

Freedom of Information Act 2000

Guidance

a. The purpose of the Freedom of Information Act 2000

The Freedom of Information Act 2000 (FOIA) gives people a general right of access to information held by or on behalf of public authorities. According to [the Information Commissioner](#), the FOIA promotes a culture of openness and accountability across the public sector and should lead to a better understanding about:

- how public authorities carry out their duties
- why they make the decisions they do
- how they spend public money

The FOIA was enacted by the first term Labour government but took effect only on January 1, 2004. The FOIA is best known as a tool for journalists and has been used to uncover a number of widely reported [stories](#) in its first year. However, it has also become a commercial and legal tool and is used to gain information about competitors or for legal proceedings.

b. Who can ask for information?

Anyone can ask for information from a public authority. One does not have to have a particular status or relationship with the public authority, nor does it matter how the requestor intends to use the information – disclosure under the FOIA is said to be applicant and purpose blind. The identity of the requester and use to which information may be put are not grounds for withholding information. It is legitimate for one supplier to seek information about another for purely commercial purposes. The FOIA can also be used as a tool to gain pre-litigation disclosure of information relating to potential claims. This cannot be used as a ground for withholding disclosure.

c. Who can be asked?

The Act applies to public authorities, a phrase which is given a very wide definition. It includes Government departments, the NHS including GPs, the Police Service and a variety of bodies listed in [Schedule 1](#) of the FOIA.

d. What can be released?

The Act applies to all **information** (not documents) held by the public authority at the time the request is received. Documents are not information; they do however contain information. Some public authorities do release copies of the documents that contain the information requested with exempted information redacted (blacked out); under the terms of the FOIA this is not required. A public authority may choose to provide the information in a letter setting out all non-exempt information requested.

In a research context, information may be contained in existing contracts and those which are completed, as well as related materials such as tenders, briefs, research proposals and resulting reports.

Section 1 of the act places twin duties on public authorities to:

- (i) confirm or deny any existence of the information; and
- (ii) communicate (disclose) the information if it does exist and is not subject to one of the exemptions.

Section 2 allows a public authority to refuse to confirm or deny the existence of information if the public interest in doing so outweighs the public interest in disclosure.

Information must be released within an upper limit of 20 working days – though this may be extended if a public interest balancing test is required.

e. What is kinds of exemption are there?

An **absolute exemption** is one where no balancing test is required. If the information falls within such an exemption it must not be disclosed, regardless of the public interest in doing so.

A **qualified exemption** represents a hypothetical public interest in restricting access to information of a certain type. This public interest then has to be balanced against factors in favour of disclosure.

f. What is a public interest balancing test?

The phrase “public interest” is not defined in the FOIA; it is therefore a dynamic concept, depending on the circumstances prevailing at the time.

Factors in favour of disclosure of information may include:

- Promoting public debate on the issues of the day;
- Ensuring that the public is not deceived about the way public authorities, or bodies which they regulate, operate;
- Ensuring accountability in decision making in public office;
- Exposing misconduct;
- Contributing to the maintenance of public order;
- Keeping the public adequately informed of any danger to public health or safety or to the environment.

The factors against disclosure are set out in the FOIA and listed in section g below. Where the information falls within a qualified exemption set out in the FOIA, these competing interests have to be weighed against each other in the context of the circumstances prevailing at the time.

It should be noted that there is a general presumption in favour of disclosure unless and until this is outweighed by factors to the contrary.

g. Statutory Exemptions

A public authority can refuse to disclose information by reason of a section of the FOIA. Each section relates to a specific exemption.

Section 12 – Cost of compliance exceeds appropriate limit

The cost limit is currently set at £600 for Government departments, and £450 for all other public authorities. This equates to around three-and-a-half or two-and-a-half days' work respectively.

Section 14 – the request is vexatious or repetitious

Section 22 – Information intended for future publication

This is an absolute exemption though the time scale of publication must be reasonable. Something along the lines of: “All contracts to be published after 10 years,” would likely fail to pass this exemption.

Section 23 – Information relating to bodies dealing with security matters

Section 29 – the Economy

This qualified exemption is aimed at information that could harm the economic interests and/or financial interests of the UK. It may also be relevant where disclosure could damage a public body’s financial rather than commercial position such as a major PPP or PFI deal.

Section 31 – Law enforcement

This is a very wide qualified exemption. Government guidance suggests that this exemption should cover information relating to any system or service which facilitates:

- Detention of prisoners
- Law enforcement activities of police or security forces
- Fraud investigation
- Building security
- Accident investigation
- Health & safety inspections
- Immigration control
- Tax or duty collection
- Court administration

Section 36 – prejudice to the effective conduct of public affairs

Absolute exemption

Section 38 – health and safety

Qualified exemption

Section 39 – Environmental information

An absolute exemption, this information should be requested under separate legislation – the Environmental Information Regulations

Section 40 – Personal information

Information protected by the Data Protection Act 1998 is absolutely exempted from disclosure.

Section 41- Information provided in confidence

This is an absolute exemption, not subject to public interest test, but it is not quite so wide as if first appears. The information is exempt if disclosure would constitute an actionable breach of confidence. It is not enough that the parties agree that the information should be held in confidence; the information must also have the necessary “quality of confidence” (i.e. the information is worthy of protection and is not trivial). Further, disclosure must be detrimental to the party wishing to keep it confidential. Therefore a blanket confidentiality agreement would be likely to fail as not all of the information in a contract or tender would not have the necessary quality of confidence.

Section 43- Prejudice to Commercial Interests

A public body’s or other person’s commercial interests may be prejudiced where disclosure would or would be likely to

- (i) damage its business reputation or the confidence that customers, suppliers or investors may have in it;
- (ii) have a detrimental effect on its commercial revenue or threaten its ability to obtain supplies or secure finance; or
- (iii) weaken its position in a competitive environment by revealing market sensitive information or information of potential use to its competitors.

The issue of prejudice is time sensitive – the passage of time will change the prejudicial nature of the information sought.

This exemption is subject to a public interest test. Factors that may be considered in this regard are the need for proper scrutiny of the expenditure of public funds, weighed against the importance to safeguard the public authority's financial position and ability to fulfil its role. For example, tax payers should know how the NHS spends their money, but that same information could undermine the NHS bargaining power with new suppliers.

h. Appeal of decisions not to disclose

A requester may ask for an internal review of a decision to withhold information. There is a subsequent right to appeal to the Information Commissioner, Information Tribunal and the High Court.

i. Consulting with third parties (e.g. research organisations)

The Department of Constitutional Affairs' Code of Practice provides that public authorities should consult with third parties whose information may be released as a result of an information request. However, under the terms of the act a public authority is under no obligation to do so. Even the phrasing of the Code only provides that it is general good practice to give the third party advance notice or to inform the third party afterwards.

j. Options for third parties

In addition to drafting appropriate confidentiality clauses, per **Section 41** above, third parties should consider including contractual rights to participate in the process of dealing with an information request. This could include the:

- Right to be notified of any request for information relating to them
- Right to be consulted
- Right to veto providing information pursuant to a request.

The Office of Government Commerce issues model contract terms for procurement contracts, which include FOIA related terms. It should be noted that the model terms provide for a much higher standard of notification and consultation where the contract is between two government

parties than one between the government and a private party. Private parties should be aware of this and aim to negotiate for the higher standard of consultation.

It is also possible that a third party could seek an interim injunction preventing release of the information through an action for breach of confidence or breach of contract or an application for judicial review. This option remains as yet untested under the FOIA.

k. Possible effects on research

As stated at the beginning of this document, the FOIA applies to information held by, or on behalf of, public authorities. Accordingly, research organisations may find themselves drawn into FOIA issues in two ways. Firstly they may have provided information to a public authority. This may be included in tender documents, contracts or research reports. Secondly they may hold information on behalf of the public authority. It may be the case that contractually any work product is the property of the public authority client or that the researcher holds the sole copy of a research report paid for by the public authority.

In either case, information requests should be made to the public authority rather than the research organisation. If a research organisation receives such a request in error, the requestor should be referred to the public authority.

More generally research organisations preparing documents for public authorities should be aware that the information that they contain could be subject to an information request. The contents of the documents should be selected accordingly. Additionally, they should also keep in mind that public authorities are moving towards a position of greater openness, favouring releasing information in the absence of compelling reasons against.

Further Information

The Freedom of Information Act 2000

<http://www.opsi.gov.uk/acts/acts2000/20000036.htm#aofs>

DCA Code of Practice

<http://www.dca.gov.uk/foi/codepafunc.htm>

Office of Government Commerce –Model Contact Terms

<http://tinyurl.com/cswgl>