Ministry of Defence Access to Information
Guidance Note

Version 6 June 2009

Guidance Note E3: Qualified FOI exemptions most relevant to the MOD

See Annex A to this guidance for International Relations

See Annex B for separate procedures for consultation with US interlocutors.

Qualified exemptions

1. All qualified exemptions in the FOI Act are subject to a test of the balance of public interest and it is necessary to establish whether, in all the circumstances of the case, the information should be released or withheld. MOD policy requires authorisation by a member of the SCS or 1* equivalent to withhold information. Any relaxation of this policy must be agreed in advance with CIO CI Access and documented in local procedures. The 1* must assess the applicability of the exemption, whether the balance lies in withholding or releasing the information and, where the information is withheld, that disclosure would causes harm or prejudice as described in part 2 of the Act. Information can only be withheld where the balance of public interest lies in favour of withholding. **Where the arguments for and against release are even, the public interest is in disclosure**. See Guidance Note E4.

1.2 The Official Secrets Act prohibits the unlawful disclosure of information. A disclosure made fully in accordance with the MOD procedures for complying with the FOI Act and EIRs is a lawful disclosure. However, where the public interest test is required (e.g. on defence), the decision will be a matter of judgement and may be finely balanced. It is particularly important that decisions to release hitherto sensitive or classified information is authorised at the appropriate level.

2. **S. 22 Information intended for future publication**

2.1 If, at the time the request is made, it is intended to publish the information at a later date, then it may be exempted if it is reasonable that it should not be disclosed until the intended date of publication. This could apply, for instance, to statistics published at set intervals or where information on a research project is incomplete and it would be inappropriate to publish prematurely. The exemption hinges on the prior intention to publish. Deciding after the request is received is not allowed! "Publication" includes speeches, press releases, interviews, videos, reports any other form of communication. It is not necessary for the intended publication to be in recorded form, nor in a form which can be "reasonable accessible" thereafter. For further information on this exemption see MOJ Guidance on s.22

2.2 This exemption applies whether the information is to be published by the MOD or any other Department or person and whether or not the intended date of publication is known. It allows public authorities the space, within reason, to determine their own publication timetables and deal with the necessary preparation, administration and context of publication. It is recommended that some indication to the intended publication date is given. This exemption is not to be used to delay- there must be real intent to publish in the future. Should the public authority (or third party) subsequently decided not to publish – then the exemption no longer applies. Remember, there is still a legal duty to provide reasonable advice and assistance and the exemption is subject to a public interest test. It may be possible to provide information in advance of publication. The duty to confirm or deny that the requested information is held does not arise if to comply would itself disclose information which it is reasonable to withhold until the publication date

2.3 This exemption is also related to the duty to adopt a Publication Scheme. Where the MOD Publication Scheme states that we will publish information on specified dates, or at specified intervals, this exemption would normally apply to particular requests for such information. See Guidance Note C1 Publication Scheme

3. **S. 24 National Security**

3.1 This exemption applies to information not covered by the absolute exemption s.23 'Bodies

dealing with security matters'. There is no statutory definition of the term 'national security'. Case by case consideration will be necessary. The test to be applied when considering whether to apply the s.24 exemption is not whether the information relates to national security but whether the exemption is required for the purpose of safeguarding national security. That is, to apply the exemption it must be possible to identify an undesirable effect on national security, or the risk of such an undesirable effect, that would result from disclosure. It is also necessary to consider whether the requested information could cause damage if put together with other available information. The kind of information which national security covers could be:

- The security of the nation includes its well being and the protection of its defence and foreign policy interests, as well as its survival;
- The nation does not refer only to the territory of the UK, but includes its citizens, wherever they may be, or its assets wherever they may be, as well as the UK's system of government; and
- There are a number of matters which UK law expressly recognises as constituting potential threats to, or otherwise relevant to, the safety of well being of the nation, including terrorism, espionage, subversion, the pursuit of the Government's defence and foreign policies, and the economic well being of the UK. But these matters are not exhaustive: the Government would regard a wide range of other matters as being capable of constituting a threat to the safety or well being of the nation. Examples include the proliferation of weapons of mass destruction and the Critical National Infrastructure, such as water supply or national grid, from actions intended to cause catastrophic damage.

However, these examples are not exhaustive and each piece of information should be considered individually.

Historical Records

3.2 The s.24 exemption applies to all records, regardless of their age, including historical records. It is possible that the sensitivity of s.24 information may diminish with the passage of time once the records in which the information is contained has become a historical record. Each case should be judged on a case by case basis, consulting as appropriate.

The link between s.23 and s.24

3.3 There is considerable overlap between the information covered by s.23 and that covered by s.24. The use of s24(2) and s.23(5) together is possible under the Act (in contrast to s.23(1) and s.24(1) which are mutually exclusive) where exemption from the duty to confirm or deny the existence of information is required. Consideration of the combination is necessary because the nature of s.23 inevitably discloses that a security body is involved (or that absence of a security body is significant) and the use of s.23 and s.24 together may be the only way that the 'non-committal' response that NCND requires, in order to work, can be maintained. If s.24(2) is claimed along side s.23(5) in a NCND response, for the qualified exemption s.24 you will need to consider the public interest for and against confirming or denying that information is held. There may be occasions where communicating the public interest argument to the applicant would in itself reveal exempt information. In these cases s.17(4) can be relied upon. For further information on NCND and the use of s.23 and s.24 together see Guidance Note D7.

Certificates

3.4 A certificate signed by a Minister of the Crown (i.e Cabinet Ministers, the Attorney General and Advocate General) is "conclusive evidence" that the information is of the type in question. A certificate may apply to information existing at the time the certificate is issued, or it may also cover information acquired or recorded at a later date. A certificate is not required to claim this exemption but careful consideration should be given to how a case would be made to Secretary of State were a certificate needed following a successful appeal. See Guidance Note E6 Ministerial

Certificates. The record of any decision to withhold information must demonstrate the need to withhold it. If steps could be taken to allow the information to be disclosed whilst safeguarding national security in some other way, those steps must be considered. Consideration must also be given as to whether there are parts of the request which may be met. The duty to confirm or deny does not arise if to comply would itself disclose information, which is exempt under s.24.

3.5 **All potential use of s.24 should be notified to CIO Access Special Projects for referral to MOJ Clearing House and the National Security Liaison Group.**

3.6 Where "neither confirm nor deny" needs to be maintained for national security purposes, it is important to always consider claiming the equivalent exemption under s.24 (2): National security. Use of s.23 and s.24 together may be the only way that the "non-committal "response that NCND requires in order to work, may be maintained. So that it cannot be readily inferred that use of the two exceptions together is itself an indicator of the relevant security body activity, it is also important that where s.24 is relied on, reciprocal consideration is given to the justification for relying on s.23. For further information on this exemption see MOJ Guidance on s.23

4. S. 26 Defence

4.1 This exemption applies to information the disclosure of which would, or would be likely to, prejudice the defence of the British Islands, or any colony, or the capability, effectiveness, or security of the armed forces or of any forces operating with them. It can only be used where release would be prejudicial to defence activities **and** where the public interest in withholding the information, outweighs the public interest in disclosing it. It need not be "defence" information. The duty to confirm or deny does not arise if to comply would, or would be likely, to result in the harm set out in relation to defence. For more detail see MOJ Guidance on s.26

- Members of the Armed Forces are regarded as including:
  - Units based abroad in temporary or permanent headquarters
  - The Gibraltar Regiment
  - Officials of a government department, wherever situated, acting in their official capacity
- "Forces operating with them" includes forces with which the UK is operating in a formal or informal alliance or agreement.
- Schedule 1 to the Interpretation Act 1978 defines 'British Islands' as meaning the United Kingdom, the Channel Islands and the Isle of Man.
- Colony is defined as meaning any part of Her Majesty's dominions outside the British Islands except for a Commonwealth country, a territory whose external relations is the responsibility of a country other than the UK, and any associated state. The current list of colonies is:
  - Anguilla, British Virgin Islands, Pitcairn Islands, Cayman, Islands, South Georgia and South Sandwich Islands, Bermuda, Falkland Islands, Sovereign Base Area of Cyprus, British Antarctic Territories, Gibraltar, St Helena & Dependencies (Ascension Island), Turks and Caicos Islands, British Indian Ocean Territories, Monserrat.

4.2 "Prejudice" is not defined by the FOI Act. At its simplest it would cover information likely to assist an actual or potential enemy but while the likelihood of prejudice may not be very high, it should not be negligible. The sort of information covered would include that where disclosure would put the physical safety of troops at risk or impair their ability to carry out their duties, now or in the future. The timing of disclosure is likely to be a crucial factor, but although information may be less sensitive after an operation is concluded, its disclosure may still prejudice the chance of

future success. As with the national security exemption, one consideration should be whether the requested information could cause damage if put together with other available information.

4.3 It is important to recognise that there is widespread interest in defence policy and the activities of the armed forces, and that it is appropriate for the public to understand how, why and what key decisions are taken in these areas. There is a legitimate public interest in the UK's defence policy and military activities and information must be disclosed wherever possible However, a fundamental aim of the government is to deliver security for the people of the UK and its overseas territories by defending them (including against terrorism), and by acting as a force for good by strengthening international peace and stability. The exemption for defence information exists in recognition that disclosure of some information could prejudice the successful achievement of this aim.

4.4 In any time of tension or conflict, it would clearly be contrary to UK interests to disclose information that could materially assist a potential enemy. While this concern will not be so obvious or immediate in peace time, the confirmation of certain defence plans, organisational or support matters could nonetheless allow a potential adversary (including a terrorist group) to gain an advantage that would be contrary to the interests of the UK. This could undermine the defence arrangements for the UK or any colony, or have an adverse impact on the capability, effectiveness or security of military or other personnel fulfilling a defence role.

4.5 Neither the FOI exemption nor the EIR exception applies on a blanket basis to defence information. You must be able to show that disclosure of the information in question would prejudice, or would be likely to prejudice, a defence matter. Even where disclosure would be prejudicial, the reviewing officer must assess the balance of public interest before deciding how to respond to a request.

4.6 **Defence information covers a broad spectrum and could include, for example,**

- Defence policy and strategy, military planning and defence intelligence;
- The size, shape, organisation, logistics, order of battle, state of readiness and training of the armed forces of the Crown;
- The actual or prospective deployment of those forces in the UK or overseas, including their operational orders, tactics and rules of engagement;
- Plans and measures for the maintenance of essential supplies and services that are or would be needed in time of conflict,
- The weapons, stores, transport or other equipment of those forces and the invention, development, production, technical specification and performance of such equipment and research relating to it;
- Plans for future military capabilities;
- Plans or options for the defence or reinforcement of a colony or another country.
- Analysis of the capability, state of readiness, performance of individual or combined units, their equipment or support structures.
- Arrangements for co-operation, collaboration, consultation or integration with the armed forces of other countries, whether on a bilateral basis or as part of a defence alliance or other international force.

4.7 **Environmental information**

The definition of "environmental information" is very wide and includes any activities that affect or are likely to affect the state of the elements or their interaction, or substances, energy, noise, radiation, waste, emissions or other factors that affect or are likely to affect those elements. The

EIR could therefore be relevant to a wide range of defence matters, for example relating to the operations, equipment, movement and training of the armed forces.

General factors to take into account when deciding whether disclosure would have a prejudicial effect on defence include:

- **Nature of information** The fact that a document carries a security classification does not mean that the exemption applies, though it may be an indication that use of the exemption should be considered. The protective marking may relate to matters other than defence (for example national security or international relations), or it may no longer be warranted due to the passage of time or events. In addition, the security classification will reflect the highest classification applicable to any information contained in the document at the time of creation and it may not be relevant to the entire contents. Classification is not an exemption in itself.

- **Source of information** For example information that was supplied by or relates to the Special Forces or one of the other security bodies named in s.23 of the FOI Act or confidential information received from another State (where s.27 International Relations and/or s.41 Information provided in confidence exemptions may be relevant). The disclosure of information in the face of an objection from an allied country, or in breach of a clear undertaking to preserve confidentiality, may well prejudice the UK's defence relations by restricting exchanges of information or by jeopardizing military co-operation.
- **Information already in the public domain** You should take account of what is already in the public domain (either in the UK or overseas) when assessing prejudice to defence matters. The fact that information has already been disclosed may reduce or negate any potential prejudice; on the other hand in some circumstances it could give rise to prejudice that would not otherwise have existed. You may need to consider **how** the information came to be in the public domain as defence might be prejudiced by officially disclosing information, which has previously only been the subject of an un-attributable report or speculation. If it is decided to withhold information, it will be necessary to be able to demonstrate quite clearly that disclosure could reasonably be expected to result in some specific prejudice to defence matters, including whether there are real and substantial grounds for the expectation.
- **Timing** The sensitivity of information will often be dependent on the timing of a request and the age of the information. For example, while information about a specific operation might prejudice operational effectiveness if it were to be made public at the planning stage, the concern about disclosing some or all of the information is likely to diminish or disappear after the operation has taken place.

5. S. 27 International Relations

5.1 There are two parts to this exemption. The first considers the effects of disclosure and exempts information the disclosure of which would, or would be likely to,

- prejudice relations between the UK and any other State, or international organisation, or international court,
- the interests of the UK abroad, or
- the promotion, or protection, by the UK of those interests.

5.2 The second part describes information by its origins and exempts confidential information obtained from a State or international organisation, or international court. In this context "confidential" means any information that has been obtained from a foreign State, organisation or court under terms which require it to be held in confidence at the time of the request, or under circumstances which the supplier might reasonably expect it to be so held.

5.3 For example, an Information Tribunal hearing found in favour of MOD in the Campaign against the Arms Trade case relating to the Kingdom of Saudi Arabia MOU (supply and maintenance of military planes), maintaining the use of the exemption at s.27. Even though the reaction to disclosure by the Saudis was hard to predict, the risk of adverse reaction was considered sufficient prejudice. When applying section 27(prejudice to international relations) prejudice may lie in simply making relations more difficult, even if the response from any other nation to the release of information is not known, and difficult to predict. Take care with information that has been provided by another nation, or international organisation. Consider if disclosure is likely to prejudice the UK's relations, or whether it has been provided in confidence, a reasonable expectation that the information will be held in confidence is sufficient for it to be withheld under s.27(2).

5.4 **Please also note the revised guidance** that Defence Security (Def Sy) **must** be advised immediately of the details of any request for access to foreign owned classified information received. While the MOD recipient of the FOI request for the foreign classified information must consult the foreign owner (see guidance note E3. Appendix A), Def Sy will advise the Cabinet Office Security Policy Division of the request and, in accordance with its obligations under applicable defence bi-lateral security arrangements/agreements, inform the overseas security authority in the originating country of the request and with whom the MOD recipient is consulting in that country about the disclosure. CIO CI Access Special Projects will consult with NSLG.

Please contact Defence Security (Def Sy) xxxxxxxxxxxxxxxxxxxxxxxxx or xxxx xxxxxxxx e-mail xxxxxxxxxxxxxxxxxx or xxxxxxxxxxxxxxxxxx

5.5 **The duty to confirm or deny does not arise** if the information is exempt or if to comply would, or would be likely to result in the harm set out in relation to international relations, or would itself involve the disclosure of confidential information (whether recorded or not) obtained from another State or international organisation.

5.6 Unless it is obvious that the information can or cannot be released it is good practise to consult the supplier and/or affected party, and the Foreign and Commonwealth Office. If a public interest test is being applied, a reasonable extension to the twenty-day deadline is allowed and their views may be sought during this time. This is not the purpose of, or justification for the extension however and the FOI Act does not give any veto to a third party. For more detailed guidance on this exemption see E3 Annex A at the end of this note. See also MOJ Guidance on s.27

6 S.35 Formulation of Government policy

6.1 S.35 provides a "space" around decision-making to enable ministers and officials to engage, confidentially, in full and frank discussion of policy and other administrative matters. Information ceases to be exempt under s.35 if it is over 30 years old (although other exemptions may apply). Before then, the prejudice which would be caused by disclosure can generally be expected to diminish over time.

6.2 S.35 is designed to exempt information likely to be found in four particular contexts. It works in the first place on the basis of a test as to the content of the information – what it is about. It is closely linked to the exemption at S.36. It should be noted that s.35 and s.36 can not **both** be cited to explain a refusal to disclose information: s.36 may only be used where s.35 does not apply. However, note that s.36 can be cited in the alternative. For example, if it is found on appeal that the exemption at s.35 does not apply it may be that s.36 does apply.

6.3 Information is within the scope of the **s.35** exemption if it "relates to" any of the types of information listed below:

- the formulation or development of government policy
- Ministerial communications

- the request for, or provision of, advice by any law officer
- the operation of any ministerial private office.

Under the terms of the exemption there is therefore no need for the disclosure of information to be prejudicial: it has the potential for exemption simply because it is in one of the categories listed. It is possible for information to be exempt under more than one part of s.35, e.g. it might relate both to the formulation of policy and constitute ministerial communications. However, remember that it is subject to the public interest test.

Section 35 Formulation or development of government policy

6.4 Government Policy is not defined. It would cover both more immediate or long term reform and strategic policy aimed at short term policy development or formulation. The type of information covered would include drafts as well as final submissions; minutes; internal departmental correspondence and ancillary documents such as emails. The exemption also applies to early ideas which may be discarded. It is not the nature of the document but the substance of the information which counts.

6.4.1 The exemption applies only to the **formulation** of policy. If policy formulation continues whilst the policy is being implemented then care will be required in distinguishing between continuing policy development and the implementation or operation of policy (which will not be covered by s.35 but may be within the scope of s.36). It may not always be clear when a decision is taken – this may be incremental or interim, so it is important to be as clear as possible about the decision making process. Facts will be more releasable than advice.

6.4.2 After policy decisions have been taken, there may be good reasons why it would not be in the public interest to disclosure information about the preceding debate. For example, the disclosure of free and frank exchanges of correspondence could draw attention to conflicting positions that would make it more difficult o achieve successful implementation. Other information will, by its nature, be more readily disclosable, e.g. background facts, analyses and statistics. Only where factual information is inextricably interlinked with advice etc might the public interest be against disclosure. Whilst this is a useful pointer to relative sensitivities it is important to remember that, within the context of MOD business, some factual information could be sensitive for operational or other reasons and merit the protection of other exemptions.

6.4.3 Once a policy decision is reached, the statistical information used to provide an informed background is not exempt under s.35 although it may be exempt under another exemption. In incremental policy decision making, statistical information should be releasable when it becomes historical explanation rather than a continuing and integral part of the process

6.4.4 Just because the requested information relates to the formulation of policy, s.35 will not automatically apply. It must be demonstrated why the balance of public interest is in withholding this particular piece of information.

Ministerial communications

6.5 Ministerial communications covers all forms of information (meetings, discussions, telephone calls) but only **between** ministers of the Crown. A submission proposing that a minister write to another would be covered as would papers prepared for Cabinet. The criterion is that the communication is in their position as ministers, relating to their ministerial duty. If the enquiry relates to the papers of a previous administration, the CIO CI Access team must be informed as this may require referral to the MOJ Clearing House.

Law Officers' advice

6.6 Under s.35(1)(c) requests for, and the provision of, any advice from the defined Law Officers (the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland) falls under this exemption. Any advice requested or given by these persons is covered, not just legal

advice. But a decision or communication which does not amount to advice is not covered. No information about whether or not the Law Officers have advised, or the advice itself, should be disclosed without consulting the Law Officers via CIO CI Access.

Operation of any ministerial private office

6.7 Under s.35(1)(d) information relating to the operation of a ministerial private office falls under this exemption. A private office is defined as "any part of a government department which provides personal administrative support to a minister of the Crown….." This does not mean all information passing through the office, but e.g. organisation and procedures for handling the minister's papers. Advice from the Information Commissioner suggests that the management of ministerial diaries may be covered but information about ministerial engagements is unlikely to be. Information about a minister's private affairs is not exempt here but may be under s.40 Personal Information. This exemption applies **only** to ministers' offices. Those of CDS and PUS are not covered.

Section 36 – Prejudice to Effective Conduct of Public Affairs

7. Section 36 (2): Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person. Disclosure of the information under the FOI Act-

(a) would, or would be likely to, prejudice-

i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

ii. the work of the Executive Committee of the Northern Ireland Assembly, or

iii. the work of the Executive Committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

i. the free and frank provision of advice, or

ii. the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice the effective conduct of public affairs.

Confirm or Deny

7.1 Section 36 (3) provides that the duty to confirm or deny, (section 1 (1) (a) of the FOI Act, does not arise in relation to information to which section 36 applies (or would apply if held by MOD) if, **in the reasonable opinion of the qualified person,** compliance with section 1(1) (a) would, or would be likely to, have any of the effects mentioned in subsection (2).

Reasonable Opinion of a Qualified Person

7.2 Section 36 applies if, in the reasonable opinion of a qualified person, the adverse effect would or would be likely to follow from disclosure. **The use of s.36 in MOD requires a Minister, as the qualified person, to determine whether the exemption at section 36 is engaged. The responsibilities of the qualified person cannot be delegated.**

7.3 NDPBs which have confirmed that they wish an MOD Minister to act as their "qualified person" will need to consult the lead Minister for the subject. The submission should be made by the most senior person within the NDPB.

7.4 S.36 refers to the **effects** of disclosure. The Minister must have sight of **all** the information within scope of the exemption, and must be fully informed of all the circumstances of the case in order to make a **decision** confirming that disclosure would have the consequences claimed.

Information within Scope of this Exemption

7.5 Section 36 only applies to information which is <u>not</u> exempt under section 35. Like s.35, this exemption protects the delivery of effective central government, but s.36 is not limited to a

particular kind of information. Virtually any information that is not within the scope of any other exemption may be considered under s.36, but other exemptions should be considered in the first instance. While s.35 and s.36 cannot be used cumulatively, they can be cited in the alternative.

7.6 S.63 (1) relating to historical records states that s.36 does not apply to information beyond 30 years. However, there may be other relevant exemptions that will still apply.

7.7 MOD policy requires that where there are grounds to withhold information, or to refuse to confirm or deny its existence, this must be confirmed at 1* (SCS or military equivalent) level. If the 1* believes that s.36 applies, the ministerial decision must then be sought by submission to the lead Minister for the subject. Where there is no clear lead Minister the submission should go to US of S in his capacity as lead Minister for open government.

7.8 **Requests for information originating from a previous government administration should be referred to CIO CI Access, who will consult with the Attorney General's Office.**

Submissions to Minister

8. The submission should not ask the Minister to agree, or to approve, but to **decide** whether the exemption at s.36 (2) is engaged. **All** the information considered to be within scope of the exemption **must be provided** with the submission and shown to the Minister. The submission should provide a summary of the case and give the author's view on whether the exemption is engaged, However, it must be clear that the purpose of the submission is to seek the **Minister's decision** on whether the exemption is engaged.

8.1 If the Minister is satisfied that the exemption applies, then the response from the Minister's office should say that the Minister "*has decided in his/her capacity as the qualified person that the exemption at s.36 is engaged".*

The level of prejudice should be stated in the reply, depending on the subsection applied:

(a) would, or would be likely to, prejudice,

(b) would, or would be likely to, inhibit,

(c) would otherwise prejudice, or would be likely otherwise to prejudice.

8.2 Generally the stronger **would** implies that it is more probable than not, and the lesser that there is a significant risk. It is important to make this distinction and the level of prejudice believed to apply should be set out in the submission to allow the Minister to make an informed decision.

8.3 The reply should then go on say, for example in respect of S.36(2)(b), "*Minister has decided that disclosure would prejudice the free and frank provision of advice"*, thus engaging the higher level of prejudice. Where ***would*** is to be applied there must be clear evidence that disclosure **would** have this effect. If this is not the case then the lesser **would be likely to** should be applied.

8.3 At present, we seek to withhold s.36 submissions from disclosure, even when requested by the IC, but it would be prudent to keep in mind that there is a possibility that the submission could be requested and subsequently shown to the IC. **Remember that the FOI Act is applicant blind and therefore any background information on the applicant is irrelevant to any decision taken**. If it is felt appropriate to provide any such information, consider if an oral briefing would be sufficient.

Public Interest Test

9. Once this decision has been taken the public interest test (PIT) then follows. However, for practical reasons it will be necessary to carry out the PIT at the same time for inclusion in the submission. The two parts of the submission should be clearly identified as separate. The evidence for the engagement of s.36 comes first, followed by the PIT balanced argument, for and against disclosure.

9.1 Each request must be considered on a case by case basis, applying the PIT to the particular circumstance of the case. The reasoning behind the decision that the PIT lies in favour of withholding the information within scope of the exemption should be included in the submission. Although the PIT is conducted by an official, it will be helpful for the Minister to see the full argument.

9.2 In favour of disclosure will be factors such as:

- Open policy making will increase trust in government,
- Increased confidence in the decision making process,
- Informing public debate on important matters.

Factors in favour of non-disclosure may be:

- Provision and protection of a free space in which Ministers and their officials can think through the implications of various options under consideration without fear of disclosure,
- Appropriate expert advice may not be provided because of the reluctance to engage in discussion where there is concern that the advice may be disclosed,
- Early disclosure of assessments and preliminary thinking may undermine the decision making process by adverse public reaction.

The current relevance of the issue is a factor in considering the public interest test, and the sensitivity of information is likely to reduce over time, therefore the age of the information will also be relevant.

9.3 The reply from the Minister's office should then go on to say, for example, " *in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure and the information should be withheld*". Where possible any reasoning should be included, the wording of course will depend on the information under consideration, and what the Minister wishes to say.

Legal Advice

10. Where legal advice is to be provided as part of the submission keep this in a separate section headed 'Legal Advice'. Legal advice on FOI is exempt from disclosure to the IC. In cases where the information may be subject to a subsequent appeal this will ensure that it is not inadvertently disclosed as part of the submission should a decision be taken that it is in the best interests of the Department to disclose the s.36 submission to the IC.

Statistical Information Under s.36

11. S. 36 (4) deals with statistical information. This provision needs to be read alongside s.35(2) which states that once a policy decision has been made, statistical background information is not to be regarded as related to the formulation of the policy advice or ministerial communication. S.35(4) provides that there is a strong public interest in disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision taking. It may continue to be exempt under s.36, if disclosure meets the prejudice and inhibition tests of s.36.

If information is to be withheld the prejudicial effects of disclosure of must be clearly shown. **However, there is no requirement for the qualified person to be engaged in the decision in respect of a decision at s.36(4).**

The Response to the Request

12. The response to the applicant should explain that a Minister has made the decision that the exemption is engaged, for example:

"In MOD, determining whether disclosure would have a detrimental effect, as defined by the s.36 exemption, falls to a Minister as the qualified person asked to make the decision. All the relevant information was provided to allow the Minister to make a fully informed decision on the application of s.36. The Minister has decided that s.36 (2) xxx applies to the information requested".

12.1 The Act states that an explanation of the PIT must be given to an applicant where information is to be withheld. The response should fully explain the assessment made of the balance of public interest, and why it was decided that the balance lies in favour of maintaining the exemption and withholding the information. Following the explanation of the PIT the response should confirm that:

" *it has been decided that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure and the information should be withheld*".

13. **Retain all relevant correspondence as an audit trail that the correct procedure has been followed, this is particularly important should an appeal be made.**

14. **Template for FOI s.36 Submission**

Reference

AIT Number

Date

Main Addressee

Copy to:

FOI ACT 2000 REQUEST – ENGAGEMENT of SECTION 36 EXEMPTION

Issue

Recommendation

*The Minister is asked to **decide** whether section 36 is engaged and to set the level of prejudice i.e. "**would"** or "**would be likely to"**.*

Timing

Background

*This should contain a concise summary of the background to the request and a description of the information under consideration. **All** the information within scope of the exemption **must be provided** with the submission. It is not sufficient to offer to provide the information if requested. Keep in mind that this submission may be disclosed to the Information Commissioner in the event of an appeal.*

Engagement of s36

*The submission should provide advice that s.36 is believed to be engaged **but** the responsibilities of the qualified person cannot be delegated, it must be clear that the Minister is asked to make the decision and not to agree with a decision already taken.*

*A view should also be given on the level of prejudice, this will in most cases be the lesser "**would be likely to"** as the stronger "**would**" requires clear evidence of prejudice.*

Public Interest Test

The Public Interest Test is carried out by an Official but it is helpful to provide this in the submission. The factors considered in favour of disclosure, and in favour of withholding, should be clearly set out, keeping in mind that the Act provides for the disclosure of information, unless the balance falls in favour of withholding the information.

Legal Advice

If legal advice is required as part of the submission it should be provided under a separate heading. This serves to highlight it to the Minister and to ensure that it is not inadvertently disclosed.

Presentation

Consider the impact of the response and provide a news brief where appropriate.

15. Section 42 Legal Professional Privilege

15.1 Section 42 provides that information in respect of which a claim to legal professional privilege (LPP) - 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. If you are considering disclosing such information you must seek consent from the provider of the advice.** If it is not practicable to obtain the consent of the provider of the advice, the matter should be referred to CIO-Access/DGLS.

15.2 The duty to confirm or deny does not arise where to do so would involve the disclosure of such information. Disclosure of the fact that legal advice has been sought could, in some circumstances, disclose something of the substance of the advice. You should also consider whether disclosing the fact that legal advice has been sought will disclose information relating to the formulation or development of government policy. This may engage the s.35 exemption.

15.3 Advice from the Law Officers falls to be considered under s.35 (1) (c). This exemption applies to both legal and non-legal advice given by the Law Officers and any request for the provision of advice. **When considering requests for advice given by the Law Officers and whether or not to confirm or deny, the matter must be referred to the Attorney General's Office through CIO-CI Access.**

Information within Scope of S.42

15.4 Examples of the type of information this exemption could apply to are:

- Communications with external lawyers
- Communications with MOD legal advisers

- Communications with lawyers employed by another public authority
- Where a policy official relays legal advice to a Minster via a submission
- A summary of legal advice, even when the source is not the advising lawyer

In certain circumstances communications with a third party may also fall within the scope of the exemption, for example, advice sought from an expert for the purposes of litigation.

15.5 Lawyers and their clients have a general expectation that their communications will be confidential. There is a professional duty of confidence owed to clients by their lawyers. Information may cease to be privileged if it is widely copied and shared with third parties. This does not mean that a sharing of information between, for example, the MOD and the Treasury will result in the loss of LPP, but the preservation of confidentiality will have a bearing on deciding the balance of public interest. Legal advisers should be aware that the advice they provide is subject to the Act, and if the balance of public interest finds in favour of disclosure, it may be disclosed.

The Public Interest Test

15.6 Section 42 is a qualified exemption and requires the balance of public interest to be considered. However, where information is withheld using this exemption it will be by virtue of the strong public interest in maintaining the legal professional privilege, public authorities must be allowed to seek and receive advice of this nature in relation to their duties on behalf of the public. The advice sought and given must be a free exchange of views, to be of the most value to the authority, and to the public on whose behalf they carry out these duties. Although there is a public interest in transparency in the decision making process, and knowing that good quality advice has been part of this process could be in the public interest, disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests. **Each request must be considered on a case by case basis but it is only in exceptional cases where there is a clear public interest in knowing this advice that the balance will fall in favour of disclosure.**