

ACPO  
Manual of Guidance

# The Freedom of Information Act (2000)



ASSOCIATION OF  
**CHIEF POLICE OFFICERS**

Version 6.1

**This manual is fully disclosable under FOI and has been prepared following feedback from and consultation with the Information Commissioner's Office.**

**Please destroy all previous copies of this manual and work only from this one.**

**If you have a technical FOIA enquiry please check this manual before contacting the CRU.**

**We would urge all practitioners to join the FOIA community on POLKA where an electronic version of this manual is available.**

**DISABILITY DISCRIMINATION ACT (DDA) STATEMENT**

This manual has been produced specifically for FOI practitioners.

Additional copies are available, if required, in larger print from the ACPO Central Referral Unit.

## LIST OF ABBREVIATIONS

ACPO	Association of Chief Police Officers
ACPOS	Association of Chief Police Officers of Scotland
BAU	Business as Usual
CHIS	Covert Human Intelligence Source
CPIA	Criminal Procedures and Investigation Act
CPS	Crown Prosecution Service
CRU	Central Referral Unit
DDA	Disability Discrimination Act
DP	Data Protection
DPA	Data Protection Act
EIR	Environmental Information Regulations
FOI	Freedom of Information
FOIA	Freedom of Information Act
GCHQ	Government Communications Headquarters
GPMS	Government Protective Marking Scheme
HMIC	Her Majesty's Inspector of Constabularies
IC	Information Commissioner
ICO	Information Commissioner's Office
IPCC	Independent Police Complaints Commission
IT	Information Tribunal
MOG	Manual of Guidance
MOJ	Ministry of Justice
NCND	Neither Confirm Nor Deny
NIP	Notice of Intended Prosecution
NSAP	National Security Appeals Panel
PIT	Public Interest Test
PNC	Police National Computer
SAR	Subject Access Request
SOCA	Serious Organised Crime Agency
SRP	Safer Roads Partnership

## LIST OF APPENDICES

Appendix 1	Environmental Information Regulations
Appendix 2	Freedom of Information Act

# TABLE OF CONTENTS

LIST OF ABBREVIATIONS	2
LIST OF APPENDICES	2
Appendix 1 Environmental Information Regulations	2
Appendix 2 Freedom of Information Act	2
TABLE OF CONTENTS	
FOREWORD	13
FREEDOM OF INFORMATION ACT 2000	14
ENVIRONMENTAL INFORMATION REGULATIONS	15
TIMESCALE SUMMARY	16
NEITHER CONFIRM NOR DENY (NCND) SUBSECTIONS	16
USING THE ACPO NATIONAL MANUAL OF GUIDANCE	17
INTRODUCTION	18
ACPO STATEMENT OF POLICY	18
POLICE SERVICE REFERRAL CRITERIA	19
INTRODUCTION	19

THE PROCESS	19
CENTRAL REFERRAL UNIT REFERRAL CRITERIA V4	20
ACPO FREEDOM OF INFORMATION REFERRAL TEMPLATE V2	21
<b>DEFINING A REQUEST</b>	<b>22</b>
GENERAL INFORMATION	22
FOI AND ENVIRONMENTAL INFORMATION REGULATIONS (EIR)	22
LEGISLATION - SECTION 8	22
BUSINESS AS USUAL	23
<b>FEE REGULATIONS</b>	<b>25</b>
LEGISLATION - SECTION 9	25
LEGISLATION - SECTION 12	25
LEGISLATION - SECTION 13	26
GUIDANCE	27
FEE REGULATIONS	27
THE APPROPRIATE LIMIT	27
CALCULATING COSTS	27
ESTIMATE	28
CHARGEABLE ITEMS	28
<b>TIME FOR COMPLIANCE</b>	<b>30</b>
LEGISLATION - SECTION 10	30
GUIDANCE	31
NOT COMPLYING WITH THE 20 WORKING DAY LIMIT	31
OTHER FACTORS WHICH MAY AFFECT THE DEADLINE	31
PIT EXTENSION	31
<b>VEXATIOUS REQUESTS</b>	<b>34</b>
LEGISLATION - SECTION 14	34

<b>GUIDANCE</b>	<b>34</b>
OVERVIEW	34
IDENTIFYING AND DEALING WITH A VEXATIOUS REQUEST	34
REPEATED REQUESTS	35
REFUSING THE REQUEST	36
<b>ACKNOWLEDGING A REQUEST &amp; PROVIDING ASSISTANCE</b>	<b>37</b>
LEGISLATION - SECTION 16	37
GUIDANCE	37
<b>TRANSFER OF REQUESTS</b>	<b>38</b>
LEGISLATION - SECTION 16	38
GUIDANCE	38
WHERE NO INFORMATION HELD	38
WHERE INFORMATION PARTIALLY HELD	38
THE RECEIVING AUTHORITY'S OBLIGATIONS	38
CONSULTATION WITH THIRD PARTIES	39
<b>THE DECISION-MAKING PROCESS</b>	<b>40</b>
GUIDANCE	40
MODEL REQUEST PROCESS	40
<b>REFUSING REQUESTS FOR INFORMATION</b>	<b>43</b>
LEGISLATION - SECTION 17	43
GUIDANCE	44
INTERNAL REVIEW	45
GENERAL CONSIDERATIONS	45
FREEDOM OF INFORMATION ACT AND EIR REVIEW CHECKLIST	47
<b>NCND</b>	<b>48</b>
LEGISLATION - SECTION 1	48
GUIDANCE	48

GENERAL	48
WHY IS NCND NEEDED?	48
WHEN CAN NCND BE USED?	49
NCND QUALIFIED EXEMPTIONS	49
NCND WITH ABSOLUTE EXEMPTIONS	49
RESPONDING TO THE APPLICANT	50
SECTION 17(4) REFUSAL	50
PARTIAL NCND	50
THE USE OF NCND FOR S23 AND S24 MATERIAL	50
COMBINED USE OF S23(5) AND S24(2) EXEMPTIONS TOGETHER	50
<b>PROVIDING INFORMATION</b>	<b>52</b>
LEGISLATION - SECTION 11	52
GUIDANCE	52
MEDIUM OF COMMUNICATION	52
WHERE INFORMATION IS RELEASED	53
COPYRIGHT	53
DISCLOSURE LOG	53
<b>FOI EXEMPTIONS</b>	<b>54</b>
<b>THE PUBLIC INTEREST TEST</b>	<b>55</b>
OVERVIEW	55
THE DUTY TO CONFIRM OR DENY AND THE PIT	56
CONDUCTING THE PUBLIC INTEREST TEST	57
CONSIDERATIONS THAT ARE INVALID	60
BALANCE TEST	60
<b>SECTION 21</b>	<b>62</b>
<b>INFORMATION REASONABLY ACCESSIBLE BY OTHER MEANS</b>	<b>62</b>
LEGISLATION	62
GUIDANCE	62
ADDITIONAL GUIDANCE	64

<b>SECTION 22</b>	<b>65</b>
<b>INFORMATION INTENDED FOR FUTURE PUBLICATION</b>	<b>65</b>
LEGISLATION	65
GUIDANCE	65
<b>SECTION 23</b>	<b>67</b>
<b>INFORMATION SUPPLIED BY, OR CONCERNING, CERTAIN SECURITY BODIES</b>	<b>67</b>
LEGISLATION	67
<b>SECTION 24</b>	<b>68</b>
<b>NATIONAL SECURITY</b>	<b>68</b>
LEGISLATION	68
GUIDANCE	68
CONSULTATION	68
MINISTERIAL CERTIFICATES	69
GENERAL POINTS	69
NATIONAL SECURITY	70
NCND EXISTENCE OF INFORMATION	70
<b>SECTION 26</b>	<b>72</b>
<b>DEFENCE</b>	<b>72</b>
LEGISLATION	72
GUIDANCE	72
<b>SECTION 27 INTERNATIONAL RELATIONS</b>	<b>73</b>
LEGISLATION	73
GUIDANCE	73

<b>SECTION 28 RELATIONS WITHIN UK</b>	<b>75</b>
LEGISLATION	75
GUIDANCE	75
<b>SECTION 29</b>	<b>76</b>
<b>THE ECONOMY</b>	<b>76</b>
LEGISLATION	76
GUIDANCE	76
<b>SECTION 30</b>	<b>77</b>
<b>INVESTIGATIONS AND PROCEEDINGS CONDUCTED BY PUBLIC AUTHORITIES</b>	<b>77</b>
LEGISLATION	77
GUIDANCE	77
RELATIONSHIP WITH S31	78
ATTRACTION OF NCND WHEN S30 IS ENGAGED	78
THE PUBLIC INTEREST TEST	79
CASE-BY-CASE	79
<b>SECTION 31</b>	<b>80</b>
<b>LAW ENFORCEMENT</b>	<b>80</b>
LEGISLATION	80
GUIDANCE	81
WHAT TYPE OF INFORMATION IS COVERED?	82
RELATIONSHIP WITH S30 (INVESTIGATIONS ETC)	82
ATTRACTION OF NCND WHEN S31 IS ENGAGED	83
HARM AND THE PUBLIC INTEREST TEST	83
HISTORICAL INFORMATION	83
<b>SECTION 32</b>	<b>84</b>
<b>INFORMATION CONTAINED IN COURT RECORDS</b>	<b>84</b>

LEGISLATION	84
GUIDANCE	84
INFORMATION LIKELY TO BE COVERED	85
HISTORICAL INFORMATION	85
SECTION 33	86
AUDIT FUNCTIONS	86
LEGISLATION	86
GUIDANCE	86
SECTION 34	87
DISCLOSURE WHICH WOULD INFRINGE PARLIAMENTARY PRIVILEGE	87
LEGISLATION	87
GUIDANCE	87
SECTION 35	88
FORMULATION OF GOVERNMENT POLICY AND OTHER GOVERNMENTAL INTERESTS	88
LEGISLATION	88
GUIDANCE	88
SECTION 36	90
DISCLOSURE PREJUDICING THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS	90
LEGISLATION	90
GUIDANCE	90

<b>SECTION 37</b>	<b>92</b>
<b>COMMUNICATION WITH THE ROYAL FAMILY AND HONOURS</b>	<b>92</b>
LEGISLATION	92
GUIDANCE	92
<b>SECTION 38</b>	<b>93</b>
<b>HEALTH &amp; SAFETY</b>	<b>93</b>
LEGISLATION	93
GUIDANCE	93
<b>SECTION 39</b>	<b>95</b>
<b>ENVIRONMENTAL INFORMATION</b>	<b>95</b>
LEGISLATION	95
GUIDANCE	95
<b>SECTION 40</b>	<b>96</b>
<b>PERSONAL INFORMATION</b>	<b>96</b>
LEGISLATION	96
GUIDANCE	97
S40(1)	97
S40(2)	97
S40(5)	99
PROCESSING DATA	99
<b>SECTION 41</b>	<b>100</b>
<b>INFORMATION PROVIDED IN CONFIDENCE</b>	<b>100</b>
LEGISLATION	100

GUIDANCE	<b>100</b>
BREACH OF CONFIDENCE TEST	101
OFFICIAL GUIDANCE	102
<b>SECTION 42</b>	<b>104</b>
<b>LEGAL PROFESSIONAL PRIVILEGE</b>	<b>104</b>
LEGISLATION	104
GUIDANCE	104
<b>SECTION 43</b>	<b>105</b>
<b>COMMERCIAL INTERESTS</b>	<b>105</b>
LEGISLATION	105
GUIDANCE	105
OFFICIAL GUIDANCE	106
CONSULTATION	108
CONTRACTS/CONFIDENTIALITY CLAUSES	108
<b>SECTION 44</b>	<b>109</b>
<b>INFORMATION COVERED BY PROHIBITIONS ON DISCLOSURE</b>	<b>109</b>
LEGISLATION	109
GUIDANCE	109
<b>PUBLICATION SCHEME</b>	<b>110</b>
INTRODUCTION	110
LEGISLATIVE REQUIREMENTS	110
DOCUMENTS TO BE VIEWED	111
GUIDANCE	111
GUIDE TO PUBLISHED INFORMATION	111
INFORMATION TO BE MADE AVAILABLE	112
FORMAT OF THE PUBLICATION SCHEME	113

MONITORING AND REVIEW	113
FEEES AND CHARGES	113
COMPLAINTS PROCEDURE	114

**APPENDIX 1** **115**

**ENVIRONMENTAL INFORMATION REGULATIONS** **115**

LEGISLATION **115**

GUIDANCE **116**  
LIST OF EIR EXCEPTIONS 116

**APPENDIX 2** **118**

**FOI LEGISLATION** **118**

# FOREWORD

As a public service, policing must wherever possible be transparent and accountable. Although this was true prior to the introduction of the Freedom of Information Act (FOIA), the ramifications of this legislation have begun to create a world in which proactive publication by public bodies is the norm. Not only does this add value to our policies and procedures, it also enhances the trust of our communities as they can see with clarity how we have performed our duty. Of course, this approach to proactive publication does not prevent requests for information from rising: since the publication of the last Manual of Guidance (MOG), we have seen a 20% growth in the annual level of applications. The Service receives more Freedom of Information (FOI) requests than any other public body and law enforcement remains a matter of significant public interest. When this is added to the desire of the Service to place as much information as possible in the public environment so that local communities can influence policing priorities, then the overall challenge for managing our information becomes even more complex. The recent decision by Government to include the Association of Chief Police Officers (ACPO) within the legislation is further evidence of the desire to promote public accountability at all levels within the Service.

However, there remains the reality that not all policing information is for public consumption. We need to make balanced judgments in accordance with the principals of the Act so as to justify why some information remains unpublished. It is a matter of significant concern for many in the Police Service that certain areas of our critical business (such as those concerning police informants, the management of sex offenders in the community, victims of crime and security operations involving the Royal Family and visiting Heads of State) continue to be subject of numerous FOI applications. The 'right to know' is not a 'right to know everything'. We maintain the view, for example, that in order to continue to attract police informants and to protect their safety, it is essential that their identity and the amount that they are paid remains confidential. Interestingly, other countries who have implemented Freedom of Information specifically excluded such data becoming publicly available within their legislation.

I have become more convinced about the value of retaining an ACPO Central Referral Unit (CRU) in order to promote corporate compliance with national FOIA issues whenever possible. This process has been invaluable when attempting to address key business issues. Working with the ACPO lead for specific business areas, the CRU has continued to deliver corporate advice assisting forces to release information in the knowledge that other forces will follow the same principals. I do not regard this as an attempt to thwart the individual decision-making of Chief Officers, merely to assist them in coming to a conclusion which remains theirs alone to make.

In addition, between June 2008 and June 2009, the CRU has continued to deliver essential training to over 240 members of staff from police forces and other partner agencies across the country. This has ensured that staff continue to develop skills and understand the intricacies of making a judgement with regard to the retention or release of information. Hopefully, these training programmes have helped to 'de-mystify' the legislation and especially to encourage our staff to contact applicants in order to find out exactly what they require and if appropriate, to release it. At its best, FOI requires close liaison with applicants and first class communication skills which promotes under most circumstances compliant responses.

We work very constructively with the Information Commissioner (IC) and his staff and continue to be grateful for the advice that has been offered in the compilation of this manual. Of course, we do not always agree but professional debate can often lead to a better outcome for both organisations and more importantly, for the public.

Finally, can I take the opportunity of wishing you well in your work involving Freedom of Information. Policing in a liberal democracy is a huge challenge but one which ensures that the informed consent of our communities continues to support our policing endeavours.



Ian Readhead QPM, LL.B  
ACPO Director of Information

# FREEDOM OF INFORMATION ACT 2000

<p><b>THE BASICS</b></p>	<ul style="list-style-type: none"> <li>• The Act gives any individual anywhere in the world the right to information held by the Police Service, subject to the application of exemptions.</li> <li>• The Act gives two related qualified rights - the right to be told whether the information is held and the right to receive the information.</li> <li>• The right of access applies regardless of the purpose of the application.</li> </ul>
<p><b>RESPONSIBILITIES ON PUBLIC AUTHORITIES</b></p>	<p>The Freedom of Information Act confers two responsibilities on public sector bodies:</p> <ul style="list-style-type: none"> <li>• The duty to confirm or deny whether the information requested exists; and</li> <li>• The duty to communicate the information.</li> </ul> <p>The two main instruments through which the release of information is achieved are:</p> <ul style="list-style-type: none"> <li>• <b>Creating and maintaining a publication scheme</b> The purpose of this is to make available a significant proportion of disclosable information routinely available and accessible without waiting for it to be requested.</li> <li>• <b>Providing a general right of access to all types of 'recorded' information held by public authorities</b> Under the terms of the Act, public authorities are required to make available requested information (subject to a range of exemptions) to any individual or organisation anywhere in the world.</li> </ul>
<p><b>VALIDITY</b></p>	<p>To be valid under the Freedom of Information Act, requests:</p> <ul style="list-style-type: none"> <li>• Must be made in writing;</li> <li>• Must clearly describe the information being sought;</li> <li>• Can be made from anywhere in the world;</li> <li>• Can be made by an individual or an organisation;</li> <li>• Can be made by letter, fax or email;</li> <li>• Must be legible; and</li> <li>• Must contain the name of the applicant and a return address.</li> </ul> <p>To be valid under the Freedom of Information Act, requests do not:</p> <ul style="list-style-type: none"> <li>• Have to be written on a special form;</li> <li>• Need to mention the Act; or</li> <li>• Need to refer to 'Freedom of Information' in any way.</li> </ul>

<b>WHAT IS COVERED?</b>	<p>The Freedom of Information Act:</p> <ul style="list-style-type: none"><li>• Covers records capable of recovery in any form.</li><li>• Covers information not data or documents.</li><li>• Covers information in any format, no matter how it is recorded.</li><li>• Is fully retrospective: as long as the public authority has the information, it must be considered to fall within the scope of the request.</li></ul> <p>All information, no matter how recorded, is subject to the FOIA. This includes written records, typed, handwritten, scribbled notes, e-mails, flip-charts, videos, audio tapes, computer tapes, logs, answer phone messages, tapes of telephone conversations and archived records.</p>
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**UNDERLYING ALL OF THIS IS THE PRESUMPTION THAT INFORMATION WILL BE RELEASED IN-KEEPING WITH THE SPIRIT OF THE LEGISLATION WHICH EMPHASISES A POSITIVE APPROACH TO DISCLOSURE.**

The FOIA gives a general right of access to information to the public. However, the Act makes provision for withholding of information and offers 23 exemptions that may be applied to decline disclosure. For the Police Service, some exemptions are more relevant and applicable than others.

Applying exemptions under the FOIA can be complicated. Detailed guidance is provided in this manual.

### **ENVIRONMENTAL INFORMATION REGULATIONS**

ICO guidance on the Environmental Information Regulations (EIRs) may be located on the relevant ICO's website guidance page.

<http://www.ico.gov.uk/>

## TIMESCALE SUMMARY

The following timescales apply:

Reasonable interval (repeated request)	60 working days
Clarification	If not received, request can be closed after 20 working days
Internal review	20 working days
PIT extension (qualified exemptions)	20 working days

## NEITHER CONFIRM NOR DENY (NCND) SUBSECTIONS

S23(5)	Information supplied by, or concerning, certain security bodies
S24(2)	National security
S30(3)	Investigations and proceedings conducted by public authorities
S31(3)	Law enforcement
S32(3)	Court records
S36(3)	Disclosure prejudicing the effective conduct of public affairs
S38(2)	Health & safety
S40(5)	Personal information
S41(2)	Information provided in confidence
S43(3)	Commercial interests
S44(2)	Information covered by prohibitions on disclosure

# USING THE ACPO NATIONAL FOI MANUAL OF GUIDANCE

Welcome to the latest version of the ACPO National Manual of Guidance for the Freedom of Information Act.

***PLEASE DESTROY ALL PREVIOUS VERSIONS OF THE MANUAL AND WORK FROM THIS VERSION ONLY***

<b>MANUAL OBJECTIVES</b>	<ul style="list-style-type: none"> <li>• To ensure consistency of approach in applying FOI principles, making FOI decisions and enforcing FOI exemptions;</li> <li>• To act as a user’s guide;</li> <li>• To provide a comprehensive resource for FOI Officers;</li> <li>• To ensure consistency in publishing information into the public domain via force publication schemes and in response to FOI enquiries; and</li> <li>• To define those requests that must be referred centrally due to their possible impact on the Police Service as a whole.</li> </ul>
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**BEFORE CONTACTING THE ACPO CENTRAL REFERRAL UNIT PLEASE REFER TO THE MANUAL!**

MANUAL STRUCTURE	
<b>Legislation</b>	Under this heading, the specific section of the Act is presented, together with any other relevant information.
<b>Guidance</b>	ACPO interpretation of the Act and ACPO policy are covered under this heading. Falling under this heading is detailed guidance on good practice in relation to each of the key processes.

# INTRODUCTION

THIS IS THE LATEST VERSION OF THE FOI MANUAL.

PLEASE DISREGARD ALL OTHER VERSIONS AND  
REFER ONLY TO THIS ONE.

The ACPO FOI Manual of Guidance provides the corporate template for processing and managing FOI across the 44 Home Office forces of England, Wales and Northern Ireland, each of which stands alone as an independent public authority. By following one single reference document, national corporacy can be encouraged, ensuring that the Act is interpreted in the same way by each force, safeguarding consistency and equality in the decision-making process.

The manual contains detailed guidance and advice on dealing with requests for information and managing complaints. It provides interpretation of FOI exemptions and it discusses the categories of information that the Police Service views as significant and in need of protection.

Looking beyond the FOI request process itself, the manual explains how forces should look to release information proactively through local publication schemes.

The Manual of Guidance has been ratified by ACPO and therefore provides the template that forces **must** follow in order to maintain a consistent and coherent approach to the application of the legislation across the Police Service.

## ACPO STATEMENT OF POLICY

ACPO is committed to the fair treatment of people regardless of their age, colour, culture, disability, ethnic or national origins, gender, race, religious beliefs or sexual orientation.

The content of this manual has been created to ensure that every individual or group is treated equitably and consistently.

When applying the guidance within this manual, practitioners must consider the legislative requirements that must guide decision-making to avoid discriminating against any group or individual.

# POLICE SERVICE REFERRAL CRITERIA

## INTRODUCTION

There are certain risks associated with the disclosure of the types of information held by the Police Service. These risks range in severity from the minor upset of a partner agency to the death of an individual and/or damage to the national infrastructure.

These outcomes can be caused by a wide range of scenarios from criminal, concerted campaign or media use of the legislation to poorly thought out release or withholding of information. Actually refusing to provide information, even if appropriate, can sometimes be more damaging than releasing it, due to the adverse publicity and complaints it may attract.

In order to combat these issues, and reduce the risks, a Central Referral Unit has been created and ratified by all Chief Constables in the UK. The CRU's remit is to:

- Provide advice, good practice and consistency in response with regard to FOIA requests that meet the referral criteria.
- Co-ordinate strategic development of FOIA throughout the Police Service.
- Maintain and develop relationships with partners, other agencies, regulatory bodies and requestors at a national level.
- Deliver FOIA training and promulgate good practice appropriate to the needs of the service.
- Proactively monitor potential criminal and misuse of the legislation in order to protect the service.
- Analyse intelligence.

Ensuring delivery of this remit is the responsibility of the respective ACPO and Association of Chief Police Officers of Scotland (ACPOS) portfolio holders. The CRU will centrally co-ordinate combined activity and its location will be determined by the ACPO portfolio holder.

## THE PROCESS

Forces should analyse all FOIA requests they receive using the referral criteria in this manual. Please note v4 of the Referral Criteria contained within this manual has been considerably altered since v3.

A request being referred must be accompanied by the CRU template (please see next page). Please note that this template must be completed in its entirety for consideration by the CRU and incomplete templates will be returned. If information is not available to complete a particular box on the template, please indicate this.

In the first instance issues requiring advice or requests for referral should be sent by e-mail to [acpo.advice@foi.pnn.police.uk](mailto:acpo.advice@foi.pnn.police.uk).

The CRU may be contacted by telephone on 0844 892 9010.

## CENTRAL REFERRAL UNIT REFERRAL CRITERIA V4

- All requests as specified below should be sent to the CRU.
- A **fully** completed referral form must accompany each request.
- The criteria is broken down by 'risk', which indicates the severity of harm that the public and/or the Police Service could suffer at a national level if the request is not subjected to appropriate consideration. 'Low Risk' is an indicator that detriment **may** still occur, but only at a local level.
- Accordingly, any individual and/or force deciding not to comply with the criteria may have to account for any adverse effect caused without the support of national business leads and/or senior partner agencies.

Risk	Subjects
High	Firearms (police or criminal), CBRN and explosives*  National Systems (eg. ANPR, PNC, PND, NDNAD etc)*  Information originating from ACPO/S (eg. Manuals of Guidance)*  RSO or MAPPA*  Ongoing high profile/national investigations or operations* ----- Witness Protection **  Information originating from or relating to the Security Services/SOCA/ SCDEA**  VIP/Royalty Protection **  CHIS/Informants **  Terrorism or domestic extremism **  Surveillance/RIPA**
Medium	Information sent to or from a national body (eg. Home Office)*  Completed high profile/national investigations or operations (eg. Pentameter 1, G8)*
Low	Unpublished statistics, resource or finance information not subject to Home Office/Scottish Executive returns  Any request being made vexatious (indicate whether advice is needed or if submission is for recording purposes only)
*	Unless already published or disclosed within last 12 months
**	Must always be referred regardless of previous disclosures or advice

In addition to the above the following should also be referred:

- Requests for an internal review of a previously CRU referred request.
- An appeal with the Information Commissioners Office (ICO) or Tribunal case, regardless of whether it has been referred before.

Forces may also refer any other request which they require assistance in responding to or are have concerns about **provided they specify exactly what service is required from the CRU.**

**ONCE REFERRED, IF NO ADVICE HAS BEEN RECEIVED, PLEASE DO NOT SEND A RESPONSE TO THE APPLICANT WITHOUT DISCUSSING THE MATTER WITH THE RELEVANT CRU CASEWORKER.**

## ACPO FREEDOM OF INFORMATION REFERRAL TEMPLATE V2

- When submitting a request to the Central Referral Unit, all fields on this form must be completed as fully as possible.
- If answers are not yet known, please indicate when information will be provided.
- There is no requirement to complete this form if responding to a CRU circulated request.

1.	Your force reference:	
2.	Date request received:	
3.	Is this an initial submission/internal review/ICO appeal/tribunal?	
4.	Details of the applicant: - name - company/organisation - address - e-mail - phone	
5.	Actual wording of request: <i>Please do not attach a PDF - word or e-mail only</i>	
6.	Referral subject area:	
7.	Person dealing with request:	
8.	Initial thoughts on disclosure or any other information about the case which may assist:	
9.	What service is required from the CRU?	

# DEFINING A REQUEST

## GENERAL INFORMATION

Under the FOIA any information, documentation or records that are produced internally or held by a public authority, or held by contractors or third parties on behalf of the public authority, are covered by the Act.

All information held by staff associations, such as the Police Federation, Unison, National Black Police Association, Gay and Lesbian Association etc, will not be covered by the Act even though the information may be held on police servers or premises, as long as the information is only for the sole use of those associations or unions.

However, if the information is used or accessed by the police force to execute its functions as an organisation, then it would be deemed as being held by the Police Service and would, therefore, need to be considered for disclosure under the FOIA. This also applies to information provided to forces by suppliers and contractors and to information held by them on forces' behalf.

## FOI AND ENVIRONMENTAL INFORMATION REGULATIONS (EIR)

There are many similarities between the two regimes and any request for 'environmental information' must be answered in accordance with the EIRs rather than the FOIA. It is possible that in some cases both regimes will be relevant. In these cases, it is essential to be clear which parts of the information fall under which regime so as to apply the correct exemption or exception if information has to be withheld.

Requests for information under the EIRs do not need to be made in writing but can include telephone requests on environmental matters (although in practice it is advisable to make a written record of any verbal requests received).

Under FOI there is a requirement to provide a substantive response to any request for information promptly and in any event within 20 working days. There is some scope to extend this timescale when a qualified exemption is being considered and it is necessary to assess the balance of public interest. The EIRs also require requests to be answered within 20 working days but there is provision to extend the response time to 40 working days, but only for complex and voluminous requests.

## **LEGISLATION - SECTION 8**

- (1) In this Act any reference to a 'request for information' is a reference to such a request which-
  - (a) is in writing,
  - (b) states the name of the applicant and an address for correspondence, and
  - (c) describes the information requested.
  
- (2) For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request -
  - (a) is transmitted by electronic means,
  - (b) is received in legible form, and
  - (c) is capable of being used for subsequent reference.

Clearly, **most** written requests for information received by a force are likely to be FOIA requests and by law must be treated as such. This includes requests made via social networking sites providing they fulfil the s8 criteria.

Where a request is received and the applicant is either anonymous or suspected to be using a pseudonym, there is no lawful requirement to deal with this under FOIA because the criterion defined under s8 is not met. However, if there is no harm in disclosing the requested information and there is negligible cost, forces are encouraged to provide the information.

**The key is to engage the applicant whenever the opportunity arises. This leads to greater clarity, and in some cases can actually save time!**

### **BUSINESS AS USUAL**

To overcome the bureaucratic issues associated with many thousands of pieces of correspondence being processed under FOIA, there is an established option called 'Business as Usual' (BAU).

This term has been created to cover certain types of requests which can fall outside of the legislation. It is an informal agreement and has no legal basis whatsoever.

Extreme care needs to be taken when taking a request outside of the legislation, as an abuse of BAU could invite an Enforcement Notice from the Information Commissioner's Officer (ICO) or, much more seriously, the withdrawal of the BAU as an option for all public authorities.

**To be treated as BAU, a request for information must fit the 'Key Criteria' in that:**

- It must not indicate that it is an FOIA request.\*
- The information will be provided.
- The information will be provided within 20 working days.

*\* Decision Notices have indicated that requests that are merely addressed to the 'FOI Department' or the 'FOI Mailbox' would be an indication of the intent of the applicant. If in doubt, clarify with the applicant.*

It is common to receive written requests for information from partner agencies, and other law enforcement bodies, such as the Crown Prosecution Service (CPS), Local Authorities, Independent Police Complaints Commission (IPCC), Home Office, Serious Organised Crime Agency (SOCA) and other forces.

The provision of information to these bodies is an established, key business process, which should not attract the usual FOIA procedure, and should whenever possible be processed as BAU. \*\*

However, such requests can only be processed as BAU when the key criteria are met. If the request falls outside of the key criteria, there is still an option to capture it within BAU, provided written confirmation that the requestor does not require it to be

processed under FOIA is sought. In the case of any doubt, a formal withdrawal obtained from the applicant will provide an audit trail, protecting the receiving authority.

*\*\* Care should be taken that just because the requestor is a member of such an organisation, that they are not exercising their private rights under FOIA. If in doubt, ask!*

It is common for numerous requests for information to come into force media departments. In the vast majority of cases this will take the form of a telephone call, which in itself is not a valid FOIA request, and should be dealt with appropriately.

However, care needs to be taken with written requests, which are highly likely to conform with s8 of the Act and will therefore meet all the legal criteria that define an FOIA request. In order for these to be processed as BAU, it **must** fit the 'key criteria' outlined in this manual.

If in any doubt, enquiries must be made with the applicant as to their intentions and if necessary, written confirmation obtained. Written confirmation must be received from the applicant prior to any request being withdrawn under FOI and processed through Business as Usual channels.

It is recognised that some information is normally provided for a fee, such as road traffic collision reports. A request for the provision of such data can be dealt with informally if the 'key criteria' are met. Otherwise, the request will need to be processed under the legislation and should attract the s21 exemption, Information reasonably accessible by other means. See also the chapter on the publication scheme.

Practitioners should split up questions before processing/proceeding.

Each subject area contained within a request is counted as a separate request. This is particularly relevant when considering the Fees Regulations (see relevant section in this manual) and the requirements for partial NCNDs where parts of a request fall under the Data Protection Act.

A basic example of this is if a request were received asking for general information about police vehicles and bonus payments to the Chief Constable, this must be divided into two individual requests.

A more complex illustration would be one of the types of requests commonly received by Safer Roads Partnerships (SRPs) where a recipient of a Notice of Intended Prosecution (NIP) makes a request for information personal to themselves (and their case) combined with training details of officers, calibration certificates of cameras and statistical information on the site.

In this example, there may be a requirement to provide an NCND response to the element of the request relating to the individual's personal details and the existence of information relating to the offence itself, coupled with the requirement to provide other more generic information- such as officer training details and calibration certificates - under FOI. In order to facilitate this multiple response, practitioners are advised to break the request down into its component parts and respond accordingly.

# FEES REGULATIONS

## LEGISLATION - SECTION 9

- (1) A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a 'fees notice') stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1).
- (2) Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.
- (3) Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State.
- (4) Regulations under subsection (3) may, in particular, provide -
  - (a) that no fee is payable in prescribed cases,
  - (b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and
  - (c) that any fee is to be calculated in such manner as may be prescribed by the regulations.
- (5) Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.

## LEGISLATION - SECTION 12

- (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
- (3) In subsections (1) and (2) 'the appropriate limit' means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.
- (4) The Secretary of State may by regulation provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority -
  - (a) by one person, or
  - (b) by different persons who appear to the public authority to be acting in concert or in pursuance 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.

- (5) The Secretary of State may by regulation make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

### **LEGISLATION - SECTION 13**

- (1) A public authority may charge for the communication of any information whose communication-
- (a) is not required by section 1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of section 12 (1) and (2), and
  - (b) is not otherwise required by law, such fee as may be determined by the public authority in accordance with regulations by the Secretary of State.
- (2) Regulations under this section may, in particular, provide -
- (a) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and
  - (b) that any fee is to be calculated in such manner as may be prescribed by the regulations.
- (3) Subsection (1) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of information.

## GUIDANCE

### FEES REGULATIONS

S12 of the FOIA provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit. The appropriate limit is the key concept concerning fees.

The Fees Regulations state that this cost limit is £450 in the case of the Police Service.

A public authority must still confirm or deny whether it holds the information requested **unless the cost of this alone would exceed the appropriate limit.**

### THE APPROPRIATE LIMIT

There are two distinct areas in relation to fees contained within the legislation.

The first area is relevant to the initial processing of a request when an authority, when estimating the time taken, can take into account the following four items:

- Determining if the information is held;
- Locating the information;
- Retrieving the information; and
- Extracting the information to be disclosed from the other information\*.

\*The time spent identifying information to be exempted and the time dedicated to the process of redaction cannot be included in the fees estimate.

#### Example

A request is received for any external feedback on the force's new IT project.

The information is contained somewhere within a mixture of electronic files and hard copy letters and correspondence contained within 10 crates. The total number of documents is in excess of 10,000 and to read through each of those documents to determine those relevant to the request is likely to exceed the 18 hours.

A similar request is received for **all** information held relating to the force's new IT project. The same information is identified as being relevant to the request. There is now no requirement to filter out irrelevant documents as all the information is captured by the request. The fact that these documents now need to be read in order for a disclosure decision to be made is not something that can be included within the fees estimate.

### CALCULATING COSTS

An authority can take into account the costs attributable to the time that persons (both the authority's staff and external contractors) are expected to spend on these activities. Such costs are calculated at £25 per hour per person for all authorities regardless of the actual cost or rate of pay, which means that the limit will be exceeded if these activities exceed 24 hours for central government, legislative bodies and the armed forces, and 18 hours for all other authorities.

NB. The figures of £450 and £600 relate only to the appropriate limit; they do not relate to the fees that may be charged.

## ESTIMATE

S12 makes it clear that a public authority does not have to make a precise calculation of the costs of complying with a request. Only an estimate is required.

However, the estimate must be **reasonable**.

Good practice when refusing a request on cost is to provide a breakdown of how those costs have been estimated. This is supported by the Information Tribunal's approach in the case of *Gowers v London Borough of Camden & the ICO* in which it was stated that a public authority should demonstrate how their estimate has been calculated.

Where a force refuses a request because the appropriate limit has been exceeded, it should advise and assist an applicant on options in refining their request in order to bring it under the cost threshold. Options may include:

- Providing an index or list of information where already available.
- Ascertaining whether the applicant would like a summary or digest of the information request.
- Ascertaining whether the applicant would like to view the information should the cost of providing the information in permanent form be too costly.
- Answering and charging up to the full amount (please consult with CRU prior to selecting this option).
- Declining to answer the request due to the likely cost of compliance being greater than the appropriate limit.
- Answering and waive the fee.

Forces are able to charge for disbursement or communication costs regardless of the amount of time required to process the request.

## CHARGEABLE ITEMS

There are two types of fees that can be charged:

- A fee to cover the **marginal costs** of the request - the cost of finding, sorting, editing or redacting. Fees can only be charged in such situations when the marginal cost exceeds the **appropriate limit**, as defined in the fees regulations.
- A fee to cover the cost of **disbursements**, such as printing, photocopying or postage.

### Marginal Costs

S13 states that a fee may be charged for requests that exceed the appropriate limit. The current regulatory limit has been set by the Secretary of State and currently stands at £600 for central government and £450 for other public authorities, including local authorities, the Police Service, the health service and education.

If it is estimated that the cost of responding to a request would be less than £450, the Police Service is unable to pass on the marginal charge for the request to the applicant.

### Standard Hourly Rate

In order to provide a national standard for charging for access to information from UK police forces, it is recommended the standard hourly rate contained within the Fees Regulations should be adopted by forces.

This rate currently stands at £25 per hour which equates to 18 hours of work.

This charge will apply regardless of geographical location and who deals with the request.

#### Disbursements

Disbursements may include:

- Photocopying or printing material - At cost;
- Postage - At cost;
- Producing material in an alternative format, such as putting it onto CD-Rom, video, audio cassette or in Braille - At cost; and
- Translating information into a different language at the request of the applicant (not Welsh). If a public authority regularly works in the language requested and has an in-house translation service, it should consider waiving any translation costs.

Staff time associated with these activities cannot be included unless the request exceeds the fee limit and the force has taken the decision to charge for the total cost of the request.

There is no limit to the amount that a public authority may charge in disbursements.

If disbursement costs are not received within 60 working days (beginning on the day the fees notice is issued), the force is not obliged to comply with its duty to provide the information.

#### **UPDATED ACPO POLICY**

When processing voluminous requests, for which neither S12 (excess costs) nor S14 (vexatious) apply, forces should continue to engage with the applicant in order to negotiate a solution. If this fails and it is likely that exemptions are engaged, those should be applied to the entire request, evidenced in line with S17. In addition to this, evidence of the substantial administration burden compliance would cause should also be provided. The usual complaint processes will apply and the applicant can seek adjudication from the ICO. The CRU will then engage with the ICO, invite him to rule on the exemptions and to consider applying his discretion, under s58, in supporting non-disclosure on the basis of unreasonable effort if he is so minded.

Any force considering such action should refer the case to the CRU and it engage with the ICO at an early stage to get a steer on such cases. The fact that discretion will only be exercised in exceptional circumstances should always be borne in mind.

Ultimately, a negotiated settlement will still be the CRU's primary aim.

The CRU would define a 'voluminous' request not by the number of documents, but by the time it would take to ascertain whether the information requested is exempt. Arguably, a common sense baseline to begin with is 18 hours.

# TIME FOR COMPLIANCE

## LEGISLATION - SECTION 10

- (1) Subject to subsections (2) and (3), a public authority must comply with section (1) promptly and in any event not later than the twentieth working day following date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3) If, and to the extent that -
  - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
  - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied, the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which the notice under section 17(1) must be given.
- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.
- (5) Regulations under subsection (4) may-
  - (a) prescribe different days in relation to different cases, and
  - (b) confer a discretion on the Commissioner.
- (6) In this section -
  - (a) 'the date of receipt' means -
  - (b) the date on which the public authority receives the request for information, or if later, the day on which it receives the information referred to in section 1(3); 'working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

## **GUIDANCE**

### **NOT COMPLYING WITH THE 20 WORKING DAY LIMIT**

The time limit in which forces have to respond to requests is very clearly defined in the legislation and ICO guidance. Requests must be answered as soon as practicable, and in any case within 20 working days. It is important to remember that day '1' will be the day after receipt.

If on rare occasions forces believe that it may not be possible to meet the 20 working day deadline, they should contact the CRU as soon as possible for further advice.

There is a possibility that the deadline can be legally extended for public interest considerations (see relevant section of this manual) but only where a valid qualified exemption is engaged. This option should not be taken unless the force is honestly considering public interest issues.

There is no provision to support occasions where forces cannot comply because of issues such as poor records management, lack of resources or internal failings due to members of the force not participating effectively in the request process.

ICO guidance clearly articulates that consultation and research with stakeholders is not a valid reason for non-compliance in respect of exceeding the time limit on requests.

### **OTHER FACTORS WHICH MAY AFFECT THE DEADLINE**

The 20 working days time limit becomes effective on the day of receipt or the date on which further information that has been reasonably required has been received. Where a fee is charged, the 20 day compliance time period will begin again upon clearance of the applicant's cheque.

If a request is received and there is an 'out of office' with an alternative address, the request has not been 'received' and the onus falls back on the applicant to re-direct. If an 'out of office' is on with no alternative, the request was received on the date it arrived in the original mailbox.

If s8 of the Act is not complied with (see relevant section of this manual), then the 'clock' will not have started as a legal request does not yet exist.

If clarification has been requested or the force is awaiting further details from the applicant, then the clock can be 'stopped'. It should re-start immediately upon receipt of the requested clarification or details.

Where clarification or a fee is required, the authority may close off the request after 60 working days if no further correspondence is received from the applicant

### **PIT EXTENSION**

Where a qualified exemption is being applied, the public authority may 'stop the clock' and extend the deadline for consideration of public interest factors for a time which is reasonable in the circumstances. The FOIA does not define the word 'reasonable', but it is the ICO view that it is **not** acceptable for a public authority to take, as a matter of course, several weeks to assess the public interest considerations.

In cases where the public interest considerations are exceptionally complex, it may be reasonable to take longer but, in no case should the **total** time exceed 40 working days.

It is imperative that the applicant is kept regularly informed of progress and where the initial 20 working days is going to be exceeded, forces must still serve a 'refusal notice' under s17 of FOIA within 20 working days of a request even in those cases where it is relying on a qualified exemption and has not yet completed the public interest test. That notice must state the exemption(s) being relied on and, if not apparent, why. The notice must include an estimate of the time by which this decision will be made. If the final decision is to withhold the information requested, a second notice must then be issued providing the reasons for the decision on the public interest. No further notice is required if the final decision is to disclose the information.

In some situations, a qualified exemption may apply to the duty to confirm or deny and, due to the need to consider the balance of the public interest, it may not be appropriate to confirm or deny whether the information is held within the 20 working day deadline. If time for complying needs to be extended in relation to the duty to confirm or deny, the letter to the applicant must be very carefully drafted to ensure that no indication is given as to whether or not the information requested is held.

Also remember that if no exemptions apply to some of the information requested, it should be provided within the 20 days as usual. The time deadline for the provision of this information cannot be extended. It would be good practice to provide this information together with the extension notice.

It is recommended that a PIT extension response should include:

*'The FOI Act obliges us to respond to requests promptly and in any case no later than 20 working days after receiving your request. We must consider firstly whether we can comply with s1(1)(a) of the Act, which is our duty to confirm whether or not the information requested is held and secondly we must comply with s1(1)(b), which is the provision of such information. However, when a qualified exemption applies either to the confirmation or denial or the information provision and the public interest test is engaged, the Act allows the time for response to be longer than 20 working days, if the balance of such public interest is undetermined.*

*In this case we have not yet reached a decision on where the balance of the public interest lies in respect of either of the above obligations. We estimate that it will take an additional [xx] days to take a decision on where this balance lies. Therefore, we plan to let you have a response by [date]. If it appears that it will take longer than this to reach a conclusion, you will be kept informed.*

*The specific exemption(s) which apply in relation to your request is/are: [ include both qualified and absolute indicating which is which and include a brief explanation of why it/they apply unless it is not apparent or unless you are not required to do so by virtue of s17(4)].*

*Insert usual complaint information.*

Additional information may be located on the ICO's guidance pages.  
<http://www.ico.gov.uk/>

# VEXATIOUS REQUESTS

## LEGISLATION - SECTION 14

- (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
- (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

## THIS IS A MANDATORY REFERRAL

## GUIDANCE

### OVERVIEW

Under s14(1), forces do not have to comply with vexatious requests. There is no public interest test and no requirement to provide any information or confirm or deny whether the information is held. However, in most cases a refusal notice will still need to be issued.

This section is designed to protect forces from requestors who seek to abuse their rights under the Act, in an attempt to deliberately disrupt or impact on public functions.

The application of s14 requires the gathering of evidence and like all decisions made under FOI can later be subject to external scrutiny. It is therefore imperative that its application is proportionate and relevant to the prevailing circumstances and a full record is kept.

The term 'vexatious' is not defined in the Act but most ordinary dictionaries list it as 'causing irritation or annoyance'. This does not mean, however, that an applicant simply annoying an FOI Officer is vexatious!

Deciding whether a request is vexatious is a flexible balancing exercise, taking into account all of the circumstances of the case.

It is important to note that it is the request- not the requester - that is made vexatious. A public authority cannot make a request vexatious just because the individual concerned has caused problems in the past. Nonetheless, the past behaviour of the requester will be relevant if the request perpetuates that individual's behaviour.

### IDENTIFYING AND DEALING WITH A VEXATIOUS REQUEST

To identify a vexatious request, the following questions should be considered, taking into account the history and context of the request.

**Would complying with the request impose a significant burden?**

This requires consideration of more than just the cost of compliance. Would responding divert or distract staff from their usual work? This factor alone is not likely to be strong enough.

**Is it fair to regard the request as obsessive?**

Relevant factors would be the volume and frequency of requests. Requests for information the applicant has already seen, or a clear intention to use the request to reopen issues that have already been debated and considered, such as complaints.

**Is the request harassing the authority or causing distress to staff?**

The focus should be on the effect of the request, not on the requester's intention. A 'reasonable person' must regard the request as harassing or distressing. Relevant factors could include volume and frequency of correspondence, hostile, abusive or offensive language or mingling requests with accusations and complaints.

**Is it designed to cause disruption or annoyance?**

This can be difficult to prove but evidence from interaction from the applicant should be preserved. If they are a member of a campaign group and their intentions are in the public domain then this could well be relevant, for example.

**Does it lack any serious purpose or value?**

On its own this factor is unlikely to be sufficient. FOIA is generally not concerned with the motives of an applicant. If the requester will not provide a reason for wanting the information then it does not mean that there cannot be one. However, there will always be mileage in engaging with the applicant to see if they can assist in understanding, as a request which certainly does have a serious purpose or value is unlikely to ever be made vexatious.

To progress along the vexatious route, an FOI Officer should be able to produce evidence under more than one of the listed headings.

The wider history and context of the request is also important:

- Is this the latest in a long line of requests?
- Does it form an overall pattern of behaviour?

**REPEATED REQUESTS**

There is also a separate provision under s14(2) when a request can be refused if it is repeated. To engage this section, the following must be established:

- It was made by the same person as a previous request.
- It is identical or substantially similar to the previous request; and
- A reasonable interval has not elapsed since the previous request.

Requests cannot be refused under this section if they are submitted by different persons, unless there is a belief that they are part of a campaign designed to cause disruption or annoyance, in which case s14(1) may apply. It may be simpler to aggregate them for the purposes of cost under s12, if there is a belief that requesters are acting together and compliance would exceed the cost limit.

The 'reasonable interval' is not defined but it is suggested that 60 working days may be a useful benchmark. However this is subject to the prevailing, depending circumstances such as the information changing on a regular basis, or a newer version becoming available shortly after the request was dealt with.

### **REFUSING THE REQUEST**

When a vexatious or repeated or repeated request has been received, a refusal notice must be issued within 20 working days. The refusal notice should state that either s14(1) or s14(2) is engaged, together with an explanation as to why. Details must also be provided in respect of the force's internal review procedure and the right to appeal to the ICO.

However, s17(6) states a refusal notice need not be issued if the same applicant has already received a refusal notice for a previous vexatious or repeated request and it would be unreasonable to issue another one.

If the use of s14 is being contemplated, the CRU should be notified so that a database of evidence can be maintained which will be necessary should the request go to more than one force. Evidence of vexatiousness can be obtained from many external sources but the decision to make a request so will still lie with each individual receiving force.

The ICO Charter may be of assistance when determining whether an applicant may be made vexatious under s14 of the Act. This document is located with other information on their website at:

<http://www.ico.gov.uk/>

# ACKNOWLEDGING A REQUEST & PROVIDING ASSISTANCE

## LEGISLATION - SECTION 16

- (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

## GUIDANCE

- The Police Service has a duty to provide advice and assistance to applicants making FOI requests.
- Whilst there is no requirement to acknowledge a request under the Act, the Police Service will acknowledge all requests received. The acknowledgement should include the date the request was received and contact details for the FOI Team.
- Where necessary, the applicant should be contacted to clarify the request.
- Procedures for dealing with FOI requests should be published under the force publication scheme.
- Under the FOIA, all members of staff within an organisation are obliged to provide assistance to any person requesting information.
- Where an applicant is unable to make a request in writing (for instance due to illiteracy, disability or illness), a note of the request can be made on behalf of the applicant and sent to them for confirmation.
- If advice and assistance has been provided and the force is still unable to identify and locate the requested information, the force is not expected to seek further clarification.
- Where further clarification has been sought and the applicant has not responded, the force may close off the request after 60 working days if no further clarification is received.

It is good practice and highly recommended that the applicant is contacted, verbally if possible, to try and assist in identifying the exact information required from the authority. In the case of media organisations, it is recommended that this contact is purely about the request and where the media organisation is asking specific questions about the police force, they should be directed to the Media Services Department.

# TRANSFER OF REQUESTS

## LEGISLATION - SECTION 16

This area of the Act is governed by Code of Practice 45.

## GUIDANCE

Requests may be completely transferred where the force holds none of the information requested, or partially transferred where the force holds some of the information requested.

### WHERE NO INFORMATION HELD

- The applicant must be informed as soon as possible that no information is held.
- If the force is aware of where the information may be held, the request should be transferred with the applicant's consent.
- If the force reasonably concludes that the applicant is not likely to object, the force may transfer the request without referring to the applicant. The applicant should be informed that the request has been transferred.
- As an alternative, the force may suggest that the applicant re-applies to the authority it believes holds the information. The force should provide the applicant with contact details for the relevant authority.
- A request should not be transferred without first confirming with the second force or public authority that the information is held.

### WHERE INFORMATION PARTIALLY HELD

- The applicant must be informed as soon as possible that only part of the information is held.
- Where the information is partially held elsewhere and the force can identify the authority or other force that holds the information, the force may then transfer the remainder of the request to another force or public authority.
- If the force reasonably concludes that the applicant is not likely to object, the force may transfer the request without going back to the applicant but should still inform the applicant that the request has been transferred.
- The request should not be transferred without first confirming with the second force or public authority that the information is held.
- If a force believes an applicant is likely to object, it should only transfer the request with consent. If there is any doubt, the police force may prefer to contact the applicant and suggest that they make a new request to the second authority.
- Alternatively, the force may suggest that the applicant re-applies to the authority that the police force believes holds the information. The force should provide the applicant with contact details for the relevant authority.

### THE RECEIVING AUTHORITY'S OBLIGATIONS

- The receiving authority must comply with its obligations as if it had received the request direct from the applicant.
- The time for complying with such a request commences from the day that the receiving authority receives the request.

### **CONSULTATION WITH THIRD PARTIES**

Forces should be aware of and adhere to s45 which covers the provision of advice and assistance, the transfer of requests between public authorities and the consultative process.

When a third party may be affected by disclosure, the Police Service will consult with that third party prior to disclosure, unless consultation is impracticable (for example, because the third party cannot be located or because the cost of consultation is disproportionate). In this case, the Police Service should consider what is the most reasonable course of action under the requirements of the Act and the individual circumstances of the request.

Where the interests of more than one third party are affected and they have a representative organisation, consultation with the representative organisation, or a representative sample of third parties if there is no representative organisation, is sufficient.

If a third party does not respond to consultation, the force has a duty to disclose information under the Act within the time limits.

**In all cases, it is the receiving force/authority that determines whether information should be disclosed.** A refusal to consent to disclosure by a third party does not, in itself, mean that information should be withheld.

# THE DECISION-MAKING PROCESS

## GUIDANCE

In order to process a request for information effectively, ACPO has devised a 'good practice' model. To fully understand the model and its application, practitioners are strongly advised to attend the ACPO decision-maker/reviewers' training courses.

This process works equally well for the initial decision and any subsequent internal review.

## MODEL REQUEST PROCESS

### Pre-Decision Making

Dealing with requests can be a time-consuming and expensive activity for forces, but it is a statutory requirement. The number of requests received by forces tends to be proportionate to their size, but with similar resources some seem to struggle more than others to meet legislative deadlines. The one common factor seen in those forces that seem to manage the workload more efficiently is their ability to engage with applicants.

It is strongly suggested that when any request is received which is complicated and potentially difficult to answer, the applicant should be contacted. The primary function of this interaction is to establish exactly what the applicant wants and to encourage a mutual exploration of other options which make it easier for them identify and obtain the information required.

This activity is fully in-keeping with the Codes of Practice and the duty to assist under s16 of the Act but forces should note that apart from clarification of the request, there is no legal requirement for the applicant to provide any further information.

It is also recommended that before investing time in making a decision on disclosure the following are all completed in the order that they occur:

- Is the request vexatious or repeated? (See s14 Guidance)
- Is the request valid? (See 'Defining a Request')
- Has the applicant been contacted to establish exactly what they want?
- Confirm this cannot be provided under normal business processes (see Business as Usual).
- Is it already in the public domain? (See s21 and chapter on Publication Scheme)
- How much will it cost and is the information actually held? (See s12 Guidance)
- Should the CRU be notified? (See Police Service Referral Criteria)

Once these points have been successfully resolved, deciding on a suitable response can begin in earnest.

## How to Make a Decision on Disclosure

### Overview

FOIA is the statutory requirement for forces to confirm to the public that they hold information (s1(1)(a)), and if they do, to communicate that information to the world (s1(1)(b)). There will be occasions when to do either of these things will be in contravention of legislation. However, to deny the public of their 'right to know' is not a decision that can be taken lightly as there are ramifications for individuals and organisations that intentionally do so in contravention of the Act.

The following process has evolved which enables these decisions to be made effectively and professionally, taking into account a wide range of factors. Forces must have in place robust policies and procedures on information disclosure, ensuring that those responsible for making decisions have the appropriate skills, are vetted to be able to view the information and are fully supported by senior management.

### Identifying Harm

The main reason for not complying with s1(1) of the Act is that some kind of prejudice would occur. This is labelled by the Police Service as 'harm' and although no such definition exists within the Act, this is the beginning of the process that will determine whether an exemption could apply. It is the responsibility of the decision-maker in the first instance to collect evidence of all the potential harm that might result from disclosure of the information, and subsequently to determine the likelihood of the harm occurring if it is not certain or probable.

There is no definition contained within the Act as to exactly what this harm may be, although the regular tribunal decisions assist us in our understanding. In the policing context harm is defined as:

- *The undesired consequence of the disclosure of information which will or could lead to the physical or mental harm of a person, damage to property, loss of public confidence or a reduction in the effective provision of public service delivery.*

Although harm need not be substantial, the ICO expects it to be more than trivial. It must be real and not perceived. The degree of harm is not specified, so strictly any level of harm or damage might be argued. However, forces should bear in mind that the less significant the harm is shown to be, the higher the likelihood that the public interest test will require disclosure.

The Information Tribunal has also considered the evidential burden in establishing the likelihood of prejudice. A force cannot be expected to prove exactly what would happen on disclosure. However, it is not sufficient to put forward unsupported speculation or opinion; you must be able to provide some evidence so that a conclusion can be drawn about what is likely.

Decision-makers are encouraged to ensure that the evidence they produce meets or exceeds the above standards. Actual examples are far more effective than anecdotal comparisons. Regardless of whether there is a legal requirement to communicate harm to the applicant (prejudice-based exemptions) once identified, it is good practice to ensure that any harm should be recorded as part of the decision-making process.

When collecting evidence of harm, in order of priority, the following should be considered:

- Individuals
- The community
- The force and wider Police Service
- Other bodies

The sequence of actions detailed in the following table should be followed as a template for the decision-making process:

Phase	Action	Next Phase
1	Ensure the pre-decision making tasks have been completed - for example, s14 considerations.	Go to phase 2.
2	Collect the information that has been requested.	Go to phase 3.
3	Establish: Is there any harm in confirming the information is or is not held?*	If yes, go to phase 5. If no go to phase 4.
4	Establish: Is there any harm in disclosing the information?*	If yes, go to phase 5. If no go to phase 8.
5	Identify which exemptions are engaged and then filter them according to type.	If you decide to rely only on absolute exemptions then go to phase 7. If a mix or only qualified exemptions apply then go to phase 6.
6	Conduct a public interest test for each of the exemptions* (see public interest test chapter).	If the PIT overcomes all of the exemptions in relation to phase 3 go back to phase 4. If the exemptions from phase 4 are overcome go to phase 8. If the balance in relation to either does not favour disclosure go to phase 7.
7	Ensure <b>all</b> of the information requested is actually exempt. If it is prepare a full refusal notice (see refusing a request). If not, consider redaction and prepare a partial refusal.	If full refusal end the process. If partial move the non exempt material <b>only</b> to phase 8.
8	Release the information.	End.

*\* It is unlikely that decision-makers will be experts in the relevant business area of the information requested so it is imperative that as many stakeholders in disclosure as possible are identified and where appropriate consulted, including third parties that may be outside the organisation. Doing so will ensure that the evidence of harm and public interest factors are properly gathered.*

# REFUSING REQUESTS FOR INFORMATION

## LEGISLATION - SECTION 17

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-
  - (a) states that fact,
  - (b) specified the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2) Where -
  - (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
    - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
    - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
  - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given without such time as it is reasonable in the circumstances, state the reasons for claiming -
  - (a) that, in all circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
  - (b) that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or section 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where-
  - (a) the public authority is relying on a claim that s14 applies,

- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on a such a claim, and
  - (c) it would in all circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under subsection (1), (3) or (5) must -
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (b) contain particulars of the right conferred by s50.

## GUIDANCE

When refusing either all or part of a request because either:

- The request is deemed vexatious or repeated;
- The cost of compliance exceeds the prescribed limit; or
- The information requested falls under one of the exemptions listed in part II of the Act

then a refusal notice must be issued which complies with s17 of the Act.

There are three occasions when a refusal notice is not required. These are:

- If it appears that a request is vexatious or repeated and there has already been a refusal notice issued to the applicant in relation to a recent similar request stating that the request is vexatious or repeated and it would be unreasonable to do so again.
- If no information is held in relation to the request, although this must still be confirmed in writing and within the 20 day deadline.
- Where s8 of the Act has not been complied with.

A refusal **must** state that the information is being refused, specify the exemption(s) in question and (if it is not otherwise apparent) state why the exemption applies (Please also refer to the NCND chapter).

This means in practice that the section and subsection of an exemption must be used and its title, which type of exemption it is (qualified, absolute etc.) and an explanation as to what it means and if it is not obvious, why it applies.

If NCND is **not** being applied and qualified and/or prejudice-based exemptions are engaged, the s17 notice will also need to contain the evidence of harm, the public interest test and the balance test. Plain English should be used wherever possible and the duty to advise and assist the applicant should always be borne in mind.

A refusal notice should be signed by the decision-maker and full details of the authority's complaints procedure and particulars of the rights conferred by s50 (complaint to the ICO) must be included in all responses.

## **INTERNAL REVIEW**

Part VI of the s45 Code of Practice places a duty on public authorities to implement a complaints process to ensure that applicants are able to request an internal review if they are not content with an authority's response. This provides a first review stage for applicants.

If a complaint is received from a dis-satisfied applicant, written acknowledgement of receipt must be provided to the applicant with an indication of when a response may be expected.

The Act does not stipulate a time limit for reviews but the s45 Code of Practice states that they should be dealt with in a 'reasonable timeframe'. The ICO's guidance is that this should be taken to mean 20 working days from receipt of the appeal for a review of the request, extendable in exceptional circumstances by another 20 working days. This timeframe is endorsed by the ACPO CRU.

It is important to be aware that the internal review stage is an opportunity to consider a case completely afresh. Compliance with the legislation is an important component of the process but all relevant considerations should be revisited and appropriately documented.

Internal reviews should not be overly bureaucratic. They are intended to be a fair and impartial means of reviewing the original request process.

The original process should have produced a record of how the original decision was made and this record will provide important information to those conducting the internal review.

The applicant must be fully informed, in writing, of the outcome of the internal review. In all cases, there is a requirement to notify the applicant of the result of the internal review. If revised exemptions or public interest test are being relied upon, a new s17 refusal notice must be issued.

Whatever the result of the review, the applicant must be made aware of their further rights of appeal to the Information Commissioner's Office. Full contact details for the Information Commissioner's Office must be provided to the applicant.

The latest ICO guidance on reviews can be found through the link provided below [http://www.ico.gov.uk/what\\_we\\_cover/freedom\\_of\\_information/guidance.aspx](http://www.ico.gov.uk/what_we_cover/freedom_of_information/guidance.aspx)

## **GENERAL CONSIDERATIONS**

- The review should be undertaken by someone different from, and preferably senior to, the original decision-maker.
- Those forces, whose organisational and process structures make this difficult, should focus on the consideration that the main need is to be able to demonstrate the independence of the reviewer from the influence of the initial process and its decision-maker.
- The reviewer should preferably be trained in and have a good understanding of

Freedom of Information issues or be able to directly seek advice from such a person.

- If the nominated reviewer or reviewers have no Freedom of Information experience then they should identify a suitably qualified person to assist with the review, particularly if the main issues relate to legal compliance. The advisor should preferably be someone who had no involvement in the original request.
- It should, where possible, be a one stage procedure and as prompt, thorough, clear and simple as is practical.
- If at all possible, this should apply even when the matter relates to complex matters or significant strategic issues and the review is carried out by a panel.

The checklist on the following page may assist forces in processing internal reviews.

## FREEDOM OF INFORMATION ACT AND EIR REVIEW CHECKLIST

<b>PROCEDURE</b>	Were timescales adhered to?	
	Was the requestor kept informed?	
	If any of the requested information was held by another authority, was the request, or part of the request, appropriately transferred?	
<b>RELEVANT INFORMATION</b>	Was all the requested information held located and recovered correctly?	
	If there was any difficulty, what action has or can be taken to address this matter? (e.g. has appropriate discussion taken place with the information owner?)	
	Were issues regarding inaccurate or misleading information appropriately conveyed to the requestor?	
<b>ORIGINAL DECISION</b>	Did the response 'no information held' accurately reflect the circumstances?	
	Was the request correctly defined as 'repeated' or 'vexatious'?	
	Were the grounds for any refusal appropriate and correctly explained to the requestor?	
	Have circumstances changed since the original decision was made?	
	Would further disclosure now be possible, beneficial or desirable?	
	Were appropriate exemptions cited?	
	Was suitable evidence provided to demonstrate they were engaged?	
	Were any prejudice and public interest considerations correctly addressed?	
	Were submissions made by the information owners regarding the appropriateness of information disclosure suitably considered?	
	Was any other local or national advice regarding the information considered in the original response?	
	Did the original response letter meet the requirements under s17 of the Act?	
<b>REVIEW DECISION</b>	Does the review decision support the original decision?	
	Is the release of additional information appropriate?	
	Were any shortcomings in original process identified?	
<b>REVIEW CONCLUSION</b> <b>The Complainant</b>	Have you informed the complainant within 20 working days of the result of your review? (Note - the result communication should clearly set out the decisions and provide the rationale for those decisions in the same manner as an initial Freedom of Information response. Even where the original decision is supported the reasoning and explanations should be reiterated to some degree).	
	Have you disclosed any additional information or clearly articulated the steps to be taken to provide access to the information (e.g. visit to a particular site)?	
	Have you apologised for any identified inadequacies in the original process?	
	Have you provided contact details for the Information Commissioner's appeal process and the necessary instructions on how to initiate an appeal?	
<b>Original Decision-Maker</b>	Has appropriate feedback been provided to the original decision-maker (including the result of the review and suggestions for the future handling of similar requests)?	
	Have you identified any additional training needs?	
<b>The Organisation</b>	Have you informed the relevant information owners, providing comment and advice where their opinion on any release does not reflect the decision of the review?	
	Have you checked that all those with an interest in the result of the review are informed?	
	Have you identified any need to change business processes, provide training or raise awareness within the organisation?	

# NCND

## LEGISLATION - SECTION 1

Section 1 of the Freedom of Information Act 2000 provides two distinct but related rights of access to information which impose corresponding duties on public authorities. These are:

- Section 1(1)(a) the duty to inform the applicant whether or not information is held by the authority, and, if so,
- Section 1(1)(b) the duty to communicate that information to the applicant.

## THIS IS A MANDATORY REFERRAL WHEN USING S23(5) AND S24(2)

## GUIDANCE

### GENERAL

The Act refers to the first duty as 'the duty to confirm or deny'. Although the second duty - to provide the information - is the one with which most applicants will be concerned, both have equal weight and, when information is exempt but subject to the public interest test, the test is applied to both s1(1)(a) and s1(1)(b) independently.

The thinking behind the separate provisions is quite straightforward. If information has been requested but is not held, it will normally be reasonable to inform the applicant of this fact. However, there may be some exceptional cases where it would not even be right to confirm or deny if the information requested were held. For instance it would not make sense to allow criminals to discover if they were under suspicion and, if so, to discover the extent of those suspicions.

### WHY IS NCND NEEDED?

The principle of NCND is long established and is needed to protect harm which may arise if an authority has to confirm or deny whether it holds particular information. In some situations, simply confirming or denying whether an organisation holds a particular category of information could in itself disclose sensitive and damaging information.

A good example of this practice is where a police force is asked for all the information that they have on surveillance operations in relation to particular premises. Any information held is likely to fall within the s30 exemption, as it is held by that authority for the purposes of a criminal investigation (the application of s30 is subject to the balance of the public interest but there is a strong public interest in maintaining the integrity of surveillance operations).

However, simply refusing to provide the requestor with the information would not go far enough to protect the integrity of any operations. If the police force were to confirm or deny that they have the information then that would, in itself, indicate whether or not the police have had an interest in the premises concerned.

To disclose even that amount of information could be prejudicial to any operations or investigations that are taking place or may take place in the future. Hence the necessity to NCND the response under s30(3) of the Act.

#### **WHEN CAN NCND BE USED?**

All exemptions except s21 (Information accessible to the applicant by other means) include a provision which enables public authorities, in certain circumstances, to neither confirm nor deny whether it has the information that has been requested.

When withholding information, it is necessary to:

- (a) consider if the exemption applies; and
- (b) consider whether (if the exemption applies) it is necessary for the force to neither confirm nor deny that it holds the information requested.

There is still a requirement to assess the exemption that would (if the information were held) be engaged, even when an NCND approach is adopted. As before these principles are split into qualified and absolute exemptions as outlined below.

#### **NCND QUALIFIED EXEMPTIONS**

In cases where the information (if held) would be subject to a qualified exemption, a public interest test must be applied.

If a public authority does not hold the requested information and the applicable exemption is prejudice-based, it should first consider whether denying that it holds the information would have any of the prejudicial effects stated in the section, and then apply the public interest test.

If a public authority does not hold the requested information and the exemption being considered is class-based, a public authority needs to consider whether it would apply if the information were held.

When a public authority holds the requested information, two public interest tests must be separately applied - to the disclosure of the information itself and to the fact that information is held - and it should not be assumed that the outcome in each test will be the same.

#### **NCND WITH ABSOLUTE EXEMPTIONS**

Where the information requested is subject to an absolute exemption, there is clearly no need to undertake a public interest test on the information held (or not); what is necessary to determine is would the confirmation or denial of the existence of the information requested (that has been assessed as covered by an absolute exemption) in itself breach these principles. If this is the case then there will be a requirement to NCND the absolute exemption claimed.

An example of when this would be necessary would be if a request were received asking if a named individual had been subject to a criminal conviction. Clearly any response would be subject to s40 exemption as it relates to personal information and any disclosure would breach the individual's Data Protection rights. That said, if the force were to confirm that it held information on that individual by exempting the request,

this would provide the applicant with information about a named individual again breaching his/her Data Protection Rights. Clearly there is a need to NCND under s40(5).

### **RESPONDING TO THE APPLICANT**

When a public authority refuses either to disclose requested information or confirm or deny that any information is held, it must under s17(1) of the Act, issue a refusal notice stating the fact of refusal, the exemption used and why the exemption applies. A public authority should be clear in its refusal notice that where the public interest test applies, it has applied it in relation to each duty individually. That said, s17(4) states that a public authority is not obliged to make a statement as to the reasons why NCND is engaged IF the statement itself would involve the disclosure of information which in itself would be exempt. It is the view of the Information Commissioner that whenever possible public authorities should provide an explanation on why the NCND principles are engaged, though if this will compromise the NCND stance then a standard s17(4) statement can be provided.

### **SECTION 17(4) REFUSAL**

An example of a s17(4) refusal is shown below:

*The [force] neither confirms nor denies that it holds any of the information requested. To give a statement of the reasons why neither confirming nor denying is appropriate in this case would itself involve the disclosure of exempt information, therefore under s17(4), no explanation can be given. To the extent that section [add section] applies, the [force] has determined that in all the circumstances of the case the public interest in maintaining the exclusion of the duty to neither confirm nor deny outweighs the public interest in confirming whether or not information is held.*

### **PARTIAL NCND**

There can be circumstances where a partial NCND is engaged; a public authority may confirm that some information is held (this may be supplied or exempted) though to confirm that this represents all the information in the possession of the authority would in itself be harmful. Authorities may then add to their response that they neither confirm nor deny (under the respective exemption) that any other information is held. This more frequently occurs with the use of exemptions s23 and s24 considered below.

### **THE USE OF NCND FOR S23 AND S24 MATERIAL**

There are clearly considerable sensitivities in relation to material held that may have been provided by or relate to an exempt body, (e.g. the Security Services or SOCA), or would prejudice national security. For these cases there is often a requirement to combine the NCND approach for both s23 and s24 exemptions to prevent disclosing information that would itself breach these principles. **These cases will be mandatory referrals to the CRU where advice can be provided.**

### **COMBINED USE OF S23(5) AND S24(2) EXEMPTIONS TOGETHER**

There is considerable potential overlap between the information covered by s23 and that covered by s24. Clearly information about the existence or otherwise of information from, or relating to, a security body is information which is also capable of being exempt under s24(2), for the purpose of safeguarding national security.

The use of s23(5) and s24(2) together is possible under the Act (in contrast to s23(1) and s24(1) which are expressly mutually exclusive). The ability to use s23(5) and s24(2) together is important where it is necessary to answer a request in a way that preserves NCND.

Where NCND needs to be maintained for national security purposes, it is important that whenever an exemption from the duty to confirm or deny the existence of information is claimed under s23(5) consideration is always given to claiming the equivalent exemption under s24(2).

Of course, use of s24(2) will require a full consideration of the need for the national security exemption and the public interest in disclosure. However, consideration of the combination is necessary because the nature of s23 inevitably discloses that a security body is involved (or that the absence of involvement of a security body is significant) and use of s23 and s24 together may be the only way that the 'non committal' response that NCND requires, in order to work, can be maintained.

Further, so that it cannot be readily inferred that use of the two exemptions together is itself an indicator of the relevance of security body activity, it is important that where s24 is relied on, reciprocal consideration is given to the justification for relying on s23. NCND may be undermined not only by confirming that there is information held (i.e. implying that the security bodies have an interest in the subject) but also by confirming that there is no information held (i.e. implying that the security bodies do not have an interest).

This whole field is complex and requires considerable experience both in selection of appropriate exemptions and the framing of a response which will need to consider the issues surrounding s17(1) and s17(4) responses. Guidance will be provided by the CRU and draft outline response with which to 'build' the reply letter can be supplied. As previously stated consultation with relevant partner agencies is essential hence the mandatory referral criteria to the CRU where appropriate specialist advice and consultation can be achieved.

# PROVIDING INFORMATION

## LEGISLATION - SECTION 11

- (1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely -
  - (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
  - (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
  - (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant, the public authority shall so far as reasonably practicable give effect to that preference.
- (2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.
- (3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.
- (4) Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

## GUIDANCE

### MEDIUM OF COMMUNICATION

When making a request for information, an applicant may express a preference for the way in which the information is received. This relates to the medium (ie. electronic, hard copy etc) but not the actual format (ie where a table is provided to be completed).

The Police Service must comply with the preference as far as it is reasonably practicable. In determining whether it is reasonably practicable, the Police Service must have regard to all the circumstances, including the cost of doing so.

When it is not reasonably practicable to comply with a preference, the applicant must be notified of the reasons.

Where no preference is specified for the method of communication, the information can be communicated by any means reasonable in the circumstances.

#### **WHERE INFORMATION IS RELEASED**

The applicant must be advised, in writing, of:

- The decision;
- Form and manner of access; and
- The applicant's rights to complain, including details of the internal complaints procedure and the Information Commissioner's details.

#### **COPYRIGHT**

Generally, the information provided under the FOIA is not subject to copyright. The CRU would not advocate that copyright be attached routinely to responses but should only be included when information falls within normal copyright rules.

It is ACPO's advice that copyright legislation does not override disclosure under the FOIA.

Third party information is not exempt from disclosure because it is copyrighted. When considering disclosure of copyrighted material, FOI officers should focus on the genuine harm that may be caused by disclosure (usually under s41 and s43).

#### **DISCLOSURE LOG**

The Disclosure Log on the force's publication scheme should be updated regularly to ensure all disclosures made under FOI are published.

# FOI EXEMPTIONS

SECTION	EXEMPTION	TYPE	TYPE
Section 21	Information reasonably accessible by other means	Absolute	Class-based
Section 22	Information intended for future publication	Qualified	Class-based
Section 23	Information supplied by, or relating to, bodies dealing with security matters	Absolute	Class-based
Section 24	National security	Qualified	Prejudice-based
Section 26	Defence	Qualified	Prejudice-based
Section 27(1) Section 27(2)	International relations International relations	Qualified Qualified	Prejudice-based Class-based
Section 28	Relations within the UK	Qualified	Prejudice-based
Section 29	The economy	Qualified	Prejudice-based
Section 30	Investigations and proceedings conducted by the public authority	Qualified	Class-based
Section 31	Law enforcement	Qualified	Prejudice-based
Section 32	Court records	Absolute	Class-based
Section 33	Audit functions	Qualified	Prejudice-based
Section 34	Parliamentary privilege	Absolute	Class-based
Section 35	Formulation of government policy	Qualified	Class-based
Section 36	Prejudice to the effective conduct of public affairs	Qualified	Prejudice-based
Section 37	Communication with Her Majesty etc and honours	Qualified	Class-based
Section 38	Health & safety	Qualified	Prejudice-based
Section 39	Environmental information	Qualified	Class-based
Section 40	Personal information	Absolute (in part)	Class-based
Section 41	Information provided in confidence	Absolute	Class-based
Section 42	Legal professional privilege	Qualified	Class-based
Section 43(1) Section 43(2)	Commercial interests	Qualified Qualified	Class-based Prejudice-based
Section 44	Prohibitions on disclosure	Absolute	Class-based

Qualified	Apply public interest test
Prejudice-based	Evidence harm in disclosure

# THE PUBLIC INTEREST TEST

## OVERVIEW

Qualified exemptions contained within the Freedom of Information Act are subject to the application of the public interest test. Even if such exemptions are engaged, the information must still be disclosed unless the public interest in maintaining the exemption is greater than the public interest in disclosing it. If the balancing test is equal, the default option should be to disclose.

The 'public interest', is not however, what the public may find interesting, there must be some tangible benefit to the community in such a disclosure. Ultimately it must be something that serves the interests of the public. It is a requirement to identify all the factors which serve these interests and also those which do not, only then can a decision be made.

Under the FOIA, an authority must apply the public interest separately to each relevant exemption. This is to ensure that a force does not then rely on an exemption which the PIT has overcome. The public interest must not be used on its own to refuse to disclose information; it must only be used in conjunction with an exemption.

The exemptions subject to the application of the public interest test are listed in the table below.

SECTION	EXEMPTION
Section 22	Information intended for future publication
Section 24	National security
Section 26	Defence
Section 27	International relations
Section 28	Relations within the UK
Section 29	The economy
Section 30	Investigations and proceedings conducted by the public authority
Section 31	Law enforcement
Section 33	Audit functions
Section 35	Formulation of government policy
Section 37	Communication with Her Majesty etc and honours
Section 38	Health & safety
Section 39	Environmental information
Section 42	Legal professional privilege
Section 43	Commercial interests

## THE DUTY TO CONFIRM OR DENY AND THE PIT

Under s1(1)(a), an authority is under a duty to confirm or deny whether it holds information requested. This duty does not arise where the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing. To this end most exemptions also contain a subsection which allows a 'neither confirm nor deny response', if appropriate.

Practitioners often make the mistake of only considering the public interest in relation to disclosing the information, (s1(1)(b)). It is important to also be aware of the requirements to consider the PIT in relation to s1(1)(a), if there is harm in confirming or denying that information is held and a qualified exemption is being relied upon, a PIT must be completed.

The difficulty is in grasping the point that the debate now will be purely based on the issues with confirming or not that the information actually exists, rather than disclosing it.

Reference should be made to the separate chapter in this manual on neither confirm nor deny, but the below fictional case study may assist in understanding the differences.

### Example

Force's A and B are asked for the technical details of a particular piece of covert equipment. Harm is identified that engages s31(3) Law enforcement, as confirming or not whether the information is held will disclose the forces tactical capability. S31 is a qualified exemption, so the decision-maker has to first consider the PIT in relation to confirming whether the information is even held.

In Force A the PIT issues identified are the detrimental impact to the public of that equipment becoming compromised versus their right to know of its usage and that funds for fighting crime are appropriately spent. On balance, as the procurement processes in place and independent financial auditing serve the needs of the public in ensuring that funds are spent appropriately, it is decided that the former is the most persuasive argument and an NCND stance by virtue of s31(3) is the response provided.

In Force B, the PIT issues are virtually identical except that also favouring confirmation or denial is the fact that the force took part in a 'fly-on-the-wall' programme which showed the equipment being used. On balance it is found that the public interest is better served by confirming information is held and s31(3) is overcome.

Force B then have to move on to consider the PIT in relation to s31(1) as disclosure of the technical information requested will enable criminals to put in place counter measures. Now, the issues are the effects on the public of crime being more difficult to detect versus them being better informed, enabling more accurate debate and accountability. It is decided that the balance lies with the former and the force confirms information is held, but refuses to disclose it by virtue of s31(1).

## CONDUCTING THE PUBLIC INTEREST TEST

A thorough, effective test will largely depend on the decision-maker's research, coupled with the ability to make out reasoned arguments. It should be objective, but it can become subjective if the individual either does not possess the relevant skills or is unduly influenced by external influences and/or their own views and prejudices.

The public interest test should be applied in a manner that is in-keeping with the spirit of the Act. That is to say there is an assumption that public authorities will provide information requested unless an exemption applies and the public interest favours retention of the information over disclosure. The burden of proof lies with the decision-maker to establish whether there are sufficient grounds to justify an exemption.

The starting point for conducting the test becomes the collation of all the relevant factors. It is unlikely that any one individual can provide all of this information and it should be obtained from a variety of sources. If not approached in this manner there is a risk that the views of the person providing the factors actually dictate the end result, or their own lack of knowledge is detrimental to the process.

The below fictional case study may help demonstrate this point:

### Example

Forces A and B receive identical requests for statistical data on rape in a small policing team area.

The FOI Officer in Force A asks the force Performance Department, who produce the statistics, for any harm in disclosure and if so what the PIT considerations might be. The response is that they can see no harm. The information is disclosed, this raises public awareness in the area, resulting in a local news item and an offender ceasing their activities due to the publicity. This compromises an ongoing covert operation.

In Force B, the FOI Officer asks for any Harm and PIT considerations from the Performance Department, the policing teams Sergeant and the DCI responsible for the force's rape strategy. From the Sergeant they learn of several local community issues, and the DCI tells them about an ongoing covert operation and the problems a disclosure will cause. The FOI officer works through the information provided and finds there is sufficient harm to engage s31(1), the PIT looks at the issues of the detriment to the public in a potential rapist escaping justice versus the need for the community to be aware of current issues. The balance falls in favour of non-disclosure, and a complex refusal notice is issued. They brief the SIO on the covert operation and the force media department. The local media are engaged and work with the police to not highlight the refusal as it appears on the force disclosure log. The offender is brought to justice a short time later, and then together with the usual media releases the FOI officer puts the statistics into the public domain.

We have established that the role of the decision-maker is to identify all the relevant issues and incorporate those into a decision making framework. The full process is outlined in this manual and the following is just the PIT phase.

1. Identify all of the exemptions that are engaged with the disclosure of the information.
2. Filter those exemptions to identify which ones are qualified and which are absolute. It is suggested that if many exemptions are engaged there is little benefit in using all of them and the most appropriate ones should be used. There can be a temptation to rely only on absolute ones, as there is no PIT, but you should only do so if they are firmly engaged, and actually cover all of the information requested. You may not be allowed to re-introduce exemptions later in the request lifecycle but forces are also discouraged from adopting a 'shotgun approach' by using excessive numbers.
3. For every qualified exemption there is a need to identify and outline the positives and negatives in disclosure in relation to each exemption. The Information Tribunal in the *England/Bexley case (EA/2006/0060, 0066)* recognised that when considering public interest factors in favour of maintaining the exemption, a public authority should only consider the particular interest which the exemption seeks to protect, for example the prevention of crime. In contrast, the public interest factors in favour of disclosure are not restricted in this way, and can include the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.
4. If the PIT obviously favours disclosure then that exemption should then be disregarded.
5. The remaining exemptions then need to be looked at as a whole, to see if the balance of the PIT issues favours disclosure. Only now can a decision be made.

The following table of some of the exemptions more commonly used by the police service and the issues likely to be relevant may assist in your research. It is not an exhaustive list, and the weight of each point will vary from case to case. It also does not take into account the harm that may have been identified even though this will always be relevant to the public interest.

**To be valid factors in favour of non-disclosure, there must be a clear relationship between the factors, the information and the exemption and this must be articulated. Factors favouring disclosure can be more generic and wider in nature.**

EXEMPTION	NON-DISCLOSURE	DISCLOSURE
Section 22	<ul style="list-style-type: none"> <li>The publication date is imminent.</li> <li>There may be a duty to present the information to another body or person first eg. Police Authority, Coroner, staff association, IPCC.</li> <li>It would disrupt a press strategy designed to elicit information from or to inform the public.</li> <li>The publication is being prepared at some expense to the force and the spending of additional public funds would be wasteful.</li> </ul>	<ul style="list-style-type: none"> <li>Information is only in draft form and is likely to change significantly when published.</li> <li>The publication will not provide everything that was requested.</li> <li>The date for publication is in the distant future.</li> <li>The information relates to mistakes made by the force.</li> </ul>
Section 24	<ul style="list-style-type: none"> <li>It is 'reasonably necessary' to apply the exemption.</li> <li>The risk of harm to the public would increase.</li> <li>Ongoing or future operations to protect the security or infrastructure of the UK would be compromised.</li> <li>Security measures would be rendered less effective.</li> </ul>	<ul style="list-style-type: none"> <li>The information simply relates to national security and disclosure would not actually harm it.</li> <li>The information relates to mistakes made by the force.</li> <li>Better informed public can take steps to protect themselves.</li> <li>Use of public funds.</li> <li>The information relates to mistakes made by the force.</li> </ul>
Section 30	<ul style="list-style-type: none"> <li>An investigation would be prejudiced.</li> <li>The right to a fair trial would be undermined.</li> <li>The force's future law enforcement capabilities would be affected.</li> <li>Maintaining a confidential source.</li> <li>Hinder the prevention or detection of crime.</li> <li>Undermine the partnership approach to investigations.</li> </ul>	<ul style="list-style-type: none"> <li>The investigation is closed and any proceedings have been completed.</li> <li>Satisfaction that the investigation was conducted properly.</li> <li>The prosecution collapsed because of procedural failure or mis-management.</li> <li>Use of public funds.</li> <li>The investigation is high profile or national.</li> </ul>
Section 31	<ul style="list-style-type: none"> <li>Law enforcement tactics would be compromised.</li> <li>A fear of crime will be realised.</li> <li>Individuals are placed at risk.</li> <li>Hinder the prevention or detection of crime.</li> <li>Impact on police resources.</li> <li>More crime could be committed.</li> <li>Undermine the partnership approach to law enforcement.</li> </ul>	<ul style="list-style-type: none"> <li>Better awareness may reduce crime or lead to more information from the public.</li> <li>The information relates to mistakes made by the force.</li> <li>The public would be able to take steps to protect themselves.</li> <li>Some information is already in the public domain.</li> </ul>
Section 38	<ul style="list-style-type: none"> <li>The risks to individuals are significant and evidenced.</li> <li>Loss of confidence in the public authority to protect the well being of the community.</li> </ul>	<ul style="list-style-type: none"> <li>The evidence provided does not reveal a 'significant risk' to the physical or mental health or the safety of an individual.</li> <li>Better informed public awareness and debate.</li> <li>Use of public funds.</li> <li>The information relates to mistakes made by the force.</li> </ul>
Section 43	<ul style="list-style-type: none"> <li>Damage would occur to an ongoing tender process.</li> <li>Civil action from third party will take place.</li> </ul>	<ul style="list-style-type: none"> <li>Better understanding of how public funds are spent.</li> <li>The information is historic.</li> <li>Funds have been mis-spent.</li> <li>Better understand the decision-making process.</li> </ul>

## CONSIDERATIONS THAT ARE INVALID

In addition, there are a number of criteria that may not be considered as part of the public interest test or may be applied only in limited circumstances:

<b>EMBARRASSMENT</b>	Potential embarrassment to the force, Police Service or an individual officer on release of information is not a valid public interest consideration in favour of non-disclosure.
<b>HIGH PUBLIC OFFICE</b>	Where the subject of the information, the giver or the recipient of the information holds high office, this is not in itself sufficient to weigh against disclosure. An assessment of the consequences of the disclosure of the particular issue is required.
<b>POLICY DEVELOPMENT</b>	Even where information relates to policy development, this does not establish a public interest consideration favouring non-disclosure. Even if policy is under review, it still may be in the public interest to release.
<b>CANDOUR AND FRANKNESS</b>	Claims that disclosure would prejudice the supply of frank and candid information in the future can only be considered where there is a very particular factual basis to support this view. The possibility of future publicity through disclosure may deter immediate release and should provide an incentive to improve the quality of the information/record prior to disclosure.
<b>DISCLOSURE OF CONFUSING OR MISLEADING INFORMATION</b>	In most cases, the force would have a means of avoiding such a prejudicial effect by releasing new or revised information to rectify any inaccuracies or clarify the situation. If a certain course of action has not been considered and should have been, this is not enough to withhold.
<b>INFORMATION/RECORDS HELD DO NOT FAIRLY REFLECT THE REASONS FOR A DECISION</b>	Where this occurs, the force would have the opportunity to provide additional information that accurately explains the reason for the decision.
<b>DRAFT DOCUMENTS</b>	There may be benefits of public access to draft material, to further the accountability and public planning process. Draft documents may therefore be disclosed. Disclosure of this kind allows members of the public to examine the process by which a decision has been reached, thus serving the public interest.
<b>GOVERNMENT PROTECTIVE MARKING SCHEME (GPMS)</b>	The marking of material under the GPMS will not, in itself, be valid grounds for withholding information. GPMS indicates how a document should be transported, handled and stored. The content of the material should be examined and the relevant exemptions applied only after discussion with the data owner and other relevant parties. Time elapsed since the document was marked under GPMS may also be a factor in any decision to release or withhold.

## BALANCE TEST

After establishing all the facts for and against disclosure, and filtering out those exemptions which are obviously overcome, a decision then has to be made on what are the most persuasive arguments. This is probably one of the most challenging areas for a decision-maker, especially if it appears that others within the organisation have already made up their minds, without proper consideration of these factors. Force policies and procedures should support and empower FOI staff to make proper decisions, based on the evidence that they have before them. This requires high levels of skill and judgement and is not purely an administrative function. It is imperative that they are appropriately trained and have access to not only all the information requested but also the background and history of everything relevant to the case.

When applying the PIT, the factors favouring disclosure and non-disclosure should always be recorded, this will form the basis of any future audit trail and help justify disclosure or non-disclosure in the event of challenges or appeals to the decision. It will also form the basis for any refusal notice. If released, it can be kept in a less formal format.

In addition to justifying non disclosure to the applicant, the decision-maker may also be held to account by the ICO, Information Tribunal or even a court. You should ensure that your records will provide all you need to do so, especially as it may be several months in the future.

**It will also be the case, that if a forces request response impacts on another, or the business area concerned, then the ACPO team are likely to require a copy of the rationale for disclosure in order to mitigate any adverse effects.**

# SECTION 21

## INFORMATION REASONABLY ACCESSIBLE BY OTHER MEANS

### LEGISLATION

- (1) Information which is reasonably accessible to the applicant otherwise than under s1 is exempt information.
- (2) For the purposes of subsection (1)-
  - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
  - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

EXEMPTION TYPE: Absolute  
Class-Based

### GUIDANCE

When using this exemption, the applicant must be provided with details of where the information may be obtained from. The provision of information under the FOIA is generally free of charge (apart from what's allowable in the Fees Regulations). However, it is permissible to cite this exemption when the information is normally provided for a fee. For example, road traffic accident/collision reports.

A public authority must clearly indicate on its publication scheme if it is making a charge for the supply of information. It may be appropriate to include on the publication scheme a list of documents and other information that is available for a fee.

This exemption may be applied if the information requested is publicly available on a website (not just the force's own website) or in the publication of another individual, organisation or publisher.

To apply this exemption, information must be physically and geographically accessible to the applicant. If it is available in one location only and there is a requirement to source the information in person, this may not be considered 'reasonably' accessible.

Charges for information may be made where:

- Information is already provided for a fee under a statutory scheme; and
- The information is already published as part of the authority's publication scheme and a charge has already been indicated for the class of information in question.

The publication scheme must specify the format in which information is published. Information provided in electronic format should be offered as a hard copy alternative for those applicants without reasonable access to the Internet.

Where a public authority has a legal obligation to publish certain types of information, this too should be considered reasonably accessible, even though it may not appear on, or be described in, the publication scheme. This applies if the information requested is available by virtue of the legal obligations of another public authority to publish.

The exception is information that is available only on inspection, by visiting a specific location for example. In this case, the information is not considered to be reasonably accessible even though the authority has a legal obligation to publish it (unless it falls within a class of information that is included on the authority's publication scheme).

Information that is normally made available in inspection is not 'reasonably accessible' if:

- The applicant lives a considerable distance away;
- The applicant has mobility problems; or
- There are other factors that may influence an applicant's ability to view the information.

In these cases, the authority may consider providing a hard copy of the information - though this does not mean it is obliged to every time.

The authority is under no obligation to translate information that is released in response to a request into other languages. It may, however, be reasonable for the authority to translate the original request and then consider translation on a case-by-case basis.

Where an applicant has a disability or may require the information requested in an alternative form - such as in Braille or an audio-tape - the onus is on the authority to consider providing it in the format requested if it is 'reasonably whom the information is reasonably accessible, they may fall foul of other statutory duties laid down by the Welsh Language Act 1993, the Race Relations Amendment Act 2000 and the Disability Discrimination Act 1995.

Public authorities may also have their own internal policies that commit them to delivering a certain level of service for members of the non-English speaking community. It is important that members of staff responsible for dealing with FOI requests are aware of existing policies regarding access to information for those with physical disabilities or for non-English speakers.

When a special case is put to the authority for information published, where disability or other difficulties result in problems in accessing the information (such as lack of Internet access), then it will be left to the individual force to decide on how best to provide the applicant with the information requested.

### **ADDITIONAL GUIDANCE**

When considering the application of this exemption (and also s40), FOI Officers can take into account the identity of the applicant. For example, s21 may be used where the applicant is an employee of the organisation and is able to access information on the force's Intranet.

S21 can only be relied upon under CPIA if the information has already been provided under CPIA and not on speculation that it may be provided under CPIA.

# SECTION 22

## INFORMATION INTENDED FOR FUTURE PUBLICATION

### LEGISLATION

- (1) Information is exempt information if -
- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
  - (b) the information was already held with a view to such publication at the time the request for information was made, and
  - (c) it is reasonable in all circumstances that the information should be withheld from disclosure until the date referred to in paragraph.
- (2) The duty to confirm or deny is excluded where compliance with that duty would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

**EXEMPTION TYPE:** Qualified  
Class-based

**APPLY:** Public interest test

### GUIDANCE

S22 may be engaged when there is an intention to publish the information requested at the time of receipt. Without this intention, s22 may not be used and authorities may not take the decision to publish the information after the request for information is received. No actual publication date is required for s22 to be engaged. However, the Act states that the publication date set must be 'reasonable'. Where the date for publication has still to be determined, s22(1)(c) may only be cited where it is reasonable to postpone publication until an unspecified date.

S22 may only be cited where the information that is intended for publication is exactly what has been requested by the applicant.

This exemption is concerned with the **timing** of the release of information. It is not concerned with the **suitability** of the **content** for release. The decision to publish must have already been made at the time the request is received, subject to possible amendments.

This exemption also covers information that another authority or person (individual or organisation) intends to publish. One public authority, for example, may have been given a draft or document that another intends to publish. The exemption may also be

cited if an alternative body, other than the one to which the application was originally made, is planning to publish the information requested.

Where a request for information is directed at information that falls within a class defined in the authority's publication scheme, it may be assumed that the information is intended for publication, even if it has not already been published. Thus, the decision becomes one relating to timing rather than disclosing or withholding the information. The authority must consider whether it is in the public interest to release information earlier than originally planned. Whilst authorities may wish to wait until one set of meeting minutes is approved at a subsequent meeting prior to releasing them to the public, it should recognise the public interest in providing draft minutes to applicants who may either wish to attend or have an input into the subsequent meeting.

If there is already an intention to publish requested information, it is generally the case that the sooner the intended date of publication, the stronger the case for applying exemption.

Even if the information is in a draft form and may be amended or omitted prior to the final version being agreed, this exemption still applies. Whilst the words may differ from draft to final document, the information imparted probably will not. Where the information exists in draft or rough form only or if it forms a part of a larger body of work or information, it may be more difficult to apply s22.

Reasons such as political embarrassment and administrative inefficiency may not be used as reasons to delay publication.

# SECTION 23

## INFORMATION SUPPLIED BY, OR CONCERNING, CERTAIN SECURITY BODIES

### LEGISLATION

- (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).
- (2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to s60, be conclusive evidence of that fact.
- (3) The bodies referred to in subsections (1) and (2) are—
  - (a) the Security Service,
  - (b) the Secret Intelligence Service,
  - (c) the Government Communications Headquarters (GCHQ),
  - (d) the special forces,
  - (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
  - (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
  - (g) the Tribunal established under section 5 of the Security Service Act 1989,
  - (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
  - (i) the Security Vetting Appeals Panel,
  - (j) the Security Commission,
  - (k) the Serious and Organised Crime Agency (SOCA) including CEOP.
- (4) In subsection (3)(c) 'the Government Communications Headquarters' includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.
- (5) The duty to confirm or deny does not arise if, or to the extent that, compliance with s1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

EXEMPTION TYPE: Absolute  
Class-based

**THIS IS A MANDATORY REFERRAL TO THE CRU**

# SECTION 24

## NATIONAL SECURITY

### LEGISLATION

- (1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.
- (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
- (3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to s60, be conclusive evidence of that fact.
- (4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

EXEMPTION TYPE: Qualified  
Prejudice-based

APPLY: Evidence of harm  
Public interest test

**THIS IS A MANDATORY REFERRAL TO THE CRU**

### GUIDANCE

Sections 23 and 24 are often very closely linked.

A s23 exemption is applicable to information received from or related to a number of bodies specifically listed in the Act. The s24 exemption is applicable to information, the non-disclosure of which is necessary to safeguard national security.

In certain circumstances, it will be necessary to use the two exemptions together. In other circumstances the two exemptions are mutually exclusive and cannot be used jointly. It is ACPO policy that the data owner must always be consulted when a s23 or s24 exemption is considered. This procedure must be followed whether the data is held or, if not, would likely have come from a s23 body.

### CONSULTATION

Due to the sensitivities of these exemptions it is MANDATORY that responses considering or likely to engage these exemptions are referred to the ACPO Central Referral Unit.

The Central Referral Unit Manager will engage the broader consultation procedures which must be undertaken under nationally agreed partnership protocols.

### **MINISTERIAL CERTIFICATES**

Occasionally at the point of an ICO appeal or Information Tribunal (IT), it may be necessary to consider the use of a 'ministerial certificate' for s23 and s24 exemptions. The effect of a certificate, signed by a Minister of the Crown, is to provide conclusive evidence that an exemption is engaged and avoid the need for the ICO or IT to make judgement on information with which they have no experience. It should be noted that for s24 exemptions the use of a certificate does not provide the public interest balance on non-disclosure only that the exemption applies. Responsibility for the PIT balance is maintained by the ICO. That said, there are unlikely to be circumstances that support the release of information that could jeopardise national security.

Either the Information Commissioner or the applicant can appeal against the certificate, to the National Security Appeals Panel of the Information Tribunal (NSAP).

This is a complex and highly sensitive process and will be led by the CRU in close consultation with the Ministry of Justice (MOJ) and relevant stakeholder agencies.

### **GENERAL POINTS**

#### **Information Supplied by, or Relating to Exempt Security Bodies**

This absolute exemption covers any information supplied by or relating to an exempt body. Within the policing environment this is likely to be information from or linked to SOCA and the Security Services, though broad consideration of all exempt bodies is necessary when considering complex requests. Though there is no specific definition of 'relates to' within the legislation, FOI practitioners are required to adopt a cautious approach when assessing these facts.

#### **Information Covered by this Exemption**

As the security bodies are not 'public authorities' for the purposes of the Act, they are not under any duty themselves to disclose information. It is only information supplied by them to departments, or information that relates to them and held by departments, that needs to be, and is, addressed by s23.

Insofar as the exemption relates to the source, rather than the content of the information, it is not possible to give an indicative list of the types of information that may be covered by s23. Insofar as the application of the exemption turns on whether information 'relates' to the security bodies, it will be capable of covering a range of subject matter of a policy, operational or administrative nature.

#### **Considerations**

The Act does not specify how remote from the original source information needs to be before it is no longer to be regarded as 'directly' or 'indirectly supplied' by, or that it relates to, one of the security bodies. However, if it is possible to trace a discrete piece of information back through each transmission to its original source, then this would seem to be sufficient, however many hands it has passed through and even if its wording has changed along the way.

In line with core NCND principles decision-makers should bear in mind that acknowledging that no information supplied by or relating to any of the security bodies is held may in itself constitute information about one of the security bodies, and that in some circumstances it may be appropriate to apply the 'neither confirm nor deny' provisions under s23(5) and/or s24(2), even when no information is held.

While there is no right of access under the FOIA to information supplied by or relating to the security bodies it may still be possible to disclose information, quite separately from the Act, if disclosure is officially authorised. However, it remains important that the disclosure of any information that could be covered by s23 (including historical records) takes into account other relevant legal considerations, and that the decision is taken after consultation with the respective legal and security experts.

### **NATIONAL SECURITY**

The test to be applied when considering whether to claim a s24 exemption is not whether the information relates to national security but whether the exemption is required for the purpose of safeguarding national security. That is, to claim the exemption it must be possible to identify an undesirable effect on national security, or the risk of such an undesirable effect, that claiming the exemption would prevent.

This exemption applies to information not covered by s23, though it may on occasion be necessary to use both exemptions together.

It will be essential to consider circumstances where actual harm has, or will, occur to national security; the need to prevent harm occurring; to avoid the risk of harm occurring; and whether the requested information could cause damage if put together with other available information.

Taken together, the following statements on national security may form the basis for identifying the type of information which falls into this category.

- The security of the nation includes its well being and the protection of its defence and foreign policy interests, as well as its survival;
- The nation does not refer only to the territory of the UK, but includes its citizens, wherever they may be, or its assets wherever they may be, as well as the UK's system of government;
- Potential threats to, or otherwise being relevant to, the safety or well-being of the nation, including terrorism, espionage, subversion, the pursuit of the Government's defence and foreign policies, and the economic well-being of the United Kingdom.
- Other areas may include the proliferation of weapons of mass destruction and the protection of the Critical National Infrastructure, such as the water supply or national grid, from actions intended to cause catastrophic damage.

### **NCND EXISTENCE OF INFORMATION**

Full guidance on the Neither Confirm Nor Deny principles can be found within this manual. Careful consideration is required when assessing the need to confirm or deny matters exempt by way of s23 and s24 individually or combined.

Where responses are considered for information relating to exempt bodies or national security purposes, in most cases it will be necessary to assess adopting an NCND approach: s23(5) and/or s24(2). The duty to confirm or deny does not arise if to comply would itself disclose information, which is exempt under the Act. The use of s23 and s24 together may be the only way that the 'non-committal' response that NCND requires in order to work, may be maintained. So that it cannot be readily inferred that use of the two exceptions together is itself an indicator of the relevant security body activity, it is also important that where s24 is relied on, reciprocal consideration is given to the justification for relying on s23.

# SECTION 26

## DEFENCE

### LEGISLATION

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to prejudice -
- (a) the defence of the British Islands or of any colony, or
  - (b) the capability, effectiveness or security of any relevant forces.
- (2) In subsection (1)(b) "relevant forces" means—
- (a) the armed forces of the Crown, and
  - (b) any forces co-operating with those forces, or any part of any of those forces.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection 1.

**EXEMPTION TYPE:** Qualified  
Prejudice-based

**APPLY:** Evidence of harm  
Public interest test

### GUIDANCE

The term 'co-operation' may include:

- Working with the UK's forces on a particular project or to include a much wider range of 'friendly' forces; and
- Information about the capabilities and vulnerabilities of forces working with UK forces.

The effect of disclosing information on the relationship between the UK and any other state should also be considered as a relevant factor in the public interest test when applying this exemption.

There is no current ACPO interpretation of this exemption and ACPO feels this exemption will have limited application within the Police Service.

# SECTION 27

## INTERNATIONAL RELATIONS

### LEGISLATION

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice -
  - (a) relations between the United Kingdom and any other State,
  - (b) relations between the United Kingdom and any international organisation or international court,
  - (c) the interests in the United Kingdom abroad, or
  - (d) the promotion or protection by the United Kingdom of its interests abroad.
- (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
- (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)–
  - (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
  - (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

**EXEMPTION TYPE:** s27(1)  
Qualified  
Prejudice-based  
s27(2)  
Qualified  
Class-based

### GUIDANCE

S27(1) is prejudice-based and covers disclosures that would, or would be likely to, prejudice international relations.

This is a broad exemption that is designed to cover the 'interests of the United Kingdom abroad' and 'the promotion or protection by the United Kingdom of its interests abroad'.

The exemption, however, does not cover the interests of specific groups within the state. Rather, this provision is designed to protect general national interests.

This exemption is class-based and covers information received in confidence from other states and international bodies.

The duty to confirm or deny the existence of information is also excluded to the extent that compliance with that duty would:

*'involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.'*

Since s27(2) is class-based, there is no need for a public authority to establish the specific prejudice that would occur from disclosure.

There is some overlap between s27(2) and s41 (Information in confidence). However, s41 applies to the disclosure of information obtained from another person whilst s27(2) refers to information obtained from a state, organisation or court that:

- Is confidential at any time while the terms on which it was obtained require it to be held in confidence; or
- While the circumstances in which it was obtained make it reasonable for the state, organisation or court to expect that it will be so held.

This provision is therefore concerned with the conditions under which the information was obtained.

It is ACPO's view that this exemption will be used in limited circumstances and with particular reference to forces with international responsibilities or in respect of forces that have relationships with forces overseas.

# SECTION 28

## RELATIONS WITHIN UK

### LEGISLATION

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1) 'administration in the United Kingdom' means -
  - (a) the government of the United Kingdom
  - (b) the Scottish Administration
  - (c) the Executive Committee of the Northern Ireland Assembly
  - (d) the National Assembly for Wales
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

**EXEMPTION TYPE:** Qualified  
Prejudice-based

**APPLY:** Evidence of harm  
Public interest test

### GUIDANCE

This exemption was included in the Act to protect relations between the devolved administrations of the UK.

Where the release of information would compromise these relations, this exemption may be applied.

In contrast to s27 (International relations), there is no specific class-based exemption covering information received in confidence from another administration in the UK.

It is ACPO's view that this exemption will have very limited relevance to the Police Service.

# SECTION 29

## THE ECONOMY

### LEGISLATION

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to prejudice -
- (a) the economic interest of the United Kingdom or of any part of the United Kingdom
  - (b) the financial interests of any administration in the United Kingdom, as defined by section 28(2)
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

**EXEMPTION TYPE:** Qualified  
Prejudice-based

**APPLY:** Evidence of harm  
Public interest test

### GUIDANCE

Categories of information that might fall within this exemption may include premature disclosure of governmental intentions relating to taxation or to the disposal of substantial property holdings owned by the state that would be likely to lead to the prejudice of the short-term economic interests of the UK. This exemption may also be used for information that would, if released, prejudice the economics of a region, in terms of inward investment for example.

It may be more difficult, however, for public authorities to prove that disclosure would cause prejudice in the longer term.

It is believed that s29 will not be a key exemption for the Police Service.

# SECTION 30

## INVESTIGATIONS AND PROCEEDINGS CONDUCTED BY PUBLIC AUTHORITIES

### LEGISLATION

- (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of -
  - (a) Any investigation which the public authority has a duty to conduct with a view to it being ascertained (i) whether a person should be charged with an offence, or (ii) whether a person charged with an offence is guilty of it,
  - (b) Any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority had the power to conduct, or
  - (c) Any criminal proceedings, which the authority has the power to conduct.
- (2) Information held by a public authority is exempt if -
  - (a) it was obtained or recorded by the authority for the purpose of its functions relating to -
    - (i) Investigations falling within subsection (1)(a) or (b),
    - (ii) Criminal proceedings which the authority has the power to conduct,
    - (iii) Investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
    - (iv) Civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
  - (b) it relates to the obtaining of information from confidential sources.
- (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

**EXEMPTION TYPE:** Qualified  
Class-based

**APPLY:** Public interest test

### GUIDANCE

S30 creates an exemption for information:

- Which is or has been held for the purposes of a criminal investigation;
- Which is or has been held for criminal proceedings conducted by a public authority; or
- Which was obtained or recorded for various investigative functions from confidential sources and relates to those confidential sources.

Information covered by this exemption is subject to the 30 year rule. If this time period has expired, forces will still need to ensure that other exemptions such as s31/s40 are not still engaged.

The first part of the exemption covers particular criminal investigations and proceedings and the second part provides protection to information about confidential sources on a wider range of investigative functions as listed under s30(2).

This exemption covers information held at **any time** for the purposes of an investigation, whether the case is ongoing, closed or abandoned.

It is ACPO's view that information relating to ongoing investigations is unlikely to ever be released under FOIA (subject to the application of the outcome of the PIT), nor that relating to confidential sources. The disclosure issues with regard to sources are well known (CHIS), but less so investigations themselves. To disclose ongoing investigations would risk undermining the human rights of any suspect to a fair trial and more importantly the rights of the victim, if a prosecution were to fail due to an adverse disclosure. There are already in place established procedures for disclosure when to do so would aid an investigation, for example an appeal for witnesses through media channels. FOIA is not the correct discipline to use for such matters.

#### **RELATIONSHIP WITH S31**

There are areas of overlap between s30 and s31. Whereas s30 provides an exemption in relation to a particular criminal investigation, s31 provides for general steps taken in relation to law enforcement.

It is clear within s31 itself that where s30 applies s31 cannot be used. This should be borne in mind when analysing investigation material subject to a request. All the information may not be covered by s30 as there needs to be a link between the information and the investigation. For example, a crime file may contain a policy or procedural reminder on its completion and this would not be information held for the purposes of a specific investigation, therefore engaging s31 instead, if the disclosure would prejudice law enforcement.

#### **ATTRACTION OF NCND WHEN S30 IS ENGAGED**

There is an option within s30 to Neither Confirm Nor Deny the information is held (see NCND chapter).

The success of many investigations depends on ensuring the information is not disclosed prematurely. It is likely that a non-committal response will be required when the existence of an investigation is not yet in the public domain or it is a necessary response to protect the identity of some informants or defendants.

For example a request stating 'please disclose copies of the investigation into Smith' whether held or not is likely to attract an NCND response, unless such an investigation is already public knowledge. To use exemptions or state 'not held' could actually disclose sensitive and personal information.

### **THE PUBLIC INTEREST TEST**

S30 is a qualified exemption. This of course means that even if the information requested is exempt, the public interest in maintaining the exemption may be outweighed by a wider public benefit in disclosure.

A critical issue is likely to be the timing of the disclosure. Factors favouring disclosure are likely to be weaker while an investigation is being carried out, or is unsolved and subject to Criminal Procedures and Investigations Act (CPIA) review, for the reasons outlined above. However, once an investigation is completed, the public interest in understanding why an investigation reached a particular conclusion, or in seeing that the investigation has been properly carried out, could well outweigh the public interest in maintaining the exemption.

This will still be relative to the factors outlined in the public interest chapter; however, the ICO has outlined his view that cases where justice was not done, either to the accused person or victim, may shift the public interest towards disclosure. This is especially so in cases where procedural failure or mismanagement is the cause.

### **CASE-BY-CASE**

An important element when dealing with requests for investigations is the requirement to deal with each request on a case-by-case basis. Also, there is a need for each piece of information to be assessed. Simply applying a 'blanket' exemption because the information requested is an investigation, is not valid. Decision Notices and tribunal cases have shown that this is flawed because the PIT may well be different for each piece of information. For example a benign note on the file discussing charging options will have different considerations to a sensitive witness statement. The most cost and time effective method to do this will be to establish exactly what information the applicant really wants, potentially removing the need to analyse each separate piece.

It has been established from the Information Tribunal that even though s30 is a class-based exemption, there is a requirement to clearly demonstrate in any refusal, what prejudice the investigation would suffer if the information were to be disclosed.

# SECTION 31

## LAW ENFORCEMENT

### LEGISLATION

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice -
- (a) the prevention or detection of crime
  - (b) the apprehension or prosecution of offenders
  - (c) the administration of justice
  - (d) the assessment or collection of any tax or duty or any imposition of a similar nature
  - (e) the operation of immigration controls
  - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained
  - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)
  - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
  - (i) any enquiry held under the Fatal Accidents and Sudden Death Inquiries (Scotland) Act 1976.
- (2) The purposes referred to in subsection (1)(g) to (i) are-
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
  - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
  - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
  - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
  - (e) the purpose of ascertaining the cause of an accident,
  - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
  - (g) the purpose of protecting the property of charities from loss or misapplication,
  - (h) the purpose of recovering the property of charities,
  - (i) the purpose of securing the health, safety and welfare of persons at work, and
  - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

<b>EXEMPTION TYPE:</b>	Qualified Prejudice-based
<b>APPLY:</b>	Evidence of harm Public interest test

## **GUIDANCE**

S31 creates an exemption from the right to disclose information if releasing it would, or would be likely to cause **significant** harm to the functions of a public authority.

Public authorities may engage this exemption **firstly** either in relation to certain 'activities' listed under sections (1)(a) to (f), of the exemption which are:

- (a) The prevention and detection of crime.
- (b) The apprehension or prosecution of offenders.
- (c) The administration of justice.
- (d) The assessment or collection of tax.
- (e) The operation of immigration controls.
- (f) The maintenance of security and good order in prisons.

or **secondly** carrying out a 'specified purpose', s(1)(g) to (i) as outlined in s31(2):

- Determining whether a person has broken the law;
- Determining whether a person is responsible for improper conduct;
- Determining whether there are or may be circumstances which would justify regulatory action;
- Determining a person's fitness or competence to manage a corporate body or to continue in any profession or other activity which they are or would like to become authorised to carry on;
- Determining the cause of an accident;
- Protecting charities against misconduct or mismanagement in their administration or recovering the property of charities;
- Securing the health, safety and welfare of staff: and
- Protecting people other than staff against risk to health or safety arising from the actions of a person's staff.

This would appear on the surface somewhat complex, exacerbated by the terminology used in the guidance issued by the ICO on this exemption. The guidance refers to 'stand-alone activities' and 'qualified purposes', although these phrases are not contained within the legislation.

The use of this exemption by the Police Service is somewhat simplified due to the fact that it obviously carries out all of the activities of the prevention and detection of crime, the apprehension or prosecution of offenders and the administration of justice listed under (a), (b) and (c). The Service also has limited exposure to the activities outlined in (e) and (f) where policing involves the physical security of entry points to the UK or the external security of prisons. The Service has no functions that would involve the activities in d.

It will be for decision-makers to establish whether the disclosure will or be likely to prejudice one of these activities, so that s31(1) is correctly considered. If a specified purpose is likely to be compromised by disclosure, s31(2) will be engaged instead. It is ACPO's view that it will be rare for the latter to be used as the fact that the Police Service obviously carries out a law enforcement function, as an activity, is an established fact.

This should not however, lead practitioners to believe that they do not need to understand the differences between 'activities' and 'specified functions'. The use of this exemption is not restricted to those authorities whose information is simply covered by it, as is the case with s30.

For example a local council may be asked for information that damages a police function, enabling them to engage the exemption legitimately. This is particularly relevant when reviewing information which has been generated by, or mutually shared, as part of partnership working.

#### **WHAT TYPE OF INFORMATION IS COVERED?**

The information potentially covered by this exemption is very broad. As a general, but not exhaustive guide, consideration should be given to any disclosure which will or could prejudice:

- Crime prevention, detection or reduction.
- Arrest or prosecution of offenders.
- Penalties for criminal behaviour.
- Breaches of military law.
- Administrative arrangements of courts.
- Court functions.
- Witness care.
- Transport of defendants.
- Civil case processes.
- Effective and efficient conduct of a police force or the service.
- Security and protection arrangements.

#### **RELATIONSHIP WITH S30 (INVESTIGATIONS ETC)**

There are areas of overlap between s30 and s31. It is mandated within s31 itself that where s30 applies to information, then s31 cannot also be engaged. So although these two exemptions cannot be applied to the same piece of information, there may a need to still use both exemptions in response to a request. It is imperative, therefore, that an applicant is told exactly which exemption is relevant to which part of the information.

For example, a request for information in relation to an investigation is received. The request asks for information about the decision-making process behind key decisions in the investigative process. It would appear that s30 is engaged and therefore s31 is excluded. However, examination of the case papers shows that various procedural documents and Manuals of Guidance are also relevant to the request, not just the case papers.

Since s30 only covers:

*'Information held by a public authority if it has at any time been held by the authority for the purposes of any investigation which the public authority has a duty to conduct',*

this will cover the case papers but not the other documents. If the disclosure of the additional documents will or be likely to prejudice law enforcement, then s31 will also be engaged.

#### **ATTRACTION OF NCND WHEN S31 IS ENGAGED**

There is an option within s31 to Neither Confirm Nor Deny the information is held. (For additional information on using NCND, please see the relevant section). An example where a force may wish to NCND using s31 may be where a particular tactic is not widely known in the public domain and is therefore likely to attract a non-committal, NCND response.

For example, confirming the use of a policing method which is not in the public domain, may prejudice the use of this method by allowing criminals to adopt countermeasures. If a request asking for the number of times a force has used this tactic is simply exempted, this would actually confirm that such a tactic is used. As such, an NCND response would be more appropriate.

#### **HARM AND THE PUBLIC INTEREST TEST**

S31 is a qualified and prejudice-based exemption. This requires the production of evidence of what prejudice may be caused and a full public interest test. (Please refer to the section on harm and the public interest test for more information).

A critical issue is likely to be the timing of the disclosure. Factors favouring disclosure are likely to be weaker while a tactic or methodology is still in current use. However, great care still needs to be taken as it is not uncommon for an outdated tactic to be bought back into use, sometimes many years later, as criminals modify their behaviour.

Information covered by this exemption also tends to attract the most difficult public interest balance test. The public interest in knowing why something was done, particularly if it were badly managed, is a powerful argument. The ICO has outlined his view that cases where justice was not done, either to the accused person or victim, may shift the public interest towards disclosure. This is especially so in cases where procedural failure or mismanagement is the cause.

Each request must be dealt with on a case-by-case basis. There is a need for each piece of information to be assessed. Simply applying a 'blanket' exemption because the information requested would prejudice law enforcement is not valid. The most cost and time effective method of achieving this detailed assessment is to establish exactly what information the applicant really wants, potentially removing the need to analyse each separate piece.

#### **HISTORICAL INFORMATION**

This exemption does not apply to information in records that are more than 100 years old.

# SECTION 32

## INFORMATION CONTAINED IN COURT RECORDS

### LEGISLATION

- (1) Information held by a public authority is exempt information if it is held only by virtue of being contained in -
  - (a) any document filed with, or otherwise placed in custody of, a court for the purposes of proceedings in a particular cause or matter,
  - (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
  - (c) any document created by
    - (i) a court, or
    - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.
- (2) Information is exempt from the duty to communicate where it is held only by virtue of being contained in:
  - (a) any document placed in custody of a person conducting an enquiry or arbitration, for the purposes of the inquiry or arbitration, or
  - (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration
- (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.
- (4) In this section -
  - (a) 'court' includes any tribunal or body exercising the judicial power of the State,
  - (b) 'proceedings in a particular cause or matter' includes any inquest or post-mortem examination
  - (c) 'inquiry' means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
  - (d) except in relation to Scotland, 'arbitration' means any arbitration to which Part 1 of the Arbitration Act 1996 applies.

**EXEMPTION TYPE:** Absolute  
Class-based

### GUIDANCE

Although large amounts of police information are submitted to the courts, the majority of this information is unlikely to be covered by the s32 exemption.

This is due to the key words used within the legislation which stipulate that information held 'only by virtue' is covered.

Police information is rarely gathered solely for court use as it tends to have multiple functions. In fact, it is unlikely at the information-gathering stage that a definitive knowledge as to the likely final use of the information would be known. For example witness statements are taken as the Police Service has a statutory function to investigate crime and secure evidence. However, at the time statements are taken, the future or end usage of that information is unlikely to be known.

Another example would be a set of financial records which are the subject of litigation. If those records were held for the purposes of that litigation only then they would be covered by s32. However, the reality is that they probably existed because of the authority's obligation to keep financial records in the first place.

In any case, information relating to forthcoming criminal or civil litigation cases is not covered by this exemption. The proceedings in question must have already commenced or have been concluded at the time the request was received for s32 to be engaged.

#### **INFORMATION LIKELY TO BE COVERED**

Anything generated by the court itself will attract this exemption in addition to anything produced by the police solely for court use. Discovering the provenance and reasons for the existence of information is key to identifying whether this exemption may be engaged. If in any doubt practitioners should seek advice from the author of the document or the Criminal Justice Departments (or equivalent) who are responsible for the preparation of court papers.

Some of the information likely to attract this exemption includes:

- Warrants
- Court orders
- Court transcripts and records
- Interim court orders
- Bail applications
- Witness summons

#### **HISTORICAL INFORMATION**

This exemption is only valid for information less than 30 years old.

This exemption is mainly intended for use by the courts themselves and its use is limited with regard to police information. It is felt that the more police-specific exemptions of s30 and s31 will be more effective in protecting the type of information concerned, especially if there is any doubt as to why it was created. However, it should be borne in mind that this is a powerful absolute, class-based exemption meaning there is no need to evidence prejudice or conduct a public interest test.

# SECTION 33

## AUDIT FUNCTIONS

### LEGISLATION

- (1) This section applies to any public authority which has function in relation to -
  - (a) the audit of the accounts of other public authorities
  - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions
- (2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's function in relation to any of the matters referred to in subsection (1).
- (3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

**EXEMPTION TYPE:** Qualified  
Prejudice-based

**APPLY:** Public interest test  
Evidence of harm

### GUIDANCE

This exemption may be cited by public authorities that have functions relating to either:

- The audit of accounts of other public authorities; or
- To the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their function.

Importantly, this exemption **does not** cover information that relates to a local authority's internal audit.

ACPO guidance is that this exemption may be used for information that's intended for future publication where the public interest test has been applied and it is judged that there may be an adverse effect if the information requested is released prematurely.

This exemption is designed to protect organisations with an external audit function - such as the Audit Commission or the Her Majesty's Inspector of Constabularies (HMIC) - where the audit results are, by their very nature, for public consumption.

This exemption **does not** cover auditing processes that an organisation may exercise on itself, internally.

# SECTION 34

## DISCLOSURE WHICH WOULD INFRINGE PARLIAMENTARY PRIVILEGE

### LEGISLATION

- (1) Information is exempt information if exemption from section 1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.
- (2) The duty to confirm or deny does not apply if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

**EXEMPTION TYPE:** Absolute  
Class-based

### GUIDANCE

Information is exempt from disclosure if its release would infringe the privileges of either House of Parliament.

The purpose of this exemption is to protect Parliament's power to retain control over disclosure of its own information.

The duty to confirm or deny is excluded under this exemption where confirming or denying the existence of information would infringe the privileges of either House.

Whilst confirmation or denial of the existence of information is less likely to infringe Parliamentary privilege than disclosure itself, s34(2) will apply where confirmation or denial would result in a breach of privilege.

# SECTION 35

## FORMULATION OF GOVERNMENT POLICY AND OTHER GOVERNMENTAL INTERESTS

### LEGISLATION

- 1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to -
  - (a) the formulation or development of government policy
  - (b) Ministerial communications
  - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
  - (d) the operation of any Ministerial private office
- (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-
  - (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
  - (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
- (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1). Duty to confirm or deny does not arise in relation to information that is exempt as defined above.

**EXEMPTION TYPE:** Qualified  
Class-based

**APPLY:** Public interest test

### GUIDANCE

This exemption was incorporated into the Act to ensure that policy discussion can be conducted privately. Without this protection, the 'normal' processes of government may be inhibited. Civil servants, for example, may be less candid in their advice to Ministers when considering policy options.

This exemption is reasonably broad in its scope and can be used to cover the formulation or development of government policy even where a policy has been finally adopted.

Limitations on the scope of this exemption have been introduced. For example, once a decision on government policy has been made, background statistical information that provided an informed background in the decision-making process does not fall under this exemption and may therefore be subject to disclosure.

ICO Guidance recommends the disclosure of factual information used to underpin the decision-making process. However, distinguishing between statistics and other forms of fact is more difficult than it may appear. When considering the public interest when differentiating between factual and other information, the Act states:

*'regard shall be had to the particular public interest in the disclosure of factual information which has not been used, or is intended to be used, to provide an informed background to decision-taking'.*

Whilst this exemption is wide-ranging, it is not all-encompassing and covers only information relating to the 'formulation or development of government policy'. Information that relates to the execution of adopted policies or information concerning other procedural or administrative functions will not fall within the exemption.

This is not an exemption that the Police Service can apply: its use is limited to government departments.

# SECTION 36

## DISCLOSURE PREJUDICING THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS

### LEGISLATION

- (1) This section applies to -
- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35,
  - (b) information which is held by any other public authority.
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
- (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.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

**EXEMPTION TYPE:** Qualified  
Prejudice-based

**APPLY:** Evidence of harm  
Public interest test

### GUIDANCE

Information is exempt from disclosure if, in the reasonable opinion of a 'qualified person'\*, its disclosure would prejudice, or would be likely to prejudice, certain specified interests relating to public affairs.

Where the information in question is held by either House of Parliament, S36 is an absolute exemption. This exemption may well be applied to stop disclosures that might prejudice the effective conduct of Parliamentary business, even when the principle of Parliamentary Privilege is not threatened.

In other cases, s36 is a qualified exemption. This means the public interest test must be applied.

Where, in all circumstances of the case, the public interest in non-disclosure outweighs the public interest in disclosure, the information need not be disclosed.

S36 differs from other exemptions because it uses the term 'reasonable opinion of a qualified person'. Information to which this section applies is exempt information if, in the reasonable opinion of a 'qualified person', disclosure of the information:

- (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

The main beneficiaries of this exemption will be public authorities. This exemption has been referred to as a 'mopping up' clause in the Act to prevent disclosure of information that's not covered by other specific provisions.

Under this exemption, there is no duty to confirm or deny if, in the opinion of 'reasonable person,' the information is not disclosable.

Assuming a 'qualified person', on reviewing the request for information, believes that the information should be exempt because public interest favours retention, the release of material requested may be declined.

\* A specific definition of a 'qualified person' is not included in the Act. Qualified persons are authorised by a Minister of the Crown. For the Police Service, the suitably 'qualified person' is the **Chief Constable or Commissioner**.

It is ACPO's view that this exemption will have minimal relevance and will only be used by the Police Service in the most exceptional cases.

# SECTION 37 COMMUNICATION WITH THE ROYAL FAMILY AND HONOURS

## LEGISLATION

- (1) Information is exempt information if it relates to -
  - (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
  - (b) the conferring by the Crown of any honour or dignity
- (2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

An amendment to the 2000 Act commenced on 19<sup>th</sup> January 2011. It states that information relating to communications with the Sovereign, the heir to the Throne or the second in line to the Throne (and communications made or received on their behalf) is subject to an absolute exemption from disclosure, and information relating to communications with other members of the Royal Family (and communications made or received on their behalf) or the Royal Household is subject to a qualified exemption from disclosure (Schedule 7, paragraphs 2 and 3).

**EXEMPTION TYPE:** Qualified

Class-based

**APPLY:** Public interest test

## MANDATORY REFERRAL TO CRU

## GUIDANCE

This exemption covers letters or other documents received from members of the Royal Family or Royal Household. It will also apply to notes of meetings between officials of a public authority and a member of the royal family or royal household.

ACPO guidance is that all communication falling under this exemption will be actively protected. Where a request is received in relation to the Royal Family and/or any policing issues associated with them, the request must be referred to the Central Referral Unit.

Any response will be approved by the ACPO lead within the Metropolitan Police Service and the keeper of historical records within Buckingham Palace.

# SECTION 38

## HEALTH & SAFETY

### LEGISLATION

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to -
- (a) endanger the physical or mental health of any individual, or
  - (b) endanger the safety of any individual
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

**EXEMPTION TYPE:** Qualified  
Prejudice-based

**APPLY:** Evidence of harm  
Public interest test

### GUIDANCE

This exemption appears to be of particular relevance to the Police Service. A s38 exemption may be applied where disclosure of information would, or would be likely to endanger:

- The physical or mental health of any individual; or
- The safety of an individual.

It is likely that this definition will cover a wide spectrum of scenarios. By applying this exemption to 'any individual', it may be interpreted as the mental or physical health of a police officer, the requester, another individual or the public in general.

This provision is in line with a similar provision in the Data Protection Act (DPA) that prohibits subject access where there is a risk of 'serious harm'.

This exemption also has the potential to be linked to the provision of confidential and personal information where identification of the source may place that person at risk.

ACPO guidance is that this exemption would be applied vigorously in respect of protecting the identity (and therefore the safety) of informants. This cannot be stated strongly enough.

Other areas that would be protected under s38 are photographs and videos showing post-mortems, injuries, accidents, crime scene videos and similar material that would be likely to affect the mental health of those affected if released into the public domain.

In our consideration, anything requested that is anti-s38 that would have a detrimental effect on mental well-being to the family of those investigated or the public, will be vigorously protected.

# SECTION 39

## ENVIRONMENTAL INFORMATION

### LEGISLATION

- (1) Information is exempt information if the public authority holding it-
  - (a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or
  - (b) would be so obliged for any exemption contained in the regulations.
- (2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
- (3) Subsection (1)(a) does not limit the generality of section 21(1)

**EXEMPTION TYPE:** Qualified  
Class-based

**APPLY:** EIR (2004)

### GUIDANCE

This exemption aims to ensure that any requests for information are handled under specific regulations implementing the UK's international obligations on access to environmental information rather than under the Act.

Where a request for environmental information is made, it should be considered under the Regulations rather than under the FOI Act.

ACPO suggests mechanisms should be in place to automatically route queries relating to environmental information through the Environmental Information Regulations.

For more information, please see Appendix 1.

# SECTION 40

## PERSONAL INFORMATION

### LEGISLATION

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-
  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) The duty to confirm or deny-
  - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and (b) does not arise in relation to other information if or to the extent that either-
    - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
    - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
  - (b) does not arise in relation to other information if or to the extent that either—
    - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.]

Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

- (ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.
- (7) In this section— “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act; “data subject” has the same meaning as in section 1(1) of that Act; “personal data” has the same meaning as in section 1(1) of that Act.

**EXEMPTION TYPE:** Absolute (in part)  
Class-based

**APPLY:** Public interest test on rare occasions

## GUIDANCE

Under the DPA, applicants must clearly state their intention to apply for their own personal information.

This is not the case under FOI: there is no requirement to specify that a request is being made under FOI legislation and it is up to the authority receiving the request to determine the correct path.

The interface between the DPA and FOIA is complex. The FOIA contains some significant amendments to the DPA. In particular, it increases the range of data to which an individual has rights of access under the DPA. It will be necessary, therefore, in certain circumstances when processing FOI requests to step into the DPA.

S40 for the most part is an absolute exemption.

### S40(1)

Where a request is made by an applicant requesting their own personal information, this is an absolute exemption under s40(1).

This application becomes a Subject Access Request under the DPA and should be channelled through appropriate procedures to be dealt with by Data Protection Officers and a s40(5) refusal notice issued.

### S40(2)

If the request for information relates to third parties (anybody other than the data subject), it is absolute under s40(2) if disclosure would breach any of the data protection principles. Releasing sensitive personal information to someone other than the data subject will almost always infringe the data protection principles contained in the DPA.

Generally speaking, two broad questions will need to be addressed:

1. Is the information 'personal data'?
2. If so, will disclosure breach one of the data protection principles?

#### **Data Protection Principles:**

According to the 8 principles, data must be:

- Fairly and lawfully processed;
- Processed for limited purposes;
- Adequate, relevant and not excessive;
- Accurate and up to date;
- Not kept for longer than is necessary;
- Processed in line with your rights;
- Secure; and
- Not transferred to other countries without adequate protection.

It is a requirement when refusing information under this sub-section to articulate to the applicant which of these principles would be breached and why.

Of the above, the first principle is the most relevant to decision making under FOI. Practitioners must always determine whether disclosure is 'fair' to the data subject. There is a requirement to balance the public interest in disclosure against any harm that may be caused to the individual concerned.

'Personal Data' means data that relate to a living individual who can be identified:

- From those data; or
- From those data and other information that is in the possession of, or likely to come into the possession, of the data controller.

This definition also includes the expression of any opinion about the individual or any indication of the intentions of the data controller or any other person in respect of the individual.

'Sensitive Personal Data' means personal data consisting of information that relates to:

- The racial origin of the data subject;
- The political opinions of the data subject;
- The religious beliefs or other beliefs of a similar nature;
- Membership of a Trade Union or similar;
- His or her physical or mental health or condition;
- His or her sexual life;
- The commission or alleged commission by the data subject of any offence; or
- Any proceedings of any offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

Requests for information about third parties are covered by the FOIA but data protection principles apply. This is governed by s40(2). For this type of request, there is a need to consider whether disclosure contravenes the data protection principles and the lawful

processing of data.

This exemption falls into 2 parts. Where the release of data would:

- Contravene data protection principles; or
- If the request had been made by the subject of the data, it would be covered by an exemption under the DPA.

Where requests relating to third party information are made and exemptions may not be applied, then the information will be released. **However, this will be rare.**

S40(2) also contains two alternative exemptions for third party data. However, for practical purposes it is hard to think of a situation when these might be useful, as it is highly likely that the main third party data exemption or other FOIA exemptions will be easier to apply.

#### **S40(5)**

Please refer to the NCND chapter when using s40(5).

#### **PROCESSING DATA**

Compliance with the terms of FOIA is a statutory obligation. This means that forces may need to process personal data in order to extract the information that has been requested. This would not represent a breach of the Data Protection Act, even though the force is not now processing the data for reasons for which it was originally gathered eg accessing PNC.

# SECTION 41

## INFORMATION PROVIDED IN CONFIDENCE

### LEGISLATION

- (1) Information is exempt if -
  - (a) It was obtained by the public authority from any other persons (including another public authority), and
  - (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

**EXEMPTION TYPE:** Absolute  
Class-based

Although not qualified, there is a requirement to conduct a PIT on whether the common law duty of confidentiality can be overcome. This differs from the usual PIT applied under FOI insofar as the default position favours non-disclosure unless overwhelming evidence is provided favouring disclosure.

### GUIDANCE

S41 covers information provided in confidence and is likely to have widespread relevance to the Police Service. However, whilst the exemption appears to be both class-based and absolute, its power is reduced because it is defined in 'relation to the equitable action for breach of confidence'.

This means s41 is an absolute exemption - where release of the information would result in an actionable breach of confidence - but it has its own built-in form of testing for ascertaining whether there could be such a breach.

This exemption does not cover information that a public authority has generated internally. It specifically relates to information that has been obtained by the public authority from another person (this may include an individual, a company, a local authority or any other 'legal entity'). The exemption may be enforced only where an actionable breach of confidence would occur should the information be disclosed. This is where release would result in the provider or a third party taking the authority to court.

- Information falling within s41 may also be exempt from disclosure under s40 (Personal information), s43 (Commercial interests) or s30(2) (Confidential sources).

## **BREACH OF CONFIDENCE TEST**

To determine whether a breach of confidence would occur if the information were to be disclosed, the following questions need to be applied:

- **Does the information have the necessary quality of confidence about it?**  
Information that is already in the public domain, or has not been treated as confidential by the originator, does not have the necessary quality of confidence. Where information has been subjected to restricted disclosure - where it is not already available publicly or where the originator of the information has treated it as confidential - the information may still be subject to an obligation of confidence.
- **Was the information imparted in circumstances that imply an obligation of confidence?**  
This refers to whether the 'giver' of the information expresses that the information is confidential in nature when s/he imparts the information to others. At the same time, the recipient of the information must acknowledge that the information received is confidential in nature. In this case, there is an obligation of confidence attached to the information.
- **Was there an unauthorised use of that information to the detriment of the person communicating it?**  
This exemption also applies to information given to a public authority by another body or individual, not information that a public authority itself might consider as confidential. When deciding on whether to release the information or not, there is no obligation to consult third parties but the draft Codes of Practice state that those parties affected by disclosure should be approached.
- **The Duty to Confirm or Deny S41(2)**  
If confirming existence of the information would be likely to be a breach of confidence, then the need to confirm/deny is negated. This applies where information is provided by informants.

Where the legal rights of a third party would be breached - under the DPA, for example - they should be consulted prior to disclosure.

The ACPO view is that information given by informants, whether internal or external, will be exempt under s41, subject to the breach of confidence test although consideration should also be given to the application of s40.

The provision of information to the Police Service by individuals and organisations remains critical to the prevention and detection of crime. Much of this information is supplied as part of routine transactions with victims, witnesses and other persons connected to crimes or other incidents that require police involvement.

In addition, the Police Service actively encourages the community to supply information relating to specific crimes and more general criminal activity through Crimestoppers and the use of informants.

It has been long recognised that the supply of information concerning serious and organised criminal activity to the police has been critical to crime detection and/or disruption. In many cases this information is supplied only as a result of assurances of confidentiality. In the policing context, any breach of confidentiality that leads to the identification of informants or organisations may have serious consequences, including loss of life.

Apart from the serious consequences that arise in any individual case, the disclosure of information relating to confidential sources is likely to reduce the willingness of individuals to supply information to the Police Service and engage with the wider criminal justice system.

CHIS will be actively protected for the life of the informant (and potentially beyond where family issues are relevant).

#### **OFFICIAL GUIDANCE**

The law of confidence is a common law concept. To determine whether an obligation of confidence exists in terms of FOI, there is a need to consider:

- The circumstances under which the information was provided to the authority; and
- The nature of the information.

Where explicit conditions of confidence are attached to information, it is clear that a public authority should be cautious in its subsequent use or disclosure. The conditions of confidence may be written, contractual or verbal.

It becomes more difficult to judge whether an obligation of confidence exists when it is not stated explicitly, but is obvious or implied from the circumstances of its transfer. In these cases, it is recommended that the advice of any third party likely to be affected by disclosure should be considered prior to the release of information. Where information is gathered as a result of the statutory requirements or powers conferred upon a public authority, there is a need to carefully consider whether or not the law of confidence would prevent disclosure of information to third parties.

Information that has the necessary quality of confidence about it should be protected by an obligation of confidence. The information itself need not be highly sensitive in nature but it should not be trivial either.

The information in question must not be readily available elsewhere or by other means. It should not be able to be surmised. Equally, the information need not necessarily be secret: a victim of crime, for example, does not lose the right to confidentiality if they disclose details of a crime to a friend.

The courts have identified three general sets of circumstances that may precipitate the disclosure of information:

- Disclosures with consent. Where the person (individual or organisation) to whom the obligation of confidentiality applies consents to the release of the information, this

will not lead to an actionable breach of confidence;

- If a disclosure is required by law, it is unlikely the information will be subject to an FOI request in any event; or
- Disclosures where there is a strong public interest in releasing the information requested.

When enforcing this exemption, public authorities must be satisfied that any breach of confidence that would occur from the release of the information would be actionable ie. the aggrieved third party would have the right to take the authority to court.

Thus, a public authority must:

- Be sure that the information in question is confidential;
- Take advice from the people - individuals or organisation - affected but be aware that third parties are not afforded the right of veto and the decision to release or withhold is with the public authority; and
- Be aware that the aggrieved party must have legal standing - one Government department can not, for example, sue another.

The GPMS is a useful preliminary indicator as to the nature of the information. However, documents and information marked 'confidential' are not necessarily automatically exempt from release.

Documents that were originally labelled 'confidential' may no longer be confidential because of the time elapsed. Authorities should consider the introduction of a system that defines and records the period of time during which the marking scheme is anticipated to be relevant.

There is no guarantee that information received from external bodies will have the necessary quality of confidence about it after a period of time. Similar to issues relating to the internal marking scheme, what was confidential at the time of writing may no longer be at the time disclosure is requested. However, prior to disclosure, it is recommended that a public authority consults the information provider and any affected third party, notwithstanding the fact that the ultimate decision will rest with the public authority.

The law of confidence is legally complex. The IC recommends that other exemptions contained within the Act may be more immediately relevant.

This exemption can only be used for externally generated information since a public authority is unable to sue itself.

# SECTION 42

## LEGAL PROFESSIONAL PRIVILEGE

### LEGISLATION

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

**EXEMPTION TYPE:** Qualified  
Class-based

**APPLY:** Public interest test

### GUIDANCE

Under the Act, an applicant may not obtain disclosure of legal advice offered to a public authority by a solicitor in private practice or an in-house lawyer, subject to the application of the public interest test since this is a qualified exemption.

This exemption is class-based. This means there is no requirement to demonstrate any 'prejudice' that may occur to the professional legal adviser/client relationship if information is disclosed. It is inherently implied that the release of information that may appear trivial might undermine the relationship between lawyer and client. However, the public interest test must be applied to determine whether the information should be disclosed or exempted.

By virtue of s63 of the Act, this exemption will no longer apply after a period of 30 years following the year after the record in question was created.

For the Police Service, s30 (Investigations and proceedings conducted by public authorities) or s31 (Law enforcement) may be more easily applied than s42, Legal professional privilege.

**Note:** Where s42 is being considered or cited, the force's legal services department must be contacted and their views sought.

The client-legal professional privilege is a principal enshrined in history that must be respected.

Advice provided by the CPS is not covered by s42.

# SECTION 43

## COMMERCIAL INTERESTS

### LEGISLATION

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

**EXEMPTION TYPE:** Qualified  
Class-based

**APPLY:** Public interest test

### GUIDANCE

S43 sets out an exemption from the right to know if:

- The information requested is a trade secret. In this case, there is no need to apply the public interest test and consider the harm its release may cause. It may be withheld; or
- The release of the information is likely to prejudice the commercial interests of any person (a 'person' may be an individual, a company, public authority itself or any other legal entity). Where the information requested does not constitute a trade secret, it can only be withheld if the public authority is satisfied a person's commercial interests would be compromised by its release.

S43 does not absolve the authority from the obligation to inform an applicant whether it holds the information that constitutes a trade secret.

However, where the requested information is likely to prejudice commercial interests other than trade secrets, s43 removes the obligation to confirm whether the information is held.

If information is produced or compiled with a view to it being sold on as a commercial product - as with training materials, for example - then this too will fall under the s43 exemption.

Where the information requested is neither commercially sensitive nor commercially valuable or where it has no commercial value to the organisation in any other format, then authorities must consider releasing it, subject to application of the public

interest test.

#### OFFICIAL GUIDANCE

A 'trade secret' is not defined in the FOIA. However, its interpretation can be wide-ranging and may extend to customers and the goods they buy, a company's pricing structure if this is generally not in the public domain and the source of a company's 'competitive advantage'. In keeping with other breaches of confidentiality, the unauthorised disclosure of information may result in legal action being taken against the public authority.

By definition, disclosing a trade secret would prejudice a commercial interest. The public authority must confirm or deny that it holds the information.

The following questions will help a public authority determine whether the information requested constitutes a trade secret:

- Is the information commercially sensitive and does it give a company a 'competitive edge' over its rivals?
- Is it obvious from the nature of the information that its release would cause harm and erode competitive advantage? Has the owner of the information stated this?
- Is the information already published in some form and in the public domain?
- How easy would it be for competitors to discover or reproduce the information for themselves? Generally, the less skill or effort that was required to generate the information, the less likely the information will constitute a trade secret.

The concept of commercial interests is wide and extends to a person's ability to successfully trade in a commercial environment. The underlying motive for commercial activity is profit.

Types of information that may affect commercial interests include:

- **Procurement** - public authorities will hold a range of information relating to the procurement process and proposed future procurement plans. This may include information held in unsuccessful bids right through to the details of the contract with the successful company. Details may also be held of how a company or product has performed under contract.
- **Regulation** - public authorities that perform their regulatory functions and potential breaches may hold information that will support this role.
- **Public authority's own commercial activities** - those public authorities that engage in commercial activities may hold information that will potentially fall within the scope of the exemption.
- **Policy development** - information that is commercial in nature may be recorded during the formulation or evaluation.
- **Policy implementation** - public authorities may hold information relating to the assessment of business proposals and the awarding of grants that may be

commercially sensitive in nature.

- **Private finance initiative/public private partnerships** - where the private sector is involved in the financing and delivering of public sector projects and services, the public authority may hold information that is both project-related and more general.

The information listed above is not necessarily exempted from disclosure under FOIA but is subject to the prejudice test and the public interest test prior to disclosure.

The following outline some of the questions that may be asked when reviewing whether the release of information may harm the commercial interests of either the public authority or supplying companies:

- **Does the information relate to, or could it impact on commercial activity?**  
Some information may directly relate to commercial activity whilst other information may have a more indirect link.
- **Is the commercial activity conducted in a competitive environment?**  
The lower the level of competition in any given marketplace, the less likely commercial interests will be prejudiced with the release of information. Where a public authority is the sole purchaser of specialist equipment, for example, the commercial interests of the company could be more dependent on the procurement plans of the public authority rather than the impact of releasing commercial information.
- **Would there be damage to reputation or business confidence?**  
If release were to damage a company's reputation or the confidence of customers, suppliers or investors, the commercial exemption may be applied. The same may be said where release may impact revenue or threaten ability to obtain supplies or secure finance.
- **Whose commercial interests are affected?**  
In some circumstances, it may be unclear as to whose commercial interests may be prejudiced by disclosure of information. For example, if the amount of money set aside by a public authority for procurement is released, the bargaining position of the authority may be compromised if suppliers then increase their prices.
- **Is the information commercially sensitive?**  
Companies compete by offering something different from their rivals. The difference will often be reflected in their price and may also relate to the quality or specification of the product or service they offer. Information identifying this unique element is likely to be commercially sensitive. It may also inadvertently reveal information about profit margins and possibly working practises.
- **What is the likelihood of the prejudice being caused?**  
A judgement will need to be made on the likely prejudice caused by disclosure of certain information. Whilst the prejudice may not be substantial, it does not have to be trivial either. Prejudice should be likely from disclosure or there should be a

significant risk, rather than it being a remote possibility.

The public authority must always consider whether the release of information is in the public interest, regardless of whether or not the information forms a trade secret. Authorities must weigh the possible prejudice caused by disclosure against the likely benefit to the applicant and the wider public.

In addition, just because a request for information was declined at one point in time, it does not mean that the public interest is best served if that information is permanently withheld. Market conditions may change and information relating to costs may become out of date quickly.

FOI decision-makers must also remember that there is an overlap between commercial interest and confidentiality. They will determine whether or not disclosure might prejudice commercial interests of a third party, consider the likelihood of a third party being able to successfully take action in the courts for breach of confidence.

### **CONSULTATION**

A public authority may wish to consult parties likely to be affected by the disclosure of commercial information to determine likely prejudice. Discussion with suppliers to identify the types of information that may harm commercial interests if disclosed may be appropriate.

A review of circumstances under which the public authority agrees to consult suppliers in the event of FOI requests is also advisable. However, it is ultimately the responsibility of the public authority to decide whether or not an exemption applies to prevent the release of information.

### **CONTRACTS/CONFIDENTIALITY CLAUSES**

There is an overlap between s43 and s41 which provides that information is exempt where its release could lead to a public authority being taken to court for a breach of confidence.

During the procurement process, suppliers may request of public authorities that they sign confidentiality clauses that attempt to prevent the disclosure of information. However, blanket clauses that are designed to restrict the disclosure of **any** information, including that which could be disclosed without any prejudice to the commercial interests of the supplier, are not acceptable in the view of the IC. Alternatively, clauses that seek to identify and protect that information that would genuinely prejudice a third party's commercial interests are perfectly acceptable.

In the future, public authorities may be well advised to develop a new approach to confidentiality agreements. They may also wish to review existing contracts and discuss with suppliers and contractors the circumstances under which the information might be released in response to a request for information.

# SECTION 44

## INFORMATION COVERED BY PROHIBITIONS ON DISCLOSURE

### 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 compatible with any Community obligation, or
  - (c) would constitute punishment 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).

**EXEMPTION TYPE:** Absolute  
Class-based

### GUIDANCE

This exemption is something of a catch-all and states information that may be prohibited from disclosure under other legislation is protected under FOI.

Under this exemption, information is exempt from disclosure if it is prohibited from being released under any other enactment.

Where there is another piece of legislation governing the release of certain categories or types of information, these are sufficient grounds to refuse release under an FOI request.

In effect, s44 allows other pieces of legislation to be imported into the FOI Act under s44(1)(a).

S44(1)(b) prohibits disclosure of information if it is incompatible with or contradictory to any European Union legislation covering release of categories or types of information.

S44(1)(c) facilitates the withholding of any information that would, if released, lead to contempt of court.

If this exemption had not been included in the FOIA, there would be a danger that where there is a requirement for information to be withheld under other legislation, it may have been releasable under FOI, causing a potentially serious conflict without the protection afforded by s44.

# PUBLICATION SCHEME

## INTRODUCTION

S19 of the Act places a duty on public authorities to adopt, implement, operate and maintain a publication scheme. The publication scheme is an integral part of compliance with the Freedom of Information Act and serves as the ongoing indicator that public authorities are committed to openness and transparency.

A well managed, up-to-date publication scheme will ensure that information is proactively published in accordance with the spirit and intentions of the Act to make information available to the public.

It is important to note that the proactive publishing of information is an organisational responsibility and not solely a matter for FOI Officers. There are wider organisational benefits than those related solely to compliance with the Act. Aside from improved transparency and openness, forces can:

- Manage the content, format and timescales of the publication of information;
- Make wider use of information it already produces for other purposes such as for Police Authority or Home Office use;
- Divert requests for information from the bureaucracy of the FOI process; and
- Enable FOI Officers, when responding to FOI requests, to make greater use of s21 and s22.

## LEGISLATIVE REQUIREMENTS

Following its review in 2007/08, the ICO has produced a model publication scheme that can be adopted without modification by any public authority without further approval and will be valid from 1<sup>st</sup> January 2009 until further notice.

The scheme commits an authority:

- To proactively publish or otherwise make available as a matter of routine, information, including environmental information, which is held by the authority and falls within the classifications.
- To specify the information held by the authority that falls within the classifications.
- To proactively publish or otherwise make available as a matter of routine, information in line with the statements contained within the scheme.
- To produce and publish the methods by which the specific information is made routinely available so that it can be easily identified and accessed by members of the public.
- To review and update on a regular basis the information the authority makes available under this scheme.
- To produce a schedule of any fees charged for access to information which is made available proactively.
- To make this publication scheme available to the public.

The scheme includes:

- Classes of information and a general definition of those classes;
- The method by which information will be made available; and
- Circumstances where charges may be made.

**THE ABOVE CONSTITUTES THE LEGAL REQUIREMENTS UNDER s19 OF THE ACT.**

The ICO has also provided the following guidance:

- Sector-specific guidance manual, known as the 'Definitions Document'; and
- 'How to Operate a Publication Scheme', which includes the ICO enforcement policy. This guidance does not set out any legal requirements but it does provide good practice and will be used by the ICO as a starting point for assessing whether a public authority has complied with the model publication scheme.

The Central Referral Unit has provided detailed examples of information which must be published on the new publication scheme in order to comply with the Act. The listed information is the **minimum standard** to which forces are required to adhere.

This document has been drawn up specifically for forces to ensure clarity in what is required to appear within the new publication scheme as a minimum.

Copies are available from the CRU and are also published on POLKA.

## **DOCUMENTS TO BE VIEWED**

In order to implement the new publication scheme, forces may need to refer to ICO guidance:

<http://www.ico.gov.uk/>

## **GUIDANCE**

Forces will have a link to 'Freedom of Information' prominently displayed on the front page of their force web-site. The link will direct the public to the Publication Scheme, which will list the following documents:

- The ICO Model Publication Scheme 2009  
- a link to the ICO Website may be provided
- The Police Sector Definitions Document  
- a link to the ICO Website may be provided.
- Guide to Published Information  
- a detailed section on this document appears below.

### **GUIDE TO PUBLISHED INFORMATION**

- The Guide **must** be published on the force website.
- Each force is required to produce and publish its own unique copy of this document that is force-specific.

- The ICO has stated that the Guide will specify:
  - The information it will routinely make available (based on the Police Sector Definitions Document and the ACPO Minimum Standards Document)
  - How the information can be accessed; and
  - Whether or not a charge will be made for it.
- Each piece of information must be located on the website or accessible via other means to the general public. This can include hard copy information that may be sent out on request.
- There is no requirement to make a paper copy of the entire contents of the published information available in libraries or other public areas. However, any public contact points, e.g. front desk at police stations, reception staff, switchboard staff, should have sufficient understanding of how to assist the public if they make a request for information, including checking whether the information is already published or available.
- Use of the Guide means that the information does not have to be published in a discrete area of the force web-site. The information can be held on a page relevant to that subject matter, on another web-site or in paper or disc format held by the owning department. However, forces may choose to operate the traditional method of grouping the published information together. If information is not grouped together, the Guide should contain links.
- The model scheme introduces the concept of 'routinely making information available'. It is not necessary to have all the information in full on the force web-site; this can often be impractical due to the size of documents. The Guide will state how the information can be accessed: i.e. a link to the relevant page on the force web-site, a link to another web-site, a contact number for the public to use to ask for a copy of the information to be sent to them, arrangements for coming into force to view the information.
- An example of this document has been posted within the FOIA community on POLKA.

#### **INFORMATION TO BE MADE AVAILABLE**

The starting point for ensuring that the required information is made available is the Police Sector Definitions Document, which puts a policing slant on the generic classes of information listed in the model publication scheme.

The contents of this document have been the subject of consultation with a group of regional representatives and it is expected that most forces will hold the majority of the information listed.

The ICO expects authorities to regard the document as a 'minimum requirement' and to provide all the information listed unless it can be legitimately excluded.

Information can be legitimately excluded where:

- It is not held;
- It is exempt from disclosure by virtue of an exemption in the FOI Act; or

- The information is not readily available, e.g. the information has been archived in accordance with records management policy; the information is held in an obsolete format and would require specialist techniques to retrieve it.

ACPO has produced further guidance on the application of the descriptions in the Police Sector Definitions Document. However, it will be up to each force to demonstrate that information has been excluded legitimately.

As well as listing what information is available, your Guide will explain how often the information is updated, whether previous data is still available and for how long, and when data will be archived.

### **FORMAT OF THE PUBLICATION SCHEME**

The manner in which the ICO has devised the model scheme allows for some flexibility in the format. The most important principle is that the information is accessible to the public, regardless of whether they have any knowledge or understanding that the proactive publication of information is a requirement under the Freedom of Information Act.

ACPO advises that forces can select their preferred format for the publication scheme; either a discrete area on the force web-site or links to where the information is held. The Guide to Published Information must be easily accessible. All staff with a role in handling enquiries from the public must be made aware of the Guide and how to access it.

### **MONITORING AND REVIEW**

The model scheme includes a requirement to review the information published under the scheme.

Forces can approach this in one of two ways:

- The FOI Officer is responsible for adding and updating the information as it becomes available.
- The department owning the information is responsible for adding and updating the information, with the FOI Officer conducting a review at least annually to ensure the publication scheme is being maintained.

In either option it is ACPO policy that FOI Officers conduct an annual review of the publication scheme to include how it is operating as well as the information itself. This review should be carried out in conjunction with departments to ensure that best use is being made of the publication scheme and to assess whether new information is being produced that should be made public.

### **FEES AND CHARGES**

The expectation of both the ICO and ACPO is that information will be provided free of charge. A charge can be made in exceptional circumstances and this should be made clear in the Guide to Published Information. Charges can be made for disbursements, e.g. photocopying, postage, or where the authority is legally authorised to charge.

It is ACPO policy that a charge should be made only in exceptional circumstances and where the charge can be fully justified. Information published on the force web-site will not attract a fee (including disbursements) if it is requested in hard copy format. Information that is 'made available' can attract a fee for disbursements where the document is large or where the person requests that it is made available in a particular format, e.g. copied to disk or CD. Forces should refer to the disbursements section of the Fees Regulations.

#### **COMPLAINTS PROCEDURE**

The information on your web-site should include details of how to make a complaint about how the force is operating its publication scheme.

In this first instance, such complaints should be directed to the FOI Officer. The FOI Officer will establish whether the complaint is upheld and provide a written response to the complainant within 20 working days. The written response will include details of how to complain to the ICO if the complainant is not satisfied.

# APPENDIX 1

## ENVIRONMENTAL INFORMATION REGULATIONS

### LEGISLATION

2(1)(a)...environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural or any other material form on

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- (a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment affecting or likely to affect the elements of the environment referred to in (a);
  - (c) measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements by any of the matters referred to in (b) and (c).
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -
- (a) international relations, defence, national security or public safety;
  - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
  - (c) intellectual property rights;
  - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
  - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
  - (f) the interests of the person who provided the information where that person-
    - (i) was not under, and could not have been out under, any legal obligation to supply it to that or any other public authority;
    - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
    - (iii) has not consented to its disclosure; or
  - (g) the protection of the environment to which the information relates.

- (6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and it held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

## **GUIDANCE**

It is ACPO Policy that requests for information that fall under EIR will be handled in exactly the same way as Freedom of Information requests, with the exception that EIR requests may be received verbally.

The main differences between the FOIA and the EIR may be identified as follows:

- The key difference is that, unlike FOI requests, EIR requests may be received verbally and there is no legislative requirement for them to be written down.
- Under FOIA, the public interest test applies only in the case of qualified exemptions. Under EIR, the public interest test applies to all of the exceptions.
- The duty to confirm or deny applies in all cases under EIR except where there would be an adverse affect on international relations, defence, national security, public safety and confirming or denying would therefore not be in the public interest.
- Under EIR, any disclosure that would adversely affect the rights of an individual not obliged to provide the authority with information would not be entitled to disclose where the individual affected has not consented to disclosure.
- There are additional exceptions under EIR that are not specifically covered under FOIA such as exceptions to disclose in relation to internal communications and exceptions on disclosure where release would adversely affect intellectual property rights or the protection of the environment. Under EIR, there are no exceptions that link the release of information with a prejudicial impact on the economic interests of the UK or part of the UK
- Under EIR, the applicant has 40 working days to appeal any decision made by the authority and the authority must respond to any complaint within 40 working days.

### **LIST OF EIR EXCEPTIONS**

- 3(a) Exempt personal data in regulation 12.
- 4(b) Manifestly unreasonable in regulation 12.
- 4(c) Too general in regulation 12.
- 4(d) Work in progress / incomplete data in regulation 12.
- 4(e) Internal communications in regulation 12.
- 5(a) Adverse effect on international relations, defence, national security or public safety in regulation 12.
- 5(b) Adverse effect on course of justice or conduct of inquiries in regulation 12.
- 5(c) Adverse effect on intellectual property rights in regulation 12.

- 5(d) Impinges on confidentiality of a public authority's work (where provided by law) in regulation 12.
- 5(e) Impinges on confidentiality of commercial or industrial information (where provided by law to protect a legitimate economic interest) in regulation 12.
- 5(f) Adverse effect on interests of person who provided the information (subject to conditions) in regulation 12.
- 5(g) Adverse effect on protection of environment to which information relates in regulation 12.

Additional information may be retrieved at:

<http://www.ico.gov.uk/>

# APPENDIX 2

## FOI LEGISLATION

### PART I

#### ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

##### *Right to information*

#### **1 General right of access to information held by public authorities**

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

#### **2 Effect of the exemptions in Part II**

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

(a) section 21,

(b) section 23,

(c) section 32,

(d) section 34,

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords,

(f) in section 40—

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(g) section 41, and

(h) section 44.

### **3 Public authorities**

(1) In this Act “public authority” means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

(2) For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

### **4 Amendment of Schedule 1**

(1) The Secretary of State may by order amend Schedule 1 by adding to that Schedule a reference to any body or the holder of any office which (in either case) is not for the time being listed in that Schedule but as respects which both the first and the second conditions below are satisfied.

(2) The first condition is that the body or office—

(a) is established by virtue of Her Majesty’s prerogative or by an enactment or by subordinate legislation, or

(b) is established in any other way by a Minister of the Crown in his capacity as Minister, by a government department or by the National Assembly for Wales.

(3) The second condition is—

(a) in the case of a body, that the body is wholly or partly constituted by appointment made by the Crown, by a Minister of the Crown, by a government department or by the National Assembly for Wales, or

(b) in the case of an office, that appointments to the office are made by the Crown, by a Minister of the Crown, by a government department or by the National Assembly for Wales.

(4) If either the first or the second condition above ceases to be satisfied as respects any body or office which is listed in Part VI or VII of Schedule 1, that body or the holder of that office shall cease to be a public authority by virtue of the entry in question.

(5) The Secretary of State may by order amend Schedule 1 by removing from Part VI or VII of that Schedule an entry relating to any body or office—

(a) which has ceased to exist, or

(b) as respects which either the first or the second condition above has ceased to be satisfied.

(6) An order under subsection (1) may relate to a specified person or office or to persons or offices falling within a specified description.

(7) Before making an order under subsection (1), the Secretary of State shall—

(a) if the order adds to Part II, III, IV or VI of Schedule 1 a reference to—

(i) a body whose functions are exercisable only or mainly in or as regards Wales, or

(ii) the holder of an office whose functions are exercisable only or mainly in or as regards Wales, consult the National Assembly for Wales, and

(b) if the order relates to a body which, or the holder of any office who, if the order were made, would be a Northern Ireland public authority, consult the First Minister and deputy First Minister in Northern Ireland.

(8) This section has effect subject to section 80.

(9) In this section “Minister of the Crown” includes a Northern Ireland Minister.

#### **5 Further power to designate public authorities**

(1) The Secretary of State may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who—

(a) appears to the Secretary of State to exercise functions of a public nature, or

(b) is providing under a contract made with a public authority any service whose provision is a function of that authority.

(2) An order under this section may designate a specified person or office or persons or offices falling within a specified description.

(3) Before making an order under this section, the Secretary of State shall consult every person to whom the order relates, or persons appearing to him to represent such persons.

(4) This section has effect subject to section 80.

#### **6 Publicly owned companies**

(1) A company is a “publicly-owned company” for the purposes of section 3(1)(b) if—

(a) it is wholly owned by the Crown, or

(b) it is wholly owned by any public authority listed in Schedule 1 other than—

(i) a government department, or

(ii) any authority which is listed only in relation to particular information.

(2) For the purposes of this section—

(a) a company is wholly owned by the Crown if it has no members except—

(i) Ministers of the Crown, government departments or companies wholly owned by the Crown, or

(ii) persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown, and

(b) a company is wholly owned by a public authority other than a government department if it has no members except—

(i) that public authority or companies wholly owned by that public authority, or

(ii) persons acting on behalf of that public authority or of companies wholly owned by that public authority.

(3) In this section— “company” includes any body corporate; “Minister of the Crown” includes a Northern Ireland Minister.

### **7 Public authorities to which Act has limited application**

(1) Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.

(2) An order under section 4(1) may, in adding an entry to Schedule 1, list the public authority only in relation to information of a specified description.

(3) The Secretary of State may by order amend Schedule 1—

(a) by limiting to information of a specified description the entry relating to any public authority, or

(b) by removing or amending any limitation to information of a specified description which is for the time being contained in any entry.

(4) Before making an order under subsection (3), the Secretary of State shall—

(a) if the order relates to the National Assembly for Wales or a Welsh public authority, consult the National Assembly for Wales,

(b) if the order relates to the Northern Ireland Assembly, consult the Presiding Officer of that Assembly, and

(c) if the order relates to a Northern Ireland department or a Northern Ireland public authority, consult the First Minister and deputy First Minister in Northern Ireland.

(5) An order under section 5(1)(a) must specify the functions of the public authority designated by the order with respect to which the designation is to have effect; and nothing in Parts I to V of this Act applies to information which is held by the authority but does not relate to the exercise of those functions.

(6) An order under section 5(1)(b) must specify the services provided under contract with respect to which the designation is to have effect; and nothing in Parts I to V of this Act applies to information which is held by the public authority designated by the order but does not relate to the provision of those services.

(7) Nothing in Parts I to V of this Act applies in relation to any information held by a publicly-owned company which is excluded information in relation to that company.

(8) In subsection (7) “excluded information”, in relation to a publicly-owned company, means information which is of a description specified in relation to that company in an order made by the Secretary of State for the purposes of this subsection.

(9) In this section “publicly-owned company” has the meaning given by section 6.

### **8 Request for information**

(1) In this Act any reference to a “request for information” is a reference to such a request which—

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested.

(2) For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request—

(a) is transmitted by electronic means,

(b) is received in legible form, and

(c) is capable of being used for subsequent reference.

## 9 Fees

(1) A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a "fees notice") stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1).

(2) Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.

(3) Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State.

(4) Regulations under subsection (3) may, in particular, provide—

(a) that no fee is to be payable in prescribed cases,

(b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and

(c) that any fee is to be calculated in such manner as may be prescribed by the regulations.

(5) Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.

## 10 Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

"the date of receipt" means—

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

### **11 Means by which communication to be made**

(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely—

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,

(b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and

(c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.

(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.

(3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.

(4) Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

### **12 Exemption where cost of compliance exceeds appropriate limit**

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance 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 all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

### **13 Fees for disclosure where cost of compliance exceeds appropriate limit**

(1) A public authority may charge for the communication of any information whose communication—

(a) is not required by section 1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of section 12(1) and (2), and

(b) is not otherwise required by law,

such fee as may be determined by the public authority in accordance with regulations made by the Secretary of State.

(2) Regulations under this section may, in particular, provide—

(a) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and

(b) that any fee is to be calculated in such manner as may be prescribed by the regulations.

(3) Subsection (1) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.

#### **14 Vexatious or repeated requests**

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

#### **15 Special provisions relating to public records transferred to Public Record Office**

(1) Where—

(a) the appropriate records authority receives a request for information which relates to information which is, or if it existed would be, contained in a transferred public record, and

(b) either of the conditions in subsection (2) is satisfied in relation to any of that information, that authority shall, within the period for complying with section 1(1), send a copy of the request to the responsible authority.

(2) The conditions referred to in subsection (1)(b) are—

(a) that the duty to confirm or deny is expressed to be excluded only by a provision of Part II not specified in subsection (3) of section 2, and

(b) that the information is exempt information only by virtue of a provision of Part II not specified in that subsection.

(3) On receiving the copy, the responsible authority shall, within such time as is reasonable in all the circumstances, inform the appropriate records authority of the determination required by virtue of subsection (3) or (4) of section 66.

(4) In this Act “transferred public record” means a public record which has been transferred—

(a) to the Public Record Office,

(b) to another place of deposit appointed by the Lord Chancellor under the [1958 c. 51.] Public Records Act 1958, or

(c) to the Public Record Office of Northern Ireland.

(5) In this Act— “appropriate records authority”, in relation to a transferred public record, means—

(a) in a case falling within subsection (4)(a), the Public Record Office,

(b) in a case falling within subsection (4)(b), the Lord Chancellor, and

(c) in a case falling within subsection (4)(c), the Public Record Office of Northern Ireland; “responsible authority”, in relation to a transferred public record, means—

(a) in the case of a record transferred as mentioned in subsection (4)(a) or (b) from a government department in the charge of a Minister of the Crown, the Minister of the Crown who appears to the Lord Chancellor to be primarily concerned,

(b) in the case of a record transferred as mentioned in subsection (4)(a) or (b) from any other person, the person who appears to the Lord Chancellor to be primarily concerned,

(c) in the case of a record transferred to the Public Record Office of Northern Ireland from a government department in the charge of a Minister of the Crown, the Minister of the Crown who appears to the appropriate Northern Ireland Minister to be primarily concerned,

- (d) in the case of a record transferred to the Public Record Office of Northern Ireland from a Northern Ireland department, the Northern Ireland Minister who appears to the appropriate Northern Ireland Minister to be primarily concerned, or
- (e) in the case of a record transferred to the Public Record Office of Northern Ireland from any other person, the person who appears to the appropriate Northern Ireland Minister to be primarily concerned.

### **16 Duty to provide advice and assistance**

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

### **17 Refusal of request**

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection 17(1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

### *The Information Commissioner and the Information Tribunal*

#### **18 The Information Commissioner and the Information Tribunal**

(1) The Data Protection Commissioner shall be known instead as the Information Commissioner.

(2) The Data Protection Tribunal shall be known instead as the Information Tribunal.

(3) In this Act—

(a) the Information Commissioner is referred to as “the Commissioner”, and

(b) the Information Tribunal is referred to as “the Tribunal”.

(4) Schedule 2 (which makes provision consequential on subsections (1) and (2) and amendments of the [1998 c. 29.] Data Protection Act 1998 relating to the extension by this Act of the functions of the Commissioner and the Tribunal) has effect.

(5) If the person who held office as Data Protection Commissioner immediately before the day on which this Act is passed remains in office as Information Commissioner at the end of the period of two years beginning with that day, he shall vacate his office at the end of that period.

(6) Subsection (5) does not prevent the re-appointment of a person whose appointment is terminated by that subsection.

(7) In the application of paragraph 2(4)(b) and (5) of Schedule 5 to the [1998 c. 29.] Data Protection Act 1998 (Commissioner not to serve for more than fifteen years and not to be appointed, except in special circumstances, for a third or subsequent term) to anything done after the passing of this Act, there shall be left out of account any term of office served by virtue of an appointment made before the passing of this Act.

### *Publication schemes*

#### **19 Publication schemes**

(1) It shall be the duty of every public authority—

(a) to adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a “publication scheme”),

(b) to publish information in accordance with its publication scheme, and

(c) from time to time to review its publication scheme.

(2) A publication scheme must—

(a) specify classes of information which the public authority publishes or intends to publish,

- (b) specify the manner in which information of each class is, or is intended to be, published, and
  - (c) specify whether the material is, or is intended to be, available to the public free of charge or on payment.
- (3) In adopting or reviewing a publication scheme, a public authority shall have regard to the public interest—
- (a) in allowing public access to information held by the authority, and
  - (b) in the publication of reasons for decisions made by the authority.
- (4) A public authority shall publish its publication scheme in such manner as it thinks fit.
- (5) The Commissioner may, when approving a scheme, provide that his approval is to expire at the end of a specified period.
- (6) Where the Commissioner has approved the publication scheme of any public authority, he may at any time give notice to the public authority revoking his approval of the scheme as from the end of the period of six months beginning with the day on which the notice is given.
- (7) Where the Commissioner—
- (a) refuses to approve a proposed publication scheme, or
  - (b) revokes his approval of a publication scheme, he must give the public authority a statement of his reasons for doing so.

## **20 Model publication schemes**

- (1) The Commissioner may from time to time approve, in relation to public authorities falling within particular classes, model publication schemes prepared by him or by other persons.
- (2) Where a public authority falling within the class to which an approved model scheme relates adopts such a scheme without modification, no further approval of the Commissioner is required so long as the model scheme remains approved; and where such an authority adopts such a scheme with modifications, the approval of the Commissioner is required only in relation to the modifications.
- (3) The Commissioner may, when approving a model publication scheme, provide that his approval is to expire at the end of a specified period.
- (4) Where the Commissioner has approved a model publication scheme, he may at any time publish, in such manner as he thinks fit, a notice revoking his approval of the scheme as from the end of the period of six months beginning with the day on which the notice is published.
- (5) Where the Commissioner refuses to approve a proposed model publication scheme on the application of any person, he must give the person who applied for approval of the scheme a statement of the reasons for his refusal.
- (6) Where the Commissioner refuses to approve any modifications under subsection (2), he must give the public authority a statement of the reasons for his refusal.
- (7) Where the Commissioner revokes his approval of a model publication scheme, he must include in the notice under subsection (4) a statement of his reasons for doing so.

## **PART II EXEMPT INFORMATION**

### **21 Information accessible to applicant by other means**

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1)—
- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

## **22 Information intended for future publication**

(1) Information is exempt information if—

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

## **23 Information supplied by or relating to bodies dealing with security matters**

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

(a) the Security Service,

(b) the Secret Intelligence Service,

(c) the Government Communications Headquarters,

(d) the special forces,

(e) the Tribunal established under section 65 of the Regulation of [2000 c. 23.] Investigatory Powers Act 2000,

(f) the Tribunal established under section 7 of the [1985 c. 56.] Interception of Communications Act 1985,

(g) the Tribunal established under section 5 of the [1989 c. 5.] Security Service Act 1989,

(h) the Tribunal established under section 9 of the [1994 c. 13.] Intelligence Services Act 1994,

(i) the Security Vetting Appeals Panel,

(j) the Security Commission,

(k) the National Criminal Intelligence Service, and

(l) the Service Authority for the National Criminal Intelligence Service.

(4) In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

## **24 National security**

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.

(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

## **25 Certificates under ss. 23 and 24: supplementary provisions**

(1) A document purporting to be a certificate under section 23(2) or 24(3) shall be received in evidence and deemed to be such a certificate unless the contrary is proved.

(2) A document which purports to be certified by or on behalf of a Minister of the Crown as a true copy of a certificate issued by that Minister under section 23(2) or 24(3) shall in any legal proceedings be evidence (or, in Scotland, sufficient evidence) of that certificate.

(3) The power conferred by section 23(2) or 24(3) on a Minister of the Crown shall not be exercisable except by a Minister who is a member of the Cabinet or by the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland.

## **26 Defence**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces.

(2) In subsection (1)(b) “relevant forces” means—

- (a) the armed forces of the Crown, and
- (b) any forces co-operating with those forces,  
or any part of any of those forces.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

## **27 International relations**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—  
(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or  
(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(5) In this section— “international court” means any international court which is not an international organisation and which is established—

(a) by a resolution of an international organisation of which the United Kingdom is a member, or  
(b) by an international agreement to which the United Kingdom is a party; “international organisation” means any international organisation whose members include any two or more States, or any organ of such an organisation; “State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

## **28 Relations within the United Kingdom**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1) “administration in the United Kingdom” means—

- (a) the government of the United Kingdom,
- (b) the Scottish Administration,
- (c) the Executive Committee of the Northern Ireland Assembly, or
- (d) the National Assembly for Wales.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

## **29 The economy**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the economic interests of the United Kingdom or of any part of the United Kingdom, or
- (b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

## **30 Investigations and proceedings conducted by public authorities**

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—
  - (i) whether a person should be charged with an offence, or
  - (ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if—

(a) it was obtained or recorded by the authority for the purposes of its functions relating to—

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings which the authority has power to conduct,

(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

(4) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references—

(a) to any officer of the authority,

(b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and

(c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.

(5) In this section—

“criminal proceedings” includes—

(a) proceedings before a court-martial constituted under the Army Act 1955, the [1955 c. 18.] Air[1955 c. 19.] Force Act 1955 or the [1957 c. 53.] Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,

(b) proceedings on dealing summarily with a charge under the Army Act 1955 or the [1955 c. 18.] Air[1955 c. 19.] Force Act 1955 or on summary trial under the [1957 c. 53.] Naval Discipline Act 1957,

(c) proceedings before a court established by section 83ZA of the [1955 c. 18.] Army Act 1955, section 83ZA of the [1955 c. 19.] Air Force Act 1955 or section 52FF of the [1957 c. 53.] Naval Discipline Act 1957 (summary appeal courts),

(d) proceedings before the Courts-Martial Appeal Court, and

(e) proceedings before a Standing Civilian Court; “offence” includes any offence under the [1955 c. 18.] Army Act 1955, the [1955 c. 19.] Air Force Act 1955 or the [1957 c. 53.] Naval Discipline Act 1957.

(6) In the application of this section to Scotland—

(a) in subsection (1)(b), for the words from “a decision” to the end there is substituted “a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted”,

(b) in subsections (1)(c) and (2)(a)(ii) for “which the authority has power to conduct” there is substituted “which have been instituted in consequence of a report made by the authority to the procurator fiscal”, and

(c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

### **31 Law enforcement**

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
  - (b) the apprehension or prosecution of offenders,
  - (c) the administration of justice,
  - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
  - (e) the operation of the immigration controls,
  - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
  - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
  - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
  - (i) any inquiry held under the [1976 c. 14.] Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
- (2) The purposes referred to in subsection (1)(g) to (i) are—
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
  - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
  - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
  - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
  - (e) the purpose of ascertaining the cause of an accident,
  - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
  - (g) the purpose of protecting the property of charities from loss or misapplication,
  - (h) the purpose of recovering the property of charities,
  - (i) the purpose of securing the health, safety and welfare of persons at work, and
  - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

### **32 Court records etc**

- (1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
  - (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
  - (c) any document created by—
    - (i) a court, or
    - (ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.

(4) In this section—

(a) “court” includes any tribunal or body exercising the judicial power of the State,

(b) “proceedings in a particular cause or matter” includes any inquest or post-mortem examination,

(c) “inquiry” means any inquiry or hearing held under any provision contained in, or made under, an enactment, and

(d) except in relation to Scotland, “arbitration” means any arbitration to which Part I of the [1996 c. 23.] Arbitration Act 1996 applies.

### **33 Audit functions**

(1) This section applies to any public authority which has functions in relation to—

(a) the audit of the accounts of other public authorities, or

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1).

### **34 Parliamentary privilege**

(1) Information is exempt information if exemption from section 1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

(2) The duty to confirm or deny does not apply if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

(3) A certificate signed by the appropriate authority certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of avoiding an infringement of the privileges of either House of Parliament shall be conclusive evidence of that fact.

(4) In subsection (3) “the appropriate authority” means—

(a) in relation to the House of Commons, the Speaker of that House, and

(b) in relation to the House of Lords, the Clerk of the Parliaments.

### **35 Formulation of government policy etc**

(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to—

- (a) the formulation or development of government policy,
  - (b) Ministerial communications,
  - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
  - (d) the operation of any Ministerial private office.
- (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—
- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
  - (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
- (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
- (4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

“government policy” includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

“the Law Officers” means 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;

“Ministerial communications” means any communications—

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales; “Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary; “Northern Ireland junior Minister” means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the [1998 c. 47.] Northern Ireland Act 1998.

### **36 Prejudice to effective conduct of public affairs**

(1) This section applies to—

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

- (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.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"—

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

(b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,

(c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

(d) in relation to information held by the House of Commons, means the Speaker of that House,

(e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,

(f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,

(g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,

(h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means—

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the Assembly First Secretary,

(i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,

(j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,

(k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,

(l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means—

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,

(m) in relation to information held by the Greater London Authority, means the Mayor of London,

(n) in relation to information held by a functional body within the meaning of the [1999 c. 29.] Greater London Authority Act 1999, means the chairman of that functional body, and

(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—

(i) a Minister of the Crown,

(ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

(6) Any authorisation for the purposes of this section—

- (a) may relate to a specified person or to persons falling within a specified class,
  - (b) may be general or limited to particular classes of case, and
  - (c) may be granted subject to conditions.
- (7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion—
- (a) disclosure of information held by either House of Parliament, or
  - (b) compliance with section 1(1)(a) by either House,
- would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

### **37 Communications with Her Majesty etc. and honours**

- (1) Information is exempt information if it relates to—
- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
  - (b) the conferring by the Crown of any honour or dignity.
- (2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

### **38 Health and safety**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to—
- (a) endanger the physical or mental health of any individual, or
  - (b) endanger the safety of any individual.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

### **39 Environmental information**

- (1) Information is exempt information if the public authority holding it—
- (a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or
  - (b) would be so obliged but for any exemption contained in the regulations.
- (2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
- (3) Subsection (1)(a) does not limit the generality of section 21(1).

### **40 Personal information**

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
- (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section— "the data protection principles" means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act; "data subject" has the same meaning as in section 1(1) of that Act; "personal data" has the same meaning as in section 1(1) of that Act.

#### **41 Information provided in confidence**

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

#### **42 Legal professional privilege**

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

#### **43 Commercial interests**

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

#### **44 Prohibitions on disclosure**

- (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).

### **PART III**

#### **GENERAL FUNCTIONS OF SECRETARY OF STATE, LORD CHANCELLOR AND INFORMATION COMMISSIONER**

#### **45 Issue of code of practice by Secretary of State**

- (1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.
- (2) The code of practice must, in particular, include provision relating to—
  - (a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them,
  - (b) the transfer of requests by one public authority to another public authority by which the information requested is or may be held,
  - (c) consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure of information,
  - (d) the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information, and
  - (e) the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information.
- (3) The code may make different provision for different public authorities.
- (4) Before issuing or revising any code under this section, the Secretary of State shall consult the Commissioner.
- (5) The Secretary of State shall lay before each House of Parliament any code or revised code made under this section.

#### **46 Issue of code of practice by Lord Chancellor**

- (1) The Lord Chancellor shall issue, and may from time to time revise, a code of practice providing guidance to relevant authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the keeping, management and destruction of their records.

(2) For the purpose of facilitating the performance by the Public Record Office, the Public Record Office of Northern Ireland and other public authorities of their functions under this Act in relation to records which are public records for the purposes of the [1958 c. 51.] Public Records Act 1958 or the Public Records Act (Northern Ireland) 1923, the code may also include guidance as to—

(a) the practice to be adopted in relation to the transfer of records under section 3(4) of the [1958 c. 51.] Public Records Act 1958 or section 3 of the [1923 c. 20 (N.I.)] Public Records Act (Northern Ireland) 1923, and

(b) the practice of reviewing records before they are transferred under those provisions.

(3) In exercising his functions under this section, the Lord Chancellor shall have regard to the public interest in allowing public access to information held by relevant authorities.

(4) The code may make different provision for different relevant authorities.

(5) Before issuing or revising any code under this section the Lord Chancellor shall consult—

(a) the Secretary of State,

(b) the Commissioner, and

(c) in relation to Northern Ireland, the appropriate Northern Ireland Minister.

(6) The Lord Chancellor shall lay before each House of Parliament any code or revised code made under this section.

(7) In this section “relevant authority” means—

(a) any public authority, and

(b) any office or body which is not a public authority but whose administrative and departmental records are public records for the purposes of the [1958 c. 51.] Public Records Act 1958 or the Public Records Act (Northern Ireland) 1923.

#### **47 General functions of Commissioner**

(1) It shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of—

(a) the requirements of this Act, and

(b) the provisions of the codes of practice under sections 45 and 46.

(2) The Commissioner shall arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public—

(a) about the operation of this Act,

(b) about good practice, and

(c) about other matters within the scope of his functions under this Act,

and may give advice to any person as to any of those matters.

(3) The Commissioner may, with the consent of any public authority, assess whether that authority is following good practice.

(4) The Commissioner may charge such sums as he may with the consent of the Secretary of State determine for any services provided by the Commissioner under this section.

(5) The Commissioner shall from time to time as he considers appropriate—

(a) consult the Keeper of Public Records about the promotion by the Commissioner of the observance by public authorities of the provisions of the code of practice under section 46 in relation to records which are public records for the purposes of the [1958 c. 51.] Public Records Act 1958, and

(b) consult the Deputy Keeper of the Records of Northern Ireland about the promotion by the Commissioner of the observance by public authorities of those provisions in relation to records which are public records for the purposes of the [1923 c. 20.] Public Records Act (Northern Ireland) 1923.

(6) In this section “good practice”, in relation to a public authority, means such practice in the discharge of its functions under this Act as appears to the Commissioner to be desirable, and includes (but is not limited to) compliance with the requirements of this Act and the provisions of the codes of practice under sections 45 and 46.

#### **48 Recommendations as to good practice**

(1) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a recommendation (in this section referred to as a “practice recommendation”) specifying the steps which ought in his opinion to be taken for promoting such conformity.

(2) A practice recommendation must be given in writing and must refer to the particular provisions of the code of practice with which, in the Commissioner’s opinion, the public authority’s practice does not conform.

(3) Before giving to a public authority other than the Public Record Office a practice recommendation which relates to conformity with the code of practice under section 46 in respect of records which are public records for the purposes of the [1958 c. 51.] Public Records Act 1958, the Commissioner shall consult the Keeper of Public Records.

(4) Before giving to a public authority other than the Public Record Office of Northern Ireland a practice recommendation which relates to conformity with the code of practice under section 46 in respect of records which are public records for the purposes of the Public Records Act (Northern Ireland) 1923, the Commissioner shall consult the Deputy Keeper of the Records of Northern Ireland.

#### **49 Reports to be laid before Parliament**

(1) The Commissioner shall lay annually before each House of Parliament a general report on the exercise of his functions under this Act.

(2) The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit.

### **PART IV ENFORCEMENT**

#### **50 Application for decision by Commissioner**

(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,

(b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a “decision notice”) on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

(7) This section has effect subject to section 53.

## **51 Information notices**

(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with a notice (in this Act referred to as “an information notice”) requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or

(b) in a case falling within subsection (1)(b), a statement—

(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), and

(ii) of his reasons for regarding that information as relevant for that purpose.

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

(4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.

(7) The Commissioner may cancel an information notice by written notice to the authority on which it was served.

(8) In this section “information” includes unrecorded information.

## **52 Enforcement notices**

(1) If the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I, the Commissioner may serve the authority with a notice (in this Act referred to as “an enforcement notice”) requiring the authority to take, within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements.

(2) An enforcement notice must contain—

(a) a statement of the requirement or requirements of Part I with which the Commissioner is satisfied that the public authority has failed to comply and his reasons for reaching that conclusion, and

(b) particulars of the right of appeal conferred by section 57.

(3) An enforcement notice must not require any of the provisions of the notice to be complied with before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.

(4) The Commissioner may cancel an enforcement notice by written notice to the authority on which it was served.

(5) This section has effect subject to section 53.

## **53 Exception from duty to comply with decision notice or enforcement notice**

(1) This section applies to a decision notice or enforcement notice which—

(a) is served on—

(i) a government department,

(ii) the National Assembly for Wales, or

(iii) any public authority designated for the purposes of this section by an order made by the Secretary of State, and

(b) relates to a failure, in respect of one or more requests for information—

(i) to comply with section 1(1)(a) in respect of information which falls within any provision of Part II stating that the duty to confirm or deny does not arise, or

(ii) to comply with section 1(1)(b) in respect of exempt information.

(2) A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b).

(3) Where the accountable person gives a certificate to the Commissioner under subsection (2) he shall as soon as practicable thereafter lay a copy of the certificate before—

(a) each House of Parliament,

(b) the Northern Ireland Assembly, in any case where the certificate relates to a decision notice or enforcement notice which has been served on a Northern Ireland department or any Northern Ireland public authority, or

(c) the National Assembly for Wales, in any case where the certificate relates to a decision notice or enforcement notice which has been served on the National Assembly for Wales or any Welsh public authority.

(4) In subsection (2) “the effective date”, in relation to a decision notice or enforcement notice, means—

(a) the day on which the notice was given to the public authority, or

(b) where an appeal under section 57 is brought, the day on which that appeal (or any further appeal arising out of it) is determined or withdrawn.

(5) Before making an order under subsection (1)(a)(iii), the Secretary of State shall—

(a) if the order relates to a Welsh public authority, consult the National Assembly for Wales,

(b) if the order relates to the Northern Ireland Assembly, consult the Presiding Officer of that Assembly, and

(c) if the order relates to a Northern Ireland public authority, consult the First Minister and deputy First Minister in Northern Ireland.

(6) Where the accountable person gives a certificate to the Commissioner under subsection (2) in relation to a decision notice, the accountable person shall, on doing so or as soon as reasonably practicable after doing so, inform the person who is the complainant for the purposes of section 50 of the reasons for his opinion.

(7) The accountable person is not obliged to provide information under subsection (6) if, or to the extent that, compliance with that subsection would involve the disclosure of exempt information.

(8) In this section “the accountable person”—

(a) in relation to a Northern Ireland department or any Northern Ireland public authority, means the First Minister and deputy First Minister in Northern Ireland acting jointly,

(b) in relation to the National Assembly for Wales or any Welsh public authority, means the Assembly First Secretary, and

(c) in relation to any other public authority, means—

(i) a Minister of the Crown who is a member of the Cabinet, or

(ii) the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland.

(9) In this section “working day” has the same meaning as in section 10.

#### **54 Failure to comply with notice**

(1) If a public authority has failed to comply with—

(a) so much of a decision notice as requires steps to be taken,

(b) an information notice, or

(c) an enforcement notice,

the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

(2) For the purposes of this section, a public authority which, in purported compliance with an information notice—

(a) makes a statement which it knows to be false in a material respect, or

(b) recklessly makes a statement which is false in a material respect,

is to be taken to have failed to comply with the notice.

(3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

(4) In this section “the court” means the High Court or, in Scotland, the Court of Session.

#### **55 Powers of entry and inspection**

Schedule 3 (powers of entry and inspection) has effect.

### **56 No action against public authority**

(1) This Act does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed by or under this Act.

(2) Subsection (1) does not affect the powers of the Commissioner under section 54.

## **PART V APPEALS**

### **57 Appeal against notices served under Part IV**

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

(3) In relation to a decision notice or enforcement notice which relates—

(a) to information to which section 66 applies, and

(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,

subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

### **58 Determination of appeals**

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

### **59 Appeals from decision of Tribunal**

Any party to an appeal to the Tribunal under section 57 may appeal from the decision of the Tribunal on a point of law to the appropriate court; and that court shall be—

(a) the High Court of Justice in England if the address of the public authority is in England or Wales,

(b) the Court of Session if that address is in Scotland, and

(c) the High Court of Justice in Northern Ireland if that address is in Northern Ireland.

### **60 Appeals against national security certificate**

(1) Where a certificate under section 23(2) or 24(3) has been issued—

(a) the Commissioner, or

(b) any applicant whose request for information is affected by the issue of the certificate,

may appeal to the Tribunal against the certificate.

(2) If on an appeal under subsection (1) relating to a certificate under section 23(2), the Tribunal finds that the information referred to in the certificate was not exempt information by virtue of section 23(1), the Tribunal may allow the appeal and quash the certificate.

(3) If on an appeal under subsection (1) relating to a certificate under section 24(3), the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the Minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate.

(4) Where in any proceedings under this Act it is claimed by a public authority that a certificate under section 24(3) which identifies the information to which it applies by means of a general description applies to particular information, any other party to the proceedings may appeal to the Tribunal on the ground that the certificate does not apply to the information in question and, subject to any determination under subsection (5), the certificate shall be conclusively presumed so to apply.

(5) On any appeal under subsection (4), the Tribunal may determine that the certificate does not so apply.

### **61 Appeal proceedings**

(1) Schedule 4 (which contains amendments of Schedule 6 to the [1998 c. 29.] Data Protection Act 1998 relating to appeal proceedings) has effect.

(2) Accordingly, the provisions of Schedule 6 to the [1998 c. 29.] Data Protection Act 1998 have effect (so far as applicable) in relation to appeals under this Part.

## **PART VI**

### **HISTORICAL RECORDS AND RECORDS IN PUBLIC RECORD OFFICE OR PUBLIC RECORD OFFICE OF NORTHERN IRELAND**

### **62 Interpretation of Part VI**

(1) For the purposes of this Part, a record becomes a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.

(2) Where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records in that file or other assembly are to be treated for the purposes of this Part as having been created when the latest of those records was created.

(3) In this Part "year" means a calendar year.

### **63 Removal of exemptions: historical records generally**

(1) Information contained in a historical record cannot be exempt information by virtue of section 28, 30(1), 32, 33, 35, 36, 37(1)(a), 42 or 43.

(2) Compliance with section 1(1)(a) in relation to a historical record is not to be taken to be capable of having any of the effects referred to in section 28(3), 33(3), 36(3), 42(2) or 43(3).

(3) Information cannot be exempt information by virtue of section 37(1)(b) after the end of the period of sixty years beginning with the year following that in which the record containing the information was created.

(4) Information cannot be exempt information by virtue of section 31 after the end of the period of one hundred years beginning with the year following that in which the record containing the information was created.

(5) Compliance with section 1(1)(a) in relation to any record is not to be taken, at any time after the end of the period of one hundred years beginning with the year following that in which the record was created, to be capable of prejudicing any of the matters referred to in section 31(1).

#### **64 Removal of exemptions: historical records in public record offices**

(1) Information contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland cannot be exempt information by virtue of section 21 or 22.

(2) In relation to any information falling within section 23(1) which is contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland, section 2(3) shall have effect with the omission of the reference to section 23.

#### **65 Decisions as to refusal of discretionary disclosure of historical records**

(1) Before refusing a request for information relating to information which is contained in a historical record and is exempt information only by virtue of a provision not specified in section 2(3), a public authority shall—

(a) if the historical record is a public record within the meaning of the [1958 c. 51.] Public Records Act 1958, consult the Lord Chancellor, or

(b) if the historical record is a public record to which the [1923 c. 20 (N.I.).] Public Records Act (Northern Ireland) 1923 applies, consult the appropriate Northern Ireland Minister.

(2) This section does not apply to information to which section 66 applies.

#### **66 Decisions relating to certain transferred public records**

(1) This section applies to any information which is (or, if it existed, would be) contained in a transferred public record, other than information which the responsible authority has designated as open information for the purposes of this section.

(2) Before determining whether—

(a) information to which this section applies falls within any provision of Part II relating to the duty to confirm or deny, or

(b) information to which this section applies is exempt information,

the appropriate records authority shall consult the responsible authority.

(3) Where information to which this section applies falls within a provision of Part II relating to the duty to confirm or deny but does not fall within any of the provisions of that Part relating to that duty which are specified in subsection (3) of section 2, any question as to the application of subsection (1)(b) of that section is to be determined by the responsible authority instead of the appropriate records authority.

(4) Where any information to which this section applies is exempt information only by virtue of any provision of Part II not specified in subsection (3) of section 2, any question as to the application of subsection (2)(b) of that section is to be determined by the responsible authority instead of the appropriate records authority.

(5) Before making by virtue of subsection (3) or (4) any determination that subsection (1)(b) or (2)(b) of section 2 applies, the responsible authority shall consult—

(a) where the transferred public record is a public record within the meaning of the [1958 c. 51.] Public Records Act 1958, the Lord Chancellor, and

(b) where the transferred public record is a public record to which the [1923 c. 20 (N.I.).] Public Records Act (Northern Ireland) 1923 applies, the appropriate Northern Ireland Minister.

(6) Where the responsible authority in relation to information to which this section applies is not (apart from this subsection) a public authority, it shall be treated as being a public authority for the purposes of Parts III, IV and V of this Act so far as relating to—

(a) the duty imposed by section 15(3), and

(b) the imposition of any requirement to furnish information relating to compliance with Part I in connection with the information to which this section applies.

## **67 Amendments of public records legislation**

Schedule 5 (which amends the [1958 c. 51.] Public Records Act 1958 and the Public Records Act (Northern Ireland) 1923) has effect.

### **AMENDMENTS OF DATA PROTECTION ACT 1998**

#### ***Amendments relating to personal information held by public authorities***

### **68 Extension of meaning of "data"**

(1) Section 1 of the [1998 c. 29.] Data Protection Act 1998 (basic interpretative provisions) is amended in accordance with subsections (2) and (3).

(2) In subsection (1)—

(a) in the definition of "data", the word "or" at the end of paragraph (c) is omitted and after paragraph (d) there is inserted "or

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);", and

(b) after the definition of "processing" there is inserted—

" "public authority" has the same meaning as in the Freedom of Information Act 2000;".

(3) After subsection (4) there is inserted—

"(5) In paragraph (e) of the definition of "data" in subsection (1), the reference to information "held" by a public authority shall be construed in accordance with section 3(2) of the Freedom of Information Act 2000.

(6) Where section 7 of the Freedom of Information Act 2000 prevents Parts I to V of that Act from applying to certain information held by a public authority, that information is not to be treated for the purposes of paragraph (e) of the definition of "data" in subsection (1) as held by a public authority."

(4) In section 56 of that Act (prohibition of requirement as to production of certain records), after subsection (6) there is inserted—

"(6A) A record is not a relevant record to the extent that it relates, or is to relate, only to personal data falling within paragraph (e) of the definition of "data" in section 1(1)."

(5) In the Table in section 71 of that Act (index of defined expressions) after the entry relating to processing there is inserted—

"public authority section 1(1).".

### **69 Right of access to unstructured personal data held by public authorities**

(1) In section 7(1) of the [1998 c. 29.] Data Protection Act 1998 (right of access to personal data), for "sections 8 and 9" there is substituted "sections 8, 9 and 9A".

(2) After section 9 of that Act there is inserted—

"9A Unstructured personal data held by public authorities

(1) In this section "unstructured personal data" means any personal data falling within paragraph (e) of the definition of "data" in section 1(1), other than information which is recorded as part of, or with the intention that it should form part of, any set of information relating to individuals to the extent that the set is structured by reference to individuals or by reference to criteria relating to individuals.

(2) A public authority is not obliged to comply with subsection (1) of section 7 in relation to any unstructured personal data unless the request under that section contains a description of the data.

(3) Even if the data are described by the data subject in his request, a public authority is not obliged to comply with subsection (1) of section 7 in relation to unstructured personal data if the authority estimates that the cost of complying with the request so far as relating to those data would exceed the appropriate limit.

(4) Subsection (3) does not exempt the public authority from its obligation to comply with paragraph (a) of section 7(1) in relation to the unstructured personal data unless the estimated cost of complying with that paragraph alone in relation to those data would exceed the appropriate limit.

(5) In subsections (3) and (4) "the appropriate limit" means such amount as may be prescribed by the Secretary of State by regulations, and different amounts may be prescribed in relation to different cases.

(6) Any estimate for the purposes of this section must be made in accordance with regulations under section 12(5) of the Freedom of Information Act 2000."

(3) In section 67(5) of that Act (statutory instruments subject to negative resolution procedure), in paragraph (c), for "or 9(3)" there is substituted ", 9(3) or 9A(5)".

### **70 Exemptions applicable to certain manual data held by public authorities**

(1) After section 33 of the [1998 c. 29.] Data Protection Act 1998 there is inserted—

"33A Manual data held by public authorities

(1) Personal data falling within paragraph (e) of the definition of "data" in section 1(1) are exempt from—

(a) the first, second, third, fifth, seventh and eighth data protection principles,

(b) the sixth data protection principle except so far as it relates to the rights conferred on data subjects by sections 7 and 14,

(c) sections 10 to 12,

(d) section 13, except so far as it relates to damage caused by a contravention of section 7 or of the fourth data protection principle and to any distress which is also suffered by reason of that contravention,

(e) Part III, and

(f) section 55.

(2) Personal data which fall within paragraph (e) of the definition of "data" in section 1(1) and relate to appointments or removals, pay, discipline, superannuation or other personnel matters, in relation to—

(a) service in any of the armed forces of the Crown,

(b) service in any office or employment under the Crown or under any public authority, or

(c) service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action taken, in such matters is vested in Her Majesty, any Minister of the Crown, the National Assembly for Wales, any Northern Ireland Minister (within the meaning of the Freedom of Information Act 2000) or any public authority,

are also exempt from the remaining data protection principles and the remaining provisions of Part II."

(2) In section 55 of that Act (unlawful obtaining etc. of personal data) in subsection (8) after "section 28" there is inserted "or 33A".

(3) In Part III of Schedule 8 to that Act (exemptions available after 23rd October 2001 but before 24th October 2007) after paragraph 14 there is inserted—

"14A (1) This paragraph applies to personal data which fall within paragraph (e) of the definition of "data" in section 1(1) and do not fall within paragraph 14(1)(a), but does not apply to eligible manual data to which the exemption in paragraph 16 applies.

(2) During the second transitional period, data to which this paragraph applies are exempt from—

(a) the fourth data protection principle, and

(b) section 14(1) to (3)."

(4) In Schedule 13 to that Act (modifications of Act having effect before 24th October 2007) in subsection (4)(b) of section 12A to that Act as set out in paragraph 1, after "paragraph 14" there is inserted "or 14A".

### **71 Particulars registrable under Part III of Data Protection Act 1998**

In section 16(1) of the [1998 c. 29.] Data Protection Act 1998 (the registrable particulars), before the word "and" at the end of paragraph (f) there is inserted—

"(ff) where the data controller is a public authority, a statement of that fact,".

### **72 Availability under Act disregarded for purpose of exemption**

In section 34 of the [1998 c. 29.] Data Protection Act 1998 (information available to the public by or under enactment), after the word "enactment" there is inserted "other than an enactment contained in the Freedom of Information Act 2000".

## *Other amendments*

### **73 Further amendments of Data Protection Act 1998**

Schedule 6 (which contains further amendments of the Data Protection Act 1998) has effect.

## **PART VIII**

### **MISCELLANEOUS AND SUPPLEMENTAL**

### **74 Power to make provision relating to environmental information**

(1) In this section "the Aarhus Convention" means the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters signed at Aarhus on 25th June 1998.

(2) For the purposes of this section "the information provisions" of the Aarhus Convention are Article 4, together with Articles 3 and 9 so far as relating to that Article.

(3) The Secretary of State may by regulations make such provision as he considers appropriate—

(a) for the purpose of implementing the information provisions of the Aarhus Convention or any amendment of those provisions made in accordance with Article 14 of the Convention, and

(b) for the purpose of dealing with matters arising out of or related to the implementation of those provisions or of any such amendment.

(4) Regulations under subsection (3) may in particular—

(a) enable charges to be made for making information available in accordance with the regulations,

(b) provide that any obligation imposed by the regulations in relation to the disclosure of information is to have effect notwithstanding any enactment or rule of law,

(c) make provision for the issue by the Secretary of State of a code of practice,

(d) provide for sections 47 and 48 to apply in relation to such a code with such modifications as may be specified,

(e) provide for any of the provisions of Parts IV and V to apply, with such modifications as may be specified in the regulations, in relation to compliance with any requirement of the regulations, and

(f) contain such transitional or consequential provision (including provision modifying any enactment) as the Secretary of State considers appropriate.

(5) This section has effect subject to section 80.

## **75 Power to amend or repeal enactments prohibiting disclosure of information**

(1) If, with respect to any enactment which prohibits the disclosure of information held by a public authority, it appears to the Secretary of State that by virtue of section 44(1)(a) the enactment is capable of preventing the disclosure of information under section 1, he may by order repeal or amend the enactment for the purpose of removing or relaxing the prohibition.

(2) In subsection (1)— “enactment” means—

(a) any enactment contained in an Act passed before or in the same Session as this Act, or  
(b) any enactment contained in Northern Ireland legislation or subordinate legislation passed or made before the passing of this Act; “information” includes unrecorded information.

(3) An order under this section may do all or any of the following—

(a) make such modifications of enactments as, in the opinion of the Secretary of State, are consequential upon, or incidental to, the amendment or repeal of the enactment containing the prohibition;

(b) contain such transitional provisions and savings as appear to the Secretary of State to be appropriate;

(c) make different provision for different cases.

## **76 Disclosure of information between Commissioner and ombudsmen**

(1) The Commissioner may disclose to a person specified in the first column of the Table below any information obtained by, or furnished to, the Commissioner under or for the purposes of this Act or the [1998 c. 29.] Data Protection Act 1998 if it appears to the Commissioner that the information relates to a matter which could be the subject of an investigation by that person under the enactment specified in relation to that person in the second column of that Table.

TABLE

<i>Ombudsman</i>	<i>Enactment</i>
The Parliamentary Commissioner for Administration.	The Parliamentary Commissioner Act 1967 (c. 13).
The Health Service Commissioner for England.	The Health Service Commissioners Act 1993 (c. 46).
The Health Service Commissioner for Wales.	The Health Service Commissioners Act 1993 (c. 46).
The Health Service Commissioner for Scotland.	The Health Service Commissioners Act 1993 (c. 46).
A Local Commissioner as defined by section 23(3) of the Local Government Act 1974.	Part III of the Local Government Act 1974 (c. 7).
The Commissioner for Local Administration in Scotland.	Part II of the Local Government (Scotland) Act 1975 (c. 30).
The Scottish Parliamentary Commissioner for Administration.	The Scotland Act 1998 (Transitory and Transitional Provisions)(Complaints of Maladministration) Order 1999 (S.I. 1999/1351).
The Welsh Administration Ombudsman.	Schedule 9 to the Government of Wales Act 1998 (c. 38).
The Northern Ireland Commissioner for Complaints.	The Commissioner for Complaints (Northern Ireland) Order 1996 (S.I. 1996/1297 (N.I. 7)).
The Assembly Ombudsman for Northern Ireland.	The Ombudsman (Northern Ireland) Order 1996 (S.I. 1996/1298 (N.I. 8)).

(2) Schedule 7 (which contains amendments relating to information disclosed to ombudsmen under subsection (1) and to the disclosure of information by ombudsmen to the Commissioner) has effect.

## **77 Offence of altering etc. records with intent to prevent disclosure**

(1) Where—

(a) a request for information has been made to a public authority, and

(b) under section 1 of this Act or section 7 of the [1988 c. 29.] Data Protection Act 1998, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) No proceedings for an offence under this section shall be instituted—

(a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;

(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

## **78 Saving for existing powers**

Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it.

## **79 Defamation**

Where any information communicated by a public authority to a person ("the applicant") under section 1 was supplied to the public authority by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice.

## **80 Scotland**

(1) No order may be made under section 4(1) or 5 in relation to any of the bodies specified in subsection (2); and the power conferred by section 74(3) does not include power to make provision in relation to information held by any of those bodies.

(2) The bodies referred to in subsection (1) are—

(a) the Scottish Parliament,

(b) any part of the Scottish Administration,

(c) the Scottish Parliamentary Corporate Body, or

(d) any Scottish public authority with mixed functions or no reserved functions (within the meaning of the [1998 c. 46.] Scotland Act 1998).

## **81 Application to government departments etc**

(1) For the purposes of this Act each government department is to be treated as a person separate from any other government department.

(2) Subsection (1) does not enable—

(a) a government department which is not a Northern Ireland department to claim for the purposes of section 41(1)(b) that the disclosure of any information by it would constitute a breach of confidence actionable by any other government department (not being a Northern Ireland department), or

(b) a Northern Ireland department to claim for those purposes that the disclosure of information by it would constitute a breach of confidence actionable by any other Northern Ireland department.

(3) A government department is not liable to prosecution under this Act, but section 77 and paragraph 12 of Schedule 3 apply to a person in the public service of the Crown as they apply to any other person.

(4) The provisions specified in subsection (3) also apply to a person acting on behalf of either House of Parliament or on behalf of the Northern Ireland Assembly as they apply to any other person.

## **82 Orders and regulations**

(1) Any power of the Secretary of State to make an order or regulations under this Act shall be exercisable by statutory instrument.

(2) A statutory instrument containing (whether alone or with other provisions)—

(a) an order under section 5, 7(3) or (8), 53(1)(a)(iii) or 75, or

(b) regulations under section 10(4) or 74(3),

shall not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(3) A statutory instrument which contains (whether alone or with other provisions)—

(a) an order under section 4(1), or

(b) regulations under any provision of this Act not specified in subsection (2)(b),

and which is not subject to the requirement in subsection (2) that a draft of the instrument be laid before and approved by a resolution of each House of Parliament, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) An order under section 4(5) shall be laid before Parliament after being made.

(5) If a draft of an order under section 5 or 7(8) would, apart from this subsection, be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument, it shall proceed in that House as if it were not such an instrument.

## **83 Meaning of “Welsh public authority”**

(1) In this Act “Welsh public authority” means—

(a) any public authority which is listed in Part II, III, IV or VI of Schedule 1 and whose functions are exercisable only or mainly in or as regards Wales, other than an excluded authority, or

(b) any public authority which is an Assembly subsidiary as defined by section 99(4) of the [1998 c. 38.] Government of Wales Act 1998.

(2) In paragraph (a) of subsection (1) “excluded authority” means a public authority which is designated by the Secretary of State by order as an excluded authority for the purposes of that paragraph.

(3) Before making an order under subsection (2), the Secretary of State shall consult the National Assembly for Wales.

## **84 Interpretation**

In this Act, unless the context otherwise requires—

“applicant”, in relation to a request for information, means the person who made the request;

“appropriate Northern Ireland Minister” means the Northern Ireland Minister in charge of the Department of Culture, Arts and Leisure in Northern Ireland; “appropriate records authority”, in relation to a transferred public record, has the meaning given by section 15(5); “body” includes an unincorporated

association; "the Commissioner" means the Information Commissioner; "decision notice" has the meaning given by section 50; "the duty to confirm or deny" has the meaning given by section 1(6); "enactment" includes an enactment contained in Northern Ireland legislation; "enforcement notice" has the meaning given by section 52; "executive committee", in relation to the National Assembly for Wales, has the same meaning as in the [1998 c. 38.] Government of Wales Act 1998; "exempt information" means information which is exempt information by virtue of any provision of Part II; "fees notice" has the meaning given by section 9(1); "government department" includes a Northern Ireland department, the Northern Ireland Court Service and any other body or authority exercising statutory functions on behalf of the Crown, but does not include—

- (a) any of the bodies specified in section 80(2),
- (b) the Security Service, the Secret Intelligence Service or the Government Communications Headquarters, or
- (c) the National Assembly for Wales; "information" (subject to sections 51(8) and 75(2)) means information recorded in any form; "information notice" has the meaning given by section 51; "Minister of the Crown" has the same meaning as in the Ministers of the [1975 c. 26.] Crown Act 1975; "Northern Ireland Minister" includes the First Minister and deputy First Minister in Northern Ireland; "Northern Ireland public authority" means any public authority, other than the Northern Ireland Assembly or a Northern Ireland department, whose functions are exercisable only or mainly in or as regards Northern Ireland and relate only or mainly to transferred matters; "prescribed" means prescribed by regulations made by the Secretary of State; "public authority" has the meaning given by section 3(1); "public record" means a public record within the meaning of the [1958 c. 51.] Public Records Act 1958 or a public record to which the [1923 c. 20 (N.I.).] Public Records Act (Northern Ireland) 1923 applies; "publication scheme" has the meaning given by section 19; "request for information" has the meaning given by section 8; "responsible authority", in relation to a transferred public record, has the meaning given by section 15(5); "the special forces" means those units of the armed forces of the Crown the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director; "subordinate legislation" has the meaning given by subsection (1) of section 21 of the [1978 c. 30.] Interpretation Act 1978, except that the definition of that term in that subsection shall have effect as if "Act" included Northern Ireland legislation; "transferred matter", in relation to Northern Ireland, has the meaning given by section 4(1) of the [1998 c. 47.] Northern Ireland Act 1998; "transferred public record" has the meaning given by section 15(4); "the Tribunal" means the Information Tribunal; "Welsh public authority" has the meaning given by section 83.

## **85 Expenses**

There shall be paid out of money provided by Parliament—

- (a) any increase attributable to this Act in the expenses of the Secretary of State in respect of the Commissioner, the Tribunal or the members of the Tribunal,
- (b) any administrative expenses of the Secretary of State attributable to this Act,
- (c) any other expenses incurred in consequence of this Act by a Minister of the Crown or government department or by either House of Parliament, and
- (d) any increase attributable to this Act in the sums which under any other Act are payable out of money so provided.

## **86 Repeals**

Schedule 8 (repeals) has effect.

## **87 Commencement**

- (1) The following provisions of this Act shall come into force on the day on which this Act is passed—
  - (a) sections 3 to 8 and Schedule 1,
  - (b) section 19 so far as relating to the approval of publication schemes,

(c) section 20 so far as relating to the approval and preparation by the Commissioner of model publication schemes,

(d) section 47(2) to (6),

(e) section 49,

(f) section 74,

(g) section 75,

(h) sections 78 to 85 and this section,

(i) paragraphs 2 and 17 to 22 of Schedule 2 (and section 18(4) so far as relating to those paragraphs),

(j) paragraph 4 of Schedule 5 (and section 67 so far as relating to that paragraph),

(k) paragraph 8 of Schedule 6 (and section 73 so far as relating to that paragraph),

(l) Part I of Schedule 8 (and section 86 so far as relating to that Part), and

(m) so much of any other provision of this Act as confers power to make any order, regulations or code of practice.

(2) The following provisions of this Act shall come into force at the end of the period of two months beginning with the day on which this Act is passed—

(a) section 18(1),

(b) section 76 and Schedule 7,

(c) paragraphs 1(1), 3(1), 4, 6, 7, 8(2), 9(2), 10(a), 13(1) and (2), 14(a) and 15(1) and (2) of Schedule 2 (and section 18(4) so far as relating to those provisions), and

(d) Part II of Schedule 8 (and section 86 so far as relating to that Part).

(3) Except as provided by subsections (1) and (2), this Act shall come into force at the end of the period of five years beginning with the day on which this Act is passed or on such day before the end of that period as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

(4) An order under subsection (3) may contain such transitional provisions and savings (including provisions capable of having effect after the end of the period referred to in that subsection) as the Secretary of State considers appropriate.

(5) During the twelve months beginning with the day on which this Act is passed, and during each subsequent complete period of twelve months in the period beginning with that day and ending with the first day on which all the provisions of this Act are fully in force, the Secretary of State shall—

(a) prepare a report on his proposals for bringing fully into force those provisions of this Act which are not yet fully in force, and

(b) lay a copy of the report before each House of Parliament.

### **88 Short title and extent**

(1) This Act may be cited as the Freedom of Information Act 2000.

(2) Subject to subsection (3), this Act extends to Northern Ireland.

(3) The amendment or repeal of any enactment by this Act has the same extent as that enactment