

## Freedom of Information Act

### The exemption for information intended for future publication

The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities. This is part of a series of guidance notes to help public authorities understand their obligations and to promote good practice.

This guidance will assist public authorities in applying the exemption in section 22 of the FOIA for information intended for future publication. It replaces Awareness Guidance No 7.

#### Overview

There are circumstances when it is reasonable and correct for public authorities to delay the provision of information until it is made generally available through publication.

#### What does the Act say?

Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:

- the public authority holds it with a view to its publication;
- the public authority or another person intends to publish the information at some future date, whether determined or not; and
- in all the circumstances it is reasonable to withhold the information prior to publication.

Section 22 provides a qualified exemption, so public authorities must consider whether the public interest in applying the exemption is greater than the public interest in providing the information.

Each part of the exemption will be covered in turn.

#### At the time the request for information was made

Section 22 applies only when the information is held with a view to publication at the time the request for it was received. If a

decision to publish is not made until after the request has been made, the exemption cannot apply.

**Example:**

The public authority refused to release an invitation to tender document, indicating that it would be published once the franchise had been awarded. Once a decision about the award of the franchise was made the information was provided. On investigating the complaint it became apparent that the authority had no settled intention to publish the information at the time the request was received. As the authority had not made a decision to publish this information prior to the request, the Information Commissioner found that the exemption in section 22 did not apply.

[ICO Decision Notice FS50081543](#)

### It holds the information

As always, it is important to keep in mind that the FOIA is about the release of information, not the release of documents. Documents can go through many drafts before they are finalised. If the intention or expectation, in producing any one of those drafts, is to publish the information in it, the exemption can be considered. Data may be collected in separate files or from separate locations prior to collation or comparison. If the intention or settled expectation, in collecting the information, is to publish it after collation or comparison, the exemption can be considered.

If you want further assistance on when information is held there is [guidance on our website](#).

### With a view to publication

“With a view to” indicates that an intention has been made to publish the information, or, at the very least, that information is held in the settled expectation that it will be published.

Publication requires the information to be generally available to the public. It is not enough if the intention is to make it available to a restricted audience.

Publication is often understood to indicate that the information will be made available in a form that can be reproduced or circulated, for example in print or online. However, it is not

restricted to making the information available in this way. It would also include making it available on inspection or, in some circumstances through speech. Information in picture form will be covered if the picture is to be made available through public display. Notes made in preparation of a speech will be covered if the speech is to be publicly broadcast. What is important is that the intention is to make the information available to the general public.

If during the course of the preparation of information for publication some material is rejected, the exemption will no longer cover the rejected material. The authority will no longer hold that material with a view to publication.

**Example:**

The public authority had refused a request for prison-related information about several notorious convicted murderers. One of the exemptions upon which it relied was s22, on the grounds that it intended to place **some** of the requested information into the public domain via The National Archives (TNA). To do this, it planned to review all the information prior to transfer to TNA at some future date. The Commissioner rejected the authority's view that s22 was engaged. Although it was clear that some of the information was destined for future publication, the authority could not specify which information that was. It therefore could not be said that, as at the date of the request, the authority had an intention or settled expectation that all the information for which it had claimed section 22 would be published.

ICO Decision Notice [FS0121803](#)

At some future date (whether determined or not)

The date of publication does not need to be definite for the exemption to apply. There will be some information that is compiled as part of a scheduled procedure which includes a planned publication date. The date of publication of other material may be less certain, for example:

- a deadline may be provided, but publication could be at any time before then;
- publication will take place once an information gathering exercise has been completed; or

- by reference to other related events.

As long as a decision has been made that the information requested will be published at some time in the future, or there is a settled expectation that this will happen, the exemption can be considered.

### Publication by the public authority or another person

It is not necessary for publication to be planned by the public authority receiving the request. For example, draft documents or completed reports may be circulated from one public authority to others for comment or consultation. If the body producing the draft or report intends or expects to publish the information contained in it, the exemption will apply to requests received by all authorities holding the information.

### Reasonable, in all the circumstances, to withhold the information prior to publication

There is some overlap between the factors to be taken into account in deciding what is reasonable and those which are relevant in balancing the public interest test. A public authority has, however, first to determine whether or not it is reasonable in all the circumstances to withhold the information in order to apply the exemption, before considering whether there is a public benefit in providing the information prior to publication.

So public authorities should first give separate consideration to whether or not it is:

- sensible,
- in line with accepted practices, and
- fair to all concerned

to withhold the information prior to publication.

In considering what is reasonable in all the circumstances, a public authority may also wish to consider:

- Is it the right decision to manage the availability of the information by planning and controlling its publication?
- Is it necessary to avoid any advantage that would be obtained by the requester in obtaining the information prior to general publication?
- Does the timetable properly require internal or limited consideration of the information prior to its public release?

- Having made the decision to publish the information, are there real difficulties in extracting the information prior to publication?
- Is this information that should be available through the publication scheme?

**Example:**

A complainant had requested a copy of a PhD thesis that had been submitted to a university. At the time, the thesis was embargoed from publication since it was the subject of a commercial publishing contract. The university refused the request, applying s22(1) and s43(2). On internal review, the university explained that the thesis would be made available in its library once the book based on it was published (or if it failed to be published). The complainant argued that there was no settled intention by the university to publish the information. The Commissioner disagreed with this view. He also found that it was reasonable in the circumstances of this case for the university to delay publication since it had agreed to the embargo, and disclosure of the thesis would be unfair to the author since it would be likely to place her in breach of her publishing contract. In addition, premature disclosure of the thesis would be likely to undermine the commercial impact of the book. Finally, he found that it was balanced and reasonable for the university to limit the delay in publication of the thesis to the time of publication of the book. The Commissioner decided that the balance of the public interest favoured maintenance of the s22 exemption in these circumstances.

[ICO Decision Notice FS50349323](#)

## The public interest test

If information falls within the exemption in section 22 it is still necessary to consider whether the public interest in maintaining the exemption is greater than the public interest in providing the information. There will be circumstances where it is reasonable in all the circumstances to withhold the information, but the public benefit in maintaining the exemption is not greater than the public benefit in disclosure.

**Example:**

The Commissioner found that it was reasonable to withhold information held by a public authority in a consultant's report where it was the intention of another authority to publish the information at a later date. However, in the circumstances of the situation it was found that the public interest in maintaining the exemption did not outweigh the public interest in providing the information.

[ICO Decision Notice FS50123357](#)

Given that the exemption applies only where there is an intention to release information, any harm that might result from the release of the information itself is only relevant if it results from early disclosure ahead of the scheduled release date. The factors to be taken into account in considering the public interest in maintaining the exemption will relate to the timing of the release of the information. The public interest in releasing the information will often be stronger if the planned date of publication is far in the future, or where there is no firm indication of a likely date of publication.

**Example**

....the balance of the public interest must focus on whether in the circumstances of the case it would be in the public interest for the public authority to keep to its original timetable for disclosure or whether in the circumstances of the case the public interest would warrant an earlier disclosure. In the circumstances, it was found to be of greater public benefit to ensure that **all** the information about MPs' expenses (which went beyond the information requested in this particular case) was disclosed by the HoC as soon as practicably possible, even if this was at the expense of delaying the provision of the relatively small proportion of that information covered by this specific request.

[ICO Decision Notice FS50209662](#)

**The duty to confirm or deny**

There is no duty to confirm whether or not information is held if in doing so information that would be exempt from release under section 22(1) of the FOIA, whether or not already

recorded, would be disclosed. Subject to this, a public authority need not confirm whether or not it holds information when:

- if it did hold the information, it would be held at the date of request with a view to publication;
- if it did hold the information, it would be reasonable to withhold the information until the date of publication; and
- in all the circumstances of the case, the public interest in withholding whether or not information is held is greater than the public interest in disclosing whether or not the information is held.

### The position following publication

Once information has been published, the exemption in section 22 will no longer apply to any of the same information contained in earlier drafts or other documents.

### Good Practice

As part of their normal business operations and in accordance with the general principles of openness and accountability, public authorities should be giving consideration to the general release of information of public interest. This pro-active publication of information is required for the proper operation of a publication scheme. Properly identifying material to be published and timetabling publication so that it is available to the public at the earliest opportunity should be central to the operations of all public authorities.

In accordance with the section 45 Code of Practice, if the information requested is due to be published by a third party, it will be good practice to consult that person or body. The third party will be in a better position to advise whether or not it is reasonable to withhold provision of the information prior to publication and to advise on public interest factors.

If you apply this exemption, we consider that it would be good practice to provide a requester with a likely publication date. If a decision is subsequently made that the information will not be published, the requester should be informed and asked if they wish to submit their request again.

If a public authority decides that information due to be published in the future should be provided in response to a request, it should consider making it generally available by bringing forward the publication date. Where the exemption is

applied, it may in some circumstances be necessary to consider if the public interest would be better served by bringing forward the proposed date of publication.

## Environmental Information

If the request is for environmental information its provision is to be considered in accordance with the Environmental Information Regulations 2004 (the EIR). There is no direct equivalent to section 22 of the FOIA in the EIR, but the exceptions in regulation 12(4)(d) – material in the course of completion, unfinished documents and incomplete data – and regulation 12(4)(e) – internal communications – may apply.

## More information

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunal and courts on freedom of information cases. It is a guide to our general recommended approach to this area, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please contact us.

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Website: [www.ico.gov.uk](http://www.ico.gov.uk)