



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 36 – Prejudice to effective
conduct of public affairs

14 May 2008

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Introduction

Section 36 relates to information that if disclosed would adversely affect the delivery of effective central government and other public services. It is the effect that disclosure of information would have, rather than the type of information itself, that is key in considering the application of section 36.

Section 36 is designed to protect information whose disclosure:

(a) would, or would be likely to, prejudice –

- i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- ii. the work of the Executive Committee of the Northern Ireland Assembly, or
- iii. the work of the Cabinet of the Welsh Assembly Government

(b) would, or would be likely to, inhibit –

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36 is closely related to section 35 (formulation of government policy etc.). For example, advice relating to the formulation of government policy will usually be considered under section 35. However, there are other areas of advice that ministers receive which do not relate to formulating or developing policy which, if released, might impact on the effective conduct of public affairs, for example a candid internal discussion about how best to approach an external stakeholder.

While section 36 applies to all public authorities, section 35 only applies to information held by a 'government department'¹ or the Welsh Assembly Government. So, information held by a local authority that relates to

¹'Government department' is defined in section 84 of the Freedom of Information Act and includes: a Northern Ireland department; the Northern Ireland court service, and any other body or authority that is 'governmental' and 'departmental' in nature and which exercises statutory functions on behalf of the Crown.

formulation of government policy might be withheld under section 36, where it could not be withheld under section 35.

Section 36 requires a determination by a 'qualified person'. It is the only exemption in the Act that has this provision. The exemption under section 36 will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect specified in paragraph 2 would follow from disclosing the information. In relation to information held by government, the qualified person must be a Minister or, if held by a non-Ministerial department, the persons in charge of that department (for example, the Chief Executive).

Both sections 35 and 36 are subject to the public interest test. When considering the public interest test, you will need to weigh up:

- the important public interest in disclosure of information about, for example, process of government policy formulation
- versus
- the powerful public interest in ensuring that there is a space within which Ministers and officials are able to discuss policy options and delivery, freely and frankly

Relationship with section 35

Section 36 is closely related to section 35. If information is exempt under section 35, section 36 cannot apply. For example, if information relates to Ministerial communications, it should be considered under section 35 and not under section 36. However, public authorities may rely upon section 36 in the alternative, in case it is decided on appeal that the section 35 exemption is not engaged.

Section 36 applies to a broader range of public authorities than section 35:

Section 35 applies only to information held by a government department or the Welsh Assembly Government. Its provisions on ministerial communications and private offices apply only to Ministers of the Crown or ministers in the Northern Ireland and Welsh administrations.

Section 36 applies to all public authorities covered by the Act.

This means that, for example, a draft policy paper sent by a government department to a local authority would fall to be considered under section 35 if the government department were asked to disclose it, but under section 36 by a local authority faced with the same request.

Unlike section 35, section 36 is a 'prejudice-based exemption', that is, it works by reference to **the effects of disclosure**. Section 36 contains no restrictions at all on the nature or content of the information to which it applies; it focuses solely on whether the disclosure of information would have certain detrimental effects.

What information is covered by this exemption?

Section 36 relates to information that in the reasonable opinion of a qualified person, if disclosed, would adversely affect the following areas:

- the maintenance of the convention of the collective responsibility of the Ministers of the Crown
- the work of the Executive Committee of the Northern Ireland Assembly
- the work of the Cabinet of the Welsh Assembly Government
- the free and frank provision of advice
- the free and frank exchange of views for the purposes of deliberation
- the effective conduct of public affairs

Collective responsibility

The longstanding constitutional convention of the collective responsibility of Ministers of the Crown is set out in the Ministerial Code. Decisions of government are taken collectively, and each member of the government is party to the decision and committed to it. A minister who objects to a decision is expected, once he or she has made his or her case, to accept the collective decision about the policy or course of action to be pursued. If a minister cannot do so he or she is expected to resign.

Maintaining this convention is fundamental to the continued effectiveness of Cabinet government. If policy disagreements within government were to be revealed, the government would be unable convincingly to put forward a united front, and properly accept collective responsibility for its decisions.

There is a close inter-relationship between privacy of discussion amongst Cabinet members and the convention which requires that ministers should be able to argue freely in private in the expectation that when decisions have been reached they will present a united front. Collective responsibility is sometimes spoken of as Cabinet collective responsibility, reflecting Cabinet's role as the supreme decision-making body in government. But all ministers are bound by collective responsibility (even if they were not part of the Cabinet decision-making process on a particular issue).

If ministers thought that their views would be revealed publicly, the nature of policy discussions would be very different. It might deter ministers and officials from raising radical or controversial options and having free and frank discussions about all available possibilities in relation to any given policy or idea. This would have a detrimental effect on both the process of collective government and the quality of the decisions made at the highest level, undermining good government.

The public interest in maintaining the convention of ministerial collective responsibility is recognised by its inclusion in this exemption and also in the provision made in section 35 for the protection of information relating ministerial communications (which makes special reference to Cabinet proceedings).

Whether this exemption applies will depend on whether disclosing information would or would be likely to cause some harm or prejudice to this convention. You will need to consider whether disclosing information:

- would reduce confidence in, or the effectiveness of, a final decision taken by ministers
- would make it less likely that decisions will be taken collectively
- would inhibit discussions between ministers
- would make it more difficult for ministers and departments to act collaboratively and cohesively
- would, by revealing differences in opinion within government, increase the extent to which some individual ministers can be held responsible for government decisions (and reduce it for others)
- would encourage the exploitation of differences of opinion for political or personal purposes

The sort of information most likely to fall within the scope of this exemption would be information which revealed the positions which individual ministers had taken on issues of government policy. Information that would reveal which ministers were personally involved in a particular decision is also likely to engage the exemption.

Information revealing differences between departments at official level are likely to be covered by this exemption also, since they may indicate differences at a ministerial level. Similarly, information does not need specifically to mention a minister in order to be exempt: it may be that the information in question could provide enough evidence for the particular departmental/ministerial stance to be covered.

The exemption may be relevant to correspondence between officials reporting on their ministers' views on individual policy questions, or submissions to ministers from their officials reporting the views of other ministers. It may also apply to informal communications or notes where the same effect can be identified.

The work of the Cabinet of the Welsh Assembly Government or the Executive committee of the Northern Ireland Assembly

The Cabinet of the Welsh Assembly Government consists of the First Minister and the Welsh Ministers appointed by the First Minister under section 48 of the Government of Wales Act 2006. Most of the 'devolved functions' are conferred on or transferred to 'the Welsh Ministers' (see section 45(2)) and are exercisable by the First Minister or any of the 'other' Welsh Ministers (see section 57(3)). Section 57(4) provides that any act or omission of the First Minister or the Welsh Ministers is to be treated as an act or omission in relation to each of them, (unless the act or omission relates to a function which is that of the First Minister alone). To that extent, the Government of Wales Act 2006 appears also to give statutory recognition to the principle of Cabinet collective responsibility, which operates in a similar way to the Westminster system. The Welsh Assembly Government's Ministerial Code also states that the Cabinet operates on the basis of collective responsibility.

The Northern Ireland executive could not be said to have a 'convention' about collective responsibility and is, under the terms of the Northern Ireland Act 1998, explicitly a power-sharing executive. However, the provision at section 36(2)(a)(ii) is intended to have a similar effect as the provision made for the protection of collective responsibility of Ministers of the Crown. If disclosure of the information would be likely to undermine the trust and

understanding which are necessary to allow the administration to function properly, then the terms of the exemption would be satisfied.

Free and frank provision of advice, or exchange of views, for the purposes of deliberation

The 'provision of advice' should be interpreted widely and may be internal within the authority (for example the provision of advice by officials to ministers), or external – the authority either receiving advice from outside or itself providing advice to third parties. The 'exchange of views' is limited only by being 'for the purposes of deliberation'. That will include processes of decision-making, opinion-forming or evaluation, but is likely to exclude very casual or trivial exchanges. However, informal notes of meetings or exchanges of information will be covered when these relate to deliberation of a matter. Again, you should consider if these were to be disclosed whether there would be a prejudicial effect on any possible future range of views.

This exemption is likely to be engaged if release of information would have an inhibiting effect. That is, if advice would be less likely to be sought or offered, or if any exchange of views would be more reticent or circumscribed either in relation to the specific issue or as a general result.

You will need to consider, in respect of each request for information, what affect disclosure would have on the provision of advice or the exchange of views. For example:

- Would it make it more likely that the person or any other offering advice will be unwilling to do so in future?
- Would it inhibit that person or any other from offering unwelcome advice?
- Would it make it more likely that the person being advised will not ask for advice in future?
- Would it have a similar inhibiting effect on other people in future?
- Would it make it more likely that advice will be given that is materially different because of the possibility of disclosure?
- Will it make people less likely to engage in discussion (oral or written) as part of the deliberative process?

- Would it distort or restrain that discussion?
- Would it result in pressure being brought to bear on officials to provide particular advice?
- Would officials be less likely to record this sort of information if it were subsequently disclosed?

The disclosure of some kinds of information is more likely to have an inhibiting effect than others. Although advice relating to the formulation of government policy will fall to be considered under section 35, there are, for example, other kinds of advice which ministers receive which do not relate to formulating or developing policy, for example deciding what press line the Minister might take, or what strategy to adopt when dealing with parliamentary questions. Many departments have extensive management, delivery and operational functions and important decisions have to be taken in the performance of those functions. These decisions will be informed by advice received from officials and third parties. They may also be the result of debate amongst ministers or discussions with stakeholders.

Information the disclosure of which might have a potentially inhibiting effect may be contained in formal minutes and submissions or recorded in the minutes of a meeting. Records of meetings will contain the exchange of views that took place in reaching a decision. There may well be informal records of meetings or discussions that it would also be inappropriate to disclose. You should consider whether disclosure of details of this sort of meeting would reduce the likelihood of them being held again, or prejudice their content. The provision of advice and the exchange of views protected by this exemption is not limited to government ministers, but includes advice and discussion which takes place at official level and within public authorities outside central government departments.

The information sought does not need to be the full record of advice or an exchange of views to be capable of having an inhibiting effect; it may merely refer to it indirectly or affect it some other way. For example, to disclose a reference to the fact that a confidential meeting has taken place or confidential advice has been given could in some circumstances itself have an inhibiting effect.

The information need not refer to the provision of advice or an exchange of views. It is the effect of disclosure which triggers the application of the exemption. You do not have to demonstrate that such a prejudice will definitely occur, but you do need to be able to show that the risk of one is real. If there is a genuine risk then the exemption will be engaged and the public interest test will have to be applied.

The public interest considerations will be very similar to those mentioned in the guidance for section 35.

The effective conduct of public affairs

This provision covers any adverse effect on the effective conduct of public affairs not specifically set out in the rest of section 36 or covered in other exemptions.

It was intended by Parliament to cover residual situations that could not be foreseen where it was necessary to withhold information in the interests of good government.²

Because this exemption is so broadly expressed, departments should explain clearly why the exemption is engaged, setting out the risk of harm or damage that could result from the release of the information in question.

Section 36 cannot be used simultaneously with section 35, but it may apply in addition to other exemptions under the Act. This general prejudice to the conduct of public affairs provision might easily be engaged, for example, alongside the exemption relating to audit functions. Also, although section 36 cannot be used in conjunction with section 35, it can be used in the alternative. So a public authority may rely on it before the Information Commissioner or the Tribunal in the case where they determine that the information is not within the scope of section 35.

Statistical information

Under section 36(4), there is no requirement for ‘the reasonable opinion of a qualified person’ for the exemption in relation to statistical information.

Under section 35(2) of the Act, once a policy decision has been made, statistical information used to provide an informed background to that decision is not regarded as related to either the formulation of policy or ministerial communications.

Statistical information of this sort, therefore, will cease to be exempt information under section 35 although it may continue to fall within the

² Lord Falconer made it clear, in debates on the Bill (Hansard, HL (series 5) vol 619, col 240 (14 November 2000)) that residual situations might arise, which could not be foreseen, where it was necessary to withhold information in the interests of good government.

scope of another exemption. It may be exempt under section 36 if its disclosure would meet the prejudice and inhibition tests in this section.

Reasonable opinion of a qualified person

Section 36 is unique in that it only applies if the reasonable opinion of a qualified person is that certain forms of adverse effect would or would be likely to follow from disclosure. Information can be withheld only if it is the reasonable opinion of a qualified person that its disclosure would have the adverse effect specified, and if in all the circumstances of the case the public interest in withholding it outweighs the public interest in disclosure.

‘Reasonable opinion’

‘Reasonable’ does not mean that the decision has to be the only one possible in the circumstances, or even that it is the one that most people, faced with those circumstances, would have reached. It must, however, be within a range of reasonable responses. The qualified person will then need to be provided with any background information they might need in order to reach such a decision. You will need to outline in detail all the relevant factors as they relate to the particular circumstances of the case in order to allow them to make an informed decision on whether or not the exemption applies.

It will be extremely important to document thoroughly the reasons why information falls within section 36(2). The provision is wide-ranging and any decision to withhold information under it should be narrowed down as precisely as possible by clear reference to the risk of harm that could be caused by disclosure of the information in question. It is because the scope of the provision is so potentially wide that the requirement for a qualified person to take the decision on the application of section 36 in each case was included in the legislation.

Unlike some other provisions of the Act, section 36 does not specify that the opinion should take the form of a certificate. It does not have to be given in writing at all, and may in fact be communicated orally. Nevertheless, in the interests of maintaining an effective audit trail, we recommend you should note when and by whom the decision was taken.

‘Qualified person’

The decision in section 36 on whether a disclosure would or would be likely to have the prejudicial or inhibiting effects specified can be taken only by a ‘qualified person’. **The qualified person cannot delegate this decision-making function to others.** This is not a case where powers conferred on a minister can be exercised by officials on his behalf. A decision to exercise the power must be submitted to ministers in the case of most government departments for their agreement.

Subsection (5) sets out who is the qualified person in each case. Section 36(5)(o) and (6) detail who the qualified person(s) is/are for the authorities not covered under subsection (5)(a)-(n) and how they may be designated. In these cases more than one person – or even a whole class of people – may be ‘qualified’. Conditions may be imposed. Subsection (5)(o) covers a wide range of bodies, for example, all local authorities in England are covered by it.

For government departments, the qualified person is either any Minister of the Crown or, for departments which are not headed by a minister, the commissioners or other person in charge of the department. For Northern Ireland departments, the qualified person is the Northern Ireland Minister in charge of the department. For the Welsh Assembly Government, they are the Welsh Ministers or the Counsel-General.

It will typically be a minister in the department to which the request was made who acts as the qualified person. Unlike some provisions, any Minister of the Crown can exercise this function; it does not have to be a Cabinet minister. The most appropriate way of proceeding is likely to be through advice to ministers asking them to consider exempting the material, and a prepared form of words setting out the minister's opinion that exemption applies. Ministers will be asked to make a personal assessment – it is their opinion which determines the application of the exemption – and the facts must be fully laid before them and the reasons fully articulated.

Information held by Parliament

For information that is held by Parliament, a certificate provided under section 35(7) by the Speaker of the House of Commons or the Clerk of the Parliaments is taken to be conclusive evidence that the disclosure would be

prejudicial or harmful – it cannot be questioned by the Commissioner and is not subject to the public interest test (see section 2(3)(e)).

These certificates apply only to information 'held by Parliament'. The same information in the hands of a department is subject to the public interest test (unless it falls, as it may do, within section 34 on parliamentary privilege).

The public interest test

The exemption in section 36 is subject to the public interest test (with the exception of information held by Parliament). That means that even where likely prejudice can be demonstrated, it is still necessary to consider whether in all the circumstances of the case the public interest in withholding the information outweighs the public interest in disclosure. Only if that is the case should the information be withheld.

Section 36 is designed to protect the effective conduct of public affairs, to the extent that that is dependent on:

- the maintenance of the doctrine of collective responsibility for ministers of the Crown, and analogous understandings in the workings of the Northern Ireland Assembly and the Welsh Assembly Government
- not inhibiting the free and frank provision of advice
- not inhibiting the free and frank exchange of views for purposes of deliberation

This list is not exhaustive. Other disclosures might also prejudice the effective conduct of public affairs, for example, releasing the names of junior officials and their responsibilities expose them up to undue pressures from the media or members of the public, and release of contact details can lead to 'interference in the carrying out of [civil servants'] responsibilities', which is not in the public interest, as the Information Tribunal recognised in the DESO decision.³

In most cases where the effective conduct of public affairs would be likely to suffer as a result of the disclosure of information, those circumstances are addressed under a separate and specific exemption provision of the Act.

³ Ministry of Defence v Information Commissioner and Rob Evans (EA2006/0027) (20 July 2007), at paragraph 88.

Section 36 is residual. Ministers accepted during the debates on the Bill that one of the purposes of section 36 was to provide for individual situations which had not yet been envisaged but where it became clear, on the facts, that disclosure would not be in the public interest.

It is also important to remember that the other primary purpose of section 36 is to address for other bodies those situations which, for government departments, are effectively covered by section 35.

In weighing the competing public interests to determine whether information ought to be disclosed, you should consider the extent of the harm caused to the relevant interest by disclosure of the information in question against the general public interests set out below and in the guidance on section 35.

For example, if the prejudice to collective responsibility is slight, although the general public interest in maintaining the convention remains high, the balance may in the light of all of the circumstances come down in favour of disclosure. But if for example there is already a lot of information in the public domain about an issue, and releasing this information would not substantively add to that knowledge but would still pose a risk of prejudice, then the public interest is likely to favour non-disclosure. There is an important public interest in the principles of good government that this exemption seeks to protect.

Similar to the public interest test under section 35, the following considerations, dependent on the specific facts of the case, are likely to be relevant. Considerations which potentially may weigh in favour of disclosure include:

- Open policy making may lead to increased trust and engagement between citizens and government.
- The desirability of citizens being confident that decisions are taken on the basis of the best available information.
- Knowledge that the arguments relating to a debate will be disclosable will in fact improve the quality of those arguments. Far from inhibiting the frank provision of advice, there might be circumstances where the prospect of disclosure would enhance the quality of advice.
- The response to new policy initiatives may improve, and government generally may become 'better'.
- More open policy making can result in better policy formulation. A wider range of views and opinions, including expert knowledge, may be canvassed.

- As knowledge of the way government works increases, public contribution to the policy making process could become more effective and broadly-based.
- The public interest in knowing that ministers are adhering to the Code which regulates their conduct.
- The information would expose wrongdoing on the part of government.
- The information would demonstrate that wrongdoing had been effectively dealt with.
- The substance of the information may relate closely to a matter of public importance about which public debate could be informed by its disclosure.

Considerations which may weigh in favour of withholding information include:

- Ministers and their officials need space in which to develop their thinking and explore options in communications and discussions with other ministers and officials.
- There needs to be a free space in which it is possible to 'think the unthinkable' and use imagination, without the fear that policy proposals will be held up to ridicule.
- Ministers and their officials need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects.
- Premature disclosure of preliminary thinking may end up closing off better options because of adverse public reaction.
- Disclosure of the process of interdepartmental consideration may undermine the collective responsibility of the government.
- The decision-making process may not be properly recorded so as to avoid creating information which is disclosable.
- Appropriate expert advice is not sought because of the reluctance of those who might supply it to engage in a debate where their contribution might be disclosable.

The duty to confirm or deny

The 'neither confirm nor deny' provision (section 36(3)) also requires the reasonable opinion of a qualified person that disclosure of whether the public authority held the information would produce one of the effects spelled out in subsection (2).

Duration of the exemption

Under section 63, information which is exempt under section 36 ceases to be exempt when it becomes a historical record, that is 30 years after it, or the most recent paper on the file in which it is contained, was created. The 'neither confirm nor deny' provisions also cease to apply to records exempt under section 36 once they become historical records. However, there may be other relevant exemptions that continue in force (for example, section 27 on international relations).

In many cases, information will become less sensitive as time goes by. A time span of two administrations (that is, governments of different political parties) is often a good rule of thumb about whether information held by central government is likely still to be sufficiently sensitive that its disclosure would have the effects referred to in section 36(2). This is not, however, always the case – there may still be prejudice. For example, disclosure of very candid or frank discussions from the past may discourage others from having them in the future. Information held by different public authorities will have varying periods of sensitivity.

Other relevant exemptions

When considering the withholding of information under section 36, it is very likely that another exemption may be relevant. This is because section 36 is mainly about ways of working, is generally expressed, and is residual.

Like all information covered by the Act, information exempt under section 36 may also be covered by:

- the exemption in section 21 for information available elsewhere (for example in the annexes to a White Paper)
- the exemption in section 22 for information which it is planned to publish in the future (for example where a department has been working up a White Paper)

So far as the content of the information is concerned, you should consider whether it may be covered by:

- section 26 on defence
- section 27 on international relations
- section 28 on relations within the United Kingdom
- section 29 on the economy
- section 39 on environmental information
- section 40 on personal data

