



Freedom of Information Act Awareness Guidance No 20

Prejudice & Adverse Affect

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 (FoIA) and the Environmental Information Regulations 2004 (EIR). The aim is to introduce some of the key concepts in the legislation 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, in Part 1, we look at the test of prejudice which features in a number of the exemptions in the Freedom of Information Act and, in Part 2, the equivalent provision, the adverse affect test, in the EIR.

PART 1 – FREEDOM OF INFORMATION ACT

A) WHAT ARE THE DIFFERENT EXEMPTION TYPES?

The right to know is laid out in section 1(1)(b) of the FoIA. The exemptions from the right are then laid out in Part 2. They can be divided into two types - those which are and those which are not subject to the public interest test. Those exemptions which are not subject to the public interest test are called absolute exemptions and are listed in section 2(3) of the Act. Further information on the public interest test can be found in Awareness Guidance Number 3.

The exemptions subject to the test are known as qualified exemptions. These can be further divided into class-based and prejudice-based exemptions. Class-based exemptions are those in which it is assumed that disclosure of information of a certain kind, laid out in the section, will be harmful. For whole classes of information, in other words, some sort of harm is presupposed and there is no requirement on the part of the public authority to show what that harm might be. For instance, there is a class-based exemption for information intended for future

publication. In order to rely upon the exemption it is not necessary to demonstrate any harm, merely to show that the information requested is intended for publication.

B) WHICH EXEMPTIONS ARE PREJUDICE-BASED?

In the main, the prejudice-based exemptions share the phrase “would, or would be likely to, prejudice”. The sections in which this phrase appears are:

- s26 - Defence
- s27(1) - International relations - s27(2) and s27(3) are class based
- s28 - Relations within the United Kingdom
- s29 - The economy
- s31 - Law enforcement
- s33 - Audit functions
- s43(1) - Commercial interests (s43(2) - trade secrets - is class based)

Additionally, two sections use alternative words for “prejudice”. These are:

- s36 – where in (2)(b) it reads “would, or would be likely to, inhibit ... the free and frank provision of advice etc”
- s38 - Health and safety “would, or would be likely, to endanger”

These exemptions are obviously of similar type to those above. The different wording is simply due to the subject and phrases that follow, and does not signify anything more. Detailed discussion on these sections is available in the ICO Awareness and Casework Guidance series.

Finally, there is the national security exemption laid out in s.24 of the Act. The relevant words are as follows:

“information.....is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security”

Although in this case it is clear that the phrasing is quite different, as with the other exemptions of this kind, the public authority is required to prove the detrimental effect of disclosing requested information (here showing how disclosure would harm - or “prejudice” the purpose of - safeguarding national security). Again, separate guidance on this exemption is available.

a) How do the prejudice-based exemptions work?

There are two issues that need to be considered with prejudice-based exemptions. Firstly, it is necessary to establish the nature of the prejudice (or

other stated harm) that might result from disclosure of the information requested, and secondly, if prejudice (harm) is not certain, to determine the likelihood of it occurring.

b) What does prejudice mean?

The word 'prejudice' is not defined in the Act, although it is common in other legislation. During Parliamentary debates, it was suggested that the key term in the non-class-based exemptions should be 'harm', but it was recognised that the use of 'prejudice' elsewhere, particularly in the Data Protection Act, supported its use in Freedom of Information.

In legal terminology, prejudice is commonly understood to mean harm and the Information Commissioner regards them as being equivalent. So, when considering how disclosure of information would prejudice the subject of the exemption being claimed, the public authority may find it more helpful to consider issues of harm or damage.

Although prejudice need not be substantial, the Commissioner expects that it be more than trivial. Strictly, the degree of prejudice is not specified, so any level of prejudice might be argued. However, public authorities should bear in mind that the less significant the prejudice is shown to be, the higher the chance of the public interest falling in favour of disclosure.

c) How likely is likely?

The words "or would be likely to" allows for the chance of prejudice to be less than completely certain, as would be the case if the Act had only allowed exemptions where disclosure "would prejudice".

The phrase "likely to prejudice" has been considered by the courts in the case of R (on the application of Alan Lord) and The Secretary of State for the Home Department. Although this case concerns the Data Protection Act, the Commissioner regards this interpretation as persuasive. The judgment reads:

"Likely connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. 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."

In other words, the probability of prejudice occurring need not be more likely than not, but there should certainly be substantially more than a remote possibility. Once again, it will be advisable to consider the issue of public interest, as the degree of likelihood may well have an impact on whether or not disclosure of information would be required as a result of the public interest test.

PART 2 – ENVIRONMENTAL INFORMATION REGULATIONS

A) WHAT IS THE DIFFERENCE BETWEEN THE ACT AND THE EIR?

The EIR have exceptions rather than exemptions. Unlike the Act, all are subject to the public interest test. Like the exemptions in the Act, however, the exceptions may be divided into two groups: the first class based and the second subject to “a test of adverse affect”. This is very similar, though not identical to the prejudice test.

B) WHICH EIR EXCEPTIONS CONTAIN THE ADVERSE AFFECT TEST?

The exceptions subject to the adverse affect test are listed in Regulation 12(5) as follows:

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person—
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority,
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it, and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

C) HOW DOES THE ADVERSE AFFECT TEST WORK?

Like “prejudice”, “adverse affect” can be regarded as working as a harm test. However, whereas the Act provides exemptions not only in those cases where

prejudice **would** occur but also those where prejudice **would be likely** to occur, the adverse affect test provides exceptions only in those cases where an adverse affect **would** arise. In other words, so far as environmental information is concerned, in order to engage an exception, some harm must be certain rather than merely likely. This is a significant difference.