

The Freedom of Information Act 2000

Chapter summary

The Freedom of Information (FoI) Act 2000 created the UK's first general right of access to information held by Government departments and public authorities. Use of this right has produced many exclusive stories, some about the highest reaches of Government. But FoI is bedevilled by bureaucratic delay and wide-ranging exemptions. This chapter deals with FoI law as it applies in England, Wales and Northern Ireland, and information access rights in the Environmental Information Regulations 2004.

37.1 Introduction to the Act

The Act gives people the right to require 'public authorities' to disclose information they might not otherwise publish, without charging for finding and collating it, subject to cost limits.

The Parliamentary expenses scandal in spring 2009 highlighted the Act's short-comings. FoI requests by campaigner and journalist Heather Brooke forced House of Commons officials to disclose some details of what some MPs were claiming in expenses for their second homes. But the official disclosures were anodyne in comparison with the truth, which emerged when full details were leaked to the Telegraph Media Group—and showed that MPs 'flipped' their main and second homes to maximise expenses, claimed for items ranging from moat-clearing and duck houses to dog biscuits and bath plugs, and did not have to produce receipts.

37.1.1 Difficulties with FoI obligations

The Act has brought many newsworthy disclosures by national, regional and local journalists.

Many public bodies are helpful when responding to FoI requests, but others delay answering requests or are extremely slow when considering the ‘public interest test’ (discussed later in the chapter). Research published on the Institute for Government website in April 2017 showed that the Government was becoming more secretive, with the number of FoI requests Whitehall departments were refusing to answer growing from 25 per cent in 2010 to 41 per cent by the end of 2016. Government figures published in December 2019 showed that the number of rejected requests remained steady at 40 per cent.

Government departments and other public bodies often seek to use the Act’s exemptions to thwart requests for information, and numerous requestors win appeals to the Information Commissioner and the First-tier Tribunal (Information Rights). Journalists using the Act need to be systematic and persistent—it is still a worthwhile tool for investigative journalism.

37.2 What is a ‘public authority’ under the Act?

The Act covers about 100,000 major and minor bodies in the public sector, including:

- national Government departments and ministries such as the Home Office, Foreign Office and Prime Minister’s Office;
- the House of Commons, the House of Lords and the National Assemblies of Northern Ireland and Wales;
- the armed forces;
- local government—metropolitan, city, county, district and parish councils, transport executives, waste disposal agencies, police forces, fire services;
- national park authorities;
- universities, colleges and schools in the state sector;
- the National Health Service, including primary care trusts, hospital trusts, health authorities, and doctors’ and dentists’ practices;
- various advisory councils and regulatory bodies with statutory powers, such as Ofcom and the General Medical Council;
- the Universities and Colleges Admissions Service (UCAS), National Police Chiefs’ Council, Financial Ombudsman Service (FOS) and companies entirely owned by local authorities are also now subject to the Act.

It does not define ‘public authority’, but lists, in Schedule 1, the bodies and organisations it covers. More have been added by statutory instruments—in 2021, for example, these included the Commissioner for Patient Safety, the Domestic Abuse Commissioner, the Office for Environmental Protection and the Trade Remedies Authority.

37.3 Institutions and agencies not covered by the Act

The security and intelligence agencies—MI5, MI6 and GCHQ—are exempt, and so not required to respond to FoI requests. Courts and tribunals are not covered, though some information gathered or created in their functions will be available if

a request is made to the Government department holding it, such as the Ministry of Justice.

The following are not public authorities under the Act: housing associations; charities; private prisons; harbour authorities; and MPs and Peers, as individuals.

The Royal Family never came under the Act. But an amendment which came into force in January 2011 gave the Queen, Prince of Wales and Prince William absolute exemption from any request for information. Other members of the Royal Family, such as the Duke of Edinburgh and Prince Harry, remain subject to a qualified exemption—public bodies holding information about them should release it if there is a public interest in disclosure.

The Advanced Research and Invention Agency (Aria), an independent UK scientific research agency to fund science and technology which was first announced in February 2021 and created by legislation passed in 2022, is exempt, despite calls from the Campaign for Freedom of Information for it to come under the scope of the Act. The Government's reasoning for Aria not brought under the Act was to spare it the 'burden' of responding to FoI requests. However, the decision to exclude it was criticised by the outgoing Information Commissioner, Elizabeth Denham, who told a parliamentary committee the move was 'really harmful' because it sent a 'message about transparency and its importance' to everyone working in the relevant department. Ms Denham also told MPs during the same session that there 'needs to be a root-and-branch review' of the FoI Act, and 'whether it is fit for purpose' (*Campaign for Freedom of Information News*, 29 November 2021).

37.4 How the Act works

A public authority should respond to a request for information within 20 working days by supplying the information or explaining that it cannot do so because:

- it does not hold it—in most circumstances this must be made clear;
- providing it would exceed the cost limits for free provision—see later in the chapter;
- it is exempt from disclosure.

For some exempt categories—for example, information held in confidence or concerning national security—an authority does not have to say what it holds if denying or confirming its existence would undermine the purpose of the exemption. For more information see 37.5 Exemptions.

Journalists should check an authority's website for information before making an FoI request, as it might already publish the material—the Act says each authority must have a 'publication scheme'. If the information is not listed, journalists should ask the official who coordinates the authority's FoI matters about what information it holds. Section 16 of the Act says authorities must offer 'advice and assistance', including on how to frame requests to stay within the cost limits for free responses.

A requestor's reason for wanting information should play no part in an authority's decision on providing it.

An authority which has to apply the ‘public interest test’ (see later) to see if an exemption applies may take more than 20 working days to respond. Even if it deems that some information sought is exempt from disclosure, it must consider whether a request can be met in part by releasing non-exempt information.

37.4.1 What is information?

Section 84 of the Act defines information as ‘information recorded in any form’. The right under the Act is for *information* to be communicated to the requestor, not necessarily in the form of particular documents, though requests often refer to particular documents, which are supplied. ‘Document’ includes electronic documents (*Dominic Kennedy v Information Commissioner and Charity Commission* [2010] EWHC 475 (Admin), [2010] 1 WLR 1489).

An authority does not have to gather information it does not already hold.

The Protection of Freedoms Act 2012, by amending the 2000 Act, gave requestors greater rights to have datasets held by public authorities sent to them in electronic, re-usable form.

 see Useful Websites at the end of this chapter for dataset guidance

37.4.2 Cost limits

A Government department required to disclose requested information must do so free if the cost to it is no more than £600. All other public authorities covered by the Act must provide such information free if doing so costs no more than £450. Cost is estimated by assessing—at £25 an hour—the staff time reasonably needed to determine whether a body holds the information, to find and retrieve it, and if necessary to extract it from a document. If the cost limit is exceeded, the authority does not have to supply any information requested, but may *choose* to do so, without charge or at a price reflecting the cost of providing it. An authority which can comply with part, but not all, of a request within the cost limits has a duty under section 16 to offer a requestor advice to see if he/she wishes to re-define or limit the request. If the information is to be provided on paper, the requestor can be charged a reasonable price for photocopying. Information can often be sent by email.

Journalists should make requests as specific as possible. A requestor may get round a cost limit by breaking a ‘large’ request into several smaller ones, sent serially. But authorities may ‘aggregate’ the cost of two or more requests made within 60 days by the same person for the same or similar types of information—that is, treat them as being part of a single request—and refuse them if in total they breach the cost limit for one request. Authorities should not use aggregation powers to frustrate a sequence of requests each of which, on the basis of information sent previously, digs further into a topic by asking for further different information.

37.4.3 Advice and assistance

Section 16 requires a public body to give prospective or actual requestors ‘advice and assistance, so far as it would be reasonable to expect the authority to do so’:

- It should, if asked, tell a requestor *before* he/she makes a request what information of the type sought might be available, and help frame a request.
- It should give guidance to avoid a request breaching the cost limit for providing information free.

Section 1(3) allows a body which ‘reasonably requires’ further detail to identify and locate information to clarify this with the requestor, and, if such further detail is not provided, not to comply with the request. The Information Commissioner has made clear that a public authority which tells a requestor that the information is already in the public domain should also indicate where it can be found.

37.5 Exemptions

Bodies may refuse to supply information on various grounds—exemptions. The Information Commissioner’s Office website has guidance on these.

 see Useful Websites at the end of this chapter for ICO guidance

37.5.1 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. 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.



Ch. 28 covers data protection law, which might be cited when a public authority seeks to use the section 44 exemption.

37.5.2 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 body which declines to supply information in these categories must show how it applied the public interest test.

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

- general arguments in favour of promoting transparency, accountability and participation;
- that disclosure might enhance the quality of discussions and decision making generally;
- that the balance might be tipped in favour of disclosure by financial issues—such as if the information requested involves 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 which, in respect of information relating to an investigation, may be relevant;
- the impact of disclosure upon individuals and/or the wider public.



Useful websites

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 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.

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.

37.5.2.1 Delays in the public interest test

The Act does not set a deadline for completing the ‘public interest test’ over an FoI request—considering it may mean the 20-day period for responding to requests instead becomes months. But a public body must tell a requestor within the 20-day limit that a qualified exemption might apply.

37.6 If the information is not supplied

If an authority takes no decision on supplying the information within the 20-day limit, or refuses to supply it because of the cost limit or an exemption, a requestor can ask for an ‘internal review’ of the decision, which should be conducted by an official other than the one involved in the refusal. There is no timescale for completing this review. The Information Commissioner’s Office has said that 20 working days (from the time a request for a review is received) is a reasonable time for a review and that in no case should the time exceed 40 working days. A requestor dissatisfied with the result of a review can appeal to the Information Commissioner.

37.7 The Information Commissioner and the First-tier Tribunal (Information Rights)

The Freedom of Information Act 2000 is enforced by the Information Commissioner, who also oversees the Data Protection Act 2018.

The Commissioner can: order a body to release information if he/she disagrees with a refusal to disclose it; question an authority’s claim not to hold requested

information; and question its estimate that disclosure would exceed the cost limit.

If a requestor claims an authority has not responded within the 20-day limit, the Commissioner can, under section 52, serve it with an enforcement notice requiring compliance with the Act. As an ultimate sanction, he/she can ask the High Court to punish an authority's failure to comply with the notice as contempt of court. Section 48 gives him/her the power to issue a 'good practice recommendation' specifying the steps an authority should take to improve compliance.

Requestors and public authorities dissatisfied with the Information Commissioner's decision can appeal to the First-tier Tribunal (Information Rights) within 28 days of receipt of the decision. The Tribunal, part of the First-tier Tribunal in the administrative justice system—see ch. 18—publishes its decisions online.



Useful websites

see Useful Websites at the end of this chapter for the Tribunal's site

37.8 Ministers' power of veto

Cabinet Ministers can veto notices issued by the Commissioner requiring Government departments to disclose requested information. A veto can be challenged in law.

37.8.1 'Clearing house' controversy

In June 2021, an information tribunal judge criticised the Cabinet Office for a 'profound lack of transparency' and overturned the department's attempt to withhold information about the 'clearing house' - a unit which centrally screens FoI requests made of the Government. Following a number of FoI requests being blocked, journalists and campaigners came to believe the clearing house ran a watchlist or 'blacklist' of journalists from various publications to identify FoI requests considered 'politically sensitive' and then advise other Government departments how to frustrate them. The clearing house was widely criticised after it was revealed that departments had been sending it details of journalists with FoI requests - despite FoI law requiring almost all requests to be handled without knowledge of who sent them. After 12 former and serving national newspaper editors wrote an open letter calling for the matter to be investigated, the Commons' Public Administration and Constitutional Affairs Committee (PACAC) conducted an inquiry and published its report in April 2022, concluding that greater transparency was needed for the Government to restore trust in its handling of FoI requests. The report also said the committee had received evidence of 'poor' FoI administration by Government, which appears to be 'inconsistent with the spirit and principles' of FoI law and suggested the Government should accept an offer from the Information Commissioner to audit the Cabinet Office. The Government

rejected this offer and launched an internal review the day before the PACAC report was published. The review is being led by a non-executive director of the Home Office and was ongoing at the time this chapter was written (*The Times*, 9 June 2021, *openDemocracy*, 8 June 2021, *PACAC News*, 29 April 2022).



Useful websites

See useful websites at the end of this chapter for the PACAC report

37.9 The FoI Act's coverage of media organisations

The BBC, Channel 4 and S4C—public service broadcasters—were made subject to the Act, but in a limited way as disclosure provisions only apply to information they hold ‘for purposes other than those of journalism, art or literature’. It does not require these broadcasters to comply with:

- (1) requests attempting to reveal journalists’ confidential sources;
- (2) requests by rival news organisations, or by the subjects of journalistic investigations (that is, ‘data subjects’), aimed at securing, before or after broadcast, material gathered in a journalistic investigation, including any footage/audio not broadcast.

The Supreme Court has ruled that if information is held for journalistic purposes, it is exempt from disclosure even if it is also held for other purposes (*Sugar (Deceased) (Represented by Fiona Paveley) v BBC and another* [2012] UKSC 4, [2012] 1 WLR 439, [2012] 2 All ER 509).

37.10 Environmental information

The Environmental Information Regulations 2004 (EIR) require public authorities to provide information about environmental matters. They give, in the environmental field, the public—and journalists—more powerful rights of access to information than those in the FoI Act. A public authority receiving a request for information within the scope of the EIR should automatically deal with it under the EIR rather than under the Act (ideally the request should refer to the EIR). For guidance on using the EIR, see Useful Websites at the end of this chapter.

Environmental information covers air, water, land, natural sites and living organisms—including genetically modified (GM) crops—and discharges, as well as noise and radiation. The EIR cover more bodies than the FoI Act, with fewer exemptions—for example, information about emissions cannot be withheld because of commercial confidentiality.

All bodies subject to the FoI Act are also subject to the EIR and the same 20-day deadline applies to requests for information. Privatised water and sewerage companies in England and Wales are not subject to either the Act or the EIR, although they are in Scotland.

The EIR require that public authorities must assist those requesting information.

EIR requests can be turned down on grounds of national security. But all refusals are subject to a public interest test and requests can be refused only if the public interest in non-disclosure far outweighs the public interest in disclosure. A 'reasonable' fee can be charged for EIR requests.

37.11 Legal issues in using FoI disclosures in stories

Publication of material disclosed under the FoI Act or the EIR brings no special protection against an action for defamation. The FoI Act and EIR do not confer statutory qualified privilege on such reports. Chs 22 and 23 of this book explain defamation defences.

Material disclosed under either the Act or the EIR will be protected by **copyright**. But a **fair dealing** defence applies to citing some text verbatim for the purposes of reporting current events. Ch. 29 explains copyright law.

Recap of major points

- The Freedom of Information Act 2000 gives a general right of access to information held by public authorities including Government departments and local authorities.
- But there are wide-ranging exemptions and plenty of potential for delays in responding.
- The Act obliges public authorities to offer requestors advice to enable them to word their requests in such a way that they are more likely to succeed.
- The Information Commissioner hears appeals against a body's refusal to supply information. The First-tier Tribunal (Information Rights) can hear appeals against the Commissioner's decisions.
- The Environmental Information Regulations 2004 provide powerful rights of access to information in fields they cover.

Useful Websites

www.opsi.gov.uk/Acts/acts2000/ukpga_20000036_en_1/

Freedom of Information Act

<https://ico.org.uk>

Information Commissioner's Office (ICO)

http://ico.org.uk/for_the_public/official_information

ICO guidance on advice and assistance for requestors

https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

ICO guidance on the public interest test

www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

Code of Practice for public authorities on FoI requests

<https://ico.org.uk/media/for-organisations/documents/1151/datasets-foi-guidance.pdf>

ICO guidance on release of datasets

<https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/what-are-the-eir/>

ICO guidance to public authorities on EIR

www.Folman.com

Blog written by an FoI practitioner, including a useful guide on making FoI requests

<https://foi.directory/>

FoI Directory site run by Matt Burgess

<https://committees.parliament.uk/committee/327/public-administration-and-constitutional-affairs-committee/news/166107/poor-handling-of-foi-requests-by-government-spurs-call-for-independent-audit/>

PACAC Report on Cabinet Office