



Ministry of
JUSTICE

**Freedom of information
guidance**
Exemptions guidance
Section 38 – Health and safety

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Introduction

Section 38 applies to information that if disclosed would be likely to put the physical or mental health or the safety of **any** individual at risk or greater risk. The individual does not need to be identifiable and may be a member of the public, where the danger is to the health or safety of the public at large. The exemption can apply equally to a group or class of people who could have their health and safety adversely affected by disclosure.

The exemption identifies two separate, but related risks associated with disclosure. Those likely to:

- endanger the physical or mental health of any individual
- endanger the safety of any individual

A broad approach should be taken when considering potential risks: mental health should include general emotional and psychological well-being, but should not necessarily include mere distress, while safety should be taken to mean general protection from harm.

It is important to clarify in this context that information about health and safety is not necessarily the same as information that endangers health and safety. For example, the Health and Safety Executive is responsible for investigating accidents under health and safety legislation but information relating to this function is more likely to be covered by the exemption at section 30 or section 31.

The exemption refers to information which if released ‘would or *would be likely to* endanger...’ This can include events that could reasonably be expected but do not have to be definitely foreseeable.

Some of the information relating to health and safety is likely to be environmental information and therefore exempt under section 39 of the Freedom of Information Act. If this is the case, disclosure should be considered under regulation 12(5)(a) of the Environmental Information Regulations 2004 (EIRs).

It is also necessary to bear in mind that requests may include personal information which would be exempt under section 40. For example, disclosure of information which would identify ‘whistleblowers.’

Section 38 is subject to the public interest test, for more on which see below.

In some circumstances it may be appropriate to neither confirm nor deny whether the requested information is held, if confirming whether or not information is held would itself risk endangering the health or safety of any person.

How can disclosure endanger an individual's health and safety?

An act of disclosure may not always in itself endanger the individual directly, the risk will usually be an indirect result such as leading him or her to take steps which create the danger – such as ceasing to take medication, or by enabling a third party to cause harm to others.

An act of disclosure may cause mental harm directly – for example resulting in a sufficient level of shock or distress as to endanger an individual's future mental well-being.

There are many different ways in which disclosure of information could endanger someone's health or safety either directly or indirectly. The following are some examples of such disclosures:

those which would allow individuals, groups or firms to be identified or located and consequently targeted and attacked for their beliefs or practices, including work in controversial scientific areas;

- disclosure of plans and policies relating to the accommodation of individuals, or groups of individuals, where disclosure could lead to their being threatened or harassed (for example, asylum seekers)
- disclosing information about negotiations with kidnappers, where disclosure could endanger the safety of hostages
- information relating to the protection of the Critical National Infrastructure, such as the water supply, national grid, or gas supply from actions intended to cause catastrophic damage and/or cause death or serious injury
- information relating to the identity of informers or undercover officers
- disclosure which may have an adverse effect on public health

- the disclosure of sensitive or graphic information about deceased individuals which could cause serious distress to others such as family members, particularly if they were not previously aware of it

It is important to bear in mind that some people are particularly vulnerable and their health or mental health may be more easily endangered than that of others.

It is also possible that information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied on.

Public interest test

If it is decided that requested information falls within the terms of section 38, the balance of the public interest must be assessed, i.e. the risks to the health and safety of an individual or group would need to be weighed against the public interest in disclosure in all circumstances of the case. Decisions on the public interest should be made on a case-by-case basis.

Given that it is never in the public interest, of itself, to endanger the health and safety of any individual, the following considerations may also be relevant:

- the size of the risk involved, and the extent to which steps might be taken to reduce or manage that risk
- the nature and seriousness of any resulting outcome were that risk to come about – i.e. it would be difficult to class a high risk of a trivial injury to an individual as 'endangerment'
- the possibility that disclosure would help to protect the health or safety of other individuals
- the possibility that the anticipated danger could be prevented or managed by other, reasonable, precautions
- whether disclosing information would reduce the potential danger to people by making them aware of various risks and enabling them to take appropriate action
- withholding the information is likely to give the impression that there is something to hide that could undermine public trust

- the recommendations and information supplied by departments with specific responsibilities to inform the public of health and safety issues, are to be trusted and acted upon
- the release of speculative, or incomplete information could mislead individuals or the public at large, causing them to act or fail to act against their own interests

Other statutes and policies

There may be legal prohibitions on disclosing information which would endanger an individual's health or safety. The most relevant examples include:

- Rehabilitation of Offenders Act 1974
- Health and Safety at Work Act 1974 (Section 28)
- Human Rights Act 1998
- Data Protection Act 1998

A public body can potentially face a claim for damages if it discloses information in circumstances which could foreseeably injure someone. In such cases, likely to be very rare, legal advice should be sought.

Consultation

Where information held has been supplied by a third party it may be advisable to consult that party regarding possible risks. It may also be advisable to consult those potentially affected by identified risks.

Relationship with other exemptions

Several other exemptions are likely to be relevant when applying section 38:

- **Sections 23 and 24:** (Information dealing with security matters: National security) – information relating to emergency planning, or counter-terrorist policies may well originate from the security service and as such fall under the section 23 absolute exemption. Otherwise, it may be exempt under section 24.
- **Sections 30 and 31:** (Investigations and law enforcement) – when information relates to an investigation or proceedings or when the disclosure might prejudice matters such as the administration of justice, prosecution of offenders or the prevention or detection of crime.
- **Section 32:** (Court records) – restrictions on the disclosure of information contained in court records may be relevant to the protection of the health and safety of individuals, for example victims and witnesses.
- **Section 39:** (Environmental information) – where information is environmental information it is exempt under the Freedom of Information Act and must be considered under the Environmental Information Regulations (EIRs). Section 12(5)(a) of the EIRs exempts information which would adversely affect public safety. Regulation 13 protects personal data.
- **Section 40:** (Personal information) – much of the information that could lead to a person's health or safety being endangered is personal information which would be exempt under section 40 of the Freedom of Information Act and must be dealt with under the terms of the Data Protection Act. In most instances this will prevent the disclosure of the most obvious kinds of personal information which could result in harm to an individual's health or safety such as their address and family details. In particular, the Data Protection (Subject Access Modification)(Health) Order 2000 (SI 2000/413) covers information which relates to the physical or mental health of an individual where disclosure would be likely to cause serious physical or mental harm to that or another individual.
- **Section 44:** (Statutory bars) – There are also statutory bars on the release of some information to protect the health and safety of individuals (for example, preventing release of names of victims of sexual offences.)

