

FOISA Guidance

Section 33: Commercial interests and the economy

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
Administration in the United Kingdom	The Government of the UK; the Scottish Administration; the Executive Committee of the Northern Ireland Assembly; the National Assembly for Wales (section 28(2) of FOISA)
Scottish Administration	Members of the Scottish Executive and junior Scottish Ministers and their staff; non-ministerial office holders of the Scottish Administration and their staff (sections 126(6) and (7) of the Scotland Act 1998)

The exemption

The exemption: the main points

1. Section 33 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains four distinct exemptions. Information may be withheld if:
 - (i) it is a trade secret (section 33(1)(a));
 - (ii) disclosure would (or would be likely to) prejudice substantially the commercial interests of any person or organisation (section 33(1)(b));
 - (iii) disclosure would (or would be likely to) prejudice substantially the economic interests of the whole or part of the UK (section 33(2)(a)); or
 - (iv) disclosure would (or would be likely to) prejudice substantially the financial interests of an administration in the UK (section 33(2)(b)).
2. All of the exemptions in section 33 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 it outweighs the public interest in maintaining the exemption.
3. The exemptions in section 33(1) don't last forever. In general, they can't be applied to information that is more than 15 years old. However, the exemptions in section 33(2) can be applied to information regardless of how old it is.
4. With all of the section 33 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).

“Commercial confidentiality”

5. Information which is commercially sensitive is often described as being “commercially confidential.” However, there is no single exemption in FOISA covering “commercial confidentiality”. FOISA draws a distinction between information where disclosure would have a detrimental effect on commercial interests, and information which is “confidential” under Scots law.
6. This briefing deals with FOISA’s “commercial interests” exemption only. A separate briefing considers the “confidentiality” exemption under section 36 of FOISA (see **Appendix 1: Resources**).

Steps in applying the exemption

7. The steps an authority must take once it has located and retrieved requested information held are:
 - (i) Decide, does the exemption apply?
 - (ii) If the exemption does NOT apply, the information cannot be withheld under the exemption.
 - (iii) If the exemption DOES apply, the public interest test must be applied.

- (iv) If the public interest in disclosure outweighs that in maintaining the exemption, the exemption does not apply and the information cannot be withheld under the exemption.
- (v) If the public interest in maintaining the exemption outweighs that in disclosing the information, it can be withheld and notice served to that effect.

Section 33(1)(a) – Trade Secrets

8. Information is exempt under section 33(1)(a) if it is a trade secret. There is no definition of trade secret in FOISA. When the FOI (Scotland) Bill was being considered by Parliament, the then Justice Minister said:

"Although trade secrets are often considered to be commercial interests ... they are materially different from the normal interest that a business has in the confidentiality of its affairs. A trade secret can be regarded as an asset - perhaps the most valuable asset - of the business. The recipes for Drambuie and Irn Bru are examples of trade secrets that people would readily recognise as being of a different quality from commercial interests. Sometimes trade secrets attract legal protection, such as a patent or copyright, but often the only protection is in maintaining their secrecy."

9. The trade secrets exemption doesn't contain a "harm test". Unlike the other section 33 exemptions, public authorities don't have to evidence that disclosure would, or would be likely to, cause substantial prejudice.

10. The definition of trade secret has been considered by the courts. In **Facenda Chicken Ltd v Fowler**, the court recognised that it was difficult to define "trade secret":

"It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality."

11. In **Lansing Linde Ltd v Kerr**, the court described a trade secret as:

"... information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication."

12. See **Appendix 1: Resources** for a link to these two judgments.

13. Examples of the types of information which the courts have previously identified as trade secrets include:

- (i) technical data relating to special methods of design or construction;
- (ii) details of trade practices and processes which would be harmful if they fell into the hands of competitors;
- (iii) technical knowledge connected with the manufacture of particular goods;
- (iv) information relating to sales, prices, marketing activity or customers which would be advantageous to a competing company.

14. In deciding whether information constitutes a trade secret, there are a number of questions to consider, such as:
- (i) Is the information of commercial value?
 - (ii) Is the information used for the purpose of trade?
 - (iii) Would the disclosure of the information harm trade?
- If the answer to any of these is no, the information is unlikely to be a trade secret
- (iv) Is the information common knowledge? The more people who know it, the less likely it is to be a trade secret.
 - (v) How easy would it be for competitors to discover or reproduce the information for themselves? The easier it would be for competitors to copy, the less likely it is that the information is a trade secret.
 - (vi) Has the value of the information diminished over time? Information which constitutes a trade secret when it was created may lose its commercial value as time passes.
15. See **Appendix 1: Resources** for examples of decisions issued by the Commissioner which consider whether information is a trade secret.

The public interest test

16. 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 maintaining the exemption.
17. 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.
18. The Commissioner has published guidance on the public interest test. See **Appendix 1: Resources**.

Section 33(1)(b) – Substantial prejudice to commercial interests

19. Information is exempt under section 33(1)(b) if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person. “Person” includes a public authority, company and partnership.
20. “Commercial interests” is not defined in FOISA. There are not the same as financial interests. A person’s or organisation’s commercial interests will usually relate to the commercial trading activity they undertake, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.
21. There may be cases where prejudice to a person’s financial interests may affect their commercial interests, but this won’t always be the case. For example, information about the

level at which Council Tax is to be set is information which affects the financial interests of a local authority, but that information doesn't relate to any commercial activity.

22. In seeking to withhold information under section 33(1)(b), the authority must ensure that it sets out whose commercial interests are likely to be prejudiced, as well as the particular nature of those interests. See **Appendix 1: Resources** for examples of decisions where the Commissioner has considered whether commercial interests are involved.

“Likely”

23. The exemption in section 33(1)(b) can only be applied 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 properly applied. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.

“Substantial prejudice”

24. There is no definition of “substantial prejudice” in FOISA, but the damage caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.
25. As with all exemptions, section 33(1)(b) needs to be justified on a case by case basis. Contracts with third party service providers might contain information which falls within the scope of section 33(1)(b), but it won't usually be appropriate to withhold contracts in their entirety. The content of contracts must be assessed, and only information which falls within the scope of an exemption withheld. It will usually be appropriate for contracts to be disclosed with exempt information “redacted” (blacked out), rather than for them to be withheld in their entirety.
26. The effect of the passage of time must also be considered when assessing whether disclosure of information would, or would be likely to, cause substantial prejudice. Information about a tendering process may well cause harm to the commercial interests of those submitting tenders during or immediately following the process, but as time passes the likelihood of this harm will diminish as prices, service delivery methods and market conditions change.
27. Another factor to consider is whether the information is already publicly available. Where information is in the public domain, it will not generally be appropriate to apply the exemption in section 33(1)(b). See **Appendix 1: Resources** for an example of a decision where this was the case.
28. The Scottish Ministers' Code of Practice on the Discharge of Functions under FOISA and the Environmental Information (Scotland) Regulations 2004 contains helpful guidance on disclosing information relating to contracts or the procurement process (see **Appendix 1: Resources**).

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 or withholding the information. The authority must identify and set out the competing public interest arguments:
 - (i) as to why the public interest would be served by disclosing the information, and

- (ii) why it would be served by maintaining the exemption.
30. 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.
 31. FOISA does not define “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” The public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
 32. The Commissioner has published guidance on the public interest test. See **Appendix 1: Resources**.

Section 33(2)(a) - The economic interests of the United Kingdom

33. Section 33(2)(a) of FOISA exempts information from disclosure if disclosure would, or would be likely to, prejudice substantially the economic interests of the whole or part of the UK. This includes regions of the UK and not just the separate countries making up the UK.
34. The exemption may potentially apply to information relating to an individual company if that company's performance would have a major influence on the national or local economy.
35. The exemption will not apply to information relating to the economic interests of states other than the UK, unless the disclosure of that information would also impact on the UK economy.

“Likely”

36. The exemption in section 33(2)(a) can only be applied 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 properly applied. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.

“Substantial prejudice”

37. There is no definition of “substantial prejudice” in FOISA, but the damage caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.
38. As with all other exemptions, section 33(2)(a) needs to be justified on a case by case basis. In common with the other exemptions in section 33, much of the information may be time-sensitive, with the potential harm caused by disclosure diminishing over time. For example, the sensitivity of information relating to the Budget or changes in interest rates is likely to diminish in this way as time passes. See **Appendix 1: Resources** for an example of a decision issued by the Commissioner.

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 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 maintaining the exemption.

40. FOISA does not define “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” 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**.

Section 33(2)(b) – The financial interests of a UK administration

42. Under section 33(2)(b), information is exempt if disclosure would, or would be likely to, prejudice substantially the financial interests of an “administration in the United Kingdom” (see **Glossary and abbreviations** for definitions).
43. An administration’s financial interests will generally concern the management of its financial resources. Information may be exempt if disclosure would have a significant detrimental impact on matters such as the funding of the administration, the revenue raised through taxation, or the availability and cost of borrowing to the administration.

“Likely”

44. The exemption in section 33(2)(b) can only be applied 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 properly applied. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.

“Substantial prejudice”

45. There is no definition of “substantial prejudice” in FOISA, but the damage caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal. The harm must affect the financial interests of the administration as a whole, as opposed to only a department, agency or other component part of that administration.
46. As with all other exemptions, section 33(2)(b) will need to be justified on a case by case basis. In common with the other exemptions in section 33, much of the information may be time-sensitive, with the potential harm caused by disclosure diminishing over time. See **Appendix 1: Resources** for examples of decisions issued by the Commissioner.

The public interest test

47. 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 maintaining the exemption.
48. FOISA does not define “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” The public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
49. The Commissioner has published guidance on the public interest test. See **Appendix 1: Resources**.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Section 33(1)(a) Paragraph 14	180/2006	Alfred Weir and Fife Council	The Council refused to disclose pricing schedules submitted three years earlier as part of a tendering process. We decided that the commercial sensitivity of the information had decreased significantly, and that the pricing schedules used would not guide future submissions.
Section 33(1)(a) Paragraph 14	056/2006	MacRoberts and City of Edinburgh Council	Information could be compiled through publicly accessible Council registers, albeit at a cost. As the information could be reproduced by competitors, it did not constitute a trade secret.
Section 33(1)(a) Paragraph 14	104/2008	Streetwork UK and Glasgow City Council	We did not accept that the whole of a successful tenderer's proposal was a trade secret, particularly in the absence of arguments as to which parts were considered secret and why. Given the passage of time, sensitivity in the information had reduced.
Section 33(1)(a) Paragraph 14	102/2011	Tom Gordon and City Building (Glasgow)	Here, the authority argued that the weightings in a tender evaluation matrix constituted a trade secret. We disagreed – a relatively standard set of criteria had been used; the main evaluation criteria and weightings had been included in the tender document which was completed by all bidders and it was unclear how future tenderers could use the information to distort a bid or be detrimental to the authority.
Section 33(1)(b) Paragraph 21	098/2007	Sandra McGregor and the Common Services Agency for the Scottish Health Service	NHS Scotland's Central Legal Office competes with private law firms for business from NHS Scotland bodies. It has commercial interests in relation to its legal fees and outlays.

Reference	Decision number	Parties	Summary
Section 33(1)(b) Paragraph 21	056/2006	MacRoberts and the City of Edinburgh Council	This case dealt with information Scottish Water had given the Council. Scottish Water is charged with operating as if it were a private company. It held commercial interests in relation to the information.
Section 33(1)(b) Paragraph 21	233/2006	Mike Portlock and Glasgow City Council	Request for the cost of a foodstuff purchased by the Council. A proportion of the foodstuffs purchased were used to supply a commercial catering service operated by the Council. As a result, the Council had commercial interests.
Section 33(1)(b) Paragraph 21	052/2006	Mr K and the University of Aberdeen	The University's purchase of travel services did not represent a commercial interest: the University engaged in this activity only occasionally, and did so only in order to fulfil its core functions.
Section 33(1)(b) Paragraph 21	114/2007	Prof. Neil Kay and the Scottish Ministers	This involved a request for information about the Gourock – Dunoon ferry route. Information had been withheld under section 33(1)(b). Some of the information was already in the public domain and the Commissioner concluded that it was not exempt.
Section 33(1)(b) Paragraph 21	042/2017	Gary Barwood and Scottish Futures Trust	We agreed that disclosing the rate of return for lenders in infrastructure projects would cause substantial prejudice to SFT's commercial interests. Disclosure would allow future tenders to be tailored to undercut previous, successful bids for similar projects, providing other bidders with a competitive advantage. This would place existing lenders at a substantial disadvantage.
Section 33(2)(a) Paragraph 37	023/2008	Paul Drury and Glasgow City Council	The Council argued that disclosing travel and hotel costs associated with Glasgow's bid to stage the 2014 Commonwealth Games would be likely to damage Glasgow's chances of success, prejudicing the delivery of economic benefits to Glasgow, the West

Reference	Decision number	Parties	Summary
			Coast of Scotland, and Scotland as a whole. We did not accept that disclosure would damage Glasgow's chances of winning the bid, or have the consequences argued by the Council.
Section 33(2)(b) Paragraph 45	067/2005	Western Ferries (Clyde) Ltd and the Scottish Ministers	Here, we did not accept that disclosing information about ferry services provided by CalMac between Gourock and Dunoon would substantially prejudice the Scottish Administration's financial interests.
Section 33(2)(b) Paragraph 45	119/2007	Ms N and the Common Services Agency for the Scottish Health Service	We did not accept that disclosing information about compensation claims for Hepatitis C would substantially prejudice the Scottish Administration's financial interests.
Section 33(2)(b) Paragraph 45	074/2011	Caroline Gerard and the City of Edinburgh Council	Here, we did not accept that disclosing the fee paid to Experian for work done on an analysis of the Council's Council Tax debt would substantially prejudice the Scottish Administration's financial interests.
Section 33(2)(b) Paragraph 45	171/2012	Elekta Ltd and the Scottish Ministers	We did not accept that disclosing information about a radiotherapy equipment contract would substantially prejudice the Scottish Administration's financial interests.

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 do not 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
Glossary	Scotland Act 1998	http://www.legislation.gov.uk/ukpga/1998/46/contents
6	Commissioner's guidance: Section 36 Confidentiality	www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36
12	Facenda Chicken Ltd v Fowler	[1987] 1 Ch 117, [1986] 1 All ER 617
12	Lansing Linde Ltd v Kerr	1 All ER 418, [1991] 1 WLR 251, CA
17, 31, 40, 48	Commissioner's guidance: The Public Interest Test - FOISA	www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest
27	The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (December 2016)	https://beta.gov.scot/publications/foi-eir-section-60-code-of-practice/FOI%20-%20section%2060%20code%20of%20practice.pdf?inline=true

Appendix 2: The exemption

Section 33: Commercial interests and the economy

- (1) Information is exempt information if-
 - (a) it constitutes a trade secret; or
 - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
 - (a) the economic interests of the whole or part of the United Kingdom; or
 - (b) the financial interests of an administration in the United Kingdom.
- (3) In subsection (2), “administration in the United Kingdom” has the same meaning as in section 28(2).

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