



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN34: Section 38 (Health and Safety)

Document history

<i>Version No</i>	<i>Reference</i>	<i>Date Issued</i>	<i>Review Date</i>
1	CIO-3-19-1-3	September 2012	September 2013

What this is about:

This note provides an overview on exemption section 38 of the Freedom of Information (FOI) Act – information which, if disclosed, would endanger the physical or mental health or safety of any individual. It provides an outline of MOD compliance points to consider when engaging section 38 and other exemptions to consider.

Detail:

(1) Information is exempt information if its disclosure under the FOI Act would, or would be likely to—

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

Section 38 is a qualified exemption and is subject to a public interest test.

MOD compliance points:

- A broad approach should be taken when considering potential endangerment scenarios: mental health should include general emotional and psychological well-being, but should not include mere distress, while safety should be taken to mean general protection from harm.
- In making a judgement that disclosure of information would endanger individuals in the way described in the exemption you must explain what scenario would arise that would cause this endangerment, describe the causal factors and assess how likely they are to occur. In determining likelihood it is useful to consider endangerment scenarios as falling into three categories:
 - i) only a hypothetical or remote risk of occurrence;
 - ii) more than a hypothetical or remote risk of occurrence; and
 - iii) more than a 50% chance of an occurrence.

For ii and iii it should normally be possible (and necessary) to cite previous occurrences of the harm that use of the exemption is intended to prevent. Once the likelihood of occurrence has been set you should then take this into account in deciding the level of prejudice (see next bullet).

- You must specify the level of prejudice stating whether the level is “would” or “would be likely to” prejudice. ‘Would’ means ‘more probable than not’; in other words, there is a more than a 50% chance of the disclosure causing the prejudice; ‘would be likely’ means that

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- there must be more than a hypothetical or remote possibility of prejudice occurring but that it must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
- Having determined the level of prejudice in relation to the application section 38, you then need to conduct a Public Interest test and determine where the balance of the public interest lies (i.e. whether or not the public interest in withholding the information outweighs the public interest in its disclosure).
- An expert opinion should be obtained if you wish to withhold information that would or would be likely to endanger the mental health of the individual.
- It is possible that information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied on.
- In some circumstances 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 individual.
- Do any other exemptions apply to the information?

Possible related exemptions (from MOJ guidance)

- **Sections 23 and 24:** (Information dealing with security matters: National security) – information relating to emergency planning, or counter-terrorist policies may originate from the security bodies and as such fall under the section 23 absolute exemption. Otherwise, it may be exempt under section 24. You must consult CIO if you are considering applying these exemptions or NCND.
- **Sections 30 and 31:** (Investigations and law enforcement) – when information relates to an investigation or proceedings or when the disclosure might prejudice matters such as the administration of justice, prosecution of offenders or the prevention or detection of crime.
- **Section 32:** (Court records) – restrictions on the disclosure of information contained in court records may be relevant to the protection of the health and safety of individuals, for example victims and witnesses.
- **Section 39:** (Environmental information) – where information is environmental information it is exempt under the FOI Act and must be considered under the Environmental Information Regulations (EIRs). Section 12(5)(a) of the EIRs exempts information which would adversely affect public safety. Regulation 13 protects personal data.
- **Section 40:** (Personal information) – much of the information that could lead to a person's health or safety being endangered is personal information which would be exempt under section 40 of the FOI Act and must be dealt with under the terms of the Data Protection Act (DPA). In most instances this will prevent the disclosure of the most obvious kinds of personal information which could result in harm to an individual's health or safety such as their address and family details.

MOD Casework Example:

- An FOI request was received for the official précis of a board of inquiry (BOI) into the loss of an aircraft in February 1961. Some information was withheld under section 38(1)(a) (endangering to an individuals physical or mental health or safety). The ICO Decision

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Notice ([ICO ref: FS50418798 Apr 12](#)) found that there was no evidence to suggest release would, or would be likely, to cause physical or mental harm to any surviving relatives beyond stress and worry. In this case, release would not cause a sufficient level of harm to the families to warrant the engagement of section 38, particularly given the substantial passage of time since the incident. The DN also highlighted that any future requests for similar information would have to be considered on a case by case basis.

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

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