Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Freedom of Information Act Awareness Guidance No 20

Prejudice & Adversely Affect

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 (FoIA) and the Environmental Information Regulations 2004 (EIR). The aim is to introduce some of the key concepts in the legislation 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.

In Part 1, we look at the test of prejudice which features in a number of the exemptions in the Freedom of Information Act and, in Part 2, the equivalent provision, the adversely affect test, in the EIR.

PART 1 – FREEDOM OF INFORMATION ACT

A) WHAT ARE THE DIFFERENT EXEMPTION TYPES?

The right to know is laid out in section 1(1)(b) of FoIA. The exemptions from the right are then laid out in Part II. They can be divided into two types - those which are and those which are not subject to the public interest test. Those exemptions which are not subject to the public interest test are called absolute exemptions and are listed in section 2(3) of the Act.

The exemptions subject to the public interest test are known as qualified exemptions. These can be further divided into class-based and prejudice-based exemptions.

For information included in the class-based exemptions the public authority is not required to show that release of the information would cause an identified harm. If information is included in the class defined in the section it is covered by the exemption. For instance, there is a class-based exemption for information that has been at any time held for the purposes of specified investigations and proceedings conducted by the public authority. In order to rely upon the exemption it is not necessary to demonstrate any harm, merely to show that the information requested is or has been held for these purposes. The public authority would then have to apply the public interest test.

In respect of the prejudice-based exemptions the public authority must first show that a disclosure of information would, or would be likely to, cause the harm identified in the exemption. If that is established, the exemption is engaged and the public authority must then go on to apply the public interest test.

(Further information on the public interest test can be found in Awareness Guidance Number 3.)

B) WHICH EXEMPTIONS ARE PREJUDICE-BASED?

In the main, the prejudice-based exemptions share the phrase "would, or would be likely to, prejudice". The sections in which this phrase appears are:

- s26 - Defence
- s27(1) - International relations (s27(2) and s27(3) are class based)
- s28 - Relations within the United Kingdom
- s29 - The economy
- s31 - Law enforcement
- s33 - Audit functions
- s 36(2)(a) and (c) – Public affairs
- s43(1) - Commercial interests (s43(2) - trade secrets - is class based)

Additionally, two sections use alternative words with similar meaning. These are:

- s36 – where in (2)(b) it reads "would, or would be likely to, inhibit … the free and frank provision of advice etc"
- s38 - Health and safety "would, or would be likely, to endanger"

These exemptions are obviously of similar type to those above, although the different wording gives a more precise meaning. Detailed discussion on these sections is available in the ICO Awareness Guidance series.

Finally, there is the national security exemption laid out in s.24 of the Act. The relevant words are as follows:

> "information…..is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security"

Although in this case it is clear that the wording is quite different, as with the other exemptions of this kind, the public authority is required to demonstrate the detrimental effect of disclosing the requested information (here showing how disclosure would harm - or prejudice - national security).

a) How do the prejudice-based exemptions work?

There are two issues that need to be considered with prejudice-based exemptions. Firstly, it is necessary to establish the nature of the prejudice (or other stated harm) that might result from disclosure of the information requested, and secondly, if prejudice (harm) is not certain or probable, to determine the likelihood of it occurring.

b) What does prejudice mean?

The word 'prejudice' is not defined in the Act, although it is common in other legislation. During Parliamentary debates, it was suggested that the key term in the exemptions that are not based on a class of information should be 'harm', but it was recognised that the use of 'prejudice' elsewhere, particularly in the Data Protection Act, supported its use in Freedom of Information.

In legal language, prejudice is commonly understood to mean harm, and the Information Commissioner regards them as meaning the same thing. So, when considering how disclosure of information would prejudice the subject of the exemption being claimed, the public authority may find it more helpful to consider issues of harm or damage.

The Information Tribunal has emphasised that in considering the "would prejudice" limb of the prejudice test, the prejudice must be at least more probable than not. The burden of evidence on a public authority is therefore stronger than it is when considering whether prejudice is "likely" (see below). A public authority is expected to provide evidence to show that there is a causal relationship between the potential disclosure and the prejudice. However, it does not have to prove that prejudice would occur beyond any doubt.[1]

Although prejudice need not be substantial, the Commissioner expects it to be more than trivial. The degree of harm is not specified, so strictly any level of harm or damage might be argued. However, public authorities should bear in mind that the less significant the prejudice is shown to be, the higher the likelihood that the public interest test will require disclosure.

c) How likely is likely?

The words "or would be likely to" allows for the prospect of prejudice to be less than probable, as would be the case if the Act had only allowed exemptions where disclosure "would prejudice".

The phrase "likely to prejudice" has been considered by the courts and by the Information Tribunal. From these decisions the test to be applied is that the chance of prejudice being suffered should be more than a hypothetical possibility; it has to be demonstrated that there is a real and significant risk of harm.[2] A remote possibility of harm is insufficient, even if the risk can fall short of being more probable than not.[3]

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[1] Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 & EA/2005/0030; 17 October 2006)
[2] John Connor Press Associates Ltd v Information Commissioner (EA/2005/0005; 25 January 2006)
[3] R (on the application of Lord) v Secretary of State for the Home Department [2003]

The level of risk will be a factor to take into account when considering the public interest test .

The Information Tribunal has also considered the evidential burden in establishing the likelihood of prejudice. A public authority cannot be expected to prove exactly what would happen on disclosure. However, it is not sufficient for a public authority to put forward unsupported speculation or opinion; the public authority must be able to provide some evidence from which it can then extrapolate in order to come to a conclusion about what is likely. [1]

PART 2 – ENVIRONMENTAL INFORMATION REGULATIONS

A) WHAT IS THE DIFFERENCE BETWEEN THE ACT AND THE EIR?

The EIR have exceptions rather than exemptions. Unlike FoIA, all exceptions are subject to the public interest test. Like the exemptions in FoIA, however, the exceptions may be divided into two groups: the first class based and the second subject to a test of "release that would adversely affect". This is very similar though not identical to the prejudice test.

B) HOW DOES THE "WOULD ADVERSELY AFFECT" TEST WORK?

Like "prejudice", "adversely affect" can be regarded as working as a harm test. However, whereas FoIA provides exemptions not only in those cases where prejudice would occur but also those where prejudice would be likely to occur, the adversely affect test provides exceptions only in those cases where an adverse result would arise. In other words, with environmental information, in order to engage an exception, some harm must be at least probable rather than merely likely. This is a significant difference. This has been confirmed by the Information Tribunal which has stated that to satisfy the test of "would" it has to be shown that that the adverse effect is more likely than not[2], and that it is not enough to say that the disclosure could or might have such an effect.[3]

C) WHICH EIR EXCEPTIONS REFER TO RELEASE THAT WOULD 'ADVERSELY AFFECT'?

The exceptions subject to the adversely affect test are listed in Regulation 12(5) as follows:

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

[1] England v Information Commissioner and London Borough of Bexley (EA/2006/0060 & EA/2006/0066; 10 May 2007)
[2] Burgess v Information Commissioner & Stafford Borough Council (EA/2006/0091; 7 June 2007)
[3] Archer v Information Commissioner & Salisbury District Council (EA/2006/0037; 9 May 2007)

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority,

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it, and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Further advice

If you need any more information about this or any other aspect of Freedom of Information or Environmental Information please contact us.

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