

EXPLANATION OF EXEMPTIONS UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Introduction

This document provides guidance on the exemptions from disclosure available within FOISA. The exemptions are listed in the order they appear in the Act, along with the relevant section number from the Act.

The information given here is not exhaustive and further information can be obtained from the central FOI Team (foi@pkc.gov.uk, extension 77933, fax 77939) or from the website of the [Scottish Information Commissioner](#).

There are two types of exemptions in the Act – absolute and non-absolute (or qualified). The difference being that for a non-absolute exemption the public interest in disclosing the information must be considered even if the exemption applies.

The application of the exemptions (and the test of public interest) are undertaken by each public authority and are based on precedents, any guidance available and the authority's own understanding of the situation at the time.

Contents

[Public Interest](#)

[Substantial Prejudice](#)

[S.25 Information otherwise accessible](#)

[S.26 Prohibitions on disclosure](#)

[S.27 Information intended for future publication](#)

[S.28 Relations within the United Kingdom](#)

[S.29 Formulation of Scottish Administration policy](#)

[S.30 Prejudice to effective conduct of public affairs](#)

[S.31 National security & defence](#)

[S.32 International relations](#)

[S.33 Commercial interests and the economy](#)

[S.34 Investigations by Scottish public authorities](#)

[S.35 Law enforcement](#)

[S.36 Confidentiality](#)

[S.37 Court records](#)

[S.38 Personal information](#)

[S.39 Health, safety and the environment](#)

[S.40 Audit functions](#)

[S.41 Communications with Her Majesty, etc.](#)

Substantial Prejudice

Many of the exemptions within the Act use the test of “substantial prejudice”. There is no definition of “substantial prejudice” in the Act, but the Scottish Information Commissioner’s view is that, in order to claim this, the damage caused by disclosing information would have to be real or very likely, rather than hypothetical. The harm that would be caused must be significant, not marginal, and it would have to occur in the near future not in some distant time.

We will have to consider disclosing the information requested unless it would cause real, actual and significant harm. We must be able to supply evidence of this harm to the Commissioner.

Public Interest

The Act does not define the public interest but it has been described as “something which is of serious concern and benefit to the public”. It has also been held that public interest does not mean what is of interest to the public but what is in the interest of the public.

What constitutes the public interest may change over time and according to the circumstances of each case. Because of this, the Council needs to make judgements on a case by case basis in the light of emerging guidance or best practice. We must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in withholding the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

Some of the factors which we should take into account when applying the public interest test are:

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment
- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions
- whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders
- whether disclosure would contribute to the effective oversight of expenditure of public funds and that the public obtain value for money
- whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual’s right to privacy

In deciding whether it is in the public interest to disclose information, we should not take into account:

- possible embarrassment of government or other public authority officials;
- the seniority of persons involved in the subject matter;
- the risk of the applicant misinterpreting the information;
- possible loss of confidence in government or in another public authority.

S.25 Information otherwise accessible

This exemption applies to information which is already available to the applicant by some means other than making a request under the Act for it. This may be information that is already contained within the Council's publication scheme, information which is made available under other legislation but may not appear in the publication scheme (e.g. Trading Standards Prosecutions), or historical information held in the Council Archive.

The publication scheme is a legal requirement under the Act and lists all the categories of information that the Council publishes or intends to publish, the format that the information is / will be available in, where the information can be obtained from, and whether there is a charge for providing the information. The scheme contains all the information we have a legal duty to publish, all the things we already publish, and any information we would readily make available to the public on request.

The scheme is available on the Council's Website at <http://www.pkc.gov.uk/Council+and+government/Data+protection+and+freedom+of+information/Publication+scheme/>

The Council has a duty to assist an applicant making a request, so there may be instances when we will supply information to the applicant even although it is "otherwise accessible".

This is an absolute exemption.

S.26 Prohibitions on disclosure

This exemption applies to information which cannot be released because of other legislation. Information can also be withheld if releasing it into the public domain would constitute a contempt of court.

Note that copyright is not an issue since the Copyright, Designs and Patents Act has been amended to permit the release of copyright information under FOISA.

This is an absolute exemption.

S.27 Information intended for future publication

There are two distinct cases covered by this exemption. Firstly, if information is intended to be published (that is there is already a documented plan in place to publish it when the request is received) within 12 weeks from the date of receiving a request, it does not have to be released as part of a FOI request. This exemption will only apply where the early release of the information would cause a problem of some kind (for example with a launch date) or the delay would be relatively short.

The second case is where information is obtained in the course of a programme of research where the investigations are continuing and are not yet ready to be published; and disclosure of this information prior to publication would substantially prejudice the research. This is meant to protect genuine academic research rather than “simple data collection or the analysis of such data”.

The key issue here is substantial prejudice, since there will be few occasions when the Council will be able to prove that this is the case. In the majority of cases, information falling within this bracket will have to be released.

S.28 Relations within the United Kingdom

This exemption relates to information that, if disclosed, would substantially prejudice relations between any administration in the United Kingdom (i.e. UK Government, Scottish Government, Northern Ireland or Welsh Assemblies) and any other such administration.

It is unlikely that this exemption will apply to information held by the Council.

S.29 Formulation of Scottish Government policy etc.

This exemption covers information held by the Scottish Government relating to the formulation or development of government policy (the policy of the Scottish Government and the UK Government); Ministerial communications (any communications between Ministers); the provision of any advice by Law Officers (the Lord Advocate and the Solicitor General for Scotland) and the operation of any Ministerial private office (personal administrative support to a Minister).

This exemption is unlikely to apply to the Council.

S.30 Prejudice to the effective conduct of public affairs

There are two relevant sections within this exemption. It exempts from disclosure information which would

- inhibit substantially the free and frank provision of advice or exchange of views for the purposes of deliberation;
- substantially prejudice the effective conduct of public affairs.

The first of these covers a range of information – advice or views provided to the Council by external bodies or individuals, opinions given by officers, etc. The exemption can be applied where the disclosure would substantially inhibit the

provision of the advice, etc. The “substantially inhibit” test can be taken to mean that people would actually stop giving advice, etc. if the information was disclosed.

The second is something of a catch-all and covers the situation where the disclosure of information would effectively prevent the Council from doing its work properly. Examples of the sort of information which might be covered by this exemption are inspection schedules for Environmental Health Officers, details of cases being worked on by Trading Standards, Committee reports to be considered in private, or details of security arrangements for Council premises.

S.31 National security and defence

Information is exempt from disclosure for the purpose of safeguarding national security. Similarly, information is exempt from disclosure if its disclosure would substantially prejudice the defence of the British Islands or the capability, effectiveness or security of any relevant forces.

It is possible for a public authority to obtain a certificate signed by a member of the Scottish Government certifying that such exemption is, or at any time was, required for the purpose of safeguarding national security. Such a certificate was issued covering certain information related to the G8 conference.

It should be noted that, even with a certificate, this is not an absolute exemption, so that the public interest test will always apply.

A related exemption from the UK Act potentially applies to the Council. Under that Act any correspondence with or related to the security services is exempt from disclosure.

S.32 International relations

This exemption relates to information that, if disclosed, would substantially prejudice

- relations between the United Kingdom and any other State;
- relations between the United Kingdom and any international organisation or international court;
- the interests of the United Kingdom abroad;
- or the promotion or protection by the United Kingdom of its interests abroad.

The exemption also applies to confidential information obtained from a State other than the United Kingdom or an international organisation or international court.

This exemption is highly unlikely to apply to the Council.

S.33 Commercial interests and the economy

Information is exempt from disclosure if it constitutes a trade secret; or its disclosure under this Act would substantially prejudice the commercial interests of any person or Scottish public authority.

Note that “person” can be taken to mean an organisation.

“Commercial interests” must specifically relate to a commercial trading activity, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment. Note also that financial interests are not necessarily the same as commercial interests – a proposed Council Tax level might affect the Council’s financial interests, but would not affect its commercial interests.

Information is also exempt information if its disclosure would substantially prejudice the economic interests of the UK or the financial interests of an administration in the UK.

This part of the exemption is highly unlikely to apply to the Council.

S.34 Investigations by Scottish public authorities

This exemption covers information held for the purpose of a Council investigation to ascertain whether a person should be prosecuted for an offence.

It also covers an investigation conducted by the Council from which the Council may decide to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or criminal proceedings instituted in consequence of a report made by the Council to the procurator fiscal.

The types of investigations that may come under this exemption include trading standards, benefit fraud, or other areas where we have powers of prosecution. Certain internal investigations may also be covered by this exemption. Note the overlap with the Law Enforcement exemption (S.35).

S.35 Law enforcement

This exemption covers information that, if disclosed, would prejudice substantially a number of things including:

- the prevention or detection of crime;
- the apprehension or prosecution of offenders;
- the administration of justice;
- the assessment or collection of any tax or duty;
- the exercise by any public authority of its functions for the purposes mentioned below;
- any civil proceedings brought and arising out of an investigation conducted for any such purpose

The ‘purposes’ include mentioned include:

- to ascertain whether a person has failed to comply with the law;
- to ascertain whether a person is responsible for conduct which is improper;
- to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;

- to ascertain a person's fitness or competence in relation to any profession or other activity which the person is, or seeks to become, authorised to carry on;
- to secure the health, safety and welfare of persons at work; and
- to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

The lists are wide-ranging and require careful consideration, but the basic purpose of the exemption is fairly clear and understandable. The “substantial prejudice” test will require us to show that we would be unable to carry out the function (probably related to specific cases) if the information was disclosed.

S.36 Confidentiality

There are two separate areas covered by this exemption. The first is where a claim to confidentiality of communications could be maintained in legal proceedings.

This principally covers legal professional privilege, but is considered likely to cover some communications made as part of other professional relationships such as doctor/patient and social worker/client.

The second area covers information obtained by the Council from another person where its disclosure to the public (other than under FOI) would constitute an actionable breach of confidence.

In general, traditional contract clauses referring to “confidentiality” will not be adequate defence under this exemption. The reason for the claim for confidentiality will have to be considered, particularly in relation to the commercial interest exemption (s33).

There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:

- the information must have the necessary quality of confidence;
- we must have received the information in circumstances which imposed an obligation on us to maintain confidentiality; and
- there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.

It should be noted that public interest in disclosure was a successful defence against breach of confidentiality prior to FOI.

This second part of the exemption is an absolute exemption.

S.37 Court records, etc.

Information is exempt from disclosure if it is solely contained in a document held as a “court record”. This covers documents held as part of a specific court proceeding.

This is an absolute exemption.

S.38 Personal information

Personal information (as defined by the Data Protection Act) is exempt from disclosure, under certain conditions. They are:

- if the applicant is asking for information about her/himself (but the information will, of course, be available to the applicant under the Data Protection Act)
- if the applicant is asking for information about someone else where disclosure would contravene any of the data protection principles, would cause damage or distress if released, or if it is exempt from the data subject's right of access to personal data
- if it constitutes personal census information
- if it is a deceased person's health record

The main problem area will be the second point above, where the applicant is asking for information about someone else. In general, any personal information the Council holds is kept for specified purposes and the people/organisations to whom the information will be disclosed is also specified. It is not normal for this to include disclosure to the general public.

There is guidance, however, that information about officers carrying out their duties or about posts should not be considered as personal information. Thus, information about who attended meetings, who wrote a report, salary scales and so on would not be exempt from disclosure under this exemption. Similarly information about senior officers (chief officers) is considered more likely to be disclosed than about other officers.

This is an absolute exemption.

S.39 Health, safety and the environment

This exemption is in two parts. The first covers information that, if disclosed under FOI, may endanger the physical or mental health or the safety of an individual.

The second part is a technical exemption that means that information to do with the environment has to be considered for disclosure under different regulations - the Environmental Information (Scotland) Regulations 2004.

S.40 Audit Functions

This exemption relates to information which, if disclosed, would substantially prejudice the exercise of the Council's functions in relation to audits of **other** Scottish public authorities (not internal audits).

S.41 Communications with Her Majesty etc. and honours

This exemption relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household, including information related to honours lists.