



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN20: Section 22 (Information Intended for Future Publication)

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 22 of the Freedom of Information (FOI) Act – information intended for future publication. It provides an outline of MOD compliance points to consider when engaging section 22 and other exemptions to consider.

Detail:

Section 22 of the FOI Act states that

- (1) Information is exempt information if:
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

Section 22 is a qualified exemption and is subject to the public interest test (PIT). You therefore need to consider whether the public interest in applying the exemption is greater than the public interest in providing the information.

MOD compliance points:

- Section 22 will only apply if you have decided to publish the information requested **before** the request is received. If a decision to publish is not made until after the request has been made, the exemption cannot apply.
- Section 22 may apply even if the specific date for publication has not yet been determined and it is reasonable to withhold the information prior to publication. 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. The proposed publication timetable must be **reasonable** in all the circumstances.
- The information may be exempt if it is reasonable that it should not be disclosed until the intended date of publication. 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

MOD FOI/EIR Compliance Notes

possible to provide information in advance of publication.

- Section 22 could apply 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.
- Where the MOD Publication Scheme states that the information will be published on specified dates, or at specified intervals, this exemption would normally apply to requests for such information. [The MOD Publication Scheme](#).
- “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 “reasonably accessible” thereafter. This exemption does not necessarily apply to all draft materials or background information and will only apply to the information you intend to publish.
- 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.
- Section 22 is not to be used to delay - there must be real intent to publish in the future. You should keep your audit trail which shows that the intention to publish was in place before the request was received.
- Where the information requested is in draft form, and it is not clear at the time of the request how much information in the draft is likely to be published in its current form (because further work may result in revisions to the draft or because a summarised version may eventually be published), consideration should be given to also applying section 35 or section 36 if there is likely to be a need to protect information in the original draft after publication.
- Should you or the third party subsequently decide not to publish – then the exemption no longer applies.
- Once information is published, section 22 no longer applies.

Other exemptions to consider:

- Section 35(1)(a) – formulation or development of government policy. Where the request would bring into scope versions of the information in draft form which could change before publication and which will not ultimately be released it may be necessary also to apply section 35(1)(a) (in addition to section 22) to exempt such information.
- Section 36(2)(b) – If the draft information does not relate to the formulation or development of a Government policy but includes tracked changes or other comments it may be necessary to section 36 as an alternative to section 35(1)(a) if it would have “a chilling effect” or prejudicial impact on meeting the aims of the published information to release information not meant for publication.

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