



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

Freedom of Information Act

The duty of confidence and the public interest

The Freedom of Information Act 2000 (FOIA) gives a right 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 explains to public authorities that even though the section 41 exemption for information provided in confidence is an absolute exemption, a public interest test may still need to be applied.

Overview

- Section 41 is an absolute exemption. This means that if the information falls within the exemption, there is no need to consider the public interest test under the FOIA.
- The common law duty of confidence contains an inherent public interest test which must be considered in order to decide if the information is exempt. However, some public authorities have assumed that because section 41 is an absolute exemption there is no consideration of the public interest at all when deciding to apply this exemption.

What does section 41 of the FOIA say?

Section 41 states that information will be exempt if it was obtained from another person or organisation and disclosure would result in a breach of confidence over which a person could take legal action (ie an actionable breach of confidence).

Section 2(3)(g) states this exemption is absolute. This means that if section 41 applies, a public authority does not have to apply a public interest test under the FOIA in order to withhold the information.

Actionable breaches of confidence

A breach of confidence will become actionable if:

- the information has the necessary quality of confidence;
- the information was given in circumstances under an obligation of confidence; and

- there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).

These issues and section 41 as a whole are explained further in our guidance entitled [Information provided in confidence: Awareness guidance 2](#).

However, there are certain situations when a breach of confidence is not actionable. Those situations are:

- If a person has provided consent for the disclosure of their information.
- If there is a legal requirement to disclose information.
- If it is in the public interest to disclose information.

How the public interest test is applied

The inherent public interest test in the duty of confidence is the reverse of that normally applied under the FOIA. This is because the FOIA public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

However, the public interest test within the duty of confidence assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.

Example: Lord Goff commented in *Attorney General v Guardian Newspapers (No 2)*[1990] 1 AC 109 that "... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure.". This case is cited in [Derry City Council v Information Commissioner \(EA/2006/0014; 11 December 2006\)](#) Tribunal decision.

Arguments in favour of disclosure:

- If it would highlight any misconduct, wrongdoing or risks to the public.

Example: An employee of a public authority which holds personal information on a large number of staff and members of the public discovers that its security measures are so poor that its information may easily be obtained by criminals. This means the public authority's staff and the public are potentially at significant risk of identity fraud. Therefore the employee decides to "whistle blow" on the issue despite being under a duty of confidence to their employer because they believe there is a legitimate public interest in breaching the duty in order to inform the public of the risk they are at.

- If it would promote openness and transparency.

Example: This view is supported by ICO Decision Notice [FS50093052](#) stating “The Commissioner recognises that there is an inherent public interest in public authorities being transparent in the decisions they take in order to promote accountability. If the background information to the decision making process is made public, there is a strong argument that this should improve the quality of future decisions and will ensure public authorities are acting appropriately”.

- If it would promote freedom of expression.

Example: Article 10 of the Human Rights Act 1998 (HRA), the right to freedom of expression, includes the freedom to receive and pass on information. The Tribunal in [Bluck v Information Commissioner and Epsom and St Helier University NHS Trust \(EA/2006/0090\) 17 September 2007](#) (the Bluck decision) cited a test of confidentiality for private information as set out in *Ash v McKennitt* [2006] EWCA Civ 1714 comprising of two questions, “First, is the information private in the sense that it is in principle protected by Article 8?... If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of the expression conferred on the publisher by Article 10”.

Arguments against disclosure:

- Disclosure of confidential information may undermine the principle of confidentiality. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.

Example: Patients need to have confidence that doctors will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients. This runs counter to the public interest as it could endanger the health of patients or, in the case of contagious diseases, the wider community.

This argument is cited in the [Bluck decision](#).

- There is a public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its statutory functions.

Example: This argument is supported by [S v Information Commissioner and The General Register Office \(EA/2006/0030\) 9 May 2007](#) Tribunal decision by stating “Having considered the types of information that the public do provide to the Registrars in confidence and are compelled to provide in law when coupled with the important statutory functions undertaken by Registrars, we are persuaded that the factors in favour of maintaining confidentiality strongly outweigh any public interest in disclosing the disputed information”.

- Disclosure of an individual's private personal information is an infringement of their privacy and there is a public interest in protecting the privacy of individuals.

Example: The importance of a right to privacy is recognised by the Article 8 of the HRA which says that "Everyone has a right to respect for his private and family life, his home and his correspondence." The courts must interpret domestic law, including the law of confidence, in a way that respects this right to privacy. So Article 8 considerations should be taken into account when determining whether information is confidential and are weighed against factors favouring disclosure.

This view is supported by ICO Decision Notice [FS50153967](#).

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, 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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