Information intended for future publication and research information (sections 22 and 22A)

Freedom of Information Act

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Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

2. An overview of the main provisions of FOIA can be found in The Guide to freedom of information.

3. This is part of a series of guidance, which goes into more detail than the guide, to help public authorities to fully understand their obligations and promote good practice.

4. This guidance explains to public authorities how to apply the exemptions under section 22 and section 22A FOIA.

Overview

Part A

Section 22 – information held with a view to its future publication

Section 22

- Section 22 provides an exemption for information that is intended to be published in the future.
- Information is exempt if, at the time when the public authority receives a request for it:
    - the public authority holds the requested information;
    - the public authority intends the information to be published at some future date, whether that date is determined or not; and
    - in all the circumstances it is reasonable to withhold the information until its planned publication.
- It is a qualified exemption and therefore public authorities must consider whether the public interest in maintaining the exemption is greater than the public interest in disclosing the requested information.

- The duty to confirm or deny whether information is held does not apply where to do so would disclose information that would be exempt under section 22.
- The duty to confirm or deny is subject to a public interest test.

What FOIA says

Section 22

(1) Information is exempt information if—

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

5. To engage section 22, the public authority receiving the request must show:

   - it's holding the information with a view to publishing it at a future date, even though that date is not yet set. The authority can intend the information to be published either by itself or by 'any other person'.

- it already had a settled intention for the information to be published before the request was made, and
- having considered all the circumstances, it's reasonable to withhold the information until the future date.

6. In this exemption 'any other person' means an individual or a body corporate, which could be a public authority or a private organisation.

7. This exemption is qualified. Even though the authority shows that the exemption is engaged, it must carry out the public interest test to decide if it can disclose the information.

8. The intention to publish must pre-date the request. This means that a public authority cannot, when it receives a request, attempt to give itself more time to provide the information by deciding to publish it in the future rather than provide it within the statutory time limit for answering a request.

Publishing the same information as the request

9. A general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.

10. The information that the public authority intends to be published must be the specific information the applicant has requested.

11. If, in the course of preparing information for publication, some information is discarded or rejected, the exemption under section 22 will not cover that rejected material. Clearly, at the time the decision is made to discard that material, the public authority no longer holds the information with a view to its publication.

No fixed publication date

12. Although the public authority must hold the information at the time of the request with a view to its publication, the exemption does not require a set publication date to be in place.

13. So a public authority may still be able to apply section 22 if:

- there is a publication deadline, but publication could be at any date before then;
- publication will take place once other actions have been completed;
- publication will take place by reference to other related events; or
- there is a draft publication schedule that hasn't been finalised.

14. As long as the public authority has decided that it or another person will publish the information at some time in the future, the exemption may apply.

'Publication' can have a wide meaning

15. The term 'publication' requires the information to be made available to the public. It is not sufficient if a public authority or another person only intends to make the information available to a particular, restricted audience.

16. 'Publication' is not confined to making information available in print or online. The term is very broad and can include the action of making information generally known or available; for example :
    - by physical inspection;
    - in some circumstances, through speech;
    - in picture form, if there is an intention to make the picture available through public display; and
    - via notes made in preparation for a speech - if there is an intention to broadcast the speech publicly.

17. The important issue to consider is whether there is an intention to make the information available to the general public.

Publication by making available for inspection

18. For inspection to be a valid means of publication, a public authority must be able to provide the public with appropriate and reasonable access to the information. Inspection facilities should be:
    - clearly advertised;

- readily available;
- accessible; and
- easy for the public to use (including, for example, help with finding the information, such as a cataloguing system).

19. Where a public authority has identified records for transfer to The National Archives (TNA) as 'open' records, we would accept that there is an intention to publish. This is because, once transferred to TNA, the information is made available to the public by an established and accessible system of inspection.

20. Not all public authorities will be able to offer the same level of inspection service as that offered by organisations such as TNA. But in all cases, the facilities must allow the public to have reasonable access to the information.

21. The absence of such facilities will make it more difficult to argue that inspection amounts to publication.

Reasonable to withhold the information prior to publication

22. A public authority must consider whether it is reasonable, in all the circumstances, to withhold information until the date of publication.

23. There is some overlap between the factors to consider when deciding what is reasonable, and those which are relevant to the application of the public interest test. However, before applying the public interest test, a public authority must first determine whether or not it is reasonable, in all the circumstances, to withhold the information.

24. When doing so, a public authority should first consider whether or not it is:

    - sensible;
    - in line with accepted practices; and
    - fair to all concerned.

25. A public authority may also wish to give thought to whether:

    - it is the right decision to manage the availability of the information by planning and controlling its publication;

- it is necessary to avoid the possibility of the requester gaining any advantage in obtaining the information prior to general publication;
- the timetable properly requires internal or limited consideration of the information prior to its public release;
- having decided to disclose the information, there would be real difficulties in extracting it prior to publication; and
- this information should instead be available through the authority's publication scheme.

26. The closer to the date of publication, the more reasonable it is likely to be for the public authority to withhold the information until publication has taken place.

The exemption can't apply post-publication

27. Once information has been published, the exemption in section 22 will no longer apply to any of the same information contained in either earlier draft versions or in other documentation.

Examples of decisions involving section 22

Example

ICO Decision Notice FS50121803

A public authority refused a request for prison–related information concerning several notorious convicted murderers. It relied upon section 22, on the basis that it intended to put some of the requested information into the public domain through TNA.

In order to do this, the public authority planned to review all the information prior to transferring it to TNA at some future date. It would have to undertake this exercise as it was likely other exemptions would apply to some of the sensitive information.

The Commissioner's decision was as follows:

- The Commissioner rejected the public authority's argument that section 22 was engaged. Although the

public authority intended to publish some of the information at a point in the future, the public authority could not identify which information that was. At the date of the request, it was not possible to say that the public authority had an intention or even a settled expectation to publish all the withheld information.

- The Commissioner stated he was satisfied that section 22 could apply to information even where the public authority does not itself plan to publish the information. In this instance, the public authority planned to transfer the information to TNA which would publish the information by making it available for inspection.

- Although the Commissioner found that the section 22 exemption was not engaged in this instance, he was satisfied that making information available for public inspection could be valid publication: "even if the requested information will only be available at the TNA for the public to inspect, it will constitute information that has been 'published'. In reaching this conclusion the Commissioner notes the ready availability of the TNA's inspection facilities and systems". He reached this conclusion partially by analogy with the operation of FOIA publication schemes, which can include information that is only available to the public by inspection.

Example

ICO Decision Notice FS50081543

The public authority refused a request for a copy of an invitation to tender document, indicating that it intended to publish the information once the franchise had been awarded. Following a decision to award the franchise, it provided the information.

During the course of the Commissioner's investigation, it became apparent that, at the time the public authority received the request, it had no confirmed intention to publish the information in future. The Commissioner

therefore determined that the exemption under section 22 did not apply.

Example

ICO Decision Notice FS50349323

A university refused a request for a copy of a PhD thesis that a student had submitted, applying sections 22(1) and 43(2). At the time, the thesis was embargoed from publication because a commercial publishing contract applied to it.

On internal review, the university upheld its refusal, explaining that the thesis would be made available in its library once the book that was based on it was published (or if it failed to be published).

The Commissioner disagreed with the requester's argument that the university did not have a settled intention to publish the information. He also found that it was reasonable in the circumstances for the university to delay publication since it had agreed to the embargo. He agreed that disclosure would be unfair to the author since it would be likely to place her in breach of her publishing contract. In addition, premature disclosure of the thesis would be likely to undermine the commercial impact of the book.

Finally, he found that it was balanced and reasonable for the university to limit the delay in publication of the thesis only up to the time of publication of the book.

Example

Queen Mary University of London v Information Commissioner & Mr Robert Courtney [EA/2012/0229] 22 May 2013

Queen Mary University London (QMUL) refused a request for information relating to a trial (the PACE trial) carried out into the treatment of chronic fatigue syndrome and subsequent

deterioration rates. QMUL relied on section 22 because it intended to publish the data in the future.

The Tribunal was advised that the intention was for the requested information to be published in a peer-reviewed journal but that it was not clear exactly when this would take place because of the way the peer review process worked. However, the Tribunal was satisfied that there was an intention to publish.

The Tribunal stated: "all that is necessary for s22 to be engaged is for the public authority to have the 'intention' to publish it at a future date. We are so satisfied."

The public interest test

28. Section 22 is a qualified exemption. This means that, even if the requested information falls within it, the public authority must go on to consider whether the public interest in maintaining the exemption is greater than the public interest in disclosing the information. Where the public interest is equally balanced, the authority must disclose the requested information.

29. There could be instances when it is reasonable to withhold the information under section 22, but the public interest in disclosure outweighs the public interest in withholding it.

30. FOIA does not specify the factors that should be considered in balancing the public interest.

31. However, the public interest in releasing the information will often be stronger if the publication date is far in the future or where it isn't set.

32. For more details about factors weighing in favour of disclosure, please see our guidance the public interest test.

33. Like the other exemptions in Part II of FOIA, section 22 aims to protect particular, specified interests. Therefore the public interest arguments in favour of maintaining the exemption must relate specifically to section 22.

34. Any harm that could be said to arise from the disclosure of the requested information is only relevant if it results from the early disclosure of that information, ahead of its scheduled

release date. Therefore arguments in favour of maintaining the exemption must relate to that.

35. The timing of the disclosure is often the main factor a public authority must take into account when considering the public interest in maintaining the exemption.

36. In most instances public authorities will not be able to argue that information is too technical, complex or misleading to disclose, or that it may be misunderstood or is incomplete, because they can explain it or set it into context. However, where such explanation is not possible or would not limit the damage caused, the Commissioner does accept that the argument could be relevant. Where a public authority relies on section 22 this argument may be relevant and carry weight if its publication plans include providing the necessary context or explanation.

Example

Queen Mary University of London v Information Tribunal & Mr Robert Courtney [EA/2012/0229] 22 May 2013

In this case described earlier, the Tribunal found that the public interest weighed in favour of maintaining the exemption, on the basis of the following arguments:

- the harm that might arise from early disclosure;
- the importance of the peer review process: "the additional time sought by the University prior to publication is necessary to enable the proper analysis and scientific commentary to be prepared and then scrutinized through a process of internal review and then external peer review both of which are in the public interest in order to ensure scientific rigour is maintained and that maximum value is achieved from the public investment";
- the risks of prior publication could not be mitigated adequately by publishing explanatory commentary alongside any disclosure;
- disclosure could jeopardise the publication in a peer-reviewed journal; and

- although the latest MRC guidance required MRC-funded data to be published "within a reasonable period (generally within a year of completion)", the trial in this case predated that guidance.

Example

ICO decision notice FS50209662

The House of Commons (HoC) refused a request for details of the amounts spent by seven MPs on circulars and reports to their constituents for the financial years 2006/07 and 2007/08, citing section 22.

The Commissioner was satisfied that at the time the HoC received the request, which was for a particular category of expense claim, it had an intention to publish the information. The HoC had already announced that it would disclose details of expense claims down to category, though not receipt level, for all MPs.

The Commissioner had argued strongly in previous decision notices involving requests for MPs' expenses that there was a very strong public interest in disclosure of information that added to the transparency and accountability surrounding such spending.

In this instance, he emphasised that: "the balance of the public interest must focus on whether in the circumstances of the case it would be in the public interest for the public authority to keep to its original timetable for disclosure or whether in the circumstances of the case the public interest would warrant an earlier disclosure".

In the circumstances of this case, the Commissioner found that the public interest in maintaining the exemption in section 22 outweighed that in disclosure of the information. This was because he considered that it would be of greater public benefit to ensure that all the information about MPs' expenses (above and beyond the information requested here) was disclosed by HoC as soon as possible, even if this was "at the expense of delaying the publication of the relatively small proportion of that information, ie the

information requested by this complainant, by a number of months".

The duty to confirm or deny

37. The duty to confirm or deny whether information is held does not apply where to do so would disclose information that would be exempt under section 22.

38. A public authority does not need to confirm or deny whether it holds information when, if it did hold the information:

    - it would be held at the date of the request with a view to publication; and
    - it would be reasonable to withhold it from disclosure until the date of publication.

39. This exclusion is subject to a public interest test.

40. The exclusion from the duty to confirm or deny is a complex area, and further information is available in our separate guidance When to refuse to confirm or deny information is held.

Part B

Section 22A - research information

Section 22A

- Section 22A provides an exemption for information obtained from a programme of research, as long as:
    - the programme is still under way;
    - there is an intention to publish a report of the research; and
    - disclosure of the information would or would be likely to prejudice the research programme, the interests of

participants in the programme, or a public authority holding or intending to publish a report of the research.

- The exemption is qualified and is subject to a public interest test.
- The duty to confirm or deny whether information is held does not apply where the requested information is (or if held would be) exempt under section 22A.
- The duty to confirm or deny is subject to a public interest test.

What FOIA says

Section 22A

(1) 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 the publication, by a public authority or any other person, of a report of the research (whether or not including a statement of that information), and

(b) disclosure of the information under this Act before the date of publication would, or would be likely to, prejudice —

(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 paragraph (a) (if it is a different authority from that which holds the information).

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of

subsection (1) if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)(b).

41. Section 22A was added to FOIA by the Intellectual Property Act 2014 which commenced on 1 October 2014, specifically to cover information relating to ongoing research.

42. There is a degree of overlap between section 22 and section 22A. But in several respects section 22A provides an exemption that is broader in scope - at least in respect of research information. Authorities may use section 22A to refuse access to a wider range of information relating to ongoing research.

Information from a programme of research

43. The exemption applies to information 'obtained in the course of, or derived from, a programme of research', where the research is ongoing, and there is a plan to publish a report of the outcome. Any such report may or may not include the information that has been requested, without affecting the application of the exemption to the information.

44. The exemption will include a wide range of information relating to the research project, and will cover information that is not necessarily going to be published. In other words there does not need to be any intention to publish the information that has been requested.

45. FOIA does not define 'research'. The Commissioner will use the ordinary definition of the term research: a systematic investigation intended to establish facts, acquire new knowledge and reach new conclusions.

Ongoing programme of research

46. The research programme the requested information is derived from must be ongoing. So long as that research continues, the exemption may apply.

Intention to publish a report of the research

47. The exemption requires that the research programme must be 'continuing with a view to the publication… of a report of the research (whether or not including a statement of that information)'.

48. This means that, so long as the research programme continues, the exemption may apply to the information if there is an intention for a report of the outcome to be published at some point in the future. This is the case even if a report has already been published about a particular aspect of the same research programme.

49. So long as one or more reports remain to be published and the research continues, the exemption will still protect information 'obtained in the course of, or derived from' the research programme.

Example

A professor makes a request for a specific aspect of information obtained by a university as part of its research programme on the nutritional and economic benefits of a particular type of protein. The university research has been underway for two years and is now nearly complete.

As planned, the university has published a research report on that part of the research relating to the information request, but it also plans to publish a report on all remaining sections of the research in six months' time.

As the research is continuing with a view to publishing a report (even though it will be on different aspects of the research programme), the section 22A exemption could apply to prevent premature disclosure of all the requested information.

Publication by the public authority or any other person

50. The exemption requires that the research programme is continuing 'with a view to the publication, by a public authority or any other person…' of a report of the research. Unlike section 22 where the public authority must have an intention to publish the requested information, even if this is actually carried out by another body, in section 22A any individual, body corporate, public body or private organisation could have the intention to publish a report.

Prejudice to the research or related interests

51. The public authority must demonstrate that there is a risk that disclosure of the requested information before the envisaged date of publication would or would be likely to prejudice:

    - the research programme;
    - the interests of an individual participating in the programme;
    - the interests of the authority holding the information; or
    - the interests of a different authority that is going to publish a research report.

    Therefore the risk of prejudice to the interests of an authority could be to the interests either of the authority holding the information (in the above example, the university) or of a different authority that does not hold the information but is planning to publish it.

> **Example**
>
> The university in the above example holds the requested information and the research programme is continuing there with a view to publication at some point in the future by the Department of Environment, Food and Rural Affairs (DEFRA).
>
> Section 22A could apply to exempt the requested information if disclosure would prejudice or would be likely to prejudice:
>
> - the research programme;
> - the interests of any individual participating in the programme;
> - the interests of the university; or
> - the interests of DEFRA.

52. The ICO approach to the prejudice test stems from the Information Tribunal's decision in Christopher Martin Hogan and Oxford City Council v the Information Commissioner

[EA/2005/0026 and 0030], 17 October 2006)</u>, 17 October 2006). It involves three steps.

- Show that the potential prejudice would affect relevant interests that the exemption is protecting.
- Identify the nature of the prejudice – showing that it is "real, actual or of substance" and that there is a causal link between the disclosure and the prejudice claimed.
- Decide on the likelihood of prejudice occurring.

53. The likelihood of prejudice is stated in section 22A as: 'would' prejudice or 'would be likely' to prejudice. 'Would' means that prejudice is more probable than not – ie a more than 50% chance of the disclosure causing the prejudice, although it is not certain. 'Would be likely' refers to a lower level of probability, but one which is still significant.

54. The prejudice in this exemption is very wide and only specifies whose "interests" would need to be prejudiced by early disclosure of the information, not what those interests are.

55. For more details, please see our guidance the prejudice test.

The exemption can't apply post publication

56. Once the research programme has ended and all the planned reports have been published, the exemption in section 22A will no longer apply to any of the information.

The public interest test

57. Section 22A is a qualified exemption. Therefore if the requested information meets the definition and satisfies the prejudice test, the authority must still consider whether the public interest in maintaining the exemption outweighs that in disclosing the information.

58. Please refer back to the discussion of the public interest test in section 22 above and to our guidance The public interest test. The arguments that are relevant to section 22 may also, depending upon the circumstances of the case, be relevant under section 22A.

59. When applying the public interest test in this exemption, the public authority will need to consider the extent, frequency and severity of the prejudice that has been argued. As stated

earlier, the nature of 'the interests of' is not defined; potentially those interests are not limited to issues around the research programme and could conceivably relate to interests of any kind.

60. However, the Commissioner considers that it is in the public interest to allow researchers to complete their programme of research and finalise their findings before the research programme is subjected to external scrutiny. This allows the time and space for research findings to be thoroughly examined and tested by peer review, and should ultimately add to the quality of the final research report and standards of research. It also prevents an incomplete picture arising from the publication of research that is still ongoing, or from information being published without relevant context or explanation.

The duty to confirm or deny

61. In section 22A there is no duty to confirm or deny that the information is held in certain circumstances. These are:

    - where the requested information is exempt under section 22A(1) (or would be if it were held); and
    - where, or to the extent that, confirming or denying that it is held would or would be likely to prejudice an individual or authority listed in section 22A(1)(b).

62. The exclusion of the duty to confirm or deny is subject to the public interest test. For section 22A, a public authority should therefore consider whether, given the risk of prejudice, the balance of the public interest favours stating whether it holds the information.

63. Please refer back to the discussion of the duty to confirm or deny in relation to section 22, above and to our guidance The duty to confirm or deny.

Part C

Section 22 and section 22A

Good practice

64. It is good practice for public authorities to consider the general release of information that is of public interest, both as part of their normal business operations and in accordance with general principles of openness and accountability.

65. Under section 19 of FOIA all public authorities must operate a publication scheme. The proper operation of a publication scheme requires all public authorities to proactively publish information, ensuring they keep it up to date. For more details, please see our guidance Model publication scheme and Model publication scheme: using the definition documents.

66. In accordance with the FOIA Section 45 code of practice, where a request has been made for information that is due to be published by a third party, it is good practice for the public authority receiving the request to consult that person or body. The third party will be in a better position to determine whether or not it would be reasonable in all the circumstances to withhold the information prior to its publication, and will also be able to advise on public interest considerations.

67. When seeking to apply the exemptions under sections 22 or 22A, it is the Commissioner's view that it is good practice to provide the requester with an anticipated date of publication. If the authority subsequently decides not to publish the information, it should inform the requester and ask if they wish to submit the request again.

68. If a public authority decides to disclose information which was to be published at some point in the future, then it should also consider whether it is appropriate to make it generally available by bringing forward the publication date.

69. Where an authority applies the exemption, in some circumstances it should consider whether the public interest would be better served by bringing forward the proposed publication date.

Other considerations

70. There are other exemptions that might apply to research information; for example, sections 36 and 43. For more details please see our guidance:

    - Section 43: commercial interests
    - Prejudice to the effective conduct of public affairs (section 36)

71. This guidance relates only to FOIA. If the information is environmental, public authorities will instead need to consider exceptions under the Environmental Information Regulations 2004 (EIR). Please refer to The Guide to the Environmental Information Regulations.

More information

72. Additional guidance is available on our guidance pages if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.

73. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

74. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

75. If you need any more information about this or any other aspect of freedom of information, please contact us, or visit our website at www.ico.org.uk.