



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 22: information intended
for future publication

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Introduction

Section 22 exempts information requested by an applicant if it is intended for future publication. It encourages public authorities to place information in the public domain proactively.

The Freedom of Information Act recognises the desirability of information being freely available in its own right, but section 22 also acknowledges that public authorities must have freedom to be able to determine their own publication timetables. This allows them to deal with the necessary preparation, administration and context of publication. Where information is intended to be made available, individual requests for information should not determine the publication timetables of public authorities. This protection is afforded whether it is the public authority itself or another person which intends to publish – whether an individual, a company or another public authority.

The starting point for section 22 is that it exempts information which is held by a public authority with a view to its publication, by the authority or any other person, at some future date. The exact date, however, does not necessarily have to be decided already. When using the section 22 exemption, you should consider whether it is possible and appropriate to disclose the expected publication date.

Section 22 is subject to two important qualifications:

- it must be reasonable in all the circumstances to withhold the information until the date of publication
- the public interest test must be satisfied

These qualifications recognise that sometimes there will be an overriding public interest in the information being released prior to the intended publication date. Public authorities should not be able to avoid putting information in the public domain by adopting unreasonable publication timetables or an 'intention' to publish where there is little prospect of that happening within a reasonable timescale.

You cannot decide to publish information just because a freedom of information request has been received and you want to avoid disclosure. Section 22 applies only if there is already an intention to publish at the time the request is received.

Publication

'Publication' is a broad term which embraces speech, print and electronic media. It covers both commercial and non-commercial publication.

It includes any speech, written document, programme or other communication – in whatever form – which is addressed to the public at large or any section of the public. So, it can include, but is not limited, to the following:

- announcements
- press releases
- speeches, interviews, articles
- email bulletins, information available online and information retrievable electronically
- CDs, video tapes, CD ROMs
- books, journals, periodicals and newspapers
- consultation papers, white papers and green papers
- reports and responses to select committee reports
- research and statistics
- television and radio broadcasts

It is not necessary for the intended publication to be in recorded form or in a form which will inevitably thereafter be 'reasonably accessible' for the purposes of section 21 of the Act.

The exemption is also not formally limited to the intended publication of unpublished material; information may be capable of falling within the terms of section 22 even if it has already had some limited, even unauthorised publication. For example, the material may have been prematurely 'leaked'.

‘With a view to publication’

Section 22 will apply only if the information is held with a view to its publication at some future date. This will obviously cover a case where there is a firm intention by the public authority that the information will be published, although the date of publication does not have to be already decided. The fact that a decision on whether or not to publish is pending will not suffice: there must be an actual view to publication.

Section 22 will not apply if the intention to publish is decided only after a freedom of information request has been received. This is consistent with the approach in section 1(4) of the Act. If this happens, unless another exemption applies to the same information, it will have to be released in response to that request.

A public authority can still apply section 22 to information it holds even though it does not intend to publish the information itself. In other words, section 22 applies where a public authority intends to pass the information to another person in order for it to be published. For example, where material is not published 'in house' by a department but is instead published through an agent or other publisher.

It is also arguable that it applies in cases where, although the public authority has no intention of its own to publish, it holds information because, or where it is aware that, someone else intends to publish it.

For example, if the Ministry of Justice consults the Home Office in relation to a draft consultation paper, it is possible for the Home Office to hold that information with a view to its publication by the Ministry of Justice. So the Home Office would be able to rely on section 22 in considering a request for the information in question.

The 'view to publication' must be a current and continuing view. Information contained in draft documents intended for publication will be covered by section 22 while that document is the 'current' draft, though other exemptions may apply.

However, it is likely that any information that was rejected and not included in subsequent drafts will very likely continue to be exempt under other exemptions, in particular section 36 relating to prejudice to effective conduct of public affairs. This is because it will no longer be possible to say that the rejected material is held with a view to its publication, although other exemptions will apply to it.

Similarly, if a public authority or a third party changes its mind about publication, section 22 will no longer be available in respect of that

information. This does not affect previous refusals of freedom of information requests for the information on the basis of section 22, provided that there was a genuine intention to publish at the time the request was received.

Public interest test

As explained above, there are two qualifications to section 22; a request for information may only be refused if:

- it is reasonable in all the circumstances that the information should be withheld from disclosure until the future date of publication (section 22(1)(c))
- the public interest in maintaining the exemption outweighs the public interest in disclosure (section 2)

Both of these provisions require a judgement about the respective merits of immediate disclosure in response to an individual request on the one hand, and subsequent general disclosure on the other. In practice, departments should consider all the relevant circumstances and determine whether the public interest in immediate disclosure of the information outweighs the public interest in delaying until general publication, paying particular attention to the reasonableness of the date of publication.

The public interest balance under section 22 focuses mainly on timing. The crucial test is whether it is reasonable to withhold the information until the intended date of future publication, whether or not that date is specified. The key issue is not whether to release but when. The Act therefore allows the public authority a measure of flexibility, subject to the limits of reasonableness.

The public interest in permitting public authorities to publish information in a manner and form and at a time of their own choosing is important. It is a part of the effective conduct of public affairs that the general publication of information is a conveniently planned and managed activity within the reasonable control of public authorities. Where they have taken the decision in principle to publish, public authorities do have a reasonable entitlement to make their own arrangements to do so.

The following considerations may also be relevant:

- **The nature of the proposed publication timetable itself:**
As a general guideline, if the publication date is more drawn-out or

undetermined, the less reasonable delay is likely to be. However, this is by no means a rigid rule - everything depends on the reasons behind the decision.

- **Possible prejudicial effects of premature release or delay:**
What are the practical disadvantages of delay? Are any interests likely to be prejudiced? What are the practical disadvantages of immediate disclosure? If, for example, a third party's private interests would be harmed, or unnecessary public concern caused by premature disclosure, then there may be a stronger public interest in favour of withholding the information.
- **Allowing everyone to view a publication at the same time:**
Would the privileging of a freedom of information applicant with the information result in 'unfairness' to others who might be affected by an announcement? Is it important for the information to be released to everyone at the same time?
- **Pre-publication procedures:**
Would immediate disclosure undermine any relevant pre-publication procedures, such as consultation with or pre-disclosure to particular bodies or individuals? For example, in the case of a complaint it would normally be good practice first to disclose the information to the complainant or the subject of the complaint before publication.
- **Publication procedures:**
Similar to the above, it can be important in some instances to ensure publication of material takes place in accordance with certain procedures. For example, the reports of public inquiries are often published under the protection of the Parliamentary Papers Act to avoid defamation or other civil action.
- **Previous undertakings as to nature of publication:**
It may be that ministers have promised to inform Parliament first of the information sought. Similarly there may have been undertaking to inform the family first of the result of an inquiry into a death in custody. It is unlikely in circumstances such as these that the public interest will favour disclosure to the applicant.

In this context, public authorities should also bear in mind that the freedom of information right of access is to information. It may be in the public interest to disclose some of the information contained in a report due to be made public without disclosing all of the information contained in the report.

Neither confirm nor deny

The duty to confirm or deny is excluded if confirmation or denial would, in itself, involve supplying information to which section 22 applies. The public interest test applies to the decision to neither confirm nor deny.

Consultation

In the case of information held with a view to publication by another person, it may be advisable to consult that person, before coming to a decision on the request. Otherwise it may not be possible to reach a decision as to the reasonableness of delaying publication until the intended date and the subsequent operation of the public interest balance. The application of section 43 to that person's commercial interests, or any duty of confidence owed to that person (section 41), may need to be considered.

Relationships with other exemptions

Section 22 may apply in a wide range of circumstances in which other exemptions also apply. This will very often be the case where the disclosure of information is highly time-sensitive. For example, there may be a settled intention to publish certain information which before a certain date is highly market sensitive. Before that date, the public interest may strongly favour withholding the information on the grounds of prejudice to the economic interests of the UK (section 29), or to a person's commercial interests (section 43). Authorities may therefore choose to cite section 22 as well as, or in the alternative to, other qualified exemptions.

The interests specifically protected by section 22 may also be protected under other exemptions. For example:

- **Sections 35 and 36 (formulation of government policy and prejudice to effective conduct of public affairs)**
Particularly where premature disclosure would inhibit free and frank advice and discussion.

- **Section 41 (information provided in confidence)**
if a public authority holds information subject to a duty of confidence and it would be a breach of that confidence to disclose the information prematurely to the public then section 41 may apply.
- **Section 43 (commercial interests)**
Particularly where another person has copyright in the information and/or intends to publish it for financial gain or the information might be market sensitive.
- **Section 30 and 31 (investigations and law enforcement)**
Where information gathered is going to be published at the conclusion of an investigation.
- **Section 39 (environmental information)**
If requested information is environmental information then it is exempt under section 39 and its disclosure must be considered under the Environmental Information Regulations. EIR regulation 12(4)(d) exempts material that is still in the course of completion, unfinished documents and incomplete data provided that an estimated time is given for completion of the information.

Keeping the publication timetable under review

Even where information is properly withheld under the terms of section 22, that does not mean that the original timetable for publication must be adhered to at all costs. Further requests should be considered on their own merits in the light of any relevant change in circumstances. Sustained public pressure for publication may in some circumstances become a relevant consideration in its own right.

If section 22 applies, but the public interest is in favour of immediate release, the public authority can consider whether to bring forward the publication.

A public authority still needs to respond to the request within the time limit. However it may want to schedule disclosure within that limit to coincide with a managed and/or simultaneous publication of that information (for example on a website). The information would then be published and becomes accessible to the applicant by other means.

