

FOISA Guidance

Section 40: Audit functions

Exemption Briefing



Contents

Glossary and abbreviations	i
The exemption	1
The exemption: the main points	1
Steps in applying the exemption	1
Section 40 - overview	1
What type of information does the exemption cover?	2
Who can claim the exemption?	3
Appendices	4
Appendix 1: Resources	4
SIC Decisions	4
Other resources	5
Appendix 2	6
Section 40: Audit functions.....	6
Document control sheet	7

Glossary and abbreviations

Term used	Explanation
Accounts Commission	The Accounts Commission uses the audit process to assist Scottish local authorities to achieve the highest standards of financial responsibility and the economic, efficient and effective use of their resources. It is responsible for securing the audit of Scottish councils and joint boards/committees.
Audit function	This refers to the <i>statutory</i> functions of an auditing body. An authority wishing to apply this exemption in relation to its own audit functions must be able to evidence a statutory basis for those functions and that those functions include carrying out an audit or examination in line with section 40.
Audit of accounts	Section 40(a) relates to the audit of financial accounts. This includes audits carried out by Audit Scotland. It may also include audits carried out by other public authorities, such as other inspectorate bodies. All public authorities have a statutory duty to have their financial accounts audited every year, and to publish their audited accounts.
Audit Scotland	Audit Scotland audits the accounts of public authorities. It is a statutory public body which provides services to the Auditor General for Scotland and the Accounts Commission. Audits of public authorities can also be carried out by private firms appointed by the Auditor General or the Accounts Commission. Auditors report the detailed findings of audits directly to the bodies they audit, with an annual audit report summarising the key issues from each audit being made to the Controller of Audit (for the Accounts Commission) or to the Auditor General and published on the Audit Scotland website.
Auditor General	The Auditor General is the accountable officer for Audit Scotland, and is responsible for investigating whether public bodies achieve best possible value for money and adhere to the highest standards of financial management. The Auditor General is responsible for

	securing the audit of the Scottish Government and most other public sector bodies (except local authorities and joint boards/committees which are covered by the Accounts Commission).
The Commissioner	The Scottish Information Commissioner
Economy, efficiency and effectiveness of resources	Generally, this relates to an examination of whether authorities are meeting their duties to secure Best Value (Scottish Government policy, translated into various statutory duties, designed to drive forward continuous improvement in public service delivery). For example, Best Value audits look at balancing the quality of services with cost, sustainable development, engagement with the local community, equal opportunities and continuous improvement of services provided.
FOISA	Freedom of Information (Scotland) Act 2002
The Section 60 Code	The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 (December 2016 version)
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)

The exemption

The exemption: the main points

1. Information will be exempt from disclosure under section 40 of the Freedom of Information (Scotland) Act 2002 (FOISA) if its disclosure would, or would be likely to, prejudice substantially a Scottish public authority's functions in relation to:
 - (i) the audit of the accounts of other Scottish public authorities (section 40(a)); or
 - (ii) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions (section 40(b)).
2. The exemptions in section 40 are subject to the public interest test in FOISA. This means that, even if one of the exemptions apply, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
3. The exemptions in section 40 don't last forever. In general, they can't be applied to information that is more than 15 years old.

Steps in applying the exemption

4. Once an authority has located the information it must:
 - (i) Decide, does the exemption apply?
 - (ii) If the exemption does NOT apply, the information cannot be withheld under the exemption (although it might be exempt for other reasons).
 - (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 40 - overview

5. Section 40 of FOISA allows public authorities to refuse to disclose information, if disclosure would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's functions in relation to the audit of the accounts of *other* Scottish public authorities or the examination of the economy, efficiency and effectiveness with which *other* authorities use their resources in discharging their functions.

"Likely"

6. The exemptions in section 40 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 properly applied. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.

“Substantial prejudice”

7. 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 or hypothetical.
8. The exemptions in section 40 need to be justified on a case by case basis and supported by evidence.
9. The effect of the passage of time may be relevant when assessing whether disclosure of information would, or would be likely to, cause substantial prejudice.

The public interest test

10. 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 withholding it.
11. 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.” The public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
12. 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.

What type of information does the exemption cover?

13. This exemption covers information relating to audits, particularly those carried out by bodies such as Audit Scotland. It may also include audits carried out by other inspectorate bodies, such as HM Chief Inspector of Prisons for Scotland or HM Inspectors of Constabulary.
14. Section 40(a) covers the audit of financial accounts, while section 40(b) covers non-financial audits which look at how economically, efficiently and effectively a public authority is employing its resources in the pursuit of its objectives. The wording of section 40(b) suggests that the examination would have to consider economy, effectiveness **and** efficiency in order for the exemption to apply.
15. Section 40 does not cover internal audits of public bodies, or audits of private bodies carried out by public authorities. Where an audit is being carried out, but only part of the audit falls under the types of audit covered by section 40(a) or (b), only that part of the audit can be considered under this exemption.
16. If an authority wishes to apply an exemption in section 40, but is unsure whether an audit would be covered by the exemptions, it should look at the legislation which gives it the power to conduct the audit. This will usually set out the purposes of the audit and will help indicate whether the exemption may apply.
17. Section 40 can apply to any information held by the authority, provided its disclosure would, or would be likely to, substantially prejudice a public authority’s audit functions. This could include (but will not be confined to) background papers, supporting data, draft and final reports.

18. Section 40 can be applied before an audit commences, during the audit, or after the audit is completed. Before the final audit report is published, it may be possible to withhold the report under section 27 of FOISA (Information intended for future publication). See **Appendix 1: Resources**. However, the exemption in section 27 would not apply to any information which will not be contained in the final report. Once an audit report has been published, it will be more difficult to use section 40 to prevent the disclosure of background papers or draft reports.
19. Some bodies which carry out audits have expressed concern that disclosing information during the audit process may discourage public authorities from participating fully in the audits, meaning that the audit process will be harmed. Much will depend on the circumstances of each case, but in most cases auditing bodies have the power to demand access to information (meaning that the bodies being audited are required to participate in the process), so the Commissioner may not be persuaded by this argument.
20. The Commissioner has not issued any decisions on the exemptions in section 40. However, see **Appendix 1: Resources** for a link to a decision from the (UK) Information Commissioner on the equivalent exemption in the Freedom of Information Act 2000 and for a decision issued by the (Scottish) Commissioner on whether audit reports carried out by private companies are held by Audit Scotland for the purposes of FOISA.

Who can claim the exemption?

21. As noted above, the exemption does not apply to internal audits, given the requirement that the audit must be of “other” authorities. In practice, it is the bodies which carry out the audits which are most likely to claim section 40.
22. A public authority might be engaged or invited by another public authority to carry out an audit as part of its internal audit arrangements. This type of audit would not be covered by section 40 as it would have the same status as an internal audit.
23. The exemption may also be claimed by a public authority which is the subject of the audit, but only if the disclosure of the information would, or would be likely to, prejudice substantially the exercise of the auditing body’s audit functions.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Section 40(a) and (b) Paragraph 20	126/2008	William Stewart and Audit Scotland	<p>The Accounts Commission appoints auditors to audit local authorities. The auditors are either from Audit Scotland or from private firms.</p> <p>Mr Stewart asked Audit Scotland about the audit of North Lanarkshire Council's accounts carried out by a private firm (PwC).</p> <p>Audit Scotland told Mr Stewart it did not hold the information. We were satisfied that Audit Scotland did not physically hold the information, but went on to consider whether PwC held the information on Audit Scotland's behalf. (Under section 3(2)(a)(i) of FOISA, a public authority holds information for the purposes of FOISA if it is held by another person on its behalf.)</p> <p>Although Audit Scotland provides guidance and support to the auditors it appoints and monitors their performance, the auditors act independently in carrying out the audit. This meant that PwC did not hold the information on behalf of Audit Scotland.</p>

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

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 12	Commissioner's Public interest test guidance	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx
Glossary and abbreviations	Audit Scotland	www.audit-scotland.gov.uk/
Glossary and abbreviations	Accounts Commission	http://www.audit-scotland.gov.uk/about-us/audit-scotland
Glossary and abbreviations	The Scottish Government's Best Value Policy	www.scotland.gov.uk/Topics/Government/PublicServiceReform/14838
Paragraph 18	Commissioner's guidance on the exemption in section 27 of FOISA: Information intended for future publication	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section27/Section27.aspx
Paragraph 20	(UK) Information Commissioner's decision on the equivalent exemption in the Freedom of Information Act 2000	https://ico.org.uk/media/action-weve-taken/decision-notices/2006/387814/FS50115610.pdf

Appendix 2

Section 40: Audit functions

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the exercise of a Scottish public authority's functions in relation to –

- (a) the audit of the accounts of other Scottish public authorities; or
- (b) the examination of the economy, efficiency, effectiveness with which such authorities use their resources in discharging their functions.

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