



Freedom of Information Act Awareness Guidance No. 19

Health and Safety

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.

This guidance considers section 38 of the Act, which relates to the exemption from the duty to provide information if its disclosure under the Act would, or would be likely to endanger health and safety.

A) WHAT DOES THE ACT SAY?

Section 38 provides an exemption from disclosing information if such disclosure would endanger *any* individual (including the applicant, the supplier of the information or anyone else). The exemption does not necessarily deal with what are commonly thought of as health and safety matters such as the process of ascertaining the cause of an accident under health and safety legislation. (The latter may be covered by the exemption at section 31(e) relating to law enforcement – see Awareness Guidance 17.)

In particular the section provides that information is exempt if its disclosure under the Act would, or would be likely to

- endanger the physical or mental health of any individual, or
- endanger the safety of any individual.

Section 38 is a qualified exemption. This means that even if information is exempt, a public authority is under a duty to consider whether disclosure should nevertheless be made in the public interest.

B) WHAT INFORMATION IS COVERED?

Insofar as the information under request involves living individuals it will be covered by section 40 relating to personal information. The focus of section 38 will be on other information whose disclosure might pose a risk and this may include:

- Information about sites of controversial scientific research which may be targets for sabotage. There may be well founded fears that if the location of such sites were disclosed to individuals or groups opposed to the research there would be risks to the physical safety of staff;
- Information relating to the dead (not therefore covered by the personal information exemption) whose disclosure might endanger the mental health of surviving relatives;
- Information whose disclosure might have an adverse effect on public health.

These examples are discussed in greater detail in the rest of this guidance.

C) THE PREJUDICE TEST

Unlike the other exemptions in the Act subject to the prejudice test, the word “endanger” is used in section 38 rather than the word “prejudice”. The word “endanger” is perhaps used because it is more meaningful in the context of the individual than “prejudice.” In any event, the Commissioner does not consider that the use of the term “endanger” represents a departure from the test of prejudice to which section 38 is subject.

There is an obvious interrelation between physical health and safety, and in practice it may be convenient to think of physical health with medical matters and physical safety with the risk of accident and the security of individuals. Judging whether there might be a risk to physical health or safety is unlikely to be a particularly technical matter.

Risks to mental health may be more difficult to judge. However, it would be a mistake to equate danger to mental health with a risk of distress and the Commissioner considers that the endangerment of mental health implies that disclosure might lead to or exacerbate an existing mental illness or psychological disorder. Further advice on how in practice to assess and to demonstrate the risk to mental health is given in section G) below.

The Information Commissioner takes the view that the phrase ‘would or would be likely’ to prejudice or endanger means that there should be evidence of a significant risk to the physical or mental health or the safety of any individual. Further guidance on the prejudice test is given in Awareness Guidance No 20.

D) THE DUTY TO CONFIRM OR DENY

The **right to know** places two related duties on public authorities:

- the duty to confirm or deny that the information requested is held and, if it is,
- the duty to communicate the information to the applicant

Both duties must be considered separately, although if it is decided that there is no duty to confirm or deny the holding of information then there will be no duty to provide the information to the applicant.

Although the number of occasions when a public authority will be justified in neither confirming nor denying that it holds the information requested may not be very large, the Act acknowledges that such occasions may arise.

For instance, a public authority considering converting hostels under its management into residential centres for convicted offenders may wish neither to confirm nor deny that it holds such information. The safety of existing residents may be endangered if the information was disclosed that hostels were being considered for conversion. In other words, even confirming or denying that such information was held may endanger public safety, as any or all hostels managed by the public authority may be vulnerable to attack.

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

E) THE PUBLIC INTEREST TEST

Section 38 is a qualified exemption. This means that even if the information requested is exempt the public authority must decide whether the public interest in maintaining the exemption outweighs the public interest in its disclosure. In other words the harm that would be likely to be caused to any individual by the disclosure would be greater than the public interest in the disclosure.

Although the Act does not list the factors that would favour disclosure, the Information Commissioner has suggested that among the factors that would weigh in favour of disclosure are:

- Furthering the understanding 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, companies and other bodies to understand decisions made by public authorities affecting their lives.
- Bringing to light information affecting public health and safety.

In the example given above, the risk to the safety of residents would have to be weighed against the benefit that disclosure might bring in terms of informing public debate about the proposal to convert a hostel into a centre for convicted offenders. A further example of the application of the public interest test is given here.

A health authority is asked to disclose details of research which it has commissioned into the safety of a particular medication. Disclosure may endanger public safety if the disclosure caused people to discontinue taking the medication. Nevertheless, there may be a stronger overall public interest in disclosing the information to enable wider public debate about how health authorities ensure the safety of medicines that are prescribed to the public.

Applying the public interest test means weighing the harm that is identified in a particular exemption against the wider public interest that may be served by disclosure. The test must be applied on a case by case basis.

F) INTERACTION WITH OTHER EXEMPTIONS

Public authorities wishing to rely on this exemption should consider whether there is an interaction between section 38 and other exemptions in the Act. Public authorities should identify the most appropriate exemption or exemptions which apply to the information requested in each case and provide the fullest response to the applicant that details which exemption or exemptions apply to the information requested. It will not be appropriate for a public authority to apply all of the exemptions in turn with the aim of withholding information.

The overlap with the exemption relating to personal information has already been mentioned. It may also be appropriate to consider the law enforcement exemption in cases where disclosure might lead to an attack on an individual. In extreme cases it may be appropriate to consider the national security exemption.

G) ASSESSING THE RISK TO THE MENTAL HEALTH OF ANY PERSON

As mentioned above, it would be wrong to equate endangerment of mental health with the causing of distress. There are some obvious difficulties for FOI officers and other officials who have no medical training or any particular knowledge of the individual whose health might be endangered by a disclosure in judging whether it is legitimate to rely upon this part of the exemption. This difficulty is not, however, insuperable.

For instance a request may be received for the police photographs of a murder scene. The public authority may fear that disclosure might endanger the mental health of a surviving relative of the victim.

The first step may be for the authority to consider whether it holds any information as to surviving relatives and, if so, whether it has any particular information which would lead it to think there was a risk to the mental health of

a survivor. This information might take the form of medical or social work reports.

Assuming that no information is held, or that the information held is not conclusive, the authority may consider taking advice from an expert or other suitably qualified person who may be able to advise upon the possible effect of disclosure. This need not be a medical opinion of someone who has treated the relative, although in some cases that may be appropriate. However it should be an authoritative opinion upon which the authority is able to rely in the event of an appeal against refusal.

Having considered the impact of the disclosure, the public authority must also consider the public interest in disclosure. The possible risk to the mental health of a surviving relative in disclosure would have to be weighed against the legitimate interest of the survivor himself or of the other family members understanding their personal circumstances or in exceptional cases of the wider public in understanding the details of a criminal case.

In refusing a request for information, the public authority would not necessarily be called upon to disclose its precise grounds for refusal or the content of the opinion which it had received, particularly if to do so would be to breach medical confidentiality. However, in the event of a complaint to the Commissioner, the authority would normally be expected to demonstrate that it had obtained authoritative opinion justifying its reliance on the exemption. (The Commissioner would, of course, be under a duty not to disclose any confidential information he had received to the complainant or a third party.)

H) SUMMARY AND PRACTICAL ISSUES

- Information may be exempt under section 38 if its disclosure under the Act would, or would be likely to endanger the physical or mental health of any individual or the safety of any individual.
- The **right to know** places two related duties on public authorities. The duty to confirm or deny that the information requested is held and, if it is, the duty to communicate the information to the applicant. Both duties must be considered separately, although if it is decided that there is no duty to confirm or deny the holding of information then there will be no duty to provide the information to the applicant.
- Public authorities must, however, demonstrate that the disclosure of the information requested would or would be likely to endanger the physical or mental health or the safety of any individual. In addition they must consider whether the public interest in withholding the information outweighs the public interest in its disclosure.
- The Commissioner advises that, if a public authority wishes to withhold information because it poses a risk to mental health, it should consider obtaining an expert opinion confirming that the disclosure of the information would be likely to endanger the mental health of the applicant or any other individual.

- Public authorities may be able to reduce the risk of endangerment to the mental health of an applicant for information (assuming that he or she is the person who may be adversely affected) by explaining the possible risks in advance and giving an opportunity to reconsider the request or by encouraging the applicant to have another person present when information is given. In some cases it may be appropriate to offer counselling.
- Public authorities wishing to rely on the exemption at section 38 should consider whether there is an interaction between it and other exemptions in the Act. Public authorities should identify the most appropriate exemption or exemptions which apply to the information requested, in each case.