



Wales Office



Freedom of Information Manual

walesofficefoi@walesoffice.gsi.gov.uk

December 2010

Introduction to Freedom of Information (FOI)

The Freedom of Information Act 2000 provides greater access to information held by the Wales Office and other Government Departments in two ways:

- The right to be informed in writing whether the Wales Office holds the information requested; and
- if the information is held, the right to have that information released to him/her.

unless there are reasons as outlined in the legislation that means it is not in the public interest to either release the information, or even to confirm or to deny that it exists.

These rights of access are legally enforceable. It is fully retrospective and so applies to all information, no matter how recent or old the information is. Requesters do not have to actually cite the Act in their request.

Any individual whose request for information is declined or ignored has the right to approach the department in question, to ask for a review of the decision. However, there are cases where the public's right to access information is subject to limitations and these limitations are called exemptions.

Anyone may request information from the Wales Office (note they do not have to live in the UK or be a British national). They can request this through a written letter, fax or email. The request should have the name and address of the applicant for a response, although an email address is also acceptable. The request must describe the information required. Note that they do not have to actually state that they are requesting information under the Act.

Key contacts

walesofficefoi@walesoffice.gsi.gov.uk

[REDACTED]

[REDACTED]

Other access rights legislation

The public also have the right to request information under two more pieces of legislation.

Environmental Information Regulations (EIR)

The revised and strengthened Environmental Information Regulations (EIR) came into force on 1 January 2005. It gives access rights to any individual, anywhere in the world, but it deals specifically with information relating to any decisions, activities and policy formulation that may have an impact on the environment. The definition of environmental information is broad and includes such things as:

- Water pollution statistics
- Information about the built environment
- The food chain
- Information regarding the public authorities Health and Safety polices.
- Cost benefit analysis
- Information regarding discharges and emissions
- Any information regarding policy plans and programmes that affect, or likely affect, the environment.

The key features of the EIR are:

- Requests may be made in writing or orally
- Replies must be within 20 working days
- There is no upper limit for the cost of meeting a request beyond which the request may be refused
- There is a limited range of exemptions, all of which are subject to the public interest test.
- Requests do not have to cite the EIRs.

Data Protection Act (DPA)

There are two main ways in which the Data Protection Act protects people's right to a private life:

- It set out eight data protection principles that people must comply with when dealing with and disclose personal information
- It gives individuals a number of specific legal rights, in particular the right of access to their personal details.

The DPA is also known as 'subject access request' and the main key points for processing are:

- From January 2005 it applies to all personal information that is held by public authorities and government departments
- Officials must reply within 40 calendar days
- Those who make a request do not have to cite the DPA
- There are a number of exemptions, which can restrict the right to access to information

Dealing with an FOI request – key concepts

What initially happens when the request is received?

It is important to log any Freedom of Information request as promptly as possible as the Act lays down statutory time limits for replying – currently 20 working days from receipt. The performance of each government department is published annually.

Most FOI requests will come to the Correspondence Unit or FOI team (see key contacts list on the inside front cover) first. If you receive a request, you must forward it without delay to the FOI team – do not action it without clearance from the FOI team to do so.

The FOI team will

- log and dispatch the request to an action official according to subject area;
- copy the request to the Private Offices, Special Advisers, Glynne Jones, [REDACTED] and to the Strategy Unit and
- co-ordinate the response and provide advice if necessary.

If you do not believe that you are best placed to action the request, you must inform the FOI team immediately.

Extensions to the 20 working day limit

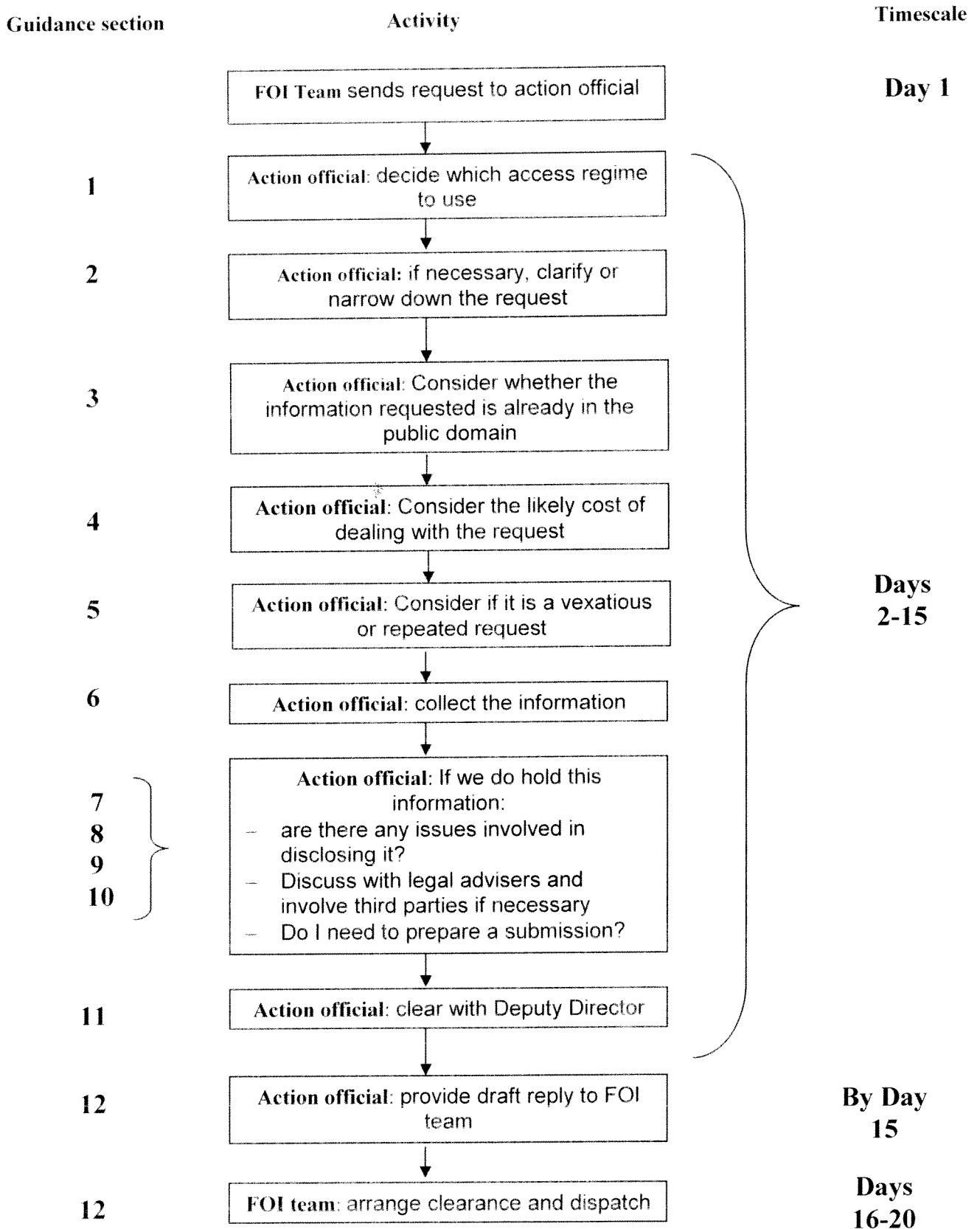
There are exceptions where extra time can be taken into account when responding to a request, such as for applying the public interest test – the Act allows the timescale to be extended by a 'reasonable period'. Although there is no statutory time limit on how long is considered a reasonable period, under s17(2) officials must give an estimated date by which they expect to arrive at a decision. These estimates must be realistic and particular to each case; it should also reflect any lead-time involved in consulting third parties. If you exceed the additional time, the applicant must be informed, with reasons for delay and an update on when the likelihood of a decision will be.

The FOI team will send a letter to the requestor stating that we need more time to consider their request and giving an estimated date. Please note that action officials do not write.

What should I do when I've been assigned a request for action?

Action officials must provide a draft reply to the FOI team within 15 working days of receipt. This allows time for clearance. If a longer time is needed (for example, to conduct a public interest test), you must inform the FOI team immediately and well before the statutory 20 day deadline with an estimated time for completion. The FOI team will prepare a holding letter.

Actioning an FOI request



1. Decide which access regime to use

ACTION
OFFICIAL
LEADS

Almost all requests should be dealt with under the FOI framework. If the request is for personal data, then you should consider using the DPA instead.

If you need guidance on which regime is most suitable, contact the FOI Team for advice.

2. If necessary, clarify or narrow down the request

ACTION
OFFICIAL
LEADS

A number of requests made for information under the Act can be very broad and fail to describe the information requested clearly enough to enable officials to identify and locate the information. If the request is too broad or general in nature (e.g. seeks all information on a topic over many years) you have a duty to provide advice and assistance to the applicant in order to focus the request. However, the breadth of the request is not an automatic reason to refuse it, although time considerations might well be relevant here.

There are some other reasons why an applicant's request may need validating, such as:

- Timescale too broad - i.e. *is question asking since devolution, this year or last, this month etc?*
- Geography – *question may not be clear whether Wales or UK.*

In these instances, we must write to the applicant asking for clarification of their request. The action official should draft a suitable letter (using the template on TRIM) and send **to the FOI team** for distribution.

3. Consider whether the information requested is already in the public domain

ACTION
OFFICIAL
LEADS

Information that is 'reasonably accessible to the applicant by other means' is exempt under FOI Section 21, even if there is a charge attached to accessing the information.

Under Section 19 of the Act, all public authorities must adopt and maintain a publication scheme. The publication scheme sets out classes of information which the Department intends to make available to the public as a matter of course, the manner in which the information is to be made available and whether the information will be provided free of charge or for a charge. The Wales Office scheme can be seen on our website.

Consider whether the information requested is already in the public domain. The information may be available through:

- The Department's publication scheme;
- The Stationery Office;
- At The National Archives or from local libraries.

If the information is now or soon to be publicly available, you have the discretion to refuse the request (under section 21 or 22 of the Act) Applicants should be directed to where they can obtain the requested information. Draft an appropriate letter and return to the FOI team.

If the Department does not hold the information that has been requested, but you believe another public authority holds it, you should consider the best way to help the requester. In most cases this will mean contacting the requester and supplying the contact details of the public authority in question.

Note that if the requester is asking for you to create information that is not already held at the time of receipt of the request you are not obliged to create the information.

4. Consider the likely cost of dealing with the request

ACTION
OFFICIAL
LEADS

Consider the likely cost of dealing with the request information. Will the cost of locating, retrieving, and extracting the information exceed the appropriate limit? The appropriate limit for Central Government is set at £600, which represents the estimated cost of one person spending 3½ working days in determining whether the Department holds the information, and locating, retrieving and extracting the information. The £600 limit covers the time taken to find, sort, edit or redact material. It does not cover the time taken to consider whether an exemption applies and the public interest test.

If you consider the request is likely to exceed this limit, you must let **the FOI team** know so that they can inform the applicant.

5. Consider if it is a vexatious or repeated request

ACTION
OFFICIAL
LEADS

If the Wales Office has previously complied with a request for information that was made by a person (and the same person repeats the request or substantially similar request), then officials do not need to comply with a repeated request. This is unless a reasonable period of time has elapsed between compliance with the first request and receipt of the second.

A **vexatious** request is determined by the information requested, **not** the person making the request. An individual cannot be classified as a vexatious requestor. An individual can make as many requests for information as he/she

wishes, and cannot be labelled as vexatious – each of their requests must be determined on a case-by-case basis – but the provisions on aggregating the time of these requests may be relevant. Vexatiousness needs to be assessed in all the circumstances of an individual case, but if a request is not a genuine endeavour to access information for its own sake, but is aimed at disrupting an authority, or harassing individuals in it, then it may well be vexatious.

If you think a request is vexatious you should discuss with the FOI team and legal advisers.

Wales Office should comply where possible with a request unless:

It is vexatious, that is :

- It would impose a significant burden on the public authority
- It clearly does not have any serious purpose or value
- It is designed to cause disruption or annoyance
- It has the effect of harassing the public authority
- It can otherwise fairly be characterised as obsessive or manifestly unreasonable

It is a repeated request, that is:

- Identical or substantially similar to a previous request from that person (unless a reasonable amount of time has elapsed between them, if in doubt contact the FOI Team for advice).

6. Collect the information

**ACTION
OFFICIAL
LEADS**

Collate relevant information. You should record what steps you have taken to locate the information in case there is an internal review or investigation. Places where information could be held include:

- Information held electronically, e.g., on laptops, TRIM;
- Emails;
- Information that is recorded on paper, e.g., letters, memorandum or papers in a file;
- Notes written in the margins of a document, note-pad or post-it note;
- Sound and video recordings, e.g., CDs or video tapes.
- The right to access also applies to information that is in storage, for example, in the filing systems.

The FOI Act entitles individuals to have access to information and not to documents. It may often be the case that the easiest way to provide the information is to supply a copy of the relevant document since a document may contain the information that has been requested. You may find it easier to copy and paste the relevant information from several documents into a new, collated document. Where a requester expresses a preference for the way in which the information is to be communicated

to him or her then you should comply with that preference insofar as it is reasonably practicable. This may include providing a digest or summary of the information being sought, photocopies or computer files. In most circumstances it will simply be a case of supplying copies of the documents being requested.

Please note, under the Act, it is a criminal offence to alter, destroy or hide any information where a request has been made for it.

If there is no information, draft an appropriate letter and return to the FOI team with the record you have made detailing your searches.

Some information that is physically present on your premises or systems is not properly to be regarded as "held" by the Department.

Examples include:

- Private material brought into the office by Ministers or officials;
- Material belonging to other people or bodies;
- Trade Union material;
- Constituency material; and
- Material relating to party political matters.

Remember that, unlike with for example a Treat Official, there is no obligation to create information to respond to an FOI request – although we are under an obligation to be helpful.

7. If we do hold this information, are there any issues involved in disclosing it?

ACTION OFFICIAL LEADS

Although the FOI Act's presumption is that all information should be released if requested, it recognises that not all disclosure would be in the wider public interest, such as

- Where disclosure might be harmful to an important public interest, such as national security or international relations;
- Where disclosure is prohibited by status;
- Where responding to the request might involve providing personal information about other individuals; or
- Where disclosure might breach a duty of confidentiality.

The Act contains a number of exemptions that can be used to justify withholding information. You must test the information you have gathered to see if it would not be in the public to release it.

If you think you might need to withhold some information, you should discuss at the earliest opportunity with:

- 
- your head of branch or deputy director;

- [REDACTED]

If, after these discussions:

- you assess there is a justifiable case for withholding information;
or
- you think that there is no case for applying an exemption but that the information to be released might give rise to media or public interest,

you should make the following people aware:

- your head of branch or deputy director
- PPS/Secretary of State;
- Press Office;
- Glynne Jones;
- [REDACTED]
- Special Advisers.

Many of the exemptions operate in very different ways and, when applying individual exemptions, you may need to consider the following factors:

- The content of the information;
- The source of the information;
- The purpose for which the information was recorded.

In some instances there may be practical reasons for rejecting a request for information. For example, if the request is vexatious or repeated, or if the cost of complying with the request would exceed the cost limit (£600 or 3½ days) then the request can be refused. Be careful when citing the cost limit that you can show it would exceed it. This can be an issue if the case ever went to the Information Commissioner.

Poor record keeping is not an excuse for refusing requests on cost or time grounds.

There are 23 exemptions from the rights of access under the Act. These exemptions mark out the limits of the right of access to information under the FOI Act. If information is properly exempt then there is no right of access to it under the Act.

- **Absolute exemptions:** if an absolute exemption applies there is no obligation under the Act to consider the request for information further. Draft a suitable letter and return to the FOI Team.
- **Qualified exemptions:** these are subject to a public interest test. Qualified exemptions do not justify withholding information unless, following a proper assessment, the balance of the public

interest comes down against disclosure. When applying a qualified exemption the deadline can be extended to consider where the balance of the public interest lies. Please consult with the FOI Team in advance.

The burden is on the Department to show that the public interest in withholding the information is greater than the public interest in disclosure.

A list of exemptions is at **Appendix A**.

8. Does an absolute exemption apply?

**ACTION
OFFICIAL
LEADS**

Some of these exemptions are absolute. Where there is an absolute exemption, a public authority is not bound by either the duty to confirm or deny or communicate the information requested. The information can be withheld without considering any public interest in disclosure. Nevertheless, it is important to ensure that the decision to cite an absolute exemption is valid as this may itself be challenged. In most cases, where an exemption is absolute, its application is obligatory and it will be unlawful to release the information (e.g., ss40, 41, 44). In others, for example, information in court records, you may be able to release it on a discretionary basis.

Because of the nature of the work the Wales Office undertakes, we would not usually use one of the absolute exemptions.

9. Does a qualified exemption apply?

**ACTION
OFFICIAL
LEADS**

If the information falls under such a qualified exemption, you must consider whether the public interest factors in favour of releasing the information outweigh those in favour of withholding the information. Pose two further questions – would release of the information cause any harm (prejudice)? And, even if it would, does the public interest still favour disclosure? The process for applying the public interest test is outlined below but you will want to discuss with the legal advisers.

There is no fixed definition of “public interest” and this assessment will essentially be a matter of judgment on a case by case basis. The burden is on the Department to show that the public interest in withholding the information is greater than the public interest in disclosure.

Factors that are 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 that affect their lives or that 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 to release are not necessarily the same.

Factors that could tip the balance against disclosure include, e.g., where this might endanger the safety of personnel, undermine effective government by discouraging frankness and candour in internal communications, or threaten the Department's competitive position in a commercial matter or the Department's relationships with stakeholders.

When you cite a qualified FOI exemption, you must explain the balance of factors for and against disclosure in your reply to an applicant.

You must also document your full public interest analysis, which will usually be much fuller than that provided to the requester. Provide this to the FOI Team for the request record on TRIM. This will be important in the event of a complaint to the Information Commissioner.

When complete, draft an appropriate letter and return to the FOI Team.

10. What third parties do I need to consult throughout this process?

ACTION OFFICIAL LEADS

When considering the information to be released you should check whether any third party may have sent or supplied the information or have a close and direct interest in it. For example, you may hold information concerning:

- Contracts
- Tendering for contracts
- Other commercial information
- Information provided by foreign governments
- Information provided by WAG or NAW
- Information provided by other public authorities
- Personal information about individuals

Consultations with third parties may play an important part in considering whether exemptions apply, particularly those relating to confidence, commercial sensitivity and relations with devolved and international partners. But even where this information is not exempt, you may need to think about informing third parties or obtaining their views on the release of the information.

It is important to remember that any views expressed by third parties concerning release of information provided by them to the Department are not binding on your authority. The Department holds the information, and

as you hold the information, you are under the statutory duty to provide access to the information, not the third party.

The only real exception to this is when the third party considers that the release of the information would be an actionable breach of confidence. If this is the case, you should take legal advice. The Department has to take the final view as to whether information should be released and a refusal by a third party to consent to the release of information is not binding on you.

When considering cases which require consultation with the National Assembly or Welsh Assembly Government, you should be aware that they have their own code and handling procedures.

Ultimately, when a request is made to the Wales Office it is the Wales Office's decision whether information should be release or withheld.

Where the same or similar request has been made to a number of government departments, it is paramount that a co-ordinated approach should be adopted to avoid any inconsistencies between the different departments. These cases are notified by the FOI Team to the MoJ Clearing House who will issue guidance if appropriate.

11. Clear the draft response

ACTION
OFFICIAL
LEADS

You need to clear your draft response with your Deputy Director. Remember to leave enough time to do this.

12. Return the cleared draft to the FOI Team

ACTION
OFFICIAL
LEADS

Once your Deputy Director has cleared the draft, return to the FOI team.

The FOI team will check whether the reply is appropriate from a customer perspective. They will also arrange for clearance (with Glynne Jones, Special Advisers, Press Office, Strategy Unit, the Private Offices and others as appropriate).

Glynne Jones is responsible for the final clearance of all FOI requests.

Ministers do not play a formal role in clearing FOI responses. But as they are responsible for the conduct of business in their Department, they need to be aware of information being made available. As part of the clearance process, the FOI Team will arrange for ministers to note the proposed release. However, if a proposed release is sensitive, complex or likely to cause significant media interest, you may need to draft a formal

submission so that ministers understand the background. The Private Office or your Deputy Director will commission this if necessary.

**FOI TEAM
LEADS**

The FOI team will send out the response to the requestor. They will also arrange for any information released to be scanned and published on the Wales Office website, in accordance with our publication scheme.

Internal Reviews

If a requester is not content with the Department's handling of their request for information they have a right to complain within two months of our response and are entitled to request an internal review whereby the applicant can ask the Department to look at the original decision again. The grounds of complaint can be broadly divided into the following categories:

- Procedural matters. Failure to respond to a request within the statutory deadline of 20 working days or failure to keep the requester informed of any delay in dealing with their case by explaining why longer than 20 working days is needed.
- Exemptions. The requester considers that the Department wrongly withheld the information that was being sought and has failed to correctly apply an exemption under the Act.
- Failure to properly explain any reasons for refusing the request.
- The requester did not receive all of the information requested. (This would also include a challenge to the Department's claim that the information is not held).
- Failure to give proper advice and help.
- The applicant feels that a fee has been wrongly charged.

In the vast majority of cases complaints will be to challenge the Department's decision to withhold information by applying an exemption(s) to the information being sought.

What is the process for an internal review?

The FOI team will inform the action official who dealt with the request that an appeal has been lodged. The official will need to make available a copy of all of the relevant information, and the documentation they made to evidence their proper search for the information and any consideration of exemptions and public interest tests.

Action officials must provide this material within 5 working days of receipt by the Department. This allows sufficient time for it to be considered. The Department has a target of 20 days for replying to a request for internal review.

The FOI Team will consult the Head of Office and Glynne Jones and agree who should conduct the review. It will in all cases be someone who was not involved in any way with the handling of the original request.

The reviewer will:

- assess whether the Department has complied with its responsibilities under the FOI Act, including timeliness, conducting sufficient and reasonable searches;
- assess whether any exemptions were applied properly; and

- re-consider the public interest, in disclosure and determine whether the information should be disclosed.

An internal review can have two outcomes:

- The original decision is reversed; or
- The original decision is upheld.

Exemptions

The FOI Act allows for information to be withheld on the following grounds (exemptions of particular relevance to the Wales Office are marked with *)

* Section 21: Information accessible to applicant by other means (absolute exemption)

* Section 22: Information intended for future publication

Section 23: Information supplied by, or relating to, bodies dealing with security matters (absolute exemption)

Section 24: National security

Section 26: Defence

Section 27: International relations

* Section 28: Relations within the United Kingdom

Section 29: The economy

Section 30: Investigations and proceedings conducted by public authorities

Section 31: Law enforcement

Section 32: Court records, etc. (absolute exemption)

Section 33: Audit functions

Section 34: Parliamentary privilege (absolute exemption)

* Section 35: Formulation of government policy

Section 36: Prejudice to effective conduct of public affairs (absolute exemptions for information held by House of Commons or House of Lords)

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

Section 38: Health and safety

Section 39: Environmental information

Section 40: Personal information (absolute exemption)

Section 41: Information provided in confidence (absolute exemption)

Section 42: Legal professional privilege

Section 43: Commercial interests

Section 44: Information the disclosure of which is otherwise prohibited by law (absolute exemption)

Guidance on the application of exemptions

Section 12 Cost

Under section 12 of the Act a public authority is not obliged to comply with a request if the cost of complying would exceed the "appropriate limit" as set out in the FOI and DP (appropriate limit and fees) Regulations.

Section 21 Information accessible by other means

Section 21 exempts information that is already reasonably accessible to the applicant by other means.

Key points:

- The question to be asked is whether the information is reasonably accessible to the applicant: public authorities need to be alert to any attributes of an individual applicant which may mean that information is more or less accessible to him or her than it is to the public at large.
- Section 21 may apply even if a fee is charged for supplying the information.
- Where information is exempt under section 21, the Act does not allow a public authority to 'neither confirm nor deny' that fact.
- Section 21 is not subject to any public interest test.

Section 22 Information intended for future publication

Section 22 exempts information requested by an applicant if it is intended for future publication.

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 the public interest test.

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

Section 23 exempts information received from, or related to, the security bodies listed at section 23(3) of the FOIA. This includes the Security Service, the Secret Intelligence Service, Government Communications Headquarters and the Serious Organised Crime Agency.

Key points:

- It will often be appropriate to 'neither confirm nor deny' that the requested information is held, as the fact that a public authority does or does not hold information supplied by one of the security bodies can itself be information relating to those bodies.
- The interaction between section 23 and section 24 (national security) is complex and needs to be considered carefully in order to ensure that the relevant public interests are protected.
- Section 23 is not subject to any public interest test.
- A ministerial certification procedure exists where it becomes necessary to rely on this exemption.

Section 24 National security

The section 24 exemption applies to information that must not to be disclosed in order to safeguard national security.

Key points:

- To apply section 24, it will be necessary to decide whether any harm to national security might result from disclosure of the requested information.
- Section 24 guidance should be read together with the section 23 guidance when contemplating withholding information on grounds related to national security.
- In some circumstances it may be appropriate to 'neither confirm nor deny' whether the requested information is held.
- Section 24 is subject to a public interest test.
- A ministerial certification procedure exists where it becomes necessary to rely on this exemption.

Section 26 Defence

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

- the defence of the British Islands or any colony; or
- the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with them.

Key points:

- To apply section 26 it will be necessary to establish how exactly defence matters would be prejudiced by disclosure of the information.
- 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 the public interest test.
- In some circumstances it may be appropriate to 'neither confirm nor deny' whether the requested information is held.

Section 27 International relations

Section 27 applies to the following two categories of information:

- information whose disclosure would be likely to prejudice international relations.
- confidential information obtained from another state, an international organisation or an international court.

Key points:

- Departments should consult the Foreign and Commonwealth Office in connection with the application of section 27.
- Section 27 is subject to the public interest test.
- In some circumstances, section 27 may be used to 'neither confirm nor deny' that information is held.

Section 28 Relations within the UK

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 Executive, the Executive Committee of the Northern Ireland Assembly and the Welsh Assembly Government.

Key points:

- Where necessary, regard should be made to the Memorandum of Understanding, agreed between the four administrations, which includes safeguards to ensure that information shared between administrations is appropriately protected.
- Where appropriate, you should consider consulting the other administration(s) concerned when determining whether section 28 applies. Separate freedom of information legislation applies in Scotland.
- Section 28 is subject to the public interest test.
- You are not required to 'confirm or deny' whether the requested information is held if to do so would be likely to prejudice relations between UK administrations.

If you think s28 applies, contact the FOI Team immediately for advice and more extensive guidance.

Section 29 The economy

Section 29 applies to information where 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:

- Departments should consult with HM Treasury when considering this exemption.
- Section 29 is subject to the public interest test.
- Public authorities can 'neither confirm nor deny' whether they hold information, using section 29(3).

Section 30 Investigations and proceedings conducted by public authorities

Section 30 is concerned primarily with preserving the integrity of certain proceedings and investigations conducted by public authorities. There are two ways in which the application of section 30 may be triggered:

- where information has at any time been held for the purpose of specified criminal and other investigations or proceedings; and
- where information relates to the obtaining of information from confidential sources and was obtained or recorded for 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 closely linked to section 31 (law enforcement). The two exemptions cannot apply to the same information and it is important that the correct exemption is applied.
- Section 30 is subject to the public interest test.
- It may be necessary to 'neither confirm nor deny' that requested information is held, as the success of an investigation can often depend on ensuring that information is not disclosed prematurely.

Section 31 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.

Key points:

- Section 31 only applies in cases where the information does not fall within section 30.
- The structure of section 31 is complex and it will be necessary to give careful consideration to the important differences 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 the public interest test.

Section 32 Court records

Section 32 exempts information contained in particular types of litigation documents and 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 the FOI Act does not supersede those regimes.

Key points:

- Section 32 will apply only if the public authority concerned holds the information solely because it was contained in one of the specified documents.
- The application of section 32 is not subject to any public interest test.

Section 33 Audit functions

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

Key points:

- Section 33 only applies where a 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 can only be claimed by the department carrying out the audit.
- Section 33 is subject to the public interest test.

Section 34 Parliamentary privilege

Section 34 applies to information where disclosure would be an infringement of the privileges of either House of Parliament.

Key points:

- Section 34 needs 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.
- Section 34(3) enables the parliamentary authorities to conclusively certify that section 34 applies. Departments are strongly advised to consult officials from the relevant House before claiming exemption under section 34 and to obtain a certificate where necessary.
- Section 34 is not subject to any public interest test.

Section 35 Formulation of government policy

Section 35 is aimed at protecting the government policy-making process in order to maintain the delivery of effective government.

Section 35 applies to information that 'relates to':

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

Key points:

- Section 35 can only be used by government departments (including a Northern Ireland government department) or the Welsh Assembly government.
- Section 35 is closely related to section 36, which protects the effective conduct of public affairs. However, the two exemptions cannot apply to the same information, although they can be cited in the alternative.
- Section 35 is subject to the public interest test.
- Given the wide range of section 35, you should be particularly mindful of the need to consult interested departments.

Section 36 Prejudice to effective conduct of public affairs

Section 36 relates to information that if disclosed would adversely affect the delivery of effective central government and other public services. Section 36 exempts information whose disclosure would be likely to:

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

Key points:

- This exemption is not commonly used and must only be considered if other exemptions are inappropriate. If you think s36 applies, contact the FOI Unit immediately for advice and discuss with the legal advisers.

- Section 36 requires a determination by a 'qualified person' that disclosure of the requested information would have one of the specified prejudicial effects. For the Wales Office, this means a minister.
- Section 36 can only be used if section 35 does not apply to the information.
- Section 36 is subject to the public interest test.

Section 37(1)(a) Communications with Her Majesty, with other members of the royal household, and

Section 37(1)(b) The conferring by the crown of any honour or dignity

Section 37 applies to two categories of information:

- Information relating to communications with Her Majesty, other members of the Royal Family or the Royal Household; and
- 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 the government are essentially confidential in nature. In only the most exceptional situations will the public interest in disclosure outweigh the public interest in maintaining the exemption for this type of information.
- In respect of both parts of this exemption, public authorities should be mindful of the need to consult relevant departments or private offices.
- Section 37 is subject to the public interest test.
- Where section 37(2) applies there is no obligation under section 37(1)(a) or 37(1)(b) to confirm or deny whether or not the information requested is held.

Section 38 Health & 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.
- Section 38 is subject to the public interest test.
- It may be appropriate to 'neither confirm nor deny' whether the requested information is held, if confirming whether or not information is held would itself risk endangering the health or safety of any person.

Section 39 Environmental information

Section 39 exempts environmental information whose disclosure must be considered under the Environmental Information Regulations 2004: a specific regime to enable individuals to access environmental information, which includes its own exceptions from that right of access.

Key points:

- If information is environmental information and is exempt under section 39, public authorities must consider its disclosure under the Environmental Information Regulations (EIRs) 2004.
- All the exceptions in the EIRs are subject to a public interest test.

Section 40 Personal information

Section 40 concerns personal data within the meaning of the Data Protection Act 1998 (DPA). Section 40 of the FOIA applies to:

- requests for the personal data of the applicant him or herself, and
- requests for the personal data of someone else (a third party)

Key points:

- When an individual asks for his or her own personal data under the FOI Act, this should be treated as a 'subject access request' under the DPA. Requests for one's own data are exempt under section 40(1) of the FOIA. This is an absolute exemption. The applicant should be advised of the procedure for making a subject access request.
- In most circumstances, for requests for the personal data of a third party (someone other than the applicant), the application of section 40 will turn on whether disclosure of the information to a member of the public would be 'fair', under the Data Protection Principles in the DPA.
- Officials should consult experts where the application of section 40 is difficult or unclear: getting a decision wrong may result in a breach of the Data Protection Act 1998.

Section 41 Information provided in confidence

Section 41 provides an exemption to the right of access if the requested information was provided to the public authority in confidence.

Key points:

- Section 41 will only apply where a person would be able to bring a successful legal action for breach of confidence as a result of disclosure.
- Section 41 is not subject to the public interest test, 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: legal advice will often be necessary.

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 the public interest test. 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.

Section 43 Commercial interests

Section 43 exempts information where 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.

Section 44 Prohibitions on disclosure

Section 44 applies to three distinct categories of information:

- If there is an existing statutory bar to the disclosure of information by a public authority then that information will be exempt;
- If disclosure would be incompatible with a European Community obligation then the information will be exempt; and
- 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 points:

- 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.
- Section 44 is not subject to any public interest test.

Useful Contacts – Who can help?

Departmental FOI Officer:

The Wales Office FOI Co-ordinator is [REDACTED] who will support FOI requests through the system. If you are in any doubt, please contact him to ensure the response targets is met and the best advice and assistance is provided to the applicant.

MoJ

Within MoJ the Clearing House acts as an expert policy advice centre, to which requests can be referred by the Wales Office via the FOI Co-ordinator.

The Clearing House will not answer requests on behalf of departments.
It will:

- Provide advice to departments on difficult cases;
- Ensure a consistent approach is adopted across government on round-robin and potentially precedent setting cases;
- Revise government guidance in light of emerging case law and new policy; and
- Be a source of expert advice and guidance to Departments on the FOI Act, Data Protection and the EIRs.

Welsh Assembly Government – Access to Information Unit

You should bear in mind that the Welsh Assembly Government has it own FOI Code of Practice and guidance. This, and contact details for FOI officials, can be found at:

<http://new.wales.gov.uk/publications/accessinfo/?lang=en>

When considering cases, the Wales Office lawyers must be kept in the loop.

Comments and suggestions

We welcome comments and suggestions both on this document and for improving our practices. If you have any, please email them to the “Wales Office FOI” address.