

FOISA Guidance

The public interest test in FOISA

Briefing



Scottish Information
Commissioner

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Glossary and abbreviations

Term used	Explanation
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
The Commissioner	The Scottish Information Commissioner
Absolute exemption	An exemption in Part 2 of FOISA which is not subject to the public interest test
DPA 2018	The Data Protection Act 2018
EIRs	Environmental Information (Scotland) Regulations 2004
FOI	Freedom of Information
FOISA	Freedom of Information (Scotland) Act 2002
UK GDPR	UK General Data Protection Regulation
Qualified exemption	An exemption in Part 2 of FOISA which is subject to the public interest test

The public interest test

The main points

1. Under section 1(1) of the Freedom of Information (Scotland) Act 2002 (FOISA), a person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
2. This right is not absolute. In some cases, information is exempt from disclosure. The exemptions are contained in Part 2 of FOISA.
3. There are two main types of exemptions: absolute exemptions and qualified exemptions.

Absolute exemptions

4. Exemptions which are not subject to the public interest test are known as “absolute exemptions.” Where an absolute exemption applies, a public authority is entitled to withhold the information without going on to consider the public interest.

Qualified exemptions

5. Where a qualified exemption applies, the information must be disclosed unless the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption. Where the competing public interests are evenly balanced, the information should be disclosed.
6. Most of the exemptions in FOISA are qualified, so are subject to the public interest test.
7. This guidance tells public authorities how to address the public interest test. It gives examples of the factors they should take into account when deciding where the public interest lies. Requesters may also find the guidance helpful when a public authority refuses to disclose information because it is subject to a qualified exemption.
8. The Environmental Information (Scotland) Regulations 2004 (the EIRs) also contain a public interest test. The Commissioner has issued separate guidance on the public interest test in the EIRs (see **Appendix 1: Resources**).

List of absolute exemptions

9. Where an absolute exemption applies, a public authority is **not** required to go on to consider the public interest test. The absolute exemptions in FOISA are:
 - Section 25 – Information otherwise accessible
 - Section 26 – Prohibitions on disclosure
 - Section 36(2) – Confidentiality
 - Section 37 – Court records, etc.
 - Section 38(1)(a) – where a requester has asked for their own personal data
 - Section 38(1)(b) (read with section 38(2A), i.e. where the disclosure of personal data would breach any of the data protection principles in Article 5(1) of the UK GDPR (or section 34(1) of the DPA 2018). (When applying the section 38(1)(b) exemption, it is sometimes necessary to consider the public interest test. See paragraph **10**.)

- Section 38(1)(c) – Personal census information
- Section 38(1)(d) – A deceased person’s health record

List of qualified exemptions

10. Where a qualified exemption applies, a public authority must go on to consider the public interest test in order to determine whether the information should be disclosed. The following exemptions are all qualified exemptions:

- Section 27 – Information intended for future publication
- Section 28 – Relations within the United Kingdom
- Section 29 – Formulation of Scottish Administration policy etc.
- Section 30 – Prejudice to effective conduct of public affairs
- Section 31 – National security and defence
- Section 32 - International relations
- Section 33 - Commercial interests and the economy
- Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations
- Section 35 – Law enforcement
- Section 36(1) – Confidentiality
- Section 38(1)(b) – Personal information:
 - *either* read with section 38(2B): i.e. disclosure of personal data would contravene Article 21 of the UK GDPR (general processing: right to object to processing)
 - *or* read with section 38(3A): i.e. if the subject of the information were to ask to see their own information under Article 15(1) of the UK GDPR (or under section 45(1)(b) of the DPA 2018) the information would be withheld
- Section 39 – Health, safety and the environment
- Section 40 – Audit functions
- Section 41 – Communications with His Majesty etc. and honours

The public interest in practice

What is meant by “the public interest”?

11. FOISA does not define the public interest. It has been described elsewhere as “something which is of serious concern and benefit to the public”, not merely something of individual interest. It has also been described as “something that is “in the interest of the public”, not merely “of interest to the public.” In other words, it serves the interests of the public.
12. When applying the test, the public authority is deciding whether, on balance, it serves the interests of the public better to withhold or disclose information. The “public” in this context does not necessarily mean the entire population. It might relate to a relatively localised public (e.g. a small community or interest group) or to the wider public at large.

The balancing exercise

13. There is a two-step process in considering whether a qualified exemption can be applied. The first step is to determine whether the exemption actually applies.
14. If the relevant test or tests in the exemption are met, then the information is exempt information. The Commissioner has produced detailed guidance on all of the exemptions in FOISA. (See **Appendix 1: Resources** for links to guidance on the qualified exemptions.)
15. The second step is to go on to apply the public interest test to determine whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. This means that, even though the information is exempt from disclosure (i.e. is subject to a qualified exemption), it still has to be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.
16. The authority must identify and set out the competing arguments as to why the public interest would be served by disclosure of the exempt information and by withholding the exempt information. Having identified the public interest arguments on each side, the authority must then carry out a balancing exercise to determine where the public interest lies.
17. This will involve looking at the content and context of the information and at the likely effect of disclosure.
18. Where a public authority decides that the public interest lies in maintaining an exemption (and so decides to withhold information from a requester), it must give the requester a refusal notice under section 16 of FOISA within 20 working days of receipt of the request.
19. Section 16(2) makes it clear that where a public authority is withholding information on public interest grounds, the refusal notice must state why the authority believes that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.¹
20. This means it is not enough for a public authority simply to tell the requester that the public interest lies in maintaining the exemption. The authority must set out the competing public interest arguments and explain why it has concluded that the public interest lies in maintaining the exemption as opposed to releasing it. Without this information, public authorities are likely to find it difficult to justify their decision on the public interest if an appeal is subsequently made to the Commissioner.

Factors which should be taken into account

21. The following are examples of the type of factors authorities should take into account when deciding where the public interest lies. This is **not** an exhaustive list, but gives an indication of the sort of issues authorities should be considering.
 - the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;

¹ Note – an authority refusing to confirm or deny whether information is held in terms of section 18 of FOISA must still issue a refusal notice, but does not need to state in its response to the request for information and any review why it believes the public interest in maintaining the exemption outweighs that in disclosure of the information – see section 18(2) of FOISA.

- whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;
- whether disclosure would impact adversely on safeguarding national security or international relations;
- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual's right to privacy.

Factors which should not be taken into account

22. The following factors should **not** be taken into account when applying the public interest test.

- possible embarrassment to government or other public authority officials;
- the fact that senior persons are involved;
- possible loss of confidence in government or other public authority;
- the risk of the requester misinterpreting the information.

23. Just because information is complex, or might be difficult for the requester to interpret, does not mean that the information should be withheld on public interest grounds. If a public authority is concerned that information might not be easily understood, or would be misinterpreted, there is nothing to stop the authority from explaining the information.

Passage of time

24. The need to consider the public interest “in all the circumstances of the case” means that the factors weighing in favour of disclosure or maintaining an exemption, or their relative weight in the balancing exercise, is likely to change over time. It is important that the balancing exercise takes into account the circumstances at the time of the information request (or, where relevant, at the review stage). Just as the application of an exemption may change with the passage of time, the balance of the public interest will also shift with the passage of time, usually in favour of disclosing the information.

The public interest test in decisions

25. As noted in paragraph 14, the Commissioner has issued guidance on each of the FOISA exemptions. **Appendix 1: Resources** contains links to guidance on each of the qualified exemptions. The guidance contains examples of cases where the Commissioner has concluded whether the public interest lies in withholding the information or in disclosing it.

Appendices

Appendix 1: Resources

Paragraph	Resource	Link
8	EIRs Guidance: The Public Interest Test in the EIRs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx
14	Section 27 – Information intended for future publication	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section27/Section27.aspx
14	Section 28 – Relations within the United Kingdom	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section28/Section28.aspx
14	Section 29 – Formulation of Scottish Administration policy etc.	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx
14	Section 30 – Prejudice to effective conduct of public affairs	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx
14	Section 31 – National security and defence	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section31/Section31.aspx
14	Section 32 - International relations	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.aspx
14	Section 33 - Commercial interests and the economy	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx
14	Section 34 – Investigations by Scottish public authorities and proceedings arising out of such investigations	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section34/Section34.aspx
14	Section 35 – Law enforcement	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx
14	Section 36(1) – Confidentiality	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx
14	Section 38(1)(b) (not all of section 38(1)(b) is subject to the public interest test)	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx
14	Section 39 – Health, safety and the environment	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx
14	Section 40 – Audit functions	FOISA exemptions Scottish Information Commissioner (itspublicknowledge.info)
14	Section 41 – Communications with Her Majesty etc. and honours	FOISA exemptions Scottish Information Commissioner (itspublicknowledge.info)

Appendix 2

Section 2: Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - (b) section 26;
 - (c) section 36(2);
 - (d) section 37; and
 - (e) in subsection (1) of section 38 –
 - (i) paragraphs (a), (c) and (d); and
 - (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied.

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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info

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