



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 21: information available
by other means

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Introduction

Section 21 exempts information from the right of access under the Freedom of Information Act if that information is reasonably accessible to the applicant by other means. There are two policy aims behind this exemption.

- First, it is aimed at preserving intact all existing laws providing access to information. The Freedom of Information Act is not designed to subsume other legal access rights, nor to give alternative routes of access where existing regimes are already available. The Freedom of Information Act access rights build on, but do not replace, previous access rights. Those existing rights, and the separate procedural regimes which are tailored to them, continue in place, and the Freedom of Information Act observes corresponding limits to its role.
- Secondly, it confirms that the Freedom of Information Act does not provide alternative means of access to information which is already freely available, either through commercial publishing operations or through existing publicly funded provision. The Freedom of Information Act rights are designed to supplement, and not to duplicate, the usual flow of information to the public through the commercial electronic and print media, and through existing library and archive services.

Section 21 is an absolute exemption, which means that no consideration of the public interest test is required to withhold information.

Public authorities should also use publication schemes to place information in the public domain proactively. If information has already been made available in a publication scheme, then it will be exempt under section 21.

Where information is exempt under section 21, the Act does not allow a public authority to neither confirm nor deny that fact. The Freedom of Information Act therefore recognises that information about whether a public authority holds published information is something about which there is a right to be told. However, this is separate from the question of how an applicant can be expected to access the information itself.

As a matter of good practice, you should consider either providing the requested section 21 material to the applicant or directing him or her to the whereabouts of the information.

What information may be covered by this exemption?

Section 21 exempts information which is 'reasonably accessible' to the applicant otherwise than via a freedom of information request. Subsections (2) and (3) explain what 'reasonably accessible' means in certain situations.

Unusually in the Freedom of Information Act, the question to be asked under section 21 is whether information is reasonably accessible 'to the applicant'. In other words, can the **person** who has made the request for information reasonably obtain it by other means? This is distinct from many of the other exemptions, which focus on disclosure to the public and the operation of which is applicant-blind.

The information does not have to be reasonably accessible to the public in general. Provided that the particular applicant who has requested it can reasonably access the information, it will be exempt. The Act therefore requires the individual characteristics of the applicant to be taken into account to some extent. There are, however, a number of preliminary considerations which may need to be taken into account in approaching the test of 'reasonable accessibility'.

Information accessible only on payment (section 21(2)(a))

Information can still be 'reasonably' accessible even if an applicant has to pay for it. Much rests on how much it would cost to access the requested information. Although the fact of a charge is never itself enough to prevent information being 'reasonably accessible', there are instances when the size of the charge could be sufficient to mean that section 21 does not apply. However, section 21 will apply in most cases when an ordinarily available publication can be accessed, even if it means purchasing it.

Information which must be made available to the public on request (by virtue of an enactment) (section 21(2)(b))

If a public authority is under a statutory duty to communicate information to members of the public on request, that information is automatically 'reasonably accessible' to the applicant and will be exempt under section 21.

The following points are important in considering whether information falls within section 21(2)(b):

- The obligation must be to communicate the information to members of the public. This differs from the rest of the section 21 exemption which is concerned with the availability of the information to the applicant.
- If the statutory obligation is only to make the information available for inspection, this part of section 21 will not apply. Inspection simply means looking at the information. Section 21(2)(b) is not relevant where the statutory obligation is only to permit inspection, even though a copy of the information may in practice be available. If there is no legal obligation to go beyond inspection, then the information will not automatically be 'reasonably accessible'. But it may of course still be exempt under section 21 – a more qualitative assessment of all the circumstances will be required in order to determine whether it is 'reasonably accessible' (see **'Information available from a public authority on request'** on page 5).
 - An example of a statutory obligation only to make information available for **inspection** is section 3 of the Commons Registration Act 1965. Section 1 of that Act requires registers of commons and town or village greens to be kept. Section 3 provides that 'any register maintained under this Act shall be open to inspection by the public at all reasonable times'. Although section 3 does not rule out copies being provided on request, the obligation is only to allow inspection.
- 'Enactment' can include primary legislation (Acts of Parliament), secondary legislation (Statutory Instruments, Orders in Council), local and private legislation.
- The fact that payment may be required for the information does not mean that it is excluded from this part of section 21, regardless of the level of fee or charge required.

One example of the application of section 21(2)(b) is section 67 of the Trade Marks Act 1994. Section 67(1) provides that:

‘after publication of an application for registration of a trade mark, the registrar shall on request provide a person with such information and permit him to inspect such documents relating to the application, or to any registered trade mark resulting from it, as may be specified in the request... any request must be made in the prescribed manner and be accompanied by the appropriate fee (if any)’

In relation to the obligation to 'provide a person with such information... as may be specified in the request', this satisfies all the elements of section 21(2)(b) because:

- a person is obliged
- under an enactment (section 67 of the Trade Marks Act 1994)
- to communicate the information to members of the public
- on request
- the fact that payment of a fee may be required is irrelevant

This means that the information will be considered 'reasonably accessible' and will be exempt from the Freedom of Information Act under section 21.

Another example is section 33(1) of the Births and Deaths Registration Act 1953 which provides that:

‘any person shall, on payment of a fee... and on furnishing the prescribed particulars, be entitled to obtain from the Registrar General, a superintendent registrar or a registrar a short certificate of the birth of any person.’

So, in this example, any information contained in a short certificate will be exempt from the Freedom of Information Act under section 21.

Information available from a public authority on request (section 21(3))

If information is available only from a public authority itself on request, otherwise than as a matter of legal duty by or under an enactment, the information will not be exempt under section 21 simply by virtue of this fact. In other words, just because a public authority would have given information to an applicant if they had requested it, otherwise than under the Freedom of Information Act, this does not mean that the information is exempt under section 21; it is still necessary to make a qualitative assessment of whether

or not the information is 'reasonably accessible' to the applicant (see page 7: **'When will information be "reasonably accessible" to the applicant?'**).

There is an obvious point of principle about the function of the Freedom of Information Act here. The individual rights of access under the Act do not have a role to play where an authority has already gone a step further in making information more generally available.

But the authority does have to go that step further. Where an authority's openness policy goes no further than the Freedom of Information Act rights to have access to information on request – or indeed not so far as them – then that policy is not an alternative to compliance with the legal rights. It is effectively displaced by those rights.

Information available because of publication schemes (section 21(3))

The Freedom of Information Act also makes clear that public authorities should proactively place information in the public domain and take advance decisions to disclose. This is set out in the 'publication scheme' provisions of sections 19 and 20 of the Act. Where possible, public authorities should publish information proactively. If a public authority has already made information available, there is no need to provide the information under the Freedom of Information Act.

Information made available under a publication scheme, including where any payment that might be required in accordance with the scheme, will always be exempt under section 21 because it is reasonably accessible. This includes information only available on request from that authority.

The role of the Information Commissioner in approving publication schemes is considered to be a sufficient guarantee of the 'reasonable accessibility' of information. Where a publication scheme operates in accordance with the Freedom of Information Act, no further evaluation of accessibility is required. Where information is available under a publication scheme only on request, then the terms of the publication scheme will govern the handling of the request rather than the terms of the Freedom of Information Act.

When will information be 'reasonably accessible' to the applicant?

As explained above, information will automatically be 'reasonably accessible' to the applicant if:

- any person is obliged by a law to make the information available on request to a member of the public (otherwise than by inspection); or
- it is available on request from the public authority concerned in accordance with that authority's publication scheme and any fee is charged in accordance with that scheme.

If information falls within these categories, it will be exempt under section 21 and no further consideration of whether it is 'reasonably accessible' will be necessary.

If information does not fall within these two categories, an assessment of its accessibility, in all the relevant circumstances, will be required in order to determine whether section 21 applies. Broadly speaking, the accessibility of the information must be considered in light of two different factors:

- the nature of the requested information; and
- the nature and characteristics of the applicant.

Whether or not information is 'readily accessible' will depend on the particular circumstances involved and the information which is being sought.

The information

It is worth asking the following questions when determining whether information is 'readily accessible':

- Is the information readily available to purchase through commercial outlets? Or is it 'out of print'?
- Is the information mass-produced in large print-runs or confined to a few, scarce or specialist sources or outlets?
- Can the information be downloaded through the internet?

- Is the information available through public library services? Or confined to private collections?
- Is the information discrete and able to be isolated or collated? Or dispersed and difficult to identify?
- Is it catalogued and indexed?
- Is the information archived? Or short-lived?
- Is it subject to difficult access conditions or terms of reuse?

The accessibility of information contained in records and documents held by archive repositories subject to the Freedom of Information Act is discussed below.

The applicant

The test for the application of section 21 is whether information is reasonably accessible to the particular applicant who has requested it. This 'personalisation' of the test is unusual in Freedom of Information Act terms, and needs to be considered with some care. You may need to communicate with the applicant to establish any characteristics that might be relevant.

It means that although information might not be reasonably accessible to the wider public, if the specific applicant making the request has reasonable access to it then the information will be exempt in relation to the applicant. This might not be the same for other applicants.

In determining whether information is 'reasonably accessible' to the applicant, the following factors may be relevant:

- any regimes for public access to information which fall outside the terms of section 21(2)(b) - for example because they are not created by or under an enactment, or because their obligations do not go beyond giving inspection; in the latter case, the practical arrangements available for obtaining copies of the information requested will be relevant;
- any legal access schemes or rights which are available to that particular applicant. If, for example, a person is obliged by law (an enactment) to provide the applicant - as opposed to the public - with the information requested then it is likely to be 'readily accessible' to the applicant unless some feature of the access scheme indicates otherwise. For example, section 3 of the Access to Health Records Act 1990 provides that the holder of a health record shall allow

access to the health record of a deceased person on application by that person's personal representative by supplying the applicant with a copy or extract if so required (amongst other things);

- any qualities, qualifications or other entitlements the applicant may have which give access to otherwise closed or private sources of information - for example membership of a university library, or of a society or profession; and/or
- any enhanced skills or resources the applicant may have which would bring otherwise inaccessible information within his reach - for example research, technical or linguistic skills. The resources available to a requestor who is a Member of the Scottish Parliament were taken into account in *HM Treasury v ICO*¹.

It is a matter of judgement whether public authorities pursue the possibility of special accessibility in any given case. Under the Freedom of Information Act, though, applicants do not have to offer the sorts of detail that might be required by a public authority to establish whether information is reasonably accessible to that applicant. If a public authority cannot establish this, it will be unsafe to rely on the exemption.

A difficult question arises in the case of information that would be reasonably accessible to the public in general, or to a member of the public, but might not be reasonably accessible to a particular applicant because of a special disadvantage. There are many forms of disadvantage that can prevent the accessibility of publicly available information in an individual case – for example disability, educational or economic disadvantage, or limited linguistic skills.

A reasonable approach might be along the following lines:

- In the absence of any indication to the contrary, the information is likely to be reasonably accessible to any individual applicant.
- If the applicant makes a case that the information is not reasonably accessible because of their personal disadvantaged position, then that will have to be looked at on its merits. However, the test remains reasonable accessibility, which leaves some scope to argue that there are limits to the Freedom of Information Act's rights of access in relation to resolving an applicant's individual disadvantage in accessing requested information.

¹ *HM Treasury v Information Commissioner* (7 November 2007) (EA/2007/0001).

However, as a matter of good practice, you should consider providing the requested section 21 material or informing the applicant where the information is to be found.

Other duties

When you are considering section 21, be aware of the duty to give reasons for refusal of a request under section 17, and the duty to provide advice and assistance under section 16.

With this in mind, section 21 is designed to redirect applicants to existing sources of information they seek, and to raise awareness of other legal rights of access. A public authority's duties under section 16 may mean that they should explicitly highlight how an applicant might obtain the information they seek. There are limits on this – the Information Tribunal found in *HM Treasury v The Information Commissioner* (EA/2007/0001) (7 November 2007) that because the requestor was a Member of the Scottish Parliament, and given the resources available to him, it was reasonable of the Treasury not to help him find information on their website. Additionally, if the authority has the power (*vires*) to do so, it might go further – this exemption leaves open entirely the question of the possibility of disclosure of the information to which it applies outside the boundaries of the Freedom of Information Act.

In some cases, a public authority may decide that it is preferable – for example, easier or more helpful - to provide information outside the boundaries of the Freedom of Information Act, rather than refuse it because the information is already accessible to the applicant by other means.

Relationship with other exemptions

Information falling within section 21 is by its nature unlikely to fall within any of the other exemptions in the Act; section 21 is concerned with different routes of access to information and not with substantive grounds for withholding information.

There is, however, some potential for overlap between section 21 and section 40(1). Both of these exemptions could have the effect of diverting a 'subject access' request for personal data to the subject access regime provided by the Data Protection Act 1998. In such circumstances, section 40 is the more relevant provision and should always be cited.

Similar considerations apply to section 39 and the Environmental Information Regulations, and section 32 in relation to information access to which is subject to judicial control.

Public archives and records offices

Information contained in records and documents which are subject to the Freedom of Information Act and are held by archive repositories may be exempt under section 21 if the records and documents are catalogued and included in the repository's publication scheme (or that of the parent authority if the repository itself does not have a scheme). The publication scheme should explain how the records and documents can be accessed.

The Public Services Quality Group of the National Council on Archives has produced a 'Standard for Access to Archives', providing guidance on what constitutes an acceptable standard of service for archive repositories, including availability to the public. Where a personal visit to an archive repository is not practicable for members of the public some alternative should be provided by the repository, such as a paid research service or reference to a list of professional researchers.