



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 28: Relations within the
United Kingdom

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Introduction

Section 28 applies to information whose disclosure would be likely to prejudice relations between two or more administrations in the United Kingdom. The relevant administrations are the government of the United Kingdom, the Scottish Executive, the Executive Committee of the Northern Ireland Assembly and the Welsh Assembly Government.

The devolved administrations do not include the Wales Office, Scotland Office or Northern Ireland Office, which remain part of the UK government machinery.

Section 28 is subject to a public interest test.

You are not required to confirm or deny whether the requested information is held if to do so would be likely to prejudice relations between UK administrations.

You should consider consulting the other administration(s) concerned when determining whether section 28 applies – although this will not always be appropriate. Separate freedom of information legislation applies in Scotland. The analogous section of the Freedom of Information (Scotland) Act 2002 has the words ‘prejudice substantially’ (see Annex B) in the equivalent exemptions, which arguably imposes a higher test for exemption than under section 28 of the Freedom of Information Act.

Overview of devolution in the UK

In very broad terms, the devolution statutes establish the extent of devolution to the three devolved administrations. The UK government represents UK interests in matters that are not devolved to Scotland, Wales or Northern Ireland. These are known as ‘reserved’ or ‘excepted’ matters for the purposes of Scotland and Northern Ireland and are listed at Annex A. In Wales the position is different. The Welsh Assembly Government has responsibilities in specified fields which are also listed at Annex A. Those fields will be filled with specific devolved competencies over time. Any matters falling outside that list will remain the responsibility of the UK government.

Policy responsibility for non-devolved matters lies with the relevant UK government ministers and departments. It is the responsibility of the

Secretaries of State for Scotland, Wales and Northern Ireland to ensure that the interests of those parts of the UK are properly represented and considered in non-devolved matters. There are agreements in place between the administrations to govern relations in areas such as the EU and international relations, and concordats on the handling of procedural, practical or policy matters. There is also agreement between the administrations that the four of them will work together (where appropriate) on matters of mutual interest and co-operate on a range of issues.

Details of the relationships between the administrations and their respective responsibilities are set out in a Memorandum of Understanding and a brief summary of these relationships and responsibilities is provided in Annex A.

Annex C contains a list of other relevant policies and statutes.

What information may be covered by this exemption?

Section 28 is engaged, regardless of the nature and content of the information in question, **where the effects of disclosing the information would or would be likely to prejudice relations between any of the administrations** – that is not only the relationship between the UK Government and a devolved administration, but also relations between the devolved administrations themselves. A brief summary of the relationships between the administrations is set out at Annex A.

There are two distinct circumstances in which section 28 is likely to apply:

- a) where information subject to a freedom of information request has been obtained from or shared between administrations
- b) where information held by one administration (in particular the UK Government) could prejudice relations because they would not want other administrations to see the information or because other administrations would not want the information to be disclosed

a) Information obtained from or shared between administrations

As is made clear in the Memorandum of Understanding between the UK administrations, all four are committed to the principle of good communication with each other -- especially where one administration's work may have some bearing upon the responsibilities of another. To enable each to operate effectively, they provide each other with policy information including scientific and technical statistics, research and, where appropriate, representations from third parties. They will (in confidence where necessary):

- alert each other to relevant developments within their areas of responsibility, wherever possible prior to publication
- give consideration to the views of the other administrations
- where appropriate, establish arrangements that allow for policies to be developed jointly between administrations

However, there are certain areas of government action (e.g. national security and budget proposals) where prior notification is much less likely.

Under the Memorandum of Understanding agreed between the four administrations, there are safeguards to ensure that information shared with other administrations is subject to appropriate protection. It has been agreed that in certain circumstances confidentiality is expected between administrations and that the administrations should (as far as possible) respect this confidentiality. Under the Memorandum of Understanding, administrations will:

- state what restrictions (if any) there should be on information they share
- treat information received in accordance with the restrictions placed on their usage
- disclose information in accordance with the Freedom of Information Act or the Freedom of Information (Scotland) Act (but in doing so have regard to the safeguards at (i)-(ii) and in difficult cases refer back to the originator of the information)
- accept that some information is subject to statutory or other restrictions and that there will be a common approach to the classification and handling of sensitive material

An expectation of confidentiality cannot be absolutely determinative of the question of whether a disclosure would be likely to prejudice relations between administrations. All of the circumstances at the time of the potential disclosure must be considered. But it is likely to be a very relevant consideration.

b) Information held by one administration

Apart from information shared between administrations there may be many circumstances in which one administration holds information the disclosure of which would be likely to prejudice relations with another administration. Examples might include:

- sensitive information held by UK government departments on devolved matters which pre-date devolution but which concern the devolved administrations
- information held by devolved administrations relating to reserved or excepted matters (see Annex A)
- briefing or comments on another administration's plans or policies
- an assessment of the operation of policy in a devolved area
- information about another administration that has come direct from a third party

Different considerations will clearly apply to such cases. In dealing with requests for such information it will be necessary to consider the degree of prejudice which might be caused by disclosure.

'Prejudice relations'

The exemption can only be used where the release of information would, or would be likely to cause prejudice to the relations between administrations.

Embarrassment is not enough to justify the use of the exemption. Prejudice means more than embarrassment; the release of information would have to be sufficient to risk harm to relations – current or future. If there is a

potential prejudice it will then be necessary to apply the public interest test to ascertain whether the public interest favours disclosure (even though disclosure would have an adverse impact on relations). It is important to consider the possibility that the disclosure of seemingly innocuous information against the will of another administration could damage the relationship of trust between the administrations and balance this against the case for disclosure.

To that end, it is very important that there is consultation with other administrations where the information has come from that administration and where disclosure may affect its interests. Consultation will provide the most reliable evidence of whether there is or is not likely to be prejudice to relations within the UK.

The prejudice likely to be caused by the disclosure of information will have to be considered as each case arises.

Managing the exchange of information to assist decisions on disclosure

To assist the effective management of information exchanged between administrations, it is likely to be helpful for administrations to make clear from the outset when the information they are sharing is shared on the basis of an expectation of confidence. Section 41 of Freedom of Information Act provides an exemption where the disclosure of information would constitute an actionable breach of confidence. Though not tested by the courts, you should be aware that the courts may be reluctant to find a breach of confidence between administrations (unless the administration itself would be at risk of an action) because both are subject to access to information legislation. However, the reasonable expectations which underlie the exchange of information among administrations are likely to be very relevant to subsequent requests for disclosure; the more clearly they are articulated at the outset, the more likely it is that a disclosure decision will be able to be made clearly in turn.

In line with the Memorandum of Understanding, it would be desirable for UK government departments to make clear to devolved administrations whether they consider information they are sharing to be sensitive (and if so for how long). In some cases it may be helpful and necessary to highlight cases where information may be subject to other freedom of information exemptions applicable to the relevant administrations. When sharing information departments will wish to consider the strong emphasis on sharing information under devolution and the shared commitment to

freedom of information and respecting confidentiality (contained in the Memorandum of Understanding). Departments will also want to bear in mind the fact that under freedom of information it will ultimately be a matter for each devolved administration to decide whether information it holds should be disclosed.

Section 3(2)(a)(ii) of the Freedom of Information (Scotland) Act 2002 provides that information held by a Scottish public authority in confidence, having been supplied by a UK Government Minister or department, is not treated as being 'held' by the authority. Such information would not, therefore, be disclosed under the Act. The relevant Scottish public authorities are listed in Schedule 1 to that Act and include the Scottish Ministers, Scottish Executive, local councils and NHS trusts. There is no direct equivalent in the Freedom of Information Act 2000 in respect of information which has been supplied in confidence by a Scottish public authority although certain exemptions may be relevant including section 36 (prejudice to effective conduct of public affairs) and section 41 (information provided in confidence).

Public interest test

Once it has been ascertained that information would or would be likely to prejudice relations between administrations, departments must assess, in all the circumstances of the case, whether the balance of the public interest comes down for or against disclosure. Does the public interest in having the information disclosed outweigh the public interest that would be protected by non-disclosure?

The public interest is not a fixed concept and changes over time and from case to case. What will be the correct course of action in one case may not be correct in another. Each case must be treated on its merits.

In weighing up the public interest in the case of section 28, it is important to consider, for example, the following factors:

- the wider public interest in freedom of information and any particular commitments given by administrations (see Annex B)
- the commitment to sharing information between the four administrations
- the commitment to respecting confidential information shared between bodies

- the nature and extent of prejudice to the relationships between administrations that might be caused by the disclosure of a particular piece of information
- the importance of ensuring appropriate frankness and candour of discussion between the administrations
- the extent to which other exemptions may be relevant

It is important to draw a clear distinction between what is in the public interest, and what the public is interested in. However, embarrassment and potential confusion are not alone legitimate reasons for withholding information. Therefore, to withhold information the public interest in applying an exemption must outweigh the public interest in disclosure.

The imperatives for disclosure must be viewed against the reality that the devolution settlement relies on an atmosphere of trust, co-operation, sharing information and respect between the four administrations. The disclosure of information which would damage the fundamental basis of the settlement is likely to be a very significant factor in determining whether information should be disclosed, because it may result in the breakdown of relationships and thus compromise the effectiveness of the settlement.

Especially where there has been consultation with another administration and that administration is opposed to disclosure on reasonable grounds, it is likely that disclosure will only be warranted where there are strong public interest considerations in favour of disclosure. Nevertheless, the case should be considered on its own merits; although the views of another administration one way or the other are likely to be very relevant, they cannot be determinative.

As indicated above, the Memorandum of Understanding between the four administrations make clear that there is a strong commitment to freedom of information whilst respecting (in a way consistent with the Act) confidential information shared between bodies.

Examples of cases where the public interest might favour withholding information might include requests for:

- confidential briefing for UK ministers provided for ministerial meetings
- policy plans received from devolved administrations on a confidential basis which have not yet been announced
- details of meetings between the four administrations the disclosure of which could affect the effectiveness of such meetings

- details of sensitive UK negotiating position in the EU which, though reserved, impacts on devolved matters
- UK Government assessments of politics and policies in the devolved administrations

Examples of cases which might favour disclosure might include:

- information which helps public understanding of the devolution settlement
- information which would explain how decisions were taken (after an announcement has been made)
- details of negotiations which are no longer sensitive because of the passage of time
- cases where the administration which provided the information would have disclosed the information (even if a case can be made for non-disclosure)

These examples are for illustrative purposes only and individual cases must be considered on their merits.

Neither confirm nor deny

Under section 28(3) you are not required to confirm or deny whether the requested information is held if to do so would be likely to prejudice relations between UK administrations.

Consultation

When contemplating the release of information under Section 28, appropriate consideration should be given to the views of the other administration(s) (e.g. to give them time to make sufficient representations about the disclosure of the information). As noted above, consultation is likely to provide the most reliable evidence of whether or not there is likely to be prejudice to relations within the UK. Consultation is also clearly envisaged in the Memorandum of Understanding between the four

administrations. Nevertheless, decisions on disclosure are, ultimately, a matter for the public authority that receives the request.

Duration of the exemption

Under section 63 of the Freedom of Information Act, information contained in historical records (that is to say records over 30 years old) cannot be exempt information under section 28.

Relationship with other exemptions

Many other exemptions may be relevant in the context of relations between the devolved bodies. These may include:

- Section 23 Information supplied by, or relating to, bodies dealing with security matters
- Section 24 National security
- Section 27 International relations
- Section 29 The economy
- Section 31 Law enforcement
- Section 35 Formulation of government policy
- Section 36 Prejudice to effective conduct of public affairs
- Section 41 Information provided in confidence

Annex A: Devolution in the UK

Scotland and Wales

Scotland has a Parliament of 129 members elected every four years on the Additional Member System of proportional representation. The Parliament operates broadly on the Westminster model, electing a First Minister who heads an Executive. The Parliament and Executive have responsibility for most aspects of domestic, economic and social policy, while the United Kingdom Parliament retains control of foreign affairs, defence and national security, macro-economic and fiscal matters, employment and social security. The Scottish Parliament is funded by a block grant from the UK Government but has the power to increase or decrease the basic rate of income tax set by the UK Parliament by up to three pence in the pound.

The National Assembly for Wales has 60 members, also elected by the Additional Member System of proportional representation. The National Assembly as established by the Government of Wales Act 1998 was a single corporate body, which enjoyed extensive executive powers and had the power to make secondary legislation (e.g. orders and regulations fixing the detail of implementation). However, the Government of Wales Act 2006 significantly changed the devolution settlement by creating a formal legal separation between:

- The National Assembly for Wales, which is the legislature consisting of the 60 Assembly Members, and
- The Welsh Assembly Government, the executive, consisting of the First Minister for Wales, the Welsh Ministers, the Deputy Welsh Ministers and the Counsel General.

As a result of the 2006 Act, the Assembly functions, including those of making subordinate legislation, mainly transferred to the 'Welsh Ministers,' enabling them to exercise functions in their own right. In addition, the National Assembly for Wales has since May 2007, been able to seek legislative competence to pass Assembly Measures, a new category of legislation.

Northern Ireland

One of the new institutions created following the Belfast Agreement of April 1998 was an Assembly of 108 members with a similar range of legislative and executive powers to the Scottish Parliament. The Northern Ireland Executive comprises of a First Minister and Deputy First Minister, and 10 ministers, allocated in proportion to party strengths represented in the Assembly.

There are Committees for each of the main executive functions of the Northern Ireland Executive. The membership and chair of each committee is again allocated in proportion to party strengths. These Committees have scrutiny, policy development and consultative functions. Elections were held in June 1998, a First Minister and deputy First Minister were elected and agreement reached on most of the detail of institutions dealing with relationships between the Republic of Ireland and Northern Ireland.

The Executive and the institutions were first set up on 2 December 1999 but were suspended and direct rule re-introduced by the Secretary of State for Northern Ireland on 11 February 2000. The Executive and institutions were initially restored, following negotiations between all the parties, on 29 May 2000; however, further suspensions followed in August and September 2001 and from October 2002. Devolution was restored in Northern Ireland on 8 May 2007, following the election of a four-party executive of 12 ministers.

Devolved matters, and those remaining with UK Government and Parliament

The three devolution settlements are each different and the way in which devolved and non-devolved matters are defined varies from one settlement to another.

- The Scotland Act lists all matters which are 'reserved' to Westminster and the UK Government.
- The Northern Ireland Act lists those matters which are 'reserved' (matters on which the Assembly may legislate only with the Secretary of State's consent) and 'excepted' (matters on which the Assembly cannot legislate). For further information see Devolution Guidance

Note 11 and Devolution Guidance Note 9, or refer to the legislation involved.

- The Government of Wales Act 2006, by contrast, does not contain a list of reserved matters. It allows the National Assembly for Wales to pass Assembly Measures in relation to devolved areas of responsibility listed under Schedule 5 (Part 1). Before it can pass a Measure the Assembly must obtain legislative competence on a particular topic from the UK Parliament through a Legislative Competence Order or by means of a UK Parliament Bill. Once granted, the topic is inserted as a 'Matter' under the relevant field in Schedule 5. The National Assembly can then pass Measures which relate to one or more of the listed Matters, subject to any relevant 'exceptions' and general 'restrictions'.

Scotland

The Scottish Parliament and Executive are responsible for virtually all matters apart from those in the following list of 'reserved' matters:

General reservations

- constitution
- political parties
- foreign affairs
- Civil Service
- defence
- treason

Specific reservations

- financial and economic matters
- fiscal, economic and monetary policy
- the currency
- financial services
- financial markets
- money laundering

Home affairs

- misuse of drugs
- data protection

- elections
- firearms
- entertainment (film & video classification)
- immigration and nationality
- scientific procedures on live animals
- national security, interception of communications, officials secrets and terrorism
- betting, gaming and lotteries
- emergency powers
- extradition
- lieutenancies
- access to information

Trade and industry

- business associations
- insolvency
- competition
- intellectual property
- import and export control
- sea fishing (regulation outside the Scottish zone)
- consumer protection
- product standards, safety and liability
- weights and measures
- telecommunications and wireless technology
- post offices, posts and postal services
- research councils
- designation of assisted areas
- industrial development advisory board
- protection of trading and economic interests

Energy

- electricity
- oil and gas
- coal
- nuclear energy
- energy conservation

Transport

- road transport (regulation and licensing)
- rail transport
- marine transport
- air transport

Social security

- social security schemes
- child support
- occupational and personal pensions
- war pensions

Regulation of the professions

- architects
- health professions
- auditors

Employment

- Employment & industrial relations
- Health and safety
- Job search & support

Health and medicines

- abortion
- xenotransplantation
- embryology, surrogacy and genetics
- medicines, medical supplies and poisons
- welfare foods

Media and culture

- broadcasting
- public lending right
- government indemnity scheme
- property accepted in satisfaction of tax

Miscellaneous

- judicial remuneration
- equal opportunities
- control of weapons
- ordnance survey
- time
- outer space

Northern Ireland

The Northern Ireland Assembly and Executive were restored on 8 May 2007, after a period of suspension. The Northern Ireland settlement distinguishes between excepted, reserved or transferred areas. The Assembly can legislate on transferred matters but not on excepted. It can legislate on reserved matters but only with the Secretary of State's consent.

Excepted matters

- the Crown
- the UK Parliament
- international relations
- defence and national security
- dignities and titles of honour
- treason
- nationality, immigration and asylum
- tax and national insurance
- judicial appointments
- elections
- political parties
- the currency
- the National Savings Bank
- nuclear energy and installations
- regulation of sea fishing outside the Northern Ireland zone
- outer space
- any matter with which a provision of the Northern Ireland Constitution Act 1973 mainly deals

Reserved matters

- conferral of functions in relation to Northern Ireland on any Minister of the Crown.
- property of the Crown or UK Government
- navigation but not harbours or inland waters
- civil aviation but not aerodromes
- foreshore and seabed
- domicile
- the Post Office
- disqualification for membership of the Assembly
- criminal matters*
- maintenance of public order*
- establishment, organisation and control of the Police Service for Northern Ireland*

- firearms and explosives*
- civil defence
- subject matter of the Emergency Powers Act (Northern Ireland) 1926
- all matters regarding the court system apart from those listed as 'excepted'*
- functions and procedures of the Civil Service Commissioners for Northern Ireland
- Vaccine Damage Payments scheme
- import and export controls
- National Minimum Wage
- financial services and markets
- weights and measures
- telecommunications
- the National Lottery
- xenotransplantation
- embryology, surrogacy and genetics
- research councils
- consumer safety
- data protection
- environmental protection
- oaths and declarations

* The UK Government intends to devolve these matters to the Northern Ireland Administration when the Assembly requests them.

Wales

The Welsh Assembly Government will have incrementally increased devolved competence in the following areas:

- agriculture, fisheries, forestry and rural development
- ancient monuments and historic buildings
- culture
- economic development
- education and training
- the environment
- fire and rescue services and promotion of fire safety
- food
- health and health services

- highways and transport
- housing
- local government
- public administration
- social welfare
- sport and recreation
- tourism
- town and country planning
- water and flood defence
- Welsh language

Annex B: Commitments to freedom of information

The Welsh Assembly Government has gone further than the 2000 Act by making clear that notwithstanding the requirements of the Freedom of Information Act 2000, it is committed to:

- maximising openness in its business
- presenting its business in clear language, in line with its bilingual policy and taking account of different needs
- using the internet as a means of publishing information
- maintaining a publication scheme
- respecting personal privacy, the duty of confidence and all laws governing the release of information
- providing a prompt and comprehensive response to requests for information
- providing a right of complaint where a member of the public is not satisfied with the response received
- providing information free of charge where possible.

As part of its commitment to openness, the Welsh Assembly Government's Code of Practice on Access to Information also applies a substantial harm test to most of the qualified exemptions, including section 28. In such circumstances, the exemption will only be relied upon 'if disclosing the information would cause or be likely to cause substantial harm to the purpose which the exemption aims to protect'. Even if disclosure would cause or be likely to cause such substantial harm, the Welsh Assembly Government will not rely upon the exemption 'unless the public interest in avoiding that harm outweighs the public interest in disclosure of the information'.

In Scotland, freedom of information is governed by separate legislation, the Freedom of Information (Scotland) Act 2002. Section 3(2)(a)(ii) of that Act makes it clear that information received from a UK Government Minister or Department is not within the scope of that Act. For information that is within the scope of the legislation, a request may only be refused where there is 'substantial prejudice' in terms of the exemptions in the Act. The test in section 28 of the UK Freedom of Information Act is based on 'prejudice' only.

Annex C: Other relevant policies and statutes

- [Freedom of Information \(Scotland\) Act 2002](#)
- Government of Wales Act 1998
- Government of Wales Act 2006
- [Memorandum of Understanding - between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee](#)
- [Concordat between the Cabinet of the National Assembly for Wales and the Wales Office, Office of the Secretary of State for Wales](#)
- [Concordats between Scottish Ministers, United Kingdom Government and the Cabinet of the National Assembly of Wales](#), for instance – the Concordat between the Cabinet Office and the Scottish Administration, Concordat between the Office of the Deputy Prime Minister and the Scottish Executive
- [Concordats between Northern Ireland departments and the departments in Great Britain](#)
- Welsh Assembly Government's Code of Practice on Access to Information 2007

Devolution Acts

- The Northern Ireland Act 1998
- The Government of Wales Act 1998
- The Scotland Act 1998

