

FOISA Guidance

Section 27: Information intended for future publication

Exemption Briefing



Contents

Glossary and abbreviations	i
The exemption	1
The exemption: the main points	1
Introduction	1
Section 27(1) – information held with a view to publication	1
Section 27(2) – programme of research.....	3
Appendices	6
Appendix 1: Resources	6
SIC Decisions	6
Other resources	7
Appendix 2: The exemption	8
Section 27: Information intended for future publication.....	8
Document control sheet	9

Glossary and abbreviations

Term used	Explanation
The Commissioner	The Scottish Information Commissioner
FOISA	Freedom of Information (Scotland) Act 2002
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
The Section 60 Code	the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002

The exemption

The exemption: the main points

Introduction

1. Section 27 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains two distinct exemptions:
 - (i) The exemption in section 27(1) allows public authorities to refuse to disclose information if they already plan to publish it within the next 12 weeks – provided it is reasonable to delay disclosing the information until the planned date of publication.
 - (ii) The exemption in section 27(2) is aimed at universities and higher education colleges. It allows them to refuse to disclose information obtained in, or derived from, a “programme of research”, provided they are planning to publish the research. The exemption can only be applied if disclosure would cause substantial prejudice.
2. Both of the exemptions are 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.

Section 27(1) – information held with a view to publication

3. Section 27(1) exempts information from disclosure if an authority, or third party, plans to publish the information no later than 12 weeks after the date the request is made (i.e. the date the request was posted or emailed).
4. There are three main tests to be considered before applying the exemption:
 - (i) Is the information held with the intention to publish it within 12 weeks?
 - (ii) Can the authority demonstrate that was the intention when the request was made?
 - (iii) Is it reasonable to withhold the information until the planned date of publication?
5. All three tests must be satisfied before the exemption can be applied.

Is the information held with the intention to publish it within 12 weeks?

6. Section 27(1) is likely to be used by an authority where it has already decided to disclose information, but where the authority wants to control the date on which the information is disclosed.
7. The exemption in section 27(1) applies both to documents which are ready for publication and to information in draft form which needs further work. It will include information published at regular intervals, such as annual or quarterly reports, or minutes of scheduled meetings, where it is easy to demonstrate a commitment to publish the information within 12 weeks. But it could also include drafts of speeches, press releases and announcements, or incomplete data from a fact-finding project, as long as the final version of the information is due to be published within 12 weeks.
8. The exemption applies regardless of whether it is the authority or a third party that is going to publish it. However, an authority can only rely on the exemption if it actually holds the

information. If it doesn't hold the information, it should issue a notice under section 17 of FOISA. See **Appendix 1: Resources** for a link to the Commissioner's guidance on section 17.

9. The Commissioner's decisions look at whether the authority intended the information to be published within 12 weeks. See **Appendix 1: Resources** for examples of relevant decisions.

Was that the intention when the request was made?

10. Before applying this exemption, an authority must satisfy itself that, at the time the request was made, the information was scheduled to be published within 12 weeks. The exemption cannot apply if the authority only decides to publish the information **after** an individual has requested it.
11. A good question to ask yourself is: if the decision were reviewed or appealed, would the reviewer or SIC be satisfied that there was a clear and stated intention to publish?
12. See **Appendix 1: Resources** for decisions which consider this point.

Is it reasonable to withhold the information until the planned date of publication?

13. It is not enough for the public authority to prove that it already intends to publish the information within 12 weeks. The authority must also be satisfied that it is "reasonable in all the circumstances" for the information to be withheld until the planned date of publication before it can apply the exemption.
14. These are some of the things an authority might want to consider when deciding whether it is reasonable to withhold the information:
 - (i) Generally, the closer the date of publication to the date the request was made, the more reasonable it would be to withhold the information.
 - (ii) Is the information complete? If the information is still being compiled, and disclosing the information would present a misleading picture (e.g. where responses to a consultation or survey are collected over a period of weeks), it may be unreasonable to provide that information before the planned date of publication.
 - (iii) Does the information relate to new initiatives not yet launched by the authority? If the information relates to new services that are not yet in operation, or to other situations for which administrative support is not yet in place, it may be unreasonable to disclose the information before the planned date of publication.
 - (iv) Will the information disadvantage third parties if released prematurely? For example, it is likely to be reasonable to refuse to disclose details about an invitation to tender before the invitation has been published.
15. Sometimes, it might be reasonable to disclose some of the information that has been requested, while withholding the rest until the planned date of publication.

The public interest test

16. 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.

17. 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.
18. The Commissioner has produced separate guidance on the public interest test. This is available from the Commissioner’s website (see **Appendix 1: Resources** below). **Appendix 1: Resources** also contains a link to a decision where the Commissioner considered the public interest test in relation to section 27(1).

What happens if publication is delayed?

19. It may be that, having applied the exemption in section 27(1), publication is delayed. In deciding whether the authority was entitled to apply the exemption, the Commissioner will consider the reasons for delay in determining whether the exemption was applied in good faith, or whether it was just used as a delaying tactic.
20. If the authority applies the exemption then fails to publish the information within the 12 week period (or the third party fails to publish the information), the authority should, in line with its duty to advise and assist (section 15 of FOISA), contact the requester and explain the reason for the delay. It should give the revised date of publication if this is known.
21. If the requester did not challenge the authority’s earlier decision to withhold the information on the basis of the section 27(1) exemption, they may not be able to meet the 40 working day deadline to ask for a review of the decision. If the requester seeks a review after the 40 working days because of a delay in publication, it is good practice for authorities to carry out a late review: see paragraphs 9.6.1 to 9.6.4 of the Section 60 Code (link in **Appendix 1: Resources**) for good practice guidance on what to do if publication is delayed.

Section 27(2) – programme of research

22. Section 27(2) exempts information from disclosure if the information has been obtained in the course of, or is derived from, a programme of research.
23. There are three main tests to be considered before applying the exemption:
 - (i) Is the information part of a programme of research?
 - (ii) Does the authority (or another person) intend to publish a report of the research?
 - (iii) Would disclosure before publication cause, or be likely to cause, substantial prejudice?
24. All three tests must be satisfied before the exemption can be applied.

Is the information part of a programme of research?

25. The exemption is intended as a safeguard against the forced disclosure of incomplete research which could result in the misinterpretation of incomplete data from third parties, significantly harming the value of the research.

26. The phrase “a programme of research” is not defined in FOISA. During parliamentary debates on the Freedom of Information Bill, it was said that the wording was deliberately chosen to distinguish genuine academic research from other similar processes involving simple data collection or the analysis of such data (see **Appendix 1: Resources**).
27. When the Bill was being discussed, it was made clear that “a programme of research” extended only to a piece of finite research. Therefore, authorities claiming this exemption are expected to make it clear when the research would be considered to be complete.
28. The exemption is not restricted to any particular type of research or institution. It could cover research relating to social issues, the arts and humanities, as well as science and technology.

Does the authority (or another person) intend to publish a report of the research?

29. For the exemption to apply, a public authority must be able to demonstrate that the research is being carried out with a view to the results being published, whether by the authority or by another person. The exemption would cease to apply if a decision is taken not to publish part way through the programme or once the programme of research is finished.
30. It makes no difference whether or not the requested information will be included in the final report of the research. All that matters is that the information has been obtained in the course of, or derived from, the programme of research.

Would disclosure before publication cause, or be likely to cause, substantial prejudice?

31. Authorities must be able to demonstrate that disclosing the information would, or would be likely to, prejudice substantially one or more of the following:
 - (i) the programme of research
 - (ii) the interests of any individual participating in the programme
 - (iii) the interests of the public authority which holds the information, or
 - (iv) the interests of any other Scottish public authority that would, in time, publish a report of the research.
32. 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.
33. 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.
34. As with all exemptions, section 27(2) will need to be justified on a case by case basis. Since FOISA came into force, no decisions have been issued by the Commissioner regarding section 27(2).

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 or withholding the information. This involves a balancing exercise. In practice, this means the authority should

consider all the arguments why disclosure would be in the public interest and all the arguments why maintaining the exemption would be in the public interest and decide, on balance, where 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.

36. 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.
37. The Commissioner has produced separate guidance on the public interest test. This is available from the Commissioner’s website (see **Appendix 1: Resources** below).

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Section 27(1) Para 9	051/2005	Mr B and the Scottish Prison Complaints Commission (SPCC)	The SPCC refused to disclose information on the basis that the information would be in the Annual Report. The Annual Report did not contain the specific information requested by Mr B. The Commissioner decided the exemption did not apply.
Section 27(1) Para 9	135/2008	Euan Pearson and Fife Council	The Council withheld a consultation response its Housing Service had made in about a planning application. No evidence was provided on whether completion of the response was expected to take more or less than 12 weeks, or to the period within which it was customary to complete such responses. Accordingly, the Commissioner could not accept that the information was held with a view to publication within 12 weeks.
Section 27(1) Para 9	217/2013	Howling Events and Visit Scotland	Visit Scotland was asked for a copy of a report. It refused to disclose the report, relying on section 27. Since it only intended to disclose a summary of the report, the Commissioner found that the exemption did not apply.
Section 27(1) Para 11	036/2012	Rab Wilson and Ayrshire and Arran NHS Board	Mr Wilson asked the Board for copies of reports it had prepared. The Board applied the exemption in section 27, but the Commissioner was satisfied that the decision to publish versions of the reports only came about after Mr Wilson had made his request. This meant that the exemption could not apply.
Section 27(1) Para 18	203/2016	Allan Nugent and Glasgow City Council	Mr Nugent asked for a report on the 2015/16 taxi tariff which was due to be published in the next 12 weeks. The Commissioner was satisfied that the exemption in section 27(1) applied. The Commissioner also found the public interest favoured maintaining the exemption, given that the procedures for adopting the tariff included a period for external comment and appeal.

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. 032/2018).

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	Commissioner's guidance: Information not held	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Informationnotheld/InformationnotheldFOISA.aspx
19, 38	Commissioner's guidance: The Public Interest Test: FOISA	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx
22	Section 60 Code	https://beta.gov.scot/publications/foi-eir-section-60-code-of-practice/FOI%20-%20section%2060%20code%20of%20practice.pdf?inline=true
26	Committee discussions on the term "programme of research" during the progress of the Bill through the Scottish Parliament	Justice 1 Committee, 24 April 2002. Official Report, col 11158 and Justice 1 Committee, 24 April 2002. Official Report, col 11160

Appendix 2: The exemption

Section 27: Information intended for future publication

- (1) Information is exempt information if –
 - (a) it is held with a view to its being published by –
 - (i) a Scottish public authority; or
 - (ii) any other person,at a date not later than twelve weeks after that on which the request for information is made;
 - (b) when that request is made the information is already being held with that view; and
 - (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).
- (2) Information obtained in the course of, or derived from, a programme of research is exempt information if –
 - (a) the programme is continuing with a view to a report of the research (whether or not including a statement of that information) being published by –
 - (i) a Scottish public authority; or
 - (ii) any other person; and
 - (b) disclosure of the information before the date of publication would, or would be likely to, prejudice substantially –
 - (i) the programme;
 - (ii) the interests of any individual participating in the programme;
 - (iii) the interests of the authority which holds the information; or
 - (iv) the interests of the authority mentioned in sub-section (i) of paragraph (a) (if it is a different authority from that which holds the information).

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