



## Freedom of Information Act Awareness Guidance No 25

### Section 36: Effective Conduct of Public Affairs

The Information Commissioner's Office (ICO) has produced this guidance as part of a series of good practice guidance designed to aid understanding and application of the Freedom of Information Act 2000. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in response to information requests.

The guidance will be developed over time in the light of practical experience.

Section 36 is closely related to s35 (which provides an exemption for information held by government departments or the National Assembly for Wales whose disclosure would prejudice, amongst other things, the formulation of government policy). Information which is exempt under s35 cannot also be exempt under s36 and therefore s35 should be considered before s36.

#### A) WHAT DOES THE ACT SAY?

Section 36 of the Act sets out an exemption from the right to know if the disclosure of information, in the reasonable opinion of a qualified person, would prejudice the effective conduct of public affairs through:

- Prejudice or likely prejudice to the maintenance of the convention of collective responsibility of Ministers of the Crown, the work of the Executive Committee of the Northern Ireland Assembly or the work of the executive committee of the National Assembly for Wales
- Inhibition or likely inhibition of the free and frank provision of advice or exchange of views,
- Any other prejudice to the effective conduct of public affairs.

For information (other than 'statistical information') to be exempt under section 36, it must in the 'reasonable opinion of a qualified person' be capable of either prejudicing or inhibiting the matters listed above.

**a) Who is the 'qualified person'?**

The Act defines the qualified person for a number of specific public authorities listed in sections 36(5)(a) to (n). These include all public authorities in Northern Ireland and Wales and a small number of specific authorities in England. The qualified person in relation to the public authorities not listed is either a Minister of the Crown, the public authority itself if authorised by the minister, or an individual officer or employee of the authority if similarly authorised.

**In Wales the Act defines the qualified person as:**

- The Assembly First Secretary for information held by the National Assembly for Wales.
- The Auditor General for Wales is the qualified person for that authority. For other public authorities in Wales the qualified person is the public authority or any officer or employee of the authority authorised by the Assembly First Secretary.

**In Northern Ireland the Act defines the qualified person as:**

- The Presiding Officer for information held by the Northern Ireland Assembly.
- The Comptroller and Auditor General for Northern Ireland for the Northern Ireland Audit Office.
- The Northern Ireland Minister in charge of the department for information held by a Northern Ireland department.

For other public authorities in Northern Ireland the qualified person is the public authority or, any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly.

For the majority of public authorities in Northern Ireland and Wales, the Act defines 'the public authority' as the qualified person and provides for the First Minister or the Assembly First Secretary to authorise an officer of the authority as the qualified person.

**In England the Act defines the qualified person as:**

- Any Minister of the Crown for information held by a government department in the charge of a Minister of the Crown, and for information held by any other government department, the commissioners or other person in charge of that department.
- The Speaker of the House for information held by the House of Commons, and for the House of Lords, the Clerk of the Parliaments.

- The Comptroller or Auditor General in relation to information held by the National Audit Office.
- The Mayor of London for the Greater London Authority, and, in relation to information held by functional bodies within the meaning of the Greater London Authority Act, the chair of that body.

The majority of public authorities in England do not have a specified qualified person within their organisation. Therefore they will either rely on a Minister to act as a qualified person or will need to have someone in their organisation authorised by a Minister as a qualified person if they wish to rely on s36.

The Department for Constitutional Affairs (DCA) is responsible for the authorisation of a qualified person within a public authority. The Information Commissioner has no role in this process and cannot make any judgement on the suitability of a person authorised as qualified by a Minister.

All authorised qualified persons will be senior individuals in the public authority. Within local authorities, for example, the Monitoring Officer has been authorised in all cases as the qualified person. Authorities should be aware of who has been authorised within their organisation.

A list of qualified persons is available on the website of the DCA:  
[www.dca.gov.uk](http://www.dca.gov.uk)

The responsibility for the decision making cannot be delegated although the preparatory or administrative work leading up to the decision may be carried out by another person such as the officer responsible for freedom of information.

The Commissioner expects that, as the qualified person is a senior person, the responsibility under this section will be treated as a significant one and that the opinion will not be expressed lightly.

#### **b) What is a 'reasonable opinion'?**

The Information Commissioner considers a reasonable opinion to be one which lies within the bounds of reasonableness or range of reasonable opinions and can be verified by evidence. Any opinion which is not outrageous, or manifestly absurd or made with no evidence, or made on the basis of irrelevant factors or without consideration of all relevant factors, will satisfy such a test. The Commissioner may well take a different view of what would have been the best decision in the circumstances, but this is immaterial where the qualified person's opinion lies within the bounds of reasonableness.

#### **c) The public interest test**

Section 36 is not subject to the public interest test where it is invoked by the Houses of Parliament, s36 (7). In cases where information relating to the House

of Commons or the House of Lords is, in the reasonable opinion of a qualified person, considered to be exempt, there is no requirement for the public interest test to be applied to the information.

For all other public authorities seeking to exempt information under s36, even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether to disclose the information. It is only where the public interest in non-disclosure outweighs the public interest in disclosure that the information should not be disclosed. (Please refer to [Awareness Guidance 3 for further information on Public Interest Test](#)).

### **B) S36 (2) (a) (i) THE MAINTENANCE OF THE CONVENTION OF COLLECTIVE RESPONSIBILITY OF THE MINISTERS OF THE CROWN**

The concept of collective ministerial responsibility is a long-standing constitutional convention which is not regulated by statute but is formalised in the Ministerial Code, which provides guidance on the convention. Collective responsibility enables ministers to express their views in the expectation that they can argue freely and frankly in private, whilst maintaining a united front once decisions have been reached. Section 36 (2) (a) (i) provides for the exemption of information if its disclosure would undermine the convention. Collective responsibility in the past implied an obligation of confidentiality, however, the convention has become diluted in recent years; for example, former ministers have revealed details of Cabinet disagreements in their memoirs. Increasingly, information enters the public domain which identifies the differing positions taken by ministers on government policy issues. Information that was once regarded as secret, such as the composition of Cabinet Committees is now being published routinely.

A public authority will need to consider each request on a case by case basis, applying the public interest test to the particular circumstances of the case. Care must be taken when making these decisions to ensure that the concept of the convention is not damaged or changed. In cases where the prejudice to collective responsibility is insignificant because of the age of the information in question, the Commissioner would usually expect the information to be disclosed.

### **C) S36 (2) (a) (ii) AND (iii) THE WORK OF THE EXECUTIVE COMMITTEE OF THE NORTHERN IRELAND ASSEMBLY AND THE WORK OF THE EXECUTIVE COMMITTEE OF THE NATIONAL ASSEMBLY FOR WALES**

The definition of 'the work' could be interpreted more widely than collective ministerial responsibility as it refers more generally to the activities of the Executive Committee of the Northern Ireland Assembly or executive committee of the National Assembly for Wales. It is understood that there are no equivalent conventions to collective ministerial responsibility in place in Northern Ireland or Wales; however, an obligation of confidentiality corresponding to collective

responsibility, for example, may function in relation to the executive committees of Northern Ireland and Wales.

In wishing to exempt information under s36 (2) (a) (ii) and (iii) either the Presiding Officer for the Northern Ireland Assembly, the First Minister of the National Assembly for Wales, or the Minister in charge of the department (wherever appropriate) will need to consider each request on a case by case basis, applying the public interest test to the particular circumstances of the case.

#### **D) S36 (2) (b) (i) AND (ii) LIKELY TO INHIBIT THE FREE AND FRANK PROVISION OF ADVICE OR THE FREE AND FRANK EXCHANGE OF VIEWS FOR THE PURPOSES OF DELIBERATION**

Section 36 (2) (b) (i) and (ii) allow for the exemption of information if its disclosure would, or would be likely to inhibit the ability of public authority staff and others, when deliberating or providing advice, to express themselves openly, honestly and completely, or to explore extreme options. The exemption allows for information to be withheld if its disclosure would inhibit the imparting or commissioning of advice, or the offering or requesting of opinions or considerations.

**'Inhibit'** is not defined in the Act. The Information Commissioner's view is that in the context of s36 it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.

In this context **'advice'** may refer, for example, to recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified government employees, advice from external sources, or advice supplied to external sources. There may be elements of advice from, for example, legal officers that would not fall within the exemption at s42 relating to legal professional privilege, such as presentational guidance from lawyers.

**'Deliberation'** tends to refer to the evaluation of the competing arguments or considerations that may have an influence on a public authority's course of action. It will include expressions of opinion and recommendations but will not include purely factual material or background information. The information must reveal the 'thinking process' or reflection that has gone into a decision.

S36 (2) (b) acknowledges that the prospect of disclosure of information which reveals internal thinking processes may be detrimental to the ultimate quality of either policy making (for non section 35 bodies) or to other decision making within a public authority, and that this will lead to less candid and robust discussions, insufficient records being created, hard choices being avoided and ultimately the quality of government being undermined.

The Information Commissioner's view is that there must be some clear, specific and credible evidence that the substance or quality of deliberations or advice would be materially altered for the worse, by the threat of disclosure under FOIA.

### **E) S36 (2) (c) OTHERWISE PREJUDICE THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS**

The Act does not define 'effective conduct' or 'public affairs'. Arguably, everything that a public authority does could be labelled 'public affairs'. Although section 36 (2) (c) has been described as a 'catch all' exemption, this is misleading. During the parliamentary debates on the FOI Bill, the government had indicated that the intention of the section was to cover those rare situations which could not be foreseen and which cannot be covered by another exemption, where it would be necessary to withhold information in the interests of good government, rather than catching anything and everything which is not otherwise going to be exempt.

S36 (2) (c) refers to the **effective conduct** of public affairs. The section is not, therefore, restricted solely to the functions of a public authority and its ability to perform those functions, nor to individual or discrete public authorities. S36 (2) (c) places the harm outside of the individual public authority and in the realm of 'public affairs'. The Commissioner considers that s36 (2) (c) would only be available in cases where the disclosure would prejudice the public authority's ability to offer an effective public service, or to meet its wider objectives or purpose (rather than simply to function) due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.

### **F) 36 (4) STATISTICAL INFORMATION**

When the information requested is statistical, reasonable opinion of the qualified person does not apply. Instead the public authority must clearly show how disclosure would have prejudicial effects. This means that the Commissioner has greater scope to challenge any non-disclosure of information of this kind. Statistical information incorporates analyses, projections and meta-data, as well as the statistics themselves - numerical data which may take the form of a table or graph or simply be a sum total.

Statistics must be derived from a recorded or repeatable methodology, and commentary on this is also statistical information.

### **Additional Issues**

The sensitivity of information is likely to reduce over time and the age of the information, or the timing of the request may be relevant in determining whether to apply the exemption or the outcome of the application of the public interest test. In addition, s63 (1) relating to historical records, specifies that s36 does not apply beyond 30 years.

The Information Commissioner expects public authorities to offer an internal review to applicants who are dissatisfied with a decision to exempt information which they have requested. Where it is not credible to offer an internal review under s36 because of the seniority of the qualified person, it may be reasonable for public authorities to direct a dissatisfied applicant to the Information Commissioner without first conducting an internal review. Further advice on when to offer an internal review is given in the 2nd edition of the section 45 Code.