

MOD FOI/EIR Compliance Notes

FOI Exemptions

CN37: Section 41 (Breach of Confidence)

Document history

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What this is about:

This note provides an overview on exemption section 41 of the Freedom of Information (FOI) Act – information obtained from any person where disclosure would be a breach of confidence actionable by any person. It also provides an outline of MOD compliance points to consider when engaging section 41 and other exemptions to consider.

Detail:

- Section 41 applies to information obtained from any other person, including another public authority, where release would constitute an actionable breach of confidence (where the provider or a third party would have the right to take the MOD to court).
- Duties of confidence continue after the death of an individual to whom that duty is owed.
- The exemption is **absolute unless there is an overriding public interest** in disclosure. A test of the Public Interest Test is not required.

MOD compliance points:

- A **duty of confidence** arises when information is provided to the MOD in the expectation that it will only be used or disclosed in accordance with the wishes of the confider. Obligations of confidence may be explicit (in the form of a letter or contractual obligation) or implied (such as information provided to a doctor). In some circumstance it may be difficult to determine if information was provided in confidence (such as information provided to an MP by a constituent); the usual test is to assess the vulnerability to a breach of confidence action or to approach the information provider. Where the provider agrees to its release, information may be disclosed.
- If you are considering disclosing such information you should consult the third party who provided it prior to release, as well as notifying them before disclosure. If it is not practicable to obtain the consent of the provider of the advice, the matter should be referred to CIO.
- For information to be protected by section 41 it must also have the necessary **quality of confidence**. The information need not be highly confidential, but it cannot be trivial – since release of such information would not result in an actionable breach. Additionally, the information cannot be widely publicly available. Simply having a protective marking, such as being marked ‘commercial in confidence’ does not guarantee a quality of confidence.

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- **Information may be released where there is an overriding public interest to do so.** In such cases an inherent public interest test in the duty of confidence needs to be applied.
- This is the reverse of the normal PIT process, since there is a presumption in favour of withholding unless strong arguments in favour are shown. These may include exposing public impropriety, misconduct, illegality or risks to the public.
- This exemption would not usually apply to completed contracts, but may apply to elements of them. Those entering into a contract with the MOD are made aware that any information provided to the MOD will be covered by the FOI Act, and may be subject to release if a request is made.
- The duty to confirm or deny whether information is held does not arise where to do so would involve the disclosure of such information. Disclosure of the fact that information on a topic was obtained in confidence could, in some circumstances, disclose something of the substance of the information.

Other exemptions to consider:

- The wider harm which release of confidential information could cause should be considered in the exemptions used, which might require engaging **section 43 (prejudice to commercial interests)** instead of/in addition to section 41.
- If information was obtained from another state, international organisation or international court, then **section 27(2), (International relations)** should be applied instead of section 41.
- If the information in question is Legal Advice provided to the MOD in confidence by a lawyer, then **section 42 (Legal Professional Privilege)** should be applied. However, if the Legal Advice has been obtained from a third party, it may be simpler to apply section 41 instead.
- Since government departments cannot sue each other, Section 41 cannot be used to protect information passed between them. **Section 36, (Prejudice to the effective conduct of public affairs)**, should be considered instead.

MOD Casework Example:

- **Queen Elizabeth Contract Information** – A request was made for a copy of the contract between MOD and BAE Systems for the construction of the Queen-Elizabeth Class Carriers. Whilst elements of the contract were released, sections of information provided in confidence were withheld, in line with the confidentiality agreement reached between the MOD and its commercial partners. These redactions were checked and agreed to by all parties.

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