

FOISA Guidance

Section 30: Prejudice to effective conduct of public affairs

Exemption Briefing



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Glossary and abbreviations

Term used	Explanation
FOISA	Freedom of Information (Scotland) Act 2002
SIC, The Commissioner	The Scottish Information Commissioner
Scottish Ministerial Code	Scottish Ministerial Code: A Code of Conduct and Guidance on Procedures for Members of the Scottish Government and Junior Scottish Ministers (2018 Edition)

The exemption

The exemption: the main points

1. Section 30 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure where disclosure would, or would be likely to:
 - (i) prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers
 - (ii) inhibit substantially the free and frank provision of advice
 - (iii) inhibit substantially the free and frank exchange of views for the purposes of deliberation
 - (iv) prejudice substantially the effective conduct of public affairs
2. All of the exemptions in section 30 are subject to the public interest test. This means that, even if the exemption applies, the information must be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it.
3. The exemptions don't last forever. In general, they can't be applied to information that's more than 15 years old.
4. With the section 30 exemptions, a public authority can refuse to confirm or deny whether it holds the information, provided the authority is satisfied that revealing whether the information exists or is held would be contrary to the public interest (section 18 of FOISA).

Steps in applying the exemption

5. The steps an authority must take once it has located and retrieved requested information held are:
 - (i) Decide, does the exemption apply? This requires the authority to demonstrate what substantial prejudice (or substantial inhibition) would be caused by disclosure and how likely that is to occur.
 - (ii) If the exemption does NOT apply (i.e. disclosure would not cause the prejudice or inhibition claimed), the exemption does not apply and the information cannot be withheld under the exemption.
 - (iii) If the exemption DOES apply (i.e. disclosure would cause, or be likely to cause, the prejudice or inhibition claimed), the public interest test must be applied.
 - (iv) If the public interest in disclosure outweighs that of withholding the information, the exemption does not apply and the information cannot be withheld under the exemption.
 - (v) If the public interest in withholding outweighs that of disclosing the information, it can be withheld and notice served to that effect.

Section 30(a) – Scottish Ministers’ collective responsibility

6. Information is exempt under section 30(a) if disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of collective responsibility of the Scottish Ministers.

“Convention of collective responsibility”

7. Whatever their individual views on a matter may be, the Scottish Ministers are understood to make collective decisions and are required to abide by and defend those decisions, presenting a united front. The constitutional value of the convention of collective responsibility is that it promotes strong government and ensures that decisions at Cabinet level are a result of informed debate.
8. The convention applies to Ministers, Junior Ministers, Deputy Ministers and the Lord Advocate (except for decisions taken by the Lord Advocate when acting as head of the systems of criminal prosecution and investigation of deaths in Scotland). It covers all the business of the Scottish Government, including decisions, announcements, expenditure plans, proposed legislation and appointments.
9. There is no statutory basis for the convention of collective responsibility. It is formalised in the Scottish Ministerial Code. See **Appendix 1: Resources**. Although the Code sets out when information should and shouldn’t be disclosed, it recognises that disclosures are subject to FOISA. Paragraph 2.5 of the Code says:

“In accordance with the principle of collective responsibility, it is important that Ministers and their staff preserve the privacy of Government business and protect the security of Government documents, subject to the provisions of the Freedom of Information (Scotland) Act 2002 ...”
10. This means that, regardless of what is said in the Code, information can only be withheld if disclosure would, or would be likely to, prejudice substantially the maintenance of the convention of collective responsibility (and if, on balance, the public interest lies in maintaining the exemption).

“Likely”

11. The exemption in section 30(a) can only be applied where disclosure would, or would be likely to, cause substantial prejudice to the convention of collective responsibility. There must be at least a significant probability that substantial prejudice would occur in order for the exemption to be appropriately applied. There must be a genuine link between disclosure and harm: it cannot simply be a remote or hypothetical possibility.

“Substantial prejudice”

12. There is no definition of substantial prejudice in FOISA, but the prejudice caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.
13. Authorities must avoid classifying types of documents as potentially falling within this exemption. As with all exemptions, the use of section 30(a) will need to be justified on a case by case, and document by document, basis. The Commissioner’s decisions on section 30(a) make it clear that, before applying the exemption, public authorities must consider the context in which the views were expressed, the significance of those views, and the effects of

disclosure in the light of current circumstances. See **Appendix 1: Resources** for more information about the Commissioner's decisions.

The public interest test

14. If the exemption applies, the authority must go on to consider the public interest in relation to the information – see section 2(1)(b) of FOISA. This means assessing whether, in all the circumstances of the case, the public interest is better served by disclosing or withholding the information. The authority must identify and set out the competing arguments:
 - (i) as to why the public interest would be served by disclosing the information; and
 - (ii) why it would be served by withholding it.
15. Having identified the public interest arguments on each side, the authority must then carry out an exercise to determine where, on balance, the public interest lies. There is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information.
16. FOISA does not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” It has also been said that the public interest does not mean what is of interest to the public, but what is in the interest of the public.
17. The Commissioner has published guidance on the public interest test. See **Appendix 1: Resources**.

Section 30(b) – free and frank provision of advice or exchange of views

18. Information is exempt under sections 30(b) if disclosure would, or would be likely to, inhibit substantially:
 - (i) the free and frank provision of advice (section 30(b)(i)) or
 - (ii) the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)).
19. Although the exemption will often be applied to advice or to an exchange of views, it can apply to other types of information. What is important is whether the disclosure would have an inhibiting effect on the provision of advice or on the exchange on views.

“Likely”

20. The exemptions in section 30(b) can only be applied where disclosure would, or would be likely to, cause substantial inhibition. There must be at least a significant probability that substantial inhibition would occur in order for the exemption to be appropriately applied. There must be a genuine link between disclosure and inhibition: it cannot simply be a remote or hypothetical possibility.

“Substantial inhibition”

21. “Inhibit” is not defined in FOISA. This is the only exemption in FOISA where this terminology is used. In the context of section 30(b), it means to restrain, decrease or suppress the freedom with which opinions or options are expressed. The inhibition caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal, before the exemption can be applied.

Factors to consider

22. When assessing whether disclosure will cause substantial inhibition, an authority should consider the content of the information and the circumstances in which it was created. Factors to consider may include:
- (i) **the identity or status of the author and/or the recipient.** There may be an inherent sensitivity in the fact that advice or views were passed from one person to another, depending on the relationship between those parties. Where advice or views are communicated and received as part of an individual's day-to-day professional functions, for example, then the risk of substantial inhibition may well be diminished.
 - (ii) **the circumstances in which the advice or views were given.** The context in which the communication took place might be relevant; for instance, views might be more sensitive during policy formulation or other discussions.
 - (iii) **the sensitivity of the advice or views.** The subject matter and content of the advice and opinions, as well as the way in which the advice or opinion is expressed, are likely to be relevant when determining whether the exemption applies. Timing may also be relevant: disclosing advice or opinions while a decision is being considered, and on which further views are being sought, might be more substantially inhibiting than disclosing the information once a decision has been taken.
23. See **Appendix 1: Resources** for examples of the Commissioner's decisions on section 30(b).

A chilling effect?

24. Some public authorities have argued that disclosing any advice or views makes it inevitable that officials will conclude that other internal communications will probably have to be disclosed, thereby inhibiting the way in which advice or views are given in the future. This is sometimes known as "the chilling effect".
25. The Commissioner does not accept that the disclosure of advice or views in one case will have a substantially inhibiting effect in all others. The exemptions in section 30(b) must not be treated as "class exemptions". (Class exemptions – such as the exemptions in section 29 – allow information to be withheld if it falls into a particular category, e.g. Ministerial communications.) With section 30(b), authorities must consider the content of the information before deciding whether disclosure would, or would be likely to, cause substantial inhibition.
26. The Commissioner believes officials are capable of understanding that some information of a particular type may be disclosed, while other information of the same type may be withheld, depending on the circumstances. Decisions are always taken on a case-by-case basis: disclosing advice or views in one case does not imply that information in another case will also have to be disclosed. The Commissioner's decisions since FOISA came into force back this up.
27. The Commissioner recognises that the general right of access provided by FOISA must be balanced against the need to protect genuinely sensitive information. However, this does not justify a blanket exemption on all internal communications for fear that officials will react negatively to the release of information. Instead, public authorities should assess the effect

of disclosing the information in question before applying either of the exemptions in section 30(b).

28. The Court of Session agreed with this approach in the case of *Scottish Ministers v Scottish Information Commissioner* [2006] CSIH 8 (see **Appendix 1: Resources**). In their appeal, the Ministers argued that the Commissioner had erred in law by not recognising the possibility that, although the section 30 exemptions were not class based exemptions, they might apply to a class of documents, irrespective of the actual content of the documents. The Court disagreed, saying that individual documents had to be scrutinised to establish whether they contain information which, when read in the context of related information, would, or would be likely to, have the specified harmful effect. Only after such scrutiny is it possible to say whether the information concerned would, or would be likely to, have such an effect.

The public interest test

29. If the exemption applies, the authority must go on to consider the public interest in relation to the information – see section 2(1)(b) of FOISA. This means assessing whether, in all the circumstances of the case, the public interest is better served by disclosing the information or maintaining the exemption. The authority must identify and set out the competing arguments as to why the public interest would be served not only by disclosing the information, but also by withholding it. Having identified the public interest arguments on each side, the authority must then carry out an exercise to determine where, on balance, the public interest lies. There is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information.
30. FOISA does not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” It has also been said that the public interest does not mean what is of interest to the public, but what is in the interest of the public. The Commissioner has published guidance on the public interest test – see **Appendix 1: Resources**.
31. There is clearly a strong public interest in protecting the effective conduct of public affairs. The Commissioner has generally found that this public interest outweighs the public interest in disclosure of information where the effective conduct of public affairs is, or is likely to be, substantially harmed. However, there have been a few cases where a strong public interest in disclosure has swung the balance in favour of disclosure. For an example of a decision where this happened, see **Appendix 1: Resources**.

Section 30(c) – the effective conduct of public affairs

32. Information is exempt under section 30(c) of FOISA if disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The use of “otherwise” makes it clear that the exemption can’t be used to withhold information where disclosure would harm the maintenance of collective responsibility or inhibit the free and frank exchange of advice or views. In those cases, section 30(a)/(b) should be applied instead. (Of course, in some cases the exemptions may also apply but for different reasons.)
33. This makes it extra important, when applying the exemption, for authorities to demonstrate how and why disclosure would harm the effective conduct of public affairs. Authorities should be able to explain which aspects of their business would be affected, and in what

way, and be able to show why this outcome would result from disclosure of the information requested. Some examples are given in paragraph 37.

“Likely”

34. The exemption in section 30(c) can be applied only where disclosure would, or would be likely to, cause substantial prejudice. There must be at least a significant probability that substantial prejudice would occur in order for the exemption to be appropriately applied. There must be a genuine link between disclosure and harm: it cannot simply be a remote or hypothetical possibility.
35. See **Appendix 1: Resources** for examples of decisions where the Commissioner has considered whether disclosure of information would cause harm to the effective conduct of public affairs.

“Substantial prejudice”

36. There is no definition of substantial prejudice in FOISA, but the prejudice caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.

Factors to consider

37. Because of its general nature, section 30(c) can potentially apply to a wide range of situations. The Commissioner takes a case-by-case approach when reaching a decision on whether the exemption has been correctly applied. It is therefore difficult to draw any general conclusions about situations in which the exemption is likely to be upheld, as this is so dependent upon circumstances. However, there are additional factors which it may be relevant to consider when applying the exemption. These include:
 - (i) **the sensitivity of the information.** Even where information relates to a sensitive or controversial matter, the information may not, in itself, be sensitive. On the other hand, where information which is not sensitive by nature is considered in relation to a confidential or sensitive process, it may have a harmful effect on the conduct of public affairs, if disclosed. For example, documents such as a meeting agenda, which have no inherent sensitivity, might have a different status when considered as evidence submitted in a confidential grievance process.
 - (ii) **the passage of time.** Disclosing information about an ongoing matter may well cause harm. However, once a matter is concluded or settled, it is harder to argue that disclosure of such information could cause significant harm to the process. In such cases the public authority would be expected to show the effect that disclosure of the information would have on future practice.
38. See **Appendix 1: Resources** for examples of decisions issued by the Commissioner on section 30(c).

The public interest test

39. If the exemption applies, the authority must go on to consider the public interest in relation to the information – see section 2(1)(b) of FOISA. This means assessing whether, in all the circumstances of the case, the public interest is better served by disclosing the information or maintaining the exemption. The authority must identify and set out the competing arguments as to why the public interest would be served not only by disclosing the information, but also by withholding it. Having identified the public interest arguments on each side, the authority must then carry out an exercise to determine where, on balance, the public interest lies.

There is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information.

40. FOISA does not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” It has also been said that the public interest does not mean what is of interest to the public, but what is in the interest of the public.
41. The Commissioner has published guidance on the public interest test – see **Appendix 1: Resources.**
42. There is clearly a strong public interest in protecting the effective conduct of public affairs. The Commissioner has generally (although not always) found that this public interest outweighs the public interest in disclosure of the information.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
Section 30(a) Paragraph 13	057/2005	William Alexander and the Scottish Ministers	Information which names a Minister but which does not reveal anything about their views or opinions, is not exempt under section 30(a).
Section 30(a) Paragraph 13	039/2007	Michael Matheson MSP and the Scottish Ministers	The exemption can apply even where the Ministers are all in full agreement.
Section 30(a) Paragraph 13	076/2006	Paul Hutcheon and the Scottish Ministers	Information which relates to a matter of substance, but which is itself routine or mundane (e.g. expressing a view on a deadline or meeting arrangements) is unlikely to cause the harm required for the exemption to apply.
Section 30(a) Paragraph 13	053/2007	Mark Latham, Shetland Times and the Scottish Ministers	The harm caused by disclosing information may weaken over time or through changes in circumstances, such as a new Ministerial appointment.
Section 30(a) Paragraph 13	064/2014	John Pentland MSP and the Scottish Ministers	<p>Information which does not show a Minister's views, but simply their involvement in an ongoing area of policy is not caught by this exemption.</p> <p>Views held by an individual before their appointment as Minister might be exempt from disclosure if disclosed after the individual had taken up a ministerial post.</p> <p>Disclosing information which simply serves to confirm what is already known about the views of certain Ministers would not harm the collective convention of responsibility.</p>
Section 30(b) Paragraph	088/2006	Mr and Mrs G Bonelle and West Lothian Council	The Council withheld an exchange of views, but there was no indication that the exchange was in any way sensitive. There was no disagreement or controversy, and the information was similar in character to other

Reference	Decision Number	Parties	Summary
23			information already released to the requesters. The mere fact that the exchange took place would not, in this case, have a substantially inhibiting effect.
Section 30(b) Paragraph 23	089/2007	James Cannell and Historic Scotland	Mr Cannell asked for the advice given to Ministers about a listed building appeal. The Commissioner decided that, as the advice forms an essential part of the established appeal process, the disclosure of the advice would not inhibit the provision of this type of advice in future.
Section 30(b) Paragraph 31	182/2007	Alex Neil MSP and the Scottish Ministers	Although disclosure would, or would have been likely to, cause substantial inhibition, the Commissioner was satisfied that the public interest was likely to be in favour of disclosure as this would allow better scrutiny of actions relating to an overspend of public money.
Section 30(c) Paragraph 35	193/2013	Mr H and Risk Management Authority (RMA)	Mr H asked the RMA about tools involved in the risk management of offenders. The Commissioner was satisfied that disclosing this information would undermine the effectiveness of the tools; high risk offenders would be able to use this information to their advantage. This would undermine the role of the RMA in promoting effective practice and setting effective standards.
Section 30(c) Paragraph 35	241/2014	Iain Maciver and Comhairle nan Eilean Siar	This involved a request for a significant case review following a murder. On considering the disclosure of the recommendations from the review, it was noted that the Comhairle hadn't evidenced that disclosure would negatively impact on its ability to implement them. Without such evidence, the Commissioner couldn't accept that "bad press" or an increase in enquiries about the case would significantly impede or prevent it from enacting the recommendations.
Section 30(c) Paragraph 38	065/2005	Camillo Fracassini of The Sunday Times and the Common Services Agency for the Health Service	This concerned a request for information on the mortality rates of surgeons, which was refused on the grounds that release would make clinicians unwilling to take part in the clinical audit process. The Commissioner found that collection of the data was routine,

Reference	Decision Number	Parties	Summary
			and did not rely on the goodwill of the surgeons. Similar information had previously been released into the public domain, and there was no evidence that misleading conclusions had been drawn from the information. The Commissioner concluded that the exemption in section 30(c) did not apply.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you don't have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other resources

Paragraph	Resource	Link
9	The Scottish Ministerial Code (2018 edition): see paragraphs 2.4 to 2.9	http://www.gov.scot/Resource/0053/00531094.pdf
17, 30, 41	Commissioner guidance: The Public Interest Test - FOISA	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx
28	Scottish Ministers v Scottish Information Commissioner [2006] CSIH 8	Search Court of Session judgments at https://www.scotcourts.gov.uk/search-judgments/about-judgments

Appendix 2: The exemption

Section 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act –

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (b) would, or would be likely to, inhibit substantially –
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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24/10/18	KB	03.00	03.01	New document created following approval of draft
24/10/18	KB	03.01	03.02	DCS updated, published on website
28/03/19	MK	03.02	03.03	Decision number in schedule corrected
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28/03/19	MK	03.04	03.05	Copyright year updated
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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info

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