

**Ministry of Defence Access to Information  
Guidance Note**

Version 6

June 2009

## **Guidance Note E4: The Public Interest Test**

See also the MOJ guidance at: <http://www.justice.gov.uk/guidance/foi-exemptions-public-interest.htm>

1. The public interest test (PIT) enables decisions to be made on a case-by-case basis on where the balance between disclosing or withholding information lies. It **must** be used when considering whether or not information should be withheld under an FOI qualified exemption or any exceptions of the EIRs. The provision of the PIT recognises that, although a particular interest may sometimes be harmed by disclosure (and is therefore protected by an exemption or exception), when other, broader, factors are taken into consideration, the greater public interest is served by release. **The underlying assumption is that information can be released unless the public interest in withholding can be shown to be greater than the public interest in release**

1.2 Described by the Information Commissioner as being “at the heart of the Freedom of Information Act”, the public interest test is of fundamental importance being a recognition that public authorities act on behalf of the public as a whole – in the public interest - not in the name of, or on behalf of individuals or private interests. This means that the decisions you make on the release of information by the MOD must be taken with the interests of the public as a whole firmly to the fore and from the starting presumption that disclosure is in the public interest.

### **What is the Public Interest?**

2. There is no definition of public interest (or of “harm”) in either the FOI Act or EIRs. This is so that officials considering a request for information can conduct a specific analysis in light of the current circumstances, rather than being constrained by set criteria. The balance of public interest in respect of the disclosure of a particular piece of information may change over time, and factors for and against disclosure must be weighed in response to each request when it is received.

- ✘ Public interest is not the same as what the public is interested in – public curiosity about a subject is not the same as the public interest favouring the release of information.
- ✘ It is not valid to claim that information might be misunderstood because it is complex or out of context. Where appropriate, you should provide background and/or context (this would be consistent with the duty to provide advice and assistance). Also consult the Press Office who may wish to place more context in the public domain.
- ✓ The Act is intended to increase openness and the exemptions cannot be used to avoid this. The Information Commissioner has the power to ensure that the exemptions are not abused.
- ✓ Consider the harm (actual or potential) to the public interest which would result from disclosure of the information. This may involve more than one exemption or exception.
- ✓ Consider both the degree of harm, and the likelihood of the harm occurring.

### **Applying the Public Interest Test**

3. The process of applying the test is relatively straightforward:

- Can the information be released without harm?
- If not, do any exemptions or exceptions apply?
- If so, are they FOI qualified exemptions or any of the EIR exceptions?
- Consider the public interest in having the information released.
- Consider the harm (actual or potential) to the public interest which would result from disclosure of the information. This may involve more than one exemption or exception.

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- Consider the degree of harm, both in terms of the degree and the likelihood, of the harm occurring.
- Compare the two public interests. Even if releasing the information would cause harm, does the public interest still favour disclosure?
- Withhold information ONLY where the harm in releasing is GREATER than the public interest in disclosure. In some cases, this will be clear-cut, but quite often it will not. This assessment will essentially be a matter of judgement on a case by case basis by the policy staff who lead on the subject concerned.
- Remember that each item withheld needs to be justified. Different exemptions/exceptions might occur within a document.

## **Public interest factors in favour of release.**

3.1 Factors likely to argue in favour of disclosure will include furthering public understanding of key policy proposals or decisions, as well as promoting accountability and transparency about the decisions taken by public authorities and about the use of public money. There is also an accepted public interest in allowing individuals to understand decisions which affect their lives or which have an effect on public health and safety. However it is also accepted that what the public are interested in and what is in the public interest are not necessarily the same. Broadly, the release of information serves the public interest if it will enhance accountability or prevent harm.

3.2 Examples of the types of information it is in the public interest to release include:

### **Enhancing Accountability**

- Information relating to matters of public debate; public spending decisions; or performance monitoring;
- Letting people know the basis for decisions and fostering participation in public life
- Information that illustrates and preserves procedural fairness or means that justice is seen to be done

### **Preventing Harm**

- Information that reveals a crime or prevents one being committed; or that reveals or prevents misconduct or a miscarriage of justice
- Information that reveals a risk to public safety or the environment
- Information which protects the vulnerable when released
- Information that prevents the public being misled

This list is only illustrative, it should not be assumed that information of the type described should necessarily be disclosed.

## **Public interest factors in favour of withholding.**

3.3 It is not possible to be definitive about cases where the balance of public interest will weigh against disclosure. As already noted, this will depend on the specific information and the prevailing circumstances: there should be no assumption that because information has been exempt in the past it will continue to be so. Factors which could tip the balance against disclosure include where this might endanger the safety of personnel, undermine effective government by discouraging frankness and candour in communications, or threaten the Department's competitive position in a commercial matter.

## **Balance of public interest**

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3.4 Even if releasing the information would cause harm, does the public interest still favour disclosure? Withhold information ONLY where the harm in releasing is GREATER than the public interest in disclosure. In some cases, this will be clear-cut, but quite often it will not. This assessment will essentially be a matter of judgement on a case by case basis by the policy staff who lead on the subject concerned. **Remember that each exemption applied needs to be justified separately and authorised at 1\* level.** Different exemptions/exceptions might occur within a document, use of the commercial exemption requires consultation with a commercial officer *see the Commercial guidance Note*

3.5 Since the applicant is entitled to appeal against a refusal to release information (ultimately up to the Information Tribunal) you must keep an audit trail showing clearly how and why the final decision was reached, including that the PIT was applied. This must include a summary of the argumentation used. One way to do this would be to compile a table, listing all the various arguments for and against release of each potential exemption/exception under headings such as:

- Openness and transparency
- Potential impact on government policy development
- Effects on the public
- Free and frank provision of advice
- Timing of release of information

The specific headings would, of course, depend on the nature of the request, but must demonstrate that all angles were actively considered.

### Extended deadline

4. The FOI Act normally requires requests to be answered within 20 working days. If you need longer to consider a PIT when dealing with information covered by a qualified exemption then you must inform the applicant at an early stage and give (and meet) a reasonable revised deadline (*please use the template provided in related links*). If there is other information relevant to the request which can be released, or is being withheld under an absolute exemption then this part of the response should be provided without delay. **As absolute exemptions do not confer any possibility of extending the time limit, it is essential that any response relying on their use is sent promptly and no later than 20 working days after receipt of the request.**

4.1 S.10(3) only allows delay in responding until 'such time as is reasonable in the circumstances'. The applicant may disagree and request an Internal review of the decision to delay, and subsequently appeal to the Information Commissioner. Where it is possible to consider the information, make an assessment of the public interest and respond within 20 working days, you must do so. You must have fully considered the information requested BEFORE deciding that the public interest test means that the time for response has to be extended. This initial assessment should take place promptly. Authorities must **not** presume that all the information requested falls within the terms of an exemption without considering it and must not issue blanket extensions of time. You should use the appropriate template to inform the applicant within 20 working days that the MOD response will be delayed.

### Neither confirm nor deny

5. If you may be relying on a qualified exemption in order to neither confirm nor deny that you hold the requested information, and you need additional time in order to consider the public interest, you should seek advice from CIO CI Access to assist the drafting of the holding response. Remember that, for all matters relating to NCND, the correct process for engaging legal advice is through CIO CI Access. Do not approach any legal advisors on this before contacting CIO CI Access.

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**Informing the applicant**

6. Once the public interest test has been applied, a response must then be sent to the applicant. When a qualified FOI exemption (or any EIR exception) is cited, the balance of factors for **and** against disclosure must be explained in your reply and the reason why the balance of interest is in withholding. Full background analysis is not required but the summary must indicate that full consideration of the request has been given and the public interest test applied. Do not release any internal document you may have produced in reaching your decision to withhold information, the explanation is best provided in the body of the response letter. Where a number of exemptions have been applied provide a separate paragraph to explain the use of each one.

**Points to remember**

- Qualified exemptions in the FOI Act and the exceptions in the EIRs require a PIT
- Info can only be withheld where the balance falls in favour of withholding
- A decision to withhold information must be approved at 1\* level
- The 20 working days to respond to an FOI request can be extended to conduct a PIT

**However** - Within the initial 20 working days you must:

- Inform the requester that you require further time to carry out a PIT
- Say what exemptions you believe may apply
- Give an estimated date of response

**Do**

Try to respond as quickly as possible.

Aim to complete the PIT within a further 20 working days.

Keep the requester informed if there is likely to be further delay in replying.

Remember this is a 'right' to access information

**Don't**

Extend this without good reason- the time taken must be '**reasonable**' in **all the circumstances of the case**. There will be some complex issues that require consultation but you should make every effort to answer as quickly as possible.

**Do not delay access to information without good cause**

- Remember that embarrassment and potential confusion are not legitimate reasons for withholding information.
- Although the PIT compares the public interests for and against disclosure- the scales start weighed in favour of disclosing the information.
- The assessment of the balance of the public interest will change over time. The assessment of the public interest is a judgement in which fact, policy and law are all involved to some degree.
- The balance of the public interest therefore needs to be reviewed afresh in response to new requests for the information. Judgements about disclosure are not about whether it should take place in a general sense but whether it is appropriate for it to happen at the particular time that a request is received.

**Keep an audit trail!**