

# FOISA Guidance

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## Section 34: Investigations by Scottish public authorities

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### Exemption Briefing



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## Glossary and abbreviations

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<b>Term used</b>	<b>Explanation</b>
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>SIC/The Commissioner</b>	The Scottish Information Commissioner, staff of SIC (depends on context)
<b>PF</b>	Procurator fiscal
<b>COPFS</b>	The Crown Office and Procurator Fiscal Service

# The exemption

## The exemption: the main points

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1. Section 34 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains a wide range of exemptions, all relating to investigations carried out by Scottish public authorities. Information will be exempt from disclosure if:
  - (i) at any time, it has been held by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
  - (ii) at any time, it has been held by a Scottish public authority for the purposes of an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty (section 34(1)(a)(ii));
  - (iii) at any time, it has been held by a Scottish public authority for the purposes of an investigation, conducted by the authority, which may lead to the authority deciding to make a report to the procurator fiscal (PF) to decide whether criminal proceedings should be instituted (section 34(1)(b));
  - (iv) at any time, it has been held by a Scottish public authority for the purposes of criminal proceedings instituted in consequence of a report made by the authority to the PF (section 34(1)(c));
  - (v) held by a Scottish public authority for the purposes of an inquiry instituted under the Inquiries into Fatal Accident Inquiries and Sudden Deaths etc. (Scotland) Act 2016 which has not yet concluded (section 34(2)(a));
  - (vi) at any time, it has been held by a Scottish public authority for the purposes of any other investigation being carried out by virtue of a duty to ascertain the cause of death of a person (section 34(2)(b)(i));
  - (vii) at any time, it has been held by a Scottish public authority for the purposes of any other investigation being carried out for the purpose of making a report to the PF as respects the cause of death of a person (section 34(2)(b)(ii));
  - (viii) it was obtained or recorded by a Scottish public authority for the purpose of certain investigations conducted by the authority and the information relates to the obtaining of information from confidential sources (section 34(3));
  - (ix) it was obtained or recorded by a Scottish public authority for civil proceedings brought by or on behalf of the authority, provided the proceedings arise out of an investigation mentioned in section 34(1) or section 34(3) (section 34(4)).
2. The section 34 exemptions are sometimes referred to as “class-based” exemptions. This means that an exemption will apply if the information falls within a particular class of information. Unlike most of the exemptions, an authority does not have to demonstrate that disclosure would cause harm before applying the exemption.
3. The exemptions in section 34 are all 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.

4. The exemptions in section 34(2)(b) (ascertaining the cause of death of a person) do not last forever. In general, they can't be applied to information that is more than 100 years old. All of the other exemptions in section 34 last in perpetuity.
5. With all of the section 34 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).

### **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 withholding the information, 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.

### *Criminal investigations in Scotland*

7. When thinking about the exemptions in section 34(1), it's useful to know how criminal investigations are carried out in Scotland. The Crown Office and Procurator Fiscal Service (COPFS) is a department of the Scottish Government and is headed up by the Lord Advocate. Procurators fiscal (PFs) have two main functions; as public prosecutors in criminal cases and as investigators of sudden or suspicious deaths. Reports may be made to the procurator fiscal on either of these matters.
8. Criminal investigations are usually carried out by the police, but may be carried out by other reporting agencies. For example, local authorities have the power to investigate criminal offences relating to matters such as trading standards and environmental health.
9. Reports are then sent to the PF, and the PF decides what action to take, including whether to prosecute someone.
10. See **Appendix 1: Resources** for a link to COPFS' website.

### **Section 34(1) – Offences and criminal proceedings**

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11. Information is exempt under section 34(1) if it has at any time been held by a Scottish public authority for the purposes of:
  - (i) an investigation which the authority has a duty to conduct to ascertain whether a person should be prosecuted for an offence (section 34(1)(a)(i));
  - (ii) an investigation which the authority has a duty to conduct to ascertain whether a person prosecuted for an offence is guilty of it (section 34(1)(a)(ii));

- (iii) an investigation conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the PF to enable it to determine whether criminal proceedings should be instituted (section 34(1)(b)); or
  - (iv) criminal proceedings instituted in consequence of a report made by the authority to the PF (section 34(1)(c)).
12. As with the other exemptions in section 34, there is no harm test in any of these exemptions: information will be exempt simply because it has, at some point, been held by an authority for any of these purposes.
  13. When the Freedom of Information Bill was going through the Scottish Parliament, the then Lord Advocate commented that the exemptions in section 34(1) were essential for an effective justice system. He believed that witnesses would be inhibited from co-operating in criminal investigations if there was a possibility that the information they gave could be disclosed under FOISA. The Lord Advocate was also concerned that the possibility of disclosure would "undermine the informant system".
  14. The Commissioner has issued a number of decisions which look at whether section 34(1) applies. See **Appendix 1: Resources**.

#### *The public interest test*

15. 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.
16. 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.
17. There is no harm test attached to the exemption, but the possibility of harm may be a relevant consideration when looking at the public interest test.
18. The Commissioner has published guidance on the public interest test (see **Appendix 1: Resources**). The Appendix also details some of the decisions which have considered the public interest test.

## **Section 34(2) – Fatal accident inquiries and ascertaining the cause of death**

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#### *The role of the PF in relation to sudden or suspicious deaths*

19. A key function of the PF is to investigate all sudden and suspicious deaths in his or her area. In a small number of cases, fatal accident inquiries (FAIs) will be carried out. An FAI is a public inquiry into the circumstances of a death, heard before a sheriff.
20. The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (see **Appendix 1: Resources**) provides for two types of inquiry:

- (i) A *Mandatory Inquiry* will be held if a person dies in Scotland as a result of an accident sustained at work. A mandatory inquiry will also be held, regardless of the place of death, if the death occurs while in legal custody or (if a child under 18) in secure accommodation. Although they are called mandatory inquiries, the Lord Advocate may decide not to carry out an FAI if satisfied that the circumstances of the death have been sufficiently established in the course of other proceedings.
  - (ii) A *Discretionary Inquiry* will be held where the death was sudden, suspicious or unexplained, or has occurred in circumstances that give rise to serious public concern and where the Lord Advocate considers it is in the public interest to carry out an investigation.
21. Sometimes, PFs will order post mortems or further investigation to be carried out to establish the cause of death. The PF can also instigate a criminal investigation if the death is suspicious. Post mortems are carried out by pathologists, normally employed by universities or health boards. Other public authorities, such as the police, will also carry out investigations into deaths at the instruction of the PF.
22. Information is exempt under section 34(2) if:
- (i) held by a Scottish public authority for the purposes of an FAI which has not been concluded (section 34(2)(a));
  - (ii) held at any time by a Scottish public authority for the purposes of any other investigation being carried out by virtue of a duty to ascertain the cause of death of a person (section 34(2)(b)(i)); or
  - (iii) held at any time by a Scottish public authority for the purposes of any other investigation being carried out by virtue of a duty for the purpose of making a report to the PF as respects the cause of death of a person (section 34(2)(b)(ii)).
23. The exemptions in section 34(1)(b) have a wider scope than those in section 34(1)(a), in that the authority does not need to have a duty to carry out the investigation for the exemptions to apply. For example, an authority might carry out an internal investigation to ascertain whether the PF should be informed of the circumstances of a death, to allow the PF to decide whether or not to instigate criminal proceedings. The main thing to remember is that an investigation must be conducted by the authority and the information must be gathered in order to make a decision on reporting to the PF. Whether the PF is ultimately informed or not is irrelevant.
24. The Commissioner has issued a small number of decisions which look at section 34(2) applies. (See **Appendix 1: Resources.**)

*The public interest test*

25. 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 the information or by maintaining the exemption. See paragraphs 14 to 17 above.

## Section 34(3) – Confidential sources

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26. Information is exempt under section 34(3) if:
- (i) it was obtained and recorded by the authority for the purposes of investigations (other than the investigations mentioned in section 34(1)) which an authority conducts either by virtue of Her Majesty's prerogative or under any enactment for one of the purposes specified in section 35(2) of FOISA; AND
  - (ii) the information relates to the obtaining of information from confidential sources (e.g. someone who provides information to the police on the guarantee of confidentiality).
27. Although sometimes treated as two separate exemptions, the exemption in section 34(3) is in fact a single exemption, so sections 34(3)(a) and (b) must be read together. A number of the Commissioner's decisions on section 34(3) underline this point. (See **Appendix 1: Resources**.)
28. A public authority must be able to identify a specific power to conduct these investigations, since they have to be conducted either under an enactment or by virtue of Her Majesty's prerogative.
29. As was said by the then Justice Minister when the Freedom of Information (Scotland) Bill was being considered by Parliament:
- "the [exemption in section 34(3)] could not be cited by an authority that was seeking to withhold information gathered from an informant or other confidential source; it applies only to information concerning how the information was gathered, which might include information that could reveal the identity of informants ... Confidential sources are essential for the effective operation of intelligence operations intended to combat serious crime. It is vital that the means by which such information is obtained are not compromised."
30. The purposes specified in section 35(2) of FOISA are as follows:
- (a) to ascertain whether a person has failed to comply with the law
  - (b) to ascertain whether a person is responsible for conduct which is improper
  - (c) to ascertain whether circumstances arise which would justify regulatory action in pursuance of any enactment exist or may arise
  - (d) to ascertain a person's fitness or competence in relation to –
    - (i) the management of bodies corporate
    - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on
  - (e) to ascertain the cause of an accident
  - (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration
  - (g) to protect the property of a charity from loss or mismanagement
  - (h) to recover the property of a charity
  - (i) to secure the health, safety and welfare of persons at work

- (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.

31. The Commissioner has issued guidance on section 35 (see **Appendix 1: Resources**), which gives more background to these purposes and gives examples of decisions where the purposes in section 35(2) have been considered.

*The public interest test*

32. 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 the information or by maintaining the exemption. See paragraphs 14 to 17 above.

## **Section 34(4) – Civil proceedings**

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33. Information is exempt under section 34(4) if it was obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in sections 34(1) or 34(3).

34. The Commissioner has considered section 34(4) in a small number of decisions. (See **Appendix 1: Resources**.)

*The public interest test*

35. 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 the information or by maintaining the exemption. See paragraphs 14 to 17 above.

# Appendices

## Appendix 1: Resources

### SIC Decisions

Reference	Decision number	Parties	Summary
Section 34(1)(a)(i)  Paragraph 13	085/2007	Robert Dowdles and Strathclyde Police	The Police were asked about a Fraud Squad investigation. Although no proceedings had been taken, the Police had a duty to conduct an investigation to ascertain whether someone should be prosecuted for an offence. We accepted that the information Mr Dowdles had asked for was created and held for the purposes of such an investigation. As such, it fell within the exemption in section 34(1)(a)(i).
Section 34(1)(a)(i)  Paragraph 13	104/2007	Catherine Cameron and Strathclyde Police	Ms Cameron wanted to know the identity of an individual who had been reported to the PF. The Police refused to release this information. We were satisfied that the information was exempt under section 34(1)(a)(i).
Section 34(1)(a)(i)  Paragraph 13	037/2009	Steven Stewart and various police forces	Mr Stewart wanted to know how much individual police forces had paid informants. While we did not dispute that individual payments could be linked to a particular investigation, we found that the <u>total</u> amount paid to informants was not information which was, or had been, held for the purposes of an investigation, but had been recorded for accounting purposes. We found that the information was not exempt under section 34(1)(a).
Section 34(1)(b)  Paragraph 17	019/2010	Russell Findlay and Northern Constabulary	Mr Findlay asked Northern Constabulary for background information about an alleged assault which had been the subject of a press release. The Constabulary refused to disclose the information. We agreed that it was exempt from disclosure under section 34(1)(b) and concluded that, on balance, the public interest lay

Reference	Decision number	Parties	Summary
			in maintaining the exemption: while there was a public interest in scrutinising the actions of the police and in ensuring that criminal investigations are carried out thoroughly, this was outweighed by the public interest in ensuring that ongoing investigations were not compromised.
Section 34(1)(b)  Paragraph 17	174/2007	Edmund Raphael-Beldowski and Tayside Police	The Police were asked about an unsolved murder which took place in Broughty Ferry in 1912. The Police withheld the information on the basis that it was exempt from disclosure under the terms of sections 34(1)(a)(i) and (b) of FOISA. We accepted that the information was exempt from disclosure, but required the Police to disclose the information on public interest grounds. Given the age of the information, there was no chance of the information prejudicing a criminal investigation.
Section 34(2)(a)  Paragraph 23	010/2011	Keith Knowles and the Scottish Court Service (the SCS)	Mr Knowles asked the SCS for a copy of the taped proceedings of an FAI. The SCS withheld the recording under section 37 of FOISA (court records). Section 37(3) says that the exemptions in section 37 do not apply to information held by an authority for the purposes of an FAI. This decision looks at the relationship between section 34 and 37. Ultimately, we decided that the tapes could not be disclosed under FOISA.
Section 34(2)(b)(ii)  Paragraph 23	189/2012	Janet Ellis and Grampian Police	The Police were asked for statements relating to the death of a named person. We found that the exemption applied and that the public interest favoured maintaining the exemption. Ms Ellis had a strong personal interest in understanding the death in question, but there was a compelling argument for withholding witness statements: individuals must remain willing to co-operate with the criminal justice system.

Reference	Decision number	Parties	Summary
Section 34(3)  Paragraph 26	057/2007	Lilian Gordon and Grampian Police	In this decision, we explained that the purpose of this exemption was not to protect information gathered from confidential sources, or necessarily the confidentiality of the source itself, but to protect information relating to the <u>obtaining</u> of information from those sources. In other words, information is exempt if it is about the process of gathering the information - how such information is gathered, how informants are recruited and how information obtained from confidential sources is transmitted.
Section 34(3)  Paragraph 26	047/2006	E Sutherland-Loveday and Scottish Borders Council	Mr Sutherland-Loveday asked for a report supplied by the Council to Berwickshire Housing Association. The Council refused to disclose the report, relying on section 34(3)(a). Section 34(3)(a) can only be used in conjunction with section 34(3)(b). The Council did not show that the requirements of 34(3)(b) were present and therefore we rejected the exemption.
Section 34(4)  Paragraph 33	087/2010	Lyndsay Moss and NHS Lothian	Ms Moss wanted to know how many dentists had wrongly made claims to NHS Lothian and how much money it was trying to get back from those dentists. NHS Lothian was in the process of pursuing civil proceedings against a number of dentists, so applied the exemption in section 34(4). We decided that the information Ms Moss had asked for (the total sum NHS Lothian was trying to get back) was too far removed the specific civil proceedings to be considered as information obtained or recorded for the purposes of civil proceedings.
Section 34(4)  Paragraph 33	250/2014	Tom Minogue and Police Scotland	Mr Minogue asked for information about a gold wreath recovered by the police, which was the subject of a civil action of multiplepointing to establish its true owner. We rejected Mr Minogue's argument that the Chief Constable had

Reference	Decision number	Parties	Summary
			<p>raised the action in a personal rather than a professional capacity, and went on to conclude that Police Scotland were entitled to apply the exemption.</p> <p>Considering the public interest, the Commissioner accepted that the action engaged Mr Minogue's civil rights (he was a party to the action), but did not accept that determination of these rights required disclosure of this information under FOISA. On balance, we concluded that there was a greater public interest in maintaining the section 34(4) exemption and allowing the information to be considered by the court in the course of the civil action.</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
Paragraph 10	Crown Office and Procurator Fiscal Service	<a href="http://www.copfs.gov.uk/">http://www.copfs.gov.uk/</a>
Paragraph 17, 24, 31, 34	Commissioner's guidance: The Public Interest Test – FOISA	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx</a>
Paragraph 19	Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016	<a href="http://www.legislation.gov.uk/asp/2016/2/contents">http://www.legislation.gov.uk/asp/2016/2/contents</a>
Paragraph 30	Commissioner's guidance:	<a href="http://www.itspublicknowledge.info/Law/FOISA-">http://www.itspublicknowledge.info/Law/FOISA-</a>

Paragraph	Resource	Link
	Section 35 Law Enforcement	<a href="EIRsGuidance/section35/Section35.aspx">EIRsGuidance/section35/Section35.aspx</a>

## Appendix 2

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### *Section 34: Investigations by Scottish public authorities and proceedings arising out of such investigations*

- (1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-
  - (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
    - (i) should be prosecuted for an offence; or
    - (ii) prosecuted for an offence is guilty of it;
  - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
  - (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- (2) Information is exempt information if-
  - (a) held by a Scottish public authority for the purposes of an inquiry instituted under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 but not for the time being concluded; or
  - (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-
    - (i) by virtue of a duty to ascertain; or
    - (ii) for the purpose of making a report to the procurator fiscal as respects, the cause of death of a person.
- (3) Information held by a Scottish public authority is exempt information if-
  - (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
  - (b) it relates to the obtaining of information from confidential sources.
- (4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).



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