

# FOISA Guidance

## Section 31: National security and defence

Exemption Briefing



Scottish Information  
Commissioner

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## Glossary and abbreviations

Term used	Explanation
<b>FOISA</b>	The Freedom of Information (Scotland) Act 2002
<b>SIC, The Commissioner</b>	The Scottish Information Commissioner
<b>A member of the Scottish Executive</b>	The First Minister; Ministers appointed by the First Minister under section 47 of the Scotland Act 1998; the Lord Advocate and the Solicitor General for Scotland
<b>British Islands</b>	The United Kingdom, the Channel Islands and the Isle of Man (section 31(4)(a) of the Interpretation Act 1978)
<b>Colony</b>	Any part of Her Majesty's dominions outside of the British Islands except countries having fully responsible status within the Commonwealth; territories for whose external relations a country other than the United Kingdom is responsible; and associated states (section 31(4)(a) of the Interpretation Act 1978)
<b>Relevant forces</b>	The armed forces of the crown and any forces co-operating with those forces or any part of the armed forces of the Crown or of any such co-operating forces (section 31(5)(b) of FOISA)
<b>OSA</b>	Official Secrets Act 1989
<b>FOIA</b>	(UK) Freedom of Information Act 2000

# The exemption

## The exemption: the main points

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1. Section 31 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains three separate exemptions. Information is exempt if:
  - (i) exemption from disclosure is required for the purpose of safeguarding national security (section 31(1))
  - (ii) disclosure would, or would be likely to, prejudice substantially the defence of the British Islands or of any colony (section 31(4)(a))
  - (iii) disclosure would, or would be likely to, prejudice substantially the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with them (section 31(4)(b))
2. All three of the exemptions in section 31 are subject to the public interest test. This means that, even if an exemption applies, the information must be disclosed unless the public interest in withholding the information outweighs the public interest in maintaining the exemption.
3. With section 31, public authorities can refuse to confirm or deny whether they hold the information, provided they are satisfied that revealing whether the information exists or not would be contrary to the public interest (section 18).
4. Where the First Minister disagrees with a decision from the Commissioner concerning the application of section 31(1) (not section 31(4)(a) or (b)), the First Minister can, under section 52, overrule the Commissioner's decision provided:
  - (i) the information is of exceptional sensitivity and
  - (ii) the First Minister has consulted the other members of the Scottish Government
5. No certificates have ever been issued under section 52. (N.b. section 52 certificates are different from certificates issued under section 31(2).)

## Steps in applying the exemption

6. 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 of maintaining the exemption, 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 31(1) – Safeguarding national security**

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7. Information is exempt if exemption from disclosure is required for the purpose of safeguarding national security. Before applying this exemption, authorities will need to be able to demonstrate that disclosure will constitute a threat to national security. The exemption does not say that information will be exempt from disclosure simply because it relates to national security. Exemption must be required in order to safeguard national security.
8. Where a ministerial certificate states that, in order to safeguard national security, information cannot be disclosed, this will be conclusive of that fact and the Commissioner will not have the power to decide that the exemption doesn't apply.
9. The approach to this exemption will depend on whether a ministerial certificate has been issued. Both scenarios are considered below.

### *A ministerial certificate exists*

10. Where a member of the Scottish Executive has certified that exemption from section 1(1) is, or any time was, required for the purpose of safeguarding national security, the certificate will be conclusive of that fact and the fact that the exemption applies cannot be challenged.
11. There are two different kinds of certificates that can be drawn up.
  - (i) A certificate may identify the specific material to be withheld, and may be drawn up on a case by case basis.
  - (ii) Alternatively, a prospective certificate can be issued with a general description of the information to be covered.
12. Where a section 31(2) certificate exists, a public authority responding to a request for information falling within the scope of the certificate has no option but to apply the exemption. However, the public authority must still go on to consider the public interest test. This is discussed below.
13. Under FOISA, there is no specific provision for challenging national security certificates but judicial review proceedings could be raised in the Court of Session against the decision to issue a certificate.
14. Only one certificate has been issued under section 31(2) since FOISA came into force. This was a prospective certificate issued in connection with the preparation and provision of security arrangements for the G8 Summit held at Gleneagles in July 2005. The certificate meant that information connected with the preparation and provision of security arrangements for the Summit was automatically deemed to be exempt under section 31(1), regardless of which Scottish public authority held the information.
15. The certificate was revoked in April 2010. This means that information previously falling within the scope of the certificate is no longer automatically exempt under section 31(1).

### *No ministerial certificate exists*

16. In most cases, no certificate will exist: a ministerial certificate doesn't have to be in place for the exemption in section 31(1) to apply. Where a certificate has not been issued, the authority will need to be satisfied that the information can't be disclosed on national security grounds and must be able to justify any decision it takes.

17. “National security” isn’t defined in FOISA, but covers matters such as:
  - (i) the defence of the realm
  - (ii) the prosecution of war
  - (iii) the disposition of the armed forces
  - (iv) nuclear weapons
  - (v) the activities of the security and intelligence services
18. The list isn’t exhaustive. There may be other kinds of information that fall within this definition (see **Appendix 1: Resources** for examples of decisions issued by the Commissioner).
19. Information which is already in the public domain might fall within the scope of the section 31(1) exemption, particularly where information has been put into the public domain through unofficial channels (e.g. through the leaking of information). Where information has been leaked, authorities might be concerned that formal disclosure will not only authenticate the information, but also confirm that the information is accurate.
20. The Scottish Government has prepared guidance for Scottish public authorities for dealing with requests where Security and Intelligence Agency information and/or information related to national security issues are involved (see **Appendix 1: Resources**).
21. Information falling within the scope of the section 31(1) exemption may have been supplied to a Scottish public authority by a UK Government department. In such circumstances, the information may not fall within the scope of FOISA – see “**Related provisions**” below.

*The public interest test*

22. 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.
23. 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.
24. 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.
25. The Commissioner has produced separate guidance to assist with the consideration of the public interest test. This is available from the Commissioner’s website (see **Appendix 1: Resources**).

## **Section 31(4) – Defence of the nation/capability of the Armed Forces**

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26. Section 31(4) deals with the two remaining exemptions under section 31(4). Information is exempt if its disclosure would, or would be likely to, prejudice substantially:
  - (i) the defence of the British Islands or of any colony (section 31(4)(a))
  - (ii) the capability, effectiveness or security of any relevant forces (section 31(4)(b))
27. The defence of the nation is not limited to resisting external threats, but will also extend to the protection of the nation from internal threats. As a result, there is likely to be an overlap between information which would, or would be likely to, substantially prejudice the defence of the British Islands (section 31(4)(a)) or the capability, effectiveness or security of relevant forces (section 31(4)(b)) and information withheld for the purpose of safeguarding national security (section 31(1)).

### *Official Secrets Act 1989*

28. Section 2(4) of the Official Secrets Act 1989 (OSA) provides some guidance about the types of matters that may be relevant to “defence”. OSA defines “defence” as:
  - (i) the size, shape, organisation, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown;
  - (ii) the weapons, stores, or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it;
  - (iii) defence policy and strategy and military planning and intelligence and
  - (iv) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war.
29. Section 2(2) of OSA states that disclosure of information relating to defence is damaging if it:
  - (i) damages the capability of, or any part of, the armed forces of the Crown to carry out their tasks;
  - (ii) leads to loss of life or injury to members of those forces;
  - (iii) leads to serious damage to the equipment or installations of those forces;
  - (iv) endangers the interests of the UK abroad;
  - (v) seriously obstructs the promotion or protection by the UK of those interests; or
  - (vi) endangers the safety of British citizens abroad
  - (vii) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of the above effects.
30. Although the definitions are in OSA are helpful, authorities relying on these exemptions need to demonstrate that disclosure would substantially prejudice defence or any of the other interests identified in this exemption. The simple fact that the information *relates to* any of these matters is not enough for the exemption to apply.

*“Likely to”*

31. The exemptions in section 31(4) 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 harm: it cannot simply be a remote or hypothetical possibility.

*“Substantial prejudice”*

32. 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.
33. Authorities must avoid classifying types of documents as potentially falling within this exemption. As with all exemptions, the use of section 34(1) will need to be justified on a case by case, and document by document, basis.
34. In considering whether disclosure would, or would be likely to, substantially prejudice the defence of the nation, the current political climate (e.g. whether the nation is in peacetime, preparing for war, in actual hostilities, or whether the hostilities are over) is likely to be relevant.
35. Consideration should also be given to what information is already in the public domain. Where information has been disclosed by another official source, it will be much more difficult to satisfy the Commissioner that disclosure under FOISA would cause substantial prejudice (see also paragraph 19).
36. The disclosure of seemingly innocuous information might substantially prejudice defence if, once disclosed, it could be used in combination with another piece of information already in the public domain. Again, this may be a legitimate use of this exemption, but will need to be considered on a case by case basis.
37. Information falling within the scope of the section 31(4) exemptions may have been supplied to a Scottish public authority by a UK Government department. In such circumstances, the information may not fall within the scope of FOISA. See “**Related provisions**” below.

*The public interest test*

38. If the exemption applies, the authority must go on to consider the public interest in relation to the information – section 2(1)(b) of FOISA. See paragraphs 22 to 25 above
39. At the time of writing, there have been no decisions from the Commissioner involving the exemptions in section 31(4).

## Related provisions

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

40. Section 3(2)(a)(ii) might 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.
41. 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. “official-sensitive”, “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 a 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, there is no need to keep information confidential.

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

- 42. If a Scottish public authority is satisfied section 3(2)(a)(ii) applies, the authority should issue a notice which:
  - (i) states that it does not hold the information (this is required by section 17 of FOISA)
  - (ii) advises the requester that this information is covered by the UK Freedom of Information Act 2000 (FOIA) (see **Appendix 1: Resources**) and
  - (iii) refers the requester to the relevant UK Government Department.
- 43. The Commissioner has more detailed guidance on section 17 (Information not held) of FOISA. See **Appendix 1: Resources** for a link to the guidance.

*Information supplied by or relating to the security services, etc.*

- 44. Section 31 of FOISA closely follows the wording of the equivalent section in FOIA. However, FOIA also contains an additional provision (section 23) which gives absolute exemption to information which was directly or indirectly supplied to an authority by, or which relates to, certain prescribed security bodies.
- 45. Where a Scottish public authority holds information that has been supplied by or relates to any of the security bodies listed in section 23 of FOIA, it will have to justify any decision to withhold the information on the basis of an exemption under section 31 (or some other relevant exemption). However, it is possible that it may not hold the information for the purposes of FOISA (see paragraphs 40 to 43 above).

# Appendices

## Appendix 1: Resources

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Reference	Decision number	Parties	Summary
Section 31(1) Paragraph 17	151/2007	Rob Edwards and the Scottish Ministers	This involved a request for copies of documents contained in a file called, "Release of Radionuclides in Drinking Water Systems". The Ministers argued that disclosing information could harm national security as it related to measures to protect essential services. We found that the Ministers had failed to demonstrate why exemption from section 1(1) was required for the purpose of safeguarding national security.
Section 31(1) Paragraph 17	140/2014	Rob Edwards and the Scottish Ministers	In this case, the Ministers did satisfy us that exemption was required for the purposes of safeguarding national security. Mr Edwards asked for the location and quantities of potassium iodate tablets in Scotland; these are used to prevent cancer following exposure to radiation. We accepted that disclosing the information would reveal the UK's capacity to respond to attack and would be beneficial to terrorist organisations.
Section 31(1) Paragraph 17	125/2016	Alastair Tibbitt and North Lanarkshire Council	The Council was asked for the monitoring reports provided to the Lanarkshire Multi-Agency Counter-Terrorism Strategy Group or to the Scottish Ministers in line with its duties under the Counter-Terrorism and Security Act 2015. It argued that the reports were exempt from disclosure as all of its duties under the 2015 Act were associated with national security.  However, the reports were innocuous and uncontentious. They focussed on the evolution of the Lanarkshire multi-agency strategy group, its objectives, etc.  Consequently, we did not agree that exemption was required for the purposes of safeguarding national security. Section 31(1) does not exempt information simply because it <i>related to national security</i> . Exemption had to be necessary for the purposes of safeguarding national security.

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).

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
19	Scottish Government's guidance note for Scottish public authorities in relation to requests for information where Security and Intelligence Agency information and/or information related to national security issues are involved	<a href="https://www.webarchive.org.uk/wayback/archive/20141201180603/http://www.scotland.gov.uk/About/Information/FOI/18022/guidesecurity">https://www.webarchive.org.uk/wayback/archive/20141201180603/http://www.scotland.gov.uk/About/Information/FOI/18022/guidesecurity</a>
24	Commissioner's guidance – The Public Interest Test in FOISA	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx</a>
27	Official Secrets Act 1989	<a href="http://www.legislation.gov.uk/ukpga/1989/6/contents">http://www.legislation.gov.uk/ukpga/1989/6/contents</a>
41	(UK) Freedom of Information Act 2000	<a href="http://www.legislation.gov.uk/ukpga/2000/36/contents">http://www.legislation.gov.uk/ukpga/2000/36/contents</a>
43	Commissioner's FOISA guidance – Section 17: 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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### **31 National security and defence**

- (1) Information is exempt information if exemption from section 1(1) is required for the purpose of safeguarding national security.
- (2) A certificate signed by a member of the Scottish Executive certifying that such exemption is, or at any time was, required for the purpose of safeguarding national security is conclusive of that fact.
- (3) Without prejudice to the generality of subsection (2), a certificate under that subsection may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.
- (4) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-
  - (a) the defence of the British Islands or of any colony; or
  - (b) the capability, effectiveness or security of any relevant forces.
- (5) In subsection (4)-
  - (a) in paragraph (a), "British Islands" and "colony" are to be construed in accordance with Schedule 1 to the Interpretation Act 1978 (c.30); and
  - (b) in paragraph (b), "relevant forces" means-
    - (i) the armed forces of the Crown; and
    - (ii) any forces co-operating with those forces,or any part of the armed forces of the Crown or of any such co-operating forces.

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