



## MOD FOI/EIR Compliance Notes

### FOI Exemptions

#### CN31: Section 35 (Formulation of Government Policy)

##### *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 35 of the Freedom of Information (FOI) Act – information that relates to the formulation of government policy, Ministerial communications, advice from Law Officers or the operation of Ministerial private offices. It provides an outline of MOD compliance points to consider when engaging section 35 and other exemptions to consider.

##### *Detail:*

Section 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 is within the scope of the section 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.
- **The sensitivity of the information is likely to diminish with the passage of time, so that the age of the information, or timing of the request may be relevant in determining whether to apply the exemption or where the public interest may lie.**
- The section 35 exemption cannot be used if the information is in a document or file over 30 years old because at that point it becomes a historical record.

##### *MOD compliance points:*

- Section 35 is a class-based exemption meaning that information in this category can be withheld simply because it is in one of the categories listed above. However, because section 35 is a qualified exemption, withholding information of this type is not automatic. It must be demonstrated why the balance of public interest is in withholding this particular information.
- It is possible for information to be exempt under more than one part of section 35, e.g. it might relate both to the formulation of policy and constitute ministerial communications.
- Section 35 is closely linked to the exemption at section 36 but they cannot **both** be cited to explain a refusal to disclose the same information: section 36 (which requires a minister to decide that it is engaged) may only be used where section 35 does not apply e.g. it is technically possible to apply section 35 to some parts of a document and section 36 to other parts.

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- Once a policy decision is reached, the statistical information used to provide an informed background is not exempt under section 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.

### Help with the definitions of the clauses of section 35:

#### “Formulation or development of government policy”

Section 35(1)(a) can be interpreted broadly, i.e. not only Government policies discussed at Cabinet but also policies formulated and developed within single departments of state and government agencies. The type of information covered by section 35 might include drafts as well as final submissions, minutes, internal departmental correspondence, and ancillary documents such as e-mails. The exemption also might apply to early ideas which may be discarded. Policies relating to the internal management and administration of departments are not government policy and cannot be withheld using this exemption.

#### *MOD compliance points:*

- If policy formulation continues whilst the policy is being implemented care should be taken to distinguish between continuing policy development and the implementation or operation of policy (which will not be covered by section 35 but may be within the scope of section 36).
- After policy decisions have been taken, there may be good reasons why it would not be in the public interest to disclose 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 to achieve successful implementation.
- Only where factual information is inextricably interlinked with advice etc might the public interest be against disclosure. However, some factual information could be sensitive for operational or other reasons and merit the protection of other exemptions.

#### “Ministerial communications”

Section 35(1)(b) 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. Similarly, Private Secretary to Private Secretary correspondence written on behalf of their ministers. The criterion is that the communication is made 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.

#### “...the request for, or provision of, advice by any law officer”

Section 35(1)(c) covers 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.

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### “...the operation of any ministerial private office”

Section s35(1)(d) covers 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 section 40 (Personal Information.) This exemption applies **only** to ministers’ offices. Those of CDS and PUS are not covered.

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