



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN32: Section 36 (Prejudice to Effective Conduct of Public Affairs)

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 36 of the Freedom of Information (FOI) Act – information which if disclosed and not exempt under section 35, would prejudice the effective conduct of public affairs. It provides an outline of MOD compliance points to consider when engaging section 36 and other exemptions to consider. The note also provides a Template for a section 36 submission to a Minister as Ministerial approval is required to engage this exemption.

Detail:

Section 36 is a qualified exemption and therefore subject to a PIT test. However, the Houses of Parliament are able to use it absolutely in relation to information that they hold (i.e. without consideration of the public interest).

Section 36(2) provides an exemption for information where disclosure in the reasonable opinion of a qualified person:

(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.

Section 36(3) provides that the duty to confirm or deny whether relevant information is held by the public authority does not arise if, in the reasonable opinion of the qualified person, such confirmation would, or would be likely to, have any of the effects cited at section a-c above..

MOD compliance points:

- **The use of section 36 in MOD requires a Minister, as the qualified person, to determine whether the exemption at section 36 is engaged.** The Minister's responsibilities cannot be delegated but any of the MOD Ministers can fulfil the role; the

MOD FOI/EIR Compliance Notes

lead Minister for the relevant subject matter would normally be the most appropriate choice.

- Before consulting a Minister, 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 or above. If the 1* believes that there is a case for considering use of section 36, the ministerial decision must then be sought by submission to the relevant Minister.
- **The Minister must have sight of all the information within scope of the exemption**, but not necessarily all the information that has been requested, if this is not relevant to the decision on section 36. The Minister must be fully informed of all the circumstances of the case in order to make a decision whether or not disclosure would have the consequences claimed. **It is not sufficient to offer to provide the information if the Minister wishes to see it.**
- Section 36 only applies to information which is not exempt under section 35 (formulation or development of Government policy). Like section 35, the section 36 exemption protects the delivery of effective central government, but s36 is intended primarily to safeguard the 'safe space' in which advice is provided to Ministers or views exchanged by officials in relation to departmental business. It should not be used as 'blanket cover' to withhold a whole document request. Other types of information (e.g. factual information) within the same document should be protected by the application of absolute and/or qualified exemptions, as many as are appropriate, in the usual way.
- Section 63(1) relating to historical records states that section 36 does not apply to information beyond 30 years. However, it still may be necessary to continue to protect it by use of other relevant exemptions that still apply, where appropriate.
- Requests for information originating from OGDs should be referred to the original Government department for advice, although the responsibility for responding to the request will remain with the MOD.
- Requests for information dating from a previous political administration (PPA) should be referred to CIO SPP-Information Rights, who will consult with the Attorney General's Office. This instruction is only relevant in cases where an information request includes papers written by a previous Minister or if they represent the views of a Minister of the PPA not previously made public.
- All the internal correspondence and other documentation about the handling of the information request must be retained for a minimum of seven years from the date of the response to the applicant. The audit trail will be required by the Internal Review Team should the case become subject to appeal.
- Section 36 relates to information which represents the views, opinions and advice of officials. In considering the application of section 36 it is unlikely that disclosure of factual information which has been disclosed in other contexts would be covered by the exemption although any views providing advice on the implications of the scenarios described factually may be.

MOD FOI/EIR Compliance Notes

Ministerial Submissions

As Ministerial approval is required for the use of section 36, a submission should be drafted. This submission should not ask the Minister to agree, or to approve, but to **decide** whether the exemption at section 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 state that the purpose of the submission is to seek the **Minister's decision** on whether the exemption is engaged.

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 section 36 is engaged*".

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

Subsection (a)
would prejudice **or**
would be likely to prejudice;

Subsection (b)
would inhibit **or**
would be likely to inhibit;

Subsection (c)
would otherwise prejudice **or**
would be likely otherwise to prejudice.

Generally the stronger **would** implies that it is more probable than not, and the lesser **would be likely to**, 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.

The reply should then go on say, for example in respect of section 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. Deciding at what level of harm release would cause (i.e. the choice between **would** and **would be likely to**) does not, of itself, affect whether or not the information will be withheld.

It is important to keep in mind that there is a possibility that the submission could be requested by the Information Commissioner. **Remember that the FOI Act is applicant blind and therefore any background information on the applicant is irrelevant to any decision taken.**

Public Interest Test

The public interest test (PIT) can only be finalised after the decision has been taken that section 36 applies as legally the Minister is not required to assess where the balance of the public interest lies, only whether the exemption is engaged. In practice, it is unlikely that a Minister will support the use of section 36 unless he considers that disclosure is not in the public interest. A draft PIT should be prepared for inclusion in the submission so that the Minister can see Officials' views on the potential 'pro' and 'contra' arguments and where the balance of the public interest might lie.

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

MOD FOI/EIR Compliance Notes

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.

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:

- Protection of the free and frank provision of advice to Ministers (the risk of which is sometimes referred to as the “chilling effect”) - as per section 36(2)(b)(i)
- Protection of thinking space in which there can a free and frank exchange of views between officials for the purposes of deliberation (there may otherwise be a reluctance to engage in a discussion process which may be disclosed) - as per section 36(2)(b)(ii)
- Protect information that might otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs - as per section 36(c).

The above factors will need to be elaborated on to reflect the particular circumstances of the case, to ensure that specific arguments relating to what the information at issue contains rather than generic arguments are assessed.

Legal Advice

Where legal advice is to be provided as part of the submission keep this in a separate section headed ‘Legal Advice’. All MOD legal advice about the department’s compliance with the FOI Act is privileged and would not be provided to the Information Commissioner should the submission ever have to be forwarded to the Commissioner at a subsequent stage of appeal.

Withholding Statistical Information under section 36

Section 36(4) deals with statistical information. This provision needs to be read alongside section 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 that policy advice or ministerial communication. Section 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. Nonetheless, it may continue to be exempt under section 36, if disclosure meets the prejudice and inhibition tests of section 36. If information is to be withheld the reasons why must be clearly shown. **However, there is no requirement for the qualified person to be engaged in the decision in respect of a decision about application of section 36(4).**

MOD FOI/EIR Compliance Notes

Response to the Request

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 section 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 section 36. The Minister has decided that section 36(2) xxx applies to the information requested”.

The FOI Act states that an explanation of the PIT must be given to an applicant where information is to be withheld. The response should explain the outcome of the PIT 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”.

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

MOD FOI/EIR Compliance Notes

Template for FOI Section 36 Submission

TO: [specify the Minister]

From: FOI Lead Branch

Date

File reference

FOI ACT 2000 REQUEST – ENGAGEMENT OF SECTION 36 EXEMPTION

Issue

1. To enable completion of a response to a request for information under the Freedom of Information Act 2000 ('the Act'), [name Minister] is invited to decide whether the disclosure of X would or would be likely to prejudice the effective conduct of public affairs with the terms of the exemption at section 36 of the Act.

Recommendation

2. [name Minister] is invited to **decide** whether in his reasonable opinion disclosure of the information would or would be likely to:

a) [specify the relevant specific sub-section/s of the exemption that are relevant]

and

b) [if necessary]

For each decision at (a) and (b) above, the Minister is invited to:

c) Set the level of prejudice i.e. "**would**" or "**would be likely to**" prejudice the conduct of public affairs.

[Completion note: Ministers should **not** be led on the matter or whether s36 should be engaged or not.]

Timing

MOD FOI/EIR Compliance Notes

Routine. *In order to maintain a satisfactory response time it is proposed to inform the requester by [date].*

[Completion note: The Act requires public authorities to comply with requests for information within 20 working days following receipt of the request. The Commissioner's view is that even a complex case involving public interest testing should not exceed 40 working days.]

Background

This section should state the request and describe the information under consideration.

[Completion note: The identity of the requester should not be shared as this might subsequently be construed as prejudicial to the Minister's decision. Information requests under FOIA are requester blind. Keep in mind that this submission may be disclosed to the Information Commissioner in the event of an appeal.]

Engagement of s36

The section should state the relevant part of section 36(2) that Minister should consider be engaged. It must be clear that the Minister is asked to make the decision and that his responsibilities as the qualified person cannot be delegated. However, a view can be provided to the Minister on the level of prejudice that would be found appropriate, which in most cases will be the lesser "would be likely to" unless there is clear evidence for the stronger "would".

Information in Scope

The information in scope of this request is at Annex A of the submission.

Public Interest Test

The public interest testing of all the qualified exemptions is at Annex B of the submission.

[Completion note: the Public Interest Test is carried out by an Official but it is helpful to provide this as part of 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.]

Financial Aspects

[Completion note: it may be sufficient to say simply that there are no financial implications.]

MOD FOI/EIR Compliance Notes

Legal Advice

[Completion note: If legal advice is required as part of the submission it should be referred to here under a separate heading. This serves to highlight it to the Minister and to ensure that it is not inadvertently disclosed at a later date.]

Presentation

[Completion note: consider the impact of the response and provide a news brief where appropriate. Bear in mind that withholding information may attract just as much attention as releasing it. It may not be possible to produce a news brief without disclosing the requester's details, particularly if they represent a national campaign group or are a journalist. However, the presentational issues section in the submission should avoid naming the requester.]

FOI Lead Branch signature

Annexes:

- A. Information in scope (marked showing proposed application of all the exemptions)*
- B. Public interest test*