



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN40: Section 44 (Prohibitions on Disclosure)

Document history

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What this is about:

This Compliance Note provides an overview on the section 44 exemption of the Freedom of Information (FOI) Act – information whose disclosure is prohibited by law. It provides an outline of MOD compliance points to consider when engaging section 44 and any other exemptions to consider.

Detail:

Section 44 covers information which is prohibited from disclosure under other legislation.

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Section 44 is an absolute exemption and is not subject to a public interest test.

Section 44(1)(a) - where the disclosure of information is prohibited by or under any enactment

- Section 44(1)(a) provides for the exemption of information where its disclosure is prohibited by other legislation. It will be rare for information held by MOD to be covered by this exemption but should you consider that it may be, you should seek legal advice.

Section 44(1)(b) – Where the disclosure of information is incompatible with European Community obligations

- Section 44(1)(b) provides for the exemption of information where the disclosure is incompatible with any European Community obligation. Some of these obligations are implemented in UK statutes such as by an Act of Parliament or Regulations and some have not been transferred into domestic legislation i.e. EU regulations, EU Treaty obligations, EU Directives. If the information falls within a Community obligation that says it should be exempt, but that obligation either does not need to be, or has not properly been transposed into UK law, then section 44(1)(b) may apply. You should seek legal advice.

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Section 44(1)(c) - Where the disclosure of information would constitute a contempt of court

- Information is exempt when its disclosure would be punishable as a contempt of court.
- Information subject to a court order prohibiting its disclosure would be covered by section 44(1)(c). Information subject to a court order prohibiting its disclosure would be covered by this subsection.

Section 44(2) - the duty to confirm or deny

- Section 44(2) provides an exemption from the duty to confirm or deny whether information is held. It may be necessary neither to confirm nor deny that information is held if this is a requirement under other legislation, or under certain conditions or processes as specified in section 44.
- MOD has never used this subsection of the section 44 exemption and use of it will be very rare.

MOD compliance points:

- This exemption is intended to ensure that certain existing legal prohibitions on disclosure will override the general right of access (the EIRs differ from the FOI Act in that under reg.5 (6) any enactment or rule of law that would prevent the disclosure of information in accordance with the EIRs does not apply. The EIRs take precedence and the information is to be released unless another exception applies).
- The Official Secrets Act prohibits the unlawful disclosure of information. A disclosure made fully in accordance with MOD procedures for complying with the FOI Act and EIRs is a lawful disclosure. The two regimes are to that extent complementary: if FOI requires a disclosure then the Official Secrets Act will not prohibit it. Although this is an absolute exemption, the occasions on which it applies may vary from case to case. An authorised disclosure will not be prohibited by the Official Secrets Act but it is particularly important that decisions to release hitherto sensitive or classified information is authorised at an appropriate level. If in doubt you must refer to more senior staff.
- The Information Tribunal has ruled that the Human Rights Act 1998 is not a statutory bar to the disclosure of information within the terms of section 44 of the FOI Act.
- The FOI Act covers many common law prohibitions within its own exemptions. Breach of confidence, for example, is dealt with specifically in section 41. Breach of contract may involve sections 41 and 43.

MOD Casework Example:

- The MOD refused to provide footage that contained images of identifiable individuals as it might breach Article 8 of the European Convention on Human Rights (the 'Convention'). Article 8 of the Convention states that individuals have a right to respect for their private and family life. The MOD argued that the risk of distress to staff and their relatives meant that disclosure of the footage could unjustly interfere with those individuals' right to respect for their private lives. The Commissioner found that Article 8 does not act as a statutory prohibition on disclosure in this particular case and found that MOD wrongly relied on the exemption under section 44 of the Act in relation to the footage. ([ICO ref: FS50099223 Jan 08](#)).

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- 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 by MOD under section 44(1) in relation to Article 8 of the Human Rights Act (HRA) and by section 38(1)(a) (endangering to an individuals physical or mental health or safety). The ICO Decision Notice ([ICO ref: FS50418798 Apr 12](#)) found that the HRA does not operate as a statutory bar to disclosure, and therefore cannot be used as a justification under section 44(1)(a) to withhold information. Section 44 should therefore not have been engaged. The ICO also 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.

Further information

See ICO detailed guidance:

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