



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 33 – Audit functions

14 May 2008

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Introduction

This exemption applies to any public authority which has functions in relation to –

- the audit of the accounts of other public authorities, or
- the examination of the economy, efficiency and effectiveness with which other public authorities use their resources

The exemption under Section 33 applies only to departments who have relevant functions in relation to other public authorities (see paragraph 1). It will not apply where a department has functions in relation to private sector bodies, nor will it cover internal audit functions.

The exemption can only be claimed by the department carrying out the audit. It is not available to departments in so far as they are the object of those functions. Annex A gives some examples of bodies likely to be regarded as having relevant functions for these purposes.

‘Functions’ includes both powers and duties; they may therefore be in the nature of formal statutory duties, or less formal supervisory activity. For example, there may be ad hoc reviews set up within departments to look at the efficiency of non-departmental public bodies which come within their areas of responsibility. Similarly, ministers may charge a department with examining the efficiency of another department or of departments more generally across government. An example would be the Lyons Review which was established within the Cabinet Office to look at whether efficiencies could be made by moving parts of departments out of Central London; or one public authority may be asked to carry out a peer review of another public authority. When government departments are charged with such tasks it is their function to carry them out. For this reason, any list of functions that might fall within this section is never going to be exhaustive.

Section 33 is a prejudice-based exemption. **The test for this exemption will be whether or not the functions referred to in this section would, or would be likely to, be prejudiced by disclosure.** Section 33 is also subject to the public interest test.

Under section 33(3), the obligation to confirm or deny does not arise in relation to exempt information under section 33(1).

Section 33 cannot apply to a historical record, which is information that is contained in a record more than 30 years old.

It is good practice for auditors to consult with the audited body to establish the sensitivities of disclosing particular pieces of information. However a decision on whether to disclose the information must be taken by the auditing body itself (taking account of the Act and the considerations set out in this guidance).

Auditing departments and agencies will need to be aware of the confidentiality requirements of legislation that governs the particular bodies they audit. For example the external auditors of the Inland Revenue, the National Audit Office, are bound by the Finance Act 1989, which makes it a criminal offence to disclose taxpayer's information.

What information is covered by this exemption?

Section 33 (1)(a), the '**audit of accounts**', refers to financial audits. The term is not limited to the functions of carrying out audits by public authorities themselves, but could also include, for example, the functions of bodies like the Audit Commission who can appoint independent auditors to carry out an audit on their behalf. The objective of a financial audit in the public sector is to provide independent assurance of the proper accounting and use of public resources. Such work will also assist audited bodies to improve their financial and risk management.

Section 33 (1)(b), the '**examination of the economy, efficiency and effectiveness**', includes in this context, to value-for-money audits. While no agreed definition of economy, efficiency and effectiveness exists, for the purposes of this guidance the following are intended to be useful guidelines.

'Economy' audits are concerned with whether the public body secured resources for the lowest possible cost, subject to the maintenance of an adequate standard of quality.

'Efficiency' involves the auditor in an assessment of performance, in terms of a comparison between output in respect of results achieved and input in respect of resources consumed.

'Effectiveness' is concerned with the extent to which a body, project or programme achieves its stated objectives. Any department or agency which has responsibility for examining the performance of another public authority, including a consideration of how that public authority employs its resources in carrying out its functions, will fall within the scope of this section.

The term 'resources' is not limited to financial resources but includes staff, premises, equipment, and so on.

How could releasing information prejudice audit functions?

While much of the information that an auditor holds could be disclosed and may be prepared with a view to publication, there may be cases where disclosure would prejudice the audit function.

Disclosure might prejudice audit functions, for example, in the following ways:

Relations with audited bodies and audit third parties: There may be information that originates from an audited body, which, if disclosed, could harm relations between the auditors and that body, and so affect the ability of the auditors to carry out their functions effectively. While auditors have statutory powers to demand access to information in order to carry out the audit it is better if information is made available voluntarily within the context of an open and effective relationship. Moreover, auditors may also rely on information from third parties which sometimes provide a more accurate assessment of a public authority's accounts, or the efficiency/effectiveness with which it carries out its functions. If the disclosure of information by the auditors would make it less likely that such information would be volunteered in the future it would be likely to prejudice the audit function.

Audit methods: The nature of audit methods may be well known and even already within the public domain; disclosure of this sort of information is unlikely to engage this exemption. However, in the interests of an audit's effectiveness, it may in some cases be important that details of the audit method, including, for example, the specific files that the auditor intends to examine, are kept from the audited body before the audit takes place. This will limit the potential for the audited body to obstruct the audit process or otherwise improperly influence the information the auditor uses to make a judgement. Disclosure of audit methods after an audit may also prejudice subsequent audits where, for example, an auditor intends to use the same method. Releasing information about how the auditing body derives its conclusions could also prejudice the audit function for the same reason.

Public reporting and scrutiny: Before publication, many public sector auditors discuss their emerging findings and draft report with the audited bodies and other affected parties, to ensure accuracy and completeness of the evidence on which they base their conclusions and recommendations. In the case of the National Audit Office they may also be under a duty to inform Parliament first of the findings of their reports. If information on an

audit were disclosed before official publication, this might pre-empt the proper reporting process and might lead to preliminary findings that had not been fully tested being given the same currency as fully tested conclusions. This might undermine the fairness of the audit process and create a misleading impression of both the auditor and the body being audited, causing unwarranted damage to either reputation. In these circumstances the audit function would be prejudiced.

Public interest test

If it is decided that section 33 applies, public authorities will need to consider the public interest test. The balance to be struck is to whether the public interest in withholding information outweighs the public interest in disclosure. Applications will, in practice, need to be determined on a case by case basis and may, in difficult cases, require legal advice.

Public interest reasons for disclosure

There is a strong public interest in ensuring that auditors can effectively carry out audits of public authorities. Much of the information that auditors produce is made available for the same general public interest reasons that support the principles of the Freedom of Information Act. These include:

- making the reasons for a public body's decision evident
- enhancing the scrutiny and improving the accountability of public bodies
- contributing to public debate
- increasing public participation in decision-making

Prejudice to the audit function and the public interest

The audit process facilitates the accountability and transparency of public authorities for decisions taken by them, which in turn facilitates accountability and transparency in the spending of public money. And most value-for-money audits lead to a public report with these express aims. There is therefore a clear public interest in protecting the effectiveness of the audit process. There is also a counter-balancing public interest in making available information which would lead to greater public confidence in the integrity of the audit process by allowing scrutiny, not only of the audited body, but also the auditor's performance. In many cases the balance of the public interest will change over time, with the key issue likely to be whether the final report has been published.

Access to information following the completion and publication of the final audit

In the majority of circumstances there will be a significant potential for prejudice to the audit function if details of an audit are disclosed while it is still taking place. Disclosure of information prior to publication might jeopardise effective audit and might make the audited body less likely to cooperate fully with the auditor, neither of which would be in the public interest. Even where an auditor has statutory powers to access the information necessary to perform the audit, premature disclosure might delay, disrupt or damage the audit process, or make it less likely that the audited body and third parties will volunteer useful information to the auditor.

Even after the publication of the final report, officials will have to carefully weigh the public interest when dealing with requests for background information (including draft reports).

There may be a public interest in disclosing information, such as background papers and draft reports, which would show the thoroughness of the auditors' work and the process by which conclusions were arrived at. However, information contained in background papers is not subject to the same consultation and checking process as a final report. This information may consequently be untrue or misleading. The process of discussing the auditors' findings prior to publication prevents auditors publishing unwarranted criticism. The effects of disclosing such material on the audit

process will need to be carefully considered as part of weighing up the public interest.

Access to information where the final report is not published

There may be occasions where an auditor does not publish its final report. This is likely to be in instances where either the audited body commissions a report into some aspect of its organisation or performance, or where the auditor decides to complete a report for the management of the public body for similar reasons. There is an obvious public interest in ensuring that public bodies improve their efficiency and the delivery of services. Experience has shown that such reports are often enhanced by the frankness and candour with which the advice is given. Releasing this information might therefore reduce the effectiveness of the reports and in turn reduce their usefulness to the public body being audited.

Relationship with other exemptions

A range of other exemptions may be relevant to audit information. For example:

Section 22 (information intended for future publication): This will be relevant when the information requested is included in a report due for publication. For example, it will be relevant when a department holds information contained in the accounts of another department prior to those accounts being laid before Parliament. Most value-for-money audits are completed with a view to the publication of a final report, in which case if a request is for information that is due to be included in a report for publication it may be appropriate to consider the exemption under section 22 (see the relevant chapter in the exemptions guidance). The applicability of section 22 will be more limited in relation to financial audits, as the published report often contains only a brief summary of the information on which the report is based.

Section 26 (defence): This exemption might be relevant where information contained in the audit would be likely to prejudice the defence of the UK or the capability of the armed forces.

Section 31 (information which if disclosed would be likely to prejudice the prevention or detection of crime): This might be appropriate if an audit identifies weaknesses in procedures that make a department or agency vulnerable to fraud or theft. For example, failures to properly check the authenticity of documentation required to support a benefit claim. In these circumstances it would be more appropriate to apply the exemption provided by section 31.

Section 34 (parliamentary privilege): This absolute exemption will be particularly relevant to reports prepared for Parliament by the National Audit Office.

Section 35 (formulation of government policy): This will be particularly relevant if the audit information relates to the formulation of government policy.

Section 36: (prejudice to effective conduct of public affairs): This will be particularly relevant if the audit information could more generally prejudice the effective conduct of public affairs.

Section 40: (personal information): This may be appropriate for protecting, for example, personnel files that auditors temporarily hold in order to test payroll.

Section 41 (information provided in confidence): This exemption might be appropriate where disclosure, to the public, of information contained in the audit would breach a duty of confidence which the department owes to another person. It will only apply if the information was obtained from another person, for example from an audited body. In contrast to section 33, section 41 will more readily apply where a department has audit functions in relation to private sector bodies and obtains information for the purpose of those functions. If the duty of confidence is owed to another public authority, rather than a private person, section 41 will only apply if that public authority could itself refuse a freedom of information request for the information. (NB: Although section 41 is an absolute exemption in Freedom of Information Act terms, the law of breach of confidence itself involves a 'public interest' test.)

Section 43 (commercial prejudice): This might be appropriate where disclosure would be likely to prejudice the commercial interests of the audited body, or of a third party.

Section 44 (prohibitions on disclosure): takes account of the large and disparate body of legislation that places statutory duties of confidentiality on public sector auditors.

Annex A: Public authorities with functions potentially falling within the scope of s33(1)

Below are some examples of the types of organisation that are likely to exercise the functions described by section 33(1). In practice, where there is any doubt it will be for the department or agency wishing to rely on section 33 to prove it fell within the definition:

- The National Audit Office
- Northern Ireland Audit Office
- Wales Audit Office
- Audit Scotland
- The Audit Commission for Local Authorities and the National Health Service
- The Commission for Healthcare Audit and Inspection
- HM Inspectorate of Court Administration
- HM Inspectorate of Constabulary
- HM Inspectorate of Prisons
- Ofsted
- Commission for Social Care Inspection
- Office of Government Commerce

