



## Freedom of Information Act Awareness Guidance No 18

### Public Audit

The Information Commissioner's Office (ICO) has produced this guidance as part of a series of good practice guidance designed to aid understanding and application of the Freedom of Information Act 2000. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in response to information requests.

The guidance will be developed over time in the light of practical experience.

Here we look at the exemption relating to information whose disclosure might prejudice the work of public auditors. The exemption is set out in section 33 of the Act.

The Information Commissioner has also published his internal Casework Guidance on this exemption. Further guidance for public auditors is available from the Public Audit Forum [www.public-audit-forum.gov.uk/PAFFOIFINALVERSION.pdf](http://www.public-audit-forum.gov.uk/PAFFOIFINALVERSION.pdf). In addition, guidance on this and other exemptions will also be available from the Department for Constitutional Affairs.

#### A) WHAT DOES THE ACT SAY?

##### a) Who can claim the exemption?

Unlike most of the exemptions in the Act, the public audit exemption can only be used by a limited number of public authorities, in particular, those which have "functions" in relation to:

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

This will clearly include the obvious public audit bodies such as the National Audit Office, the Audit Commission or the Northern Ireland Audit Office. (There is a

separate FOI Act for Scotland and information held by public audit bodies in Scotland is covered by that legislation.)

However there may be some other bodies whose functions may properly be described as including the “examination of the economy, efficiency and effectiveness with which other public authorities use their resources” which may also be able to use the exemption. These may include:

- The Commission for Healthcare Audit and Inspection
- HM Inspectorate of Court Administration
- HM Inspectorate of Constabulary
- HM Inspectorate of Prisons
- Ofsted
- Commission for Social Care Inspection

It is not suggested that this list is an exhaustive one. If in doubt, public authorities should contact the Information Commissioner for advice.

#### **b) Who cannot claim the exemption?**

Public authorities who are subject to audit and who may, therefore, hold information which relates to public audit, for instance correspondence with auditors, draft reports and comments upon them etc, **cannot** claim the exemption. It is possible that such authorities may be able to rely upon other exemptions from disclosure, for instance if disclosure were to prejudice their own commercial interests or would infringe Parliamentary Privilege.

**NOTE:** By no means all the bodies which carry out public audit are public authorities. For instance, auditors appointed by the Audit Commission and who exercise functions under the Audit Commission Act 1998 are not caught by the definition of “public authority” contained in the Act and will not therefore be covered by the Act unless it is decided in the future to define them by Order as public authorities.

#### **c) What information is covered by the exemption?**

Information is covered by the exemption if its disclosure “would prejudice or would be likely to prejudice” any of the “functions” described above. These might include not only functions such as annual audit and value for money studies but would include the appointment of auditors under the Audit Commission Act. The assessment of prejudice is considered under a separate heading below. In broad terms, however, the term “prejudice” may be taken to mean “harm” or “damage”. The Act does not give any further indication of the types of information which may be covered by the exemption, although examples would include draft reports, audit methodologies, correspondence between auditors and bodies subject to

audit and information provided to auditors by whistle blowers or other informants. Clearly information which has been placed in the public domain, for instance published audit reports will not be covered by the exemption.

Access to environmental information is governed not by the Freedom of Information Act but instead by the Environmental Information Regulations. The EIR do not contain an equivalent to the public audit exemption. Any refusal of environmental information held for the purposes of public audit must therefore be made on other grounds as provided in the EIR.

#### **d) Nature of the exemption**

The exemption is a qualified one. This means that even if information is exempt, public authorities must disclose it in response to a request if there is an equal or greater public interest in disclosure. The public interest test is also considered under a separate heading below. In practice the assessment of likely prejudice is likely to be bound up with the application of the public interest test. However, it is important to remember that there are two stages in the decision to rely upon the exemption. If the information is not exempt, it must be supplied within 20 working days. However, if, having determined that it is exempt, the period for response may be extended if more time is actually needed to consider the public interest, for instance if it is necessary to seek legal advice.

### **B) THE DUTY TO CONFIRM OR DENY**

The right to request information from a public authority is set out in Section 1 of the Act. There are two related rights. These are:

- the right to be informed whether or not the information requested is held by the authority, and, if so,
- the right to have that information communicated to him.

The first of these rights is referred to in the phrase, “the duty to confirm or deny” which is used elsewhere in the Act. It is unlikely that there will often be prejudice to the purpose of public audit by the mere fact of confirmation that an auditor holds information of a particular sort. Indeed, in many cases, even if the information requested is of a confidential nature and should not be disclosed, it may increase public confidence to confirm that the relevant information is in the possession of the auditor.

However, there may be some exceptional cases. For instance, it would be right to give a non-committal response if asked to confirm that information had been provided by a whistleblower (if to confirm would effectively be to disclose the identity of the whistleblower).

Further advice on the duty to confirm or deny is given in Awareness Guidance No 21.

### **C) ASSESSMENT OF PREJUDICE**

The terms “likely to prejudice” and “would be likely to prejudice” which are used in a number of the exemptions are not explained in the Act. (See Awareness Guidance No 20 for further advice on the Prejudice Test.)

However, in general terms, the Commissioner takes the view that ‘prejudice’ means “harm” or “damage” and that the word ‘likely’ indicates a degree of probability where there is a very significant and weighty chance of prejudice to the subject matter of the exemption. The degree of risk must be such that there may very well be prejudice to those interests, even if the risk falls short of being more probable than not. Whether prejudice exists is a matter of fact to be decided on a case by case basis.

As indicated earlier, in practice, the assessment of prejudice is likely to be bound up with an assessment of the public interest. The greater the likely prejudice to the public audit function, the stronger the public interest in not disclosing the information requested.

Two broad types of prejudice may arise through the release of information by an auditor. Firstly, there may be prejudice to a particular audit or other process (such as the appointment of auditors). The key issue here is likely to be one of timing: the release of information about an ongoing exercise may well be likely to cause prejudice, for instance where a draft report may contain inaccuracies or provisional recommendations. By contrast, where an exercise has been completed and a final audit report has been published, it would be difficult to see how there would be prejudice to that particular exercise.

Secondly, however, there may be more general prejudice to the function of audit. For instance, if the release of information supplied in confidence or on a voluntary basis to an auditor were to discourage cooperation with the auditor in the future, it may be reasonable to argue prejudice. Similarly, while there would be unlikely to be prejudice in the release of information about standard audit methodologies, the release of information about other techniques might cause prejudice if it were to reduce the likely effectiveness of those techniques in the future.

By contrast, it would be more difficult to see how prejudice would arise if an auditor were to release information which it had received from an auditable body and which that body would be under a duty itself to provide had the request been directed to it. If the information is already in the public domain, it may be relevant to consider the exemption provided by s.21 of the Act relating to information accessible to the applicant by other means (see Awareness Guidance No 6.)

### **D) THE PUBLIC INTEREST TEST**

The Commissioner has published general advice on the public interest test in the form of Awareness Guidance No 3.

The Commissioner suggests that the following factors are likely to weigh in favour of the disclosure of information:

- furthering the understanding of and participation in the public debate of issues of the day.
- promoting accountability and transparency by public authorities for decisions taken by them.
- promoting accountability and transparency in the spending of public money.
- allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.
- bringing to light information affecting public health and public safety.

The existence of an exemption indicates that there are also public interest arguments against disclosure which, in this case, may be broadly summarised as ensuring that the Act does not prevent auditors from carrying out their duties, both by giving protection to individual audits or safeguarding the general integrity of the audit process.

The Commissioner recognises the public interest in maintaining the exemption in many cases, not least because the purposes of public audit, namely providing assurances to Parliament and the public that public bodies are able to account for the public funds allocated to them and that they deliver value for money, are so similar to the factors favouring the disclosure of information listed above.

Nevertheless, the Commissioner believes that in particular cases, the public interest may be better served by disclosure. There is a general public interest in understanding the nature of public audit and the processes by which reports are compiled and which other statutory functions are discharged. This may be an interest on the part of the wider public or an interest on the part of bodies subject to audit. There may also be cases where an auditor's report is controversial or where it deals with an issue of national importance, and where there are strong public interest arguments in favour of disclosure of other material not included in the report. For instance, a report may have been prompted as a result of a complaint by a whistleblower or a series of press reports on a particular issue. Although in many cases the auditor may wish to argue that this other material is subject to a duty of confidence and that disclosure would discourage future cooperation, there may be cases where it is more important to provide assurances that the report has been properly compiled by releasing some of the background material.

## **E) INTERACTION WITH OTHER EXEMPTIONS**

In common with other exemptions in the Act, the exemption relating to public audit functions overlaps with others. These may include:

- S.34 Parliamentary privilege
- S.40 Personal information
- S.41 Information provided in confidence
- S.43 Commercial interests

This list is not an exhaustive one.

The Commissioner's general advice is that, when refusing a request, public authorities should make reference to the principal grounds for refusal and should not seek to advance alternative exemptions where these provide much weaker grounds for refusal. While there is no reason in law why public authorities should not cite a number of different exemptions, to do so may give the applicant the impression that the authority is by nature secretive and unresponsive to the public.

As a matter of practicality, public authorities may choose to rely upon an absolute exemption (for instance Parliamentary Privilege) rather than a qualified exemption such as the public audit exemption which requires the application of the public interest test.

However, in the case of the exemption relating to information received in confidence, which is absolute, it may be preferable to rely upon that relating to public audit despite the fact that this is qualified. The law of confidence has an in-built public interest test. However this derives not from the FOI Act but the common law. Although, as noted earlier, the Act allows an extension to the 20 working day period generally allowed for response where it is necessary to consider the public interest, this provision only relates to the qualified exemptions in the Act.

## **F) PRACTICAL ISSUES**

- As mentioned, public authorities who may be able to rely upon this exemption include the obvious public audit bodies. Other authorities which have a regulatory function or powers of inspection may also be able to rely upon s.33. They may, however, wish to obtain legal advice as to the extent to which their functions fall within the definition in s.33(1). (Although the Commissioner will attempt to assist public authorities, he cannot give advice on the general law.)
- It is likely to assist audit bodies if they clarify in advance the expectation of auditable bodies with regard to information which they supply to auditors. It may be helpful, for instance to ask them to specify which

information may be freely released to enquirers and which would raise concerns. Although the suppliers of information do not have a right of veto over disclosure, this would reduce the number of times on which auditor felt the need to consult the suppliers of information as to their attitude towards disclosure.

- The Act is fully retrospective. Public audit bodies are likely to hold a considerable amount of unpublished information in relation to completed audits. Some of this information is obviously more likely to be the subject of requests for information than others. If an auditor has good reason to expect a request, it may be sensible to seek the views of the relevant third parties as to disclosure in advance of any requests.
- Public audit bodies may be able to reduce the number of individual requests for information which they receive by maximising the amount of information covered by the publication schemes.