

# FOISA Guidance

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## Section 28: Relations within the United Kingdom

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### Exemption Briefing



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## Glossary and abbreviations

Term used	Explanation
<b>The Commissioner</b>	The Scottish Information Commissioner
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>SIC</b>	The Scottish Information Commissioner, staff of SIC (depends on context)
<b>FOIA</b>	(UK) Freedom of Information Act 2000
<b>Administration in the UK</b>	The UK Government; the Scottish Administration (usually known as the Scottish Government); the National Assembly for Wales and the Executive Committee of the Northern Ireland Assembly

# The exemption

## The exemption: the main points

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1. Section 28 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure where disclosure would, or would be likely to, prejudice substantially relations between administrations in the UK (e.g. between Westminster and Holyrood).
2. The exemption in section 28(1) is 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 exemption does not last forever. In general, it cannot be applied to information that is more than 15 years old.
4. This is one of the exemptions where 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).

## How the exemption works in practice

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### Scope of the exemption

5. Although the exemption in section 28 focuses on the harm to relations between UK administrations, its use is not restricted to information held by the Scottish Government. There may be cases where Scottish public authorities (other than the Scottish Government) hold information or have been supplied with information from another UK administration (see the Glossary for the definition), disclosure of which would be exempt under section 28.

### Information supplied by another UK administration

6. Scottish public authorities might hold information supplied to them by a UK administration in the expectation that it would not be supplied to any other body or to the wider general public. It might be argued that disclosure of the information against the wishes of that administration could harm relations between UK administrations.
7. However, the fact that information has been supplied by an administration doesn't mean that it will automatically be exempt. In each case, the authority will need to show that disclosure of the information would, or would be likely to, "substantially prejudice" relations between UK administrations.

### "Likely to"

8. The exemption 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 appropriately applied. There must be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.

### "Substantial prejudice"

9. 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.

10. Authorities must avoid classifying types of documents as potentially falling within this exemption. As with all exemptions, the use of section 28 will need to be justified on a case by case, and document by document, basis. See **Appendix 1: Resources** for examples of decisions.
11. In cases like this, public authorities should check whether the information has been supplied by the UK Government and if it is held “in confidence” for the purposes of section 3(2)(a)(ii) of FOISA (see below). If this is the case, the public authority will not hold the information for the purposes of FOISA.

### **Information supplied to the Scottish Administration**

12. After devolution, a series of agreements, known as concordats, were drawn up by the administrations to facilitate co-operation between the UK Government and the devolved administrations. The provisions of an overarching concordat, the Memorandum of Understanding (MoU), are implicit in all other concordats or supplementary agreements. The MoU sets out the broad principles that govern inter-administration policy cooperation and consultation; in particular, the need for timely exchange of information and consultation and, where appropriate, for confidentiality (see **Appendix 1: Resources**).
13. Paragraph 11 of the MoU states that: “Each administration will wish to ensure that the information it supplies to others is subject to appropriate safeguards in order to avoid prejudicing its interests. The [four] administrations accept that in certain circumstances a duty of confidence may arise and will between themselves respect legal requirements of confidentiality. Each administration can only expect to receive information if it treats such information with appropriate discretion.”
14. The MoU goes on to say that the administration supplying the information should state what, if any, restrictions apply to its usage. Administrations are instructed to treat the information they receive in accordance with any restrictions specified by the supplying administration.
15. The concordats do not create legal obligations and any authority wanting to rely on the concordats must still be able to show that disclosing the information in question would, or would be likely to, substantially prejudice relations between administrations.
16. Protective markings which indicate the sensitivity of information may highlight the need to consult the administration which supplied the material, but they do **not** remove the need to assess the information in the light of FOISA.
17. The passage of time is likely to affect the application of section 28(1). Information may lose its sensitivity over time. Scottish public authorities should not simply rely on a previous refusal to justify withholding information in response to a later request (see **Appendix 1: Resources**). Once negotiations are complete it is more difficult for an authority to argue that the exemption applies.
18. An administration holding comments on another administration’s policy proposals may find it difficult to rely on this exemption if the comments are essentially already in the public domain.

### **The public interest test**

19. 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 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.

20. 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 held that the public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
21. The Commissioner has produced separate guidance to assist with the application of the public interest test. This is available from the Commissioner’s website (see **Appendix 1: Resources**).
22. In general, the Commissioner has found that where the exemption in section 28(1) applies, the public interest arguments for disclosure do not outweigh the harm that would be caused to the relationships between administrations in the UK by release. In some cases, the Commissioner has concluded that the public interest arguments for transparency and greater understanding can be addressed by the disclosure of other documents in the same case or by the existence of similar information already in the public domain. In some cases, the actual information withheld under section 28(1) in these cases would contribute little to public debate and understanding, but the harm caused by disclosure would be substantial. (See **Appendix 1: Resources**.)

## Related provisions

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### Section 3(2)(a)(ii) – Information supplied in confidence by the UK Government

23. Section 3(2)(a)(ii) may be relevant where information has been provided by the UK Government. Information is not “held” by a public authority for the purposes of FOISA if it is held in confidence, having been supplied by a Minister of the Crown or a department of the Government of the UK.
24. Section 3(2)(a)(ii) has the effect of ensuring that information which has been provided by the UK Government in confidence is not subject to FOISA. Public authorities should advise requesters instead to make their information request to the UK Government department that supplied it under the terms of the Freedom of Information Act 2000 (see **Appendix 1: Resources**).
25. There are three points to consider when determining whether section 3(2)(a)(ii) applies:
  - (i) **was the information provided in circumstances giving rise to (or at least implying) a specific obligation to keep it confidential?** In most cases, there should be a clear indication that information was intended to be treated as confidential, for example with a protective marking (e.g. “restricted”, “secret” or “top secret”) or some other express statement.
  - (ii) **is the information still confidential at the time of the request?** This will depend on the nature of the information. In order to be confidential, it needs to have the necessary quality of confidence – the information must not be common knowledge or

otherwise publicly available. For example, a document supplied to a public authority may subsequently have been published, in which case it is no longer confidential.

- (iii) **would any damage result from the disclosure of the information?** In general, if no damage would follow from disclosure, the duty of confidence does not exist.

### **How to respond to a request for information falling under section 3(2)(a)(ii)**

- 26. If a Scottish public authority is satisfied section 3(2)(a)(ii) applies, the authority should issue a notice:
  - (i) stating that it does not hold the information (this is required by section 17 of FOISA)
  - (ii) advising the requester that this information is covered by the UK Freedom of Information Act 2000 and
  - (iii) referring the requester to the relevant UK Government Department.
- 27. The Commissioner has published separate guidance on section 17 of FOISA – see **Appendix 1: Resources.**

# Appendices

## Appendix 1: Resources

### SIC Decisions

Reference	Decision number	Parties	Summary
Section 28 Para 10	057/2005	William Alexander and the Scottish Ministers	We considered the application of section 28(1) to exchanges between the UK and Scottish Governments concerning the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. We noted that the Ministers had applied the exemption in a very general manner rather than considering the actual information withheld and made it clear that the exemption should be considered on a case-by-case basis. We found that the exemption didn't apply to all the documents - some of the content was uncontroversial and administrative in nature, and disclosure would be unlikely to damage relations between the administrations.
Section 28 Para 10	022/2008	Peter McMahon and the Scottish Ministers	This considered communications relating to the removal of asylum seekers from Scotland. Not all of the information originating from the Home Office was exempt under section 28(1) – e.g. a press release and documents simply informing the UK Government of representations that had been received.
Section 28 Para 10	163/2017	Mr A and the Scottish Ministers	The Ministers were asked for a feasibility study carried out by the DWP regarding the possibility of increasing the carers' allowance in Scotland. The Ministers argued that they did not hold the information (section 3(2)(a)(ii)) but said, if they did, the information would be exempt from disclosure under section 28(1). We found that some of the information was purely internal, and so was held by the Ministers. However, that information was exempt under section 28(1): disclosure would place vital lines of communications in jeopardy on what was a sensitive and highly contentious matter.
Section 28 Para 17	143/2007	Barry Winetrobe and the Scottish Ministers	We considered information relating to the establishment of the "Sewel Convention", by which the Scottish Parliament agrees to

			Westminster legislating on devolved matters, in the period immediately after the first Scottish Parliamentary elections in 1999. We concluded that the exemption did not apply to the majority of documents to which it had been applied. In reaching this conclusion, we noted that more than five years had passed since the creation of the documents (and the establishment of the Sewel Convention) by the time the request was made.
Section 28 Para 23	036/2009	Rob Edwards and the Scottish Ministers	In this decision, we found that the public interest lay in favour of disclosing the information. Disclosure would give the public information about measures, procedures, arrangements and discussions within government relating to protection from disasters and attacks.
Section 28 Para 23	055/2013	Rami Okasha and the Scottish Ministers	In the context of communications relating to the proposed award of an honour, the Ministers argued that each administration had to have confidence in the integrity of how the others operated, to ensure consistency of approach. This being a reserved matter, relations with the UK Government would be prejudiced substantially by disclosure. We accepted this.
Section 3(2)(a)(ii) Para 25	186/2007	Richard Haley and Tayside Police	The fact that information was supplied in confidence will not be definitive in assessing whether it is held in confidence for the purposes of section 3(2)(a)(ii). This decision sets out the factors that need to be considered when determining whether section 3(2)(a)(ii) applies to information.

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

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
12	Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish	<a href="https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_De">https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_De</a>

	Ministers and the Cabinet of the National Assembly for Wales.	<a href="#">volved Administrations.pdf</a>
19	More information about the Freedom of Information Act 2000 can be found on the (UK) Information Commissioner's website.	<a href="https://ico.org.uk/">https://ico.org.uk/</a>
22	Commissioner's guidance: Public Interest Test - FOISA	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest">www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest</a>
27	Commissioner's guidance: Information not held	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Informationnotheld/InformationnotheldFOISA.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Informationnotheld/InformationnotheldFOISA.aspx</a>

## Appendix 2: The exemption

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### Section 28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration
- (2) In subsection (1), “administration in the United Kingdom” means –
  - (a) the Government of the United Kingdom;
  - (b) the Scottish Administration
  - (c) the Executive Committee of the Northern Ireland Assembly; or
  - (d) the National Assembly for Wales.



**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610  
f 01334 464611  
enquiries@itspublicknowledge.info

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**

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