

# FOISA Guidance

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## Section 32: International Relations

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### Exemption Briefing



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## Glossary and abbreviations

Term used	Explanation
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>SIC/The Commissioner</b>	The Scottish Information Commissioner
<b>International court</b>	For a court to be an “international court” under section 32, the UK must either be a member of an international organisation responsible for establishing it, or a party to the international agreement which established it (see section 32(3))
<b>International organisation</b>	The organisation must include, as its members, any two or more States (see section 32(3)). Usually, the organisation will have been created by treaty or will be a legal entity for the purposes of international law. Generally, only States or governments will be allowed to be a member of such an organisation. Examples include the Council of Europe, the European Court of Human Rights, the European Union, NATO and the United Nations. “International organisation” includes an organ of such an international organisation.
<b>State</b>	The government of any State or any organ of such a government (see section 32(3)). An organ of government will include a State’s legislature and executive bodies, as well as other bodies carrying out functions on behalf of the State.
<b>State other than the UK</b>	This includes a reference to any territory outwith the UK. The definition will therefore include territories outwith the UK which aren’t recognised as States in international law, but which belong to, or are under the dominion of, a ruler or State – e.g. Bermuda, the Falkland Islands, Gibraltar – as well as territories belonging to another State.
<b>United Kingdom</b>	Great Britain and Northern Ireland (see the Interpretation Act 1978)

# The exemption

## The exemption: the main points

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1. Under section 32(1)(a), information is exempt from disclosure if disclosure would, or would be likely to, prejudice substantially –
  - (i) relations between the UK and any other State;
  - (ii) relations between the UK and any international organisation or international court;
  - (iii) the interests of the UK abroad; or
  - (iv) the promotion or protection by the UK of its interests abroad.
2. Under section 32(1)(b), information is exempt from disclosure if it is confidential information obtained from a State (other than the UK) or from an international organisation or international court.
3. All of the exemptions in section 32 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 maintaining the exemption outweighs the public interest in disclosing the information.
4. A public authority can refuse to confirm or deny whether it holds information which, if held, would be exempt under section 32, 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).
5. Where the First Minister disagrees with a decision from the Commissioner concerning an exemption in section 32(1)(b) (not an exemption in section 32(1)(a)), the First Minister can overrule the Commissioner's decision (section 52) provided:
  - (i) the information is of exceptional sensitivity and
  - (ii) the First Minister has consulted the other members of the Scottish Government.
6. No certificates have ever been issued.

## 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 of 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 of disclosing the information, it can be withheld and notice served to that effect.

## **Section 32(1)(a) – The UK’s international relations or interests abroad**

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8. Under section 32(1)(a), information is exempt from disclosure if disclosure would, or would be likely to, prejudice substantially:
- (i) relations between the UK and any other State (section 32(1)(a)(i));
  - (ii) relations between the UK and any international organisation or international court (section 32(1)(a)(ii));
  - (iii) the interests of the UK abroad (section 32(1)(a)(iii)); or
  - (iv) the promotion or protection by the UK of its interests abroad (section 32(1)(a)(iv)).
9. The glossary at the beginning of this document helps defines some of these terms.

### *“Likely to”*

10. 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”*

11. 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.
12. Authorities must avoid classifying types of documents as potentially falling within this exemption. As with all exemptions, the use of section 32(1)(a) will need to be justified on a case by case, and document by document, basis.

### *Factors to consider*

13. When considering the exemptions in section 32(1)(a), it is important to remember that it is the international relations or interests of the UK which must be at risk of substantial prejudice from the disclosure of information – substantial prejudice to a component region or part of the UK would not necessarily meet the test.
14. Public authorities need to concentrate on the potential impact that disclosure may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information. Disclosing potentially controversial information about one state may have little or no impact on international relations, while disclosing seemingly innocuous information about a different state may have a substantial impact. Existing political relations or diplomatic sensitivities are likely to be relevant.
15. Cultural, religious or legislative differences may also be relevant. The attitude of a particular State or organisation towards freedom of information may be relevant: relations with States or bodies which are less open may be at greater risk of prejudice if sensitive information is released.
16. Even if a negative reaction is anticipated from the disclosure of information, an assessment will have to be made as to whether this reaction would, or would be likely to, prejudice substantially international relations. There may be circumstances where the disclosure of

information may cause diplomatic annoyance or irritation, but would not result in serious, prejudice to the relations between countries.

17. Information which has not been made available in the UK has, in the past, been disclosed under the US Freedom of Information Act without substantial prejudice to relations between the countries. In the 1980s, a House of Commons Select Committee investigating the collapse of the International Tin Council was unable to access information relevant to the investigation from the UK government, which claimed the information was confidential. As a result, much of the information considered by the committee came from disclosures made under the US FOI Act.
18. Before applying the exemption, authorities should consider whether the information is already in the public domain. If the information has been made available elsewhere, in particular by the State or body in question, it is much less likely that disclosure would substantially prejudice relationships or the interests of the UK. See **Appendix 1: Resources** for an example of a decision that considers this point.
19. Sections 32(1)(a)(iii) and (iv) allow authorities to withhold information the disclosure of which would, or would be likely to, prejudice substantially the “interests of the United Kingdom abroad” or the promotion and protection of those interests. The UK’s interests might potentially include interests with a financial, economic or trade basis, as well as interests relating to defence, territorial matters, or the prevention of terrorism. The interests of the UK abroad will vary over time, from State to State, and according to the circumstances of each particular case.
20. As at the time of writing, the Commissioner has not issued any decisions considering either of these two exemptions.

#### *The public interest test*

21. If any of the exemptions in section 32(1)(a) apply, the authority must go on to consider the public interest in relation to the information – 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 withholding it.
22. 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 maintaining the exemption.
23. 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. See **Appendix 1: Resources** for examples of decisions where the Commissioner has considered the public interest test in relation to section 32(1)(a).
24. 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 32(1)(b) – Confidential information obtained from a State, etc.**

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25. Under section 32(1)(b), information is exempt from disclosure if it is confidential information obtained from –
  - (i) a State other than the UK (section 32(1)(b)(i)) or
  - (ii) an international organisation or an international court (section 32(1)(b)(ii)).
26. The glossary at the beginning of this document helps define some of these terms.
27. These exemptions focus on the circumstances under which the information was obtained by a public authority. If the terms under which the information was obtained require it to be held in confidence, or if there is a reasonable expectation on the part of the State or body supplying the information that it should be held in confidence, then it is likely to be considered as “confidential information” under section 32(1)(b).
28. The exemptions here are different from the “Confidentiality” exemption in section 36(2) of FOISA. Under section 36(2), the exemption can only be used where disclosure of information would constitute an actionable breach of confidence. That is not the case here. (See **Appendix 1: Resources** for a link to the Commissioner’s guidance on section 36.)

### *Factors to consider*

29. When applying this exemption, authorities need to be able to demonstrate that information is confidential information. For example:
  - (i) there may be a formal agreement between the parties;
  - (ii) there may be a statement by the State or body which supplied the information, indicating that confidentiality is required;
  - (iii) a document may have been clearly marked as confidential by the State or body supplying it;
  - (iv) authorities may be able to demonstrate that similar evidence was previously provided in confidence; or
  - (v) the relationship between the parties may be such that confidentiality can be presumed.
30. If the information is already in the public domain, it is unlikely to be confidential, although there will be exceptions. If it has been put into the public domain by the State or international body which supplied it, or if the information can be reasonably be obtained from that body, then it is unlikely to be considered confidential.
31. To confirm the status of particular information, the authority may wish to consult the State or international body which supplied the information.
32. It is important to remember that the definition of “confidential information” in section 32(1)(b) applies only to information obtained from a foreign State, international organisation or international court. This means it is important to consider the status of the body which supplied the information.
33. See **Appendix 1: Resources** for an example of a decision involving section 32(1)(b).

*The public interest test*

34. All of the exemptions in section 32 are subject to the public interest test as set out in section 2 of FOISA. For further discussion on this, see paragraphs 20 to 23 above.

# Appendices

## Appendix 1: Resources

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### SIC Decisions

Reference	Decision number	Parties	Summary
Section 32(1)(a)(ii)  Paragraph 17	114/2007	Neil Kay and the Scottish Ministers	This case involved ferry services between Gourock and Dunoon. The Ministers withheld argued that disclosure would prejudice substantially relations between the UK and the European Commission. At the time of the request, it was public knowledge that the Ministers were engaged in discussions with the Commission – and some of the information was in the public domain. In the absence of substantial arguments from the Ministers on why disclosure would cause harm, we found that the exemption did not apply.
Section 32(1)(a)(i)  Paragraph 22	187/2007	Lachlan Muir and the Scottish Ministers	Here, we accepted that the disclosure of candid statements had the potential to cause substantial prejudice to relations between the UK and other States. On considering the public interest test, we acknowledged the need for candour in internal discussions on the UK's position in international negotiations and that the exchanges remained sensitive for some time after conclusion of the negotiations. We concluded that the public interest favoured withholding the information.



Reference	Decision number	Parties	Summary
<p>Section 32(1)(a)(i)</p> <p>Paragraph 22</p>	072/2010	David Rule and the Scottish Ministers	<p>This involved a request for a summary of a meeting between the First Minister and the US Secretary of State. The matters addressed were specific to Scotland and the Scottish Government. They did not affect the UK Government or impinge on reserved matters, and appeared to be of no direct relevance to relations between the UK and the USA. In the circumstances, we did not accept that the exemption applied. We considered the long-established good relations between the two States and the fact that a mature freedom of information regime exists in the USA, and concluded that the information was not of such sensitivity that its disclosure could cause the required harm.</p>
<p>Section 32(1)(a)(i)</p> <p>Paragraph 22</p>	132/2009	David Rule and the Scottish Ministers	<p>This involved a request for correspondence between the First Minister's Office and governments of countries including Canada, China and Norway. We found that some of the information was exempt from disclosure under section 32(1)(a)(i) and that the public interest favoured maintaining the exemption. We commented on the importance of maintaining good relations with the States concerned in the long term.</p>

<p>Section 32(1)(a)(i)</p> <p>Paragraph 23</p>	<p>050/2016</p>	<p>Tommy Kane and the Scottish Ministers</p>	<p>The Ministers were asked for information about a meeting which took place between Humza Yousef MP and the Qatari Government in December 2012. They withheld a very small amount of information (two sentences in a document) under section 32(1)(a)(i). We agreed the exemption applied. The information was very sensitive. Given that foreign relations are reserved to Westminster, any harm would be to the UK as a whole, and not just to Scotland. We noted the established convention that diplomatic communications are made in terms of inferred or assumed confidentiality. When considering the public interest, we took account of the concerns about Qatari's record on human rights, but concluded that, on balance, and having found that disclosure would cause substantial harm, the balance favoured maintain the exemption.</p>
<p>Section 32(1)(b)(ii)</p> <p>Paragraph 32</p>	<p>216/2007</p>	<p>Rob Edwards and the Scottish Ministers</p>	<p>This involved a request for a copy of a database listing EU infractions. The Ministers argued that the information had been provided to them by the EU on the understanding that the information would be held in confidence. The Commissioner found that only a small proportion of the withheld information had been provided by the EU and that none of it was confidential.</p>
<p>Section 32(1)(b)(ii)</p> <p>Paragraph 32</p>	<p>157/2015</p>	<p>Martin Arndt and the Registrar General of Births, Deaths and Marriages for Scotland</p>	<p>The Registrar was asked for meetings of the International Commission on Civil Status (ICCS), an intergovernmental organisation. Mr Arndt argued that the ICCS wasn't an international organisation. We found that it was. Whether the UK was a member was irrelevant; the ICCS clearly fell within the definition in section 32(3).</p>

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
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>
28	Commissioner's guidance – Section 36: Confidentiality	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx</a>

## Appendix 2

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### Section 32: International relations

- (1) Information is exempt information if –
- (a) its disclosure under this Act would, or would be likely to, prejudice substantially -
    - (i) relations between the United Kingdom and any other State;
    - (ii) relations between the United Kingdom and any international organisation or international court;
    - (iii) the interests of the United Kingdom abroad; or
    - (iv) the promotion or protection by the United Kingdom of its interests abroad; or
  - (b) it is confidential information obtained from -
    - (i) a State other than the United Kingdom; or
    - (ii) an international organisation or international court.
- (2) For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while-
- (a) the terms on which that information was obtained require it to be held in confidence; or
  - (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (3) In subsection (1)-
- "international court" means an international court which-
- (a) is not an international organisation; and
  - (b) is established-
    - (i) by a resolution of an international organisation of which the United Kingdom is a member; or
    - (ii) by an international agreement to which the United Kingdom is a party;
- "international organisation" means-
- (a) an international organisation whose members include any two or more States; or
  - (b) an organ of such an international organisation;
- "State" includes-
- (a) the government of any State; and
  - (b) any organ of such a government,
- and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.



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