s.34 is required for the purpose of avoiding an infringement of the privileges of either House. S.34(3) and s.34(4) make provision for the Speaker of the House of Commons, in relation to that House, and the Clerk of the Parliaments, in relation to the House of Lords, to sign certificates as conclusive evidence that the exemption applies.

## 5 Qualified Exemptions

5.1 In order to withhold information under a qualified exemption, the policy within MOD is that this is authorised by a member of the SCS or a 1\* equivalent. This is intentionally in line with the process for Parliamentary Questions. Any relaxation of this policy must be agreed in advance and documented in local procedures. The 1\* needs to assess the applicability of the exemption, that it causes harm or prejudice and where the balance of public interest lies in the case. The judgement on public interest is whether the public interest in withholding the information outweighs the public interest in disclosing it. Note that this is deliberately in favour of disclosure where the two aspects of public interest are equal. **All qualified exemptions require the application of the public interest test** (see *Guidance Note E4*).

! Although an authorised disclosure will not be prohibited by the Official Secrets Act, where an exemption requires the public interest test (e.g. on defence or national security), the decision for disclosure will be a matter of judgement and may be finely balanced. It is therefore particularly important to ensure that decisions to release hitherto sensitive or classified information is authorised in accordance with local (e.g.) TLB procedures. For more detail on the Official Secrets Act: see *Guidance Note B1: Access to information legislation*. Where information is classified: see *Guidance Note A3: Summary of the FOI Act*.

## 6 S. 28 Relations within the United Kingdom

6.1 This section exempts information, which would, or would be likely to prejudice relations between any two administrations in the UK. These are defined as the UK government, the Scottish Administration, the National Assembly for Wales and the Executive Committee of the Northern Ireland Assembly.

## 7 S. 29 The UK economy

7.1 This section exempts information, the disclosure of which would, or would be likely to prejudice the economic interests of the UK, or the financial interests of any administration in the UK. This includes, for example, budgetary interests. The duty to confirm or deny that the requested information is held does not arise if to comply would, or would be likely to, prejudice these interests.

! If considering using this exemption, consult HM Treasury via Info Access referral to the DCA Clearing House.

## 8 S. 30 Investigations and proceedings conducted by public authorities

8.1 Information is exempt if it has at any time been held by the MOD for the purposes of criminal investigations or proceedings, such as determining whether a person should be charged with an offence or whether a charged person is guilty, or investigations which may lead to a decision to institute criminal proceedings. The duty to confirm or deny does not apply to such information. S.30(6) modifies this so as to take account of the different criminal procedure in Scotland.

## 9 S. 31 Law enforcement

9.1 Information which is not exempt under Section 30 Investigations and Proceedings, may be exempt under this exemption in the event that disclosure would, or would be likely to, prejudice the following among others:-

- the prevention or detection of crime
- the apprehension or prosecution of offenders
- the administration of justice
- exercise of functions such as ascertaining if a person has broken the law, is responsible for improper conduct, whether circumstances justify regulatory action, ascertaining a person's fitness or competence in relation to their profession, ascertaining the cause of an accident
- any civil proceedings brought by or on behalf of the public authority which arise out of an investigation carried out for any of the purposes mentioned above.

The duty to confirm or deny does not arise where prejudice would result to any of these matters.

## **10 S. 33 Audit functions**

10.1 This section exempts the disclosure of information, which would, or would be likely to prejudice the exercise by any public authority of its auditing functions. It relates to the audit of the accounts of other public authorities, or examinations into the efficiency, economy and effectiveness with which they use their resources to discharge their public functions. This section **does not** extend to the internal auditing functions of authorities. The duty to confirm or deny, does not arise if compliance would prejudice the authority's auditing functions.

## **11 S. 37 Communication with Her Majesty, etc. and honours**

11.1 The FOI Act does not apply to the Royal Household. This exemption is narrow, covering information relating to communications with Her Majesty, the Royal Household etc but is still subject to the public interest test.

**!** If considering using this exemption, consult Cabinet Office via Info Access referral to the MOJ Clearing House.

11.2 Personal information relating to the Royal Family (e.g. property and funeral arrangements) may be exempt under s.40 (personal information). The Information Commissioner's guidance advises that information relating to royal visits may be exempt under s.23 and s.24 (the national security exemptions) and s.38 (health and safety).

11.3 S.37 also provides an exemption to public authorities regarding requests for information relating to honours and dignities conferred by the Crown. This includes military medals and gallantry awards.

## **12 S. 38 Health and Safety**

12.1 Information is exempt information if its disclosure under the Act would, or would be likely to

- endanger the physical or mental health of any individual, or
- endanger the safety of any individual.

**The duty to confirm or deny does not arise where prejudice would result.**

## **13 S. 39 Environmental Information**

13.1 Environmental information can cover information relating to: air, water, land, natural sites, built environment, flora and fauna, and health. It also covers all information relating to decisions or activities affecting any of these. These could therefore include enquiries about recycling,

transportation, troop movements, car parking etc. Environmental information is exempt under FOI where it is covered by the EIRs. See Guidance Notes *B3: EIRs*, *B4 Applying the EIRs and E7: EIRs exceptions*.

#### **14 S. 42 Legal professional privilege**

14.1 Information in respect of which a claim to legal professional privilege (or in Scotland to confidentiality as between client and professional legal advisor) could be maintained in legal proceedings is exempt information. Legal professional privilege covers any advice given by legal advisers, solicitors and barristers. Generally such information will be privileged. If you wish to disclose the information you will need to seek consent from the provider of the advice. The duty to confirm or deny does not arise where to do so would involve the disclosure of such information.

#### **15 Other categories of refusal**

15.1 In addition, FOI requests can be refused under the following:

- s. 12 Cost of compliance exceeds appropriate limit The cost of supplying the information would exceed a set limit, See Guidance Note *D9: Charging*.
- s. 14 Vexatious or repeated requests See Guidance Note *D6 Invalid requests*.
- s. 44 Prohibitions on disclosure Information is exempt where its disclosure is prohibited under any other legislation by order of a court or where it would constitute a contempt of court or where it is incompatible with any EC obligation. See *Guidance Note E10: Statutory prohibitions on disclosure*