

Freedom of Information Act (2000) and Environmental Information Regulations (2004) Section 36 of the FOIA: What should be recorded when considering the exemption?

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The Freedom of Information Act 2000 (FOIA) gives rights 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 provides practical assistance in the application of section 36 FOIA, where releasing information would prejudice the effective conduct of public affairs. The guidance indicates what the Information Commissioner will look for when a public authority has refused to provide information on these grounds. It indicates how he will approach the investigation of a complaint in these circumstances and what he will need to see to be satisfied that the exemption has been considered properly.

Overview

This guidance indicates what we consider should be recorded when section 36 is considered. It covers:

- identification of the qualified person;
- evidence that the opinion has been expressed;
- correctly detailing what opinion has been expressed;
- recording the process by which the opinion was obtained; and
- recording the public interest test balancing exercise.

What does the Act say?

In summary, section 36 (2) of the FOIA exempts information when, in the reasonable opinion of the qualified person, providing it would or would be likely to prejudice:

- the maintenance of the convention, of the collective responsibility of Ministers of the Crown, the work of the Executive Committee of the Northern Ireland Assembly, or the work of the Cabinet of the Welsh Assembly Government;
- the free and frank provision of advice or exchange of views; or
- the effective conduct of public affairs.

This is a qualified exemption requiring consideration of the public interest test, except where the information is held by either House of Parliament.

If a certificate is signed by the qualified person in either House of Parliament, indicating that in his opinion disclosure of information held by either House would or would be likely to have any of the effects mentioned in section 36(2) of the FOIA, this opinion cannot be challenged.

Identification of the qualified person

The qualified person is the individual or body qualified to express an opinion under section 36 of the FOIA. They are qualified by one of two methods:

- by the provisions of section 36 itself (as amended); or,
- by a person designated to provide this qualification in accordance with the provisions of section 36.

The Ministry of Justice (MOJ) has published a list of public authorities, where a qualified person or body has been authorised. This list doesn't include all public authorities and is published on an archived webpage.

The Information Commissioner will use the Act and the list published by the MOJ as first points of reference for the identification of the qualified person.

If a public authority has a body or person authorised to act as the qualified person, and this does not appear in the Act or on the MOJ list, we may require confirmation that authorisation has been given. We would expect authorities to keep on file a record that authorisation has been given, so that this can be supplied to us in the event of any dispute.

Evidence that the opinion has been expressed

Only the qualified person or body can express the opinion. It is a function that cannot be delegated.

There is no procedure in the FOIA itself for recording the opinion of the qualified person except when it is done in accordance with section 36(7). Section 36(7) of the FOIA provides for a certificate of the opinion to be signed where it is done on behalf of either House of Parliament.

We consider it to be good practice for all public authorities to record fully:

- who expressed the opinion;
- the opinion that has been expressed;
- the process followed in seeking the opinion; and
- when this was done.

Where the authority itself is the qualified person, the principal decision making body of the authority should form the opinion and enter it in the minutes of the meeting.

Correctly detailing the opinion expressed

To indicate that it has been correctly considered, the opinion should be recorded by reference to the wording in section 36. It should include:

- which activity mentioned in section 36 is likely to be prejudiced; and
- why this activity is likely to be prejudiced.

These details need to be included in a refusal notice or in communicating the result of an internal review, unless the provision of these details would itself disclose exempt information. If the details would disclose exempt information, we would still expect a full record to be kept of the reasons for non disclosure so that they can be supplied to us in the event of a complaint.

Process

We consider it essential in all circumstances to make and keep a record of the process through which the opinion was sought and obtained. In most circumstances it

is necessary not only to demonstrate that the opinion is reasonable but that the process followed was also reasonable.

Where it can be shown that the process by which the opinion was obtained was thorough and reasonable, this can support, in the event of dispute, that the opinion itself is reasonable. Demonstrating that only relevant factors were taken into account will assist in showing that the opinion was reasonable.

If we are asked to consider a complaint, we will normally require confirmation that a record of the process followed by the public authority exists. This record should show, with any other relevant matters, that the qualified person considered:

- the information itself, or a summary or description of that information;
- arguments or recommendations in favour of applying section 36; and
- any contrary arguments.

It should also include a note of which factors were taken into account.

In summary, we will need to see what was put in front of the qualified person when they reached their opinion and what they took into account.

Public interest test

It is necessary to consider the public interest test for the exempt information, unless the exemption is being applied to information held by either House of Parliament. Anyone delegated with this task can conduct this balancing exercise on behalf of the public authority. The qualified person may wish to be involved in the exercise, but this is a matter for the internal arrangements of the authority.

The authority needs to record the factors taken into account in considering the public interest test and the weight attached to them. This should be included in a refusal notice, or the notice following an internal review, unless any of these details would themselves disclose exempt information. If this applies, we would still expect a record to be kept of the public interest test arguments so that they can be supplied to us in the event of a complaint.

The opportunity presented by an internal review

We expect public authorities to demonstrate their compliance with the FOIA by giving full and proper consideration to exemptions when a request is first received. If this is not done, breaches of the FOIA will occur.

An internal review of the decision does, however, present an opportunity to reconsider how the request was dealt with. If section 36 has not been previously considered, this can be done during the internal review. If section 36 has been applied and there have been flaws in the process leading to the opinion of the qualified person, the internal review provides an opportunity to correct them.

At internal review, it may not be practicable to ask the qualified person to review the opinion expressed, but it should always be possible to review the public interest arguments.

A full record of the review process should be kept. If fresh consideration is given to the application of section 36, either because it has not previously been considered or to correct flaws, we will normally require access to the record of these considerations in the same detail as previously mentioned.

Further recommendations

We recommend that all public authorities should have a standard procedure for placing matters before the qualified person, where their opinion is being sought. It may also assist public authorities, and will assist us when considering complaints, to use a standard system including a proforma to record the process. A proforma can operate as a check list to ensure that everything is properly considered and will provide a first point of reference should the matter be considered by us on complaint.

Other considerations

We have produced general guidance on the application of the exemption in section 36 [Effective conduct of public affairs](#) (AG25) and further guidance on the public interest test [Public interest test](#) (AG3) .

More information

This guidance will be reviewed 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 recommended approach to this area.

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

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