



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 44 – Prohibitions on
disclosure

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Introduction

Section 44 applies:

- where there is an existing statutory bar to disclosure
- where disclosure would be incompatible with a European Community obligation
- where disclosure would constitute contempt of court at common law

The Human Rights Act 1998 can be a statutory bar to the disclosure of information.

Section 44 is **not** subject to any public interest test.

What information may be covered by this exemption?

This exemption overrides the normal right of access to information under the Freedom of Information Act where another enactment otherwise prohibits it. In these cases, not only will the information be exempt, but the public authority will have no discretion to release voluntarily either. If the disclosure would be unlawful (regardless of whether any penalty might result) then the prohibition must be observed. This applies whether disclosure would be a criminal offence, subject to regulatory or civil law enforcement, including public law challenge.

However, section 44 does not apply when release would be unlawful only at common law (except for contempt of court). Where, for example, disclosure would be in breach of confidence or in a breach of contract, then this exemption will not apply. The exemption only applies where the bar to disclosure is (a) written in statute, (b) is not compatible with an EC obligation or (c) constitutes a contempt of court.

The Freedom of Information Act covers many common law prohibitions within its own exemptions. Breach of confidence, for example, is dealt with specifically in section 41. Breach of contract may often involve section sections 41 and 43.

There is a specific provision in section 79 in relation to defamation. If a third person has supplied information to an authority then publication to an

applicant of any defamatory material covered in that information is privileged (unless it is shown that the disclosure was made with malice). A practitioner who discloses without malice such information in response to a freedom of information request will be therefore immune from liability for defamation. This privilege does not however extend to information generated by the public authority itself.

The precise terms of the relevant bar to disclosure will be very important. If a prohibition is general and absolute then it will be important to ensure that the correct legal interpretation of the provision has been made. If a prohibition is qualified however, or imposes conditions on the subsequent use of information, then seeking legal advice may become essential. Given that the Freedom of Information Act does not allow public authorities to place conditions on what can be done with information after it is released, prohibitions of this sort are likely to prevent disclosure, as the circumstances in which the information is permitted by the statutory bar to be released are unlikely to be in place at the time of the request. The Tribunal considered a statutory bar of this kind in the case of *Slann v The Information Commissioner* (EA/2005/0019) (11 July 2006).

This exemption will include prohibitions both:

- In primary legislation (i.e. Acts of Parliament). For example section 21 of the Local Government Finance Act 1992. The section makes it an offence to disclose or use certain information gathered by HM Revenues and Customs other than for the purpose of valuing property.
- In any sort of secondary legislation made on a statutory basis (e.g. orders, rules, regulations or codes) – for example, part 31.22 of the Civil Procedure Rules, which covers the use of documents disclosed in civil proceedings.

The Human Rights Act 1998

Some enactments can impose prohibitions of very general application. The most important of these is the Human Rights Act 1998. Section 6 of the Human Rights Act makes it unlawful for public authorities to act in a way that is incompatible with a Convention right.

Disclosures that are incompatible with one of these Convention rights are therefore included within the scope of section 44.

Disclosures that are incompatible with a Convention right are also very likely to be the subject of other exemptions – but section 44 reinforces an absolute bar on such releases. The most likely provisions which may need to be considered are:

- **Article 6: the right to a fair trial**
This would be relevant if the public disclosure of information could prejudice a fair trial.
- **Article 8: the right to respect for private and family life**
Where disclosure would breach Article 8, it is likely also to be exempt under section 40 of the Freedom of Information Act (which protects personal data). Section 40 of the Freedom of Information Act may be a more suitable exemption than section 44 because section 40 deals specifically with privacy.

Section 44 might for example prohibit the disclosure of personal information that relates to deceased persons. This might interfere with the Article 8 rights of others – for example family members, or victims of the deceased's crimes, even where the data is not their own 'personal data' and therefore not exempt under section 40.

(The confidentiality of some information (such as medical records) can survive the death of the confider. It would remain exempt under section 41 (information provided in confidence).)

Nevertheless, whether a disclosure would be prohibited would depend very much on the precise circumstances of the case. It will often be necessary to seek legal advice when considering the relevance of a Convention right.

Disclosure incompatible with any Community obligation

Information is exempt where release is incompatible with any EC obligation. Some of these are implemented in UK statutes. However, there are some obligations which have not been transferred into domestic legislation. Again, legal advice may be necessary. This may include:

- **EU Regulations**
For example, Article 5 of Regulation 1049/2001 on public access to documents of the European institutions may require consultation with European Institutions before disclosure.

- **EU Treaty obligations**
For example, Article 10 of the EC Treaty requires member states to abstain from any measure which could jeopardise the attainment of the Treaty's objectives – this might include disclosing information.
- **EU Directives**
Some rights can be enforceable before they are transposed to UK legislation. These Directives though must grant identifiable rights to individuals in order to be relied upon.
- **Administrative agreements**
For example, inter-institutional agreements which are not enshrined in primary or secondary legislation, and are not strictly legally binding, but can have legal effect.

Common law contempt of court

Information is exempt when its disclosure would be punishable as a contempt of court. Insofar as the relevant law of contempt of court has been codified in statute, for example in the Contempt of Court Act 1981, then any prohibition in disclosure will fall within subsection 1(a) of this exemption. The information is also exempt if this would amount to common law contempt (under subsection 1(c)).

Contempt of court at common law covers, in general terms, conduct intended to prejudice or impede the administration of justice. Courts can make orders to prevent disclosure to the public in order to ensure fair trials or to facilitate proceedings.

Disclosure may constitute contempt of court if it:

- breaches of a Court Order
- if it would create a risk of prejudice to imminent or pending proceedings, for example, where the public authority knows that proceedings are about to be instituted against someone and it discloses information that is likely to prejudice those proceedings

Information likely to be covered is:

- material that assumes (explicitly or implicitly) the guilt of an accused

- material that assumes the outcome of an issue that should be determined by a jury
- material that may hamper a police investigation
- material which contains a detailed account of the circumstances leading to criminal charges (where this is not already in the public domain)
- statements presented as fact or based on assertions of fact in advance of the evidence in a trial
- material which is likely to be inadmissible in court (for example, a defendant's previous convictions) but that a juror could remember
- material concerning other proceedings in which a defendant or a witness is involved
- material containing comment or information about witnesses that may undermine their integrity or credibility

For disclosure to be unlawful at common law, a 'real risk' of prejudice to the administration of justice needs to be shown. Also, whoever releases the information needs to be shown to have intended to cause this prejudice. This does not equate to a 'motive' though – knowingly disclosing information against a court order is sufficient. Nevertheless, where there is no reason to believe that proceedings are imminent (or that there is a court order), then disclosure will not constitute contempt of court.

If an authority holds information of this type, but the material is only incidental to information of greater public interest (perhaps as part of a report) then this is a complicated area requiring legal advice.

Public interest test

The exemption at section 44 is absolute. There is no public interest test required under the Freedom of Information Act.

It may however be that the prohibition in question makes reference to the public interest. This will then be a factor in assessing whether or not the original statutory bar is engaged.

Neither confirm nor deny

The duty to confirm or deny does not apply when this would itself breach a statutory prohibition or a Community obligation, or where this would constitute contempt of court.

Consultation

Given the absolute nature of this exemption, it is unlikely that consultation will be necessary.

Relationship with other exemptions

When section 44 is engaged, then often other exemptions in the Freedom of Information Act could also apply to the information. But the absolute nature of a legal prohibition means that it will generally not be appropriate to rely on another exemption that requires a public interest test. Statutory bars take precedence over these exemptions.

