



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN18: Exemptions Overview

Document history

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What this is about:

This note provides an overview of the reasons for withholding information which must be explained to a requester. A public authority must identify the exemption(s) under which the information is being withheld and explain why it applies, unless to do so would reveal exempt information. This note provides an outline of the exemptions in the Freedom of Information (FOI) Act; the difference between 'absolute' exemptions and 'qualified' exemptions, and the difference between 'class-based' and 'prejudice-based' exemptions.

Detail:

Exemptions in Part One of the FOI Act:

- A Part 1 exemption (i.e. section 12 or section 14) can be applied without locating all of the information in scope of a request **but can only be applied when specific criteria apply**.
- Section 12: This exemption allows the public authority to refuse a request on cost grounds (s12) ([See Section 1 – Initial Handling of RFIs -Section 12](#)).
- Section 14: This exemption allows a public authority to refuse a request where an identical or similar request was received within the previous 60 days (14(2)) or where the request is considered vexatious (14(1)). [See the section 14\(vexatious\) compliance note](#)
- These are handling exemptions and require no test of the public interest to be undertaken, although in applying them you must ensure that you have read the relevant guidance and the request matches any qualifying criteria.

Exemptions in Part Two of the FOI Act:

- Part Two exemptions may be class- based or prejudice based. Exemptions within these two categories may be absolute, providing no right of disclosure or qualified where the decision on disclosure is dependent on a mandatory test of the public interest.
- The distinction between 'class-based' and 'prejudice-based' is not in the wording of the FOI Act but many people find it a useful way of thinking about the exemptions.

Class-based exemptions

- Some exemptions apply only to a particular category or class of information, such as information held for criminal investigations or relating to correspondence with the Royal family. These are called class-based exemptions. Where information falls within the class of covered by a class-based exemption the exemption will always apply (providing it is clear

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that the information genuinely falls into the class of information) and the decision on disclosure is made on the weight of the public interest arguments for and against disclosure.

- Class based exemptions are listed at the end of this note.
- The Act also often refers to other legislation or common law principles, such as confidentiality, legal professional privilege, or data protection. In many cases, you may need to apply some kind of legal 'test' - it is not as straightforward as identifying that information fits a specific description. **It is important to read the full wording of any exemption and read the specific detailed guidance on the exemption, before trying to rely on it.**

Prejudice-based exemptions

- Some exemptions require you to judge whether disclosure may cause a specific type of harm, for instance, endangering health and safety, prejudicing law enforcement, or prejudicing someone's commercial interests. These are called prejudice-based exemptions.
- For prejudice-based exemptions, the FOI Act uses the following wording: "disclosure... would, or would be likely to, prejudice".... interests or factors specified in the exemption.
- Prejudice-based exemptions only come into play if a particular disclosure would prejudice the purpose of the exemption; an example is section 27 which covers information affecting international relations.
- An authority must establish the likely prejudice that would be caused before going on to consider the public interest test. It is necessary to identify both the form of the prejudice that would occur (i.e. the potential prejudicial scenario that would arise) and the likelihood of that risk occurring. Where the prejudice-based exemption uses the form "would" "or would be likely to" select one of these to define the risk of prejudice you envisage. Clearly "would" defines a greater likelihood that the prejudice would occur than "would be likely to".

Absolute exemptions.

These are listed under section 2(3) of the FOIA: sections 21, 23, 32, 34, 36 (part), 40 (part), 41 and 44. Where an absolute exemption applies, there is no right to the information under the FOI Act. The public interest test is not relevant to absolute exemptions although if there is an overriding public interest in disclosure (e.g. expenses of senior civil servants – section 40) the exemption will not be used to withhold the information even though it could be applied.

Qualified exemptions.

These are not specifically listed in the FOI Act, but are those not identified as having absolute status. They are listed at the end of this note. Where it is deemed that any of these exemptions apply, the decision on whether to withhold or release the information should be based on the results of a public interest. ([See Section 4 – Public Interest Test](#)).

SUMMARY

- The FOI Act contains provisions that provide for the exemption from disclosure of certain types of information.

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- The FOI Act contains two forms of exemption:

'Absolute' exemptions that are not subject to any public interest assessment, they act as absolute bars to the disclosure of information;

and

'Qualified' exemptions where a public interest test must be made in order to determine where the balance of the public interest lies in either disclosing the information or maintaining the exemption.

Absolute exemptions (See Section 3 – FOI Exemptions)

Section 21 - Information that is reasonably accessible by other means

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

Section 32 - Information contained in court records

Section 34 - Where disclosure of the information would infringe Parliamentary privilege

Section 36 - Information held by the House of Commons or the House of Lords, where disclosure would prejudice the effective conduct of public affairs (s.36). (Information that is not held by the Commons or Lords falling under s36 is subject to a public interest test.)

Section 37 - Information that relates to communications with HMQ, the heir and the heir apparent. (Information that relates to communications with other members of the Royal Family or with the Royal Household, conferring of honours falling under s37 is subject to a public interest test.)

Section 40 - Information which (a) the applicant could obtain under the Data Protection Act or (b) where release would breach the data protection principles

Section 41 - Information provided to a public authority in confidence (incl from another public authority)

Section 44 - When disclosing the information is prohibited by an enactment; incompatible with an EU obligation; or would commit a contempt of court

Qualified exemptions (subject to a public interest test, approved in MOD at one-star level)

Qualified exemptions can be sub-divided into two further categories:

'Class-based' exemptions covering information in particular 'classes' of information; and

'Prejudice' or Harm-based exemptions covering situations where disclosure of information would be liable to cause harm that need to be decided on a case-by-case assessment.

Class-based exemptions (See Section 3 – FOI Exemptions)

Section 22 - Information intended for future publication

Section 24 - Information which does not fall within section 23(1) is exempt if required for the purpose of safeguarding national security

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Section 30 - Information held for purposes of investigations and proceedings conducted by public authorities

Section 35 - Information relating to the formation of government policy, ministerial communications, advice from government legal officers, and the operation of any ministerial private office

Section 37 - Information that relates to communications with other members of the Royal family, and conferring honours

Section 39 - Prevents overlap between FOI Act and EIR regulations requiring disclosure of environmental information

Section 42 - Information covered by professional legal privilege

Section 43 - Trade secrets

'Prejudice' or Harm-based exemptions (See compliance notes for each exemption on Defence Intranet)

Section 26 - Prejudice the defence of the British Isles or the capability, effectiveness or security of any relevant forces

Section 27 - Prejudice international relations

Section 28 - Prejudice relations between any administration in the United Kingdom and any other such administration

Section 29 - Prejudice the economic interests of the UK

Section 31 - Prejudice law enforcement (e.g., prevention of crime, apprehension/prosecution of offenders, administration of justice, etc.)

Section 33 - Prejudice the auditing functions of any public authorities

Section 36 - In the reasonable opinion of a qualified person: prejudice the effective conduct of public affairs; prejudice collective responsibility; or inhibit the free and frank provision of advice or exchange of views

Section 38 - Endanger physical or mental health, or endanger the safety of the individual

Section 43 - Prejudice commercial interests (either of public authority or public authority private partner)

For further information – see the ICO's detailed guidance:

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx