



Information Commissioner's Office  
Promoting public access to official information  
and protecting your personal information

## Freedom of Information Act Awareness Guidance No 9

### Information contained in court records

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This guidance is currently under review. As such, if you have any questions about section 32 of the Act please contact the Information Commissioner's Office for advice:

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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 32 of the Act, which relates to the exemption for information contained in a court record or a document created for the purpose of a statutory inquiry or arbitration.

#### **A) What does the Act say?**

The information covered by this section of the Act is subject to an absolute exemption. This means that if a request is received for information covered by the section there is neither a duty to disclose it nor to confirm or deny that it is held. Moreover there is no need to consider whether there might be a stronger public interest in making the disclosure despite the existence of an exemption. In other words, information is either exempt or it is not.

The information covered is that which is held "only by virtue" of being contained in documents which have been:

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- filed with or otherwise placed in the custody of a court (or tribunal), or
- served upon or by a public authority, for the purposes of court proceedings (including inquests and post mortem examinations), or
- placed in the custody of a person conducting an inquiry or arbitration or the purposes of that inquiry or arbitration, or
- created by a court or member of the administrative staff for the purposes of court proceedings, or
- created by a person conducting an inquiry or arbitration for the purposes of that inquiry or arbitration.

The phrase, “only by virtue of,” implies that **if** the public authority also holds the information elsewhere it may not rely upon the exemption. For instance, a public authority may have a set of financial records which are the subject of litigation. If those records are held only for the purposes of litigation and are contained in court records, then they are exempt. However, if it also held the records for another business purpose then they would not be exempt.

It is important to remember that the proceedings for which the document covered by the exemption is held must actually have commenced. The exemption cannot be

stretched to cover proceedings which are merely contemplated although in such cases it may be possible to rely upon the exemption relating to legal professional privilege (see Awareness Guidance No 4).

This exemption cannot be used to refuse to confirm the existence of court proceedings or anything relating to litigation (or indeed the existence of an inquiry or arbitration). Either the legal professional privilege exemption or the laws of contempt should provide adequate protection against any harmful disclosure.

Finally it must be remembered that this is a time limited exemption which expires after 30 years when the documents containing previously exempt information become “historical records”.

## **B) Purpose and effect of the exemption**

The exemption is unusual in that it seeks not to protect the information which is covered in itself but rather to exempt from disclosure the fact that the information is contained in a court record or a document held for the purposes of an enquiry or arbitration. This is why, as in the example of financial records above, the exemption only applies to information which is held “only by virtue of” being contained in a court record. This is also the reason why subsection (3) of the exemption makes clear that there is no duty to confirm or deny the existence of information held as part of a court record or for the purposes of an inquiry or arbitration.

The thinking behind the exemption appears to be that it would be undesirable to interfere with the existing rules regarding access to/publication of information contained in court records or held for the purposes of inquiries or arbitration. These rules have been developed to ensure the right to a fair trial including the presumption of innocence. Broadly speaking, the effect of the rules is that a party to proceedings will have rights of access to information under the normal disclosure rules. Third parties, including the press, will have access to information which is made public in open court (and conversely no access to information which is subject to proceedings in private "in camera").

### **C) Who is likely to be able to claim the exemption?**

Courts and public inquiries are not public authorities for the purpose of the Act. This means that documents produced by administrative staff of the courts such as court listings (the schedules of the daily proceedings in courts) are not accessible under the Act since the staff are in fact acting on behalf of the Judge.

Courts and inquiries may be the responsibility public authorities such as government departments and local authorities. The latter are, of course, subject to the Act although it is unlikely that this will mean that they will hold any documents falling within the scope of the exemption.

Public authorities such as the police and the Legal Services Commission are more likely to hold such documents. It is to be expected that such authorities will develop their own internal guidance on core records. FOI officers for such authorities should clearly consult that guidance and take the advice of senior colleagues if in doubt about whether information requested by an applicant is covered by this exemption.

Public authorities who are parties to litigation are also likely to hold some information which may be covered by the exemption. If in doubt and in the absence of more detailed internal guidance, FOI officers may need to take legal advice or consult the courts themselves about whether information requested falls within this exemption.

### **D) Examples of records covered by the exemption**

Examples of court records covered by the exemption include witness statements, statements of case (particulars of claim, defence, counterclaim, defence to counterclaim and reply), and details of when and how a fine is paid, warrants issued by a magistrate at his home, indictment (charge) sheets and bail application sheets.

So far as inquiries are concerned, the key factor is whether or not they are governed by statute. It will often be useful, therefore, to look at the status of the

inquiry and its terms of reference. If in doubt, it is strongly recommended that FOI officers seek either the advice of the inquiry itself or of senior colleagues.

Likewise, information held for the purposes of arbitration is only exempt if the arbitration is statutory and governed by Part 1 of the Arbitration Act 1996 and, therefore, subject to a written arbitration agreement. Again, if the status of the arbitration is not certain, it is strongly recommended that FOI officers seek advice.

## **E) Key Issues for Implementation**

### **a) Duty to provide assistance**

Although this is an absolute exemption, it does not mean that requests for information contained in court and other records covered by the exemption can be ignored. On the contrary, section 16 of the Act places public authorities under an explicit duty to provide advice and assistance to applicants. In many cases, assuming that a public authority wishes to rely upon the exemption, it will be appropriate to refer the applicant to some other means by which the information requested may be obtained.

During the course of a trial, members of the public are often able to inspect documents presented to the court (although a court will normally refuse to allow this if it would compromise the interests of justice or the public interest, would reveal medical or other confidential information or would adversely affect the interests of children.) A hearing can be held in public or in private. If it is held in public members of the public can obtain a copy of a judgement or an order made but will have to pay a fee. If the hearing is held in private a member of the public who is not a party to the proceedings has to seek leave of the judge who gave the judgement or made the order.

The duty to provide assistance does not override the exemption from the duty to confirm or deny the holding of information (see above). It is likely that authorities will refer applicants to the courts mainly in those cases where the applicant is aware of the likely contents of the court record but where the authority believes that a decision about disclosure is one that should properly be left to the courts.

### **b) Further advice**

Advice is also available from the website of the [Department for Constitutional Affairs](#).