

FOISA Guidance

Section 26: Prohibitions on disclosure

Exemption Briefing



Contents

Glossary and abbreviations	i
The exemption	1
The exemption: the main points	1
Section 26(a): Prohibited by or under an enactment	1
Section 26(b): Incompatible with an EU obligation	2
Section 26(c): Contempt of court	2
Statutory contempt of court	2
Common law contempt	2
Appendices	4
Appendix 1: Resources	4
SIC Decisions	4
Other Resources	5
Appendix 2: The exemption	6
Section 26 Prohibitions on disclosure	6
Document control sheet	7

Glossary and abbreviations

Term used	Explanation
FOISA	Freedom of Information (Scotland) Act 2002
SIC, The Commissioner	The Scottish Information Commissioner
EU	The European Union

The exemption

The exemption: the main points

1. Information is exempt from disclosure under section 26 of the Freedom of Information (Scotland) Act 2002 (FOISA) where disclosure:
 - (i) is prohibited by or under an enactment (i.e. by other legislation);
 - (ii) is incompatible with an EU obligation; or
 - (iii) would constitute, or be punishable as, contempt of court.
2. The exemptions in section 26 are absolute. So, if the information is “prohibited from disclosure”, the public authority responding to the request doesn’t have to go on to apply the public interest test.
3. Unlike some of the other exemptions in FOISA, the exemptions in section 26 can be applied regardless of how old the information is.

Section 26(a): Prohibited by or under an enactment

4. This allows public authorities to refuse to disclose information where disclosure is prohibited by or under an enactment. “Enactment” means any primary legislation (an Act of the UK or Scottish Parliament) or secondary legislation (orders, rules or regulations made under an Act of the UK or Scottish Parliament).
5. It’s not always easy to decide if legislation prohibits the disclosure of information. There may be conditions or tests set out in the legislation which need to be considered before a judgement can be made on whether a prohibition applies. For example, legislation might prohibit the disclosure of information where its publication would harm or prejudice a particular interest such as national security or public safety. The legislation may nominate a specified person or body to make this decision. In cases like these, authorities will need to decide whether the provision contains a prohibition or merely a discretionary power. Where legislation gives an authority the power to decide whether information should be withheld (and not an obligation to withhold the information), the exemption will not apply.
6. See **Appendix 1: Resources** for examples of decisions where section 26(a) has been considered.
7. Any authority relying on this exemption must tell the requester why the exemption applies; this means telling the requester which provision (in which piece of legislation) prohibits disclosure.
8. Section 64 of FOISA allows the Scottish Ministers to remove or relax prohibitions which would otherwise prevent disclosure under FOISA, but only if the prohibition was in place before FOISA received Royal Assent. The Ministers have made one order under section 64 so far (for more information, see **Appendix 1: Resources**).

Section 26(b): Incompatible with an EU obligation

9. An “EU obligation” is an obligation created by, or arising under, any of the European Union (EU) Treaties. Treaty articles, European Directives, Regulations and Decisions are all examples of EU obligations. Recommendations and Opinions are not binding, so are not EU obligations.
10. EU obligations bind Member States, i.e. any of the countries or states who have joined the EU. The definition of “Member State” applies more widely than central government: it also applies to local government, police forces and some health bodies. FOISA applies both to these authorities and more widely: some public authorities subject to FOISA do not fall under the definition of Member State. If authorities are not part of the “Member State”, they cannot apply this exemption.
11. The exemption applies to EU obligations, not to other obligations the UK might have at European or international level. For example, the exemption doesn’t apply to the European Convention on Human Rights, which is an initiative of the Council of Europe and not of the European Union.

Section 26(c): Contempt of court

12. There are two broad categories of contempt of court: statutory and common law.

Statutory contempt of court

13. Statutory contempt of court involves disclosure of information which would breach the Contempt of Court Act 1981 by creating a real risk of prejudice or impediment to a fair trial or to the administration of justice. (See **Appendix 1: Resources.**) For example, it is likely to be contempt of court for an authority, which knows that proceedings are about to be instituted against someone, to disclose information likely to prejudice those proceedings. Statutory contempt of courts, being covered by an enactment, could be exempt under either section 26(a) or (c).

Common law contempt

14. Common law of contempt covers a wide variety of actions not covered by the 1981 Act. These include:
 - (i) conduct that offends the dignity of the court;
 - (ii) refusal by a witness to answer a competent and relevant question;
 - (iii) failure to obey an order of any court, whether criminal or civil; and
 - (iv) publication of information where court proceedings are not yet active, but are imminent.
15. These last two examples are the ones most likely to be relevant for FOI purposes. For example, a public authority might be:
 - (i) subject to a court order requiring it not to disclose information or
 - (ii) aware of a court order which requires that particular information should not be disclosed.

16. In cases like these, disclosure of the information would breach the court order and would be a contempt of court.
17. Contempt of court doesn't only cover courts, but a range of tribunals or bodies exercising the judicial power of the state, such as children's hearings, the Mental Health Tribunal for Scotland and employment tribunals.
18. The Commissioner has issued one decision which deals with the exemption in section 26(c) of FOISA – see **Appendix 1: Resources**.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Section 26(a) Para 5	132/2007	John Stewart and the Scottish Ministers	The Agriculture Act 1947 allows the Ministers to require farmers to give them certain information. Under section 80 of the 1947 Act (section 80 has been amended since this decision was issued), the Ministers were prohibited from disclosing information unless they considered disclosure to be in the public interest). Given that section 80 gave the Ministers the discretion to disclose information, the exemption in section 26(a) could not apply.
Section 26(a) Para 6	232/2011	Tina McGreevy and the Scottish Legal Aid Board (SLAB)	Section 34 of the Legal Aid (Scotland) Act 1986 (LASA) makes it a criminal offence for anyone employed by, or acting on behalf of, SLAB to disclose information provided to them for the purposes of LASA without the consent of the person who provided the information. In this case, no consent had been given. We concluded that section 34 of LASA prohibited disclosure and that SLAB had applied 26(a) of FOISA correctly.
Section 26(a) Para 6	269/2013	David Wilson and the Scottish Public Services Ombudsman (SPSO)	Mr Wilson made an information request to the SPSO about a complaint it had received. We agreed that the SPSO was prohibited from disclosing the information under section 19 of the Scottish Public Services Ombudsman Act 2002.
Section 26(a) Para 6	144/2015	Paul Hutcheon and the Scottish Ministers	This involved a request about activities regulated by the Regulation of Investigatory Powers Act 2000 (RIPA). We were satisfied that section 19(3) of RIPA prohibited the Ministers from disclosing the information and that the exemption in section 26(a) of FOISA applied.
Section 26(a) Para 6	173/2015	Mr N and the Scottish Legal Complaints Commission (SLCC)	Mr N made an information request to the SLCC about complaints he had raised. The SLCC refused to disclose the information: under section 43 of the Legal Profession and Legal Aid (Scotland) Act 2007, it was an offence for them to disclose the information. We agreed that the exemption in section 26(a) applied.
Section 26(c) Para 18	125/2019	Mr J and the Scottish Ministers	The Ministers were asked for anonymised copies of complaints made against Alex Salmond, former First Minister. We found that the complaints could not be

			anonymised without making them incomprehensible. We also found that the complaints were exempt under section 26(c), given the terms of a court order banning publication of information identifying the complainers.
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The Commissioner's decisions are all 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
8	Freedom of Information (Relaxation of Statutory Prohibitions on Disclosure of Information) (Scotland) Order 2008	http://www.legislation.gov.uk/ssi/2008/339/contents/made
13	Contempt of Court Act 1981	http://www.legislation.gov.uk/ukpga/1981/49

Appendix 2: The exemption

Section 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act) –

- (a) is prohibited by or under an enactment;
- (b) is incompatible with EU obligation; or
- (c) would constitute, or be punishable as, a contempt of court.

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