

## **EXEMPTIONS to the release or provision of information under Freedom of Information (Scotland) Act 2002**

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## Information Does not have to be Provided ...

There are certain circumstances where the Council does not have to provide the information requested:

if the information is not held by the Council. See definition below.

if the cost of compliance would exceed the £600 threshold. The cost threshold is set by Scottish Statutory Instrument 467 at £600.00 @ £15.00 per hour. Estimates based on actual costs must be provided.

if an exemption applies.

if the request is vexatious, or if it is repeated or substantially similar to other requests (unless a reasonable interval has elapsed between requests).

FOI(S)A contains a number of exemptions to the right to access information held by the Council. As this is new legislation, the interpretation of these exemptions may change over time as the Scottish Information Commissioner makes decisions on their application.

The Act does not prevent the release of information by the Council where exemptions apply. The Council can decide to release the information even if it is exempted, as long as we are not prevented from doing so for some other reason, e.g. legislation or confidentiality.

There are two types of exemptions, absolute and non-absolute. If an absolute exemption applies, the Council does not have to release the information. If a non-absolute exemption applies, then the information may have to be released, subject to the application of the substantial prejudice test and/or the public interest test, depending on the type of exemption. These exemptions are set out below, with examples of information which fall under each one. The Corporate Policy Unit and Legal Services should be consulted before an exemption can be used.

- Where a document has been marked as confidential or restricted, remember that this is not in itself sufficient grounds on which to prevent disclosure. Each case must be considered on its merits and we will need to decide which exemption to disclosure should apply.
- Where information has been withheld, it should not be assumed that any future requests for the same information should automatically be refused. Sensitivity of information usually decreases with age, so for each request it will be necessary to consider the harm that could result at the time of this specific request, as well as taking into account any previous decisions. Each case has to be considered separately.

Under the Act, anyone who requests information from a Scottish public authority which holds it, is entitled to be given it by the authority. The Act supports and encourages the disclosure of information.

Remember please contact the Corporate Policy Unit if you are uncertain about whether the information requested is exempt from disclosure.

Website for exemptions under FOI(S)A

<http://www.opsi.gov.uk/legislation/scotland/acts2002/20013--c.htm#25>

## Definition of Information 'Held' by the Council

The Act gives a right of access to information 'held' by the Council. This includes structured filing systems in either paper or electronic form, personal files, data in a database, diaries, videos including cctv, etc as well as information not created by the Council, but held here i.e. information supplied to the council by a third party.

In this context, the definition of 'held' can include:

- where someone else is storing information on our behalf, e.g. a storage contractor storing paper records.

- Where we've been given a copy of a record produced or supplied by another public body or person.
- It doesn't include circumstances where we hold material on behalf of other people, e.g. party political papers, or deposited collections held by Archives<sup>1</sup>.

**Absolute Exemptions (no information can be released)**

- **Section 25 – Information Otherwise Accessible and available e.g. published, on a website information regularly issued – a report. Remember to check the Publications Scheme and the Internet.**
- **Section 26 – Prohibitions on Disclosure e.g. if legislation currently prohibits the disclosure of information by the Council, this takes precedence over FOI. The exemption also applies if disclosure would result in the Council being in contempt of court such as where there is a court order in place prohibiting the Council from making the information available. It also applies if to disclose the information would be incompatible with a European Union obligation.**
- **Section 36 (2) – Confidentiality e.g. constitute a breach of confidence actionable by a third party. If the Council obtains information in confidence, the person who gave the Council the information could take the Council to court for breach of confidence if the information were to be released, then the information must not be released. This may relate to information relating to the Council's contracts with external suppliers, or information relating to the care of individuals by Social Workers. Please note that the Section 60 Code of Practice requires that the Council should refuse to include confidentiality clauses in contracts which would restrict access to information. Please refer to Guidance for Staff involved in Tendering (available on the intranet) for more detailed advice on the use of this exemption in relation to contracts.**
- **Section 37 – Court Records e.g. Information relating to court proceedings. This exemption covers information contained in documents filed with or placed in the custody of a court, and also those served upon, or by, the authority for the purposes of Council proceedings. It is up to the court to decide whether to allow public access to the information lodged with the court for the proceedings. In many cases, courts do allow open access to pleadings and hearings.**
- **Section 38 (1) (a) – Personal Information – where e.g. the applicant is the subject of the information requested. If the request is for information held about the applicant him/herself, the information is absolutely exempt from disclosure under FOI. The request should be processed under the Data Protection Act.**
- **Section 38 (1) (b) – Personal Information on relating to a third party. If the request refers to personal information about someone other than the applicant, it must not be disclosed if this would contravene any data protection principle, if the subject him/herself would be refused access to the information, if disclosure would cause damage or distress to the person**

**Where the release of information about a third party would not contravene the principles of the DPA then the Public Interest Test must be applied (see below)**

- **Section 38 (1) (c) - Personal Census information - Census information is subject to an one hundred year closure. The release of this information is managed by The National Archives, London.**

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<sup>1</sup> The definition of information 'held' by the Council under the Environmental Information (Scotland) Regulations is different from the definition in the Freedom of Information (Scotland) Act. If information is in the possession of a council and has been produced or received by the council or is held on behalf of another person or local authority then the information is considered to be "held" and should be released under the EISRs. Unlike the Freedom of Information (Scotland) Act, the EISRs do not exempt information which a council holds on behalf of another person.

- **Section 38 (1) (d) - Deceased person's health record.** It is unlikely that the Council will hold health records in the traditional sense. However, any information relating to the health of a deceased individual must not be released. This individual may have been a citizen, customer or an employee of the Council.

#### **Non-absolute exemptions**

**Non absolute exemptions are subject to:-**

- **a public interest test**, which means the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information

**OR to a**

- **substantial prejudice test**, which is not defined in FOI(S)A but which has to cause real or likely damage to be accepted as an exemption by the Office of the Scottish Information Commissioner (OSIC)
  - **Section 27 (1) – Information intended for future publication within 12 weeks of the request (public interest test only).** – This exemption covers information which is due for one-off publication, for example, a policy or strategy, and information which is published on specified dates or at specified intervals, such as statistical or annual reports.
  - **Section 27 (2) - Research information, due to be published and where prior publication would substantially prejudice the research programme or the interest of the Council (substantial prejudice test and public interest test).** Any research or consultation programme which the Council has embarked upon will normally be allowed to run its course and report according to its specified timetable. Only in cases of public interest will the Council be required to release the information in advance of scheduled publication.
  - **Section 28 – Relations within the UK – prejudice relations between the UK, including the Scottish Administration, and any other such administration**
  - **Section 29 – Formulation of Scottish Administrative Policy – e.g. government policy**
  - **Section 30 – Prejudice to the effective conduct of public affairs e.g. prejudicial to the collective responsibility of Scottish Ministers - (substantial prejudice test and public interest test).** If the disclosure of information would be liable to harm the provision of free and frank advice by any individual or organisation, or the candid exchange of views for the purposes of deliberation within the Council, requests for access may be refused. This exemption may cover some consultation undertaken by the Council, and some debates within Committees.
  - **Section 31 – National security and defence**
  - **Section 32 – International Relations**
  - **Section 33 – Commercial interests and the economy e.g. a trade secret, is likely to prejudice substantially the commercial interests of any person (including a Scottish Public Authority).**
    - **Trade Secrets (public interest test only).** This covers trade secrets, such as the recipe for Irn-bru or Drambuie. A trade secret is a business-related fact that the Court will protect as being essential to an enterprise.
    - **Commercial interests where disclosure would be likely to substantially prejudice the commercial interests of any person (substantial prejudice test and public interest test) – This exemption will cover information relating to the Council's relations with external contractors and also to the Council's own commercial interests. Types of information covered includes:**
      - **costing rates**

- factors and pricing information
- negotiating positions
- competition strategies
- business plans
- potential business options

Please refer to **Guidance for Staff involved in Tendering** (available on the Finance & ICT intranet page) for more detail on the use of this exemption.

- **Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations e.g. report to the procurator fiscal concerning possible prosecution. Information held for the purpose of investigations by the Council to establish whether an offence has been committed or for proceedings arising out of investigations (public interest test only). It also covers information held by the Council for the purposes of an inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 which has not yet been concluded; information held by a Scottish public authority into the cause of death of any person whether by virtue of a duty on the authority or to make a report to the Procurator Fiscal, and information held for the purpose of investigations in relation to the regulatory functions listed in Section 35(2) of the Act and which relate to the obtaining of information from confidential sources. The purposes under Section 35(2) include:**
  - ascertaining whether any person has failed to comply with the law;
  - ascertaining whether circumstances exist or may arise justifying regulatory action;
  - investigation of persons in regulated professions or who carry out activities which require a licence;
  - investigations into accidents;
  - action relating to health and safety.
  - Investigations relating to fraud must be treated extra-sensitively. Only when a decision has been made to proceed with prosecution should the fact that an investigation is underway be acknowledged.
- **Section 35 – Law enforcement - where disclosure could prejudice the prevention and detection of crime (substantial prejudice test and public interest test). This covers information which would, or would be likely to, prejudice substantially a list of law enforcement matters. The list includes (among other things) the prevention or detection of crime, the apprehension or prosecution of offenders or the operation of immigration controls. The exemption also covers information which would, or would be likely to, prejudice substantially any civil proceedings brought and arising out of an investigation conducted for the list of regulatory purposes specified in Section 35(2) and brought by a public authority under a duty to carry out such an investigation.**
- **Section 38 - Personal information about a third party where to release would not be in breach of the Data Protection Principles (public interest test only). This exemption covers personal information about someone other than the applicant where to release it would not be in breach of the data protection principles (contrast with absolute exemptions above).**
- **Section 39 – Health, safety and the environment e.g. likely to endanger the physical or mental health or the safety of an individual (public interest test only). This exemption relates only to information that would, if disclosed, endanger the physical or mental health or safety of any individual. This exemption does not only relate to the Health and Safety of an individual mentioned within the information, but is in place to protect the Health and Safety of all individuals. Therefore, if the release of information will harm any individual, whether someone mentioned within the information, the requester or any other individual, the Council is not obliged to provide access.**

As the Environmental Information (Scotland) Regulations (EISRs) govern the disclosure of such information, requests for access should be dealt with under these regulations. EISRs covers information types including environmental strategy and information regarding the impact of planned developments upon the environment.

- **Section 40 – Audit functions e.g. prejudice the examination of the economy, efficiency and effectiveness with which such local authorities use their resources in discharging their functions - (substantial prejudice test and public interest test). This exemption does not cover the internal audit functions of the Council. It would only apply where a public authority is carrying out an audit of another public authority, eg. Audit Scotland carrying out an audit of the Council.**
- **Section 41 – Communications with Her Majesty etc and Honours e.g. communications with Her Majesty, with other members of the Royal Family or with the Royal Household**

#### **Remember**

- **The presumption under FOI(S)A is that the Council must disclose the information unless the Act provides a specific reason to withhold it. The exemptions are intended to protect sensitive or confidential information.**
- **A number of exemptions may apply to any one request. In this case, there may be no need to look at them all in detail, but the main ones should be considered carefully as the Refusal Notice needs to state which of them apply.**
- **Even if an exemption applies, staff can still exercise discretion to disclose EXCEPT where a third party's legal rights would be affected by the release of the information.**
- **Where a record is marked as confidential or restricted, remember that this is not in itself sufficient grounds on which to prevent disclosure. Each case must be considered on its merits and we will need to decide which exemption to disclosure should apply.**
- **Where information has been withheld in the past, you should not assume that any future requests for the same information should automatically be refused. Sensitivity of information usually decreases with age, so for each request we must consider the harm that could result at the time of this specific request, as well as taking into account any previous decisions. Each case has to be considered separately.**
- **If an absolute exemption applies, consider redacting (blocking out) the sensitive information to allow for partial release of documents**

#### **Tests for Non-Absolute Exemptions**

- **Requests for information which falls under these non-absolute exemptions must be dealt with on a case-by-case basis. To ascertain whether the information should be exempt from disclosure under FOI, two tests have been established, the harm test of Substantial Prejudice and the test of Public Interest. In some cases, the substantial prejudice test must be met first before going on to apply the public interest test. In other cases only the public interest test is applicable. In all cases, there must be a presumption in favour of the disclosure of the information.**

#### **Substantial Prejudice Test**

**Many of the exemptions only apply if the disclosure of the information would " prejudice substantially" some particular interest.**

**The term is not defined in the Act but it is clear that there must be some real possibility of serious harm arising to the interest to be protected before the test of substantial prejudice is met. The Freedom of Information Act 2000 that applies in the rest of the UK only refers to "prejudice" and therefore the test in Scotland for withholding information may be harder to meet, the result being that the scales are further tipped in favour of openness.**

**The harm test of 'substantial prejudice' protects the interests of individuals and organisations as set out in the non-absolute exemptions. If the prejudice caused to these interests by the disclosure of information can be shown to be real, actual and of significant substance, the Council is not required to comply with the request for access. However, this should not be viewed as a 'get-out' clause. The**

**Council will have to prove that substantial prejudice will be caused to an individual's or organisation's interests.**

### **Public Interest Test**

**In all cases of non-absolute exemptions, the Council must consider the public interest in making the information available. 'Public interest' can be described as something that is of serious concern or benefit to the public as a whole, or as being in the interest of the public. This covers information which enhances the democratic scrutiny of decision-making and the expenditure of public funds, and which provides details of dangers to the state of public health or safety, or to the environment. The absolute exemptions are not affected by the public interest, and in some cases the substantial prejudice to interests outlined in the non-absolute exemptions will prevent disclosure.**

**The Office of the Scottish Information Commissioner has published a document on the Public Interest Test. This can be found at the following website link**

**<http://www.itspublicknowledge.info/legislation/briefings/publicinterest.htm>**

**The main features of the public interest test under FOI(S)A is that 'public interest' is not defined but is generally seen as**

- something which is of serious concern and benefit to the public not merely something of individual interest.**
- Or**
- something which is 'in the interest of the public' not merely 'of interest to the public'**

**It is also accepted that what is held to be in the public interest will change over time.**

**The public interest test must be applied to qualified or non-absolute exemptions claimed under part 2 of the Act. Remember Absolute exemptions are not subject to the public interest test.**

**So when considering an exemption follow these steps:-**

- 1. Does the information fall under the terms of an exemption. If no then release the information. If yes go on to consider the public interest test**
- 2. Apply the public interest test. If the public interest in disclosing the information is greater than the public interest in withholding the information, the information must be released. Where the council decide to withhold information it should provide reasons for this decision and issue a refusal notice to the applicant.**
- 3. A judgement will need to be made based on each case individually.**

**Factors which may inform a decision about the public interest will include whether disclosure would:-**

- enhance scrutiny of the decision making processes, improving accountability and participation**
- could contribute to the administration of justice**
- affect the economic interests of the whole or part of the UK**
- contribute to effective oversight of public funds and that the public obtain value for money**
- keep the public informed of any danger to public health, safety or the environment**
- adversely affect national security or international relations**
- contribute to ensuring that the council with regulatory responsibilities is adequately discharging its functions**
- ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims**
- contribute to a debate on a matter of public interest**
- prejudice the protection of an individuals right to privacy (Human Rights Act 1998)**

**Factors which should not be taken into account in deciding whether releasing information is in the public interest:-**

- embarrassment of government or other public local authority officials**
- seniority of persons involved in the subject matter**

- risk of applicant misinterpreting the information
- possible loss of confidence in government of other public authority

**Section 2 (1) (b) states:-**

**‘in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption’.**

**Is The Request Vexatious?**

**The Council does not have to comply with a request for information if the request (and NOT the applicant) is vexatious. Current thinking is that a request can only be considered vexatious where there is good evidence that the purpose of the request is not to obtain information but to disrupt the working of the authority. These types of requests should not be confused with a request made with a view to obtaining information to embarrass the Council with its contents, or to make political capital out of it, which would normally be legitimate requests.**

**Any decision on treating a request as vexatious should be discussed with the Chief Legal Officer. The Council must be prepared to justify the reasoning behind a refusal on these grounds to the Scottish Information Commissioner. If it is decided that the request is vexatious, issue the appropriate refusal notice.**

**Is The Request Repeated?**

**Where the Council has previously complied with a request for information made by any person, it does not have 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. If the information has changed between applications, it is unlikely to be viewed as a repeated request. For example, requests could be made once a week for up to date figures.**

**Once the information has been provided, it is good practice to ensure the information is then included in our publication scheme. This means that any future requests for the information can be responded to by directing the applicant to the scheme.**

**Any decision on treating a request as repeated should be discussed with the Corporate Policy Unit and the Service involved and any specialist advice sought from the legal team. If it is decided that the request is vexatious, issue the appropriate refusal notice.**

**Refusal to release information requested**

**Where a request is refused either in whole or in part because of an exemption, the applicant must be informed within the 20 working days time period explaining. Please pass the following information to the Corporate Policy Unit who will issue a refusal notice:**

- Which exemption has been claimed
- Unless obvious, why that exemption has been claimed
- The reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. This should list the public interest factors for and against disclosure, which have been taken into account before reaching the decision
- The only exception is where such explanation would in itself release information, which would be exempt
- The applicant must also be informed of his right to a review by the Council and if unsatisfied by this review that the applicant has the right to appeal to the Scottish Information Commissioner.

**It is important to use the answer templates supplied by the Corporate Policy Unit as these always state the applicants rights to a review of the decision by the Council and the right to appeal to the Office of the Scottish Information Commissioner if unsatisfied.**

#### **Issuing A Refusal Notice**

**Refusal notices will be issued by the Corporate Policy Unit.**

#### **Vexatious (not defined by the Act) or repeated request**

**Where a request has been identified as vexatious or repeated, a Refusal Notice will be issued by the Corporate Policy Unit stating that the Council is relying on the exemption for vexatious or repeated request.**

**If a Refusal Notice has already been issued and it would be unreasonable 'in all the circumstances' to serve another notice in relation to the current request – then no response is required though the decisions should be documented internally and recorded by the Corporate Policy Unit on the CRM system.**

**Where the cost of locating and retrieving information exceeds the appropriate limit (£600.00)**

**Issue a Refusal Notice using the appropriate template which states that the cost of compliance exceeds the limit. Provide advice and assistance in reformatting the request. Indicate what information could be provided within the cost ceiling.**

**Advice and assistance on reformatting the request could include:**

**Providing an outline of the different kinds of information which might meet the terms of the request.**

**Providing access to detailed catalogues and indexes to help the applicant understand the nature and extent of information we hold.**

**Providing a general response setting out options for further information which could be provided on request.**

#### **Exemption applies to all/part of the information**

**Where the Council refuses a request either in whole or in part because of an exemption the applicant must be informed in writing by the Corporate Policy Unit within the 20 working days time period using the appropriate template explaining:**

**Which exemption has been claimed.**

**If it's not obvious – why that exemption has been claimed.**

**The reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. This should list the public interest factors for and against disclosure which we have taken into account before reaching our decision.**

**The only exception is where such explanation would in itself release information which would be exempt.**

**The refusal notice states that the applicant has the right to a review by the Council if they are not satisfied with the response**

**The refusal notice must also state that the applicant has access to an appeal to the Office of the Information Commissioner is they are not satisfied with the council review.**

#### **Absolute exemption from requirement to disclose information**

**This may apply to only part of the information requested. Issue a Refusal Notice using the appropriate letter stating that the information is exempt from this requirement, specifying the relevant exemption**

**and stating why the exemption applies (UNLESS explaining why the exemption applies would reveal the exempt information).**

**Non-absolute exemptions where the public interest in withholding the information outweighs the public interest in disclosing it and it would not be in the public interest to disclose the information**

**This may apply to only part of the information requested. Issue a Refusal Notice using the appropriate letter stating the reasons for decision, unless this would mean revealing exempt information.**

**The 20 working day period cannot be extended to take a decision on exemptions.**

**Templates for refusals and answers to requests for information under FOI(S)A are supplied by the Corporate Policy Unit.**