



Freedom of Information Act Awareness Guidance No 3

The Public Interest Test

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). The aim is to introduce some of the key concepts of FOIA and to suggest the approaches that may be taken in response to information requests.

The public interest lies at the heart of FOIA and readers should note that this guidance is simply a starting point.

What does the Act say?

Section 1 of FOIA sets out the rights of any person making a request for information to a public authority. 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

In principle both these rights must be considered separately and, when applying the public interest test, consideration should be given first to whether it is right to confirm or deny the existence of information and second to whether that information should be supplied. In practice, most of the time the two questions will merge and for the purposes of this awareness guidance, the two questions are treated as a single **right to know**.

Section 2 then sets out the circumstances under which a public authority may refuse a request. In broad terms these are as follows:

- Absolute exemptions. These are cases where the right to know is wholly disapplied. In some cases there is no legal right of access at all, for instance information supplied by or relating to bodies dealing with security matters or information covered by parliamentary privilege. In other cases, for instance information available to the applicant by other means or personal information relating to the applicant, it may be possible to obtain the information by alternative means although not under FOIA.
- Qualified exemptions. These are cases where a public authority, having identified a possible exemption, must consider whether the public interest in maintaining the exemption is greater than that in confirming or denying the existence of the information requested and providing the information to the applicant.

Some of the exemptions in FOIA are class exemptions and some prejudice based. Class exemptions are designed to give protection to all information falling within a particular category, for instance, information subject to legal professional privilege. Prejudice-based exemptions only come into force if a

particular disclosure would prejudice the purpose of the exemption, for instance prejudice to international relations. The important thing to note is that both class and prejudice based exemptions are subject to the public interest test unless FOIA states that they are absolute exemptions. All the exemptions are listed in Appendix 1. The public interest only needs to be considered where there is an exemption and that exemption is qualified.

A) WHAT IS THE “PUBLIC INTEREST”?

It is often suggested that the fact that the term “the public interest” is not defined in FOIA leads to difficulty. This should not be the case. From time to time weighing competing interests may be difficult. However, this does not mean that the nature of the task facing a public authority when applying the public interest test is unclear. In effect something “in the public interest” is simply something which serves the interests of the public. When applying the test, the public authority is simply deciding whether in any particular case it serves the interests of the public better to withhold or to disclose information. The following examples may illustrate the point. Section 31 of FOIA exempts information whose disclosure would, or would be likely to prejudice the prevention or detection of crime or the apprehension or prosecution of offenders.

A request is received by a police force about the relative detection rates for burglaries in different areas of a city. The police may consider that by responding to the request there is some risk that criminals may be able to make use of the information in planning crimes. It is therefore relevant to at least consider the exemption. However, the risk of assistance being given to burglars must be weighed against the general public interest in openness, important aspects of which include promoting accountability and increasing participation in public debate about matters of public policy such as policing.

A second request is for information about the number of police officers allocated to guarding visiting dignitaries. In this case there is the same risk that supplying the information might assist criminals. There is also the same public interest in openness and accountability. However, the police may argue that the risk presented in the second case is considerably stronger than in the first.

B) THINGS TO BE IGNORED WHEN APPLYING THE PUBLIC INTEREST TEST

The question of where the public interest lies has often been considered by the courts in newspaper cases, particularly where an individual or organisation attempts to prevent publication of a story. The courts have often distinguished between things which are in the public interest from things which merely interest the public. It will be helpful to bear the distinction in mind.

It is also important to bear in mind that the competing interests to be considered are the public interest favouring disclosure against the public (rather than private) interest favouring the withholding of information. There

will often be a **private** interest in withholding information which would reveal incompetence on the part of or corruption within the public authority or which would simply cause embarrassment to the authority. However, the public interest will favour accountability and good administration and it is this interest that must be weighed against the public interest in not disclosing the information. Of course, there will be many occasions when public and private interests coincide. For instance there is often both a private and a public interest in the protection of legal professional privilege: a private interest in that the unauthorised disclosure of information held by a solicitor may damage the client, and a public interest, in that it is in the interests of society as a whole that there is access to justice and a fair trial.

It may sometimes be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete (for instance because the information consists of a policy recommendation that was not followed). Neither of these are good grounds for refusal of a request. If an authority fears that information disclosed may be misleading, the solution is to give some explanation or to put the information into a proper context rather than to withhold it.

C) FACTORS IN FAVOUR OF THE DISCLOSURE OF INFORMATION

There is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. Setting out the considerations for a public authority when adopting or reviewing its publication scheme, FOIA requires that

“... a public authority shall have regard to the public interest –
(a) in allowing public access to information held by the authority, and
(b) in the publication of reasons for decision held by the authority.”

It may be helpful to think about why openness should be regarded as being for the public good. In the Introduction to the Freedom of Information Act 2000, the Commissioner lists the following public interest factors that would encourage the disclosure of information:

- furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority.
- promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.
- promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for money that is public. Disclosure of information as to gifts and expenses may

also assure the public of the personal probity of elected leaders and officials.

- 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 prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.

This list is, of course, not exhaustive and there may be other factors which should be taken into account depending upon the request for information. For instance, the disclosure of information may contribute towards scientific advancements, ensure the better operation of financial and currency markets or assist in the access to justice and other fundamental rights.

D) FACTORS AGAINST THE DISCLOSURE OF INFORMATION

The main factors counting against the disclosure of information are those which are set out in the exemptions themselves. For instance, there is an obvious public interest in national defence, maintaining good international relations and law enforcement. If disclosure of information would adversely affect these matters, then it is relevant to consider the exemptions to weigh the possible adverse effect of disclosure against the positive benefit of openness.

There may, however, be other, additional factors to take into account once it has been established that at least one of the exemptions has been engaged. Consideration of the European Convention on Human Rights, for instance may lead to the conclusion that information should not be disclosed because it might prejudice the right to a fair trial.

E) ASSISTANCE IN THINKING ABOUT THE PUBLIC INTEREST TEST

A public interest test is by no means an unusual feature in freedom of information legislation. On the contrary, virtually everywhere there is freedom of information legislation there is a public interest test. Similar or identical factors to those listed above can be found in the case law from many other countries. For UK public authorities, the most useful case law is from decisions of the Information Tribunal. However, it may also be helpful to consider case law from other common law jurisdictions, in particular, Australia, Canada, Ireland and New Zealand. These cases should not be followed slavishly, not least because there are some important differences in the legislation in different countries.

It may also be helpful in certain circumstances to consider any decisions made by the Parliamentary Ombudsman when considering complaints under the Open Government Code. Although the Code is not statutory and applies

to a much smaller number of public authorities, the public interest test applied by the Ombudsman is identical to that required under FOIA.

F) PRACTICAL ISSUES

a) Attempt to anticipate likely requests

Having done this it will be easier to identify likely exemptions and, therefore the areas in which the public interest will arise. There are a number of useful steps which public authorities can take, including:

- analysing the requests for comment and other information which you receive from the media and thinking about those which have caused you difficulty;
- analysing the areas of activity which give rise to complaints: it is likely that many requests will arise in the context of other disputes between public authorities, the public, suppliers etc.;
- mapping functions onto the exemptions. Although FOIA contains 23 exemptions, it is highly unlikely that any public authority will need to rely upon more than a few of them.

b) Devise policies as to what matters to refer to decision makers

Identifying the likely types of request for information, the possible exemptions that may be relevant and some of the public interest questions that will arise should facilitate the establishment of appropriate procedures for dealing with requests. In other jurisdictions where freedom of information requests must be labelled as such, it is common to refer questions of disclosure or non-disclosure to a more senior person referred to as a “decision maker”. Requests under FOIA do not have to be labelled. However, careful consideration of the public interest issues that are likely to arise may enable authorities to produce guidance for their staff as to what sorts of requests may be handled locally and which need to be referred to a more senior member of staff.

c) Consider case precedent

See above for details of case precedent and cases considered in other jurisdictions and by the Parliamentary Commissioner. As will be apparent from this guidance, in many instances the public interest will only be understood in the context of other exemptions. Readers are therefore directed to any guidance published by the Commissioner on the exemptions in FOIA which contain advice on the public interest test in particular contexts.

d) Aim for a change of culture

FOIA is designed to change the default position from **the need to know** to **the right to know**. Embracing the new culture of openness will involve challenging the way in which things have been done in the past. This may involve a review of how protective marking systems are operated in practice, review of the circumstances under which confidentiality clauses are accepted

in dealings with private sector suppliers, or taking a fresh look at how the formulation of policy can be opened up to greater public scrutiny. The important point to grasp is that the public interest does not have a fixed meaning and that FOIA is designed to shift the balance in favour of greater openness.

APPENDIX 1: THE EXEMPTIONS

a) Qualified

- Information intended for future publication (s.22)
- National security (s.24) (This exemption should be read in conjunction with s.23 – “information supplied by, or relating to, bodies dealing with security matters”)
- Defence (s.26)
- International relations (s.27)
- Relations within the UK (s.28)
- The economy (s.29)
- Investigations and proceedings (s.30)
- Law enforcement (s.31)
- Audit functions (s.33)
- Formulation of government policy (s.35)
- Prejudice to effective conduct of public affairs (s.36)
- Communications with her Majesty (s.37)
- Health and safety (s.38)
- Some personal information (s.40).
- Legal professional privilege (s.42)
- Commercial interests (s.43)

b) Absolute

- Information accessible by other means (s.21)
- Information supplied by or relating to, bodies dealing with security matters (s.23)
- Court records (s.32)
- Parliamentary privilege (s.34)
- Personal information (s.40)
- Information provided in confidence (s.41)
- Information whose disclosure is prohibited by law (s.44)

More information

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

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