



Department
for Education

This document has been withdrawn

Academies and freedom of information

Departmental advice for academies

January 2014

60 days to respond¹⁰. Failure to comply could result in a complaint to the Information Commissioner. The response time starts from the time the request is received. Where you have asked the enquirer for more information to enable you to answer, the 20 days start time begins when this further information has been received.

35. If a qualified exemption applies and you need more time to consider the public interest test, you should reply within the 20 days stating that an exemption applies but include an estimate of the date by which a decision on the public interest test will be made. This should be within a “reasonable” time – in practice, it is recommended by the Department that normally this should be within 10 working days.

36. Where you have notified the enquirer that a charge is to be made, the time period stops until payment is received and then continues again once payment has been received.

What action is required to refuse a request?

37. If the information is not to be provided, the person dealing with the request must immediately contact the person in the academy with delegated responsibility for FOI to ensure that the case has been properly considered and the reasons for refusal are sound. If it is decided to refuse a request, you need to send a refusals notice, which must contain:

- i. the fact that the responsible person cannot provide the information asked for;
- ii. which exemption(s) you are claiming apply;
- iii. why the exemption(s) apply to this enquiry (if it is not self-evident);
- iv. reasons for refusal if based on cost of compliance (see Annex B);
- v. in the case of non-absolute exemptions, how you have applied the public interest test, specifying the public interest factors taken into account before reaching the decision (see Annex C);
- vi. reasons for refusal on vexatious or repeated grounds vii) the internal complaints procedure.

38. For monitoring purposes and in case of an appeal against a decision not to release the information or an investigation by the Information Commissioner, the responsible person must keep a record of all enquiries where all or part of the

¹⁰ Freedom of Information (Time for Compliance with Request) Regulations 2010, available to view at www.legislation.gov.uk/ukSI/2010/2768/contents/made.

requested information is withheld and exemptions are claimed. The record must include the reasons for the decision to withhold the information. Records should be retained for 5 years. There are no requirements to keep records where you have supplied the information requested.

What do I do if someone complains?

39. Any written (including email) expression of dissatisfaction - even if it does not specifically seek a review – should be handled through the academy’s existing complaints procedure which should be fair and impartial. The procedure should be clear and non-bureaucratic. Wherever practicable, the review should be handled by someone not involved in the original decision. The academy trust should set and publish a target time for determining complaints and information on the success rate in meeting the target. The academy should maintain records of all complaints and their outcome.

40. When the original request has been reviewed and the outcome is that the information should be disclosed this should be done as soon as practicable. When the outcome is that procedures within the academy have not been properly followed, the academy should review procedures to prevent any recurrence. When the outcome upholds the academy’s original decision or action, the applicant should be informed of their right to appeal to the Information Commissioner. The appeal should be made in writing to:

The Case Reception Unit, Customer Service Team, Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Annex A - exemptions to Release of Information

1. Although decisions on disclosure should be made on a presumption of openness, the FOI Act recognises the need to preserve confidentiality and protect sensitive material in some circumstances.
2. You cannot withhold information in response to a valid request UNLESS one of the following applies:
 - an exemption to disclosure; or
 - the information sought is not held; or
 - the request is considered vexatious or repeated; or
 - the cost of compliance exceeds the threshold (see Annex B).

The duty to confirm or deny

3. A person applying for information has the right to be told if the information requested is held by the Academy, and if that is the case to have the information sent (subject to any of the exemptions). This obligation is known as the Academy's "duty to confirm or deny" that it holds the information. However, the Academy does not have to confirm or deny if:
 - the exemption is an absolute exemption (see paragraph 6); or
 - in the case of qualified exemptions (see paragraph 8), confirming or denying would itself disclose exempted information

Exemptions

4. A series of exemptions are set out in the Act which allow the withholding of information in relation to an enquiry. Some are very specialised in their application (such as national security) and would not usually be relevant to Academies. There are more than 20 exemptions but Academies are likely to use only a few of them.
5. There are two general categories of exemptions:
 - **Absolute:** where there is no requirement to confirm or deny that the information is held, disclose the information or consider the public interest; and

- **Qualified:** where, even if an exemption applies, there is a duty to consider the public interest in disclosing information

What are the Absolute Exemptions?

6. There are 8 absolute exemptions listed in the Act. Even where an absolute exemption applies:

- it does not mean that you can't disclose in all cases; it means that disclosure is not required by the Act. A decision could be taken to ignore the exemption and release the information taking into account all the facts of the case;
- there is still a legal obligation to provide reasonable advice and assistance to the enquirer.

7. The absolute exemptions in the Act are set out below. **Those which might be relevant to Academies are marked with an *:**

7.1 **Information accessible to the enquirer by other means*** (Section 21)

If information is reasonably accessible to the applicant by another route than the Act, it is exempt information. This is the case even if the enquirer would have to pay for the information under that alternative route. This exemption includes cases where you are required to give information under other legislation, or where the information is available via the Publication Scheme.

7.2 **Information dealing with security matters** (Section 23) (see also qualified exemption under Section 24 on national security)

This applies to information directly or indirectly supplied by, or relating to, bodies dealing with security matters such as GCHQ, MI5, MI6, Special Forces and the National Criminal Intelligence Service.

7.3 **Court records** (Section 32) – (see also the qualified exemption under Section 30 concerning investigations and proceedings conducted by public authorities)

This applies to information related to proceedings in a court or tribunal or served on a public authority for the purposes of proceedings.

7.4 **Parliamentary Privilege** (Section 34)

This exempts information if it is required for the purpose of avoiding an infringement of the Parliamentary privilege. Parliamentary privilege is an immunity whereby MPs cannot be prosecuted for sedition or sued for libel or slander over anything said during proceedings in the House.

7.5 Prejudice to the effective conduct of public affairs (Section 36) - see also the qualified exemption part of Section 36

This relates to the maintenance of the collective responsibility of Ministers.

7.6 Personal information* (Section 40) - see also the qualified exemption part of Section 40.

Where enquirers ask to see information about them, this is exempt under the Act because it is covered by the Data Protection Act. Consult Chapter 25 – Providing Information, [A Guide to the Law for School Governors](#) on the handling of requests for personal information (subject access requests) under the DPA.

7.7 Information provided in confidence* (Section 41)

This relates to information obtained from a person if its disclosure would constitute a breach of confidence actionable by that, or another, person.

7.8 Prohibitions on disclosure* (Section 44)

Information is exempt where its disclosure is prohibited under any other legislation by order of a court or where it would constitute a contempt of court or where it is incompatible with any EC obligation. 16

What are the Qualified Exemptions?

8. With qualified exemptions, even if it is decided that an exemption applies, there is a duty to consider the public interest in confirming or denying that the information exists and in disclosing information. Advice on carrying out the public interest test is at Annex C. The qualified exemptions in the Act are set out below. **Those which might be relevant to Academies are marked with an *:**

8.1 Information available by other means (Section 21)

Information is exempt from the right of access under the Freedom of Information Act if that information is reasonably accessible to the applicant by other means.

Public authorities should also use publication schemes to place information in the public domain proactively. If information has already been made available in a publication scheme, then it will be exempt under section 21.

8.2 Information intended for future publication* (Section 22)

If at the time the request was made, information is held with a view to publication, then it is exempt from disclosure if it is reasonable that it should not be disclosed until the intended date of publication. This could apply for instance to statistics published at set intervals, for example annually or where

information is incomplete and it would be inappropriate to publish prematurely¹¹. Remember, you still have a legal duty to provide reasonable advice and assistance.

8.3 National security (Section 24) (see also absolute exemption 23)

Information is exempt for the purposes of safeguarding national security.

8.4 Defence (Section 26)

Information is exempt if its disclosure would prejudice the defence of the UK.

8.5 International relations (Section 27)

Information is exempt if its disclosure would or would be likely to, prejudice relations between the UK and any other state, international organisation.

8.6 Relations within UK (Section 28)

Information is exempt if its disclosure would or would be likely to, prejudice relations between any administration in the UK i.e. the Government, Scottish Administration, Northern Ireland Assembly, or National Assembly of Wales.

8.7 The economy (Section 29)

Information is exempt if its disclosure would, or would be likely to, prejudice the economic or financial interests of the UK.

8.8 Investigations and proceedings conducted by public authorities* (Section 30)

Information is exempt if it has at any time been held by the Academy for the purposes of criminal investigations or proceedings, such as determining whether a person should be charged with an offence or whether a charged person is guilty, or investigations which may lead to a decision to institute criminal proceedings. The duty to confirm or deny does not apply to such information.

8.9 Law enforcement* (Section 31)

Information which is not exempt under Section 30 Investigations and Proceedings, may be exempt under this exemption in the event that disclosure would, or would be likely to, prejudice the following among others:

- the prevention or detection of crime

¹¹ Note the following:

- the intended publication does not have to be by the Academy, it can be by another person or body on behalf of the Academy;
- the date of publication does not have to be known, it could be at some future date (although it is recommended that some idea of a likely date is given);
- the duty to confirm or deny does not apply if to do so would involve the disclosure of any of the relevant information.

- the apprehension or prosecution of offenders
- the administration of justice
- the exercise of functions such as ascertaining if a person has broken the law, is responsible for improper conduct, whether circumstances justify regulatory action, ascertaining a person's fitness or competence in relation to their profession, ascertaining the cause of an accident or protecting or recovering charities or its properties
- any civil proceedings brought by or on behalf of the Academy which arise out of an investigation carried out for any of the purposes mentioned above.

The duty to confirm or deny does not arise where prejudice would result to any of these matters.

8.10 **Audit Functions** (Section 33)

Information is exempt if its disclosure would, or would be likely to, prejudice the exercise of an authority's functions in relation to the audit of the accounts of other public authorities. It does not apply to internal audit reports.

8.11 **Formulation of government policy** (Section 35)

Information held is exempt information if it relates to the formulation or development of government policy, ministerial communications, advice by Law Officers (e.g. Attorney General) and the operation of any Ministerial private office.

8.12 **Prejudice to the conduct of public affairs*** (Section 36) (excluding matters covered by the absolute exemption part of Section 36)

Information likely to prejudice the maintenance of the convention of the collective responsibility of Ministers or likely to inhibit the free and frank provision of advice or exchange of views

8.13 **Communications with the Queen*** (Section 37)

Information is exempt if it relates to communications with the Queen, the Royal Family or Royal Household or if it relates to the award of honours. The duty to confirm or deny does not arise where this exemption applies.

8.14 **Health and Safety*** (Section 38)

Information is exempt if its disclosure would or would be likely to endanger the safety or physical or mental health of any individual. The duty to confirm or deny does not arise where prejudice would result.

8.15 Environmental information* (Section 39)

Information is exempt under FOI where it is covered by the Environmental Information Regulations. Environmental information can cover information relating to: air, water, land, natural sites, built environment, flora and fauna, and health. It also covers all information relating to decisions or activities affecting any of these. 18

8.16 Personal information* (Section 40) – see also the absolute exemption part of Section 40

Where an individual seeks information about themselves Data Protection Act powers apply. Where the personal information concerns a third party, it is exempt if its disclosure would contravene the Data Protection Act, or the data protection principles; or if the person to whom the information relates would not have a right of access to it because it falls under one of the exemptions to the Data Protection Act. The duty to confirm or deny does not arise in relation to this information if doing so would be incompatible with any of the above.

8.17 Legal professional privilege* (Section 42)

Legal professional privilege covers any advice given by legal advisers, solicitors and barristers. Generally such information will be privileged. An Academy wishing to disclose the information will need to seek consent from the provider of the advice. This exemption covers all such information where a claim to legal professional privilege can be in legal proceedings. The duty to confirm or deny does not arise where to do so would involve the disclosure of such information.

8.18 Commercial interests* (Section 43)

Information is exempt if it constitutes a trade secret or would be likely to prejudice the commercial interests of any person or body (including the Academy). The duty to confirm or deny does not arise where prejudice would result to commercial interests but not where the information constitutes a trade secret.

Confidentiality and Applying Exemptions

9. When considering if an exemption to disclosure should apply, bear in mind that the presence of confidential markings such as Restricted, Confidential and Private does not constitute an exemption and is not in itself sufficient grounds on which to prevent disclosure. Each case must be considered on its merits.

Timing

10. Where information has previously been withheld, it must not be assumed that any subsequent requests for the same information will also be refused. Sensitivity of

information decreases with age and the impact of any disclosure will be different depending on when the request is received. Therefore, for each request, it will be necessary to consider the harm that could result at the time of the request and, while taking into account any previous exemption applications, each case should be considered separately.

Next steps

11. In all cases, before writing to the enquirer, the person given responsibility for FOI by the Academy Trust will need to ensure that the case has been properly considered, and that the reasons for refusal, or public interest test refusal, are sound.¹⁹

Annex B - Charging

May I charge a fee?

1. FOI does not require charges to be made but Academies have discretion to charge applicants a fee in accordance with the Fees Regulations (draft fees Regulations on the Legislation website here).

What are the costs that may be taken into account?

2. You need to take the following into account when calculating the estimated cost of complying with a request for information:

- *The prescribed costs*

These are any costs reasonably incurred by the Academy:

- in determining whether you hold information of the description specified in the request;
- in locating and retrieving the information and in meeting the applicant's preference for communicating the information;
- the cost of associated staff time. But it does not include the cost of staff time incurred in determining whether the Academy is obliged to comply with the request for information.

- *The disbursements*

These are any costs directly and reasonably incurred by the Academy in:

- informing the applicant whether you hold information of the description specified in the request;
- communicating the information to the applicant.

Are there limits to the fee I can charge?

3. Yes. If you choose to charge a fee for complying with a request for information, it must not be more than the sum of the prescribed costs and the disbursements.

What if the estimated costs exceed the threshold of £450

4. If the estimated cost of complying exceeds the threshold you are not required to comply with the request but may choose to do so. If you choose to comply with a

request where the estimated cost exceeds the threshold you should calculate the charge as follows:

- 10% of the prescribed cost for the first £450;
- the prescribed costs over £450.

May I aggregate the costs where there are multiple requests?

5. Where two or more requests are made to the Academy by different people who appear to be acting together or as part of a campaign the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with them all, provided that:

- the two or more requests referred to in that section are for information which is on the same subject matter or is otherwise related;
- the last of the requests is received by the Academy before the twentieth working day following the date of receipt of the first of the requests; and
- it appears to the Academy that the requests have been made in an attempt to ensure that the prescribed costs of complying separately with each request would not exceed the appropriate limit.

How do I inform the applicant of the fee?

6. Where you intend to charge a fee for complying with a request for information then the Academy must give the person requesting the information notice in writing (the “fees notice”) stating that a fee of the amount specified in the notice is to be charged for complying.
7. Where a fees notice has been given to the person making the request, you do not need to comply with the request unless the fee is paid within three months of the notice being received.

Annex C - Applying the Public Interest Test

Background

1. Having established that a qualified exemption(s) definitely applies to a particular case, you must then carry out a public interest test to identify if the public interest in applying the exemption outweighs the public interest in disclosing it. Therefore, unless it is in the public interest to withhold the information, it has to be released. Although precedent and a developed case law will play a part, individual circumstances will vary and each case will need to be considered on its own merits.

Carrying out the test

2. It is worth noting that what is in the public interest is not necessarily the same as that which may be of interest to the public. It may be irrelevant that a matter may be the subject of public curiosity. In most cases it will be relatively straightforward to decide where the balance of the public interest in disclosure lies. However, there will inevitably be cases where the decision is a difficult one. Applying such a test depends to a high degree on objective judgement and a basic knowledge of the subject matter and its wider impact on the Academy and possibly wider. Factors that might be taken into account when weighing the public interest include:

For Disclosure	Against Disclosure
Is disclosure likely to increase access to information held by the Academy?	Is disclosure likely to distort public reporting or be misleading because it is incomplete?
Is disclosure likely to give the reasons for a decision or allow individuals to understand decisions affecting their lives or assist them in challenging those decisions?	Is premature disclosure likely to prejudice fair scrutiny, or release sensitive issues still on the internal agenda or evolving?
Is disclosure likely to improve the accountability and transparency of the Academy in the use of public funds and help to show that it obtains value for money?	Is disclosure likely to cause unnecessary public alarm or confusion?
Is disclosure likely to contribute to public debate and assist the understanding of existing or proposed	Is disclosure likely to seriously jeopardise the Academy's legal or contractual position?
Is disclosure likely to increase public participation in decision-making?	Is disclosure likely to infringe other legislation e.g. Data Protection Act?

For Disclosure	Against Disclosure
Is disclosure likely to increase public participation in political processes in general?	Is disclosure likely to create a controversial precedent on the release of information or impair your ability to obtain information in the future?
Is disclosure likely to bring to light information affecting public safety?	Is disclosure likely to adversely affect the Academy's proper functioning and discourage openness in expressing opinions?
Is disclosure likely to reduce further enquiries on the topic?	If a large amount of information on the topic has already been made available, would further disclosure shed any more light or serve any useful purpose?

3. Note also that:

- potential or actual embarrassment to, or loss of confidence in, the Academy, staff or governors is NOT a valid factor
- the fact that the information is technical, complex to understand and may be misunderstood may not of itself be a reason to withhold information
- the potential harm of releasing information will reduce over time and should be considered at the time the request is made rather than by reference to when the relevant decision was originally taken
- the balance of the public interest in disclosure cannot always be decided on the basis of whether the disclosure of particular information would cause harm, but on certain higher order considerations such as the need to preserve confidentiality of internal discussions
- a decision not to release information may be perverse i.e. would a decision to withhold information because it is not in the public interest to release it, itself result in harm to public safety, the environment or a third party?

4. You will need to record the answers to these questions and the reasons for those answers. Deciding on the public interest is not simply a matter of adding up the number of relevant factors on each side. You need to decide how important each factor is in the circumstances and go on to make an overall assessment.

For Disclosure

5. Where the balance of the public interest lies in disclosure, the enquiry should be dealt with and the information required should be made available. Where the factors are equally-balanced, the decision should usually favour disclosure (but see 3rd bullet point above).

Against Disclosure

6. After carrying out the public interest test if it is decided that the exemption should still apply, proceed to reply to the request.

There will be occasions when it has been decided that a qualified exemption applies but consideration of the public interest test may take longer. In such a case, you must contact the enquirer within 20 working days stating that a particular exemption applies, but including an estimate of the date by which a decision on the public interest test will be made. This should be within a “reasonable” time – in practice, it is recommended this decision is made and communicated within the 20 days but where not possible it is suggested that no more than 10 working days beyond the 20 days should be allowed.

7. In the case of Academies, the ‘Qualified Person’ for section 36 - prejudice to effective conduct of public affairs would be the Chair of the Board of Directors of the proprietor of the Academy¹². In most cases, this would be the Chair of the Governing Body.

¹² ‘Proprietor’ and ‘Academy’ are as defined by the Education Act (1996).



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