**Hanna and Dodd: McNae's Essential Law for Journalists 25th edition**

**Additional material for ch. 30: The Freedom of Information Act 2000**

*Section numbers from the book are used.*

**30.5 Exemptions**

Public authorities may refuse to supply information on various grounds – exemptions. The Information Commissioner’s Office website publishes guidance on these. See Useful Websites, below.

**30.5.1 Absolute exemptions**

Some exemptions are ‘absolute’ – the authority does not have to give a reason for refusing disclosure beyond stating that the exemption applies because of the nature of the information. An absolute exemption means that the authority does not have to carry out ‘a public interest test’ under the Act to decide if such information should be disclosed.

Absolute exemptions include:

Section 21 – information reasonably accessible by other means For example, if the requested information is already published online, the public authority is not required by the FoI Act to send it to a requester, but it must normally tell the requester where they can get it – for example, by providing a hyperlink to it.

Section 23 – information supplied to the public authority by or relating to bodies dealing with security matters For example, this exemption applies to information supplied by MI5, MI6 and GCHQ to another public authority, such as a Government Ministry. MI5, MI6 and GCHQ are not covered by the FoI Act, and so can refuse FoI requests.

Section 32 – court records Courts themselves are not covered by the Act, so can refuse FoI requests. This exemption covers documents held by a public authority because it is a litigant or an interested party in a court case – for example, copies of material filed with a court for the purposes of proceedings. It does not cover general statistics about the courts or crime held by the Ministry of Justice or Home Office, so FoI requests can successfully be made for these if they are not already published, or due to be published, and if no other exemption applies.

Section 40 – personal information The Act does not override data protection law. A public authority may decide that an FoI request encompasses exempt ‘personal data’. But it should consider whether deleting references which could identify an individual could allow disclosure of non-exempt information. Also, this exemption can only apply to information about people who are living; it cannot be used by a public authority to refuse to release information about people who have died.

Chapter 28 in the *McNae’s* book explains data protection law.

The Information Commissioner has made clear that when considering personal data issues, authorities should distinguish between ‘professional personal information’ such as staff job descriptions and details of their responsibilities and ‘private personal information’ such as sickness records.

Section 41 – information provided to the authority in confidence by another party This does not cover information which the public authority has generated itself, so does not cover any contract it has entered into.

**Remember!** The Information Tribunal (now called The First-tier Tribunal (Information Rights)) said that the section 40 or 41 exemptions are not as absolute as they first appear, because a public authority should apply a public interest test under data protection law and/or the law of confidence when deciding on disclosure. A requester should consider making that point to the authority if a request for information is refused because of a section 40 or 41 exemption. The ICO guidance to public authorities says of the section 41 exemption: ‘…you will still need to consider the public interest in disclosure, because the law of confidence recognises that a breach of confidence may not be actionable when there is an overriding public interest in disclosure.’

Section 44 – information the disclosure of which is forbidden by other law For example, the Information Tribunal upheld a ruling that the Independent Police Complaints Commission could not, because of a provision in the Police Act 1996, disclose under the FoI Act copies of case files relating to complaints against the police.

**30.5.2 Qualified exemptions**

The other exemptions are ‘qualified’ – the Act says information may be withheld only if the public interest in withholding it is greater than the public interest in disclosure. A public authority which declines to supply information in these categories must give reasons showing how it has applied the public interest test.

The Act does not define ‘public interest’. But in guidance in 2013 the Information Commissioner said public interest factors which should encourage public authorities to disclose information included:

• general arguments in favour of promoting transparency, accountability and participation;

• disclosure might enhance the quality of discussions and decision making generally;

• the balance might be tipped in favour of disclosure by financial issues – such as if the information requested involved a large amount of public money;

• the specific circumstances of the case and the content of the information requested in relation to those circumstances;

• the age of the information;

• the timing of a request, in respect of information relating to an investigation, may be relevant;

• the impact of disclosure upon individuals and/or the wider public.

See Useful Websites at the end of this chapter for this ICO guidance.

The Campaign for Freedom of Information has stressed the importance of applicants pursuing requests all the way to the First-tier Tribunal (Information Rights) if necessary, and not accepting a public authority’s initial refusal. Requestors should not assume that the Information Commissioner will automatically recognise the public interest case for disclosing information, and should raise it in appeal correspondence. But appeals take time, even when authorities have clearly misapplied absolute or qualified exemptions, as the Information Commissioner’s office is overworked and under-resourced.

Qualified exemptions include:

***Section 22*** – ***information intended for future publication*** The ICO guidance says: **‘**For the exemption in section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or “any other person” will publish it in future. This means that it must have a settled expectation that the information will be published at some future date…..The intention to publish must pre-date the request. This means that a public authority cannot, when it receives a request, attempt to give itself more time to provide the information by deciding to publish it in the future rather than provide it within the statutory time limit for answering a request.’

It is frustrating for journalists and other requesters that a public authority can use this exemption even if it has not decided the date on which the requested information will be published. But, remember, the authority must apply the public interest test in response to such a request.

***Section 22A – research information*** The ICO guidance explains that this exemption applies if the public authority holds the information as part of an ongoing programme of research; there is an intention by someone –whether an individual or organisation, private or public sector - to publish a report of the research; and disclosure of the information would or would be likely to prejudice the research programme, the interests of participants in the programme, or a public authority holding or intending to publish a report of the research. For example, universities may use this exemption for such research projects.

Section 24 – information which if disclosed is likely to prejudice national security This concerns information other than that already absolutely exempt under section 23.

Section 27 – information which if disclosed is likely to prejudice international relations, such as sensitive communications which public authorities in the UK have with other states, international organisations or organs of other states; the exchange of political views between states; UK policy and strategic positioning in relation to other states or to international organisations; diplomatic matters between states.

Section 31 – information held by an authority for law enforcement functions This is exempt if its disclosure would, or would be likely to, prejudice the prevention or detection of crime, the apprehension and prosecution of offenders, or the administration of justice. So details of when a speed camera at a particular site is active do not have to be disclosed as this would compromise the camera’s effect. But more general information, such as how many drivers a particular camera caught speeding on a particular day could be published.

Section 35 – information relating to formulation or development of government policy This exemption can protect, for example, information showing what has been said or written in discussions between Ministers and civil servants about what policies should be pursued or ditched. One purpose of the exemption is to help ensure such discussions are frank, because if all that is said in them could definitely be disclosed to the public, civil servants may be over-cautious in what they say or suggest about policy matters. But the First-tier Tribunal (Information Rights) has been robust in disapproving of some attempts to use this exemption. The older the information, the less sensitive it is as an indication of an authority’s policy options.

Section 36 – information the disclosure of which is likely to prejudice effective conduct of public affairs This exemption is controversial as it is so vague. Parliament intended it to cover material which did not fall into other categories but which, if disclosed, would damage a public authority’s ability to carry out its duties. FoI expert Heather Brooke says a public authority relying on it ‘is desperate and grasping at straws’.

Section 43 – commercial interests This covers trade secrets and information which, if disclosed, ‘would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it)’. For example, the exemption may be cited by a council to refuse an FoI request about what it paid for particular goods or services, or for the details of some other contract it has entered into with a commercial business. The ICO guidance to public authorities says: ‘It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage.’

**Case study**

In John Connor Press Associates v Information Commissioner (EA/2005/0005), the Information Tribunal held that the National Maritime Museum should have disclosed financial information concerning its purchase of a set of artworks. The Museum had argued that when it received the freelance news agency’s FoI request it was negotiating with another artist about another project, and its ability to ensure value for public money would have been prejudiced had financial details about the previous deal been released. The Tribunal held that no real and significant risk of such prejudice existed, partly because the deal under negotiation – which included payment for ‘performance art’ – differed in scope from the museum’s previous deal for artworks.

Useful Websites

**https://ico.org.uk**

Information Commissioner’s Office (ICO)

[**https://ico.org.uk/for-organisations/guide-to-freedom-of-information/**](https://ico.org.uk/for-organisations/guide-to-freedom-of-information/)

ICO guidance for public authorities on FoI matters

**https://ico.org.uk/media/for-organisations/documents/1183/the\_public\_interest\_test.pdf**

ICO guidance on the public interest test