

Freedom of Information exemptions

OGI

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Introduction

The [Freedom of Information Act 2000 \(FOIA\)](#) repealed the vast majority of section 5 of the [Public Records Act 1958 \(PRA\)](#) which concerned access to public records. The text that applies to The National Archives (at s5(3)) now reads:

It shall be the duty of the Keeper to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of public records in the Public Record Office which fall to be disclosed in accordance with the Freedom of Information Act 2000

Thus access to information in public records is provided under the FOIA although physical access to the records themselves falls under the PRA.

Under the FOIA there is a presumption of openness, irrespective of the date of the record, unless an exemption applies.

There are two categories of exemption: absolute exemptions and qualified exemptions. An absolute exemption means there is no obligation under the FOIA to release the requested information (although there may be other reasons outside the act to do so). A qualified exemption means that the public authority has to assess the balance of the public interest for and against disclosure. The arguments against need to outweigh those in favour to justify non-disclosure. All exemptions in the Environmental Information Regulations are qualified and are called exceptions.

Exemptions can be either class- or prejudice-based. A class-based exemption means that if the information is of a type described in the exemption then it is covered by that exemption. All absolute exemptions, and some qualified exemptions, are class-based. This means that in order to use the exemption the authority does not have to demonstrate that any particular harm would be caused by disclosure, however, in the case of qualified exemptions, authorities still need to consider the balance of public interest before deciding whether or not to disclose the information.

Prejudice-based exemptions are where the authority has to show that the prejudice or harm that is specified in the exemption either would, or would be likely to, occur. If an exemption is prejudice-based then the authority still must carry out the public interest test.

Some FOI exemptions automatically cease to apply after 20 years, or some other pre-defined period. In the case of exemptions without a pre-defined cut-off date (indefinite exemptions), the information will remain exempt for as long as the criteria for the use of the exemption continues to be applicable.

The need to apply an exemption, or to apply it in the public interest, will generally diminish as time passes so that such records can be released eventually. The exemption for personal information (s40) ceases to apply when the individual concerned is no longer alive.

Summary of FOI Exemptions

The table below shows the exemptions to the rights to information, noting their duration and also whether the public interest test applies.

The designation ‘* Secretary’ indicates that the Secretary of State must be consulted about a proposed refusal to disclose in the public interest information in a record in The National Archives or in a record retained under PRA s3(4).

The designation ‘20 **’ indicates that the exemption duration has reduced to 20 from 30 years as a result of the [Constitutional Reform and Governance Act 2010](#) section 46. This is an incremental transition from 2013 as per the [Freedom of Information \(Definition of Historical Records\) \(Transitional and Saving Provisions\) Order 2012](#).

Section	Exemption	Absolute or public interest test?	Class or prejudice test?	Duration
21	Information already accessible (through another act or included in Publication Scheme)	Absolute	Class	Disapplied for records over 20 ** years old in The National Archives

Section	Exemption	Absolute or public interest test?	Class or prejudice test?	Duration
22	Information intended for future publication (whether the date is determined or not)	Public interest	'reasonableness' test	Disapplied for records over 20 ** years old in The National Archives
23	Information supplied by, or relating to, bodies dealing with security matters (named)	Absolute unless in an historical record in The National Archives	Class	Indefinite * Secretary
24	National security	Public interest	Prejudice test (using different wording: 'for the purpose of safeguarding national security' implies a test)	Indefinite * Secretary
26	Defence	Public interest	Prejudice test	Indefinite * Secretary
27(1)	International relations – prejudice	Public interest	Prejudice test	Indefinite * Secretary
27(2)	International relations – information provided in confidence by other states or international organisations or courts	Public interest	Class	Indefinite * Secretary
28	Relations within the UK (between the UK government, the Scottish Administration, the National Assembly for Wales and the Executive Committee	Public interest	Prejudice test	30 years * Secretary

Section	Exemption	Absolute or public interest test?	Class or prejudice test?	Duration
	of the Northern Ireland Assembly)			
29	The economy	Public interest	Prejudice test	Indefinite * Secretary
30(1)	Criminal investigations and proceedings conducted by the authority	Public interest	Class	Indefinite * Secretary
30(2)	Relating to civil or criminal investigations and proceedings which use confidential sources	Public interest	Class	Indefinite * Secretary
31	Law enforcement	Public interest	Prejudice test	100 years * Secretary
32	Court records etc.	Absolute	Class	20 ** years
33	Audit functions	Public interest	Prejudice test	20 ** years * Secretary
34	Parliamentary privilege	Absolute	Prejudice test (using different wording: 'for the purposes of avoiding an infringement of the privileges of either House')	Indefinite

Section	Exemption	Absolute or public interest test?	Class or prejudice test?	Duration
			implies a test)	
35(1)(a)	Formulation of government policy	Public interest	Class	20 ** years * Secretary
35(1)(b)	Ministerial communications	Public interest	Class	20 ** years * Secretary
35(1)(c)	Law Officers' advice	Public interest	Class	20 ** years * Secretary
35(1)(d)	Operation of Ministerial Private Office	Public interest	Class	20 ** years * Secretary
36	Prejudice to effective conduct of public affairs	Public interest except for information held by either House of Parliament	Prejudice test	20 ** years This remains at 30 years for Northern Ireland material * Secretary
37(1)(a), (aa), (ab)	Communications with Royal Family and Household (Sovereign and person who is, or becomes, heir and second heir)	Absolute	Class	CRAG Act has changed s37(1)(a) by splitting it into several parts 20 years or five years after death of person concerned, whichever is later
37(1)(ac)	Communications with other members of the Royal Family not on behalf of those covered by (a)-(ab)	Public interest	Class	20 years or five years after death of person concerned, whichever is later * Secretary
37(1)(ad)	Communications with the Royal Household not on behalf of those	Public interest	Class	20 years or five years after death of Sovereign

Section	Exemption	Absolute or public interest test?	Class or prejudice test?	Duration
	covered by (a)-(ab)			contemporary with the information, whichever is later * Secretary
37(1)(b)	Honours	Public interest	Class	60 years * Secretary
38	Health and safety	Public interest	Prejudice test	Indefinite * Secretary
39	Environmental information (obliged to make available under the Aarhus convention, or would be obliged but for an exemption in Regulations under s74)	Public interest	Class	Indefinite * Secretary
40(1)	Personal information where the applicant is data subject	Absolute	Class	Lifetime of data subject
40(2)	Personal information where the applicant is a third party	Absolute in relation to categories (a)-(d) data, qualified in relation to category (e) data	Prejudice test (using different and complex wording: disclosure should not cause breach of the Data Protection Principles)	Lifetime of data subject
41	Information provided in confidence	Absolute	Variation of prejudice test (breach of confidence must be 'actionable')	Indefinite

Section	Exemption	Absolute or public interest test?	Class or prejudice test?	Duration
42	Legal professional privilege	Public interest	Variation of prejudice test (claim could be maintained in legal proceedings)	20 ** years * Secretary
43(1)	Trade secret	Public interest	Class	30 years * Secretary
43(2)	Commercial interests	Public interest	Prejudice test	30 years * Secretary
44	Prohibitions on disclosure: (a) acts (b) community obligations (c) contempt of court	Absolute	Class	Indefinite

Information exemptions (exceptions) in the Environmental Information Regulations

Regulation	Exception	Absolute or public interest test?	Duration	Note
12(3) and 13	Personal information	As FOIA s40	Lifetime of data subject	
12(5)(a)	International relations, defence, national security or public safety	Public interest test	Indefinite	

Regulation	Exception	Absolute or public interest test?	Duration	Note
12(5)(b)	Course of justice, ability of a person to receive a fair trial or ability of a public authority to conduct a criminal or disciplinary inquiry	Public interest test	Indefinite	
12(5)(c)	Intellectual property rights	Public interest test	Indefinite	
12(5)(d)	Confidentiality of proceedings of that or any other authority where such confidentiality is provided by law	Public interest test	Indefinite	Cannot be used if information relates to emissions
12(5)(e)	Confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest	Public interest test	Indefinite	Cannot be used if information relates to emissions
12(5)(f)	Interests of person who provided information where that person: (i) was not under, and could not have been put under, a legal obligation to supply it to that or any other authority (ii) circumstances of supply are not such that any authority is entitled, apart from EIR, to disclose it, and (ii) has not consented to its disclosure	Public interest test	Indefinite	Cannot be used if information relates to emissions

Regulation	Exception	Absolute or public interest test?	Duration	Note
12(5)(g)	The protection of the environment to which the information relates	Public interest test	Indefinite	Cannot be used if information relates to emissions