



HM TREASURY

# **FREEDOM OF INFORMATION ACT 2000**

## INTRODUCTION

The Freedom of Information Act (FOIA) takes effect on 1 January 2005. It replaces the existing Open Government Code.

The Act is intended to encourage greater openness in Government and more disclosure of information.

It gives the public new rights of access to information backed up by an independent enforcement regime with penalties for non-compliance.

It applies to the Treasury (and to all public authorities). We all need to know our new obligations and to comply with them.

The Treasury already releases a lot of information both proactively and on request.

Some requests will be about information where the public interest in disclosure will have to be weighed against the potential damage of disclosure eg to the economy.

Decisions to withhold information can be appealed to the Information Commissioner who has powers to over-rule us and order disclosure.

It is therefore going to be very important that if we withhold information – and there will be occasions when we will have to do this – we fully justify and document the reasons for doing so.

This guide is intended to help you:

- to identify FOIA requests;
- to answer them according to FOIA provisions and within the time limits;
- to apply any exemptions to disclosure;
- to obtain further assistance when you need it.

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# BRIEF GUIDE TO THE FREEDOM OF INFORMATION ACT 2000

The legislation applies from 1 January 2005.

It introduces a wide public right of access to information.

Any request for information which is a "subject access request" under the Data Protection Act must, to that extent, be dealt with under the DPA. And any request for environmental information must be dealt with under the Environmental Information Regulations. The boundaries between FOIA, DPA and EIR raise difficult technical issues, on which you will need to ask for legal advice if you receive such a request.

The FOIA is fully retrospective.

It applies, to all recorded information, including e-mails and data held electronically.

It applies to all UK public authorities, including the Treasury.

It imposes two sets of obligations on public authorities: to put in place publication schemes setting out what information they will publish and how they will publish it; and introduces new rights to access information held by public authorities.

Anyone in the world can request information, there is no requirement for them to give reasons why they want the information, and we should not ask.

All requests for information should be treated as FOI requests whether or not the applicant refers to the legislation.

There are 2 rights:

- to be told whether the requested body holds the information;
- to have that information disclosed (normally within 20 working days) unless it is covered by exemptions.

There are 8 absolute exemptions, where information need not be disclosed if it falls into one of these categories.

Examples of absolute exemptions include where the information is accessible by other means (including where there is a charge), where disclosure would amount to a breach of confidence actionable in law, and where disclosure is prohibited by other legislation.

There are 16 non-absolute or qualified exemptions which are subject to the public interest test.

Qualified exemptions include the national economy, the formulation of government policy, and the effective conduct of public affairs.

If a qualified exemption is relied upon to justify non-disclosure it must be shown that the public interest in not disclosing the information is greater than the public interest in disclosing.

Where the damage of disclosure is equal to the general public interest in disclosure, the obligation to disclose is decisive.

When it is necessary to consider the public interest test, the 20 day time limit for a response is extended until such time as is reasonable in the circumstances, which will depend on how difficult it is to consider the competing public interest factors. But the applicant must still be told, within the 20 days, that HMT is relying on a claim that the information is exempt, specifically what exemptions are relied on and (if not obvious) why they apply.

There is no public interest test when relying on absolute exemptions: it is sufficient to show that the requested information falls within that category.

Information is provided free up to a ceiling of £600 (24 working hours) for the cost of locating and retrieving the information. Public authorities may decline to provide information where the costs of retrieval exceeds £600 and may charge for photocopying, printing and postage.

The Information Commissioner is responsible for enforcement of the legislation. Refusals to disclose can be appealed to the Information Commissioner who can order disclosure.

Information Commissioner decisions are binding unless set aside by a Ministerial veto.

Ministerial vetos are judicially reviewable and the government has decided, as a matter of policy, that use of a Ministerial veto would require a collective Cabinet decision.

# HOW TO DEAL WITH AN FOI REQUEST

## Introduction

This section provides advice on how to handle Fol information requests.

The new rights conferred by the Act indicates commitment to greater openness by government. [For an explanation of the government's approach to freedom of information, refer to Lord Filkin's speech of June 2004 to Treasury staff. You can get a CD-Rom containing the speech from the Information Rights Unit]. Public authorities are placed under an express duty to help people exercise the new rights, both through proactive publication schemes and providing "advice and assistance" to people requesting access to information.

The new rights to information are subject to two sets of boundaries. First, there are the substantive exemptions. Second, there are also procedural limitations (such as cost). Both are discussed in more detail in this guide.

## What Counts as an Fol Request?

Requests must be in writing, with a return address, except for requests for *environmental information* which can be made orally.

E-mails count as Fol requests, provided there is a clear address to send a response.

PQs requesting information are requests under the Fol Act.

## How will I be able to Identify an Fol Request?

Requesters do not have to refer to the Fol Act and do not need to give a reason for their request.

Requests can be made by individuals on their own behalf or on behalf of organisations.

Requests can come from any part of the world – the rights under the Act are not confined to UK citizens.

Requesters can ask for information to be provided in a format of their choice. They also have the right to request access to original documents. This may entail them viewing documents on site.

We must comply with requests of this nature if it is "reasonably practicable" to do so. Ease of complying with such requests and the cost of doing so should be taken into account in considering whether to meet the request.

## **What Information do I have to provide?**

The Act gives a right of access to all recorded information. The Act purposely does not include the specific right to access specific documents as information is held in many forms and some documents may contain both discloseable and non-discloseable information.

In practice the release of documents may often be the best way to meet a request.

Where a document contains information outside that requested the information requested can be taken out and released, or the document can be redacted. Alternatively a new document with the relevant information can be prepared.

Where actual documents are being released you should delete the names of their creators and other officials mentioned in them.

Some requests will be broad requests for all information related to a specific subject or to a particular decision. Where significant efforts would be required to locate information refer to the section on fees and costs limits.

## **What about Information supplied by third parties?**

Where requests cover information that you hold, but that has been supplied by a third party, it will often be sensible to take their views on whether the information can be released. However, ultimately the disclosure decision is the Treasury's.

It is possible that 3rd party information may be covered by exemptions. You should particularly consider whether S41 (information provided in confidence) or S43 (commercial interests) applies.

## **Receiving an FoI Request**

The vast majority of FoI requests will reach you, as now, through the MINCOM system. If the request has been misdirected and should be dealt with by another Treasury team send it direct to them, if you know the relevant team. If you are unsure who is responsible return it to CEU. If the request seeks information on a number of subjects, some of which are your responsibility and some of which are dealt with by other Treasury teams, follow existing procedures for producing a single co-ordinated response.

You may receive requests for information about a subject that is not a Treasury responsibility and where another department takes the lead. However, if the Treasury holds some or all of the requested information you are obliged to respond to the request. You cannot transfer it to the relevant department: the request is to the Treasury and we must provide what information we hold on the subject. However if you do not hold information on the subject requested and know another body that does, you should point this out in your reply to the applicant.

If you receive an information request through another channel (eg e-mail directly from a journalist or member of the public) it is very important that it is handled according to FOIA principles and recorded as such. You should register the request with the Correspondence and Enquiry Unit and they will issue a MINCOM case file so that progress with the request can be tracked and recorded.

## Processing an FoI Request

This involves asking and answering 5 questions:

- A: is the information held by the Treasury?
- B: if so, is it covered by the disclosure regime in the FOIA or one of the other 2 disclosure regimes (data protection and environmental information)?
- C: if it is covered by the FOIA regime, can the information be located and retrieved within the £600 cost ceiling?
- D: if the cost of locating and retrieving the information is within the ceiling, do any exemptions apply?
- E: if qualified exemptions apply, does the public interest in relying on the exemption outweigh the public interest in disclosure?

### **A: Is the Information Held by the Treasury?**

If the information is held by the Treasury you need not send a formal acknowledgement of the request before dealing with it, unless any of the qualified exemptions may apply and you need more time than the 20 working days deadline to consider them (see Section E). If the information is not held by the Treasury you should inform the applicant as soon as possible. We have a legal obligation under FOIA to provide advice and assistance to people seeking access to information, so you should notify them of alternative ways of accessing the information if you are aware of them. This obligation only applies if you already know of such alternative sources: there is no requirement to search for alternative sources on behalf of the applicant.

A standard letter along the following lines would be appropriate:

Dear ...

Thank you for your letter of ..... making a request for information under the FOIA. The information requested is not held by HM Treasury. [If appropriate: However, I understand that (the relevant public authority) may hold such information and suggest that you contact them. Their contact details are .....]

## **B: Is the Information covered by the FOIA disclosure regime or another disclosure regime?**

If the request is a “subject access request” under the Data Protection Act then it must, to that extent, be dealt with under the DPA. If the request is for environmental information which falls within the Environmental Information Regulations 2004 regime, then it is exempt under FOIA: S39. Such requests should be dealt with under those regimes rather than FOIA. However if either the S40 (personal information) or S39 (environmental information) exemption is relied on, you will also need to write to the applicant within the 20 day time limit stating that the information requested is exempt, specifying the exemption in question, and stating (if not obvious) why the exemption applies. The boundaries of FOIA, DPA, and EIR raise difficult, technical issues on which you will almost certainly need legal advice.

### **How Do I Handle a Request for Personal Data?**

The Section 40 exemption for personal data is complex and will require legal advice to determine. This applies both to cases where the person making the request is the subject of that data, and to those cases where the requester asks for personal data about someone else. You will also need to consult the Information Rights Unit.

### **How Do I Handle a Request for Information about the Impact on the Environment?**

New Environmental Information Regulations also come into force on 1 January 2005 and establish a special access regime for environmental information. The definition of environmental information is broad and includes such things as the state of the elements of the environment e.g . air and water, factors which affect them such as waste and pollution, policies and legislation which affect the environment, human health and safety, the food chain, and built structures.

Although the disclosure regime is quite similar to FOI there are several special features of EIRs:

- requests may be made orally or in writing;
- the public authority must reply within 20 working days;
- all exemptions are subject to the public interest test;
- there is no cost limit.

If you receive a request for information that you believe may be covered by EIRs refer it to the Information Rights Unit.

## C: Can the Information be Retrieved within the £600 Cost Ceiling?

The Government plans to establish the following fees and charges regime for Freedom of Information requests:

- if the cost of location/retrieval is going to exceed £600, the public authority has the option of either declining to provide the information or providing it but on the basis of full cost recovery;
- the £600 ceiling applies only to time spent in information location, retrieval, the extraction of disclosable from non-disclosable data, together with time spent writing a response to the request. It does not cover time spent assessing whether exemptions apply and the balance to be drawn between the damage caused by disclosure of the information and the public interest in disclosure;
- charges may be levied for the transmission costs of meeting the request (eg photocopying, printing, postage). We can charge the actual cost of postage and photocopying at the rate of 10p per sheet.

The £600 figure equals 24 working hours. If you receive a request where it is clear that the cost of location/retrieval will exceed the £600 ceiling you should write to the applicant and say that the information is exempt under S12 as the cost of complying with the request would exceed the £600 threshold. While you have an option to write to the applicant saying what the estimated cost would be if it exceeds £600 and giving the applicant the option of paying the charge, it is unlikely that we will be in a position to devote resources to meeting time consuming information requests even if the costs would be recovered. You should consult the Information Rights Unit if there is any question of replying in such terms.

In cases where the £600 cost ceiling will be exceeded it might be because the applicant's request is in very general and/or sweeping terms (eg all Treasury papers on a particular subject). It is good practice when writing to refuse to provide information to explain why the cost of providing the information would exceed £600 and inviting the applicant to be more specific about the information he/she requires.

A letter along the following lines would be appropriate in such a case:

Dear ...

Thank you for your letter of ..... making a request for information under the FOIA. The information requested could not be supplied within the cost ceiling established for answering requests under S12 of the Act. However, if you could be more specific and selective about the information you require we may be able to supply you with the information you specify without exceeding the costs ceiling.



You should also send a letter to the applicant if it becomes clear that, although the information can be located/retrieved/redacted/summarised within the £600 ceiling, the transmission costs are likely to be significant enough that we would wish to charge for them. The threshold is £15. If the costs are likely to be below £15 ignore them.

## Charges

If answering the information request would cost more than £15 in transmission costs (comprising photocopying at 10p per sheet, printing, postage, any costs of converting information into a different format) you should first make an estimate of the likely cost. Then you need to inform HMT Finance of the charge to be invoiced to the member of the public using the standard invoice requisition form. (You can get this from HMT Finance). You should then send this to the applicant with a request for payment by personal cheque to HM Treasury. (We do not have any other payment methods available at present). You should inform the applicant that on receipt of the fee you will continue to process the application.

A Fees Notice along the following lines would be appropriate:

Dear ...

Thank you for your letter of ..... making a request for information under the FOIA. The information requested is held by HM Treasury and could be supplied to you within the terms of the Act. There is no charge for the costs of locating and retrieving the information but we have calculated that the cost of transmitting the information to you (photocopying and postage) would be £[x]. If you would like to receive the information on this basis please confirm your request and provide us with a cheque in the amount of £[x] payable to H.M.Treasury. We will then supply you with the requested information. Pending payment of this fee the deadline of 20 working days for responding to your request set out in the FOIA is suspended.

If you believe the fee is unreasonable you have the right to have the decision to charge it reviewed initially by an internal review procedure and, if you remain unhappy with the decision, by the Information Commissioner. If you would like to have this decision reviewed please write to Kate Jenkins, Information Rights Unit, HM Treasury, 1 HorseGuards Road, London, SW1A 2HQ, stating the grounds on which you consider the fee to be unreasonable. She will arrange for such an internal review to take place

and notify you of the outcome and process.

## Searching for Information

FOI covers all information held by the Treasury in recorded form so you will need to look through relevant paper files, electronic files and e-mails. The search should be a reasonable one adopting the following guidelines:

- a search of e-mail folders in Outlook of the relevant people who may hold the information;
- a search of the personal areas of those who may hold the information;
- search electronic files in shared drives in Panagon and any other systems;
- with paper files, search through files with relevant titles.

You are not required to search every file or e-mail available on the off chance that it may contain relevant information.

## Vexatious/Repeated Requests

The Act does not oblige us to comply with a request for information if the request is vexatious or repeated:

- Vexatious: is determined by the information requested, not the person making the request. An individual may make as many requests as they please and each must be considered on their merits. But if you believe that the requests are intended to disrupt the work of the Treasury, consult the Information Rights Unit before determining that the request is vexatious and declining it on those grounds;
- Where you have previously dealt with an information request from an applicant (either by providing or withholding information) you are not obliged to answer an identical or very similar request from the same person unless a reasonable period of time has elapsed. Again, consult the Information Rights Unit if such a case arises.

## D: Do Any Exemptions Apply?

Once you have located the information requested, you need to decide whether to release it. The section "Understanding The Exemptions" discusses the exemptions and explains how to apply them in detail. If none of the substantive exemptions apply, or if the damage that would be caused by release is so trivial that the public interest in disclosure clearly prevails, then subject to cost (see above) you should disclose the information requested.

You should send the information within 20 working days from the request being received in the Treasury, not of receiving it yourself. That is, you must reply within 20 working days, the 1st working day to count being the 1st working day after HMT received the request. This is a statutory deadline: failure to comply could lead to a

complaint to the Information Commissioner and enforcement action against the Treasury. Existing procedures for dealing with correspondence will apply with the relevant team drafting the reply for despatch by CEU.

If an absolute exemption applies (see “Understanding The Exemptions”) then the information need not be supplied and there is no need to consider the public interest in disclosure. If you are not releasing some or all of the information requested, on the basis that one or more of the substantive exemptions apply, then you must serve a Section 17 Notice i.e. a notice which states that the Treasury is relying on an exemption, specifies the exemption, and states (if it is not obvious) why the exemption applies.

Dear ...

Thank you for your letter of ..... making a request for information under the FOIA. The information in question [is held by HM Treasury] but is exempt from disclosure under [Specify the exemption in question and why it applies, eg the information is already available elsewhere and exempt under Section 21 and set out details of how to access it through this alternative mechanism]. This is an absolute exemption and is not subject to the overall public interest test concerning disclosure. You have the right to have this decision reviewed initially by an internal review process and, if you remain unhappy with the decision, by the Information Commissioner. If you would like to have this decision reviewed please write to Kate Jenkins, Information Rights Unit, HM Treasury, 1 HorseGuards Road, London, SW1A 2HQ, stating the grounds on which you consider the decision should be changed. She will arrange for such an internal review to take place and notify you of the outcome and the process.

Guidance on the handling of internal reviews is set out on pages 27-30.

**E: If Qualified Exemptions Apply, does the Public Interest in Relying on the Exemption Outweigh the Public Interest in Disclosure?**

If you believe that one of the qualified exemptions set out on pages 19-22 applies, you should refer the case to the Information Rights Unit. They will help you consider whether the public interest in not disclosing outweighs the public interest in disclosure.

We are obliged normally to respond to requests within 20 working days, but the Act allows for that deadline to be extended for such time as is “reasonable” when a decision regarding the public interest test has not yet been made. In these

circumstances, we are obliged to notify the applicant within 20 working days and give an estimate of when a decision will be taken and the applicant notified. (If that estimate later looks likely to over-run you should write to the applicant again explaining why and setting out a revised estimate for responding.)

In this case the Section 17 Notice must:

- state that HMT is relying on an exemption;
- specify the exemption;
- say why the exemption applies;
- say that no decision has yet been made regarding the balance of the public interest;
- estimate the date by which that decision will be made.

A S17 Notice to the applicant along the following lines would be appropriate:

Dear ...

Thank you for your letter of ..... making a request for information under the FOIA. The information requested is held by HM Treasury and falls within provisions of the Act that may exempt it from disclosure. [Specify the exemption in question and why it applies eg, disclosure of the information may be detrimental to the economy and therefore exempt from disclosure under S29.] This is a qualified exemption and the Treasury is required to weigh the public interest in maintaining the exemption against the public interest in disclosing the information. We are currently considering this issue and will let you know the outcome as soon as it has been resolved. The FOIA provides that while requests for information should be responded to within 20 working days from their receipt, this time limit may be extended by such time as is reasonable when considering the case of a qualified exemption whether the overall public interest is in disclosure or non-disclosure. We should be in a position to reply by [date].

The outcome of this consideration will either be to release the information (or at least some of it) or to withhold it on the grounds that the damage resulting from disclosure over-rides the public interest in disclosure. In the former case you should write to the applicant enclosing the information (subject to the need to notify the applicant of any charge that may arise for disclosure). If the decision is to withhold the information then you will need to send another S17 notice stating the reasons

for claiming that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information .Again, this further notice is required by the Act and it must say why in all the circumstances of the case ,the public interest in non-disclosure outweighs the public interest in disclosure.

A standard letter along the following lines would be appropriate:

Dear ...

Further to my letter of ..... , we have completed consideration of your request for information of ..... . We have concluded that in all the circumstances of the case the public interest in non-disclosure outweighs the public interest in disclosure. [Explain why.] You have the right to have this decision reviewed initially by an internal review process and, if you remain unhappy with the decision, by the Information Commissioner. If you would like to have the decision reviewed please write to Kate Jenkins, Information Rights Unit, HM Treasury, 1 HorseGuards Road, London, SW1A 2HQ, stating the grounds on which you consider the decision should be changed. She will arrange for such an internal review to take place and notify you of the outcome and the process.

Guidance on the handling of internal reviews is set out on Pages 27-30.

## **Tracking Progress of Fol Requests**

Fol requests, like other external correspondence, will be handled by the Correspondence and Enquiry Unit using the MINCOM system. Most requests will therefore first reach you when the MINCOM system charges a case to you. There will be an additional box on the MINCOM Main Details Screen which you should type 'Y' if it contains a request for information. This will allow for progress on Fol requests to be tracked and statistics compiled.

If you receive a request for information from any other route it is very important that you send it to CEU to register the case as an Fol request within the MINCOM system.

Responses to Fol requests will also be handled through MINCOM. A new FOI screen has been created. The screen allows you to add information about how the case had been handled, whether exemptions have been applied and say whether information has been supplied. Where exemptions have been applied you will need to clear cases with the Information Rights Unit and will not be able to close a case until their approval has been obtained.

While the statutory limit for responding to FOI requests is 20 days, the internal Treasury target for a response remains at 15 working days.

## **How to Apply the Exemptions?**

Resort to the exemptions to preserve the confidentiality of some information may be essential for the maintenance of effective government. There are 24 exemptions in the FOIA which are discussed below. The use of exemptions and the associated public interest test (for qualified exemptions) is likely to be the most controversial part of the operation of the legislation and the subject of appeals to the Information Commissioner and, possibly, judicial review. It is therefore very important that decisions to withhold information on the basis of the exemptions are well justified and documented. Accordingly all decisions to withhold information will need to be cleared with the Information Rights Unit, which will need to refer some cases to the DCA Clearing House. If you receive an information request where an issue concerning use of the exemptions arises or where you are not sure of the position on exemptions you should pass the case, along with the information requested, to the Information Rights Unit. They will discuss the case with you, perhaps including consultation with the DCA Clearing House, before a decision is reached.

## UNDERSTANDING THE EXEMPTIONS

The obligation to disclose information is qualified by recognition that disclosure of some information may damage the wider public interest. The Act lists certain categories of information that are exempt from disclosure. They fall into two categories:

Absolute exemptions (8), where information which falls into this category need not be disclosed and there is no requirement to consider the public interest in disclosure;

Qualified or non-absolute exemptions (16), where information in this category is only exempt from disclosure when in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it. Where the damage that would be caused by disclosure and the public interest in disclosure are equivalent, then the information must be disclosed.

### Using Exemptions

The FOIA creates two rights of access to information:

- to be informed, in writing, whether the authority holds the information requested;
- if such information is held, the right to have that information communicated.

#### **(i) Withholding information requested**

The first decision to take is whether to communicate information or to decline to do so because the information is covered by an exemption and (for non-absolute exemptions) the overall public interest is not to disclose. If the information is held and the decision is to disclose (subject to payment of any charge), there is no need to write a separate letter saying this. The applicant can be told that the information is held at the time it is also disclosed. Remember, this must be done within 20 working days from receiving the request. If it is decided not to disclose, a second question arises: whether or not to tell the applicant whether the requested information is held.

#### **(ii) Neither Confirming nor Denying that the information is held**

The general right of access to information conferred by the Act means that any person requesting information from HMT is entitled to be informed in writing whether it holds the information requested. That is, there is in general a duty to confirm or deny that HMT holds the information requested.

However if one of the exemptions applies, it may be appropriate not even to confirm or deny that HMT holds the information requested. Note that if the

information falls within S21, as being accessible by other means, the applicant must be told whether or not HMT holds the information. But all the other substantive exemptions explicitly set out the circumstances in which the duty to confirm or deny does not apply.

In the case of the absolute exemptions, if the relevant provisions apply, then there is no duty to confirm or deny. In the case of the non-absolute exemptions, there is a public interest test. HMT has a duty to confirm or deny unless, in all the circumstances of the case, the public interest in there not being a duty to confirm or deny outweighs the public interest in disclosing whether HMT holds the information.

The relevant provisions in the exemptions are not easily summarised. If you think that, in a particular case, the duty to confirm or deny may not apply, seek advice from the Information Rights Unit and TLA. They will assist in ensuring that any refusal of the request complies with the requirements of S17.

In many cases refusal to disclose actual information will be perfectly compatible with confirming that such information is held (stating that intelligence is held on a particular security threat while declining to disclose the intelligence). In other cases confirming the existence – or the non-existence – of certain information may be against the public interest (eg that information was held about financial restructuring plans for a major company might reveal that it was in financial difficulties; that no information was held on a particular criminal activity may tell criminals that they could get away in their crimes).

## **Interpreting the Exemptions**

The description of the various exemptions takes up a large part of the Act and both the DCA and the Information Commissioner have published lengthy descriptions and interpretations of what they mean and, for non-absolute exemptions the way the public interest in disclosure needs to be balanced against them. This short guidance note cannot go into such detail. Instead it is limited to giving a short description of each exemption so you can identify whether it potentially applies to a particular case. If it does, refer the case straightaway to the Information Rights Unit. They will help you, perhaps consulting DCA in difficult cases, to determine whether they apply and the public interest test.

## **Absolute Exemptions**

There are 8 absolute exemptions:

S21: Information accessible to applicants by other means. If information is reasonably accessible to the applicant by another route, it is exempt information. This includes where access involves paying a charge. There are no circumstances in which it is permissible to rely on S21 and refuse to confirm or deny that information is held. Whenever S21 is relied upon to refuse disclosure, you should write to the applicant and explain the way that the information requested can be obtained by other means. You will of course need to ensure that you also comply with the requirements of S17;

S23: Information dealing with security matters supplied by, or relating to, bodies dealing with security matters. The main bodies concerned are GCHQ, Security Services, Secret Intelligence Service, NCIS and the special forces.

S32: Court Records. Information contained in any document held only because it is filed with a court, or served on HMT for the purposes of court proceedings.

S34: Parliamentary Privilege. This concerns information that is covered by Parliamentary privilege, which relates mainly to the proceedings of Parliament (see Page 26);

S36: Prejudice to effective conduct of public affairs but only as far as relating to information held by the House of Commons or House of Lords; This will not affect the Treasury.

S40: Personal Information. Where the applicant is the data subject of the information, or the personal data concerns someone else and disclosure would contravene the data protection principles.

S41: Information provided in confidence. Information supplied by a 3<sup>rd</sup> party where disclosure would constitute a legally actionable breach of confidence;

S44: Prohibition on disclosure. If other legislation (domestic or EU) prohibits disclosure then such legislation is binding and the FOIA does not change the position.

## **Non-Absolute Exemptions**

There are 16 non-absolute or qualified exemptions:

S22: Information intended for future publication. Although the date of publication does not have to have been published or settled before reliance on this exemption, the intention to publish must be a firm one. A vague possibility of future publication will not suffice. An example might be statistical information that is published at regular intervals.

S24: National Security. Information whose non-disclosure is required to safeguard national security, and which is not covered by the S23 exemption.

S26: Defence. Information is exempt from disclosure if this would be likely to prejudice the defence of the British Isles or any colony or the capability, effectiveness or security of the Armed Forces of the Crown or any forces co-operating with our Armed Forces;

S27: International Relations. This exemption covers information whose disclosure would (be likely to) prejudice:

- relations between the UK and another state, international organisation or international court;
- UK interests abroad;
- the promotion or protection by the UK of its interests abroad.

Information is also exempt if it is confidential information supplied by another state, international organisation or international court.

S28: Relations within the UK. This covers information whose disclosure would (be likely to) prejudice relations between any administration in the UK and any other such administration (ie UK government, Scottish Administration, Executive Committee of the Northern Ireland Assembly or the National Assembly of Wales);

S29: The Economy. Information is exempt if its disclosure would (be likely to) prejudice:

- the economic interests of the UK or any part of the UK (this could mean a particular region or sector of the economy);
- the financial interests of any administration in the UK (eg ability to raise revenue).

S30: Investigations and Proceedings Conducted by Public Authorities. This refers to information that has been held at any time by a public authority for the purposes of a criminal investigation or criminal proceedings conducted by the public authority in question. It also covers information relating to the obtaining of information from informers. It is unlikely that this exemption will be relevant to much Treasury information.

S31: Law Enforcement. Information not exempt from disclosure under Section 30 is exempt under this section if it would (be likely to) prejudice certain law enforcement functions. These include the prevention or detection of crime and the assessment or collection of any tax or duty. Examples of disclosures which could prejudice the assessment or collection of taxes etc include:

- details of plans to close tax loopholes;
- information about the tax affairs of companies or individuals;
- details of strategies, investigative practices or negotiating tactics used to assist in collecting taxes.

S33: Audit Functions. This covers information whose disclosure would (be likely to) prejudice audits of accounts of other public authorities or the examination of the economy, efficiency, and effectiveness with which other public authorities use their resources.

S35: Formulation of Government Policy. Information is exempt if it relates to:

- the formulation or development of government policy;
- Ministerial communications;
- advice by a Law Officer;
- the operation of a Ministerial private office.

Exemptions for policy formulation and Ministerial communications do not apply to statistical information used to inform the decision once it has been taken (although they could fall under another exemption eg S36).

S36: Prejudice to the effective conduct of public affairs. Information is exempt, if in the reasonable opinion of a qualified person (which for the Treasury means a Minister) its disclosure would (be likely to):

- prejudice the maintenance of collective Ministerial responsibility;
- prejudice the work of the Executive Committee of the Northern Ireland Assembly or the National Assembly for Wales;
- inhibit the free and frank provision of advice;
- inhibit the free and frank exchange of views for the purpose of deliberation;
- otherwise prejudice the effective conduct of public affairs.

Because this exemption has to be based on the “reasonable opinion” of a Minister, you must refer all cases where you propose to rely on this provision to a Minister: the decision cannot be delegated to officials. As such a judgement can be referred to the Information Commissioner the basis on which it has been made and the basis for overriding the general presumption of disclosure should be carefully documented.

S37: Communications with the Royal Family and Honours. Information relating to Communications with the Royal Family or Household, and any information concerning honours.

S39: Environmental Information. Such information is covered by the separate disclosure regime discussed on page 10.

S40: Personal information: Personal data which does not fall within the absolute S40 exemption outlined above may nevertheless fall under a non-absolute exemption under S40. This is a complex area, requiring legal advice.

S42: Legal Professional Privilege. Information where a claim to legal professional privilege arises is exempt.

S43: Commercial Interests. Information is exempt if it constitutes a trade secret, or its disclosure would (be likely to) prejudice the commercial interests of any person, including the public authority holding it.

## **The Public Interest Test**

The FOIA seeks to balance the right to know with the delivery of effective government. If the information is covered by a qualified exemption, the issue becomes whether the damage caused by disclosure outweighs or is outweighed by the public interest in disclosure. Where the arguments are equally balanced then the outcome must be disclosure.

The balance of public interest may shift as information becomes older. For example, to disclose information shortly after a policy decision has been made may, within the terms of Section 36, prejudice the effective conduct of public affairs. However, this is unlikely to remain the case forever and something that was very sensitive a year ago may no longer be so sensitive.

Assessments of where the overall balance lies in particular cases will depend upon the individual circumstances of the cases. These are going to be matters of judgement involving questions of both law and policy. It is therefore impossible to draw up hard and fast rules on where the balance should be drawn but the following guidelines may be useful.

### **Matters of public debate or information tending to favour release**

- The case is particularly strong where the information would assist public understanding of an issue subject to current national debate.
- The issue has generated public or parliamentary debate.
- Proper public debate cannot take place without wide availability of all the relevant information.
- The Government has already placed its general assessment and judgement on public record.
- The issue affects a wide range of companies or individuals.
- Public access to the operations of government.
- Public safety.

### **Public participation in political debate tending to favour release**

- Enhancing the ability of a local interest group to effectively represent local interests on an issue.
- Facts, analysis, views and representations affecting major decisions.
- Political issue of virtually unprecedented importance.

### **Accountability for public funds tending to favour release**

- Accountability for proceeds from the sale of assets or amounts spent on administration.
- Openness and accountability for tender processes and prices.
- Misappropriation of public funds.
- Propriety of public officials.
- Obtaining value for money.

- Availability of accurate cost estimates of public projects.

### **Public interest likely to be served by non-disclosure**

- Protecting names of third parties where information on the substance has already been released.
- Sensitive issues still on the agenda or where government policy is still evolving.
- Premature release of commercial information which could prejudice sale of public assets.
- Premature release of sensitive information that would damage commercial interests.
- A final report is due shortly.
- The information already released is sufficient to inform the public.
- Other forum or process is available to address public interest concerns.

The Information Rights Unit and, in appropriate cases, the DCA Clearing House will be available to give you advice about how to deal with cases requiring these judgements to be made.

## **HANDLING HIGH PROFILE REQUESTS**

FOIA rights of access to information apply to anyone in the world and all requests are subject to the same disclosure rules. There is no provision for handling requests by particular individuals or categories (eg Members of Parliament) any differently from ordinary members of the public.

The majority of requests for information are not expected to raise difficulties and while the procedures for considering whether exemptions that may preclude release of information should always be followed, in most cases it should be possible to release the information. But certain requests may raise more difficult issues and the handling of them may be contentious. Examples of such requests would be:

- requests for information about very controversial discussions and decisions made by previous administrations (eg 1992 withdrawal from the exchange rate mechanism, discussions in the late 1980s on exchange rate policy between the Treasury and No.10);
- requests for information made by parties personally affected by the outcome of such decisions (eg losing bidder for a large government contract);
- requests for information by opposition Treasury spokesmen in Parliament or their researchers or people linked with well-known pressure groups and research institutes.

The decision on whether to release such information to these parties (and other high profile groups) should be determined using the same criteria as apply to all other requests: that is, the identity of the person asking is not relevant to the decision as to whether to release the information. The request should be dealt with by the team that would normally deal with the subject in question. In some of these situations (but not requests for information concerning previous administrations where special arrangements apply) it may be appropriate to clear the response to the request with Ministers.

To ensure requests that may require sensitive handling are treated properly, teams receiving such requests should at the outset notify the Information Rights Unit who will consider whether the request raises any issues that should be referred to the DCA Clearing House and/or whether it is necessary to involve other parts of the Treasury (eg COM, MIN) when it is time to notify the applicant of the decision about the request.

### **Requests concerning information relating to a previous administration of a different political party**

Special arrangements have been agreed where a decision is necessary about whether to withhold information on the grounds of a S36 exemption, where a Ministerial certificate is required. To preserve the convention, about not normally showing papers of a past administration of a different political party to current Ministers, a procedure for the issuance of a certificate by the Attorney-General has been agreed. If you receive a request where such issues may arise, consult the Information Rights Unit.

## **PQs AND OTHER PARLIAMENTARY BUSINESS**

Information requests from Parliament through the usual channels (PQs, MP letters about constituency cases or government policy, information requests from Select Committees etc) should be treated in accordance with FOIA principles. You should remember that FOIA requests can be made in respect of any information held by the Treasury, including advice in how to handle questions, alternative ways of answering the questions, defensive briefing for supplementaries etc. While requests for such information may well be exempt from publication under the exemptions (eg S35 or S36) you should remember that these exemptions are not absolute but are subject to the public interest test and review by the Information Commissioner. There is, however, one provision of the FOIA in respect of Parliamentary business of which you should be aware.

### **Section 34**

Section 34 provides that information is absolutely exempt from publication if this is required to prevent infringement of Parliamentary privilege. Such privilege attaches to the proceedings of Parliament, not anything to do with the functions of Parliament. Examples of information covered by Parliamentary privilege are information generated by Parliament such as unpublished drafts of Select Committee reports and information generated elsewhere that relates to Parliamentary proceedings such as Treasury memos to the Treasury Committee which the Treasury Committee has not yet published. The Treasury may also be in possession of other information relating to Parliamentary proceedings that has not (yet) been published such as draft motions, amendments or timetables. Obviously, anything that Parliament has already published is not covered by the exemption. But there is no precise definition of Parliamentary privilege or the "proceedings of Parliament" and in cases of doubt consult the Information Rights Unit which will involve Parliamentary Section and, if necessary, the DCA Clearing House.

Where the Treasury receives an FOIA request in respect of information covered by Section 34 we could decide ourselves that its publication would breach Parliamentary privilege and refuse to disclose on those grounds. However, only the House authorities can conclusively certify that the exemption applies and a Treasury decision that the Parliamentary privilege exemption applies could be subject to the internal review procedure as well as review by the Information Commissioner.

It would therefore be better to consult the Parliamentary authorities about whether privilege actually does apply and, if it does so, to have the assertion certified by the House authorities.

In handling request where Parliamentary privilege may be an issue, teams should consult the Information Rights Unit at the outset so that the question can be settled conclusively. If it is confirmed that Parliamentary privilege applies, the response to the applicant should be in those terms and there is no need to cite another exemption or explain further.

## HANDLING COMPLAINTS

If a request for information is denied or partially denied your reply should:

- explain briefly the grounds for the denial with specific reference to the statutory exemption being relied upon to justify withholding the requested information;
- inform the party making the request that they have the right to have the decision reviewed, initially through the Treasury's internal review procedure and then, if the requesting party is still dissatisfied, by the Information Commissioner.

If the provision of information is to be subject to payment of a fee, your letter explaining this should also notify the requesting party of the complaints procedure if they consider the charge to be unreasonable.

Applicants may be unhappy with their treatment if they did not receive the requested information; or their application was not dealt with within the 20 working days timescale; or they feel an unreasonable charge has been applied. In such cases an internal review of the decision must be held. Any written reply from the requester expressing dissatisfaction with the decision should be treated as a complaint and subjected to the internal review procedure even if the applicant does not state specifically that they are making a complaint and requesting a review.

If you receive a complaint directly, the Information Rights Unit should be notified. They will acknowledge it and inform the applicant by when they might expect to be told the outcome of the internal review. There is no statutory deadline for undertaking internal reviews and it will depend upon the complexity of the case. But we will aim to dispose of these within a further 20 working days.

### Internal Review

If the decision to reject a request or impose a fee has been made by an official, the decision should be reviewed by a Managing Director in another directorate. If the decision has been made by a Minister, the Minister should be given the option of having an internal review carried out. Again this would be carried out by a Managing Director from a different directorate that handled the original request. The outcome of that review would then be referred back to the Minister who would be asked whether they wished to revise their original decision. The final decision would remain with the Minister.

### Purpose

The reviewer should consider:

- Whether the FOIA has been properly applied – does the information requested genuinely fall within the exemption(s) cited?

- Whether there have been any developments since the original response that should alter our approach?
- What weight should be given to any additional points made by the applicant when registering their complaint?
- Whether it is possible to provide any further information to the requester. For example, is all the information requested fully covered by exemptions? Can we redact documents to remove sensitive information and enable their release? Can we provide any alternative information that would help the requester?
- Whether there is a public interest in overriding the relevant exemption and permitting disclosure?
- Whether there are any lessons for handling future cases?

## The Review Process

In the event of a review the Information Rights Unit (IRU) will take the lead in identifying a Managing Director to lead the review and will brief the reviewer on their role and the request. A review meeting will usually be held at which the reviewer will discuss the case with those involved, including the person who took the original decision, and ask questions. The procedure should be simple and can be quite informal but it is important that the outcome is recorded along with the reasons for it. The Information Rights Unit should attend any meetings and the reviewer may ask the IRU to produce records of the meeting and drafts of the outcomes of the complaint.

Two outcomes are possible:

- the original decision is upheld; or
- the original decision is reversed or modified.

If the original decision is upheld, the applicant should be notified in writing and advised of their right to appeal further to the Information Commissioner together with full contact details of the Office of the Information Commissioner.

Where the reviewer reverses or modifies the original decision, and the original decision was taken by an official the decision of the reviewer is substituted for the original decision. Where the original decision was taken by a Minister then the Minister would be invited to reconsider the original decision in view of the outcome of the review. Ultimately, the Minister will decide whether to accept the advice.

When the original decision is reversed, the applicant should be informed and either sent the information requested or notified as to when they may expect to receive the information. (As the reviewer will have needed to examine the information requested to rule on the complaint the normal expectation is that the information

would be available for immediate despatch to the applicant. If provision of the information would require the payment of a charge to cover transmission costs the applicant should be notified that the information will be provided on receipt of the payment.) If the outcome of the review is to release more of the information requested, but not all of it, you must notify the applicant of the right of appeal to the Information Commissioner.

## **Role of the Information Commissioner**

The Information Commissioner has responsibility for the overall supervision of the FOIA.

Complaints about decisions by public authorities can be made to the Information Commissioner (after internal review) for a decision whether HMT dealt with the information request in accordance with Part I of FOIA:

- whether an exemption has been properly applied;
- whether the public interest test was properly applied;
- whether or not fees should be levied;
- whether the time taken by the public authority to comply was reasonable;
- whether correspondence complies with statutory requirements.

The Commissioner can decide either that the public authority has complied with the Act or that further action is necessary to comply. The nature of this action (eg to provide information previously withheld) will be set out in a Decision Notice or an Enforcement Notice. These notices are binding on the public authority and if a public authority refuses to comply the Information Commissioner may refer the case to the High Court which will deal with the public authority as if it had committed a contempt of court.

Both the applicant and the public authority can appeal the Commissioner's decision to an Information Tribunal and thereafter, on a point of law only, to the courts.

## **Ministerial Veto**

Section 53 of the FOIA provides that once the Information Commissioner has issued a decision or enforcement notice, a Cabinet Minister may certify that s/he has formed a reasonable opinion that, contrary to the view of the Information Commissioner, the balance of public interest comes down in favour of withholding information. A section 53 notice over-rides an Information Commissioner notice. Such a notice would only be issued as a last resort where the government decided that notwithstanding the Information Commissioner view the public interest required that the information in question should be withheld.

Such notices:

- require full reasons to be provided for over-ruling the Information Commissioner;
- require a copy of the certificate to be laid before Parliament;

- are subject to judicial review.

The Government has decided that as a matter of policy such a notice would only be issued following a collective Cabinet decision.

## **Handling an Information Commissioner Reference**

If a case is appealed to the Information Commissioner, the Commissioner may require information to be supplied from the Treasury in order to consider the appeal. Usually this will be the information that has been requested as well as the reasons for withholding it and any other relevant information. (In the case of a qualified exemption the explanation will need to cover how the public interest test has been applied.) Such notices are called Information Notices and will specify the information and the deadline for providing it. These Notices must be complied with – refusal to comply could be treated as contempt of court if referred by the Information Commissioner to the High Court. The Information Commissioner may not require disclosure of any legal advice to the Treasury surrounding the request.

If the Information Commissioner upholds a complaint and decides that the Treasury must disclose information a Decision Notice will be issued and served on the complainant and the Treasury. This will specify the information that must be disclosed and the time period for doing so.

If the Treasury receives a Decision Notice that over-rules a previous action taken by the department (eg to withhold information or charge a fee) we have three choices:

- to comply;
- to appeal to the Information Tribunal;
- to issue a Ministerial Veto.

This will require considerable internal consultation, often involving Ministers and certainly if there is any question of a Ministerial Veto. The Information Rights Unit, in consultation with Treasury Legal Advisers and the policy teams concerned, will handle cases which have reached this stage.

## Questions & Answers

**Q: Is classified material exempt from disclosure?**

A: Not automatically. We are required to consider disclosing information even if it contains a security classification. The existence of a security classification may mean that an exemption applies to the information, in which case, you need to consider whether the damage involved in disclosure outweighs the general public interest in disclosure. This will not always be the case: the information may no longer be as sensitive as when the classification was first applied, or there may be a very strong public interest in disclosure that outweighs the damage (eg to the economy) of that disclosure.

We have put in place the following procedures for ensuring that disclosure requests pertaining to classified information are carefully considered:

- all such requests should be referred to the Information Rights Unit;
- releases of restricted/confidential should be cleared by team leaders; secret by directors; and top secret by managing directors.

**Q: Am I now obliged to keep all material in case it is subject to a future FOIA request?**

A: No. The obligation to disclose applies to information held by the public authority at the time of the request. There is no requirement to preserve all information indefinitely in case it should become the subject of a future FOIA request. You should continue to follow existing records management procedures and HMT should follow DCA's S46 guidance on the keeping, management and destruction of records. It is, however, an offence to alter or destroy material that has been the subject of an information request so as to avoid disclosing it.

**Q: How do I deal with requests for information which has been deleted?**

A: Instructing a computer to delete a particular item may not result in the item being destroyed immediately. If the material was deleted before the request was received with the intention that it should be permanently deleted in line with the Treasury's records management policy, you can treat it as permanently deleted even if technology would allow for it to be recovered. However, if it has only been temporarily deleted and could easily be recovered (eg the Deleted Items Folder in Outlook) you should regard the information as still held by the Treasury and consider disclosure.

**Q: Am I obliged to disclose drafts as well as final version of documents?**

A: It depends. If the information request can be satisfactorily answered by disclosure of the final version of the document and the earlier drafts do not contain any additional relevant information you need only disclose the final version of the document. If the applicant specifically requests sight of early drafts, or if they contain additional relevant information then you should also disclose the early drafts. However, it is possible that the chain of drafts may reveal information that is exempt from disclosure (eg the development of policy) and disclosing them would not be in the public interest. In such situations you would need to consider whether the public interest in disclosure outweighed or was outweighed by the damage of such a disclosure.

**Q: Are there any exemptions to the 20 working day deadline?**

A: Two exemptions:

- (a) when a fee is payable you should write to the applicant and say that the information will be supplied on receipt of the fee;
- (b) when you need time to consider the balance of public interest in the case of a qualified exemption you may take such extra time (if any) as is reasonable in the circumstances. You should notify the applicant in such a case and give an estimate of when you will be able to give a decision

**Q: What is a working day?**

A: Bank holidays, public holidays and weekends are not working days, but civil service privilege holidays count as working days.

**Q: When does the 20 working day deadline begin?**

A: The day after the request arrives in the Treasury: not when it is actioned to the relevant team to deal with.

**Q: Which cases should I refer to the Information Rights Unit?**

A: The majority of cases should be simple requests for information raising no sensitivities and should be treated on a business as usual basis with no need to consult the Information Rights Unit. You should consult the Information Rights Unit regarding:

- requests where you believe an exemption (either absolute or qualified) to disclosure applies and there is potentially an issue of non-disclosure;
- requests where you believe that there should be disclosure but the information is classified;
- requesting involving the interests of other public authorities or

third parties;

- requests about individuals, which may fall to be handled under the data protection regime, or about the environment, which may fall to be handled under the Environment Information Regulations;
- requests which appear to be part of an orchestrated campaign;
- requests where you consider it may be necessary to neither confirm or deny that the information is held in the Treasury;
- requests you believe to be vexatious;
- requests raising potential issues of Parliamentary privilege;
- requests where you are unclear about anything (eg whether the information is exempt or not).

In some of these cases it may be necessary to consult with the DCA Clearing House.

**Q: How do I find old papers?**

A: Consult your folder controller. Material going back to 1987 has been computerised. If you need to access it, there is a box in Outlook to help you locate the information. Material before 1987 is in hard copy files which are largely stored off the premises, but can normally be retrieved within one working day. This can be done by e-mailing IM Enquiries. You should give the file title and subject in your request. If these are not available, you should give as much information about the subject matter you are seeking and the time period concerned and the Record Management Team will try and help you.