MANUAL OF GUIDANCE

FREEDOM OF INFORMATION

ACPO
Version 3
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<td>ACPO</td>
<td>Association of Chief Police Officers</td>
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<td>ACPOS</td>
<td>Association of Chief Police Officers of Scotland</td>
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<tr>
<td>BCU</td>
<td>Basic Command Unit</td>
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<td>BNFL</td>
<td>British Nuclear Fuels Limited</td>
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<td>CCRC</td>
<td>Criminal Cases Review Commission</td>
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<td>CHIS</td>
<td>Confidential Human Intelligence Source</td>
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<td>CICA</td>
<td>Criminal Injury Compensation Authority</td>
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<td>CJA</td>
<td>Criminal Justice Act</td>
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<td>CPIA</td>
<td>Criminal Procedures and Investigation Act</td>
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<td>CPS</td>
<td>Crown Prosecution Service</td>
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<td>CRB</td>
<td>Criminal Records Bureau</td>
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<td>CRP</td>
<td>Central Referral Process</td>
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<td>CRU</td>
<td>Central Referral Unit</td>
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<td>DCA</td>
<td>Department of Constitutional Affairs</td>
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<td>DDA</td>
<td>Disability Discrimination Act</td>
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<td>DOE</td>
<td>Department of the Environment</td>
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<td>DP</td>
<td>Data Protection</td>
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<td>DPA</td>
<td>Data Protection Act</td>
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<td>DTI</td>
<td>Department of Trade and Industry</td>
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<td>EIR</td>
<td>Environmental Information Regulations</td>
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<td>FCO</td>
<td>Foreign and Commonwealth Office</td>
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<td>FOI</td>
<td>Freedom of Information</td>
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<td>FOIA</td>
<td>Freedom of Information Act</td>
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<td>GCHQ</td>
<td>Government Communications Headquarters</td>
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<td>GPMS</td>
<td>Government Protective Marking Scheme</td>
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<td>IC</td>
<td>Information Commissioner</td>
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<td>ICO</td>
<td>Information Commissioners Office</td>
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<td>ILEX</td>
<td>Institute of Legal Executives</td>
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<td>IPCC</td>
<td>Independent Police Complaints Commission</td>
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<td>LA</td>
<td>Local Authority</td>
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<td>MCA</td>
<td>Medicines Control Agency</td>
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<td>MOD</td>
<td>Ministry of Defence</td>
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<td>MOG</td>
<td>Manual of Guidance</td>
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<td>MP</td>
<td>Member of Parliament</td>
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<td>MPS</td>
<td>Metropolitan Police Service</td>
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<tr>
<td>NCND</td>
<td>Neither Confirm Nor Deny</td>
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<tr>
<td>NCSB</td>
<td>National Co-ordinator of Special Branch</td>
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<tr>
<td>NDL</td>
<td>Non-Disclosure Log</td>
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<tr>
<td>NFA</td>
<td>No Further Action</td>
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<td>PII</td>
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<td>Public Interest Test</td>
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<td>Acronym</td>
<td>Description</td>
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<td>PITO</td>
<td>Police Information Technology Organisation</td>
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<td>PSC</td>
<td>Public Sector Comparator</td>
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<td>RAF</td>
<td>Royal Air Force</td>
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<td>RICS</td>
<td>Regional Intelligence Co-ordinator</td>
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<td>RIPA</td>
<td>Regulation of Investigatory Powers Act</td>
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<td>RRAA</td>
<td>Race Relations Amendment Act (2000)</td>
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<td>RSO</td>
<td>Registered Sex Offender</td>
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<td>SAR</td>
<td>Subject Access Request</td>
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<td>SB</td>
<td>Special Branch</td>
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<td>SCP</td>
<td>Safety Camera Partnership</td>
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<td>TCG</td>
<td>Tasking and Co-ordinating Group</td>
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Section 1

Executive Summary & Instructions
EXECUTIVE SUMMARY

This manual has been created by the Association of Chief Police Officers (ACPO) to assist and support forces across England, Wales and Northern Ireland, in implementing and operating within the Freedom of Information Act 2000 (FOIA).

The Act is an opportunity to allow the Police Service to become more transparent and accountable at every level, thereby forging closer links with the communities it serves.

ACPO has taken its responsibilities under the Act seriously, but there is still a long way to go to ensure consistency in interpretation across the service in the coming years. The significance of this legislation is immense. It must be thoughtfully prepared for and continually monitored. If implemented positively, it will convey openness, increase public confidence and improve the quality of information and how it is handled. Since information is the lifeblood of the Service, this is a great opportunity for all forces.

The general public and even members of our staff often see the Police Service as being secretive. This can breed distrust of what the Service is striving to achieve.

It is essential that forces are seen to be as open and transparent with their information as possible, since the public has a right to know that their public services are being run efficiently and effectively. The concept of public service is about the right of all to decide what matters of general concern are. This, however, needs to be balanced against the needs of the organisation to maintain the secrecy of certain information which, if released into the public domain, would impact on the Service’s operational effectiveness and make it harder for the core function of law enforcement to be fulfilled.

Releasing information that would compromise operational effectiveness and the force’s ability to enforce the law is obviously not in the interests of the public. Hence the Act has made provisions to ensure that its implementation will not have an adverse impact on the force’s business. This balancing act of what is in the public interest against what would harm organisational effectiveness will prove to be a difficult test to administer fairly and consistently.

Under the FOIA, the 44 Home Office Forces in England, Wales and Northern Ireland are each treated as separate public authorities. However, whilst each force is a separate business, we all carry out the same policing function, just in different geographical areas.

All forces use ACPO policies and guidance. Therefore, it is essential that the Act is interpreted in the same way by each force, so as to ensure consistency and equality in the decision-making process, regardless of where and from whom the request originates. Where information is promulgated from either ACPO or another central body on how police forces should carry out certain parts of their business, it is important that all forces disclose material only after proper consultation has taken place with that central body.

This manual has been designed with these concerns in mind. It has been written as a comprehensive resource for Freedom of Information (FOI) practitioners. It contains detailed guidance and advice on how to deal with FOI requests, complaints and explains how the Police Service should proactively publish information through their publication schemes. It also provides ACPO guidance on interpretations of exemptions and categories of information that the Police Service sees as important and in need of protection. Crucially, the manual includes a section defining the types of requests that ACPO must be informed about. These must be
referred centrally so that, on occasions, a national response on behalf of the service may be co-ordinated.

The ACPO interpretation of the Act contained within this manual has been researched heavily by a large number of practitioners and also draws on decisions and developments from other countries that have similar and more mature Freedom of Information legislation. There has also been considerable consultation with, and guidance from, the Information Commissioners Office (ICO) and the Department for Constitutional Affairs (DCA).

As the Freedom of Information Act is brand new to this country, ACPO expects and welcomes challenges to the guidance contained within this manual in the future. Where legal precedents are set or further guidance is given, this manual will be amended centrally and re-issued to practitioners and decision-makers.

This Manual of Guidance (MOG) has been ratified by ACPO and therefore must be followed by forces, unless there are exceptional circumstances. Ensuring the Police Service gives a consistent response to a requestor, regardless of where they live in the world and the force to which the request is directed, is critical.

ACPO is committed to the fair treatment of people regardless of their age, colour, culture, disability, ethnic or national origins, gender, race, religious beliefs or sexual orientation.

The content of this manual has been created to ensure that every individual or group is treated equitably and consistently.

When applying the guidance within this manual, practitioners must consider the legislative requirements that must guide decision making to avoid discriminating against any group or individual.

**ACPO POLICY**

Where it is not in the public interest to release information held by the Police Service, the information will be retained. The public interest is not what interests the public but what will be of greater good, if released, to the community as a whole.

It is not in the public interest to disclose information that may compromise the force’s ability to fulfil its core function of law enforcement, prevent or detect crime or protect life and/or property.
FREEDOM OF INFORMATION ACT 2000
The FOIA applies to all public authorities in England, Wales and Northern Ireland. It requires the release of information to the public relating to many areas of a public authority’s operation. This general right of access came into effect on 1st January 2005.

LEGISLATIVE REQUIREMENTS

The Freedom of Information Act confers on public authorities two distinct responsibilities:
- The duty to confirm or deny whether the information requested exists; and
- The duty to communicate the information.

The two main instruments through which the release of information is achieved are:

- **Creating and maintaining a publication scheme**
  The purpose of this is to make available a significant proportion of disclosable information routinely and accessibly without waiting for it to be requested.

- **Providing a general right of access to all types of ‘recorded’ information held by public authorities**
  Under the terms of the Act, public authorities are required to make available requested information (subject to a range of exemptions) to any individual or organisation anywhere in the world.
  - To foster a culture of openness;
  - Improve the democratic process by giving greater access to information about the workings of Government and public bodies;
  - To make Government more accountable;
  - To improve transparency and accountability and to limit complacency and mal-administration;
  - To enhance public participation in, and perception of, the democratic process;
  - To encourage public discussion and understanding of the process of government; and
  - To modernise, with other policies, the process of Government in the age of the Internet where much more information is expected to be published regularly and made available electronically.

The FOIA give a general access to information to the public. However, the Act makes provision for withholding information that is crucial to maintaining the core activities of a public authority.

**Information will not be released if it will affect the ability of the organisation in question to undertake its key functions.**

Underlying all of this is the presumption that information will be released in-keeping with spirit of the legislation which emphasises a positive approach disclosure.
### FOIA and Exemptions

Specifically, there are 23 exemptions that may be applied to decline legitimately the release of information under Freedom of Information. For the Police Service, some exemptions will be more relevant and applicable than others.

Applying exemptions under the FOIA is complicated. Detailed guidance is provided in this manual.

Some exemptions are ‘absolute’ and no release is required under Freedom of Information legislation (although discretionary release is still possible).

Other exemptions are ‘qualified’ and information is subject to the application of the public interest test (PIT) to determine whether or not disclosure should be made.

Where the public interest in applying the exemption outweighs the public interest in disclosure, then the information may be withheld. However, where the opposite is true following the application of the public interest test, then information must be disclosed.

- The FOIA applies to information and not just documents;
- The FOIA applies to written work and text documents, spreadsheets, photographs, exhibits, tapes, videos, DVDs, CD-roms; and
- The FOIA applies to structured and unstructured information.

### FOIA: What’s Covered?

- The FOIA applies to information and not just documents;
- The FOIA applies to written work and text documents, spreadsheets, photographs, exhibits, tapes, videos, DVDs, CD-roms; and
- The FOIA applies to structured and unstructured information.
ENVIRONMENTAL INFORMATION REGULATIONS (EIR)

LEGISLATIVE REQUIREMENTS

2.(1)(a)
...environmental information’ has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements by any of the matters referred to in (b) and (c).

(5)
For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(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;

(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 out 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 the Regulations to disclose it; and

(iii) has not consented to its disclosure; or

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

(6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and it held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).
ACPO BEST PRACTICE ADVICE
It is ACPO Policy that requests for information that fall under EIR will be handled in exactly the same way as Freedom of Information requests.

The main differences between the FOIA and the EIR may be identified as follows:

- The key difference is that, unlike FOI requests, EIR requests may be received verbally and there is no legislative requirement for them to be written down.

- Under FOIA, the public interest test applies only in the case of qualified exemptions. Under EIR, the public interest test applies to all of the exceptions.

- The duty to confirm or deny applies in all cases under EIR except where there would be an adverse affect on international relations, defence, national security, public safety and confirming or denying would therefore not be in the public interest.

- Under EIR, any disclosure that would adversely affect the rights of an individual not obliged to provide the authority with information would not be entitled to disclose where the individual affected has not consented to disclosure.

- There are additional exceptions under EIR that are not specifically covered under FOIA such as exceptions to disclose in relation to internal communications and exceptions on disclosure where release would adversely affect intellectual property rights or the protection of the environment. Under EIR, there are no exceptions that link the release of information with a prejudicial impact on the economic interests of the UK or part of the UK

- Under EIR, the applicant has 40 working days to appeal any decision made by the authority and the authority must respond to any complaint within 40 working days.

List of EIR Exceptions
3(a) Exempt personal data in regulation 12.
4(b) Manifestly unreasonable in regulation 12.
4(c) Too general in regulation 12.
4(d) Work in progress / incomplete data in regulation 12.
4(e) Internal communications in regulation 12.
5(a) Adverse effect on international relations, defence, national security or public safety in regulation 12.
5(b) Adverse effect on course of justice or conduct of inquiries in regulation 12.
5(c) Adverse effect on intellectual property rights in regulation 12.
5(d) Impinges on confidentiality of a public authority's work (where provided by law) in regulation 12.
5(e) Impinges on confidentiality of commercial or industrial information (where provided by law to protect a legitimate economic interest) in regulation 12.
5(f) Adverse effect on interests of person who provided the information (subject to
5(g) Adverse effect on protection of environment to which information relates in regulation 12.

**DEFRA Link**

**ICO Link**
HOW TO USE THIS MANUAL

INTRODUCTION
This manual has been put together by the ACPO National Project Team to provide a comprehensive guidance tool for all Freedom of Information decision-makers.

It is crucial that there is a consistency of approach in decisions around the release of information under the FOIA and also in the application and enforcement of FOI exemptions.

Whilst it is ACPO’s intention to embrace the spirit of the legislation, encompassing openness and transparency, it is also critical that the Police Service protects information crucial to its ability to fulfil the key function of law enforcement.

To this end, there are certain categories of information that must be protected vigorously across the Police Service. Significantly, release by one force of a category or type will set a precedent that will make it much harder for other forces to withhold similar information.

The Manual of Guidance thus forms an integral part of the national response to the FOIA and provides the basis for the consistent and coherent application of the Act. The other key tool designed to assist in national co-ordination is the Central Referral Process (CRP).

The CRP will allow strategic monitoring of requests and an established procedure for referring ‘high risk’ applications for information to a central source. This will ensure that requests for information that have Service-wide implications or require a Service-wide response are identified, recorded and managed. Not only will this approach assist in the identification of possible MOSAIC attacks, it will also guarantee that sensitive and vulnerable material is protected from release.

This is the first time that such a national and co-ordinated approach has been adopted to deal with the implementation of a single piece of legislation. This in itself is a recognition of the impact this Act may have on the operation of the Police Service as a whole should material be mistakenly released into the public domain.

This Manual of Guidance is a living document that will be regularly updated and adapted to reflect rulings made by the Information Commissioner (IC) and the evolution of the legislation as it is challenged and reviewed.

Manual Objectives:
• To ensure consistency of approach in applying FOI principles, making FOI decisions and enforcing FOI exemptions;
• To act as a user’s guide;
• To provide a comprehensive resource for FOI Officers;
• To ensure consistency in publishing information into the public domain via force publication schemes and in response to FOI enquiries; and
• To define those requests that must be referred centrally due to their possible impact on the Police Service as a whole

MANUAL STRUCTURE
This manual is structured around two key areas:

• Part 1 - A comprehensive review of all FOIA processes around the implementation of the FOIA and guidance on ACPO Best Practice Recommendations; and
• Part 2 - A detailed analysis of all FOIA exemptions, the legislative requirements, ICO guidance and ACPO policy.

PART 1

The key processes that are covered are those relating to:
• The publication scheme;
• Making a request under Freedom of Information;
• Defining an FOI request;
• Acknowledging a request and providing assistance;
• Timeliness in dealing with requests;
• Fee regulations;
• Transfer of requests;
• Communicating information;
• Refusing a request;
• The decision-making process;
• Guidance on charging for an FOI request;
• Dealing with vexatious/repeated requests; and
• A review of the complaints process.

Each of the key processes is reviewed in detail under the following headings:

**Legislative Requirements**
Under this heading, the specific section of the Act is presented, together with any other relevant information.

**ACPO Policy**
ACPO interpretation of the Act and ACPO policy are covered under this heading. This includes the ACPO interpretation of ‘business as usual’ in respect of requests for information.

In addition, there are a number of template letters available under various headings to deal with processes and these are denoted in the main text by the letter symbol. These letters have been approved by ACPO at national level.

**ACPO Best Practice Advice**
Falling under this heading is detailed guidance on best practice in relation to each of the key processes.

All boxes are colour coded for ease of reference and these are consistent throughout the manual.

**Additional Process Sections**
Two additional areas are covered within the process section. These have been written to cover in detail the processes and procedures that will guide requests for information held by two of the most likely targets under FOI: Special Branch (SB) and Safety Camera Partnerships (SCP).
These sections have been written following extensive collaboration between the ACPO National FOI Team operating on behalf of the Police Service and representatives from both of these bodies.

PART 2
The second half of the manual is dedicated to FOI exemptions.

These are considered and reviewed in detail and their relevance to the Police Service is assessed. The colour-coding originated in Part 1 is continued throughout this section.

Specifically, this part of the manual will deal with:

- Applying the public interest test;
- A general review of Freedom of Information exemptions;
- An overview of absolute and qualified exemptions;
- An overview of class-based and prejudice-based exemptions; and
- A detailed explanation of Freedom of Information exemptions in numerical order.

Legislative Requirements
Under this heading, each specific section of the Act is included for reference, together with any additional information or comments.

ICO Guidance
Where available from the Information Commissioners Office, guidance has been inserted.

ACPO Policy
Under each exemption, a section is included to outline ACPO Policy.
Section 2

Publication Scheme
Publication Scheme

Introduction
The publication scheme is a key requirement under the FOIA.

Section 19 of the Act places a duty on public authorities to adopt, implement, operate and maintain a publication scheme. All 44 police forces have followed the model publication scheme that has been up and running since 1st July 2003, the content having been approved by the Information Commissioner.

ACPO Policy

Classes of Information Approved for Force Publication Scheme:

- Minutes;
- Policies;
- Performance;
- Names and Details of Senior Personnel; and
- Plans, Objectives, Strategies.

All police forces, when making information available on the publication scheme, must exercise caution.

Where one force publishes a class of information, other forces are less likely to be able to withhold information in the same class.

If an individual force wishes to add a new class of information to their publication scheme, this must be proposed at, and authorised by, the relevant regional practitioners group. It will then be forwarded to the ACPO Data Protection (DP) and FOI group for ratification.

The publication scheme should be driven by requests received. Forces should consider posting information to their publication schemes once information has been released in response to a request.

The publication scheme should contain categories of information that will be of interest to the public. Forces may add as many categories as they wish without any formal approval but must not add classes of information since this will set a precedent that the remainder of the Service is obliged to follow. By making a significant proportion of information available, public authorities can significantly reduce the number of individual requests by citing s21 of the Act. This states that information is exempt from disclosure if it is ‘readily available’ elsewhere.

The approach to releasing information via the publication scheme should be proactive. Public authorities must also ensure the content of publication schemes has been evolved with the public interest in mind. Maintaining the publication scheme is an important responsibility for Freedom of Information Officers. There is a need for constant review of material published and a constant monitoring of requests with a view to adding appropriate information to the scheme as required.
**LEGISLATIVE REQUIREMENTS**

s19 of the Act places a duty on public authorities to adopt, implement, operate and maintain a publication scheme. All 44 police forces have followed the model publication scheme that has been up and running since 1\textsuperscript{st} July 2003, the content having been approved by the Information Commissioner.

The force publication scheme should include:

- Everything that there is a legal duty to publish;
- Information that has already been published;
- Information that would be disclosed under current access to information regimes;
- The classes of information that the public authority publishes or intends to publish;
- The manner in which that information in each class is published or is intended to publish; and
- Whether the material is, or is intended to be, available to the public free of charge or on payment.

The classes of information that appear on force publication schemes have been approved by the Information Commissioner and have been published since July 2003. However, the publication scheme and its content will be subject to review every four years.

Between reviews, public authorities can add classes of information to their publication scheme but cannot remove them without the Information Commissioner’s approval.

**PUBLICATION SCHEMES – SUMMARISED TABLE OF INFORMATION**

<table>
<thead>
<tr>
<th>Principles</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Classes of Information</strong></td>
<td>Within each class of information, the public authority must be willing to disclose everything that falls within the class.</td>
</tr>
<tr>
<td></td>
<td>As new pieces of information become available within each class, they will need to be published in accordance with the publication scheme.</td>
</tr>
<tr>
<td></td>
<td>Classes of information cannot be changed, redefined or removed until the formal review date.</td>
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<tr>
<td></td>
<td>It is possible to add classes of information to the publication scheme without reference to the Information Commissioner. There is a need, however, to inform the Information Commissioner of modifications.</td>
</tr>
<tr>
<td></td>
<td>There is a requirement to take steps to ensure outdated material is not published.</td>
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<tr>
<td></td>
<td>Entire classes may have to be excluded from publication scheme because a large proportion of the information covered is, or could be, exempt information under the Act.</td>
</tr>
<tr>
<td></td>
<td>Publication scheme classes cannot be based on internal needs or historical filing where this does not support the principle of ‘reasonable accessibility’.</td>
</tr>
<tr>
<td></td>
<td>Information published on the publication scheme should not relate just to services: it must also include information about the internal structure, decision-making processes and how key appointments are made.</td>
</tr>
<tr>
<td><strong>IC Approval</strong></td>
<td>Approval can be revoked by the Information Commissioner with six months notice.</td>
</tr>
<tr>
<td><strong>Review</strong></td>
<td>Publication schemes must be reviewed periodically.</td>
</tr>
<tr>
<td><strong>Presentation and Availability</strong></td>
<td>Attention should be given to making it easy for the general public to understand. Web access is not considered to be universal enough at this stage: therefore, paper copies must be made available on request. Hard copy information does not need to replicate all of web content. The publication scheme should give clear description of how the scheme is structured and state where documents covered by scheme can be accessed.</td>
</tr>
<tr>
<td><strong>Disclosure</strong></td>
<td>Any individual disclosure will result in the inclusion of that information in the authority’s publication scheme.</td>
</tr>
<tr>
<td><strong>Fees</strong></td>
<td>An authority may charge for documents on its publication scheme but it must be made explicit what the requester is expected to pay for, in what format the information is available and the charges incurred, including postage. If not covered by publication scheme, any fee charged must be determined in accordance with fee regulations, details of which will be added when available.</td>
</tr>
</tbody>
</table>
ACPO BEST PRACTICE GUIDELINES

Review and Monitoring of Publication Schemes
All publication schemes should be reviewed regularly. There are various stages of review:

- A frequent review to check accuracy and currency of information. This could be done when adding any new information.
- A detailed review of what information is published through the scheme and whether any new information or even new information classes should be added. It is recommended that this is done at least every 6 months. Categories may be added at the discretion of individual forces.
- A review against requests made is also recommended: does the publication scheme reflect the information being requested? If not, then ensure the publication scheme is the forum for that type of information to be published.

Any reviews completed should be recorded formally so that this information may be provided to the Information Commissioner if requested.

The review should focus on information available through the information classes including:

- Checking any links to other sites/pages are still current;
- Checking that the latest versions of documents (such as policies) are displayed; and
- Checking that any old material has been archived appropriately.

Using Monitoring Information to Improve Publication Schemes
It will be useful for forces to know what information classes are most frequently accessed. If possible, forces should approach web managers with a view to monitoring documents and/or information downloaded from the publication scheme. By recording information about hits on classes of information and individual documents contained therein, the most relevant, interesting and useful information may be identified. The results of this monitoring process should then be fed back into the regional group.

Additionally, forces should provide a feedback form as part of their publication schemes to encourage user feedback.

In addition, it is best practice to encourage feedback on the site. This feedback should be used to improve the site. Genesis may then be used to share feedback with other forces to allow others to improve and update publication schemes where appropriate.

Adding Additional Information
The topic of publication schemes will be a standard agenda item for all regional meetings. Forces can then consider the results of their publication scheme reviews, and discuss additions/changes to schemes.

This is particularly important for adding new items and to ensure consistency: if one force releases information, then other forces are less likely to be able to withhold similar information.

Forces considering the addition of new information classes should raise their intention through the regional chair, who will then take it to the DP/FOI national forum held quarterly. No additional information classes will be added without ACPO approval, therefore ensuring consistency. If adding a class of information is deemed to be urgent, then this should be taken up with the national co-ordinator.
Publication of Information Following a Request
Following a request, any information released to the applicant becomes public information. It may therefore be appropriate for this information to be published through the force publication scheme to reduce the volume of similar requests.

It may not be practical to publish every single piece of information after one request: this may create a larger volume of information than can be handled. It is recommended that each force displays a list of requests received and the information available following that request.

Once completed, serious consideration should be given to making the information available directly from the website or other sources.

Multiple requests on particular subject areas should be noted and passed on to other forces via the relevant regional group and the Genesis database. The chair may then report the trend at national level. This will allow for regional and national trends in requests to be identified to feed the debate on compulsory additional classes that might be added to the publication scheme for all police forces for frequently requested information.

Disclosure Logs
Consideration should be given to publishing a disclosure logs that details all releases under FOI. The model disclosure log devised by ACPO is recommended.

Charging for Information
Guidance for charging for the provision of information is available separately, but all forces should consider an electronic payment facility through their websites.

Format of Publication Schemes
Publication schemes should be highly prominent on force websites and they must be easily accessible. The Audit Commission has stated that the publication scheme is the main interface between the public and the authority’s information.

There is a requirement for a high-profile link to each publication scheme through the front page of each force’s website. The scheme should be easily identifiable on each site and all forces should adopt the same wording: ‘Freedom of Information’, rather than ‘FOI’ or ‘Publication Scheme’.

In accordance with the Act, consideration should be given to having alternative formats of the scheme available for those who are unable to access or use the Internet. For example, if an applicant is unable to access an electronic version, this should be sent in hard copy or alternatively, a hard copy of the scheme could be available in public libraries. To prevent major amendments being required to these formats, these should be limited to the content available through the scheme, rather than a listing of all material available.

Copyright Issues
Information available through the publication scheme will normally be subject to copyright protection. By supplying individuals with information under the Act, forces are not automatically giving the recipient a right to re-use that information in any way that may constitute a breach of copyright regulations.

All information owned by the force is covered by Crown copyright. It is recommended that every release of information including that published on the publication scheme has the following copyright wording attached to it:
‘(Force name), in complying with their statutory duty under sections 1 and 11 of the Freedom of Information Act 2000 to release the enclosed information, will not breach the Copyright, Designs and Patents Act 1988. However, the rights of the copyright owner of the enclosed information will continue to be protected by law. Applications for the copyright owner’s written permission to reproduce any part of the attached information should be addressed to The Force Solicitor, (force name and address)’.

Further information on copyright issues in relation to publication schemes can be found at: www.hmso.gov.uk/copyright/guidance/gn_19.htm

Information Held on Publication Schemes
Policies
All force policies must be published on the publication scheme.

The ACPO policy template acts as a guide to forces on the content of a policy. However, forces should give consideration to providing guidance to policy writers, stressing the importance of making policy documents easily understandable and ensuring that any tactics are contained within separate procedure documents.

All forces must publish policies in their entirety, with only information covered by an exemption removed before publication. Policy summaries are not acceptable.

Procedures relating to high-risk areas will not be published. However, individual forces may publish low-risk procedures.

Timescales
All information published should be available for a minimum of one year. Following that time, a list of archived information should be available so that the public can still view what has been previously provided and what would be available upon request.

For items such as minutes, consideration should be given to the frequency of the meetings, and also the subject matter of the meetings. (For example, meetings involving financial decisions could be kept for longer, in line with legal retention periods).

For more information, refer to Appendix A.
Section 3

The Request Process
# DEFINING AN FOI REQUEST

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th>What s8 of the Act States:</th>
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<tbody>
<tr>
<td></td>
<td>(1) In this Act any reference to a ‘request for information’ is a reference to such a request which-</td>
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<td></td>
<td>(a) is in writing,</td>
</tr>
<tr>
<td></td>
<td>(b) states the name of the applicant and an address for correspondence, and</td>
</tr>
<tr>
<td></td>
<td>(c) describes the information requested.</td>
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<td></td>
<td>(2) For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request –</td>
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<td></td>
<td>(a) is transmitted by electronic means,</td>
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<td></td>
<td>(b) is received in legible form, and</td>
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<td></td>
<td>(c) is capable of being used for subsequent reference.</td>
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<table>
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<tr>
<th>The Basics</th>
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<tbody>
<tr>
<td>The Act gives any individual anywhere in the world the right to information held by the Police Service.</td>
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<tr>
<td>The Act gives two related qualified rights – the right to be told whether the information is held and the right to receive the information.</td>
</tr>
<tr>
<td>The right of access applies regardless of the purpose of the application.</td>
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</tbody>
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<table>
<thead>
<tr>
<th>What’s Covered?</th>
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<tbody>
<tr>
<td>To be valid under s8 of the Freedom of Information Act, requests:</td>
</tr>
<tr>
<td>• Must be made in writing;</td>
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<tr>
<td>• Must clearly describe the information being sought;</td>
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<tr>
<td>• Can be made from anywhere in the world;</td>
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<tr>
<td>• Can be made by an individual or an organisation;</td>
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<tr>
<td>• Can be made by letter, fax or email;</td>
</tr>
<tr>
<td>• Must be legible; and</td>
</tr>
<tr>
<td>• Must contain the name of the applicant and a return address.</td>
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<tr>
<td>To be valid under the Freedom of Information Act, requests do not:</td>
</tr>
<tr>
<td>• Have to be written on a special form;</td>
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<tr>
<td>• Need to mention the Act; or</td>
</tr>
<tr>
<td>• Need to refer to ‘Freedom of Information’ in any way.</td>
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</tbody>
</table>

The Freedom of Information Act:
• Covers records capable of recovery in any form.
• Covers information not data or documents.
• Covers information in any format, no matter how it is recorded.
• Is fully retrospective: as long as the public authority has the information, it can be requested.

All information, no matter how recorded, is subject to the FOIA. This includes written records, typed, handwritten, scribbled notes, e-mails, flip-charts, videos, audio tapes, computer tapes, logs, answer phone messages, tapes of telephone conversations and archived records.

Under the FOI, any information, documentation or record that is produced internally by a public authority, or held by contractors or third parties on behalf of the public authority, is covered by the
Note:

All information held by staff associations, such as the Police Federation, Unison, Black Police Officers Associations, Gay and Lesbian Association etc, will not be covered by the Act even though the information may be held on police servers or premises, as long as the information is only for the sole use of those associations or unions.

However, if the information is used or accessed by the police force to execute its functions as an organisation, then it would be deemed as being held by the Police Service and would, therefore, be open to disclosure under the FOIA.

ACPO POLICY

ACPO Definition of a Request:

To process a request under the Act where the request does not stipulate the FOIA is being used, ACPO insists that:

- It meets the criteria in s8 of the Freedom of Information Act; and
- The information requested is not a normal business process (on payment or otherwise) for the service and therefore reasonably accessible to the applicant under s21 of the Act. (These would include information requests from partner agencies such as the Crown Prosecution Service (CPS), Court Service, local authorities, Independent Police Complaints Authority (IPCC), other government bodies such as the Home Office, requests for road traffic incident reports, recruitment enquiries and enquiries that are routinely answered currently etc). A full list of requests that may be considered under normal business processes may be found in the section of this manual entitled ‘ACPO Business as Usual Enquiries’; and
- (i) Which results in the release of information (in any media); or
- (ii) Results in information being withheld under an exemption from the right of access; or
- (iii) The request is not proceeded with because the department estimates the cost of complying would exceed the appropriate limit in accordance with s12 of the Act; or
- (iv) The request is not processed because the department is relying on the provisions of s14 of the Act (vexatious or repeated); or
- (v) Where a search is made for the information sought in the request and it is found that none is held.
**ACPO POLICY**

**ACPO ‘Business As Usual’ Philosophy**

Requests for information received as part of the following processes should be handled as routine business and not formally recorded as statutory requests under FOIA:

- Information requested by local authorities and other statutory agencies in line with crime and disorder protocols and the functions of multi-agency public protection panels (all other ministerial/MP/LA/councillor requests for information through FOI).
- Formal written questions, the answers to which are provided in full and published.
- Any request written purely seeking a view or comment on an issue.
- Information requested by other public authorities (who do not stipulate the request is under the FOIA) in relation to information sharing on individuals or law enforcement activities.
- Information requested from private companies who are providing out-sourced services to forces.
- Provision of court welfare reports to courts for Child Access Enquiries.
- Data Protection Subject Access Requests (SAR).
- Probation service welfare reports/supply of pre-cons to probation service (including victim personal statement scheme).
- Road traffic incident disclosures to solicitors, insurance companies and loss adjusters.
- Information supplied to insurance companies and loss adjusters under the ACPO/ABI Memorandum of Understanding.
- Information requested by the Passport Agency in line with the Memorandum of Understanding.
- Third party prosecutions (where pre-cons are supplied) by statutory agencies such as Inland Revenue, Benefits Agency or Customs and Excise etc.
- Prior-court disclosures (Criminal Justice Act - CJA).
- Disclosure to CPS lawyers where it involves prospective, ongoing or previous prosecutions.
- Information requested by courts in relation to ongoing prosecutions (other than CJA go through force solicitors).
- Information requested by coroner’s courts.
- Criminal Records Bureau vetting disclosures.
- Disclosures to victim support service (new agreement).
- Requests from UK police forces in the process of crime investigation or passing of criminal intelligence.
- Requests from overseas police forces (through Force Intelligence Bureau -Interpol or SB).
- Requests from the Fire Service under local agreements for joint investigations of complaints of arson.
- Criminal Injuries Compensation Authority (CICA) Requests.
- Request from external organisations for personnel references.
- Requests from occupational health (where external organisation) about employees working or force policies.
- Requests from trade unions/staff associations in relation to complaints investigation.
- Media enquiries that relate to requests for press lines for ongoing and current investigations.
- Requests for recruitment information.
Defining a Complex Request

- Requests for force pre-printed leaflets/any published information.
- Requests about special service agreements from sports stadia or other public entertainment venues.
- Requests for information made by Criminal Cases Review Commission (CCRC).
- Routine requests from victims or witnesses on the progress of crime enquiries.
- Disclosures in response to court orders.
- Requests that relate to the work of the Motoring Ticket Office.
- Any request referring to the Police Mutual Assurance Society.
- Any statutory requests for information under s21 FOIA that require existing public disclosure of information.

By contrast, a complex request that should be dealt with under the FOIA may be characterised by requests where:

- Significant co-ordination internally and/or externally is required in order to retrieve information, apply any exemptions and respond to the applicant – this includes requests transferred in and out of the individual force.
- The time taken to retrieve the information is estimated to be at or above the level at which charges may be applied.
- The application involves the retrieval and supply of information in special formats, e.g. CD, video tape, photographs.
- The application is suspected to be vexatious or repetitive, and/or part of a campaign or ‘mosaic’ series of requests.
- The application seeks personal data concerning the applicant (SAR).
- The application is a mixed SAR, EIR and/or FOIA request.
- Involves decision-making about a qualified exemption.
- Involves the redaction of any information.
- The use of the FOIA is, or is likely to, attract significant media interest, or in cases that may set a precedent for the Police Service generally.
- It is for any other reason desirable that a national ACPO response is made in relation to the request.

Questionnaires

Following advice from the Information Commissioners Office, questionnaires are not valid FOI requests. It is for each force to determine whether it answers questionnaires generally but there is no legal requirement to do so.
POLICE SERVICE REFERRAL CRITERIA

INTRODUCTION
Following research from countries that have mature FOI legislation and concerns raised by the Police Service, two areas of risk have been identified under the FOIA. These areas have the potential to impact on the quality of service provided by individual forces and also on the Police Service’s ability to undertake its primary role of law enforcement.

The first area of risk is the inappropriate use of the legislation to attack or undermine the organisation. This will take the form of a request under the Act, from either an individual or group, that is meant to impede an individual force’s ability to undertake its core function. These requests can be labelled as vexatious or repeated and further guidance in respect of these types of requests is contained within this manual.

The second area of risk is the inappropriate release of information that would cause damage to the service. This may stem from requests spread across several authorities, all focussing on the same information in the hope that inconsistent interpretation of the Act will result in partial releases from all involved. A lack of consistency across the Service will have an impact on all police forces in the UK and may set undesirable and potentially damaging precedents.

In order to combat these issues the CRP has been developed and ratified by all Chief Constables in the UK. This process will be managed centrally on behalf of ACPO and Association of Chief Police Officer in Scotland (ACPOS). The process is being funded by every force.

Geographically, the CRP will be housed with the home force of the ACPO FOI portfolio holder. However, the service offered is a national resource.

Whilst the referral team has several functions, including offering a single point of contact for the Police Service, advice on best practice and ongoing development of FOI systems and processes, its primary function is the management of the Central Referral Process.

This will involve receiving referrals from all forces under nationally agreed criteria. Decision-makers receiving a request will be put in contact with all stakeholders relevant to the requested information so that fully informed decisions may be made under the terms of the FOIA. This will ensure national consistency in high-risk areas as well as informing the service on lessons learnt from these types of requests.

The referral team will never make decisions on behalf of the authority dealing with a request. The role of the referral team is to identify the stakeholders, gain expert advice from ACPO(S) leads which will be in the form of a comprehensive harm test and ensure all are involved in the decision-making process to assist the receiving authority.

Certain requests will be logged onto the Genesis database. This will contribute to the development of a library of information relating to FOIA requests, allowing experience to be shared amongst forces and appropriate lessons to be learnt across the UK. Access to the Genesis database may be arranged by contacting Centrex.

All s50 appeals received from the ICO must be referred to the CRP Manager. This will ensure all responses consider local and national perspectives.
ACPO POLICY

ACPO Referral Requests

The CRP should be contacted where a request for information is received relating to:

- Any information that might set a precedent;
- Any information that might affect the service nationally;
- Any information relating to terrorism;
- Any information that is of significant media interest;
- Any information contained within an ACPO/ACPOS document;
- Any information that crosses borders or is information held by a number of forces/other authorities;
- Any information relating to Special Branch or the Security Service;
- Any information relating to witness protection;
- Any information concerning Party Political Conferences;
- Any information that impacts on public authorities outside the policing sector;
- Any information relating to Airwave;
- Any information relating to Covert Human Intelligence Sources or covert surveillance techniques;
- Any information where Neither Confirm Nor Deny (NCND) is being considered;
- Any information relating to a PITO project
- Any information relating to the Home Office, Scottish Executive, or Crown Office; or
- Any other request outside of the above list that the receiving authority feels should be referred centrally.
- Any request for deceased persons’ criminal records.
- Any proposed use of s23 and/or s24 exemptions.

In addition, depersonalised details of any alleged internal s77 offence or s65 offence of the Scottish Act and any criminal investigation of an applicant in relation to their request should be notified.

The Central Referral Process must also be informed if, after the release/non-release of information which relates to the above list, a s50 appeal to the ICO is instigated.

The Central Referral Process must also be provided with all details of any s50 Decision Notice issued by the Information Commissioners Officer.

The referral team should be contacted via e-mail at foi.referral@hampshire.pnn.police.uk

The following information must be included in the central referral message:
- Exactly what information is being requested;
- Whether the information has already been obtained;
- Date of receipt of the request and how many days the request has been in the possession of the FOI Officer;
- Contact details for the submitting FOI Officer including name, force details, phone number and e-mail; and
- Details of any internal appeal processes that may have been
instigated in relation to the request.

Upon receipt of the message by the Central Referral Team, further clarification may be sought.

As soon as practicable, the submitting FOI Officer will be contacted by or given details of the relevant stakeholder(s).

Once a decision has been made, the request and the result should be notified to the Referral Team who will ensure it is posted on Genesis and that all forces are directed to it.
Authority receives request that may need referring. (Check referral criteria)

Email Central Referral Process with full details of request. (foi.referral@hampshire.pnn.police.uk)

Is this a CRP Issue?

YES

Is advice known?

YES

Prepare response to referrer.

NO

Advice required from lead group or agency.

Advice obtained.

Prepare response to referrer.

Send response to referrer.

If appropriate, place advice provided in the decision library on Genesis
## ACKNOWLEDGING A REQUEST & PROVIDING ASSISTANCE

| LEGISLATIVE REQUIREMENTS | | |
|--------------------------|--------------------------|
| **What s16 of the Act states:** | It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it. |
| **Duty to Provide Advice and Assistance** | - The Police Service has a duty to provide advice and assistance to applicants as far as would be reasonably expected.  
- Procedures for dealing with requests should be published under the force publication scheme. |
| **Assistance in Making Requests** | Under the FOIA, all staff within an organisation are obliged to provide assistance to any person requesting information. |

| ACPO POLICY | | |
|-------------|--------------------------|
| It is best practice and highly recommended that the applicant is contacted, verbally if possible, to try and assist in identifying the exact information required from the authority. In the case of media organisations, it is recommended that this contact is purely about the request and where the media organisation is asking specific questions about the request process or police force, they should be directed to the Media Services Department. |
| This method has been tried and tested overseas and has been found to save time and effort on the part of the authority and can delight the customer by providing them with exactly what they require. |

Template Letter available (Appendix B1, B2, B3, B4)
ACPO BEST PRACTICE ADVICE

• Experience from other countries suggests that contacting the applicant, preferably by phone, and at an early stage to establish a rapport and clarify any outstanding issues, has a positive benefit. Information may be provided quickly over the telephone and then confirmed by letter where appropriate.

• As with all FOI requests, it is beneficial to maintain good communication with the requester to ensure that the information provided meets their needs. This will ultimately save work and prevent the release of unnecessary information.

When to Give Assistance
Where an applicant is unable to make a request in writing (for instance due to illiteracy, disability or illness), assistance could include advice on where appropriate help and support can be found (e.g. Citizens Advice Bureau). In exceptional circumstances, a note of the request can be made on behalf of the applicant and sent to them for confirmation.

Clarifying Requests
Where a request is ambiguous or the information is unidentifiable, assistance must be given to the applicant to clarify the request. This might include providing an outline of the different kinds of information that may meet the request requirements, access to any available detailed catalogues and indexes, or an explanation of options for further information.

Further Clarification
If advice and assistance has been provided and the force is still unable to identify and locate the requested information, the force is not expected to seek further clarification. Information that has been identified and is not exempt should be disclosed.

Where further clarification has been sought and the applicant has not responded, the force may close off the request after two months if no further clarification is received.
## TIME LIMITS

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<tbody>
<tr>
<td><strong>What s10 of the Act States:</strong></td>
<td></td>
</tr>
<tr>
<td>(1) Subject to subsections (2) and (3), a public authority must comply with s(1) promptly and in any event not later than the twentieth working day following date of receipt.</td>
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<tr>
<td>(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with s9(2), the working days in the period beginning with the day on which the fee is received but the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.</td>
<td></td>
</tr>
</tbody>
</table>
| (3) If, and to the extent that –  
(a) s1(1)(a) would not apply if the condition in s2(1)(b) were satisfied, or  
(b) s1(1)(b) would not apply if the condition in s2(2)(b) were satisfied,  
the public authority need not comply with s1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which the notice under s17(1) must be given. |  |
| (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations. |  |
| (5) Regulations under subsection (4) may-  
(a) prescribe different days in relation to different cases, and  
(b) confer a discretion on the Commissioner. |  |
| (6) In this section –  
‘the date of receipt’ means –  
(a) the day on which the public authority receives the request for information, or  
(b) (b) if later, the day on which it receives the information referred to in s1(3);  
‘working day’ means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom. |  |
ACPO BEST PRACTICE ADVICE

Time Scales
- The Police Service is required to comply with all requests promptly and within 20 working days. It is ACPO policy that where necessary, this will be extended to ensure that no decisions are rushed. It is ACPO's belief that it is better to take time to make a decision and get it right than rush and make an inappropriate decision.
- A 'working day' is defined as any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day that is a Bank Holiday in any part of the United Kingdom.
- Legally, the day of receipt is the date on which the 20 working days time limit becomes effective or the date on which further information that has been reasonably required has been received.
- 'Business as usual' requests will be dealt with as part of the normal business processes of the force. If this process fails the applicant, it is at this point that the enquiry will become a formal request for information under FOI.
- Under the Code of Practice, the Police Service should not delay in responding until the end of the twentieth day if the information could reasonably be provided earlier.

Stopping the Clock
A key difference between absolute and qualified exemptions is that when considering a qualified exemption, there is provision for a 'reasonable time' to reach a decision. The reason for this is that there may be complex public interest considerations when examining information subject to qualified exemptions. This method of extending the time frame is recommended and it is imperative that the requestor is kept regularly informed of progress.

Reasonable time is not defined in the Act - the precise wording of the Act (s. 10(3)) is that release or, where appropriate, confirmation or denial of holding the information is not required 'until such a time as is reasonable in the circumstances'.

If a public authority is to use a 'reasonable time' to reach a decision, they must issue a notice explaining this to the applicant within 20 working days from receipt of the request. That notice should also give a target date for reaching the decision.

Qualified exemptions fall into two types – those where the information involved is class-based, and those where the information is prejudiced-based. These terms are explained in greater detail later in the manual, but below is a brief summary of the action that should be taken in each case.

In the case of class-based exemptions, decision-makers should first consider whether the information falls into the class. If it does, the PIT will be applied to release of the requested information. A 'reasonable time' notice should be issued where it appears that decision is going to be complex. An exemption where this may apply is s30 – Criminal investigations and proceedings.

In the case of prejudice-based exemptions, decision-makers should first decide whether there is, or is likely to be, any harm in the release of the information. If there is, or is likely to be, harm the PIT should be applied. A 'reasonable time' notice should be issued where it appears that decision is going to be complex. An exemption where this may apply is s31 – Law enforcement.

Use of a 'reasonable time' should only be used where the circumstances justify it; there may be many circumstances where PIT decisions can be taken relatively quickly.
There is likely to be a mix of absolute and qualified exemptions in many requests that are received by the Police Service. The decision on retention/release, or on confirmation/denial, must be taken on the absolute exemptions within 20 working days; there is no 'reasonable time' in the case of absolute exemptions. However, there may be circumstances where a decision is made quickly that an absolute exemption does not apply, but qualified exemptions do and a 'reasonable time’ is required to consider the PIT issues.

**ACPO POLICY**

It is ACPO policy to provide applicants with the information they request **as soon as possible**.

The 20-day time compliance period will begin the **day after** the request has been received.

It is ACPO policy that the 20-day compliance time period will begin again upon clearance of the applicant’s cheque - ie. the date on which the fees are officially cleared – where a fee is charged.

Template Letter available (Appendix B5)
FEE REGULATIONS

LEGISLATIVE REQUIREMENTS

What s9 of the Act States:

(1) A public authority to whom a request for information is made may, within the period for complying with s1(1), give the applicant a notice in writing (in this Act referred to as a ‘fees notice’) stating that a fee of an amount specified in the notice is to be charged by the authority for complying with s1(1).

(2) Where a fees notice has been given to the applicant, the public authority is not obliged to comply with s1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.

(3) Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State.

(4) Regulations under subsection (3) may, in particular, provide –
(a) that no fee is payable in prescribed cases,
(b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and
(c) That any fee is to be calculated in such manner as may be prescribed by the regulations.

(5) Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.

ACPO BEST PRACTICE ADVICE - FEES

Deciding Whether a Fee is Appropriate
- The Act does not require charges to be made, but the Police Service has discretion to charge applicants a fee in accordance with the fees regulations (CP s45 Para 19).
- Any fees charged must be made in accordance with the fees regulations except where fees may be charged under any another Act or Memorandum of Understanding (e.g. Data Protection Act 1998).
- The fees regulations do not apply to material made available under the publication scheme, information that is reasonably accessible by other means or where another Act makes provision for charges for information (CP s45 Para 20). In all cases where charges are levied for information, these must be listed within the charging class within the model publication scheme. If this is not done, then the authority must apply the FOI charging regime to information requested.

Charging a Fee for Processing a Request
- Where the receiving force wishes to make a charge, it must provide the applicant with a ‘fees notice’ stating the amount to be paid.
- A fee may be charged for information that is not required under s1(1) because the cost of
If a public authority is making a charge for answering a request, either the marginal cost and/or the cost of disbursements, it has to issue a fees notice to the applicant. The fees notice should be issued in advance of the request being answered, giving an estimate of the costs involved. When an authority issues a fees notice, the applicant has three months to pay. If payment is not forthcoming, the authority does not have to answer the request (s9(2) of the FOI Act).

When a fee is paid, the period from when the fees notice is issued to the receipt of the fees, is disregarded for the purpose of the 20-day compliance time (s10(2)).

Freedom of Information requests have to be answered promptly, and in any event not later than the twentieth working day following date of receipt. However, s10(2) of the FOI Act states that:

‘where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating ... the twentieth working day following the date of receipt.’

**Actual vs Estimated Cost**

- If the actual cost of answering the request is greater than the estimated cost, the authority must bear the additional cost. The FOIA does not allow for authorities to issue another fees notice to cover any additional cost.
- If the actual cost of answering the request is less than the estimated cost charged on the fees notice, the authority should refund the excess money to the applicant. If the actual cost proves to be less than the appropriate limit, then the authority should refund all the money to the applicant, less any disbursements.

**When the Cost of Compliance Exceeds the Limit**

- Where a request for information is refused under s12(1) because it exceeds the cost of compliance set by the fees regulations, a notice must be issued within 20 days (s17(5)). The applicant must also be notified of the internal procedures for dealing with complaints about the handling of requests for information and given details of the right to apply to the Information Commissioner for a decision notice under s50 (s17(7)).
- There is no obligation to explain why the limit has been exceeded.

**When a Fee is Not Received**

- If the fee is not paid within three months (beginning on the day the fees notice is issued), the force is not obliged to comply with its duty to provide the information.

Please refer to the section of this manual entitled 'Charging for a Request' for additional information in respect of fees regulations under FOI.

**ACPO POLICY**

Template Letter available (Appendix B6)
## CHARGING FOR A REQUEST

### LEGISLATIVE REQUIREMENTS

<table>
<thead>
<tr>
<th>Exemption where cost of compliance exceeds appropriate limit</th>
<th>Fees for disclosure where cost of compliance exceeds appropriate limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) s1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.</td>
<td>(1) A public authority may charge for the communication of any information whose communication-</td>
</tr>
<tr>
<td>(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of s1(10) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.</td>
<td>(a) is not required by s1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of s12 (1) and (2), and</td>
</tr>
<tr>
<td>(3) In subsections (1) and (2) ‘the appropriate limit’ means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.</td>
<td>(b) is not otherwise required by law, such fee as may be determined by the public authority in accordance with regulations by the Secretary of State.</td>
</tr>
<tr>
<td>(4) The Secretary of State may by regulation provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority -</td>
<td>(2) Regulations under this section may, in particular, provide -</td>
</tr>
<tr>
<td>(a) by one person, or</td>
<td>(a) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and</td>
</tr>
<tr>
<td>(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,</td>
<td>(b) that any fee is to be calculated in such manner as may be prescribed by the regulations.</td>
</tr>
<tr>
<td>The estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with them all.</td>
<td>(3) Subsection (1) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of information.</td>
</tr>
</tbody>
</table>
ACPO BEST PRACTICE ADVICE

Chargeable Items
Where fees are applicable, public authorities will have discretion about whether to charge.

However, the same rates apply in every case, regardless of whether the request is received from an individual, voluntary organisation, private sector organisation or another public authority.

There are two types of fees that can be charged:
- A fee to cover the marginal costs of the request – the cost of finding, sorting, editing or redacting.
- Fees can only be charged in such situations when the marginal cost exceeds the appropriate limit, as defined in the fees regulations.
- A fee to cover the cost of disbursements, such as printing, photocopying or postage.

Marginal Costs
s13 states that a fee may be charged for requests that exceed the appropriate limit. The current regulatory limit has been set by the Secretary of State and currently stands at:

- £600 for central government; and
- £450 for other public authorities, including local authorities, Police Service, the health service and education.

If it is estimated that the cost of responding to a request would be less than £450, the Police Service is unable to pass on the marginal charge for the request to the applicant.

Standard Hourly Rate
In order to provide a national standard for charging for access to information from UK police forces, it has been decided to recommend that forces consider adopting an approved ACPO standard hourly rate.

This rate currently stands at £25 per hour which equates to 18 hours of work.

This charge will apply regardless of geographical location and who deals with the request. It will be reviewed in 2007.

Activities that may be counted within the 18-hour limit are listed below:

- Determining whether the information is held;
- Locating and retrieving the information, whatever its format and wherever it is held;
- Once only reading of the information;
- Extracting information to be disclosed from other information;
- Communicating information including time taken to write a response to the request, or to summarise, edit or redact information; and
- Time spent making arrangements for an applicant to view documents, books, and videos or electronically held information.

The marginal cost does not include:
- Deciding whether the request is covered by the FOIA;
- The decision-making process involved in considering whether material should be exempt under the Act. This includes staff time and pursuing legal advice or the time taken by the decision-maker to refer the request to any other department to determine whether a piece of information is exempt;
- Situations where the authority can neither confirm nor deny that it holds requested
Assessing the extent of the public interest test;
• Identifying vexatious or repeated requests;
• Obtaining authorisation to send out the information;
• Managing the fees notice or aggregating requests/costs;
• Time spent to obtain the consent for disclosure from another public authority or any other individual or organisation;
• Time spent advising the applicant; and
• Any overheads such as IT running costs, superannuation costs, building-related.

**Disbursements**
A public authority can charge the applicant the full cost of disbursements (such as photocopying, printing and postage) incurred in responding to an application. Disbursements may include:
• Photocopying or printing material;
• Postage;
• Producing material in an alternative format, such as putting it onto CD-Rom, video, audio cassette or in Braille; and
• Translating information into a different language at the request of the applicant (not Welsh). If a public authority regularly works in the language requested and has an in-house translation service, it should consider waiving any translation costs.

The cost of disbursements does not include any costs that are listed as being included or excluded from the marginal cost.

Authorities can charge:
• 10p per sheet of photocopying or printing (to include postage costs), up to a maximum of £50; and
• Up to £50 to cover the cost of material provided in other formats (to include translation costs if appropriate).

Where disbursements exceed £50, the authority can include the excess cost in its calculations of the marginal cost. This means the Police Service can count disbursements over £50 in its £450 limit.

Authorities can charge for disbursements in all cases, regardless of whether the authority is also charging for the marginal cost of a request. However, in cases where the disbursement cost is low – say, less than £10 – we recommend that authorities should waive the fee.

**Example**
A force receives a request and estimates the marginal cost of responding to be £375 and the cost of disbursements to be £150.

The force may charge £50 for disbursements and add the remaining £100 to the marginal costs.

This brings the marginal cost to £475.

This is £25 over the £450 Police Service limit.

The force can choose, therefore:
- Not to provide the information;
- Answer the enquiry and charge up to £475; or
- Waive the fee altogether at its discretion

**Charging for Disbursements***
<table>
<thead>
<tr>
<th>Cost per photocopy</th>
<th>10p per page</th>
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<tbody>
<tr>
<td>CD-Rom Disk</td>
<td>Free</td>
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</table>
Where Costs Exceed the Prescribed Maximum
Where the cost of the searching and retrieving the information in order to respond to an FOI request exceeds the prescribed maximum, a public authority does not have to comply with a request.

It is a matter for forces to decide what action they will be taking in these instances. However, there are a number of options available to ensure best practice:

- Discuss with the applicant to refine the question to a more manageable level that would fall within the fees limit or ascertain whether the applicant would like part of the information up to the prescribed maximum.
- Ascertain whether the applicant would like a summary or digest of the information request.
- Ascertain whether the applicant would like to view the information should the cost of providing the information in permanent form be too costly.
- Answer and charge up to the full marginal cost of the request. This means that if the estimated marginal cost of answering the request is £500, the authority can charge the full amount to the applicant, not just the £50 representing the portion above the appropriate limit.
- Decline to answer the request due to the likely cost of compliance being greater than the appropriate limit.
- Answer and waive the fee

Fees Notices
If a force has decided to implement a fees notice, it should issue that notice as soon as practical after the receipt of a request for information, within the maximum 20 days. The fees notice should be sent to the applicant advising them of the fee payable in order to respond the information request. Applicants have three calendar months in which to send the requisite fee.

A fees notice is not to be treated as an official invoice. Freedom of Information Officers will need to refer to their individual force’s finance department in order to determine force accounting practices.

It is recommended that, for amounts less than £10 (individual forces to check internally with finance department), a fees notice is not sent. In these cases, the costs incurred by the authority in relation to receipting and banking the income are likely to be higher than the amount likely to be collected. Again, this is an area where each force must obtain advice from the force finance department.

Please find attached at Appendix C an example of a fee notice that can be tailored to meet the needs of each force. This provides a quick and easy guide for FOI staff to assist them when drawing up a fees notice and to help analyse actual costs and variances in order to respond to an FOI request. This charging template may also be required by the DCA or each force’s financial auditors to substantiate the FOI charging scheme.

These guidelines are not to be used when making charges for items requested from a force publication scheme.
Fees are not subject to VAT.

**Related Requests**
Where a public authority receives more than one request for information from an individual, or a group of individuals who appear to be working as part of a campaign, the estimated cost for complying with one of the requests can be taken to be the aggregated cost of complying with all of the requests. This is the case as long as the requests are received within 60 working days of each other i.e. the fee charged for complying with one request is the amount it would cost to comply with all requests.

This can be represented by the following formula, where $A_1 =$ cost of compliance with the first request, $A_2 =$ cost of compliance with the second request etc:

$$\text{Cost (related requests)} = A_1 + A_2$$

The estimated cost is designated as $B$.

The fee charged for access to information must not exceed a maximum determined by the public authority.

The maximum fee is effectively the disbursements incurred in complying with the request i.e:

- Postage cost in writing to the applicant to 'confirm or deny' the information is held;
- Postage cost in communicating the information;
- Photocopying costs; and
- Cost of converting the information into a media specified by the applicant (scanning etc.);

The maximum fee should not include any time taken, or expected to be taken, in performing such tasks.

The estimated cost is designated as $C$.

**Maximum Fee Where Costs Exceeds Appropriate Limits**
Where the cost of complying with the request is expected to exceed £450, a public authority may charge a maximum fee, which is to be calculated as the sum of the estimated cost of complying with the request and the estimated disbursements. If the request is, or appears to be part of a campaign request, the maximum fee cannot include the estimated aggregated cost of complying with all requests.

The following formula can be used to calculate the maximum fee:

$$\text{Maximum fee (exceeds appropriate limit)} = A + C$$

For the purposes of the maximum fee here, the figure $B$ can not be taken into account.
ACPO POLICY

Template Letter available (Appendix B16, B17, B18)
TRANSFER OF REQUESTS

LEGISLATIVE REQUIREMENTS

This area of the Act is governed by Code of Practice 45.

ACPO BEST PRACTICE ADVICE

Transfer of Requests
There are two scenarios where a request may be transferred:

(1) where the force holds none of the information requested; and
(2) where the force holds part of the information requested.

1. Where No Information is Held
The applicant must be informed as soon as possible that the information is not held.

Where the information is not held, the force may transfer the request to another force or public authority, assuming it is possible to identify the appropriate force or public authority that holds the information.

This should be done with the permission of the applicant. If the force reasonably concludes that the applicant is not likely to object, the force may transfer the request without referring to the applicant. The applicant should be informed that the request has been transferred.

As an alternative, the force may suggest that the applicant re-applies to the authority it believes holds the information.

A request should not be transferred without first confirming with the second force or public authority that the information is held.

The force should provide the applicant with contact details for the relevant authority.

When a police force is either unable to advise which public authority holds or may hold the requested information or cannot or does not feel it appropriate to transfer a request, it should consider what advice can be given to the applicant to help them pursue the request.

If the force is not able to identify who holds the information, the applicant should be informed as soon as possible.

2. Where Part of the Information is Held
The applicant must be informed as soon as possible that only part of the information is held.

Where the information is partially held elsewhere and the force can identify the authority or other force that holds the information, the force may then transfer the remainder of the request to another force or public authority.

If the force reasonably concludes that the applicant is not likely to object, the force may transfer the request without going back to the applicant but should still inform the applicant that the request has been transferred.
The request should not be transferred without first confirming with the second force or public authority that the information is held.

If a force believes an applicant is likely to object, it should only transfer the request with consent. If there is any doubt, the police force may prefer to contact the applicant and suggest that they make a new request to the second authority.

The force should provide the applicant with contact details for the relevant authority.

When a police force is either unable to advise which public authority holds or may hold the requested information or cannot or does not feel it appropriate to transfer a request, it should consider what advice can be given to the applicant to help them pursue the request.

Alternatively, the force may suggest that the applicant re-applies to the authority that the police force believes holds the information

The receiving force must provide any information it holds in relation to a request, subject to the application of exemptions.

The Receiving Authority’s Obligations
The receiving authority must comply with its obligations as if it had received the request direct from the applicant. The time for complying with such a request commences from the day that the receiving authority receives the request.

Consultation with Third Parties
When the legal rights of a third party may be affected by disclosure, the Police Service will consult with that third party prior to disclosure, unless consultation is impracticable (for example, because the third party cannot be located or because the cost of consultation is disproportionate). In this case, the Police Service should consider what is the most reasonable course of action under the requirements of the Act and the individual circumstances of the request.

Where the interests of more than one third party are affected and they have a representative organisation, consultation with the representative organisation, or a representative sample of third parties if there is no representative organisation, is sufficient.

If a third party does not respond to consultation, the force has a duty to disclose information under the Act within the time limits.

In all cases, it is the receiving force/authority that determines whether information should be disclosed. A refusal to consent to disclosure by a third party does not, in itself, mean that information should be withheld. Consultation is unnecessary where:
- It is not intended to disclose the information;
- The views of the third party cannot affect the decision (e.g. where legislation prevents or requires disclosure); or
- The information must be provided because no exemption applies.
| **ACPO POLICY** | Where the Police Service does not hold the requested information, it is ACPO policy to assist the applicant by transferring the requests on the applicant’s behalf to any relevant third party.  

It is ACPO policy **not** to release third party information without first consulting with the appropriate third party to determine whether the information is deemed suitable for release by the originators/owners of the information.  

Template Letters available (Appendix B7, B8, B9, B10) |
## COMMUNICATING INFORMATION

### LEGISLATIVE REQUIREMENTS

<table>
<thead>
<tr>
<th>s11 of the Act</th>
<th>Means by which communication is to be made</th>
</tr>
</thead>
<tbody>
<tr>
<td>States:</td>
<td></td>
</tr>
<tr>
<td>(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely -</td>
<td></td>
</tr>
<tr>
<td>(a)</td>
<td>the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,</td>
</tr>
<tr>
<td>(b)</td>
<td>the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and</td>
</tr>
<tr>
<td>(c)</td>
<td>the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant, the public authority shall so far as reasonably practicable give effect to that preference.</td>
</tr>
<tr>
<td>(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.</td>
<td></td>
</tr>
<tr>
<td>(3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.</td>
<td></td>
</tr>
<tr>
<td>(4) Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.</td>
<td></td>
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</tbody>
</table>

### ACPO BEST PRACTICE ADVICE

**Means by which Information may be Communicated to the Applicant**

When making a request for information, an applicant may express a preference for the way in which the information is received by any of the following means:

- A copy of the information in permanent form or in another form acceptable to the applicant.
- Reasonable opportunity to inspect a record containing the information.
- The provision to the applicant of a digest or summary of the information in permanent form, or in another form acceptable to the applicant.
- The Police Service must comply with the preference as far as it is reasonably practicable. In determining whether it is reasonably practicable, the Police Service must have regard to all the circumstances, including the cost of doing so.
- When it is not reasonably practicable to comply with a preference, the applicant must be notified of the reasons.
- Where no preference is specified for the method of communication, the information can be communicated by any means reasonable in the circumstances.

### Where Information Is Released

**Notifying of a Decision to Grant Access**

Advise the applicant in writing of:

- The decision;
- The date on which it was made;
- The name and designation of the person dealing with the request;
- Form and manner of access; and
- The applicant’s rights to complain, including details of the internal complaints procedure and the Information Commissioner’s details.

**ACPO POLICY**

ACPO policy is to redact vigorously any documents where information contained therein is exempt and should not be disclosed. Recipients must be unable to work out from the context of the redacted text what has been removed. This may mean removing whole paragraphs and not just sentences or words.

It is ACPO policy that any document marked ‘secret’ or above be redacted **before** it is scanned onto any electronic workflow system.

**Copyright**

The following copyright statement should accompany the release of any/all information:

*The (force name), in complying with their statutory duty under sections 1 and 11 of the Freedom of Information Act 2000 to release the enclosed information, will not breach the Copyright, Designs and Patents Act 1988. However, the rights of the copyright owner of the enclosed information will continue to be protected by law. Applications for the copyright owner’s written permission to reproduce any part of the attached information should be addressed to The Force Solicitor, (force name and address).*

Template Letters available (Appendix B11, B12, B13, B14)
# REFUSING A REQUEST

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th></th>
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<tbody>
<tr>
<td><strong>What s17 of the Act States:</strong></td>
<td></td>
</tr>
<tr>
<td>(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with s1(1), give the applicant a notice which-</td>
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<tr>
<td>(a) states that fact,</td>
<td></td>
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<tr>
<td>(b) specified the exemption in question, and</td>
<td></td>
</tr>
<tr>
<td>(c) states (if that would not other wise be apparent) why the exemption applies.</td>
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</tr>
<tr>
<td>(2) Where-</td>
<td></td>
</tr>
<tr>
<td>(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-</td>
<td></td>
</tr>
<tr>
<td>(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in s2(3) is relevant to the request, or</td>
<td></td>
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<tr>
<td>(ii) that the information is exempt information only by virtue of a provision not specified in s2(3), and</td>
<td></td>
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<tr>
<td>(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within s66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of s2,</td>
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<td>the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decisions will have been reached.</td>
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<tr>
<td>(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of s2 applies must, either in the notice under subsection (1) or in a separate notice given without such time as it reasonable in the circumstances, state the reasons for claiming -</td>
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<td>(a) that, in all circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or</td>
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<tr>
<td>(b) that, in all circumstances if the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.</td>
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<tr>
<td>(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, to the extent that, the statement would involve the disclosure of information which would itself be exempt information.</td>
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<tr>
<td>(5) A public authority which, in relation to any request for information,</td>
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</table>
is relying on a claim that s12 or s14 applies must, within the time for complying with s1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where-
(a) the public authority is relying on a claim that s14 applies,
(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on a such a claim, and
(c) it would in all circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must –
(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
(b) contain particulars of the right conferred by s50.
ACPO BEST PRACTICE ADVICE
Actions to be Taken When Refusing a Request

When Applying an Exemption
- When refusing a request on the grounds of an exemption, the applicant must be given notice of that fact within 20 days of the authority receiving the request, specifying the exemption used and why it applies. This should be formatted as follows:
  - Review of the information requested.
  - Refusal paragraph under s17 and containing the actual exemptions used.
  - The harm test explaining clearly what harm may be caused by the release of the requested information.
  - The public interest test, including all factors for and against disclosure with an explanation relating to the request on each factor.
  - The PIT balancing test which should explain clearly why the authority has reached the decision for or against disclosure.
  - The internal procedures for dealing with complaints and the applicant’s right to apply to the Information Commissioner for a decision notice.

When Disclosing Reasons Would Reveal Exempt Information
- A force is not obliged to state why an exemption applies if it would reveal exempt information. In these cases, the force should respond by neither confirming nor denying whether the information is held. Please refer to the NCND Section of the MOG.

Excess Cost
When the cost of compliance exceeds the appropriate limit or the request is vexatious or repeated:
- The applicant must be informed of that fact within 20 days of the authority’s receipt of the request. The authority should enter into dialogue with the applicant to assist them in either refining the request or informing them of what information may be obtained within the cost limit.
- The notice must contain the internal procedures for dealing with complaints and the applicant’s right to apply to the Information Commissioner for a decision notice.

ACPO POLICY
Where the decision has been taken to deny the release of requested information, it is ACPO Policy to cite all possible exemptions that apply.

Template Letters available (Appendix B15)
THE DECISION-MAKING PROCESS

ACPO BEST PRACTICE ADVICE

Recording the Decision-Making Process

A record should be kept of all applications where information has been withheld partially or in full for monitoring purposes.

The following information relating to each request should be retained for two years (subject to ICO confirmation) from conclusion of any internal complaint/appeals process for internal management purposes or to assist with any appeals:

- Name and address of applicant;
- Date request received;
- Details of any assistance offered;
- Identification of all steps taken to locate records, including dates and contact names when information requested from data owners;
- Details of any fees applied and date fees notice sent out;
- Correspondence and details relating to any transferred requests;
- Copy of material released and its source;
- Copy of material not released, its source, exemption section applied and reason for applying exemption;
- Name of decision maker/s;
- Format of provision of material;
- Copies of any correspondence with the applicant and details of any other contact; and
- All correspondence relating to complaints, enforcements or appeals.

The ACPO FOI co-ordinator should be informed of certain FOI requests and the current criteria for defining those requests that must be referred centrally is attached in Section 3.

ACPO(S) requires performance data every three months from forces and this will contain:

- Number of requests;
- Total hours spent dealing with requests;
- Timeliness in dealing with requests;
- Outcomes;
- Exemptions used;
- Internal review data;
- Proportion of subject access requests;
- Number of internal requests where known; and
- Number of requests from press associations where known.

All these details will be tabulated and sent to all Chief Constables, the DCA, the ICO and other interested parties. These will be made publicly available if requested.

ACPO POLICY

ACPO recommends that FOI requests be destroyed two years from event date unless there are outstanding appeals. This recommendation is subject to ICO agreement.
# VEXATIOUS REQUESTS

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th>Vexatious or repeated requests</th>
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</table>
| **What s14 of the Act States:** | *(1) s1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*  

*(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.*  

*s14 of The Freedom of Information Act gives public authorities the right to refuse a request if it is deemed vexatious* |

**Definition of Vexatious**  
**Entry:** Vexatious  
**Function:** Adjective  
**Definition:** Distressing  
**Synonyms:** Afflicting, aggravating, annoying, bothersome, burdensome, disagreeable, disappointing, disturbing, exasperating, irksome, irritating, mean, nagging, pesky, provoking, teasing, tormenting, troublesome, troublous, trying, ugly, unpleasant, upsetting, wicked, worrisome, worrying.  
**Concept:** Bother/trouble entity  
**Definition:**  
1. Causing or creating vexation; annoying.  
2. Full of annoyance or distress; harassed.  
3. Intended to vex or annoy.  

Extract taken from Roget’s Thesaurus (1st edition v1.0.0)
ACPO Policy

ACPO’s underlying philosophy behind Freedom of Information is to adopt an open and constructive dialogue with the applicant. ACPO’s interpretation of the Freedom of Information Act is that it is the request for information and not the applicant that should be considered vexatious.

‘...by regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) regulations 2004, a public authority is entitled to aggregate the cost of complying with requests by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign. If the public authority is suspicious that requests purporting to be from different persons are really from the same source, or that a campaign is being conducted, it need only serve a notice under s17 of the Act. That will throw the onus on the persons(s) making the request to prove their entitlement to the information requested.

s45 of the Act imposes a duty on the Secretary of State to issue a code of practice providing guidance to public authorities as to the practice which, in his opinion, it is desirable for them to follow in discharging their obligations under Part 1 of the Act. In November 2004 the Commissioner issued an 11-page guidance note on the issue of repeat and vexatious requests. If, despite following the procedures recommended within the guide, police forces find that they are having serious difficulty with vexatious or repeat requests then in our opinion the remedy is to approach the Information Commissioner with a view to his providing revised guidance.’

Template Letter available (Appendix B19, B20)

Official Guidance

Please see Awareness Guidance 22 at the link listed below:

www.informationcommissioner.gov.uk/eventual.aspx?id=9181
ACPO BEST PRACTICE ADVICE
How to Identify a Vexatious Request
Taking a decision on whether or not a request is vexatious will invariably be a subjective judgement made by the receiving force. Vexatious is not defined in the Act. However, as the right to information is ‘applicant blind’ and the motive for the application is irrelevant, vexatious may have to be interpreted as only applying to applications that can be proved to have been made for improper purposes, such as frustration of the Police Service.

In the experience of some public authorities in other countries (e.g. Ireland and Canada), applications are rarely refused as ‘vexatious’.

It follows that it is not possible to give clear guidance as to what constitutes a vexatious request. However, it is possible to identify certain characteristics that a request may exhibit that collectively or individually mean that the request can reasonably be judged as vexatious. A vexatious request may be:

1. One that is repetitious, where it contains nothing new in its content and has been dealt with, withdrawn, or resolved at the time of the last request. However, new concerns not expressed in the original request can also be raised constantly in an attempt to keep the correspondence going.

2. One that is vague in its content. The request has not clearly set out what information is required.

3. One that contains unreasonable demands, or focuses on a trivial matter. Care has to be taken with the interpretation of ‘unreasonable’ and ‘trivial’ as these can be subjective.

4. One that is aggressive or threatening in its tone.

How to Deal with a Vexatious Request
• Where a request is refused because it is considered vexatious, a notice must be issued within 20 days.
• The applicant must also be notified of the internal procedures for dealing with complaints about the handling of requests for information and given details of the right to apply to the Information Commissioner for a decision notice under s50 (s17(7)).
• No reason for the refusal needs be given.
• Where a notice has previously been issued to the applicant that the request is vexatious, the Police Service is not obliged to issue a notice.

What To Do if You Believe the Response is Vexatious?
Before responding, it is important to establish that a request is indeed vexatious. A vague request could be misinterpreted as being vexatious when it could simply be a lack of knowledge on the part of the applicant. This can easily be resolved by clarifying with the applicant what is actually required. This can be done by way of:
• A telephone call; or
• A written request for clarification.

Where a request is suspected of being vexatious, it is good practice for that judgement to be reviewed by the FOI officer or line manager before any further action is taken.

If it has been clearly established that the request is vexatious in nature, the following actions can be taken:
1. Notify the applicant of the decision (in writing) and the reasons why the request has been recorded as vexatious.

2. Retain a copy of the decision on record for future reference.

3. If subsequent repeat requests are made, notify the applicant that all future correspondence, if judged vexatious, will not be answered but should be recorded under the original request.

4. Advise applicant of formal complaints procedure.

Repeated Requests
What is a Repeated Request?
- The Police Service is not obliged to comply with a request if it is identical or substantially similar to a request from that person, unless a reasonable interval has lapsed between compliance with the previous request and the making of the current request. The reasonable interval may be defined as 60 working days.

How to Deal with a Repeated Request
- Where a request is refused because it is considered repeated, a notice must be issued within 20 days. The applicant must also be notified of the internal procedures for dealing with complaints about the handling of requests for information and given details of the right to apply to the Information Commissioner for a decision notice under s50 (s17(7)). No reason for the refusal needs be given.

Where a notice has previously been issued to the applicant that the request is repeated, the Police Service is not obliged to issue a notice.
## APPEALS PROCESS

### LEGISLATIVE REQUIREMENTS

1. Any person (in this section referred to as 'the complainant') may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

2. On receiving an application under this section, the Commissioner shall make a decision unless it appears to him-
   - that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under s45,
   - that there has been undue delay in making the application,
   - that the application is frivolous or vexatious, or
   - that the application has been withdrawn or abandoned.

3. Where the Commissioner has received an application under this section, he shall either-
   - notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
   - serve notice of his decision (in this Act referred to as a 'decision notice') on the complainant and the public authority.

4. Where the Commissioner decides that a public authority-
   - has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by s(1), or
   - has failed to comply with any of the requirements of s11 and s17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

5. A decision notice must contain particulars of the right of appeal conferred by s57.

6. Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

7. This section has effect subject to s53.

### ACPO BEST PRACTICE ADVICE

Integral to the FOIA is a suitable procedure to deal with complaints and appeals. The structure and practicalities are necessarily left to the individual authority to define.

The DCA has issued a Code of Practice on the Discharge of Functions under Part 1 of the Act. Section XII of the code defines the complaints procedure and details the principles that a public authority should follow.
The complaints and appeals procedure should be clearly documented and published as part of the authority’s publication scheme, together with statistics of previous complaints received and the performance of the authority in dealing with them against the response time target.

This document outlines the procedures that are considered to be best practice and aim to provide a standardised approach for those staff dealing with these complaints and appeals.

**The Appeals Process**

**Defining a Complaint**
The Code of Practice states that any written reply (includes those received electronically) from an applicant expressing dissatisfaction should be treated as a complaint for review.

This definition includes complaints and appeals relating to the publication scheme as well as those requests made under the general rights of access.

**Record Keeping**
It is essential to maintain decisions logs for the original request and the review procedure. These logs should record dates, actions, difficulties encountered and the views of information owners on disclosure. The conclusions of the decision-maker/reviewer should also be catalogued.

**Structure of Review**
The appeals and complaints review process should be wide-ranging and comprehensive. It is suggested that the person who made the original decision should provide the reviewer with the relevant information to assist in the processing of the complaint.

**Low-, Medium- and High-Level Information**
The type of information originally requested will influence the path taken by an appeal.

**Low-level information** is routinely released, with limited redaction and application of exemptions, and may include requests for policy, crime and other general statistics etc. In terms of the Government Protective Marking Scheme (GPMS), this information is not protectively marked and will usually have no protective classification attached to it.

**Medium-level information** refers to information that may require additional consultation outside the FOI team prior to release. This may be with the Data Protection team or with another department or Basic Command Unit within the force, or it may be with an external agency. It may include requests for third party personal data, requests for information held on investigation files or requests for information that, if disclosed, may harm the core policing function. Information is likely to be redacted and exemptions applied. In terms of the GPMS, this information may have no protective classification attached to it or it may be labelled ‘Restricted’.

Requests for **high-level information** would generally, though not exclusively, be referred to the Central Referral Unit for national guidance or a national response. Requests may relate to Confidential Human Intelligence Sources (CHIS), Registered Sex Offenders (RSOs), ACPO/ACPOS documents, requests relating to Special Branch etc. In respect of the GPMS, this information is usually labelled either ‘Confidential’ or ‘Secret’ and is viewable only by individuals with an appropriate level of security clearance.

Each application for information, however, must be treated and reviewed on a case-by-case basis.
Review Procedure
- Were the timescales adhered to?
- Was the applicant kept informed?
- Was the applicant helped to locate information if not held by police force?
- Was the response communicated in the format preference of the applicant? If not, why not?
- Was a transfer or partial transfer of request made? If so, was this handled correctly and in line with Code of Practice?
- Was a fees notice served and the principles of the charging regime applied?
- Was a refusal notice served?
- Where the request appeared to be vexatious, undertake a review of the procedure and decision.

Review Information Identified for Response
- Was the information sourced correctly?
- Was there a need to obtain additional information?
- Were all systems and information directories searched in response to the information request?
- Were any problems encountered in obtaining the information from the information owners?

Review Original Decision
- Analyse the decisions made by the FOI decision-maker in relation to any exemptions applied.
- Analyse the application of the public interest test and the resulting decision.
- Consider the comments made by information owners (if any) regarding disclosure of the information.
- Discuss decision logs with FOI decision-maker.

Formulate Review Decision and Document
- Document review decision.
- Record in two ways 1) procedural 2) disclosure decision

Advise Decision-Maker of Review Decision
- Highlight where procedures were not followed correctly.
- Advise any amendments to the initial decision (if applicable) and provide rationale. (This should be dealt with in a constructive manner).
- Communicate any amendments to the initial decision to information owners who may be affected by any additional disclosure. This is important since their original views may well have prompted the original decision that the information should be withheld.

Advise Applicant of Review Decision
- Clearly set out decisions and rationale (ensure that where information is not to be disclosed, the rationale does not inadvertently disclose it).
- Where additional information is to be disclosed, provide that information.
- Where procedures were not followed correctly, apologise.
- Provide details of Information Commissioner appeal process.

Where Appropriate Amend Procedures
- Where the review has highlighted issues and possible weaknesses in the procedural process, amend accordingly and disseminate to appropriate personnel.
• Additionally review any guidance or training that may be impacted by amendments.

Involving the Information Commissioner
• The ICO will not accept complaints unless the request has first been subject to the force’s own internal complaints procedure.
• Once the complaint has been passed to the ICO, it will be reviewed then returned to the submitting force.
• Once returned to the submitting force, the complaint then becomes subject to that force’s own internal complaint processes.

What the ICO Does Next
• Upon receipt of a complaint, the IC will set up an information tribunal (a route into the civil court).
• Once a decision has been taken by the information tribunal, an enforcement notice will be centrally referred with recommendations.
• The enforcement notice will then be disseminated to all forces and forces will be required to amend their procedures accordingly.

Timing
It is anticipated that dealing with a complaint will take between 3-6 months.

Dealing With Alleged Destruction of Material
Where a complaint is made to an organisation that has disposed of information following a request, the police force must follow its internal complaints procedures and refer this matter to its Professional Standards Department.
(s77 Criminal Offences)

Target Times for Responding to Appeals & Complaints
The Code of Practice states that target times for dealing with complaints and appeals may be set by individual authorities. It may be appropriate, however, for the Police Service to set a standard response time to show a corporate approach to this issue.

The period set should be reasonable, defensible and subject to review. The period provided by the FOIA in respect of original decisions stands at 20 working days. Where a complaint is received the original decision will need careful examination. This may involve a panel being organised (See Team Structure). It follows that in the more complex of cases, the period required to undertake a considered review of the request will be greater than for the more straightforward cases.

The Code of Practice states that the target times for determining FOI complaints should be published alongside information as to how successful the public authority has been in meeting those targets. It is recommended that this information is included within the force’s publication scheme.

Team Structure
Independence of Review of Complaint/Code of Practice

The Code of Practice states:
‘Where the complaint concerns a request for information under the general right of access, the review should be handled by a person who was not a party to the original decision, where this is practicable.’
The Code of Practice provides an example of a very small public authority where it might be considered impracticable to enforce the suggestions in the Code of Practice. However, it is unlikely that the Police Service would be considered in this category and therefore the independence of reviewers should be strongly considered.

The Code of Practice recommends the following:

- The person who was a party to the original decision should not review the complaint – except in the case where it is impractical e.g. a very small public authority).
- Target times for responses to complaints and the public authorities performance should be published.

The FOI decision-maker(s) who was/were a party to the original decision may be required to provide information that led to the decision being taken but should not review the complaint.

In specific cases, where it is impossible for the reviewer to have had complete independence from the original decision (e.g. where the reviewer had a partial input into the original decision), then this should be explained to the applicant.

The person appointed to undertake the role of reviewer would need a detailed knowledge of the Act and be of sufficient seniority to uphold or overrule the original decision.

The Review Panel?

In the more complex cases (and perhaps in some of the earlier cases until precedents have been established), it may be good practice to establish a review team. The team should consist of personnel who have a sound knowledge of the Act, along with those who have a wider perspective of the organisation and are able to consider the operational implications of releasing or withholding information.

The bureaucracy involved in establishing a review team will need to be considered against the difficulties and pressures an individual acting alone may face. Where issues can be discussed by a team, this may lead to a more reasoned and well-balanced decision being made that could stand closer scrutiny if it were subsequently placed before the Information Commissioner.

A review panel may consist of a number of personnel from the force including senior police officers, force solicitor, DP/FOI Officers and specialists relevant to the request.

In light of the obvious pressures of time upon such personnel, it may be appropriate to hold the panel on specified dates.

The responsibility for monitoring the operation of the FOI Act and enforcing obligations placed upon public authorities lies primarily with Information Commissioner.

Failure to comply with notices issued will be treated as contempt of court.

The Information Commissioner has the power:

- To issue decision notices;
- To enforce the right of access to information; and
- To enforce sanctions.
<table>
<thead>
<tr>
<th>ACPO POLICY</th>
<th>ICO guidance is that an applicant should make any appeal within 2 months of the response provided by the force.</th>
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<tbody>
<tr>
<td></td>
<td>It is considered that the target time for responding to complaints should be as soon as practicable and in any case within three months.</td>
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<tr>
<td></td>
<td>Where a request for information has been dealt with by normal methods of business delivery (e.g. via the recruitment department) and a complaint is received, this should not be dealt with under the FOI complaints process.</td>
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<tr>
<td></td>
<td>Only where the request has been processed as an official FOI request should this complaint process be utilised.</td>
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<tr>
<td></td>
<td>Template Letters available (Appendix B21, B22, B23)</td>
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</table>
Section 4

SB & SCP Processes
SPECIAL BRANCH

INTRODUCTION
The objective of this chapter is to offer practical advice and guidance on how SB nationally can obtain consistency in FOI decision-making and disclosure of information.

This section has been prepared following consultation with the ACPO FOI team, legal council, the Information Commissioner, National Co-ordinator of Special Branch (NCSB), Security Service, National Co-ordinator for Counter Terrorist Investigations and individual force Special Branches throughout England, Wales, Scotland and Northern Ireland.

THE CONSTITUTIONAL POSITION OF SPECIAL BRANCHES
Constitutionally, each police force has a Special Branch component. As such, Special Branch is subject to the full provisions of the Freedom of Information Act.

The Chief Constable in each force area will be the ‘parent public authority’ for the purposes of the Act. The Chief Constable in each force will be legally responsible for FOI requests received by their Special Branch.

APPROACH TO FOIA
In delivering its legal responsibility under FOIA, Special Branch will release information that is requested, unless it is not in the public interest and exemptions may be applied. Disclosure, however, must be balanced with Special Branch’s higher level of responsibility in comparison with other police departments in relation to intelligence that has been gathered in support of national security.

Each Freedom of Information request must be analysed individually and processed as per the ACPO Manual of Guidance. The most important feature of the evaluation of the information is the application of the harm and PIT tests, where appropriate.

As a rule, all policies are appropriate to publish, particularly where these reflect statutory responsibilities, such as Regulation of Investigatory Powers Act (RIPA). However, operational procedures, methodology and tactics will be protected by the correct application of exemptions. This is because the release of this type of information would rarely be in the public interest and may reduce Special Branch’s capability to perform its overall function. Under the FOIA, each request must be considered on a case-by-case basis.

POINT OF CONTACT FOR FOIA ENQUIRIES
Each Special Branch should establish an information manager through whom all FOIA requests should be directed. As per the Manual of Guidance, it is essential that the Central Referral Process is notified of any requests received. The CRP will log the referral and where appropriate, follow their remit and seek national guidance.

Whilst the request is being processed by the CRP, the information manager will not provide a response to the applicant until central guidance is received.

PROCESSING OF REQUESTS
The administration of the FOIA process (i.e. receipt, recording, searching, replying) will be undertaken separately at force level outside Special Branch.

The Special Branch information manager will take responsibility for the request. This will include assessing and processing the information requested and recording in detail the decision-making process. The reply, including details of any material released, a written review of the public interest test and a record of any exemptions applied, should be copied to
the host force and the Central Referral Process. Copies of the actual material assessed do not need to be supplied.

Given the high level of importance to national security of the decisions taken by Special Branch under FOIA, it is essential that the information manager should have a detailed knowledge of how Special Branch and its partners operate.

As well as considering FOIA requests on behalf of the Chief Constable, the Special Branch information manager will act as a single point of contact to co-ordinate FOIA issues between forces and relevant non-police agencies.

**AFFILIATED ORGANISATIONS**

The following organisations are closely affiliated to Special Branch and are likely to attract FOIA interest in their own right. However they are not ‘public authorities’ for the purposes of the Act:

- ACPO (TAM).
- Advisory Group.
- National Co-ordinator of Special Branch.
- National Co-ordinator for Ports Policing.
- Regional Intelligence Co-ordinators (RICs).

Each of these organisations should identify its own information manager. They will be responsible for undertaking information searches and offering disclosure/exemption recommendations for each FOI request.

The Metropolitan Police Service (MPS) will be the dedicated parent ‘public authority’ for the following organisations:

- NPOIU.
- NJU.
- NTFIU.
- NTELS.
- Prison liaison.
- PICTU.
- NECTU

Local information managers within these organisations will conduct the primary information search and will make a recommendation on disclosure. The SO12 information manager will administer the FOIA process.

**WHERE FOI INTEREST RELATES SPECIFICALLY TO THE WORK OF THE REGIONAL INTELLIGENCE CO-ORDINATOR (RIC)**

A RIC has no formal legal standing or responsibility under the Act. Where an FOI issue relates to information possessed and used exclusively by a RIC, in cases where a specific Special Branch is not identified, the nominated lead force for the RIC will act as the relevant ‘public authority’.

**SPECIAL BRANCH AND s23 and s24 EXEMPTIONS**

A protocol between the Security Service and the Police Service has been agreed and must be followed.

Research from other jurisdictions shows that the most important areas where the role of consultation is paramount are:

- To inform all data owners of the request; and
- To ensure a consistent response is given to the requestor.
Where the 3rd party is not an excluded body by virtue of s23 (e.g. another Special Branch), Special Branches must consult the data owner when considering the public interest and prejudice tests.

With regard to national security, there is full guidance provided in this manual covering both s23 (Information provided by security bodies) and s24 (National security). This guidance must be followed.

Terrorist threat assessments provided by Special Branch are derived directly from intelligence provided by the Security Service and therefore qualify for absolute exemption under s23. Public order threat assessments may be excluded by virtue of s24, accompanied by a public interest test.

**NCND**

In certain circumstances, Special Branches may apply an exemption to confirming or denying whether the information is held at all.

Where simple confirmation of the existence of information or that the information is held at all by the authority may lead to harm, the Special Branch information manager may decide to ‘Neither Confirm Nor Deny’ (NCND).

On these occasions, Special Branches should provide an NCND response in respect of the requested information. A full explanation of this option, together with a nationally agreed wording, is contained within this Manual of Guidance and all decision-makers must adhere to this standard.

**PROTECTIVE MARKING**

GPMS is not recognised under the FOIA. The labelling of information as ‘confidential’ cannot be used to prevent the disclosure of information into the public domain.

The protective marking system does, however, assist the decision-maker by ensuring that any document with a high level of marking is referred for consultation to the data owner for an explanation of the designated level of security.

Decision-makers must also understand that whilst a document can have some information removed under an exemption (i.e. redacted), the remainder of the text may still be released if no harm would be caused.

**PROACTIVELY PUBLISHING INFORMATION**

To minimise time spent on processing FOIA enquiries, Special Branch should consider publishing as much information as possible using the host force’s publication scheme.

The Special Branch information manager must be consulted prior to the posting of Special Branch information.

The MPS has agreed the categories of information that will be disclosed on the force publication scheme. For the sake of consistency, it is recommended that all other Special Branches adhere to this model. The MPS Special Branch or National Special Branch may be consulted for advice.

Where a new category of information is proposed, outside of the format agreed by the MPS, the national co-ordinator of Special Branch must be consulted.
Under no circumstances may the force publication scheme be used to disclose information provided to the force by any agency that is excluded by s23(1) of the Act.

WEEDING AND DESTRUCTION OF RECORDS
FOIA should not interfere with local weeding and destruction policies.

However, under no circumstances should a document be destroyed for the purposes of evading a request for information under FOI.

Documents scheduled for destruction under time limits set by local policy that are subject to an on-going FOI request, must be retained until the FOIA matter is complete or the information is placed on the publication scheme.

ROLE OF THE NATIONAL CO-ORDINATOR OF SPECIAL BRANCH
The national co-ordinator of Special Branch will be informed of FOI requests by the Central Referral Process in the following circumstances:

- FOIA requests that have been passed beyond internal appeal and await external appeal;
- Where the subject matter of the FOI request has a high national profile;
- Where the subject matter has significant implications for other Special Branches; and
- Where the information requested comes from the Security Services.

In these circumstances, the Special Branch national co-ordinator will monitor the implications and risks from a national perspective. The force concerned will continue to assume responsibility as the relevant ‘public authority’.

Through the CRP and the Special Branch User Group, the Special Branch national co-ordinator will oversee FOI across the country to ensure consistency between forces and to encourage best practice.

NATIONAL CO-ORDINATION - FOIA USER GROUP
To ensure consistency throughout the country in the management of requests, a FOIA user group has been established comprising representatives from each RIC. This will meet quarterly to review relevant cases and share good practice and lessons learnt from current cases. Special Branches from each force are recommended to share FOIA issues with their RIC FOIA representative. The lessons learnt will be published on the Genesis database.

Special Branch information managers may consult the Metropolitan Police Special Branch help desk (not 24 hours) to assist in addressing key FOIA issues.

APPEALS PROCESS
The appeals process will be as per the ACPO National Manual of Guidance but where the information is of a sensitive nature, the process will be undertaken and completed by individuals with the appropriate security clearance.

The CRP must be informed of all appeals received.
SPECIAL BRANCH FOI REQUEST PROCESS

1. Receipt of Request
2. Registered on Receiving Force’s System
3. Police Central Referral Process
4. National Special Branch
5. Special Branch Information Manager
6. Sort Out Information: Collate, Apply Exemptions, Redact
7. Return Response to Regional Police Force
SAFETY CAMERA PARTNERSHIP

INTRODUCTION
Safety Camera Partnerships (SCPs) are not public bodies in themselves but are constituted of public bodies. As such, whilst complying with the specific policies of individual parent organisations, they recognise the need to embrace FOI legislation.

This policy document has been devised following consultation with both Safety Camera Partnerships nationally as well as the ACPO FOI team, to identify best practice in terms of responding to FOI requests.

This chapter details what information may be released (and some guidance as to format), and outlines the practical steps that partnerships should take to facilitate this process.

National collaboration has ensured that all partnerships agree on the levels of sensitivity of the information that each holds, the frequency with which that information may be released, and the format/s of release.

The policy document has been seen by the Office of the Information Commissioner and is endorsed by the ACPO FOI working group.

All partnerships across the UK are committed to being open and transparent wherever possible and providing information to the public proactively. It is the partnership’s on-going intention to publish information that the public has an interest in viewing. However, partnerships also have a responsibility to protect the communities they serve through the prevention and detection of speeding and other offences, such as red-light running. As such, it must be recognised that it is not in the public interest to release certain information: information concerning ongoing investigations, intelligence and the use of related operational techniques must be protected. These are central to the maintenance of an effective enforcement programme. In this respect, Safety Camera Partnerships nationally will, when appropriate and reasonable, apply the exemptions afforded under the Freedom of Information Act.

KEY AREAS OF EXEMPTION:
The specific exemptions contained in the Act that are relevant to Safety Camera Partnerships are:

- s30 – Investigations;
- s31 - Law enforcement;
- s36 - Prejudice the effective conduct of public affairs;
- s38 - Health and safety; and
- s43 - Commercial interests.

Two specific categories of information are of particular concern to Safety Camera Partnerships. These are:

- Details of enforcement thresholds; and
- Information that could be used to deduce enforcement activity at specific sites or routes.

In September 2004, ACPO applied the public interest test to evaluate whether withholding such information from the public better served the interests of the public than releasing it. It was agreed that the benefit of disclosing such information was outweighed by the potential negative consequences to law enforcement and to the impact on road safety.
As such, the guidance is that these two categories of information qualify for exemptions under s31 and s38 of the Act. This will be applied on a case-by-case basis. Partnerships should utilise the wording of the ACPO decision as the basis for the exemption justification. In addition, Safety Camera Partnerships must provide written documentation of the application of the public interest test (including factors for and against disclosure and a balancing test) and a harm test where qualified and prejudice-based exemptions respectively are used.

Exemptions may also be applied to a third category of concern - information that could jeopardise the safety or security of partnership staff or assets – where partnerships have a well-founded concern about the safety or security of their staff or assets. These exemptions will be made on an individual basis.

Information that is held by a public body with a view to its publication at a later stage may also be exempt under s22, subject to the public interest test.

Generally, all other information held by Safety Camera Partnerships should be made available to the public.

The SCP publication scheme shows what information will be published.

**PUBLISHING INFORMATION**
Partnerships should ensure that information held is up to date and that sensitive information is redacted from documents. Meeting minutes, for example, which may include information subject to exemptions, will need to be edited before public release so that exempt information is redacted as appropriate. (Where a document contains some sensitive information the expectation is that the sensitive information itself be redacted prior to public release, and only after an evaluation has been made as to whether that ‘sensitive information’ would qualify for exemption under the Act.)

Some categories of information require explanations to go alongside the actual data to minimise misunderstanding or misinterpretation.

Partnerships must address issues of document copyright with suppliers, so that any questions about copyright (of equipment manuals etc) are resolved.

In addition, licences for computer software should be scrutinised to determine whether there would be any issues of commercial interest or confidentiality with regards to releasing electronic information to the public. It is up to the public body, and not the third party supplier, to make this decision.

**PUBLISHING INFORMATION PROACTIVELY**
The key to reducing the amount of time spent on replying to enquiries clearly lies in proactively publishing as much information as possible on the Safety Camera Partnership’s publication scheme.

**CREATION OF STANDARD LETTERS**
Partnerships should have devised standard replies to queries for information. These letters should state what exemption has been applied and why that exemption is considered appropriate. A letter should also have been prepared to the effect that a partnership does not hold the information requested.
INFORMATION THAT WILL NOT BE RELEASED, UNDER QUALIFIED EXEMPTION(S)

A. The following categories of information are likely to be exempt because they could jeopardise the operational effectiveness of camera enforcement, and thus fall under the exemption as outlined in s31 of the FOI Act - Law enforcement – sections A and B:

1. Specific enforcement thresholds applied by a partnership. This category of information will be exempted nationally because of the concern that the information contains working practices that, if known, would have an impact on operational policing. Following application of the public interest test in September 2004 ACPO concluded that:

'It is considered that the public interest in disclosing Force speeding thresholds is outweighed by the potential consequences to law enforcement and the impact of such a release on road safety measures and consequently the safety of the public at large.'

2. Site specific information that includes:
   - The level of use of a single site – e.g. numbers of offences detected at a single site, hours of enforcement time at a site, revenue generated on a site-specific basis;
   - The operational programme of fixed camera sites, and prioritisation of all sites; and
   - The detailed programme for mobile camera routes (regular programmes may be released by those partnerships that hold this information but this should not be too detailed or it could jeopardise casualty reduction).

The exemption applicable is again s31 Law enforcement (sections A and B). The concern is that the information contains working practices that, if known, would have an impact on operational policing. The ACPO decision reads as follows:

'It is considered that the public interest in disclosing site specific data at this level is outweighed by the potential consequences to law enforcement and the impact of such a release on road safety measures.'

B. The following categories of information will generally be exempt because they fall under the Data Protection Act (DPA) 1998:

(a) Personal data, including actual salaries of individual staff members
(b) Information relating to other peoples’ offences.

C. Certain other types of information may be exempt because they fall under other exemptions provided for in the FOI Act: This includes:

(a) Information that is relevant to an ongoing police investigation or to legal action (exempt under s30, Investigations);
(b) Information which is reasonably accessible to the applicant elsewhere or by other means (s21); and
(c) Information that may endanger the safety of members of the partnership or threaten the security of its assets (s38 – Health and safety).

D. Information that is due to be published by a partnership in the future may be exempt under the conditions laid out in s22 of the Act.
Section 5

The Public Interest Test
THE PUBLIC INTEREST TEST

LEGISLATIVE REQUIREMENTS

Of the 23 exemptions identified by the Act, 17 are subject to the application of the public interest test (PIT). Even some of the absolute exemptions have a public interest test incorporated into them.

The following exemptions are subject to the application of the public interest test:

- **Section 22**: Information intended for future publication
- **Section 24**: National security
- **Section 26**: Defence
- **Section 27**: International relations
- **Section 28**: Relations within the UK
- **Section 29**: The economy
- **Section 30**: Investigations and proceedings by public authorities
- **Section 31**: Law enforcement
- **Section 33**: Audit functions
- **Section 35**: Formulation of Government policy and other governmental interests
- **Section 36**: Prejudice to the effective conduct of public affairs
- **Section 37**: Communication with the Royal Family and honours
- **Section 38**: Health and safety
- **Section 39**: Environmental information
- **Section 40**: Personal information (specifically s40(3)(a)(i))
- **Section 42**: Legal professional privilege
- **Section 43**: Commercial interests

The public interest refers to:
- Considerations affecting the good order and functioning of community, government and public service affairs; and
- Common benefit to be derived by all members of a community (or a substantial part) and for their benefit.

The public interest does not extend to:
- Matters that the public may be curious about, interested in or amused by; and
- ‘Individual right of access’ applies only to the extent that disclosure of certain information would be harmful to the wider public interest, or to specific private interests deemed worthy of protection.

Source: Blackstones

There is a presumption that information released under a class-based exemption following the application of the public interest test is more likely to cause damage that information released under a prejudice-based exemption.

WHAT IS THE PUBLIC INTEREST?

In common with FOI legislation in other democracies, the FOI contains a number of qualified exemptions that allow public authorities to withhold information if the public interest so dictates.
There is no definition of the ‘public interest’ contained within the Freedom of Information Act. Instead, the concept is taken from case law and other UK legislation. This definition has been evolved from research undertaken in Australia, New Zealand, Ireland and Canada. Further consideration as to what constitutes the ‘public interest’ has been defined in other countries with similar or comparable legislation.

The absence of a definition allows flexibility in interpreting the public interest and provides an opportunity for a firmer interpretation to evolve as circumstances change.

**Generally speaking, information may be withheld under the public interest test if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.**

The public interest test should be applied in a manner that is in-keeping with the spirit of the Act. That is to say there is an assumption that public authorities will provide information requested unless an exemption applies and the public interest favours retention of the information over disclosure. The burden of proof lies with the decision-maker to establish whether there are sufficient grounds to justify an exemption.

**PUBLIC INTEREST TEST AROUND THE WORLD**

The following websites provide details and information about the public interest test in the UK and other countries and the latest public interest judgements.

- www.dca.gov.uk
- www.informationcommissioner.gov.uk
- www.cfoi.org.uk
- www.oic.gov.ie
- www.infocom.gc.ca

**ACPO POLICY**

Where it is not in the public interest to release information held by the Police Service, the information will be withheld. The public interest is **not** what interests the public but what will be of greater good, if released, to the community as a whole.

It is **not** in the public interest to disclose information that may compromise the force’s ability to fulfil its core function of law enforcement.

However, the presumption is in favour of disclosure for cases that are balanced between release and non-release.
ACPO BEST PRACTICE ADVICE

Introduction
The aim of this paper is to give some guidance as to what considerations should be made when deciding where the public interest lies in relation to specific information for the purposes of the Freedom of Information Act 2000. It should be read in conjunction with the paper ‘Public Interest Test’ in Appendix D1.

It is not intended that this list be exhaustive; only that it should outline some of the considerations that may be relevant.

The PIT Process
The beginning point, when considering any application for information under FOIA, is that information or records should be disclosed unless the structured and reasoned application of an exemption and public interest test considerations favours non-disclosure.

It is not sufficient that information will be of interest to the public: its release must be beneficial to the community as a whole.

Record Keeping
Freedom of Information Officers should always document the reasoning process applied when considering exemptions and the public interest test. This document should include a record of potential positive and negative outcomes/implications that may be derived should the information/record be withheld or released. This will form the basis of any future audit trail and help justify disclosure or non-disclosure in the event of challenges or appeals to the decision.

Where there is a direct link between the release of the information requested and the advancement of, or prejudice to, the public interest, this will heavily influence whether the information should be disclosed or not.

In the absence of public interest considerations favouring non-disclosure, the relevant information/record (or part thereof) is not exempt.

Where there are public interest considerations that favour non-disclosure, the information will be exempt only if those considerations outweigh all public interest considerations favouring disclosure.

The following generic headings provide a list factors favouring disclosure/non-disclosure. Please note that when applying these headings it is essential that the factors are explained and integrated into the actual information requested and the exemptions used. This will allow the applicant to understand why the particular factor has been used. Example public interest tests may be found on Genesis.

Considerations Favouring Disclosure

- Accountability
  When information disclosed relates directly to the efficiency and effectiveness of the force or its officers. The purpose of the Act is to make public authorities more accountable and this factor, therefore, may be applied to a wide range of scenarios from how an individual or the force fulfils their role or function, to policy decisions that have been taken in relation to investigations or general policy issues.
• **Public participation**  
Where the service would benefit from public participation and the input of the community at large, this would favour disclosure. This must be related to the debate and decision-making function of the force. This factor may be used when policies are being reviewed that have had, or may subsequently have, an impact on the local community.

• **Public awareness**  
Where disclosure of information about issues of general concern can assist individuals in making decisions about their own activities e.g. information about crime prevention methods, road safety/crime initiatives, trends of burglary etc. This factor may also apply in relation to raising general levels of awareness about issues that may affect the community.

• **Public debate**  
Where release of information would contribute to the quality and accuracy of public debate. This factor applies where the release of accurate information will inform and enhance public debate on particular subjects that may be topical.

• **Justice to an individual**  
The public interest may be served by providing individuals with information of particular reference to them and their situation e.g. information that would assist the applicant to understand the steps taken by the service in dealing with their request/complaint, information which would assist them to assess whether to pursue a legal remedy or otherwise.

• **Research**  
In appropriate cases, providing information/records may assist in research that could benefit the community at large.

• **Accountability for public funds**  
Where public funds are being spent, there is a public interest in accountability and justification. This is another factor that has wide-ranging application to numerous scenarios and represents one of the fundamental principles of the Act.

• **Public safety**  
There may be occasions when it is appropriate to disclose information that would have an impact on public safety, such as emergency contingency plans. This may be applied where the public would benefit from having enhanced knowledge and would therefore be able to take the necessary precautionary steps to protect themselves.

• **Improper actions of public officials**  
Disclosure of information relating to the abuse of office where public officials have used their office improperly. This applies at all levels within the organisation.

**Considerations Favouring Non-Disclosure**  
The following criteria will be applied by the Police Service in favour of non-disclosure:

• **Investigations**  
Information relating to an investigation will rarely be disclosed under FOIA and only where there is a strong public interest consideration favouring disclosure. It is the Association of Chief Police Officer’s approach that information relating to an investigation will rarely be disclosed under the provisions of the Freedom of Information Act. Whilst such information may be released in order to serve a ‘core policing purpose’ – to prevent or detect crime or to protect life or property - it will only be disclosed following a Freedom of Information
request if there is are strong public interest considerations favouring disclosure. The further the considerations favouring disclosure are from a core policing purpose, the lighter the considerations will be.

- **Exemption provisions**
  Where multiple exemptions apply to a piece of information, this would favour non-disclosure.

- **Interests of third parties**
  Where third party interests might be jeopardised by release of information that relates to personal affairs of individuals and/or sensitive commercial information held about business, financial, contractual or operational issues. See also Data Protection issues.

- **Efficient and effective conduct of the service/a force**
  Where current or future law enforcement role of the force may be compromised by the release of information. This is a very wide-ranging factor and when applied, evidence should be provided to demonstrate the impact.

- **Flow of information to the service/force**
  Where releasing information would act as a deterrent to the public to provide information to the force. With this relationship impeded, it would be more difficult for the force to gather information required to perform its public service functions. Examples of this would be to protect flow of information from, and identity of, informants to the public having confidence that their information will be treated sensitively and appropriately.

- **Fair treatment of an individual**
  There can be public interest in non-disclosure of information that adversely affects the reputation of an individual e.g. where they have been the subject of unsubstantiated allegations.

- **Public safety**
  There may be occasions where the release of information relating to public safety may not be in the public interest. Public safety is of paramount importance to the policing purpose and must be considered in respect of every release.

- **On-going investigations**
  It would not be in the public interest to release information that may be of assistance to offenders/prevent an individual from being brought to justice. The right to a fair trial is of paramount importance and any disclosure could be subject to sub judice.

- **Fishing expeditions**
  It would not be in the public interest to release all information relating to a vague ‘catch all’ type request. In these circumstances, the applicant should be contacted to determine exactly what information is required.

- **Existing procedures**
  It would not be in the public interest for Freedom of Information to be used to obtain information which is already available under existing procedures.

- **Tortuous duty**
  In circumstances where the service/force is under a legal obligation to maintain confidences, it would not be in the public interest to release the information if the grounds for this duty can be shown to be valid and it could leave the force vulnerable to civil proceedings.
• **Commercial Interests**
  There may be occasions where the commercial interests of a party may be affected by the disclosure of information, but where this is not sufficient for an exemption under section 43 to be claimed. In such cases, a public interest consideration favouring non-disclosure can arise.

• **Timing of Request**
  In certain circumstances, such as requests relating to commercial contracts, the timing of the request may create a public interest against disclosure. If the request is received before the tendering process has been completed, it is envisaged that an exemption under section 43 could be maintained at that time. However, it should be made clear to the applicant that a different decision may be reached if the request were to be resubmitted once the tendering process had been completed.

**Considerations That Are Invalid**
In addition, there are a number of criteria that may not be considered as part of the public interest test or may be applied only in limited circumstances:

• **Embarrassment**
  Potential embarrassment to the force, Police Service or an individual officer on release of information is not a valid public interest consideration in favour of non-disclosure.

• **High public office**
  Where the subject of the information, the giver or the recipient of the information holds high office, this is not in itself sufficient to weigh against disclosure. An assessment of the consequences of the disclosure of the particular issue is required.

• **Policy development**
  Even where information relates to policy development, this does not establish a public interest consideration favouring non-disclosure. Even if policy is under review, it still may be in the public interest to release.

• **Candour and frankness**
  Claims that disclosure would prejudice the supply of frank and candid information in the future can only be considered where there is a very particular factual basis to support this view. The possibility of future publicity through disclosure may deter immediate release and should provide an incentive to improve the quality of the information/record prior to disclosure.

• **Disclosure of confusing or misleading information**
  In most cases, the force would have a means of avoiding such a prejudicial effect by releasing new or revised information to rectify any inaccuracies or clarify the situation. If a certain course of action has not been considered and should have been, this is not enough to withhold.

• **Information/records held do not fairly reflect the reasons for a decision**
  Where this occurs, the force would have the opportunity to provide additional information that accurately explains the reason for the decision.

• **Draft documents**
  There may be benefits of public access to draft material, to further the accountability and public planning process. Draft documents may therefore be disclosed. Disclosure of this kind allows members of the public to examine the process by which a decision has been
reached, thus serving the public interest.

- **Government Protective Marking Scheme**
  The marking of material under the GPMS will not, in itself, be valid grounds for withholding information. GPMS indicates how a document should be transported and stored. The content of the material should be examined and the relevant exemptions applied only after discussion with the data owner and other relevant parties. Time elapsed since the document was marked under GPMS may also be factor in any decision to release or withhold.

**Overview**
Interpretation of the ‘public interest test’ is likely to be dynamic and evolve over time, especially as disclosure of information will be assessed on an individual, case-by-case basis. The Information Commissioner’s decisions on appeals and challenges to decisions taken to withhold information under the PIT will also clarify what constitutes the public interest over the longer term.

Initially, however, the application of the relevant principles should be guided by the criteria listed. This will provide a transparent assessment and application of public interest considerations within the decision-making process. This in itself will be instrumental in developing guidance from the Information Commission of the specific points and therefore lead to a consistent standard of applying interpretations across the UK.

For further information relating to the public interest test, giving examples and stated cases, please refer to Appendix D1.
APPLYING THE PUBLIC INTEREST TEST

The below is an extract from a decision that was made by the Irish Information Commissioner in the case of Ms Madeleine Mulrennan (No. 031109) and the Department of Education and Science.

This is an example of an FOI request for records relating to a consultant's report and ministerial decision to close a Dublin college.

The authority in question failed to apply a public interest test so the Commissioner applied one on behalf of the authority.

It is replicated here to show the best practice in applying a PIT so that a full rationale can be given for why a release of information was, or was not, in the public interest. In most cases there will be a public interest for and against disclosure and by using this method, the decision making process is both clear to the applicant, the internal review panel and the Information Commissioners Office if appealed. It is ACPO’s view that all forces should apply the public interest test in a similar manner.

"This shows an example where the request for information was declined without proper justification and suitable application of the public interest test.

I note that neither the original decision maker, nor the decision maker at internal review stage, dealt with the public interest provisions in s21 which must always be considered where s21(1) is invoked as the basis for refusing an FOI request. I regard this as a significant omission and a serious defect in the decision making process in this particular case.

As I find that neither the exemptions in s21(1)(b) or 21(1)(c) apply in this case, it is not necessary for me to consider the public interest considerations as required in s21(2). However, for the sake of completeness I will now consider the public interest provisions of s21(2).

s21(2)

I note again that the Department has failed to address the public interest aspect which must be considered where a s21 exemption is invoked.

In my view the following public interest factors favour release of the records in this case:

- The public interest in individuals being able to exercise their rights under the FOI Act in order to enhance their understanding of the reasons for courses of action taken by a public body;
- The public interest in members of the public knowing how a public body ensures that its decisions are predicated on ensuring value for money;
- The public interest in members of the public knowing how a public body performs its functions particularly in a context where a decision has consequences for existing employees and their families; and
- The public interest in ensuring openness, transparency and accountability in relation to the expenditure of public money.

The following public interest factors favour withholding the records:

- The public interest in public bodies being enabled to perform their functions effectively and efficiently particularly in relation to issues concerning the good management of public finances;
- The public interest in managers in the public service being allowed the opportunity to formulate plans without undue interference; and,
- The public interest in avoiding the premature disclosure by public bodies of plans and positions which they may adopt.
In weighing up the relative strengths of these opposing public interests, I consider that the public interest would be better served by releasing the information in the records. The records sought concern a decision to close a third level college and it is a decision which has very significant implications for existing staff and for potential future students; it is a decision, also, which seems likely to have significant financial implications into the future. In these circumstances, I believe the public interest arguments in favour of openness and accountability are particularly strong.

Even if I had not found that neither of the exemptions in s21(1)(b) or 21(1)(c) apply in this case, the provisions of s21(2) would indicate that release serves the public interest.'
Section 6

FOI Exemptions
## FOI EXEMPTIONS

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<td>Section 44</td>
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FOI EXEMPTIONS – AN OVERVIEW

INTRODUCTION

When an FOI request is made, the applicant has a legal right to that information (s1) unless there is harm in its release. Where this is the case, an exemption will apply.

The Act contains a series of exemptions that may be applied to assist public authorities in protecting information that, if released, may have a negative impact on the organisation’s ability to fulfil core functions.

The onus is on the FOI decision-maker to provide a structured and valid argument to justify the non-release of information. This argument must include a balanced assessment of likely harm should the information be disclosed and countered with a review of likely harm that may be caused if the information is retained.

This review process must be fully documented and applied in every case where exemptions may be enforced. The thought processes associated with applying one or more exemptions must be clearly recorded, fair and transparent. They must be rigorous enough to stand up to future scrutiny should the decision to withhold be challenged.

THE EXEMPTIONS – ABSOLUTE & QUALIFIED

There are 23 exemptions under the Freedom of Information Act. They fall into one of two categories:

1. Absolute exemptions
2. Qualified exemptions

Two of the 23 provisions confer a mixture of absolute and qualified exemptions depending on the nature of the information or, in the case of s40, the identity of applicant.
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<td>• There are 8 absolute exemptions.</td>
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<td>• Where one or more of these exemptions apply, there is no requirement for disclosure in most cases.</td>
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<td>• Where an absolute exemption applies, there is no duty to confirm or deny the existence of the information requested (with the exception of s21 exemption).</td>
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<td>• The public authority does not need to consider whether public interest favours disclosure where information requested falls within an absolute exemption.</td>
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<td><strong>Qualified Exemptions</strong></td>
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<td>• This exemption can only apply if the public interest lies in the confirmation or denial of the existence of information or release of the information, or lies in not confirming/denying or not releasing the information.</td>
<td></td>
</tr>
</tbody>
</table>

Where absolute and qualified exemptions are applied together, the terms and conditions of the absolute exemption will take precedence.

Qualified exemptions are only effective in exempting an authority from compliance with the duty to confirm or deny where... ‘in all circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information. In the case of communicating the information, a qualified exemption will only be effective where, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’.

**THE EXEMPTIONS – CLASS-BASED & PREJUDICE-BASED**

In addition, exemptions may also be classified as class-based or prejudiced-based.
<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th></th>
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</thead>
<tbody>
<tr>
<td><strong>Class-Based Exemptions</strong></td>
<td></td>
</tr>
<tr>
<td>Class-based exemptions are exemptions where all information falling into that particular class is exempt from disclosure. All but one of the class-based exemptions are absolute and around half of the qualified exemptions are class-based.</td>
<td></td>
</tr>
<tr>
<td><strong>Class-based exemptions that are 'absolute' are:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Section 21</strong></td>
<td>Information accessible to applicant by other means</td>
</tr>
<tr>
<td><strong>Section 23</strong></td>
<td>Information supplied by, or relating to, bodies dealing with security matters</td>
</tr>
<tr>
<td><strong>Section 32</strong></td>
<td>Court records</td>
</tr>
<tr>
<td><strong>Section 34</strong></td>
<td>Parliamentary privilege</td>
</tr>
<tr>
<td><strong>Section 41</strong></td>
<td>Information provided in confidence</td>
</tr>
<tr>
<td><strong>Section 40</strong></td>
<td>Personal information</td>
</tr>
<tr>
<td><strong>Section 44</strong></td>
<td>Prohibitions on disclosure</td>
</tr>
<tr>
<td>If the exemption is class-based, there is no need to consider the issue of any prejudice (harm test) caused by the release of information, or whether the exemption is absolute or qualified.</td>
<td></td>
</tr>
<tr>
<td><strong>Class-based exemptions that are 'qualified' are:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Section 22</strong></td>
<td>Information intended for future publication</td>
</tr>
<tr>
<td><strong>Section 27(2)</strong></td>
<td>International relations</td>
</tr>
<tr>
<td><strong>Section 30</strong></td>
<td>Investigations and proceedings conducted by the public authority</td>
</tr>
<tr>
<td><strong>Section 35</strong></td>
<td>Formulation of government policy</td>
</tr>
<tr>
<td><strong>Section 37</strong></td>
<td>Communication with Her Majesty etc and honours</td>
</tr>
<tr>
<td><strong>Section 39</strong></td>
<td>Environmental information</td>
</tr>
<tr>
<td><strong>Section 42</strong></td>
<td>Legal professional privilege</td>
</tr>
<tr>
<td><strong>Section 43(1)</strong></td>
<td>Commercial interests</td>
</tr>
<tr>
<td>These are subject to the application of the PIT.</td>
<td></td>
</tr>
<tr>
<td>In general terms, under class-based exemptions, disclosure of information is excluded. This is regardless of whether it would be harmful to the public interest or not. Put another way, most class-based exemptions are absolute with an underlying assumption that disclosure of any information falling within a class-based exemption would be damaging.</td>
<td></td>
</tr>
<tr>
<td><strong>Prejudice-Based Exemptions</strong></td>
<td></td>
</tr>
<tr>
<td>Prejudice-based exemptions only come into effect where disclosure of information in question would, or would be likely to have, a specified prejudicial effect or identifiable harm. This exemption focuses on identifying the harm that may be caused by release, whether that harm is actual, real or of substance.</td>
<td></td>
</tr>
<tr>
<td>All other exemptions are prejudice-based exemptions.</td>
<td></td>
</tr>
<tr>
<td>Section 24</td>
<td>National security</td>
</tr>
<tr>
<td>Section 26</td>
<td>Defence</td>
</tr>
<tr>
<td>Section 27(1)</td>
<td>International relations</td>
</tr>
<tr>
<td>Section 28</td>
<td>Relations within the UK</td>
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<tr>
<td>Section 29</td>
<td>The economy</td>
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<td>Section 31</td>
<td>Law enforcement</td>
</tr>
<tr>
<td>Section 33</td>
<td>Audit functions</td>
</tr>
<tr>
<td>Section 36</td>
<td>Prejudice to the effective conduct of public affairs</td>
</tr>
<tr>
<td>Section 38</td>
<td>Health &amp; safety</td>
</tr>
</tbody>
</table>

Prejudiced-based exemptions come into effect when the disclosure of information would have a specified prejudicial effect (actual, real or of substance). Where there are no prejudicial effects, the information must be released under FOIA.

Public authorities are neither obliged to confirm or deny the existence of information requested, nor communicate the information where specified interests may be prejudiced by confirmation or denial.

Where there may be prejudicial effects, the public interest test must be applied. In some cases, public interest may lie in disclosing information, even though there may be a prejudicial effect in that release. When information requested falls within this class, the authority must demonstrate that public interest favours continued secrecy.

**ACPO POLICY**

ACPO policy is to cite all possible relevant exemptions once a decision of non-disclosure has been reached.

When a decision has been taken to apply an exemption, then all other pertinent exemptions will be applied. If it is not in the public interest to release requested information, then it is ACPO policy to protect the information vigorously. Where exemptions have been labelled ‘class-based’, legislators have already accepted that the release of this information would be harmful and this should be explained to the applicant.

It is considered good practice to link up the exemptions applied. For example, s30(2) refers to Confidential sources. Where dealing with requests relating to CHIS, applicants will automatically be referred to s30(2). However, other exemptions may be available such as s38 (Health and safety) to protect the welfare and perhaps the life of the informant, s31 (Law enforcement) since it is fundamental to the Police Service’s core business to recruit informants, s40 (Personal data), s41 (Information provided in confidence) since informants believe they are giving information in confidence meaning that release of that information would result in an actual breach of confidence and s36 (Disclosures prejudicing the effective conduct of public affairs).
NEITHER CONFIRM NOR DENY (NCND)

With the exception of s21, the duty to confirm or deny the existence of information in response to an FOI request does not arise.

This provision in the Act ensures a public authority is not obliged to reveal the existence of information where such a revelation would be an important form of information in itself. Whilst this is particularly pertinent to s23 and s24 exemptions, it is a provision that is relevant to other key exemptions that will be used by the Police Service.

There will be occasions when NCND does not need to be maintained. This may be, for example, where the security bodies are already known to be involved in or have an interest in a certain area of activity. Equally, there may be cases where the information is shortly to be made available in the public domain, making an NCND stance unnecessary.

On the other hand, however, there may be occasions where simply confirming or denying the existence of information might reveal an interest in a particular individual, on-going investigation, organisation or subject.

NCND may be used, even if the authority does not hold the information requested, as confirming non-existence may in itself provide valuable information about individuals or organisations NOT being investigated.

Enforcing NCND should be considered on a case-by-case basis.

Where acknowledging that the information does or does not exist may inadvertently offer valuable information in itself to the applicant, the Police Service may invoke the NCND clause and must adopt the following wording to ensure that there is no unintended disclosure:

‘The (constabulary/police) can neither confirm nor deny that it holds the information you requested as the duty in s1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of (quote exemption such as s23(5), 24(2), 30(3) etc). However, this should not be taken as conclusive evidence that the information you requested exists or does not exist.’

For additional guidance on NCND, please refer to the DCA website at:
www.dca.gov.uk
# ABSOLUTE EXEMPTIONS

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<td><strong>Absolute Exemptions S2(3)</strong></td>
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<td></td>
</tr>
<tr>
<td><strong>Section 21</strong></td>
<td>Information reasonably accessible by other means</td>
<td></td>
</tr>
<tr>
<td><strong>Section 23</strong></td>
<td>Information from or relating to certain security bodies</td>
<td></td>
</tr>
<tr>
<td><strong>Section 32</strong></td>
<td>Information contained in court records</td>
<td></td>
</tr>
<tr>
<td><strong>Section 34</strong></td>
<td>Information disclosure of which would breach Parliamentary privilege to ensure that mechanisms introduced by Act do not interfere unduly with the areas of responsibility of other constitutional bodies</td>
<td></td>
</tr>
<tr>
<td><strong>Section 36</strong></td>
<td>Information disclosure of which would prejudice the effective conduct of public affairs – when such information is held by House of Commons or House of Lords</td>
<td></td>
</tr>
<tr>
<td><strong>Section 40</strong></td>
<td>Personal information where the applicant is the subject of personal information and, in certain circumstances, where the applicant is a third party</td>
<td></td>
</tr>
<tr>
<td><strong>Section 41</strong></td>
<td>Information provided in confidence (irregular because defined in relation to the equitable action for breach of confidence which has its own inherent form of protection for public interest disclosure)</td>
<td></td>
</tr>
<tr>
<td><strong>Section 44</strong></td>
<td>Information covered by prohibitions on disclosure are included because the disclosure of information falling within their scope is governed by other laws</td>
<td></td>
</tr>
</tbody>
</table>

Notes:
The application of absolute exemption is not mandatory. Where information has been requested and there is a clear benefit to the Police Service as a whole in its release, decision-makers may take the decision to release information that may otherwise be covered by an absolute exemption.

*s36 and s40 confer a combination of absolute and qualified exemption. This is subject to the nature of the information or, in the case of s40, the identity of the applicant.*
SECTION 21
INFORMATION REASONABLY ACCESSIBLE BY OTHER MEANS

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th>21(1) information which is reasonably accessible to the applicant otherwise than under s1 is exempt information.</th>
</tr>
</thead>
<tbody>
<tr>
<td>What the Act States:</td>
<td>Absolute Class-based</td>
</tr>
<tr>
<td>Exemption Type:</td>
<td>Required to confirm or deny the existence of the information but not to communicate it.</td>
</tr>
</tbody>
</table>

OFFICIAL GUIDANCE

ICO guidance identifies two scenarios where charges may be made:
• Where information is already provided for a fee under a statutory scheme; and
• Where the information is already published as part of the authority's publication scheme and a charge has already been indicated for the class of information in question.

Should a public authority already have a legal obligation to publish certain types of information, then that information should be considered reasonably accessible, even though it may not appear on, or be described in, the publication scheme. This also applies if the information requested is available as a consequence of the legal duty of another public authority.

The exception is information that is available only on inspection, by visiting a specific location for example. In this case, the information is not considered to be reasonably accessible even though the authority has a legal obligation to publish it unless it falls within a class of information that is included on the authority's publication scheme.

The onus is on the public authority to assist and advise applicants when they request information. Where an authority is not under a duty to incorporate into its publication scheme information that it is legally bound to publish, the Information Commissioner’s view is that it is helpful and appropriate to place that information on the publication scheme.

Where a public authority is not required to make information available (other than under the FOI Act), it is not considered ‘reasonably accessible’ unless it falls within a class of information published under the authority’s publication scheme.

Accessibility

Information that is normally made available in inspection is not ‘reasonably accessible’ if:
• The applicant lives a considerable distance away;
• The applicant has mobility problems; or
| **Language** | There are other factors that may influence an applicant's ability to view the information. In these cases, the authority should consider providing a hard copy of the information – though this does not mean it is obliged to every time. |
| **Disability** | The authority is under no obligation to translate information that is released in response to a request into other languages. It may, however, be reasonable for the authority to translate the original request and then consider translation on a case-by-case basis. |
| **Non-Electronic Information** | Where an applicant has a disability or may require the information requested in an alternative form – such as in Braille or an audio-tape – the onus is on the authority to consider providing it in the format requested if it is ‘reasonably practicable’ to do so. |
| **Using a s21 Exemption** | The publication scheme must specify the format in which information is published. Information provided in electronic format should be offered as a hard copy alternative for those applicants without reasonable access to the Internet. |
| **Charging Policy** | When using this exemption, public authorities may either:  
- Make the requested information available and accessible by other means (such as via the publication scheme); or  
- Consider the release of the information in accordance with the requirements of the FOIA. |

A public authority **must clearly indicate** on its publication scheme if it is making a charge for the supply of information. It may be appropriate to include on the publication scheme a list of documents and other information that is available for a fee.

Where the authority is not relying on s21, it will be entitled to charge a fee for photocopying and postage in accordance with the fees regulation to cover the full costs of disbursements. Authorities need to be aware, however, that if the decision is taken to charge some applicants for information, but not those for whom the information is reasonably accessible, they may fall foul of other statutory duties laid down by the Welsh Language Act 1993, the Race Relations Amendment Act 2000 and the Disability Discrimination Act 1995.

Public authorities may also have their own internal policies that commit them to delivering a certain level of service for members of the non-English community. It is important that members of staff responsible for dealing with FOI requests are aware of existing policies regarding access to information for those with physical disabilities or for non-English speakers.

**Full ICO Guidance**  [www-informationcommissioner-gov-uk](http://www-informationcommissioner-gov-uk)  
ACPO POLICY

This is an absolute exemption that may be applied where the information requested is reasonably accessible to members of the public elsewhere or by other means.

This exemption is not subject to the public interest test.

Public authorities are under a duty, defined in s16 of the Act, to ‘provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information’.

When applying this exemption, public authorities must inform applicants as to how they can obtain the information they are seeking.

Where this exemption is cited, information must be ‘reasonably accessible’.

This means it may be available free of charge or on payment of a ‘reasonable’ fee.

This exemption may not be used if the fee required to access the required information is inordinately high.

To apply this exemption, information must be physically and geographically accessible to the applicant. If it is available in one location only and there is a requirement to source the information in person, this may not be considered ‘reasonably’ accessible.

This exemption may be applied if the information requested is publicly available on a website (not just the force’s own website) or in the publication of another individual, organisation or publisher.

If the public authority enforces this exemption where the information is available under its publication scheme, an applicant will be able to challenge the level of fee charged under that scheme.

General

Publicly accessible information will be interpreted as meaning information published in the force publication scheme.

When a special case is put to the authority for information published, where disability or other difficulties result in problems in accessing the information (such as lack of Internet access), then it will be left to the individual force to decide on how best to provide the applicant with the information requested.
SECTION 23
INFORMATION SUPPLIED BY, OR CONCERNING, CERTAIN SECURITY BODIES

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>What the Act States:</td>
</tr>
<tr>
<td>(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).</td>
</tr>
<tr>
<td>(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to s60, be conclusive evidence of that fact.</td>
</tr>
<tr>
<td>(3) The bodies referred to in subsections (1) and (2) are—</td>
</tr>
<tr>
<td>(a) the Security Service,</td>
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<tr>
<td>(b) the Secret Intelligence Service,</td>
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<tr>
<td>(c) the Government Communications Headquarters (GCHQ),</td>
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<tr>
<td>(d) the special forces,</td>
</tr>
<tr>
<td>(e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,</td>
</tr>
<tr>
<td>(f) the Tribunal established under section 7 of the Interception of Communications Act 1985,</td>
</tr>
<tr>
<td>(g) the Tribunal established under section 5 of the Security Service Act 1989,</td>
</tr>
<tr>
<td>(h) the Tribunal established under section 9 of the Intelligence Services Act 1994,</td>
</tr>
<tr>
<td>(i) the Security Vetting Appeals Panel,</td>
</tr>
<tr>
<td>(j) the Security Commission,</td>
</tr>
<tr>
<td>(k) the National Criminal Intelligence Service, and the Service Authority for the National Criminal Intelligence Service.</td>
</tr>
<tr>
<td>(4) In subsection (3)(c) ‘the Government Communications Headquarters’ includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.</td>
</tr>
<tr>
<td>(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with s1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).’</td>
</tr>
</tbody>
</table>

Exemption Type: Absolute Class-based
| **Confirm/Deny:** | There is no need to confirm or deny the existence of information if, by doing so, it would imply that the information exists and that it originated from a security body. |
The exemptions under s23 and s24 are extremely closely linked. The s23 exemption is applicable to information received from or related to a number of bodies specifically listed in the Act. The s24 exemption is applicable to information, the non-disclosure of which is necessary to safeguard national security.

In certain circumstances it will be necessary to use the two exemptions together. In other circumstances the two exemptions are mutually exclusive and cannot be used together. Accordingly this chapter should be read together with the chapter on s24 when contemplating withholding information on grounds related to national security. Appendix E, F and G to the s24 chapter are equally relevant to this chapter.

For guidance on the inter-relationship between the FOI Act and the Official Secrets Act 1989, see the chapter on the s44 exemption concerning prohibitions on disclosure.

As the security bodies are not 'public authorities' for the purposes of the Act, they are not under any duty themselves to disclose information. It is only information supplied by them to departments, or information that relates to them and held by departments, that needs to be, and is, addressed by s23.

In so far as the exemption relates to the source, rather than the content of the information, it is not possible to give an indicative list of the types of information that may be covered by s23. In so far as the application of the exemption turns on whether information 'relates' to the security bodies, it will be capable of covering a range of subject matter of a policy, operational or administrative nature.

In relation to any particular item of information, it will be a matter of fact as to whether it falls under s23 or not. However this may sometimes be a question of degree, or indeed be difficult to ascertain if evidence relating to the origin of the information is not available or is inconclusive. Each request that potentially involves sensitive information, has a national security element or relates, even indirectly, to the security bodies, will need to be considered on a case-by-case basis to ensure that a correct response is made. Where there is any doubt, the originator of the document containing the information should be consulted. Particular consideration needs to be given to cases where no specific information from, or relating to, a security body is held, but that absence could in itself amount to information falling within this exemption - for example by confirming an absence of security involvement in circumstances where that absence was a significant fact.

s23 is an absolute exemption. This means that there is no requirement in the Act to assess the prejudice that could be caused by disclosure, nor any requirement to consider the public interest in disclosure. It is also the case that it applies regardless of the effect,
s23(5) provides an exemption to the duty to confirm or deny whether the information requested exists (s1(1)(a)).

**Officials should bear in mind that acknowledging that no information supplied by or relating to any of the security bodies is held may in itself constitute information about one of the security bodies, and that in some circumstances it may be appropriate to apply the 'neither confirm nor deny' provisions under s23(5) even when no information is held. See section on NCND for further details.**

While there is no right of access under the FOIA to information supplied by or relating to the security bodies it may still be possible to disclose information, quite separately from the Act, if disclosure is officially authorised. But it remains important that the disclosure of any information that could be covered by s23 (including historical records) takes into account other relevant legal considerations, and that the decision is taken after consultation with the respective legal and security experts.

- Officials need to bear in mind that in order for information to come within the scope of s23, it does not have to have been supplied directly to a department by one of the security bodies. The exemption also applies where information originated with a security body but was supplied indirectly to a department (e.g. having first passed through another department).

- Although the identification of information supplied by or relating to the security bodies may be straightforward in the majority of cases, this may become less clear when it is used by recipients (for example, where a department draws on information provided by a security body to produce its own reports or documents).

- It is therefore necessary to consider how best to indicate the origin of source material. This may be difficult to achieve where historic information is involved, but departments that receive and use information from the security bodies should adopt procedures for annotating documents in a way that will confirm the relevance of s23.

- The Act does not specify how remote from the original source information needs to be before it is no longer to be regarded as ‘directly’ or ‘indirectly supplied’ by, or that it relates to, one of the security bodies. However, if it is possible to trace a discrete piece of information back through each transmission to its original source, then this would seem to be sufficient, however many hands it has passed through and even if its wording has changed along the way.

- When considering whether to apply the exemption, thought should always be given by officials as to the explanation for the decision. This explanation will be carefully examined by the
Consultation

It is important to note that where information requested only partly derives from, or relates to, the security bodies and is thus exempt under s23, the remainder of the information will be subject to the right of access under the Act (and any other applicable exemptions).

It will often be necessary to consult the security bodies for their views on how a request should be answered. It may be appropriate that the originator of the document consults with their contact directly. If the originator of the document is not known, or if officials are unsure whether to withhold or release security information, they should contact their departmental security officer, who will be able to advise on the appropriate course of action.

The s23 exemption applies to all records, regardless of their age, including historical records, except that for historical records held by the National Archives or the Public Record Office of Northern Ireland s23 ceases to be an absolute exemption after 30 years. The sensitivity of s23 information may diminish with the passage of time once the record in which the information is contained has become an historical record. Each instance should be judged on a case-by-case basis, consulting as appropriate.

Neither Confirm Nor Deny

In many situations it will be appropriate for a department neither to confirm nor deny the existence of the information sought and claim the s23(5) exemption.

Where a department does this it will not be appropriate or necessary to claim the s23(1) exemption. Clearly it would not make logical sense for the duty to communicate the information to arise where it was decided to give a ‘neither confirm nor deny’ response. Where the duty to communicate does not arise, it is not necessary to claim the exemption under s23(1).

It is also important to note that where a department does NOT hold information, directly or indirectly supplied to them by, or about, a security body it may still be appropriate to rely upon the exemption under s23(5) in order neither to confirm nor deny the existence of information. This is because to confirm that no information is held is of itself information about a security body, namely information that a security body has not supplied information. A more detailed explanation of NCND is given in the guidance on s24 at Appendix G.

Combined Use of s23(5) and s24(2) Exemptions Together
Use of s23(5) (and s24(2)) Exemption Where No Information Held

There is considerable potential overlap between the information covered by s23 and that covered by s24. Clearly information about the existence or otherwise of information from, or relating to, a security body is information which is also capable of being exempt under s24(2), if exemption from the duty to confirm the existence of information (s1(1)(a)) is required for the purpose of safeguarding national security.

The use of s23(5) and s24(2) together is possible under the Act (in contrast to s23(1) and s24(1) which are expressly mutually exclusive). The ability to use s23(5) and s24(2) together is important where it is necessary to answer a request in a way that preserves NCND.

- There will be information requests where NCND does not need to be maintained. Whether an NCND stance is required to protect national security is a matter of fact to be considered on a case-by-case basis. For example, where a request concerns an area of activity where it is known that one or more of the security bodies are involved there will be no need to maintain NCND. Equally, there may be cases where information is shortly to be put into the public domain that would make an NCND stance unnecessary.

- However, where NCND needs to be maintained for national security purposes it is important that whenever an exemption from the duty to confirm or deny (under s1(1)(a)) is claimed under s23(5) consideration is always given to claiming the equivalent exemption under s24(2). Of course use of s24(2) will require a full consideration of the need for the national security exemption and the public interest in disclosure (see s24 exemption). But consideration of the combination is necessary because the nature of s23 inevitably discloses that a security body is involved (or that the absence of involvement of a security body is significant) and use of s23 and s24 together may be the only way that the ‘non committal’ response that NCND requires, in order to work, can be maintained.

Further, so that it cannot be readily inferred that use of the two exemptions together is itself an indicator of the relevance of security body activity, it is important that where s24 is relied on, reciprocal consideration is given to the justification for relying on s23.

- NCND may be undermined not only by confirming that there is information held (i.e. implying that the security bodies have an interest in the subject) but also by confirming that there is not (i.e. implying that the security bodies do not have an interest).

Thus confirmation that no information is held that has been supplied or relates to a security body may itself be information, for which an exemption from disclosure is required. This may justify the use of the s23(5), or both the s23(5) and the s24(2) exemptions in order to neither confirm nor deny in response to a request for information. The decision as to whether a s23(5) exemption is an appropriate response where no information is held must always be considered carefully. The following factors
Application of Section 17

must always be taken into account:
- Whether the information requested could reasonably have come from or be related to a security body;
- Whether the information is about the kind of matter in which the Department would be reasonably expected to have an interest; and
- Whether, at the time of the request, the subject matter is of such sensitivity that the department would not want to reveal either information or a lack of information on the matter.

- For example, an information request is made to the Foreign and Commonwealth Office asking for information on terrorist threats to a particular UK interest overseas. No information from the security bodies is held by the Foreign and Commonwealth Office relating specifically to that UK interest as there is no threat at present. Confirmation that no information from the security bodies is held might assist terrorist groups in their activities. They could infer that the UK interest was not seen as under threat and therefore assume that it will be an easier target. Their operational plans could then be altered to target that UK interest in the future. Considering each of the factors above, claiming the s23(5) exemption in these circumstances is likely to be justified. It may also be appropriate in this situation to claim the s24(2) exemption in this case.

- This is not an easy analysis to make and there may be reasons why NCND needs to be used of which officials are not aware. Where a department is in any doubt as to the appropriate manner in which to respond in such circumstances it should always consult its departmental security officer and/or refer to the appropriate security body, who will be able to advise on the appropriate course of action.

- Whether a department holds s23 information or not, it will need to consider whether it can confirm or deny that fact in response to a request. Where a department determines that it should neither confirm nor deny the existence of the information, as mentioned above, it may rely upon s23(5). This provides that a department may NCND if compliance with the duty to inform (s1(1)(a)) would involve the disclosure of information supplied by or about a security body.

Whenever a department relies upon s23(5) to NCND, it will need to comply with the duty under s17(1) to state in a notice that it is relying upon an exemption and indicate which exemption it is relying upon. It may also be obliged to state why the exemption applies (s17(1)(c)), although this may not be required if to do so would reveal exempt information (s17(4)).

- Where a department claims the s23(5) exemption, it is not necessary for it also to claim the exemption from the duty to communicate the information (the s23(1) exemption). As such, any s17 notice in relation to a claimed exemption under s23(5)

Ministerial Certificates

- s23(2) provides that a certificate may be signed by a Minister, certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the specified security bodies. The Act says that a certificate will ‘be conclusive evidence of that fact’ but it should be noted that this can be challenged under s60.

- s23 only allows ministerial certificates to be signed in relation to specific information. The certificate cannot be general and prospective; in other words it cannot be prepared and signed in expectation of a request for information (unlike certificates served under the s24 national security exemption).

- A ministerial certificate requires the signature of a Minister of the Crown (who for these purposes are Cabinet Ministers, the Attorney General and the Advocate General).

- It is not necessary to have a certificate in order to rely on the s23 exemption but it will strengthen the position of the department in any legal proceedings, and determine the forum for hearing an appeal. When a ministerial certificate has been served, any appeal is heard by the information tribunal (the tribunal) rather than by the Information Commissioner. (See s24, Appendix E).

- Officials should consider preparing a Ministerial certificate at an early stage in response to a request for information where the s23 exemption will be relied upon. Since the certificate is relevant primarily to the stage at which formal enforcement action becomes a possibility departments need not serve a certificate on the applicant at this stage, but can defer doing so until the applicant has exhausted the internal review process and indicated that he will be applying to the Information Commissioner. To serve the certificate when answering a request may be premature and involve unnecessary work, but a department may nevertheless want to consider the drafting of a certificate at this stage in case it becomes necessary to utilise it.

- In any event, departments should consider establishing a procedure with the appropriate private office so that where necessary certificates can be drawn up and signed without undue delay. The Act does not require that a certificate is signed by any particular minister. It is also possible for one ministerial certificate to cover round robin cases. Where the information being safeguarded potentially crosses departmental boundaries, it will be important to undertake interdepartmental consultation at an early stage. You should contact your departmental security officer and, when dealing with round-robin requests, the DCA Clearing

only need state the information required in relation to the exemption from the duty to confirm or deny. Where the s24(2) exemption is claimed alongside the s23(5) exemption, the s17 notice will need to deal with both exemptions and in relation to the s24(2) exemption, make reference to the fact that the public interest for and against disclosure has been properly assessed.
- Consideration should be given to drawing up a specific certificate template; departments may wish to ask their lawyers to prepare a draft which can be adapted for use when needed.

- Where a s24(2) exemption has been claimed in conjunction with the s23(5) exemption a certificate in relation to each exemption can be deployed in respect of the same information (see guidance on ministerial certificates under s24).

- In addition to the s24 exemption, there is nothing to prevent the use of other exemptions if a s24 and/or a s23 exemption is relied upon in relation to the same information. Given the potential for overlap between exemptions, departments should be aware of the existence of other exemptions at the same time as relying on either s23 or s24. For example, if a department considers that an exemption is required for the purpose of safeguarding national security, it may also be appropriate to claim an exemption under s26 (Defence), s27 (International relations), s29 (The economy), s30 (Investigations and proceedings by public authorities) and s31 (Law enforcement).

- However, since the other exemptions do not contain provision for ministerial certificates to be deployed, there would be procedural questions to be considered if reliance on the exemptions were challenged. Thus if, say, an exemption was claimed under s23 and/or s24, and s26 (Defence) the potential appeal routes would be as follows:

  - An appeal against a certificate served under s23 or s24 would be made to the tribunal (under s60) by either the applicant or the Information Commissioner;

  - The challenge on the balance of the public interest in disclosure in relation to the s24 exemption would be made by the applicant to the Information Commissioner (but this may be adjourned pending the outcome of the appeal to the tribunal on the certificate); and

  - The challenge to the s26 exemption would be made by the applicant to the Information Commissioner. Again, it may be appropriate to invite the Commissioner to adjourn this pending the hearing of the appeal to the tribunal on the s23 or s24 certificate.

www.informationcommissioner.gov.uk

http://www.dca.gov.uk/foi/guidance/exguide/index.htm
ACPO POLICY

Confirmation or denial of information that would directly reveal the involvement of one of the listed bodies would be information in its own right and therefore exempt. To ensure that there is no unintended disclosure, the following wording must be adopted when using the NCND principle:

‘The (constabulary/police) can neither confirm nor deny that it holds the information you requested as the duty in s1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of s23(5) and 24(2) of the Act. However, this should not be taken as conclusive evidence that the information you requested exists or does not exist.’

It is ACPO Policy that the data owner must always be consulted where a s23 exemption is applied. The data owner will then decide whether a ministerial certificate should be considered. **This procedure must be followed whether the data is held or, if not, would likely have come from a s23 body.**

It is ACPO Policy to cite s24 in addition to a s23 exemption where applicable. In the majority of cases, s30 and s31 exemptions should **also** be cited as the police will only hold this information for the purposes of investigations and law enforcement. All of these exemptions should be applied in certain cases even if the information is not held as this may be information in its own right.

A protocol agreement has been drafted between ACPO and the security service. This will provide disclosure guidance for responding to information requests under FOIA.

Template Letter available (B25).
SECTION 32
INFORMATION CONTAINED IN COURT RECORDS

LEGISLATIVE REQUIREMENTS

What the Act States:

Information held by a public authority is exempt information if it is held only by virtue of being contained in:

(a) any document filed with, or otherwise placed in custody of, a court for the purposes of proceedings in a particular cause or matter,
(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
(c) any document created by
   (i) a court, or
   (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.

Information is exempt from the duty to communicate where it is held only by virtue of being contained in:

(a) any document placed in custody of a person conducting an enquiry or arbitration, for the purposes of the inquiry or arbitration, or
(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration

The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.

In this section –

(a) ‘court’ includes any tribunal or body exercising the judicial power of the State,
(b) ‘proceedings in a particular cause or matter’ includes any inquest or post-mortem examination
(c) ‘inquiry’ means any inquiry or hearing held under any provision contained in, or made under, an enactment, and except in relation to Scotland, ‘arbitration’ means any arbitration to which Part 1 of the Arbitration Act 1996 applies.

This exemption covers information contained in court records. This ensures that the courts and tribunals themselves govern disclosure of information around all aspects within and relating to the legal process.

For the purposes of the Act, a court is defined as including any tribunal or body exercising the judicial power of the State. This definition can include coroners, county, civil and criminal courts and tribunals. Not covered by the Act are bodies that possess administrative powers only.

s32 applies only to information contained in documents relating to ‘proceedings in a particular cause or matter’. This can include court
### Exemption Type:

**Information contained in formal court documents such as summonses, warrants, witness statements, affidavits and skeleton arguments.**

General information that relates to legal process is not covered by this exemption and is open for disclosure, subject to the public interest test. Thus, this exemption applies only to information held in documents that relate to particular cases and proceedings.

### Confirm/Deny:

**Absolute**

**Class-based**

Duty to confirm/deny does not arise in relation to information that is exempt by virtue of this section.

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### OFFICIAL GUIDANCE

**Claiming this Exemption**

This information is exempt from disclosure if it is contained in court records or documents held for the purposes of an enquiry or arbitration.

For records less than 30 years old, this is an absolute exemption. There is no requirement to confirm or deny the existence of the information. After 30 years, records become ‘historical’ documents and are no longer protected by s32. Where a set of documents exists that comprise a record were created at different times, the 30 years starts from the day on which the last of the documents was created.

Courts and public inquiries are not public authorities as defined in the Act. It is unlikely that they will hold any documents that will fall within the scope of this exemption.

This exemption ensures existing rules relating to access to or publication of information contained in court records or held for the purposes of inquiries or arbitration are left unchanged. This ensures the right to a fair trial and leaves intact the rights of access to information under normal disclosure rules.

The s32 exemption cannot be used to refuse or confirm the existence of court proceedings or anything relating to litigation (or even the existence of an inquiry or arbitration). In this case, either the legal professional privilege exemption or laws of contempt should protect information against harmful disclosure.

### Information That May be Covered

Types of information that may fall within the s32 exemption:

- Witness statements;
- Statement of case (such as particulars of claim, defence, counterclaim, defence to counterclaim and reply, details of when and how a fine is paid;
- Any warrants issued;
- Indictment (charge) sheet; and
- Bail application sheets.

Documents that have temporarily been placed in the custody of the court for a particular cause or matter will form a part of a court record.
Inadmissible Evidence

Whilst they remain in the possession of the court. If they are then returned to the public authority, they may be accessible from the authority under the FOIA. However, any record of the document having been lodged with the court would be exempt.

For additional information about examples of court records and information contained therein, see the court services website.

Where evidence is deemed as being inadmissible, it will not form part of a court record.

When this happens prior to the case being heard in court, the inadmissible evidence will either be removed from the case notes or stay in the notes with a line drawn through it. In either case, the information that no longer constitutes a part of the case is not exempt under s32. If, during the case hearing in court, the judge rules certain documents or evidence as inadmissible, these will be removed and returned to the appropriate party and again, will not form part of the court record. This means that the s32 exemption may not be applied to them.

Copies of Documents

An original document that has formed part of a court record may be exempt under s32 but crucially, copies of documents may not be.

However, where any of the following criteria applies to the original document, then copies will also be exempt under s32:
- If the original document was filed with or placed in the custody of a court for the purposes of proceedings in a particular cause or matter; or
- If the original document was serviced upon, or by, a public authority for the purposes of proceedings in a particular cause or matter; or
- If the original document was created by a court or any member of the administrative staff of a court.

However, if the document were created before any proceedings were considered, then subsequent copies would not be exempt.

Public Inquiries

For information to be covered by s32 exemption, any public inquiry must be governed by a statute and have associated powers to compel the production of documents, evidence and/or witnesses to attend.

The information may be contained in any document provided to the inquiry or information in any document created by individuals conducting a specific inquiry.

Prior to releasing information, decision-makers will need to refer to the terms of reference of the inquiry, the circumstances under which the inquiry was established and the powers it has been afforded. Information generated by statutory inquiries fall within this exemption. Non-statutory inquiries may also fall within this exemption but prior to making a decision, it is essential to understand the precise basis of the inquiry.
ACPO POLICY

General:

Documents relating to forthcoming litigation or future action are not covered by this exemption, though they may be covered by s42 (Legal and professional privilege). The exemption applies if a document has been:

- Filed with or otherwise placed in the custody of a court; or
- Served upon or by a public authority, for the purposes of court proceedings; or
- Placed in the custody of a person conducting an inquiry or arbitration or the purposes of that inquiry or arbitration; or
- Created by a court or member of the administrative staff for the purposes of court proceedings; or
- Created by a person conducting an inquiry or arbitration for the purposes of that inquiry or arbitration.

To apply this exemption, a court case, inquiry or arbitration must be currently taking place or have taken place. If court proceedings are being considered but have not yet commenced, the exemption can not be applied to a draft document prepared in advance of proceedings actually being issued.

The release of unused material, i.e. material that does not form part of the court record, will be subject to release following the application of the public interest test under s30.

ACPO interpretation of s32 is that:

- Any document that has been lodged with court, placed in front of a court, heard by a court or been through the court process is covered by this exemption. This will include verbal briefings and copies of documents and materials.
- Unused material may be subject to release following the application of the public interest test.

ACPO also states that no force will release any information in relation to any investigation that has not been through the court process or is currently going through the court process. This would contravene s6 of the Human Rights Act (the right to a fair trial) and s30 and s31 of the FOIA.
SECTION 34
DISCLOSURE WHICH WOULD INFRINGE PARLIAMENTARY PRIVILEGE

LEGISLATIVE REQUIREMENTS

What the Act States:
(1) Information is exempt information if exemption from s1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

Exemption Type:
Absolute
Class-based

Confirm/Deny:
Duty to confirm or deny does not arise.

OFFICIAL GUIDANCE

ICO Guidance
www.informationcommissioner.gov.uk

DCA Guidance
http://www.dca.gov.uk/foi/guidance/exguide/index.htm

ACPO POLICY
General:
Information is exempt from disclosure if its release would infringe the privileges of either House of Parliament.

The purpose of this exemption is to protect Parliament’s power to retain control over disclosure of its own information.

The duty to confirm or deny is excluded under this exemption where confirming or denying the existence of information would infringe the privileges of either House.

Whilst confirmation or denial of the existence of information is less likely to infringe Parliamentary privilege than disclosure itself, s34(2) will apply where confirmation or denial would result in a breach of privilege.

It is ACPO’s view that this exemption would be used minimally and will cover correspondence from the Cabinet Office and the Prime Minister.
**SECTION 36**
**DISCLOSURE PREJUDICING THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS**

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th>This section applies to:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>What the Act States:</strong></td>
<td>(a) Information which is held by a Government department or by the National Assembly for Wales and is not exempt information by virtue of s35; and</td>
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<tr>
<td></td>
<td>(b) Information which is held by any other public authority.</td>
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<tr>
<td><strong>Exemption Type:</strong></td>
<td>Absolute/Qualified Prejudice-based</td>
</tr>
<tr>
<td><strong>Confirm/Deny:</strong></td>
<td>Duty to confirm or deny does not arise in relation to information to which this section applies.</td>
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</table>

**OFFICIAL GUIDANCE**
- Full ICO Guidance: [www-informationcommissioner-gov-uk](http://www-informationcommissioner-gov-uk)

**ACPO POLICY**
**General:** Information is exempt from disclosure if, in the reasonable opinion of a ‘qualified person’*, its disclosure would prejudice, or would be likely to prejudice, certain specified interests relating to public affairs.

Where the information in question is held by either House of Parliament, s36 is an absolute exemption. This exemption may well be applied to stop disclosures that might prejudice the effective conduct of Parliamentary business, even when the principle of Parliamentary Privilege is not threatened.

In other cases, s36 is a qualified exemption. This means the public interest test must be applied.

Where, in all circumstances of the case, the public interest in non-disclosure outweighs the public interest in disclosure, the information need not be disclosed.

s36 differs from other exemptions because it uses the term ‘reasonable opinion of a qualified person’. Information to which this

---

*qualified person*
section applies is exempt information if, in the reasonable opinion of a 'qualified person', disclosure of the information:

(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, or

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

The main beneficiaries of this exemption will be public authorities. This exemption has been referred to as a ‘mopping up’ clause in the Act to prevent disclosure of information that’s not covered by other specific provisions.

Under this exemption, there is no duty to confirm or deny if, in the opinion of ‘reasonable person,’ the information is not disclosable.

Assuming a ‘qualified person’, on reviewing the request for information, believes that the information should be exempt because public interest favours retention, the release of material requested may be declined.

A specific definition of a ‘qualified person’ is not included in the Act. Reference is made to a person authorised by a Minister of the Crown. It also seems a Minister can authorise a public authority as a ‘qualified person’, or an officer or employee. Any authorisation might relate to:

- A specified person or persons falling within a class;
- May be general or limited to particular classes of case; or
- May be granted subject to conditions

* For the Police Service, the suitably ‘qualified person’ is the Chief Constable.

It is ACPO’s view that this exemption will have minimal relevance and will only be used by the Police Service in the most exceptional cases.
### SECTION 40
#### PERSONAL INFORMATION

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<tbody>
<tr>
<td><strong>What the Act States:</strong></td>
<td>(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the subject.</td>
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<td></td>
<td>(2) Any information to which a request for information relates is also exempt information if:</td>
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<tr>
<td></td>
<td>a. it constitutes personal data which do not fall within subsection (1), and</td>
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<td></td>
<td>b. either the first or the second condition below is satisfied.</td>
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<td></td>
<td>(3) The first condition is:</td>
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<td></td>
<td>a. in a case where the information falls within any of the paragraphs (a) to (d) of the definition of ‘data’ in s(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise under the Act would contravene –</td>
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<td></td>
<td>(i) any of the data protection principles, or</td>
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<td></td>
<td>(ii) s10 of that Act (right to prevent processing likely to cause damage or distress), and</td>
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<td></td>
<td>b. in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in s33a(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.</td>
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<tr>
<th>Exemption Type:</th>
<th>Absolute (in part)</th>
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<tr>
<td></td>
<td>Class-based</td>
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<tr>
<th>Confirm/Deny:</th>
<th>The duty to confirm does not arise where the information requested constitutes personal data of which the applicant is the subject.</th>
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<tbody>
<tr>
<td></td>
<td>The duty to confirm or deny does not arise in relation to information that, if its existence were to be confirmed or denied, would contravene any of the data protection principles in the Data Protection Act 1998.</td>
</tr>
<tr>
<td>OFFICIAL GUIDANCE</td>
<td>If information requested under the FOIA is personal data, this is automatically an absolute exemption and becomes a Subject Access Request under the Data Protection Act (1998). Where third party personal data is requested (i.e., if it relates to someone other than the applicant), then an absolute exemption applies if disclosure would breach any one of the 8 data protection principles.</td>
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<tr>
<td>Defining Personal Data</td>
<td>The Data Protection Act applies to all living individuals. Personal data, therefore, is information about a live person. Personal data may be defined under the Data Protection Act as data that is biographical in nature, has the applicant as its focus and/or affects the data subject’s privacy in his or her personal, professional or business life. Personal data can take any of the following forms: • Computer input documents; • Information processed by computer or other equipment (CCTV); • Information in medical, social work, local authority housing or school pupil records; • Information in some sorts of structured manual records; or • Unstructured personal information held in manual form by a public authority (introduced into the DPA by FOI). The ICO Guidance states that where unstructured information is requested, public authorities need not respond unless they are given any information which they reasonably need to find the information requested.</td>
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</table>
| Is it Fair to Disclose? | Prior to disclosing information, consider whether: • Disclosure would cause unnecessary or unjustified distress or damage to the person to whom the information relates; • The third party in question would expect that his or her information might be disclosed to others; • The third party has been led to believe that his or her information would be kept secret; or • The third party has expressly refused consent to disclosure of the information. Information that relates to the home or family life of an individual, personal finances or includes personal references should generally be protected. On the other hand, where information pertains to an individual in a professional, business or official capacity, this should normally be provided on request unless there is some resultant risk to the individual concerned. This does not cover embarrassment over poor administrative decisions. Information about names of officials, grades, job functions, claims submitted for expenses incurred during official duties or decisions that
have been made in an official capacity would normally all attract disclosure. Personal information, such as home address, financial information or disciplinary records would not.

The view is that there is a strong and justifiable public interest in the provision of information about how a public official in a public authority has spent public money.

The IC suggests that requests for information that may fall under s40 should be considered on an individual, case-by-case basis. Generally speaking, it appears the more senior a member of a staff, the less likely it will be considered unfair to disclose information about them acting in an official capacity.

The DPA affords individuals the right to object in writing to the processing or disclosure of their personal data.
### ACPO POLICY

#### Section 40

#### Overview

Under the DPA, applicants must clearly state their intention to apply for their own personal information.

This is not the case under FOI: there is no requirement to specify that a request is being made under FOI legislation and it is up to the authority receiving the request to determine the correct path.

The interface between the DPA and FOIA is complex. The FOIA contains some significant amendments to the DPA. In particular, it increases the range of data to which an individual has rights of access under the DPA. It will be necessary, therefore, in certain circumstances when processing FOI requests to step into the DPA.

s40 for the most part is an absolute exemption.

Where a request is made by an applicant requesting their own personal information, this is an absolute exemption under s40(1). This application becomes a Subject Access Request under the DPA and should be channelled through appropriate procedures to be dealt with by Data Protection Officers.

If the request for information relates to third parties (anybody other than the data subject), it is absolute under s40(2) if the third party’s data protection rights would be breached by disclosure. Releasing personal information to someone other than the data subject will almost always infringe the data protection principles contained in the 1998 DPA.

Because this exemption is absolute, decision-makers are unable to ‘stop the clock’ on timing. This means that one of the most complex decisions reference disclosure under the FOIA has to be taken in the 20 days time limit. However, in most cases, qualified exemptions will also apply, allowing decision-makers to stop the clock.

#### Personal Data

‘Personal Data’ means data that relate to a living individual who can be identified:
- From those data; or
- From those data and other information that is in the possession of, or likely to come into the possession, of the data controller.

This definition also includes the expression of any opinion about the individual or any indication of the intentions of the data controller or any other person in respect of the individual.

#### Sensitive Personal Data

‘Sensitive Personal Data’ means personal data consisting of information that relates to:
- The racial origin of the data subject;
- The political opinions of the data subject;
- The religious beliefs or other beliefs of a similar nature;
- Membership of a Trade Union or similar;
- His or her physical or mental health or condition;
Requests for Third Party Information

Requests for information about third parties are covered by the FOIA but data protection principles apply. This is governed by s40(2). For this type of request, there is a need to consider whether disclosure contravenes the data protection principles and the lawful processing of data.

This exemption falls into 2 parts. Where the release of data would:
- Contravene data protection principles; or
- If the request had been made by the subject of the data, it would be covered by an exemption under the DPA.

Where requests relating to third party information are made and exemptions may not be applied, then the information will be released. **However, this will be rare.**

Questions to Consider

- Does the request fall under the definition of data under the DPA?
- Would disclosure of information contravene data protection principles?
- Would information requested be exempt if requested by the subject of the information?

DPA and Section 10

Section 10 Notices served under the DPA are issued to prevent the data holder from processing (collecting, storing or releasing) information.

However, if data is requested, there is no Section 10 Notice in place and the conditions of the DPA are met, then information must be released in full. When the public interest favours the release of information, it will over-ride a Section 10 Notice. However, it is anticipated that this will only happen occasionally.

How the FOIA has Amended the DPA

Prior to the introduction of the FOIA, there was no legal basis for individuals to request third party information. That privilege was afforded only to the subject of the information under the DPA. The main change instigated by the introduction of the FOIA is that others can now initiate the release of third party information as of 1st January 2005. In addition, the FOIA affords individuals the right to appeal against any decision taken to withhold third party information.

- His or her sexual life;
- The commission or alleged commission by the data subject of any offence; or
- Any proceedings of any offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.
## Applying the PIT

### The FOIA Appears to Say:

In general, it seems the more serious the offence or situation, the greater the pressure to release third party personal information and the greater chance this exemption will fail to prevent release.

**Absolute exemptions**
- Personal information about the person applying is an absolute exemption and is referred to Data Protection.
- Personal information about another person is subject to an exemption which is absolute in part if: The information falls within the definition of data under the DPA
  - And
  - Disclosure would contravene the principles of the DPA
- Or
  - If the request had been made by the subject of the data would be covered by an exemption under the DPA.

**Qualified exemptions**
- It appears that this exemption is absolute in name only. To process requests made, the FOI decision-maker must determine:
  - Whether the information requested is personal information (biographical in nature and has the applicant of the focus); and
  - Affects the applicant’s privacy in his or her personal, professional or business life.

Any information falling within this definition will be the subject of an absolute exemption. This is a Subject Access Request under the DPA and should be handled as such.

Where the information requested falls outside this definition, an absolute exemption may not be applied. In the case of applications for information about third party individuals, the same considerations apply. If the information requested falls outside this definition, it is not personal information and therefore an absolute exemption may not be applied.

Even when third party information **does** fall within the definition above, a decision will need to be taken on its release. The FOIA states this is an absolute exemption, but only when it conforms to provisions listed under the DPA. These provisions effectively constitute another version of the public interest test.

In general, the release of third party information will be rare and taken only after extensive consultation.

Where a notice has been served under Section 10 of the DPA, the public interest test must be applied and this can over-ride a Section 10 Notice.

### ACPO’s View

ACPO accept that the FOIA will most probably increase the pressure to release information that has been previously regarded as personal information. Consequently, some information may well be released.
into the public domain following a comprehensive and extensive consideration of the public interest.

In addition, it should be noted that whilst information may appear to be disclosable under s40, it may be that it is exempt from release under the protection afforded by other exemptions.

Any application for the release of information that constitutes personal data will be resisted by ACPO as a general policy. s70 of the FOIA must also be considered.
# SECTION 41
## INFORMATION PROVIDED IN CONFIDENCE

### LEGISLATIVE REQUIREMENTS

<table>
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<tr>
<th>What the Act States:</th>
<th>Information is exempt if:</th>
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<tr>
<td></td>
<td>(a) It was obtained by the public authority from any other persons (including another public authority), and</td>
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<td>(b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.</td>
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<th>Exemption Type:</th>
<th>Absolute</th>
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<td>Class-based</td>
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| Confirm/Deny:        | The duty to confirm or deny does not arise to the extent that the confirmation or denial would constitute an actionable breach of confidence. |

### OFFICIAL GUIDANCE

#### Confidentiality

The law of confidence is a common law concept. To determine whether an obligation of confidence exists in terms of FOI, there is a need to consider:

- The circumstances under which the information was provided to the authority; and
- The nature of the information.

Where explicit conditions of confidence are attached to information, it is clear that a public authority should be cautious in its subsequent use or disclosure. The conditions of confidence may be written, contractual or verbal.

It becomes more difficult to judge whether an obligation of confidence exists when it is not stated explicitly, but is obvious or implied from the circumstances of its transfer. In these cases, it is recommended that the advice of any third party likely to be affected by disclosure should be considered prior to the release of information. Where information is gathered as a result of the statutory requirements or powers conferred upon a public authority, there is a need to carefully consider whether or not the law of confidence would prevent disclosure of information to third parties.

#### Circumstances

Information that has the necessary quality of confidence about it should be protected by an obligation of confidence. The information
### Disclosure of Confidential Information

The information in question must not be readily available elsewhere or by other means. It should not be able to be summarised. Equally, the information need not necessarily be secret: a victim of crime, for example, does not lose the right to confidentiality if they disclose details of a crime to a friend.

The courts have identified three general sets of circumstances that may precipitate the disclosure of information:

- **Disclosures with consent.** Where the person (individual or organisation) to whom the obligation of confidentiality applies consents to the release of the information, this will not lead to an actionable breach of confidence;
- **If a disclosure is required by law,** it is unlikely the information will be subject to an FOI request in any event; or
- **Disclosures where there is a strong public interest in releasing the information requested.**

When enforcing this exemption, public authorities must be satisfied that any breach of confidence that would occur from the release of the information would be actionable ie. The aggrieved third party would have the right to take the authority to court.

Thus, a public authority must:

- Be sure that the information in question is confidential;
- Take advice from the people – individuals or organisation – affected but be aware that third parties are not afforded the right of veto and the decision to release or withhold is with the public authority; and
- Be aware that the aggrieved party must have legal standing – one Government department can not, for example, sue another.

The GPMS is a useful preliminary indicator as to the nature of the information. However, documents and information marked ‘confidential’ are not necessarily automatically exempt from release.

Documents that were originally labelled ‘confidential’ may no longer be confidential because of the time elapsed. Authorities should consider the introduction of a system that defines and records the period of time during which the marking scheme is anticipated to be relevant.

There is no guarantee that information received from external bodies will have the necessary quality of confidence about it after a period of time. Similar to issues relating to the internal marking scheme, what was confidential at the time of writing may no longer be at the time disclosure is requested. However, prior to disclosure, it is recommended that a public authority consults the information provider and any affected third party, notwithstanding the fact that the ultimate decision will rest with the public authority.

### Actionable Breaches of Confidence

When enforcing this exemption, public authorities must be satisfied that any breach of confidence that would occur from the release of the information would be actionable ie. The aggrieved third party would have the right to take the authority to court.

Thus, a public authority must:

- Be sure that the information in question is confidential;
- Take advice from the people – individuals or organisation – affected but be aware that third parties are not afforded the right of veto and the decision to release or withhold is with the public authority; and
- Be aware that the aggrieved party must have legal standing – one Government department can not, for example, sue another.

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### Other Issues

The law of confidence is legally complex. The IC recommends that other exemptions contained within the Act may be more immediately
Please refer to Appendix I for Questionnaire Analysis of responses by national suppliers when questioned about their concerns in relation to disclosure of information.

- **Full ICO Guidance**
  - [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)

- **Full DCA Guidance**
  - [http://www.dca.gov.uk/foi/guidance/exguide/index.htm](http://www.dca.gov.uk/foi/guidance/exguide/index.htm)
### ACPO POLICY

**General**

s41 covers information provided in confidence and is likely to have widespread relevance to the Police Service. However, whilst the exemption appears to be both class-based and absolute, its power is reduced because it is defined in ‘relation to the equitable action for breach of confidence’.

This means s41 is an absolute exemption - where release of the information would result in an actionable breach of confidence - but it has its own built-in form of testing for whether disclosure is in the public interest.

### Exempt Information

- Information received from another body or person.
- Information that is commercial, personal and official in nature and of a confidential nature.

### Non-Exempt Information

- Information that the public authority itself perceives as confidential.

This exemption does not cover information that a public authority has generated internally. It specifically relates to information that has been obtained by the public authority from another person (this may include an individual, a company, a local authority or any other ‘legal entity’). The exemption may be enforced only where an actionable breach of confidence would occur should the information be disclosed. This is where release would result in the provider or a third party taking the authority to court.

### Related Exemptions

- Information falling within s41 may also be exempt from disclosure under s40 (Personal information), s43 (Commercial interests) or s30(2) (Confidential sources).

### Special Conditions

**Breach of Confidence Test**

To determine whether a breach of confidence would occur if the information were to be disclosed, the following questions need to be applied:

- **Does the information have the necessary quality of confidence about it?**
  
  Information that is already in the public domain, or has not been treated as confidential by the originator, does not have the necessary quality of confidence. Where information has been subjected to restricted disclosure – where it is not already available publicly or where the originator of the information has treated it as confidential – the information may still be subject to an obligation of confidence.

- **Was the information imparted in circumstances that imply an obligation of confidence?**
  
  This refers to whether the ‘giver’ of the information expresses that the information is confidential in nature when s/he imparts
the information to others. At the same time, the recipient of the information must acknowledge that the information received is confidential in nature. In this case, there is an obligation of confidence attached to the information.

- **Was there an unauthorised use of that information to the detriment of the person communicating it?**
  This exemption also applies to information given to a public authority by another body or individual, not information that a public authority itself might consider as confidential. When deciding on whether to release the information or not, there is no obligation to consult third parties but the draft Codes of Practice state that those parties affected by disclosure should be approached.

- **The Duty to Confirm or Deny S41(2)**
  If confirming existence of the information would be likely to be a breach of confidence, then the need to confirm/deny is negated. This applies where information is provided by informants.

Where the legal rights of a third party would be breached – under the DPA, for example – they should be consulted prior to disclosure.

The ACPO view is that information given by informants, whether internal or external, will be exempt under s41, subject to the breach of confidence test.

The provision of information to the Police Service by individuals and organisations remains critical to the prevention and detection of crime. Much of this information is supplied as part of routine transactions with victims, witnesses and other persons connected to crimes or other incidents that require police involvement.

In addition, the Police Service actively encourages the community to supply information relating to specific crimes and more general criminal activity through Crimestoppers and the use of informants.

It has been long recognised that the supply of information concerning serious and organised criminal activity to the police has been critical to crime detection and/or disruption. In many cases this information is supplied only as a result of assurances of confidentiality. In the policing context, any breach of confidentiality that leads to the identification of informants or organisations may have serious consequences, including loss of life.

Apart from the serious consequences that arise in any individual case, the disclosure of information relating to confidential sources is likely to reduce the willingness of individuals to supply information to the Police Service and engage with the wider criminal justice system.

CHIS will be actively protected for the life of the informant.
SECTION 44
INFORMATION COVERED BY PROHIBITIONS ON DISCLOSURE

| LEGISLATIVE REQUIREMENTS | (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –  
| What the Act States: | (a) is prohibited by or under any enactment  
| | (b) is compatible with any Community obligation, or  
| | (c) would constitute punishment as a contempt of court.  
| Exemption Type: | Absolute  
| | Class-based  
| Confirm/Deny: | The duty to confirm or deny does not arise.  

OFFICIAL GUIDANCE

Full ICO Guidance  www.informationcommissioner.gov.uk
Full DCA Guidance  http://www.dca.gov.uk/foi/guidance/exguide/index.htm
ACPO POLICY

General:

This exemption is something of a catch-all and states information that may be prohibited from disclosure under other legislation is protected under FOI.

Under this exemption, information is exempt from disclosure if it is prohibited from being released under any other enactment.

Where there is another piece of legislation governing the release of certain categories or types of information, these are sufficient grounds to refuse release under an FOI request.

In effect, s44 allows other pieces of legislation to be imported into the FOI Act under s1(a).

s1(b) prohibits disclosure of information if it is incompatible with or contradictory to any European Union legislation covering release of categories or types of information.

s1(c) facilitates the withholding of any information that would, if released, lead to contempt of court.

If this exemption had not been included in the FOIA, there would be a danger that where there is a requirement for information to be withheld under other legislation, it may have been releasable under FOI, causing a potentially serious conflict without the protection afforded by s44.
## QUALIFIED EXEMPTIONS

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<td><strong>Section 22</strong></td>
<td>Information intended for future publication</td>
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<td><strong>Section 24</strong></td>
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<td><strong>Section 40</strong></td>
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<td><strong>Section 42</strong></td>
<td>Legal professional privilege</td>
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<td><strong>Section 43</strong></td>
<td>Commercial interests</td>
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**Public Interest Test**

Qualified exemptions must be considered with reference to the public interest test to determine whether a qualified exemption may be applied.

*S36 and S40 confer a mixture of absolute and qualified exemption. This is subject to the nature of the information or, in the case of S40, the identity of the applicant. These exemptions are dealt with in the section headed ‘Absolute Exemptions’.*
# SECTION 22
## INFORMATION INTENDED FOR FUTURE PUBLICATION

### LEGISLATIVE REQUIREMENTS

| What the Act States: | Under s22(1) of the Act, a public authority does not have to communicate information where:
| | (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
| | (b) the information was already held with a view to such publication at the time the request for information was made, and
| | (c) it is reasonable in all circumstances that the information should be withheld from disclosure until the date referred to in paragraph.
| Exemption Type: | Qualified
| | Class-based
| Confirm/Deny: | The duty to confirm or deny is excluded where compliance with that duty would involve the disclosure of any information (whether or not already recorded). |

### OFFICIAL GUIDANCE

| Information That May Be Covered | Where there is an intention to publish information at the time of a request relating to that information, s22 may be enforced. However, it is not appropriate that a decision is taken to publish the information only after the request for information is received.
| | This exemption also covers information that another authority or person (individual or organisation) intends to publish. One public authority, for example, may have been given a draft or document that another intends to publish.
| | To apply this exemption, public authorities do not necessarily have had to set a publication date. Proposed publication may be via the authority’s publication scheme.
| | The application of this exemption is subject to the public interest test.
| | Potentially, there is a large range of information that may be covered by the exemption. Information that has been prepared for publication such as press releases, text of official announcements and speeches, annual reports, publicity materials and information that exists in draft form. There are also issues in relation to some types of research.
| | It may be likely that information intended for publication may well fall
Information Prepared for Release

Within a class of information that is defined in the authority’s publication scheme.

To determine whether this exemption applies, questions to be considered include:

- Is there already an intention to publish the information requested?
  Where the information has been prepared for release, then the intention to publish is a foregone conclusion.
  Where the information exists in draft or rough form only or if it forms a part of a larger body of work or information, it may be more difficult to apply s22.
- Is the information intended for publication exactly the information that has been requested by the applicant?

Research

Where information has already been prepared for release, it is likely a publication date will already have been designated. Where the decision has been taken in principle to release the information, the issue becomes more about timing than disclosure.

The exemption may also cover information that exists in draft form that is intended for publication. The key issue is the likelihood of publication: if there is a firm intention to publish at the time the request for information is received, the exemption may be considered. Even if the information contained in a draft may be amended or omitted prior to the final version being agreed, this exemption still applies. Whilst the words may differ from draft to final document, the information imparted probably will not.

s22 is not designed to protect information held for research purposes in general. Where research has been executed with a view to publish, then it may be reasonable to claim the exemption.

Information Published under a Publication Scheme

s19 of the FOIA requires public authorities to publish information in accordance with their publication schemes. Where a request for information is directed at information that falls within a class defined in the authority’s publication scheme, it may be assumed that the information is intended for publication, even if it has not already been published. Thus, the decision becomes one relating to timing rather than disclosing or withholding the information. The authority must consider whether it is in the public interest to release information earlier than originally planned.

Unlike s21 which covers information that is currently available elsewhere, s22 requires the public authority to consider whether it should adhere to the original timetable of release or whether the circumstances of the case, including public interest, might warrant earlier disclosure.

Timing of Publication

If there is already an intention to publish requested information, it is generally the case that the sooner the intended date of publication, the stronger the case for applying exemption.

An authority may wish to review its original publication schedule when:
- The release of information to applicant may result in unfairness to others;
- The public authority may be under a duty to present a report in the first instance to a particular individual or to make an announcement in a particular forum before making it generally available; or
- An announcement may be designed to prompt enquiries from public and may be expected to increase workloads. As such, an authority may wish to ensure that it has finalised its arrangements prior to the release of information.

It would be inappropriate for a public authority refuse a request if the release of information would cause no obvious harm to the authority or any third party.

### Minutes of Meetings

Whilst authorities may wish to wait until one set of meeting minutes is approved at a subsequent meeting prior to releasing them to the public, it should recognise the public interest in providing draft minutes to applicants who may either wish to attend or have an input into the subsequent meeting.

### Partial Disclosures

An FOI request may focus on information that forms part of a larger set of information that the authority intends to publish. Where disclosure is unlikely to cause administrative or other difficulties to the authority or disadvantage any third party, it may be appropriate to release the requested information.

### Early Publication

A public authority may wish to control the release date of information to ensure all parties that have an interest in it have equal access to it. Where the public interest would be best served by disclosure, this may lead the public authority to bring forward the publication date.

The decision to bring forward the publication date of information may be made as a result of unforeseen events. Where the information is in draft form, this may involve publication in a form that differs from the original planned form of presentation. Depending on the state of the draft, it may also involve publishing only part of the information.

This exemption is concerned with the **timing** of the release of information. It is not concerned with the suitability of the **content** for release. The decision to publish has already been made subject to possible amendments.

The ICO Guidance suggests that s22 be used for information that is relatively non-contentious but where there are sound reasons for publishing in accordance with the original timetable. Where public authorities are seeking to protect more sensitive information, the application of one of the other exemptions within the Act may be more appropriate. This is also true where there remains uncertainty as to whether the information will ultimately be published or where the information is intended for future publication by another public authority.

### Implementation Issues

It is relatively easy to determine whether or not a s22 exemption may be applied in response to a request for information. The issue really is
whether or not it is in the public interest to bring forward the planned publication date. Authorities may reduce the number of requests for information that may ultimately be declined under this exemption by providing a clear description of planned publications, including a publication timetable.

Within the publication scheme, it may also be appropriate to indicate the likely date of publication within the description of the class of information.

It may also assist if drafts of documents are included in intended publication dates and an indication of whether any or all of the information could be released prior to publication.

<table>
<thead>
<tr>
<th>Full ICO Guidance</th>
<th><a href="http://www.informationcommissioner.gov.uk">www.informationcommissioner.gov.uk</a></th>
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</table>
### ACPO POLICY

**General**

The Act provides an exemption from disclosure if the information requested by an applicant is intended for future publication.

Public authorities may use this exemption to manage the release of information. The exemption may also be cited if an alternative body, other than the one to which the application was originally made, is planning to publish the information requested.

The intended date for publication does not have to have been set for this exemption to be applied. However, the Act states that the publication date set must be ‘reasonable’. Where the date for publication has still to be determined, s22(1)(c) may only be cited where it is reasonable to postpone publication until an unspecified date.

A public authority may delay publication to ensure that those who are most likely to be affected by its release may be informed. Publication may also be delayed where appropriate to ensure a reasonable return from commercial publication.

Reasons such as political embarrassment and administrative inefficiency may not be used as reasons to delay publication.

Where publication of information has been delayed, an applicant may be able to argue that the information should be released immediately if currently available information is outdated or inaccurate or where an urgent need for the information has arisen.

It is the planned date of publication that is relevant to an assessment of reasonableness under s22(1)(c).

ACPO policy on the release of information intended for future publication is as follows:

- Formal, scheduled release dates for audited and verified figures should be established by forces to ensure information is released in an efficient and proper manner. This will pre-empt requests for numerical and statistical information;
- When unaudited information is requested, the public interest test must be applied;
- Unaudited figures should be released only on request and only after the application of the public interest test and if their release is likely to benefit the community;
- When information is released prematurely or as an interim measure when not fully audited, a caveat must be added to the document stating the figures are unaudited and may subject to change; and
- In respect of the Police Service, the most likely areas to be requested are force accounts and crime statistics and figures.
## SECTION 24
### NATIONAL SECURITY

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<th>LEGISLATIVE REQUIREMENTS</th>
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<tr>
<td><strong>What the Act States:</strong></td>
<td>(1) Information which does not fall within s23(1) is exempt information if exemption from s1(1)(b) is required for the purpose of safeguarding national security.</td>
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<td>(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from s1(1)(a) is required for the purpose of safeguarding national security.</td>
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<td>(3) A certificate signed by a Minister of the Crown certifying that exemption from s1(1)(b), or from s1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to s60, be conclusive evidence of that fact.</td>
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<td>(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.</td>
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<td><strong>Exemption Type:</strong></td>
<td>Qualified</td>
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<td>Prejudice-based</td>
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<tr>
<td><strong>Confirm/Deny:</strong></td>
<td>The duty to confirm or deny is excluded where exemption from that duty is required for the purpose of safeguarding national security.</td>
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</table>
## General Points

The exemptions under s23 and s24 are extremely closely linked.

The s23 exemption is applicable to information received from or related to a number of bodies specifically listed in the Act. The s24 exemption is applicable to information the non-disclosure of which is necessary to safeguard national security.

In certain circumstances it will be necessary to use the two exemptions together. In other circumstances the two exemptions are mutually exclusive and cannot be used together. Further details are given below.

Accordingly this chapter should be read together with the chapter on s23 when contemplating withholding information on grounds related to national security. For guidance on the inter-relationship between the FOI Act and the Official Secrets Act 1989, see the chapter on the s44 exemption concerning prohibitions on disclosure.

### Type of Information Covered by This Exemption

s24(1) provides for an exemption to the duty to communicate information to a person making a request (s1(1)(b)). s24(2) provides an exemption to the duty to confirm or deny whether the information requested exists (s1(1)(a)).

There is no statutory definition of the term ‘national security’. The use of the s24 exemption (possibly in conjunction with s23 and potentially to allow an NCND response where no information is held) is complex. Case-by-case consideration will be necessary. Again, departments should not hesitate to contact the security bodies.

- The term ‘national security’ has never been defined in UK legislation and both domestic and European courts have considered that the assessment of the threat to national security is essentially a matter for the executive. In addition, when considering safeguarding national security the courts have accepted that it is proper to take a precautionary approach. That is, it is necessary not only to consider circumstances where actual harm has or will occur to national security, but also to consider preventing harm occurring and avoiding the risk of harm occurring.

- This does not make national security an unfathomable abstract concept. Often it is easier to decide on whether particular information is a matter of national security than to define categories of information in advance. However, it is possible to infer certain statements about the meaning of the term from case law and statutes.

- Taken together, these statements about national security might form the basis for identifying the kind of information which falls...
into this category. For example that:

- the security of the nation includes its well being and the protection of its defence and foreign policy interests, as well as its survival;

- the nation does not refer only to the territory of the UK, but includes its citizens, wherever they may be, or its assets wherever they may be, as well as the UK’s system of government; and

- there are a number of matters which UK law expressly recognises as constituting potential threats to, or otherwise being relevant to, the safety or well-being of the nation, including terrorism, espionage, subversion, the pursuit of the Government’s defence and foreign policies, and the economic well-being of the United Kingdom. But these matters are not exhaustive: the Government would regard a wide range of other matters as being capable of constituting a threat to the safety or well being of the nation. Examples include the proliferation of weapons of mass destruction and the protection of the Critical National Infrastructure, such as the water supply or national grid, from actions intended to cause catastrophic damage.

However, these examples are not exhaustive and each piece of information should be considered individually.

- It should be noted that national security is not the same as the interests of the government of the day. Official information that would be embarrassing or inconvenient to the government if made public is not of itself a matter of national security.

- It also needs to be borne in mind that the test for reliance on this exemption is that non-disclosure should be ‘required’ for the purpose of safeguarding national security. That means that an authority must be prepared to demonstrate the need to withhold the information requested, and if steps could be taken to allow information to be disclosed while safeguarding national security in some other way, those steps will need to be considered.

- s24 is a qualified exemption. This means that after deciding whether the information requested should be withheld for the purpose of safeguarding national security, the department must also consider whether the public interest might nonetheless be served by making disclosure.

- The test to be applied when considering whether to claim a s24 exemption is not whether the information relates to national security but whether the exemption is required for the purpose of safeguarding national security. That is, to claim the exemption it must be possible to identify an undesirable effect on national security, or the risk of such an undesirable effect, that claiming...
Public Interest Test

- When considering whether non-disclosure of a particular piece of information is required in order to safeguard national security, it is important to consider whether its release, could, if put together with other available information, cause damage. The point being that a piece of information cannot be divorced from its context and looked at in isolation. In justifying such an approach, decision-makers must be quite clear that specific harmful effects of disclosure are reasonably to be expected, including whether there are real and substantial grounds for the expectation.

- When applying the exemption, officials must clearly record the justification for the decision. This justification will be carefully examined by the Information Commissioner or the information tribunal in the event that the refusal to provide the information sought is challenged. It is not necessary to obtain a signed ministerial certificate to claim the exemption (see discussion of certificates) but careful consideration should also be given as to how a case would be made to a Minister were a certificate needed later.

- In deciding whether information is exempt information for the purposes of s24, a department must consider two things:
  - Bearing in mind in all the circumstances of the case, whether the public interest in disclosing the information outweighs the public interest in withholding the information; and
  - If it is decided to withhold the information, whether the exemption from the duty to confirm whether or not the information is held is required for the purpose of safeguarding national security, and whether there is any overriding public interest in communicating the fact that a department holds the information.

- It is self evident that the assessment leading to the conclusion that disclosure should be withheld will have embraced some relevant public interest issues. Nonetheless, where it is determined that the exemption is required to safeguard national security there will still be a separate and distinct need to consider any further competing public interests in order to decide if the public interest test is satisfied. The department must be seen to have considered first, whether the information needs to be withheld for the purposes of safeguarding national security and secondly, if so, whether in all the circumstances of the case, is it in the public interest to maintain the exemption.

- There is obviously a very strong public interest in safeguarding national security. If non-disclosure is required to safeguard national security it is likely to be only in exceptional circumstances that consideration of other public interest factors will result in disclosure. The balance of the public interest in disclosure will depend in part on the nature and likelihood of the
Consultation

Duration of the Exemption

Using this Exemption

Use of s24(2) Where no Information is Held

Application of Section 17

Potential risk to national security, as well as the nature of the countervailing public interest considerations in making the information available. Each request for information will need to be judged on its individual merits on a case-by-case basis.

- This process must be gone through whenever a s24 exemption is claimed, whether or not a certificate is deployed. See below for more information about certificates.

- If the information requested originated in another department the originator of the information should always be consulted before a final decision to disclose is reached.

- In most departments holding national security information there will be officials who you can turn to for advice in difficult cases, normally your departmental security officer. When dealing with round-robin requests you should consult the FOI co-ordination unit.

- The s24 exemption applies to all records, regardless of their age, including historical records. It is possible that the sensitivity of s24 information may diminish with the passage of time once the record in which the information is contained has become an historical record. Each instance should be judged on a case-by-case basis, consulting as appropriate.

- If a department considers that information needs protecting from disclosure for reasons of national security, but it is appropriate to confirm whether or not the information exists, then the exemption under s24(1) will apply. In those situations where it is appropriate for a department to neither confirm nor deny the existence of the information sought it will claim the s24(2) exemption. As with the guidance on s23, where a department claims a s24(2) exemption it will not be appropriate or necessary to claim the s24(1) exemption. Clearly it would not make logical sense for the duty to communicate the information to arise where it was decided to give a neither confirm nor deny response.

- As with s23(5), it is possible for a department to rely upon the s24(2) exemption even in situations where it does not hold the information sought. The s24(2) exemption may also be used where it would endanger national security to state that no information is held by a department.

- Where information is covered by s24, the department should always consider the points covered under 'Preliminary
Considerations’. Where the exemption from the duty to confirm whether or not the information is held is claimed, the department is required to reply to the applicant in accordance with s17 of the Act. Unless s17(4) applies, which allows an explanation to be withheld if this would itself disclose exempt information, the department must state:

- that the s24 exemption is being claimed, explain why the exemption applies; and

- the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure by specifying the public interest factors (for and against disclosure) which have been taken into account in reaching the decision.

**Interplay with s23**

- As stated previously the Act permits the s24(2) exemption to be used in conjunction with the s23(5) exemption (in both cases the exemption from the duty to confirm the existence of the information requested).

- The use of both exemptions in this way will be appropriate where the information requires exemption for the purposes of safeguarding national security and the information requested is, or where no information is held, could reasonably have been, directly or indirectly supplied by, or related to a security body. If the information sought requires exemption from the duty to confirm its existence for the purpose of safeguarding national security, but it is otherwise not supplied by or related to a security body, then only the s24(2) exemption may be claimed. In such a case it is important to take fully into consideration the factors which might justify an NCND response under s23(5) where no information from, or related to, a security body is held (see above).

- The Act does not however allow a s24(1) exemption to be applied to information that falls within the s23(1) exemption. This mutual exclusivity only arises where a department is claiming the exemption from the duty to communicate information sought.

- In any event, both exemptions can be applied in relation to a request for information, where part of that information derives from a security body and other parts of it derive from other sources, and where the s24 exemption is appropriate because non-disclosure is necessary to safeguard national security.

- It is also important to note that where the request covers a range of information, and only part of the information is required to be exempt under s24, the remainder of the information must be disclosed (unless requiring protection by another exemption).

**Ministerial Certificates**

- s24 provides for a ministerial certificate to be signed in support of a decision to claim an exemption from disclosure under the terms
of s24. The purpose of a certificate is to enable a Minister to confirm that the exemption is, or at any time was, required for the purpose of safeguarding national security.

- A ministerial certificate requires the signature of a Minister of the Crown (who under the definition used in the Act are Cabinet Ministers, the Attorney General and the Advocate General).

- It is not necessary to have a certificate in order to rely on the s24 exemption but it will strengthen the position of the department in any legal proceedings, and determine the forum for hearing a complaint. Where a ministerial certificate has been served, any appeal against the certificate is heard by the tribunal rather than by the Information Commissioner. (See Appendix E).

- The Act provides for two types of certificate under s24. It may either identify information to which it applies by means of a general description and/or to be expressed to have prospective effect. Alternatively, an ad hoc certificate can be drafted to cover specific information in response to a particular request.

- Where a department holds particular categories of information, the disclosure of which is always likely to be against the interests of national security, it may be appropriate to hold a prospective certificate, already signed by the Minister, relating to that particular category of information. However, each decision to deploy a certificate should be taken on its own merits in light of the prevailing circumstances.

- Where a department wishes to rely on the s24 exemption in relation to a specific request for information, and the department does not hold a prospective general certificate which covers it, consideration should be given to drawing up a specific ad hoc certificate.

- Where an ad hoc certificate is used, it will be drafted so as to meet a particular request for information, and will therefore be created at the same time and in the immediate context of the decision as to whether the exemption is required and how the balance of the public interest in disclosure applies.

- If a ministerial certificate is deployed in relation to the claimed exemption it will only relate to the question of whether the exemption is required for the purposes of safeguarding national security. It does not certify that the public interest in disclosure test has been assessed as this is a separate consideration in the process (see section entitled ‘Public Interest Test’).

- Where a certificate is general and prospective, the assessment of the public interest in the disclosure test must be carried out anew each time the certificate is deployed, both to ensure that the certificate covers that information sought and to satisfy the requirement to assess the public interest on a case-by-case basis. There will also be a need to keep any general and prospective certificates under review because information which it is considered necessary to withhold for the purposes of safeguarding
national security can be expected to vary over time.

- Officials should consider preparing a ministerial certificate at an early stage in response to a request for information where the national security exemption is to be relied upon. Since the certificate is relevant primarily to the stage at which formal enforcement action becomes a possibility, departments need not serve a certificate on the applicant at this stage but defer doing so until the applicant has exhausted the internal review process and indicated that he will be applying to the Commissioner. To serve the certificate when answering a request may be premature and involve unnecessary work, but a department may nevertheless want to consider the drafting of a possible certificate at this stage in case it becomes necessary to utilise it.

- In any event, departments should consider establishing a procedure with the appropriate private office so that where necessary certificates can be drawn up and signed without undue delay. The Act does not require that a certificate is signed by any particular Minister. It is also possible for one ministerial certificate to cover round robin cases. Where the information being safeguarded potentially crosses departmental boundaries, it will be important to undertake interdepartmental consultation at an early stage. You should contact your departmental security officer and, when dealing with round-robin requests, the FOI co-ordination unit.

- Consideration should be given to drawing up a specific certificate template; departments may wish to ask their lawyers to prepare a draft which can be adapted for use when needed.

- In addition to the s24 exemption, there is nothing to prevent the use of other exemptions if a s24 and/or a s23 exemption is relied upon in relation to the same information. Given the potential for overlap between exemptions, departments should be aware of the existence of other exemptions at the same time as relying on either s23 or s24. For example, if a department considers that an exemption is required for the purpose of safeguarding national security, it may also be appropriate to claim an exemption under s26 (Defence), s27 (International relations), s29 (The economy), s30 (Investigations and proceedings by public authorities) and s31 (Law enforcement).

- However, since the other exemptions do not contain provision for ministerial certificates to be deployed, there would be procedural questions to be considered if reliance on the exemptions were challenged. Thus if, say, an exemption was claimed under s23 and/or s24, and s26 (Defence) the potential appeal routes would be as follows:

  - An appeal against a certificate served under s23 or s24 would be made to the tribunal (under s60) by either the applicant or the Information Commissioner;
- The challenge on the balance of the public interest in disclosure in relation to the s24 exemption would be made by the applicant to the Information Commissioner (but this may be adjourned pending the outcome of the appeal to the tribunal on the certificate); and

- The challenge to the s26 exemption would be made by the applicant to the Information Commissioner. Again, it may be appropriate to invite the Commissioner to adjourn this pending the hearing of the appeal to the tribunal on the s23 or s24 certificate.

[www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)
ACPO POLICY

General

This exemption may be applied where sensitive information has been requested but where the information required neither derives from, or relates to, any of the security bodies listed in s23.

This exemption may be cited to decline the release of information that may initially appear innocuous in its own right but could, if connected with other seemingly ‘innocuous’ information, endanger national security.

A public authority may also seek to argue that s24 applies where disclosure of information could impact the flow of information from sources and therefore, over time, endanger national security.

It is ACPO’s view that this exemption provides additional backup to s23 (Information from or relating to certain security bodies). When s23 is cited as the withholding exemption, forces may also wish to consider enforcing s24 as additional protection.

NCND

Confirmation or denial of information that would directly reveal the involvement of one of the listed bodies would be information in its own right and therefore exempt. To ensure that there is no unintended disclosure, the following wording must be adopted when using the NCND principle:

‘The (constabulary/police) can neither confirm nor deny that it holds the information you requested as the duty in s1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of s23(5) and 24(2) of the Act. However, this should not be taken as conclusive evidence that the information you requested exists or does not exist.’

Consultation

It is ACPO Policy that the data owner must always be consulted where a s24 exemption is considered. The data owner will then decide whether a ministerial certificate should be applied. This procedure must be followed whether the data is held or, if not, would likely have come from a s23 body.

Application

It is ACPO Policy when citing s24 that the Central referral process Manager must be informed. The use of this exemption must be approved by the National Security Liaison Group.

Template Letter available (B25).
# SECTION 26
## DEFENCE

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<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<tr>
<td><strong>What the Act States:</strong></td>
<td>(1) Information is exempt information if its disclosure under this Act would, or would be likely to prejudice –</td>
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<tr>
<td></td>
<td>(a) the defence of the British Islands or of any colony, or</td>
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<td></td>
<td>(b) the capability, effectiveness or security of any relevant forces.</td>
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<tr>
<td><strong>Exemption Type:</strong></td>
<td>Qualified</td>
</tr>
<tr>
<td></td>
<td>Prejudice-based</td>
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<tr>
<td><strong>Confirm/Deny:</strong></td>
<td>Duty to confirm or deny does not arise if this is likely to cause prejudice to any of the matters mentioned above.</td>
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<tr>
<th>OFFICIAL GUIDANCE</th>
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<td><strong>Full ICO Guidance</strong></td>
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<tr>
<td><strong>Full DCA Guidance</strong></td>
<td><a href="http://www.dca.gov.uk/foi/guidance/exguide/index.htm">http://www.dca.gov.uk/foi/guidance/exguide/index.htm</a></td>
</tr>
</tbody>
</table>
ACPO POLICY
General:
The relevant forces to which the exemption applies are:
• The armed forces of the Crown and any forces co-operating with those forces or part thereof; and
• The Ministry of Defence and armed forces of crown

But not:
• Special forces
• Government Communications Headquarters (GCHQ) units

Any information supplied by or relating to such forces exempt under s23.

The term ‘co-operation’ may include:
• Working with the UK’s forces on a particular project or to include a much wider range of ‘friendly’ forces; and
• Information about the capabilities and vulnerabilities of forces working with UK forces.

The effect of disclosing information on the relationship between the UK and any other state should also be considered as a relevant factor in the public interest test when applying this exemption.

There is no current ACPO interpretation of this exemption and ACPO feels this exemption will have limited application within the Police Service.
SECTION 27
INTERNATIONAL RELATIONS

LEGISLATIVE REQUIREMENTS

What the Act States:
(1) Under s27(1), a public authority is exempt from duty to communicate information where disclosure of that information would, or would be likely to prejudice:
(a) relations between the United Kingdom and any other State,
(b) relations between the United Kingdom and any international organisation or international court,
(c) the interests in the United Kingdom abroad, or
(d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

Exemption Type:
- s27(1) Qualified Prejudice-based
- s27(2) Qualified Class-based

Confirm/Deny: Duty to confirm or deny is excluded to the extent that compliance with that duty would or would be likely to have a prejudicial effect.

OFFICIAL GUIDANCE

Full ICO Guidance: www.informationcommissioner.gov.uk
| **ACPO POLICY**
| **General 27(1):** |
| s27(1) is prejudice-based and covers disclosures that would, or would be likely to, prejudice international relations. |
| This is a broad exemption that is designed to cover the ‘interests of the United Kingdom abroad’ and ‘the promotion or protection by the United Kingdom of its interests abroad’. |
| The exemption, however, does not cover the interests of specific groups within the state. Rather, this provision is designed to protect general national interests. |
| This exemption is class-based and covers information received in confidence from other states and international bodies. |
| The duty to confirm or deny the existence of information is also excluded to the extent that compliance with that duty would: |
| ‘involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.’ |

| **General 27(2):** |
| Since s27(2) is class-based, there is no need for a public authority to establish the specific prejudice that would occur from disclosure. |
| There is some overlap between s27(2) and s41 (Information in confidence). However, s41 applies to the disclosure of information obtained from another person whilst s27(2) refers to information obtained from a state, organisation or court that: |
| • Is confidential at any time while the terms on which it was obtained require it to be held in confidence; or |
| • While the circumstances in which it was obtained make it reasonable for the state, organisation or court to expect that it will be so held. |
| This provision is therefore concerned with the conditions under which the information was obtained. |
| It is ACPO’s view that this exemption will be used in limited circumstances and with particular reference to forces with international responsibilities or in respect of forces that have relationships with forces overseas. |
# SECTION 28
## RELATIONS WITHIN UK

### LEGISLATIVE REQUIREMENTS

**What the Act States:**

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1) ‘administration in the United Kingdom’ means-

(a) the government of the United Kingdom

(b) the Scottish Administration

(c) the Executive Committee of the Northern Ireland Assembly

(d) the National Assembly for Wales

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with s1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

**Exemption Type:** Qualified

**Prejudice-based**

**Confirm/Deny:** Duty to confirm or deny does not arise if it would be likely to prejudice any of the bodies listed above.

### OFFICIAL GUIDANCE

**Full ICO Guidance**

[www.infoationcommissioner.gov.uk](http://www.infoationcommissioner.gov.uk)

**Full DCA Guidance**

| **ACPO POLICY**
| **General:** |
| This exemption was included in the Act to protect relations between the devolved administrations of the UK. |
| Where the release of information would compromise these relations, this exemption may be applied. |
| In contrast to s27 (International relations), there is no specific class-based exemption covering information received in confidence from another administration in the UK. |
| It is ACPO’s view that this exemption will have very limited relevance to the Police Service. |
## SECTION 29
### THE ECONOMY

### LEGISLATIVE REQUIREMENTS

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<tr>
<th>What the Act States:</th>
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<tr>
<td>(1) Information is exempt information if its disclosure under this Act would, or would be likely to prejudice –</td>
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<tr>
<td>(a) the economic interest of the United Kingdom or of any part of the United Kingdom</td>
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<tr>
<td>(b) the financial interests of any administration in the United Kingdom, as defined by s28(2)</td>
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<tr>
<td>(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with s1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).</td>
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<tbody>
<tr>
<td>Duty to confirm or deny is excluded where compliance with that duty would, or would be likely to, cause prejudice.</td>
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### OFFICIAL GUIDANCE

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# SECTION 30
## INVESTIGATIONS AND PROCEEDINGS BY PUBLIC AUTHORITIES

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<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<tr>
<td><strong>What the Act States 30(1):</strong></td>
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<tr>
<td>s30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of: (a) Any investigation which the public authority has a duty to conduct with a view to it being ascertained (i) whether a person should be charged with an offence, or (ii) whether a person charged with an offence is guilty of it, (b) Any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority had the power to conduct, or (c) Any criminal proceedings, which the authority has the power to conduct.</td>
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<tr>
<td><strong>Exemption Type:</strong></td>
<td>Qualified</td>
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<tr>
<td><strong>Confirm/Deny:</strong></td>
<td>Class-based</td>
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|  |
|--------------------------|--|
| **What the Act States 30(2):** |  |
| 30(2) Information held by a public authority is exempt if – (a) it was obtained or recorded by the authority for the purpose of its functions relating to – (i) Investigations falling within subsection (1)(a) or (b), (ii) Criminal proceedings which the authority has the power to conduct, (iii) Investigations (other than investigations falling within subsection (1)(a) or (b) which are conducted by the authority for any of the purposes specified in s31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or (iv) Civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and it relates to the obtaining of information from confidential sources. |
| **Exemption Type:** | Qualified |
| **Confirm/Deny:** | Class-Based |

Duty to confirm or deny does not arise in relation to information that would be exempted information as detailed above.
### ACPO POLICY

#### General:

**s30(1)**

This exemption covers information held at any time for the purposes of a specific investigation.

s30(1) outlines the exemption that a public authority can claim when seeking to protect information that has been collected as part of a specific investigation. This applies to cases where a suspect (or suspects) have been charged with an offence (or offences), or cases where an offender has been found guilty.

s30(1) may also be applied to cases where evidence that has been collected may lead to a conviction in the future. The exemption refers to investigations in general terms and makes no specific reference to criminal investigations.

It would be only in an exceptional case that information relating to a ‘live’ investigation would be released. One of the key issues, however, relates to serious undetected cases subject to a yearly review and establishing what criteria may be applied to determine if they remain ‘live’ or not. There may be a requirement to release information after a suitable time-elapsed period.

s30 is a class-based exemption. This means there is no need to establish likely prejudice that may be caused by release and removes the duty to confirm or deny subject to the public interest test. However unlike s31, it mentions information relating to **specific investigations**, therefore implying that each case must be considered separately on its own merits.

Any release of information would be subject to other exemptions, notably s40 (Personal information). However, some investigative material could be released subject to a PIT, especially where investigations have been concluded.

When assessing what information is likely to be requested about investigations, it is useful to draw a distinction between cases based on the seriousness of the offence. For example, less serious crimes are likely to be of a higher volume, have low detection rates and many victims, (e.g. theft, common assault etc). Serious or major crimes are likely to be less frequent, will have a higher rate of detection and fewer victims.

A major crime is defined as homicide, abduction or stranger rape, or any incident deemed as such by an officer with the relevant authority. All will fall into one of the following categories:

#### Seriousness of Offences

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
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<tbody>
<tr>
<td>Homicide</td>
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<tr>
<td>Abduction</td>
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<tr>
<td>Stranger Rape</td>
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<tr>
<td>Other Major Incidents</td>
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**OFFICIAL GUIDANCE**

ICO Guidance

[www_informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)

DCA Guidance

Who Will Request Information Under Section 30?

Section 30.1 - Applying This Exemption

- Current and ongoing investigations (no suspect charged) *;
- Cases that are less recent but regularly reviewed (under the terms of the Criminal Procedures and Investigation Act (CPIA)) *;
- Cases where a suspect(s) has or have been charged *;
- Cases that have reached court and an offender is found not guilty;
- Cases where an offender is found guilty and is serving a current sentence;
- Cases that have reached court, the offender has been found guilty and served their full term; or
- Cases that are undetected and have been declared as no further action.

* ACPO guidance states that no force should ever release information that is part of a case that has not yet reached court or is unsolved and is regularly reviewed under CPIA guidelines.

The seriousness of the initial offence and the subsequent investigation is likely to influence the sort of information that will be requested. For example when examining minor crime, it is rational to assume that a volume of requests will be made by the victims of crime seeking information specific to each case. For example, victims may want to know why a police officer did not visit them at home or why a case did not go to court.

However when considering more serious offences, the requests are likely to be less general and the questions asked are likely to be more specific. Information requests may not be limited to victims but may also be made by journalists, political campaigners and other interested parties. It is at this point that the public interest will become significant in determining the information that will be released. This is also the area where challenges are most likely to be made. There is a clear need, therefore, for a credible thought process, audit trail and clear documentation of decisions to explain the decision to withhold information.

A useful tool would be to consider the following:

- Has the information been obtained for the purpose of a police investigation?
- Has the information ever been held or recorded as part of an investigation?
- Does the information relate to the obtaining of information from a confidential source?
- Does the information relate to a specific crime past, present or future?

Although these questions allow us to assess the need to use s30, it must be remembered that this exemption is class-based exemption and therefore subject to the public interest test.

ACPO guidance states that no force would ever release information...
that is part of a case that has not yet reached court or is unsolved and is regularly reviewed under CPIA guidelines. This would clearly fall within the s30(1) exemption and may, if not followed, contravene Article 6 of the Human Rights Act.

**Section 30(2)**
The exemption detailed in s30(2) does not necessarily have to apply to a crime but will also cover information about internal whistle-blowers.

The exemption is class-based and qualified by the application of the public interest test. The exemption acts both in relation to the duty to confirm or deny (s1(a)) and the duty to communicate information (s1(b)).

As a class-based exemption, there is an underlying assumption that any information falling within the scope of the exemption would result in harm if disclosed. This assumption must thereafter be challenged by the application of the public interest test. As in all cases where exemptions are qualified by a public interest test, there is in effect a two-stage thought process:

1. Does the information requested fall within this class of exempted material?

2. In all the circumstances of this case does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

There is no presumption that information falling within a class under s30(2) will be withheld following consideration of the public interest. The public interest considerations will be specific to that particular case and may, quite rightly, result in a decision to disclose the information in the public interest.

This subsection covers information obtained or recorded for the purpose of a number of specified functions. These are more wide-ranging than those included under s30(1). The exemption therefore recognises that the Police Service will acquire information from a range of confidential sources. **It is not restricted to specific investigations or proceedings.**

There is a wide range of circumstances in which information may be obtained or recorded from sources that could be described as confidential. These range from those where there is no expressed requirement for confidentiality to those, such as informants, where there is explicit recognition that the information is supplied in confidence. The application of s30(2) on this scale will be towards those circumstances where the need to protect the source is explicit. This is likely to be evidenced by security procedures that seek to apply appropriate protection to the source and the information.

This exemption covers information relating to the obtaining of
**Other Relevant Exemptions**

**Information from confidential sources.** It is intended to allow protection for the existence and use of confidential sources.

Confidential sources are to be interpreted as both human and technical. For example, information relating to registered police informants and the deployment of covert surveillance cameras would both be covered by this exemption.

It is important to note that information from a confidential source is not included within this exemption. If exempt, this is likely to be covered within s30(1) or s31(1)(a), (b) or (c).

Information in this class exemption is that which can reasonably be expected to disclose the existence and/or identity of a confidential source. Whilst some protection is available under s31, it is recommended that the exemption under s30(2) should be primarily applied in preference. This acknowledges the underlying assumption of a class-based exemption that harm will arise from disclosure.

Confirming the existence and/or use of confidential sources is a key issue. Whilst some methodology is perhaps well known through other routes (media), the exemption should be used to prevent any confirmation by the Police Service.

Information included under s30(2) is likely to be potentially harmful if disclosed. It is therefore important that additional exemptions are considered and used to support non-disclosure where this is determined to be in the public interest.

**s38** provides a prejudice-based exemption for the disclosure of information that would, or would be likely to, endanger the physical or mental health, or the safety of an individual. The release of information that may lead to the identification of a police informant will, in many cases, present a danger to the health and safety of one or more individuals. This is subject to a public interest test.

**s40** provides an absolute exemption for personal data where application is made by a person other than the data subject. It is anticipated that significant amounts of personal data will be present in material exempted under s30(2).

**s41** provides an absolute exemption for the disclosure of information that would constitute a breach of confidence actionable by that or any other person. The fact that information may be treated as confidential by the Police Service does not necessarily allow the use of Section 41 to prevent its disclosure. It will only apply where an actionable breach of confidence would occur. This means that such an action would be successful in the civil courts. In some cases, information exempt under s30(2) will also be exempt under s41.

The following general types of information should be treated as exempt under s30(2):
1. Information relating to the use, training, and deployment of CHIS.

2. Information relating to the management of informants and their use in specified geographical areas or in relation to specified cases.

3. Information relating to specification, possession, procurement and use of covert assets, e.g. vehicles, radios, locations, etc.

4. Information relating to surveillance training, methodology and assets.

5. Information relating to the resources deployed in relation to activities that involve obtaining information from confidential sources.

6. Information relating to any aspect of witness protection.
### SECTION 31
#### LAW ENFORCEMENT

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<tbody>
<tr>
<td><strong>What the Act States:</strong></td>
<td>Information which is not exempt information by virtue of s30 is exempt information if its disclosure under this Act would, or would be likely to prejudice:</td>
</tr>
<tr>
<td>(a)</td>
<td>the prevention or detection of crime</td>
</tr>
<tr>
<td>(b)</td>
<td>the apprehension or prosecution of offenders</td>
</tr>
<tr>
<td>(c)</td>
<td>the administration of justice</td>
</tr>
<tr>
<td>(d)</td>
<td>the assessment or collection of any tax or duty or any imposition of a similar nature</td>
</tr>
<tr>
<td>(e)</td>
<td>the operation of immigration controls</td>
</tr>
<tr>
<td>(f)</td>
<td>the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained</td>
</tr>
<tr>
<td>(g)</td>
<td>the exercise by any public authority of its functions for any of the purposes specified in subsection (2)</td>
</tr>
<tr>
<td>(h)</td>
<td>any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty’s prerogative or by virtue of powers conferred by or under an enactment, or</td>
</tr>
<tr>
<td>(i)</td>
<td>any enquiry held under the Fatal Accidents and Sudden Death Inquiries (Scotland) Act 1976.</td>
</tr>
<tr>
<td><strong>Exemption Type:</strong></td>
<td>Qualified</td>
</tr>
<tr>
<td></td>
<td>Prejudice-based</td>
</tr>
<tr>
<td><strong>Confirm/Deny:</strong></td>
<td>Duty to confirm or deny does not arise if compliance would, or would be likely, to prejudice any of the matters listed above.</td>
</tr>
</tbody>
</table>

### OFFICIAL GUIDANCE

| ICO Guidance | [www.info.commissioner.gov.uk](http://www.info.commissioner.gov.uk) |
ACPO POLICY

**General:**

s31 applies to information held by public bodies that is connected with law enforcement, but not directly associated with specific investigations. This is a wide-ranging exemption.

It is a prejudice-based exemption dependant on the authority’s ability to prove the likely negative impact of the release of the information on the functions of the organisation before application of the public interest test.

Prejudice is generally defined as an injury or damage resulting from a judgement or action that has occurred with disregard or detriment to a legal right or claim. In the context of s31, the release of information must be likely to result in the prejudice of some future action.

*Chadwick, L.J.* is quoted as saying 'likely' does not carry any necessary connotation of 'more probable than not'. It is a word that takes its meaning from context. And where the context is a jurisdictional threshold to the exercise of a jurisdictional power, there may be good reason to suppose that the legislature (or the rule-making body) intended a modest threshold of probability.

The term 'likely to prejudice' can be examined in relation to previous legal actions to assess its status in this statute. For example during a tribunal case against Equifax it was stated that 'likely' could have various levels of meaning, from 'more probable than not' to 'more than fanciful'. However Chadwick did conclude that the meaning of the word 'likely' must be taken from its context. Where this is the exercise of a jurisdictional power, the definition of likely will depend on the probability of something occurring. Therefore it is not possible to interpret the likely prejudice caused until individual cases are examined.

Unlike s30, which covers information specifically collected in conjunction with a particular investigation, s31 is more broad in its application. Of the categories mentioned in this section of the act there are two that are of particular relevance to forces. These are:

- a) the prevention or detection of crime; and
- b) the apprehension or prosecution of offenders.

In the same way that policing often has to work on ‘reasonable grounds’ to believe or to suspect, it is in many cases difficult to give a clear definition. However, this phrase has been developed through case law, and the following examples are offered to assist with the decision process:

1) *From ActNow October 2003*

*The new Land Registration Rules (October 2003) provide that a person can apply to designate part of a document as being exempt from public inspection if the relevant part contains prejudicial information.*

2) The key word within the phrase is 'likely' and in the tribunal case against Equifax, it was stated that the word 'likely' could have various
levels of meaning from 'more probable than not' down to 'more than fanciful'. It may also have some intermediate meaning.

Chadwick LJ is quoted as saying 'likely' does not carry any necessary connotation of 'more probable than not'. It is a word that takes its meaning from context. And where the context is a jurisdictional threshold to the exercise of a jurisdictional power, there may be good reason to suppose that the legislature (or the rule-making body) intended a modest threshold of probability.

It would seem therefore that the impact upon the individual or the effectiveness of the legislation has a bearing on the interpretation of the word 'likely'. Therefore it will take its interpretation from the words around it rather than solely relying upon its own meaning. For this reason alone each case will need to be assessed on its merits.

This section covers any information held, that if released, may prevent the detection of crime in the future.

Crime prevention is generally held to be those steps taken on a local level to prevent crime. It can cover a whole host of activities that forces carry out. For example, this could be assessed as information regarding the specific deployment of officers patrolling certain areas and the times they are present.

Crime detection is less general, covering the activity that takes place to link incidents with offenders. This may follow an investigation as defined in s30 but can also cover other ranges of activity such as the collation of detection data to create a policing strategy. There is a great deal of sensitive information to which this exemption may be applied surrounding police forces working practices that, if known, would have a large impact on operational policing. It is therefore necessary to consider what impact the release of information may have on the operational effectiveness of a force in every case.

This phrase is the same as that used within s29(1) of the Data Protection Act 1998.

Does the information relate to any crime (see ‘apprehension or prosecution of offenders’, below for a definition of the word ‘crime’ in this context) that may potentially be committed in the future? Most information concerning operational policing is covered by s31.

It is in the ‘public interest’ (to the ‘public benefit’) to prevent crime: thus would disclosure of the information prejudice the ability of the police to prevent crime (specific or potential) e.g. deployment, numbers of officers, where, when?

Crime prevention may often be referred to as crime reduction: in practice, prevention of crime may be noted at an individual or local level (or by its absence), whilst crime reduction is noted as a more general, or statistical effect i.e. one cannot measure crime prevention, only crime reduction. A crime reduction strategy may be based upon intelligence and the prediction of an event, ultimately leading to the apprehension or displacement of offenders.
Detection is the linking of a person to a crime or an incident. This might follow an investigation (s30), but not necessarily. Information gained from detections may lead to a prevention strategy (i.e. the application of learning). Either may be intelligence-based but detection particularly is reliant on evidence. Disclosure of procedures around gathering intelligence and evidence (e.g. scientific procedures) could therefore prejudice the likelihood of detection. There are quite a lot of sensitive areas within working practices, and thus disclosure of working practices or procedures would in many cases be seen to have an impact on operational policing and on the health and safety of Police Officers undertaking that role. **In particular, s31 should be used to prevent the disclosure of detailed information regarding security provisions, which is fundamentally about the prevention of crime and the safety of the public and the Police Service.**

Any information that would highlight methods of prevention or detection of crime could be construed as to potentially impact upon those purposes (i.e. could prejudice the effectiveness of those activities). However, the question of ‘enlightening versus frightening’ as well as what is in the public interest/to the public benefit, must always be considered.

Not only can this exemption be applied to information collected or used in the prosecution of criminal offences, it may also be applied, as with s30(1), to the general process of apprehending those who commit offences of a non-criminal nature such as parking offences. This exemption should be applied to any information that, if released, may frustrate these actions.

The underlying theme of the Act is to inform the people of the actions taken by public authorities that may have an impact on their daily lives. It is not intended to be used to release information that may be of general interest to the public. Releasing any information would be likely to disclose what has previously been unknown, regardless of what the actions of the recipient may be on receipt of the information. The public interest in protecting the tactical advantage that the Police Service hold must guide us in examining likely prejudice. Therefore, even if disclosure has a relatively low chance of affecting the prosecution of an offender, the information should be withheld to protect this position.

As is the case with ‘prevention or detection of crime’, this heading appears to draw itself directly from s29 of the DPA 1998 and therefore it is anticipated that its interpretation will also be drawn from that legislation.

s29(3) of the DPA is an exemption that allows the data controller to disclose information for the purposes of:

- The prevention or detection of crime; or
- The apprehension or prosecution of offenders.

Criminal offences, and therefore offenders, should be read in the general context that a crime is an offence against national statute...
Guidance

Passed by HM Government. They are not restricted to any common terminology of a ‘crime’. ‘Offenders’ have therefore not necessarily committed a criminal offence: apprehension and prosecution could apply in other cases e.g. minor traffic offences.

In this section, it is acceptable to claim an exemption on the grounds that disclosure would be likely to prejudice the apprehension or prosecution of offenders. It is obviously in the ‘public interest’ to apprehend and prosecute offenders of legislation passed in a democratic society. To undermine the will of Parliament by such release would be contrary to the intention of Parliament when the FOI Act was passed.

As policing is a complex process, it is extremely difficult to separate out individual sections and consider them in isolation. The key is to be proportionate in the thought process. Will the public generally feel that what is being protected through use of the exemption is ‘reasonable’.

In all cases s30 – Investigations and proceedings must be considered first.

Current investigations and those that are still under review should be considered exempt. Otherwise:

- Has this information ever been held as part of an investigation?
- Has this information been obtained for the purposes of police investigation?
- Has this information been recorded for the purposes of police investigation?
- Does the information relate to the obtaining of information from confidential sources?
- Does the information relate to a specific crime past, present or future?

Although these questions allow us to assess the need to use s30, it must be remembered that it is a class-based exemption and therefore subject to the public interest test.

s31 is prejudice-based and, unlike those exemptions that are class-based, it is for the authority to show the harm that any release may cause. Even though there may be evidence of harm in the release, it is still subject to the public interest test which may weight in favour of disclosure, dependent on the circumstances.

It would appear that most information concerning operational policing is covered by s31.

Any information that would highlight methods of prevention or detection of crime, or apprehension or prosecution of offenders, could be construed as potentially impacting upon those purposes (i.e. could prejudice the effectiveness of the force’s activities in those areas).

There are sensitive areas within working practices. Thus disclosure of working practices or procedures would, in many cases, be seen to
Applying the Public Interest Test

have an impact on operational policing and should often/probably be protected. As working practices are likely to be discussed at meetings, certain meetings could also be considered as containing sensitive or non-disclosable information, such as TCG Levels 2 & 3.

Areas where exemptions under s30 and s31 could be sought cover a wide variety of areas. Guidance is therefore provided by means of a list of questions that should be asked in each case. Some examples are also provided though this list is by no means exhaustive. The aim is:

a) to determine whether the sections can be applied;
b) to assist with the provision of an audit trail; and consequently,
c) to enable the exemption to be applied (or not).

In each case, the relevance of the information being examined to the original enquiry must be considered. If the information is not relevant to answering the actual request, it need not be considered for disclosure. Just because information has been provided to the decision-maker, it does not necessarily mean it is relevant.

Application of the public interest test is subjective and every case must be considered on its own merits. The public interest test can be applied both for and against the release of information. For example releasing information that may compromise future court action could be seen to be acting against the public interest and against the defendant’s Human Rights under Article 6.

**It is therefore ACPO policy that no disclosure will be given prior to a court hearing or a decision for No Further Action (NFA).**

The first step is to assess if the information requested has been collected or can be collated from an existing source of information. For example, requests may be made in relation to information that has been specifically collected during the course of an investigation that may be in the public interest to release if requested.

It is fairly obvious to the public that this information would have been collected in the course of such an investigation. Given the high level of public awareness and political campaigning regarding these offences, an FOI request could realistically be anticipated. Such a request could argue public interest on the grounds that such information should be available in order that parents can assess the risk to their children’s safety. In such a case, it is unlikely that the release of this information will ever be sanctioned due to the risk to the individuals (s38 – Health & safety, s40 – Personal data, s31 – Law enforcement) of offences likely to be committed against them.

It may be useful to consider public interest in terms of what may be of benefit to public knowledge, remembering that public interest is not about releasing information that the public may be curious about. It is in the interest of the public for the Police Service to prevent and detect crime, but a line must be drawn between what may be enlightening to the public (and therefore encourages them to give their assistance in the prevention and detection of crime) versus what
Other Relevant Issues

- Is the information requested contained in a court record? (s32)
- Is the question about personal data or is there personal data in the information requested? (s40)
- Is there any other legislation that may prevent the release of this information e.g. Human Rights Act etc.
- Is there any information that, if released, would affect national security? (s24)
- Does the information contain any third party data? (s43)
- Would disclosing the information be a breach of confidence? (s41 & s43)
- Would disclosing the information affect the health and safety of any persons? (s38)
- Are any other FOIA exemptions applicable?
- Would the release of information affect any key police activities? (Please see Table 2).
- Is there any prejudice to the effective conduct of public affairs s36(c)?

Release of Historical Cases

Consideration should be given to how each police force will routinely publish files of investigations, crimes, incidents or events that are of historical interest or subject to repeat requests. Where information is already freely available in the public domain (that is, it has been released previously), routine publication will remove the need to comply with successive requests. Consideration should be given to the point at which documents become of historic value and are freely available. Should this, for example, be at the point at which a file is normally destroyed (subject to current guidelines) or when all parties directly involved are deceased?

Records of historical interest are often passed to county archives/historical centres for retention under the 30 Year Rule, with a restriction placed on their disclosure. Historical files will not generally contain the same amount of information as the complete set of original documents but can include reports, summaries, photo’s etc. As with all files held in this way, there are guidelines as to the time limit for full availability to the public. Technically, these files are still owned by the relevant force, and therefore it may be necessary to produce a Memorandum of Understanding in relation to their availability to the public.

Summary

The underlying theme of FOI is to openly inform the public of the actions of public authorities. However, as the release of information is effectively a disclosure to the world (the recipient of information can often be unknown and consequently their intentions once they have acquired such information are also unknown), the potential for an impact on the apprehension or prosecution of offenders, for example, is such that the interpretation of 'likely' will need to be measured towards the lower end of the probability scale.

satisfies a curiosity (see public interest test).

Once an assessment has been made regarding the public interest of releasing information collected as part of a criminal investigation post-court or NFA or otherwise, consideration must be given to other factors that may prevent release.
To clarify this statement and as an example, if the disclosure has even a relatively low chance of affecting the potential to prosecute an offender, **the information should not be released.** Nevertheless, when making the decision to refuse to release certain information, the vulnerability caused by release must be able to be articulated, readily understood and ‘more than fanciful’ in order comply with s31.

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**Summary Questions**

- In examining the information for potential disclosure, consideration must be given to the likelihood of the disclosure removing any advantage a police force may have over any criminal/offender.
- Consider the possibility that disclosure of any information may, if viewed or merged with other information, potentially impact upon any of the above issues.
- An audit trail to support the decision(s) following from the answers to these questions must be maintained.

**ACPO guidance is that a direct link between disclosure and harm must be shown when applying this exemption.**

**Practitioners should be aware of a recent study completed by the New Scientist magazine. It demonstrates that TV shows depicting forensic techniques and police work are raising awareness amongst criminals that might help them to avoid detection. This must be borne in mind when considering release of information and the application of the s31 exemption and the harm test.**
SECTION 33
AUDIT FUNCTIONS

LEGISLATIVE REQUIREMENTS

What the Act States:

(1) This section applies to any public authority which has function in relation to-

(a) the audit of the accounts of other public authorities
(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority’s function in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with s1(1)(a) would, or would be likely to prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1).

Exemption Type: Qualified
Prejudice-based

Confirm/Deny: Duty to confirm or deny does not arise where compliance would, or would be likely to, prejudice any of the functions listed above.

OFFICIAL GUIDANCE

ICO Guidance  www.informationcommissioner.gov.uk
DCA Guidance  http://www.dca.gov.uk/foi/guidance/exguide/index.htm
ACPO POLICY

This exemption may be cited by public authorities that have functions relating to either:
- The audit of accounts of other public authorities; or
- To the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their function.

Importantly, this exemption does not cover information that relates to a local authority’s internal audit.

ACPO guidance is that this exemption may be used for information that’s intended for future publication where the public interest test has been applied and it is judged that there may be an adverse effect if the information requested is released prematurely.

This exemption is designed to protect organisations with an external audit function – such as the Audit Commission or the HMIC – where the audit results are, by their very nature, for public consumption.

This exemption does not cover auditing processes that an organisation may exercise on itself, internally.
### SECTION 35
FORMULATION OF GOVERNMENT POLICY
AND OTHER GOVERNMENTAL INTERESTS

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<tbody>
<tr>
<td><strong>What the Act States:</strong></td>
</tr>
<tr>
<td>(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to – (a) the formulation or development of government policy (b) Ministerial communications (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or (d) the operation of any Ministerial private office</td>
</tr>
<tr>
<td><strong>Exemption Type:</strong></td>
</tr>
<tr>
<td>Qualified Class-based</td>
</tr>
<tr>
<td><strong>Confirm/Deny:</strong></td>
</tr>
<tr>
<td>Duty to confirm or deny does not arise in relation to information that is exempt as defined above.</td>
</tr>
</tbody>
</table>
OFFICIAL GUIDANCE

Limitations on the scope of this exemption have been introduced. For example, once a decision on government policy has been made, background statistical information that provided an informed background in the decision-making process does not fall under this exemption and may therefore be subject to disclosure.

ICO Guidance recommends the disclosure of factual information used to underpin the decision-making process. However, distinguishing between statistics and other forms of fact is more difficult than it may appear. When considering the public interest when differentiating between factual and other information, the Act states:

‘regard shall be had to the particular public interest in the disclosure of factual information which has not been used, or is intended to be used, to provide an informed background to decision-taking’.

Whilst this exemption is wide-ranging, it is not all-encompassing and covers only information relating to the ‘formulation or development of government policy’. Information that relates to the execution of adopted policies or information concerning other procedural or administrative functions will not fall within the exemption.

ICO Guidance

www.informationcommissioner.gov.uk

DCA Guidance

http://www.dca.gov.uk/foi/guidance/exguide/index.htm

ACPO POLICY

This exemption was incorporated into the Act to ensure that policy discussion can be conducted privately.

Without this protection, the ‘normal’ processes of government may be inhibited. Civil servants, for example, may be less candid in their advice to Ministers when considering policy options.

This exemption is reasonably broad in its scope and can be used to cover the formulation or development of government policy even where a policy has been finally adopted.

It is ACPO’s view that this exemption will have limited application to the Police Service.
## SECTION 37
### COMMUNICATION WITH THE ROYAL FAMILY AND HONOURS

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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<tr>
<td><strong>What the Act States:</strong></td>
</tr>
<tr>
<td>(1) Information is exempt information if it relates to –</td>
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<tr>
<td>(a) communications with Her Majesty, with other members of</td>
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<tr>
<td>the Royal Family or with the Royal Household, or</td>
</tr>
<tr>
<td>(b) the conferring by the Crown of any honour or dignity</td>
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<tr>
<td>(2) The duty to confirm or deny does not arise in relation to</td>
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<tr>
<td>information which is (or if it were held by the public authority would</td>
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<tr>
<td>be) exempt information by virtue of subsection (1).</td>
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<tr>
<td><strong>Exemption Type:</strong></td>
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<tr>
<td>Qualified</td>
</tr>
<tr>
<td>Class-based</td>
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<tr>
<td><strong>Confirm/Deny:</strong></td>
</tr>
<tr>
<td>Duty to confirm or deny does not arise in relation to exempt</td>
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<tr>
<td>information as defined above.</td>
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<tr>
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<tbody>
<tr>
<td><strong>ICO Guidance</strong></td>
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<tr>
<td><a href="http://www.informationcommissioner.gov.uk">www.informationcommissioner.gov.uk</a></td>
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<tr>
<td><strong>DCA Guidance</strong></td>
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<tr>
<th>ACPO POLICY</th>
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<tr>
<td>This exemption covers letters or other documents received from</td>
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<td>members of the Royal Family or Royal Household. It will also apply to</td>
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<tr>
<td>notes of meetings between officials of a public authority and a</td>
</tr>
<tr>
<td>member of the royal family or royal household.</td>
</tr>
<tr>
<td>ACPO guidance is that all communication falling under this exemption</td>
</tr>
<tr>
<td>will be actively protected. <strong>Where a request is received in relation to the Royal Family and/or any policing issues associated with them, the request must be referred to the Central Referral Process.</strong></td>
</tr>
<tr>
<td><strong>Any response will be approved by the ACPO lead within the Metropolitan Police Service and the keeper of historical records within Buckingham Palace.</strong></td>
</tr>
</tbody>
</table>
## SECTION 38
### HEALTH & SAFETY

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th>What the Act States:</th>
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<tbody>
<tr>
<td>Information is exempt information if its disclosure under this Act would, or would be likely to</td>
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<tr>
<td>(a) endanger the physical or mental health of any individual, or</td>
<td></td>
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<tr>
<td>(b) endanger the safety of any individual</td>
<td></td>
</tr>
<tr>
<td>(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with s1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).</td>
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<thead>
<tr>
<th>Exemption Type:</th>
<th>Qualified Prejudice-Based</th>
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<tr>
<th>Confirm/Deny:</th>
<th>Duty to confirm or deny does not arise in relation to information that is exempt as defined above.</th>
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<tr>
<th>OFFICIAL GUIDANCE</th>
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<td>ICO Guidance</td>
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<table>
<thead>
<tr>
<th>ACPO POLICY</th>
<th>General</th>
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<tbody>
<tr>
<td>This exemption appears to be of particular relevance to the Police Service.</td>
<td></td>
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<tr>
<td>A s38 exemption may be applied where disclosure of information would, or would be likely to endanger:</td>
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<tr>
<td>• The physical or mental health of any individual; or</td>
<td></td>
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<tr>
<td>• The safety of an individual.</td>
<td></td>
</tr>
<tr>
<td>It is likely that this definition will cover a wide spectrum of scenarios. By applying this exemption to ‘any individual’, it may be interpreted as the mental or physical health of a police officer, the requester, another individual or the public in general.</td>
<td></td>
</tr>
<tr>
<td>This provision is in line with a similar provision in the DPA that prohibits subject access where there is a risk of ‘serious harm’.</td>
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<tr>
<td>This exemption also has the potential to be linked to the provision of confidential and personal information where identification of the</td>
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</tbody>
</table>
source may place that person at risk.

ACPO guidance is that this exemption would be applied vigorously in respect of protecting the identity (and therefore the safety) of informants. This can not be stated strongly enough.

Other areas that would be protected under s38 are photographs and videos showing post-mortems, injuries, accidents, crime scene videos and similar material that would be likely to affect the mental health of those affected if released into the public domain.

Other areas that would be protected include information about damage to property that may lead to injury of people.

**ACPO CANNOT SEE HOW, IN ANY CASE OR CIRCUMSTANCE, IT WOULD EVER BE IN THE PUBLIC INTEREST TO RELEASE PHOTOGRAPHS AND DOCUMENTS THAT ARE, BY NATURE, DISTASTEFUL.**

Readers are encouraged to refer back to Chadwick’s definition of ‘likely to prejudice’ in s31.

In our consideration, anything requested that is anti-s38 that would have a detrimental effect on mental well-being to the family of those investigated or the public, will be vigorously protected.
## SECTION 39
### ENVIRONMENTAL INFORMATION

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th>What the Act States:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) Information is exempt information if the public authority holding it-</td>
</tr>
<tr>
<td></td>
<td>(a) is obliged by regulations under s74 to make the information available to the public in accordance with the regulations, or</td>
</tr>
<tr>
<td></td>
<td>(b) would be so obliged for any exemption contained in the regulations.</td>
</tr>
<tr>
<td></td>
<td>(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).</td>
</tr>
<tr>
<td></td>
<td>(3) Subsection (1)(a) does not limit the generality of s21(1)</td>
</tr>
<tr>
<td>Exemption Type:</td>
<td>Qualified Class-based</td>
</tr>
<tr>
<td>Confirm/Deny:</td>
<td>The duty to confirm or deny does not arise in relation to information that is exempt as defined above.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>OFFICIAL GUIDANCE</th>
<th>ICO Guidance</th>
<th>DCA Guidance</th>
<th>Other</th>
</tr>
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Copyright: © Hampshire Constabulary 2006
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<tr>
<th><strong>ACPO POLICY</strong></th>
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<tbody>
<tr>
<td><strong>General</strong></td>
<td>This exemption aims to ensure that any requests for information are handled under specific regulations implementing the UK’s international obligations on access to environmental information rather than under the Act.</td>
</tr>
<tr>
<td><strong>Environmental Information Regulations</strong></td>
<td>Current regulations in force since 1992 are expected to be replaced by new regulations as from January 2005. Where a request for environmental information is made, should be considered under the Regulations rather than under the FOI Act. ACPO suggests mechanisms should be in place to automatically route queries relating to environmental information through the Environmental Information Regulations.</td>
</tr>
</tbody>
</table>
# SECTION 42
## LEGAL PROFESSIONAL PRIVILEGE

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
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</thead>
<tbody>
<tr>
<td><strong>What the Act States:</strong></td>
<td>(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.</td>
</tr>
<tr>
<td></td>
<td>(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with s1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.</td>
</tr>
<tr>
<td><strong>Exemption Type:</strong></td>
<td>Qualified</td>
</tr>
<tr>
<td></td>
<td>Class-based</td>
</tr>
<tr>
<td><strong>Confirm/Deny:</strong></td>
<td>Duty to confirm or deny does not arise where disclosure of any information could impact legal proceedings or the legal process.</td>
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<table>
<thead>
<tr>
<th>OFFICIAL GUIDANCE</th>
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<tbody>
<tr>
<td><strong>What is Legal Professional Privilege?</strong></td>
<td>This is a concept that has been developed through the courts and case law rather than defined in an Act of Parliament. There is no attempt in the FOIA to define legal professional privilege: it is likely, therefore, that the scope of this exemption may shift as the courts refine their interpretation of the concept.</td>
</tr>
<tr>
<td></td>
<td>Legal professional privilege enforces the fact that any communication – oral or written – of a legal nature, between client and professional legal adviser, is confidential and should not be revealed without consent. Communications can not be disclosed, even in a court of law.</td>
</tr>
<tr>
<td></td>
<td>Where legal professional privilege does not apply, information may still be withheld under other FOI exemptions: specifically, s41 (Information provided in confidence).</td>
</tr>
<tr>
<td><strong>Defining a Professional Legal Adviser</strong></td>
<td>Legally qualified individuals may include both internal and external lawyers such as qualified solicitors, barristers and licensed conveyancers. Legal executives may also assist solicitors in England in the provision of legal advice to clients.</td>
</tr>
<tr>
<td></td>
<td>The Institute of Legal Executives (ILEX) takes the view that legal professional privilege should be extended to include any professionally qualified legal executive holding recognised legal qualifications who are retained by clients for the provision of legal advice. Anybody meeting these criteria should be treated in the same manner as solicitors. ICO guidance supports this definition.</td>
</tr>
</tbody>
</table>
### Who can Claim Privilege?

Privilege attaches to the information itself and belongs to the client. Whilst there may be cases where a professional legal adviser ceases to be bound by legal professional privilege, it cannot normally be waived without instructions from the client. The FOI Act will not alter this situation. A professional legal adviser may face disciplinary action and could be subject to a civil action if privileged information is unjustifiably disclosed.

### Categories of Legal Professional Privilege

There are two categories of legal professional privilege:
- **Advice privilege** – where no litigation is contemplated or pending
- **Litigation privilege** – where litigation is contemplated or pending

#### Advice Privilege

This category of privilege is associated with communications between a client and legal advisers. It covers any part of a document where there is no pending or contemplated litigation. The information in question must be communicated in a professional capacity so not all communications from a professional legal adviser will attract advice privilege.

Legal professional privilege arises from the nature of the relationship between professional legal adviser and client where an obligation of confidentiality is implied in their relationship. For information to be covered by privilege, it must generally possess the same qualities as other confidential information as outlined in this manual. It will, for example, be characterised by limited availability and not already accessible in the public domain. Communication also needs to be made for the principal or ‘dominant’ purpose of seeking or giving legal advice.

#### Litigation Privilege

Litigation privilege arises where litigation is contemplated or underway. When this is the case, privilege attaches to all documents, reports, information and evidence that has been collected in relation to the litigation process. Litigation privilege will include the communications between a professional legal adviser and client in addition to a host of other documents.

Litigation privilege has wider implications than advice privilege. It includes communications made with third parties, not just communications between the professional legal adviser and client. This will not affect the normal rules governing the disclosure of information. Any information being relied upon in proceedings would have to be disclosed under normal court procedures relating to litigation.

### Establishing the Existence of Privilege

In determining whether information is privileged, 2 questions should be considered:
- For what purpose was the information created or communicated? This is known as the ‘purpose test’.
### The Purpose Test

In the case of litigation privilege only, how likely is the proposed litigation? This is known as the 'likelihood test'.

For legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation, or for the seeking or provision of legal advice.

With regard to advice privilege, the dominant purpose of the communication between the two parties – the client and the professional legal adviser – must be that of seeking and providing legal advice. This may be determined by inspecting the documents generated. Information does not necessarily attract privilege just because it is handed to a legal professional adviser with other papers – the test is whether the information was passed to the legal professional adviser for the sole or dominant purpose of obtaining legal advice.

With regard to litigation privilege, the information must have been created for the purpose of on-going litigation or contemplated litigation. The dominant purpose of the documents can normally be determined by an inspection of them. Where individual pieces of information were created before any litigation proceedings were anticipated or commenced, it may still be claimed that they were brought together with others for the purpose of litigation. In general, where a professional legal adviser has selected information with discretion and not just copied information en masse, a claim for privilege is likely to be upheld in court.

The likelihood test applies only to litigation privilege. For information to attract litigation privilege, it must have been created or brought together for the purpose of proposed or anticipated litigation. Courts have ruled that there must be a 'reasonable prospect of litigation' at the time the information was created or brought together.

Information may cease to be privileged if it is copied and shared with third parties. The issue that will determine whether the privilege has ceased is how widely any copies have been distributed. Where the document has been copied and distributed internally to a handful of individuals and as such retains its confidentiality, the copy will normally be afforded the protection of privilege. Where copies have been distributed externally as part of commercial dealings, the privilege will be lost.

Another consideration that will influence whether information is privileged is the identity of the client. The client may be a team within an organisation rather than an individual or a whole department or every single employee. If the client is a large team, or even a department of a public authority, then the information will be likely to retain its privilege if it is copied to each and every member of the team. There will also be cases where a public authority holds information subject to privilege owed to a third party.

### Copying and Sharing Information

Privilege exists to protect and advance justice. It does not apply to information that conceals fraud, crime or the innocence of an individual. The loss of privilege attached to information occurs even
### The Public Interest Test

Legal professional privilege is subject to PIT.

However, the FOIA can not force professional legal advisers to disclose privileged information without the consent of the individual to whom the privilege belongs. The FOIA simply ensures the public interest receives some weighting in the decision to disclose communications. Public authorities must review their decisions in relation to legal professional privilege and incorporate the public interest as a factor when disclosing or retaining information. All requests must be judged on their own merits.

Factors that may influence a public authority’s decision to either waive or maintain privilege in relation to information are:

- **Timing**
- **Policy advice**
- **Access to Justice**
- **Interaction with other FOI Exemptions**

### Timing

Where the possibility of litigation has subsided, the public authority may be more inclined to disclose. In cases where legal professional privilege may still be attached to documents and information, disclosure may be the most appropriate option once the public interest argument has been considered, particularly where no harm would be created.

However, where litigation is on-going and disclosure would impact the prospects of success by the authority, the public interest may clearly best be served by non-disclosure of the information.

Under FOI, this exemption can no longer be applied to information in perpetuity. This means that information that was part of a ‘historical record’, defined in the Act as record that is 30 years old, can not be exempted from disclosure. In the past, privileged documents held by public authorities would have been subject to the National Archives’ 30 year rule disclosure provisions. This term was subject to possible extension. Under the FOIA, if it is judged that harm may still occur from disclosure, even after 30 or more years, then other exemptions must be cited to protect the information.

### Policy Advice

A key objective of the FOIA is to provide the public with an explanation of the reasons for decisions made by authorities. In considering the decision to disclose information, the IC would expect public authorities to consider:

when the professional legal adviser is unaware of the wrongdoing.

Where a client is warned by the professional legal adviser about the danger of prosecution for a fraud or crime that has not yet been committed, this would normally attract privilege. However, once a professional legal adviser becomes aware of the wrongdoing, the information loses its privilege status. A distinction must also be drawn between legal advice given after the intention of furthering a criminal purpose, before a wrongdoing which does not.
### Access to Justice

Legal professional privilege is one instrument that helps ensure a defendant the right to a fair trial. This is a powerful argument against the waiving of privilege in many cases: ICO guidance stresses that privilege should be retained in cases where disclosure might prejudice the rights of either the authority itself or any third party to obtain access to justice.

### Interaction with other FOI Exemptions

Legal advice will often contain confidential information about third parties. Under the FOIA, an absolute exemption exists in respect of information that would, if disclosed, give rise to an actionable breach of confidence. Where information that attracts privilege contains information about third parties – whether they be witnesses or litigants – it will not be disclosed.

### Issues for Implementation

The law on legal professional privilege is complicated and some issues for consideration are:

- **Legal professionals are increasingly providing advice on policy.** In this case, public authorities may wish to simplify the process of responding to requests for information by introducing a marking system to identify legal and non-legal advice given by legal staff.
- **FOI staff should educate professional legal advisers to ensure they are aware that information ‘held’ by the authority is subject to FOI and any legal advice provided may be subject to release at some point.**
- **Legal advice should be structured to separate out information that shouldn’t be disclosed where it may prejudice the right to a fair trial.**
- **Authorities such as the Police Service might wish to consider publishing general legal advice obtained previously that might increase public understanding of policies and procedures.**
- **FOI officers should agree with policies with their legal teams for when and how to apply this exemption. The criteria should be made public.**

### ICO Guidance

[www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)

### DCA Guidance

ACPO POLICY

General:

Legal privilege has two aspects:
- Litigation privilege covers all communications if the predominant purpose of those communications relates to litigation; and
- Legal privilege is also afforded to more general communication between a client and legal advisor for the purpose of the giving or obtaining of legal advice. To benefit from this privilege and to ensure that communications are immune from disclosure in the course of legal proceedings, communication must be with a professional legal adviser.

Under the Act, an applicant will be exempt from obtaining disclosure of legal advice offered to a public authority by a solicitor in private practice or an in-house lawyer. Where advice was provided by a solicitor in private practice, it is likely to be covered by s41 (Information provided in confidence). Where advice was provided or sought internally by the public authority itself, s42 (Legal professional privilege) may apply. This will also cover other legally privileged material that comes into the possession of the local authority.

This exemption is qualified. This means there are occasions when legal professional privilege can, and must, be overridden. However, Articles 6 and 8 of the European Convention on Human Rights may reduce the likelihood that such arguments will be successful and applicants may be unsuccessful in their arguments that legal professional privilege should not prevent access to information in a wider range of situations than currently exists.

This exemption is class-based. This means there is no requirement to demonstrate any ‘prejudice’ that may occur to the professional legal adviser/client relationship if information is disclosed. It is inherently implied that the release of information that may appear trivial might undermine the relationship between lawyer and client. However, the public interest test must be applied to determine whether the information should be disclosed or retained.

By virtue of s63 of the Act, this exemption will no longer apply after a period of 30 years following the year after the record in question was created.

As examined above, legal professional privilege can be divided into two parts:
- Advice privilege
- Litigation privilege

Advice privilege extends to communications between a legal advisor and their client which have been made for the dominant purpose of giving or receiving legal advice.

Litigation privilege extends to communications between:
- A legal advisor and their client;
- A legal advisor and a third party;
- The client and a third party;
made for the purpose of giving or receiving legal advice in relation to
a proposed or ongoing legal action or for the purpose of collecting evidence to defend or support such a claim.

The recent cases discussed above have not changed the operation of legal professional privilege in any way. They have simply reaffirmed the long accepted common-law principles of legal professional privilege and acted as a reminder of exactly what these are and when they apply.

Since s42 is a public interest exemption, it is necessary to consider the public interest when applying this exemption. This involves balancing the public interest in maintaining the exemption against the public interest in disclosing the information. If the public interest in maintaining the exemption outweighs the public interest in disclosure, the information should be withheld. When conducting the balancing exercise, it is necessary to consider all relevant factors in favour of and against disclosure. The factors that will be relevant will differ from each case. A more detailed examination of the operation of the public interest test and the factors which may be taken into consideration when deciding where the public interest lies can be found in the public interest section of this Manual of Guidance. It is important that all relevant exemptions are applied to the information before it is released into the public domain.

For the Police Service, s30 (Investigations and proceedings conducted by public authorities) or s31 (Law enforcement) may be more easily applied than s42, Legal professional privilege.

For the full paper on Legal Professional Privilege, please refer to Appendix H.

**Note:** Where s42 is being considered or cited, the force’s legal services department must be contacted and their views sought.

ACPO’s position is that this exemption will only be used in exceptional circumstances and where there is a strong public interest in releasing this type of information.

The client-legal professional privilege is a principal enshrined in history that must be respected.
# SECTION 43
## COMMERCIAL INTERESTS

<table>
<thead>
<tr>
<th>LEGISLATIVE REQUIREMENTS</th>
<th>What the Act States:</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>(1) Information is exempt information if it constitutes a trade secret.</td>
</tr>
<tr>
<td></td>
<td>(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice commercial interests of any person (including the public authority holding it).</td>
</tr>
<tr>
<td>Exemption Type:</td>
<td>Qualified Class-based</td>
</tr>
<tr>
<td>Confirm/Deny:</td>
<td>Duty to confirm or deny does not arise where compliance would, or would be likely to, prejudice the interests listed above</td>
</tr>
</tbody>
</table>

## OFFICIAL GUIDANCE

### Trade Secrets

A ‘trade secret’ is not defined in the FOIA. However, its interpretation can be wide-ranging and may extend to customers and the goods they buy, a company’s pricing structure if this is generally not in the public domain and the source of a company’s ‘competitive advantage’. In keeping with other breaches of confidentiality, the unauthorised disclosure of information may result in legal action being taken against the public authority.

By definition, disclosing a trade secret would prejudice a commercial interest. The public authority must confirm or deny that it holds the information.

The following questions will help a public authority determine whether the information requested constitutes a trade secret:

- Is the information commercially sensitive and does it give a company a ‘competitive edge’ over its rivals?
- Is it obvious from the nature of the information that its release would cause harm and erode competitive advantage? Has the owner of the information stated this?
- Is the information already published in some form and in the public domain?
- How easy would it be for competitors to discover or reproduce the information for themselves? Generally, the less skill or effort that was required to generate the information, the less likely the information will constitute a trade secret.

## Commercial Interests

The concept of commercial interests is wide and extends to a person’s ability to successfully trade in a commercial environment. The
The underlying motive for commercial activity is profit.

Types of information that may affect commercial interests include:

- **Procurement** – public authorities will hold a range of information relating to the procurement process and proposed future procurement plans. This may include information held in unsuccessful bids right through to the details of the contract with the successful company. Details may also be held of how a company or product has performed under contract.

- **Regulation** – public authorities that perform their regulatory functions and potential breaches may hold information that will support this role.

- **Public authority’s own commercial activities** – those public authorities that engage in commercial activities may hold information that will potentially fall within the scope of the exemption.

- **Policy development** – information that is commercial in nature may be recorded during the formulation or evaluation.

- **Policy implementation** – public authorities may hold information relating to the assessment of business proposals and the awarding of grants that may be commercially sensitive in nature.

- **Private finance initiative/public private partnerships** – where the private sector is involved in the financing and delivering of public sector projects and services, the public authority may hold information that is both project-related and more general.

The information listed above is not necessarily exempted from disclosure under FOIA but is subject to the prejudice test and the public interest test prior to disclosure.

The following outline some of the questions that may be asked when reviewing whether the release of information may harm the commercial interests of either the public authority or supplying companies:

- **Does the information relate to, or could it impact on commercial activity?**
  Some information may directly relate to commercial activity whilst other information may have a more indirect link.

- **Is the commercial activity conducted in a competitive environment?**
  The lower the level of competition in any given marketplace, the less likely commercial interests will be prejudiced with the release of information. Where a public authority is the sole purchaser of specialist equipment, for example, the commercial interests of the company could be more dependent on the procurement plans of the public authority rather than the impact of releasing
commercial information.

- **Would there be damage to reputation or business confidence?**
  If release were to damage a company’s reputation or the confidence of customers, suppliers or investors, the commercial exemption may be applied. The same may be said where release may impact revenue or threaten ability to obtain supplies or secure finance.

- **Whose commercial interests are affected?**
  In some circumstances, it may be unclear as to whose commercial interests may be prejudiced by disclosure of information. For example, if the amount of money set aside by a public authority for procurement is released, the bargaining position of the authority may be compromised if suppliers then increase their prices.

- **Is the information commercially sensitive?**
  Companies compete by offering something different from their rivals. The difference will often be reflected in their price and may also relate to the quality or specification of the product or service they offer. Information identifying this unique element is likely to be commercially sensitive. It may also inadvertently reveal information about profit margins and possibly working practises.

- **What is the likelihood of the prejudice being caused?**
  A judgement will need to be made on the likely prejudice caused by disclosure of certain information. Whilst the prejudice may not be substantial, it doesn’t have to be trivial either. Prejudice should be likely from disclosure or there should be a significant risk, rather than it being a remote possibility.

The public authority must always consider whether the release of information is in the public interest, regardless of whether or not the information forms a trade secret. Authorities must weigh the possible prejudice caused by disclosure against the likely benefit to the applicant and the wider public.

**General public interest factors**
The strong public interest in openness does not necessarily override all other considerations.

**Accountability for the spending of public money**
There is a strong public interest in allowing the public to scrutinise how public money is spent and ensuring the authority is getting value for money.

**Protection of the Public**
Where the public authority holds information on the quality of products or on the conduct of private companies, there is a strong argument in allowing access to information that might ultimately protect the public, even though his may reveal a trade secret or prejudice the commercial interests of a company.

**Circumstances under which the public authority obtained the information**
Where the information was obtained under the statutory powers of a public authority, it must be considered whether disclosure is
Implementation Issues

prevented under legislation or by a duty of confidence.

Where the information may have been volunteered to the authority, the arguments favouring disclosure must be carefully weighed against the risk of discouraging private companies from participating in future research.

**Competition Issues**

It is in the public interest to ensure that companies are able to compete fairly for public sector contracts. This is a key factor to consider when contemplating the disclosure of information.

**Timing**

Timing of disclosure is also a critical factor.

The tendering process, for example, may incorporate information that is commercially sensitive whilst the tendering process is on-going but less sensitive once a contract has been awarded.

In addition, just because a request for information was declined at one point in time, it doesn’t mean that the public interest is best served if that information is permanently withheld. Market conditions may change and information relating to costs may become out of date quickly.

FOI decision-makers must also remember that there is an overlap between commercial interest and confidentiality. They will determine whether or not disclosure might prejudice commercial interests of a third party, consider the likelihood of a third party being able to successfully take action in the courts for breach of confidence.

**Consultation**

A public authority may wish to consult parties likely to be affected by the disclosure of commercial information to determine likely prejudice. Discussion with suppliers to identify the types of information that may harm commercial interests if disclosed may be appropriate.

A review of circumstances under which the public authority agrees to consult suppliers in the event of FOI requests is also advisable. However, it is ultimately the responsibility of the public authority to decide whether or not an exemption applies to prevent the release of information.

**Contracts/Confidentiality Clauses**

There is an overlap between s43 and s41 which provides that information is exempt where its release could lead to a public authority being taken to court for a breach of confidence.

During the procurement process, suppliers may request of public authorities that they sign confidentiality clauses that attempt to prevent the disclosure of information. However, blanket clauses that are designed to restrict the disclosure of any information, including that which could be disclosed without any prejudice to the commercial interests of the supplier, are not acceptable in the view of the IC.
<table>
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<tr>
<th>ICO Guidance</th>
<th>DCA Guidance</th>
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<tr>
<td>Alternatively, clauses that seek to identify and protect that information that would genuinely prejudice a third party’s commercial interests are perfectly acceptable.</td>
<td></td>
</tr>
<tr>
<td>In the future, public authorities may be well advised to develop a new approach to confidentiality agreements. They may also wish to review existing contracts and discuss with suppliers and contractors the circumstances under which the information might be released in response to a request for information.</td>
<td></td>
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<tr>
<td><a href="http://www.informationcommissioner.gov.uk">www.informationcommissioner.gov.uk</a></td>
<td></td>
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</tbody>
</table>
### ACPO POLICY

**General:**

s43 sets out an exemption from the right to know if:
- The information requested is a trade secret. In this case, there is no need to apply the public interest test and consider the harm its release may cause. It may be withheld; or
- The release of the information is likely to prejudice the commercial interests of any person (a ‘person’ may be an individual, a company, public authority itself or any other legal entity). Where the information requested does not constitute a trade secret, it can only be withheld if the public authority is satisfied a person’s commercial interests would be compromised by its release.

s43 does not absolve the authority from the obligation to inform an applicant whether it holds the information that constitutes a trade secret.

However, where the requested information is likely to prejudice commercial interests other than trade secrets, s43 removes the obligation to confirm whether the information is held.

ACPO guidance is that substantial amounts of information will be commercially sensitive and therefore may be withheld under the terms of s43.

If information is produced or compiled with a view to it being sold on as a commercial product – as with training materials, for example – then this too will fall under the s43 exemption.

Where the information requested is neither commercially sensitive nor commercially valuable or where it has no has no commercial value to the organisation in any other format, then authorities must consider releasing it, subject to application of the public interest test.

A copy of the guidelines issued to Force Procurement Officers and a process chart for making a decision on release may be found in Appendix I. Appendix I also contains a Questionnaire Analysis of responses by national suppliers when questioned about their concerns in relation to disclosure of information. The main sensitivity is price.

Other areas of concern include any information that is commercially sensitive and, if it were available in the public domain, would be harmful. In these cases, the public interest test must be applied.

Chadwick’s definition of ‘likelihood to prejudice’ (reviewed in s31) should also be considered in this context. The likelihood that prejudice will be caused by release of requested information can be as low as 20%: even if there is a 20% likelihood that prejudice may result from the release on information, this is sufficient justification for refusing release.

### Contracts and Procurement Advice:

- **Advice:**
  - s43 sets out an exemption from the right to know if:
    - The information requested is a trade secret. In this case, there is no need to apply the public interest test and consider the harm its release may cause. It may be withheld; or
    - The release of the information is likely to prejudice the commercial interests of any person (a ‘person’ may be an individual, a company, public authority itself or any other legal entity). Where the information requested does not constitute a trade secret, it can only be withheld if the public authority is satisfied a person’s commercial interests would be compromised by its release.

- **Policy:**
  - s43 does not absolve the authority from the obligation to inform an applicant whether it holds the information that constitutes a trade secret.
  - However, where the requested information is likely to prejudice commercial interests other than trade secrets, s43 removes the obligation to confirm whether the information is held.

- **ACPO Guidance:**
  - ACPO guidance is that substantial amounts of information will be commercially sensitive and therefore may be withheld under the terms of s43.
  - If information is produced or compiled with a view to it being sold on as a commercial product – as with training materials, for example – then this too will fall under the s43 exemption.
  - Where the information requested is neither commercially sensitive nor commercially valuable or where it has no has no commercial value to the organisation in any other format, then authorities must consider releasing it, subject to application of the public interest test.
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  - Chadwick’s definition of ‘likelihood to prejudice’ (reviewed in s31) should also be considered in this context. The likelihood that prejudice will be caused by release of requested information can be as low as 20%: even if there is a 20% likelihood that prejudice may result from the release on information, this is sufficient justification for refusing release.
Section 7

Appendices
APPENDIX A
PUBLICATION SCHEME

APPENDIX/LINKS TO OTHER SITES
Under the Freedom of Information Act, information that is 'reasonably accessible to the applicant by other means' (s21) does not have to be disclosed. However, authorities have a 'duty to provide advice and assistance' (s16) to anyone who is looking for information.

It is recommended that 'useful links' are provided within publication to direct the public to routinely published information and other areas of particular interest. This will assist the public and may reduce the number of requests received. The following are suggested as a minimum:

- Police Authority Website
- Unitary Authorities – A list of local authorities that make up the force boundary can be a very useful source of related information in regard to Crime and Disorder Audits etc and other local government/police partnership working.

FOI RELATED SITES
- www.dataprotection.gov.uk – The Information Commissioners website. Further information relating to FOI and Data Protection, the role of the Information Commissioner and other related sites.
- www.cfoi.org.uk
  Campaign for Freedom of Information - A substantial site offering a background to the Act and a number of related articles, as well as a full version of the Freedom of Information Act.
- www.dca.gov.uk/index.htm
  The Lord Chancellors Department (now called The Department for Constitutional Affairs) - An array of Information on Freedom of Information, Data Protection and other areas of interest, such as Criminal Justice. A full copy of the FOI Act and Lord Chancellors guidance can be found here.

POLICING AND STATISTICS
- www.police.uk
  Police Service Site for the UK - A comprehensive site providing useful links to all official regional and non-regional police force sites and related organisations such as ACPO. Also provides links to other groups including Victim Support and police associations.
- www.homeoffice.gov.uk/crime/index.html
  Home Office Site - Provides substantial information on UK policing including crime prevention advice, police reform and details of police complaints. Links to a number of government publications and documents are also available.
- www.statistics.gov.uk
  Office of National Statistics - A comprehensive site containing a whole range of statistical information on national policing and crime trends. Also contains crime statistics on individual towns and cities.
- www.centrex.police.uk/business/stats.html
  National Police Training Site - This site contains information on training issues as well as
other general policing information and provides a number of interesting links including the United Nations Survey on Crime site.

  E-Government Website - Hosts a number of links to websites ranging from Animal Welfare to National Security.

**LOCAL LINKS**
This classification is useful for sites that are of local or regional interest for example Safety Camera Partnerships and Neighbourhood Watch Schemes. Forces will have to decide what sites to put under this classification.

**DISCLAIMER**
Under the useful links section it would be advisable to also issue a disclaimer that makes it clear that the content of other sites is not the responsibility of the force. This is an example used by one Force:

‘The force is not responsible for the content or reliability of any of the websites referenced, and does not necessarily endorse the views expressed within them. Listings shall not be taken as endorsement of any kind. We cannot guarantee that these links will work all of the time and we have no control over availability of the linked pages.’

**FURTHER READING**

**NHS Guidance**

[http://www.show.scot.nhs.uk/Publications/ME/complaints/CHS/Section5/050_105ContinualAndVexatiousComplainants.htm](http://www.show.scot.nhs.uk/Publications/ME/complaints/CHS/Section5/050_105ContinualAndVexatiousComplainants.htm)


**PCA Guidance**

[http://www.homeoffice.gov.uk/docs/pupcamp2.html#III.%20FIRST%20DECISIONS%20ON%20HANDLING%20OF](http://www.homeoffice.gov.uk/docs/pupcamp2.html#III.%20FIRST%20DECISIONS%20ON%20HANDLING%20OF)
APPENDIX B
TEMPLATE LETTERS

LETTER B1
Insufficient Information Provided to Enable a Response to be Actioned.

Dear

FREEDOM OF INFORMATION ACT REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by the (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST)

This is to inform you that I cannot identify any specific records / documents that will satisfy your request based on the details you have provided. To enable (insert force name) to meet your request could you please provide this office with further information. I provide some guidance that may assist you more clearly describe the information you require:

FREE TEXT PARAGRAPHS

1) Outline other information available that might meet the terms of the request.

2) Provide a general response to the request setting out options for further information which could be provided on request.

3) Detail access to catalogues / reports etc which maybe available help the applicant ascertain the nature and extent of the information held by us.

After receiving your reply, your request will then be considered and you will receive the information requested within the statutory timescale of 20 working days as defined by the Freedom of Information Act 2000, subject to the information not being exempt or containing a reference to a third party.

However, if the requested additional information has not been received by (DATE) I will assume you no longer wish to proceed with this request and will treat it as withdrawn.

There may be a fee payable for the retrieval, collation and provision of the information you request. If this is the case you will be informed and the 20 working day timescale will be suspended until we receive payment from you. If you chose not to make a payment then your request will remain unanswered.

Your attention is drawn to the attached sheet which details your right of complaint.
I would like to take this opportunity to thank you for your interest in the (NAME) Constabulary and look forward to your response.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF CASE OFFICER)  
(POSITION/DESIGNATION)
LETTER B2
Insufficient Response to Request for Additional Information

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by the (NAME) Constabulary on (DATE). I note you seek access to the following information:

• (PARAPHRASE OR SUMMARY OF REQUEST).

Following your response to our request for further information, searches were conducted at (NAME OF SYSTEMS OR LOCATIONS SEARCHED). These searches failed to locate any records / documents relevant to your request based on the information you have provided. Accordingly, I have determined that the information to which you seek access is not held by the (CONSTABULARY NAME).

Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in the (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (TELEPHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
LETTER B3
No Response for Further Information Letter

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by the (NAME) Constabulary on (DATE). I note you seek access to the following information:

• (PARAPHRASE OR SUMMARY OF REQUEST).

Further to our correspondence dated (DATE OF LETTER REQUESTING FURTHER INFO) the (CONSTABULARY NAME) has not received a response to our request for further information. Consequently your request has been withdrawn.

Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in the (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (TELEPHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
COMPLAINT RIGHTS
Are you unhappy with how your request has been handled or do you think the decision is incorrect?

You have the right to require the (CONSTABULARY NAME) to review their decision.

Prior to lodging a formal complaint you are welcome and encouraged to discuss the decision with the case officer that dealt with your request.

Ask to have the decision looked at again –
The quickest and easiest way to have the decision looked at again is to telephone the case officer that is nominated at the end of your decision letter.

That person will be able to discuss the decision, explain any issues and assist with any problems.

Complaint
If you are dissatisfied with the handling procedures or the decision of the (CONSTABULARY NAME) made under the Freedom of Information Act 2000 (the Act) regarding access to information you can lodge a complaint with the (CONSTABULARY NAME) to have the decision reviewed. (CONSTABULARY NAME) must be notified of your intention to complain within 2 months of the date of its response to your Freedom of Information request. Complaints should be made in writing and addressed to:

(CONSTABULARY NAME & ADDRESS)

In all possible circumstances the (CONSTABULARY NAME) will aim to respond to your complaint within (TIME).

The Information Commissioner
After lodging a complaint with the (CONSTABULARY NAME) if you are still dissatisfied with the decision you may make application to the Information Commissioner for a decision on whether the request for information has been dealt with in accordance with the requirements of the Act.

For information on how to make application to the Information Commissioner please visit their website at www.informationcommissioner.gov.uk. Alternatively, phone or write to:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
Phone: 01625 545 700
LETTER B4
Confirmation Letter

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

Your request will now be considered in accordance with the Freedom of Information Act 2000 (the Act). You will receive a response within the statutory timescale of 20 working days as defined by the Act, subject to the information not being exempt or containing a reference to a third party. In some circumstances the (CONSTABULARY NAME) may be unable to achieve this deadline. If this is likely you will be informed and given a revised time-scale at the earliest opportunity.

There may be a fee payable for the retrieval, collation and provision of the information you request. If this is the case you will be informed and the 20 working day timescale will be suspended until we receive payment from you. If you choose not to make payment then your request will remain unanswered.

Some requests may also require either full or partial transference to another public authority in order to answer your query in the fullest possible way. Again, you will be informed if this is the case.

Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in the (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

I regret to inform you that (NAME) Constabulary have not been able to complete its response to your request by the date originally stated.

I now advise you that the amended date for a response is (DATE). I can assure you that every effort will be made to ensure an appropriate response will be made within this new timescale.

Your attention is drawn to the attached sheet which details your right of complaint.

May I apologise for any inconvenience caused. Should you wish to discuss this matter please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Thank you for your interest in (NAME) Constabulary.

Yours sincerely

(NAME OF CASE OFFICER)  
(POSITION/DESIGNATION)
Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

This is to inform you that there will be a fee payable for this information to be retrieved, collated and provided. The fee is in accordance with the Freedom of Information (Fees and Appropriate Limit) Regulations 2004.

The fee payable totals £(SUM) and is calculated as follows:

<table>
<thead>
<tr>
<th>Prescribed costs (i.e. searching for and providing the information) charged at 10% of full cost:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Disbursement costs (i.e. photocopying, printing, postage etc.) charged at full cost:</td>
<td></td>
</tr>
</tbody>
</table>

Your Options

If you wish to reduce the amount of the costs, please contact (NAME OF CASE OFFICER) on (PHONE NUMBER) to discuss whether you could alter your request in a way that might reduce the costs. Please note that if you do alter your request so that the costs are reduced to £450 or less, those costs will be waived automatically.

If you do not alter your request, you are required to send this office correspondence, either:

- agreeing to pay these costs (including payment), or
- withdrawing your request, or
- contending that the costs have been wrongly assessed and/or should not be imposed in the form of a complaint (please refer to attached sheet detailing your right of complaint).

You have three months to pay this fee; the 20 working day timescale for providing the information you request is suspended until (NAME) Constabulary receives payment from you. Importantly, if you do not send your notice or payment by (DATE) your request for information will be taken to have been withdrawn.

On receipt of this fee I will process your request and the remaining time within the 20 working day timescale will be used to prepare a response.

Payment must be made in pounds sterling – please do not send cash through the post. Cheques should be made payable to (NAME).
I would like to take this opportunity to thank you for your interest in the (NAME) Constabulary and look forward to your response.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
LETTER B7
Transfer Whole or Part to Data Protection

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) concerning (SUMMARY OF REQUEST).

Your request for information has now been considered and I am not obliged to supply the information you have requested. Such information is exempt under section 40 of the Freedom of Information Act 2000. This exemption applies because the right given under the Act to request official information held by public authorities does not apply to personal data - any such requests become subject access requests under the Data Protection Act 1998.

In accordance with the Act, this letter represents a Refusal Notice for this particular request. This action cannot be taken as confirmation or denial that (NAME) Constabulary holds the information you have asked for.

Should you wish to know what information (if any) (NAME) Constabulary holds about you, or you would like confirmation that you do, or do not have a prosecution/conviction history, you must complete a Subject Access form. Payment of a £10.00 fee and proof of identification must accompany a completed application form. Such a form is enclosed.

Please note that once we have received your completed application the process to provide you with information can take up to 40 days.

I would like to this opportunity to thank you for your interest in (NAME) Constabulary.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
LETTER B8
Transfer of Request to Another Public Authority

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

This is to inform you that I cannot identify any specific records / documents held by (NAME) Constabulary that will satisfy your request based on the details you have provided. However, I have received advice from (OTHER PUBLIC AUTHORITY) that they may hold the information you request.

I propose to transfer your request to (OTHER PUBLIC AUTHORITY) therefore I seek your confirmation that you accept this transfer.

Alternatively you may wish to submit your request directly to (OTHER PUBLIC AUTHORITY).
The Contact Details for this organisation are:

- •
- •
- •
- •

If I do not receive your confirmation of acceptance of transfer by (DATE) I will assume you no longer wish to proceed with your request with (NAME) Constabulary and will treat it as withdrawn.

Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.
Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
LETTER B9
Part Transfer of Request to Another Public Authority

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- Part X (PARAPHRASE OR SUMMARY OF REQUEST)
- Part XX (PARAPHRASE OR SUMMARY OF REQUEST)
- Part XXX (PARAPHRASE OR SUMMARY OF REQUEST).

Parts X & XX

Your request will now be considered in accordance with the Freedom of Information Act 2000 (the Act). You will receive a response within the statutory timescale of 20 working days as defined by the Act, subject to the information not being exempt or containing a reference to a third party. In some circumstances (NAME) Constabulary may be unable to achieve this deadline. If this is likely you will be informed and given a revised time-scale at the earliest opportunity.

There may be a fee payable for the retrieval, collation and provision of the information you request. If this is the case you will be informed and the 20 working day timescale will be suspended until we receive payment from you. If you chose not to make payment then your request will remain unanswered.

Part XXX

I wish to inform you that I cannot identify any specific records / documents held by (NAME) Constabulary that will satisfy your request based on the details you have provided. However, I have received advice from (OTHER PUBLIC AUTHORITY) that they may hold the information you request.

I propose to transfer part of your request to (OTHER PUBLIC AUTHORITY) therefore I seek your confirmation that you accept this transfer.

Alternatively you may wish to submit your request directly to (OTHER PUBLIC AUTHORITY). The Contact Details for this organisation are:

* * * * * *

If I do not receive your confirmation of acceptance of transfer by (DATE) I will assume you no longer wish to proceed with Part XXX of your request with (NAME) Constabulary.

Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.
Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
LETTER B10
Third Party Consultation Letter

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

(NAME) Constabulary have received a request for information pursuant to the Freedom of Information Act 2000 (the Act) which contains information that refers to (SUMMARY OF REQUEST).

The Act gives every person a right of access to any information held by public authorities, such as (NAME) Constabulary, subject to limited exemptions.

In accordance with the Act Section 45 Code of Practice I am seeking your views on the disclosure of this information (*copy enclosed) prior to releasing it. Your views will be taken into account before we decide to take any further action. Should you wish to object to the disclosure of this information you must rely on the specific exemption provisions contained in the Act.

The Act requires that requests are met within 20 working days and in order to adhere to that statutory time limit I would welcome your written response by (DATE). Failure to respond by this time may result in (NAME) Constabulary disclosing this information without your input.

If you wish to discuss this matter before confirming your views on the information under review please contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER).

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)

* Optional depending on information subject to request
LETTER B11
Full Response Letter

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

Following receipt of your request searches were conducted within the (CONSTABULARY NAME) to locate information relevant to your request. I can confirm that the information you have requested is held by (NAME) Constabulary.

Extent Of Searches To Locate Information
To locate the information relevant to your request searches were conducted at (NAMES OF AREAS SEARCHED).

Result Of Searches
The searches located (NUMBER OF RECORDS LOCATED) records relevant to your request.

Decision
I have today decided to disclose the located information to you in full.

Please find attached records numbered 1 to (XXX).

Complaint Rights
Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
LETTER B12
S21 Reasonably Accessible – Publication Scheme Letter

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

Following receipt of your request searches were conducted within (NAME) Constabulary to locate information relevant to your request.

Decision

Pursuant to the provisions of Section 21 of the Freedom of Information Act 2000 (the Act) I have decided to refuse access to the information you have requested.

Reason For Decision

Section 21 of the Act provides:

Information which is reasonably accessible to the application otherwise than under section 1 is exempt information...

For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority’s publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

The information you have requested is available from (NAME) Constabulary’s Publication Scheme.

To access the Publication Scheme please visit our website at www.xxxxxx. Alternatively you may contact the Publication Scheme Co-ordinator using the following details:

(INSERT DETAILS)

Complaint Rights

Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

• (PARAPHRASE OR SUMMARY OF REQUEST).

Following receipt of your request searches were conducted within (NAME) Constabulary to locate information relevant to your request. I can confirm that the information you have requested is held by (NAME) Constabulary.

Extent Of Searches To Locate Information
To locate the information relevant to your request searches were conducted at (NAMES OF AREAS SEARCHED).

Result Of Searches
The searches located (NUMBER OF RECORDS LOCATED) records relevant to your request.

Decision
I have today decided to:

• disclose records numbered x to xx in full;
• disclose records numbered x, xx, xxx subject to the deletion of information pursuant to the provisions of section XX of the Freedom of Information 2000 (the Act); and
• fully exempt records numbered xxx pursuant to the provisions of section XX of the Act.

**Please note areas marked ‘Deleted Material. Not Relevant.’ relate to entirely separate police matters that do not fall within the scope of your request.

Reasons For Decision
Quote exemptions applicable.
State why exemption applies.

Harm Test
Complete harm test if applicable.

Public Interest Test
State public interest considerations favouring disclosure.

State public interest considerations favouring non-disclosure.

Complete Balancing Test
After weighing up the competing interests I have determined that the disclosure of the above information would not be in the public interest. I consider that the benefit that would result from the information being disclosed does not outweigh disclosing information relating to (TYPE OF INFORMATION EXEMPTION IS TRYING TO PROTECT).

Please find attached your copies of records numbered xx to xxxx.

Complaint Rights
Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)

* Only if qualified exemption relied upon
** Delete if not applicable

The (force’s name), in complying with their statutory duty under sections 1 and 11 of the Freedom of Information Act 2000 to release the enclosed information, will not breach the Copyright, Designs and Patents Act 1988. However, the rights of the copyright owner of the enclosed information will continue to be protected by law. Applications for the copyright owner’s written permission to reproduce any part of the attached information should be addressed to The Force Solicitor, (force address).
LETTER B14
Option to View Documents

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) concerning (SUMMARY OF REQUEST).

In your original request you mentioned that you would prefer to view the information.

This information is now available and I would be grateful if you could contact me to arrange a convenient time for you to view this information.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
LETTER B15
Refusal Response Letter

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) concerning (SUMMARY OF REQUEST).

Your request for information has now been considered and I am not obliged to supply the information you have requested.

Section 17 of the Freedom of Information Act 2000 requires (NAME) Constabulary, when refusing to provide such information (because the information is exempt) to provide you the applicant with a notice which: (a) states that fact, (b) specifies the exemption in question and (c) states (if that would not otherwise be apparent) why the exemption applies.

Reasons For Decision
Quote exemptions applicable.
State why exemption applies.

Harm Test
Complete harm test if applicable.

Public Interest Test
State public interest considerations favouring disclosure.
State public interest considerations favouring non-disclosure.

Complete balancing test

After weighing up the competing interests I have determined that the disclosure of the above information would not be in the public interest. I consider that the benefit that would result from the information being disclosed does not outweigh disclosing information relating to (TYPE OF INFORMATION EXEMPTION IS TRYING TO PROTECT).

Complaint Rights
Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

I acknowledge your payment has now been received on (DATE).

The remaining time within the 20 working day timescale will now be used to prepare a response and I aim to provide you with the information within (NUMBER) working days. In some circumstances (NAME) Constabulary may be unable to achieve this deadline. If this is likely you will be informed and given a revised time-scale at the earliest opportunity.

Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF CASE OFFICER)  
(POSITION/DESIGNATION)
LETTER B17
Option Letter – Where Over Fees Limit

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) concerning (SUMMARY OF REQUEST).

The cost of providing you with the information is above the amount to which we are legally required to respond i.e. the cost of locating and retrieving the information exceeds the ‘appropriate level’ as stated in the Freedom of Information (Fees and Appropriate Limit) Regulations 2004. It is estimated that it would cost £(sum) to comply with your request.

In accordance with the Freedom of Information Act 2000, this letter acts as a Refusal Notice however there are some alternatives that you may wish to consider.

1. Receiving part of the information requested up to the ‘appropriate level’ as stated in the Freedom of Information (Fees and Appropriate Limit) Regulations 2004.

2. Receiving a summary or digest of the information requested (if this proves to help reduce costs).

3. You can of course pay the full cost of locating and retrieving the information*.

4. Viewing the information requested (if this proves to help reduce costs).

* (Delete as appropriate)

To enable us to proceed with your request I would be grateful if you could confirm which of the above options you would prefer us to investigate further. If you chose not to respond then your request will remain unanswered.

Please contact me if you would like some advice on proceeding with your request.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
LETTER B18
Over Appropriate Fees Limit

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) concerning (SUMMARY OF REQUEST).

The cost of providing you with the information is above the amount to which we are legally required to respond i.e. the cost of locating and retrieving the information exceeds the 'appropriate level' as stated in the Freedom of Information (Fees and Appropriate Limit) Regulations 2004. It is estimated that it would cost £(sum) to comply with your request.

In accordance with the Freedom of Information Act 2000, this letter acts as a Refusal Notice.

You may wish to refine and resubmit your request so that it reduces the costs shown above. Please contact me if you would like some advice on refining your request.

Yours sincerely

(NAME OF CASE OFFICER)
(POSITION/DESIGNATION)
LETTER B19
Refusal Letter - Vexatious Requests

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO:
I write in connection with your request for information dated (DATE) which was received by (NAME) Constabulary on (DATE). I note you seek access to the following information:

Decision
Pursuant to the provisions of Section 14 of the Freedom of Information Act 2000 (the Act) I have decided to refuse your request as it has been deemed a 'Vexatious Request'.

Reasons For Decision
Section 14(1) of the Act provides:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

Section 14(2) of the Act provides:

Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

I have taken cognisance of the Information Commissioners guidance No 22 on Vexatious and Repeated requests which can be found at: http://www.informationcommissioner.gov.uk/eventual.aspx

Accordingly, I have classified your request as vexatious under both parts of section 14. My reasoning for this is as follows:

STATE REASON(S) CONSIDERING ELEMENTS SET OUT IN ACPO MOG.

It is therefore the (name) Constabulary/Police position that we will not answer or acknowledge any requests relating to (subject area).

Complaint Rights
Your attention is drawn to the attached sheet which details your right of complaint.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
LETTER B20
Refusal Letter – Repeated Requests

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE) which was received by the (NAME) Constabulary on (DATE). I note you seek access to the following information:

- (PARAPHRASE OR SUMMARY OF REQUEST).

Decision
Pursuant to the provisions of Section 14 of the Freedom of Information Act 2000 (the Act) I have decided to refuse your request as it has been deemed a ‘Repeated Request’.

Reasons For Decision
Section 14(2) of the Act provides:

Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

Our records indicate that (NAME) Constabulary previously complied with your current request on (DATE). It is clear that a ‘reasonable interval’ has not elapsed between your requests. A reasonable is defined as 60 working days.

Complaint Rights
Your attention is drawn to the attached sheet which details your right of complaint.

I would like to this opportunity to thank you for your interest in (NAME) Constabulary.

Should you have any further inquiries concerning this matter, please write or contact (NAME OF CASE OFFICER) on telephone number (PHONE NUMBER) quoting the reference number above.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
LETTER B21
Acknowledgement of Complaint- Internal Review Request

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I acknowledge receipt of your letter dated (DATE) requesting that (NAME) Constabulary review its response to your request for information concerning (SUMMARY OF REQUEST).

My understanding is that the issues you have raised are (DETAIL ISSUES).

The review will be conducted in accordance to (NAME) Constabulary’s review procedure and every effort will be made to have a response to you by the (DATE) however if it becomes clear that the review will not be completed by this date you will be contacted.

If you wish to discuss this matter prior to (NAME) Constabulary’s response please contact me.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
LETTER B22
Response to Complaint

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

Following your request to review our previous response in connection with your request for information dated (DATE) concerning (SUMMARY OF REQUEST) I can advise you that (NAME) Constabulary has now completed its review.

(DETAIL OUTCOME OF RESPONSE)
• Confirm original decision OR advise that review has resulted in an additional disclosure being made.
• Apologise where identified that correct procedures for dealing with the request were not followed.
• Refer to additional information now disclosed (e.g. see attached report).

If you are not satisfied with our response please refer to our review procedure (copy enclosed) for further information on what to do next.

If you wish to discuss this matter prior to any further action on your part, please contact me.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
LETTER B23
Acknowledgement of Notice from Information Commissioner

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I acknowledge receipt of the notice received from Information Commissioner dated (DATE) requesting (SUMMARY OF ACTIONS).

This is to inform you that we will respond accordingly.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
**LETTER B24**

**Request For Information**

Please note a valid FOIA request **must** contain your name and an address. The provision of any other contact details is optional, however any additional information you choose to provide will enable the Police Service to provide you with a faster and more efficient service.

<table>
<thead>
<tr>
<th>Title (e.g.)</th>
<th>Surname:…………………………………………………………</th>
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<tbody>
<tr>
<td>Forename(s):</td>
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<td>Address:</td>
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<td>E-mail</td>
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<tr>
<td>Tel. No. (daytime and/or Facsimile)</td>
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</tbody>
</table>

If you are making this request on behalf of an organisation or business

| Name of | |
| Your position in the organisation/business:|…………………………………………………………………………………………|

What information do you want? (Please be as specific as possible and attach an additional sheet if insufficient space.)

| What type of format do you require: | |
| Hard copy | Electronic copy | Inspection |

Do you have any special requirements for the format? If so, please give details:

| We may consult with third parties if the information you have asked for originates from or affects their legal rights. Please tick this box if you would like your personal details withheld. | |
| Yes, withhold my personal details |

Data Protection Act 1998: your personal data will only be used to enable us to deal with your request and for no other purpose.

Please return this form to: (Force name & address)
LETTER B25
Neither Confirm nor Deny

Dear

FREEDOM OF INFORMATION REQUEST REFERENCE NO: (NUMBER)

I write in connection with your request for information dated (DATE), received by the Freedom of Information Unit at (NAME) Constabulary on (DATE). I note you seek access to the following information:

• (DETAILS)

Please accept this letter as an acknowledgement of receipt of your request which has been considered under the Freedom of Information Act 2000 (FOIA).

In accordance with the Act, this letter represents a Refusal Notice for this particular request. The (NAME) Constabulary can neither confirm nor deny that it holds the information you requested as the duty in s1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of the following exemptions:

• (INSERT EXEMPTIONS AND SUB-SECTIONS)

However, this should not be taken as conclusive evidence that the information you requested exists or does not exist.

I would like to take this opportunity to thank you for your interest in (NAME) Constabulary and advise you that you can contact the Surveillance Commissioner if you have any further queries.

Should you have any further inquiries concerning this matter, please write or contact (NAME) on telephone number (INSERT) quoting the reference number above.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
APPENDIX C
FEES NOTICE

(INsert name of force or crest or use headed paper)

(NAME & ADDRESS OF APPLICANT)
Date: 21st October 2003

Dear Mr/Mrs/Miss/Ms/Dr (insert surname),

In response to your request for information dated (insert date), please find below a fees notice which has been prepared in accordance with the Lord Chancellor’s Department fee regulations, a copy of which can be obtained from The Stationery Office.

<table>
<thead>
<tr>
<th>Prescribed costs: (Insert hours or part hours) hours @ £25 per hour</th>
<th>£</th>
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<tbody>
<tr>
<td>Charged at 10% Disbursements: (Charged at actual cost)</td>
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<tr>
<td>Photocopying</td>
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<tr>
<td>Postage &amp; Packing</td>
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<tr>
<td>Other............................ (detail)</td>
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<tr>
<th>TOTAL NOW PAYABLE</th>
<th>£</th>
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</table>

Please note: (Insert constabulary/police name) is not obliged to supply any information until the above fee is received. You have three calendar months from the date of this notice in which to send us the required fee. In addition, payment of any fee does not guarantee receipt of any information. Your attention is drawn to the exemptions contained within Part II of the Freedom of Information Act 2000.

Please remit the fee of £ (insert figure) to:

(Insert address of person to receive payment)

Yours sincerely

Freedom of Information Officer

Please note: This is not an official invoice. An official receipt will be issued upon receipt of payment.
APPENDIX D1
PUBLIC INTEREST TEST

Introduction
The Freedom of Information Act 2000 (the Act) creates a rebuttable presumption that a public authority will provide any information that is requested of it. The Act contains a total of 23 exemptions from this duty to disclose, some of which are ‘absolute’ exemptions and some of which are ‘conditional’ exemptions (these are also known as ‘public interest’ exemptions). The aim of this paper is to give some guidance as to the meaning of public interest.

Section 2 of the Act states: -

"2. – (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either -
(a) the provision confers an absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exemption of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –
(a) the information is exempt information by virtue of a provision conferring an absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Possibly the most important parts of subsections (1) & (2) is the phrase “in all the circumstances of the case”. This means that each request for information should be determined on its own individual merits.

The meaning of public interest is not defined in the Act. Therefore, it will be difficult to provide guidance on exactly how the public interest test should be applied. However, some guidance can be obtained from the application of the test under Freedom of Information (FOI) legislation overseas, the interpretation of the meaning of public interest by the UK courts, the interpretation of public interest by the Ombudsman for the Code of Practice on Access to Government Information and the meaning of public interest under the Independent Police Complaints Commission.

PUBLIC INTEREST OVERSEAS

FOI legislation has been in operation overseas for a number of years. Following is an examination of the interpretation of public interest under FOI legislation.

New Zealand

The leading case on the application of public interest in New Zealand is the case of TV3 Network Services v BSA¹, in which Eichelbaum CJ said:

¹ [1995] 2 NZLR 720, 733
"It is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being legitimate concern to the public, and those which are merely interesting to the public on a human level – between what is interesting to the public and what is in the public interest to be made known."

Australia
The Australian Law Reform Commission reviewed the Australian Act in 1995, at which time it was said that the public interest "is of serious concern to the public not merely of individual interest"\(^2\). The paper listed the following factors as relevant to the public interest: -

- the general public interest in government information being accessible;
- whether the document would disclose the reason for a decision;
- whether disclosure would contribute to debate on a matter of public interest; and
- whether disclosure would enhance scrutiny of government decision making process and thereby improve accountability and participation.

Under the Australian legislation, the public interest test (called the public interest balancing test) requires that the information is withheld if the public interest considerations favouring non-disclosure outweigh those favouring disclosure.

The office of the Information Commissioner in Queensland has issued some guidance for FOI practitioners in relation to the public interest balancing test. It states:

"The ‘public interest’ refers to considerations affecting the good order and functioning of community and government affairs, for the well being of citizens. In general, a public interest consideration is one which is common to all members of the community (or a large segment of them) and for their benefit.

The public interest is usually distinct from matters of purely private or personal interest.....The 'public interest' does not refer to matters which are merely of interest to the public to know, in the sense of gratifying curiosity or providing amusement."

It goes on to state:

"for a public interest consideration to be relevant in the application of the public interest balancing test, there must be a direct link between disclosure of the particular matter in issue and the advancement of, or prejudice to, the public interest."

Canada
The Office of the Information & Privacy Commissioner for British Columbia in Order No. 332-1999, in deciding whether records relate to a matter of public interest stated:

1. The head of the Ministry must examine the requested records and decide whether they relate to a matter of public interest (a matter of public interest may be an environmental or public health or safety matter, but matters of public interest are not restricted to those kind of matters). The following factors should be considered in making this decision:
   (a) has the subject of the records been a matter of recent public debate?;
   (b) does the subject of the records relate directly to the environment, public health or safety?;
(c) could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
   (i) disclosing an environmental concern or public health or safety concern?
   (ii) contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue?; or
   (iii) contributing to public understanding of, or debate on, an important policy, law, programme or service?
   (d) do the records disclose how the Ministry is allocating financial or other resources?"

Republic of Ireland
The Irish Information Commissioner has considered the public interest in a number of cases. Due to the similarity between the UK and Irish Acts, it will be of some benefit to examine the application of the public interest in Ireland.

*Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office of Public Works*\(^3\)

Here, the requestor sought access to all documentation relating to a tender for army vehicles. The Office of Public Works released the order form for each part of the tender containing the successful tenderer’s name, the tender price and the number and type of vehicles involved. Three of the four successful tenderers applied to the Information Commissioner for a review of the decision. This was on the grounds that the prices were given in confidence, on the understanding that they would be treated in confidence and that disclosure of the information would be likely to prejudice the giving of similar information in the future. They further claimed that the information was commercially sensitive information and that the public interest did not require disclosure.

The Commissioner held that there was not a mutual understanding between the parties that the information had been provided in confidence and that disclosure of the information would not prejudice the future supply of such information from a substantial number of sources available. He further found that the tender price could not be considered to be a trade secret after the tendering process had concluded.

In relation to the public interest, the Commissioner balanced the public interest in openness against the potential harm to the tender process. He found that the advantages in terms of openness and accountability in disclosing the tender process outweighed the possible harm to the tender process and that the public interest was better served by disclosing the tender prices.

*Eircom Plc and the Department of Agriculture and Food; Mr Mark Henry and the Department of Agriculture and Food; Eircom Plc and the Department of Finance and Eircom Plc and the Office of the Revenue Commissioners*\(^4\)

In this case, the requestor sought copies of all invoices paid to 18 telecommunications companies by the Department of Agriculture and Food, the Department of Finance and the Office of the Revenue Commissioners, one of which was Eircom Plc. The Department of Agriculture and Food and the Office of the Revenue Commissioners granted access to summary information whilst the Department of Finance decided to release the records sought.

Eircom applied to the Commissioner for a review of the decisions by the public bodies. This was on the grounds that the information was commercially sensitive and that it was not in the

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\(^3\) Cases 98049, 98056, 98057

\(^4\) Cases 98114, 98132, 98164 and 98183
public interest to disclose the information. Eircom also claimed that disclosure of the information could prejudice its ability to compete for future business from public bodies and, in the case of some products, it could prejudice its ability to provide such products to customers who are not public bodies.

The requestor applied to the Commissioner for a review of the decision by the Department of Agriculture and Food.

In considering the public interest, the Commissioner found that the public interest in ensuring that the public bodies obtain value for money in purchasing telecommunications services outweighed the public interest in protecting Eircom’s ability to do business with public bodies. He also found that there was a public interest in ensuring the maximum openness in relation to the use of public funds and in requestors exercising their rights under the Act.

The Commissioner affirmed the decision of the Department of Finance and annulled the decisions of the Department of Agriculture and Food and the Office of the Revenue Commissioners. He decided that it was proper that the requestor should have access to original records, subject to deletions where the information could be used to effect a breach of the security systems used by the public bodies.

Mr Richard Oakley, The Sunday Times Newspaper and the Office of the House of Oireachtas

In this case, the requestor sought access to the total expenses paid to each member of the House of Oireachtas in relation to travel expenses, telephone and postage expenses, secretarial and office administration expenses and all other expenses paid since 1998.

The Office of the House of Oireachtas decided that certain of these documents contained personal information about the members of the Oireachtas and that the public interest favoured the disclosure of the detailed amounts paid in expenses. They further decided that the privacy rights of the members outweighed the right of access to the names of individual members in association with the amounts paid.

The Commissioner varied the decision. He found that there was an understanding with the members that details of their expenses would be treated as confidential and that details of expenses was personal information about the members. However, he decided that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy which the members might enjoy in relation to details of their expenses claims.

Mr AAY and the Department of Social, Community and Family Affairs

Here the requestor sought access to an anonymous letter which alleged that the requestor was working whilst in receipt of state benefit, an allegation which proved to be groundless.

The Department refused access on the grounds that the information was provided in confidence, on the grounds that it would remain confidential. They also argued that the release of the information would prejudice the giving of similar information in the future and that it was important that the Department should continue to receive information of such a nature.

In making his decision, the Commissioner identified three public interest factors which might require identification of an informer. These are:

1. the public interest in an individual being able to exercise their rights under the legislation;
2. the public interest in ensuring that proper and fair treatment of social welfare claimants against whom allegations of fraudulent claims are made;

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5 Case 99168
6 Case 98103
3. the public interest in discouraging the making of allegations which are false, malicious and designed only to cause distress to the party involved without providing any assistance to the public body.

He identified the public interest against the release of the information as the public interest in the Department being able to effectively deal and eliminate abuses of the social welfare system.

In this case, the Commissioner found that the public interest in withholding the information from release outweighed the public interest in disclosure.

**UK Case Law**

A form of the public interest test has been in operation in the UK for a number of years in the form of Public Interest Immunity (PII). Although each case under FOI should be decided on its individual merits, some guidance of the interpretation of public interest can be made from previous decisions made by the courts.

Lord Templeman has gone some way to defining PII in *R v Chief Constable of West Midlands Police ex parte Wiley*7, where he said: -

"Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal litigation. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice."

In the application of the public interest test for FOI purposes, it is this balancing of competing interests that is the main focus.

The case of *Conway v Rimmer*8 lead to a widening of the heads of public interest that the courts will recognise. As a result of *Re D (Infants)*9, it is now accepted that documents that are to be protected under PII need not relate to the workings of central government. It asserted that there is also a public interest in the effective workings of non-governmental bodies and agencies which perform public functions, such as public authorities.

When applying the public interest test, there are four variables that can affect the outcome of the case. These are: -

1. the importance of the public function in question;
2. the extent to which disclosure would prejudice the effective discharge of the function;
3. the importance of the material in question to the just determination of the litigation;
4. the public importance of the litigation.

*Duncan v Cammell Laird*10

This case provided the high water mark for PII. The plaintiffs brought an action for negligence against government contractors after the sinking of the submarine Thetis, with the loss of 99 lives. The plaintiffs sought discovery of the contracts with the Admiralty and the salvage reports. The Admiralty directed the defendants to object to the production of these documents on the grounds of public interest.

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7 [1994] 3 All ER 420
8 [1968] AC 910
9 [1970] 1 WLR 599
10 [1942] AC 624
The court found that where a Minister of State decides that disclosure of a document would be injurious to national defence or good diplomatic relations or it belongs to a class of documents which it is necessary to keep secret for the proper functioning of the public service, his decision is binding on the courts.

This decision received a lot of criticism due to the fact that it enabled an Executive claim of public interest immunity to succeed even where there was only a small chance of harm to the public service.

**Conway v Rimmer**¹¹

In this case, the plaintiff, a former probationary police officer, had been charged with and subsequently acquitted of the theft of a torch. He then brought an action against his former Superintendent, claiming damages for malicious prosecution. The Home Secretary objected to the production of five documents, four relating to the conduct of the probationer and the fifth of which lead to his prosecution, on the grounds that they belonged to a class of documents, the disclosure of which would be injurious to the public interest.

The court held that in cases of PII, the decision as to what should be disclosed rests with the courts, not a Minister.

In deciding what test should be applied for the purposes of PII, the court held that it should balance two public interests, that of the state or public service in non-disclosure and that of the proper administration of justice in the production of the documents.

Having examined the documents in question, the court then ordered that they be made available to the plaintiff. They felt that the documents in question were of vital importance to the case and since they were routine in nature, their disclosure would not prejudice the public interest in the effective running of the public service.

**R v Governor of Brixton Prison ex parte Osman**¹²

In this case, Osman had been given access to a number of official documents as a result of an earlier case. The Secretary of State for Foreign and Commonwealth Affairs brought a motion to have the documents struck from the record on the grounds of public interest and provided a certificate stating that the documents were subject to PII. In determining the public interest in this case, Mann LJ stated:

> ‘I turn then to the balancing exercise which is predicated in the authorities. It may be shortly put: do the interests of justice in the particular case outweigh those considerations of public interest as spoken in the certificate?’

The court found that the public interest lay in favour of withholding the documents from disclosure and ruled that they should be struck from the record.

From the cases outlined above, it is possible to gain some understanding of what 'public interest' means.

**The Code of Practice on Access to Government Information**

The Code of Practice on Access to Government Information (the Code) was introduced on the 4th April 1994 and will continue to function until the FOIA comes fully into force in January 2005. Part II of the Code is concerned with exemptions. In the preamble of the Code it states:

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¹¹ Ibid
¹² [1992] 1 All ER 108
“The following categories of information are exempt from the commitments to provide information under the Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making the information available.”

The decisions of the Ombudsman under the Code provide a number of examples where the harm test has been applied.

Refusal to provide information about the economic viability of the Thermal Oxide Reprocessing Plant (THORP) at Sellafield

Mr A asked the Department for the Environment (DOE) and the Department for Trade and Industry (DTI) for a copy of a report he had read about in the press. It was said to have been produced by firm B, management consultants, for British Nuclear Fuels (BNFL) and to concern the economic viability of THORP. He also requested details of DOE’s and DTI’s access to, and disclosure of, the report; and subsequently posed similar questions to DOE about information in their possession which has originated with firm B. DOE said they had not seen the report, adding later that DTI had given them information on the economic viability of THORP which had been prepared by BNFL with firm B’s help. DOE refused to disclose it, citing Exemption 2 (confidential communications between departments) in Part II of the Code. DTI also said that they had not seen the report. However, they had received information from BNFL, some of it produced with firm B’s help. Any of that information which was not already in the public domain was covered by Exemption 14(a) (information provided voluntarily) and possibly Exemption 13 (Third party’s commercial confidences). The Ombudsman found that neither DOE nor DTI had seen the report (if it existed). DOE were entitled to rely on Exemption 2 in refusing to disclose the information they had received from DTI. Their replies to Mr A’s requests had not been lacking in frankness, as he had suggested, but they had mishandled one aspect of his request. Some of the subsidiary information Mr A had asked DOE to provide was not exempt under the Code but had not been provided; by means of the Ombudsman’s investigation report, that was now done. The Ombudsman found that DTI could not rely in Exemption 14(a) in withholding information they had received from BNFL, because BNFL had been under an implied legal obligation to provide it. That information did, however, fall within the scope of Exemption 13; and the demands of commercial confidentiality were not, in this case, outweighed by the public interest in disclosure. The Ombudsman found that DTI had replied satisfactorily to Mr A’s requests about access to, and disclosure of, the (putative) report; and that both departments had generally given his requests a high priority. He did not uphold the complaint.

Refusal to disclose an internal report about matters raised in a complaint

Mr & Mrs Y were directors of a publishing company. In 1994, the tax affairs of both Mr & Mrs Y and their company became the subject of an investigation by the Inland Revenue (the Revenue). Having complained to the Revenue about various aspects of the investigation, Mr & Mrs Y asked to see a copy of the internal report made by the District Inspector into matters raised by their complaint. The Revenue refused the request citing Exemption 2 (Internal discussion and advice), Exemption 6 (Effective management of the economy and collection of taxes) and, indirectly, Exemption 12 (Privacy of an individual) in Part II of the Code. Mr & Mrs Y then complained to the Revenue Adjudicator who decided that, as the report contained information covered by the first two Exemptions, the Revenue were entitled to withhold it. The Ombudsman found that the report contained information that was exempt from disclosure.

13 Case number A29/95 (www.ombudsman.org.uk/pca/document/hc804/a29-95.htm)
14 Case number A26/97 (www.ombudsman.org.uk/pca/document/hc804/a26-97.htm)
under Exemptions 2 and 6, (although not Exemption 12), but he did not agree that the whole report could be withheld for that reason. On his recommendation, the Revenue agreed to disclose the (largely factual) information from the report which was not specifically exempt under the Code. The Ombudsman partially upheld the complaint.

Refusal to disclose information including telephone notes and internal legal advice from an individual’s file\(^{15}\)

Mr V’s family firm was in dispute with the Court Service about a default judgement entered in error against them at court. The firm rejected the Court Service’s offer of compensation and, as the dispute continued, Mr V asked to see all documents held by the Court Service about the case. The Court Service were willing to provide copies of some documents but relied on Exemption 4(a) (information whose disclosure could prejudice legal proceedings), and 4(d) (legal professional privilege) in refusing to provide internal minutes and legal advice; and on Exemption 4(a) and 4(d) and Exemption 9 (Voluminous or vexatious requests) to refuse his requests for transcripts of telephone conversations between the Court Service and Mr V or his solicitors. The Ombudsman agreed that legal advice was covered by Exemption 4(d), but he did not find that disclosing other information would prejudice legal proceedings simply because Mr V had been identified as a potential litigant. The Ombudsman did not agree, therefore, that Exemption 4(a) was relevant. As to Exemption 9, the Ombudsman concluded that this did not apply either. It appeared from the papers that the Court Service had only ever applied it to the notes of the telephone conversations. The Ombudsman considered that the content of those conversations was not covered by any exemption as it was information which Mr V, either directly or through those acting for him, already possessed. As for the opinion and comment attached to those notes, the Ombudsman considered that these were covered by Exemption 2 (Internal discussions and advice) as were other internal minutes to which the Court Service had applied Exemption 4(a).

Refusal to release details of an internal review of the Cardiff Bay Barrage project\(^{16}\)

An interest group asked the Welsh Office to release the facts and analysis of the facts which the government considered relevant to the decision not to prevent the Cardiff Bay Barrage project from proceeding. The Welsh Office said the review of the project involved confidential internal discussions and advice (including legal advice); and they withheld the information under Exemption 2 (Internal discussions and advice) and Exemption 4(d) (Information covered by legal professional privilege) in Part II of the Code. The Ombudsman found that the Secretary of State for Wales had already disclosed much of the information requested when he spoke about the review to a delegation which included a representative of the interest group. The Ombudsman said that the Welsh Office, by refusing the interest group’s request outright, created an impression of secrecy; they could have pointed out to the interest group, instead, that the relevant information had already been given to them. At the Ombudsman’s suggestion, the Welsh Office released a small amount of residual factual information which was contained in the review but which had not been included in the Secretary of State’s statement. The Ombudsman commented that (i) the internal opinion and advice, including some detailed analysis, and (ii) the legal advice (none of which the interested group had specifically asked to see) could be withheld under Exemption 2 and Exemption 4(d) respectively. He partially upheld the complaint.

Refusal to release information relating to the development of encryption policy\(^{17}\)

Mr J, the Director of an organisation concerned with the interaction between information technology and society, complained that the Department of Trade and Industry (DTI) refused to supply him with information relating to the formulation of the government’s policy on

\(^{15}\) Case number A13/97 (www.ombudsman.org.uk/pca/document/hc804/a13-97.htm)

\(^{16}\) Case number A.2/98 (www.ombudsman.org.uk/pca/document/hc005/hc5a2.htm)

\(^{17}\) Case number A.23/99 (www.ombudsman.org.uk/pca/document/hc21/8915-a23.htm)
encryption. In response to his initial request for information, Mr J was informed by the DTI that it would take two to three months of work in order to assess the large amount of information concerned. As an alternative they suggested a meeting in order to narrow the scope of Mr J’s request. As a result of the meeting Mr J had with DTI officials, an inventory of 16 documents which the DTI considered the most significant in the development of the United Kingdom’s encryption policy was produced. Subsequently, Mr J confirmed that he wanted these documents evaluated for disclosure. He also asked a number of further questions regarding encryption policy. In response to his request, DTI officials said that they would answer the additional questions but that it was likely that very little of the information from the 16 documents would be sanctioned for release. At the start of the Ombudsman’s investigation the Permanent Secretary of the DTI confirmed that none of the information from the 16 documents could be released and cited Exemptions 1 and 2 and Exemptions 4(d) and 11 of the Code in support of his decision. In addition two of the documents were, he said, covered by section 8(4) of the Parliamentary Commissioner Act 1967. After discussions between the Permanent Secretary and the Ombudsman, the Permanent Secretary agreed to commission a summary of analysis of the policy issues involved in developing cryptographic policy (the summary). The Permanent Secretary said on its completion that the summary contained all of the disclosable information within the documents that Mr J wanted released. That being the case, he thought that the DTI had fulfilled their obligations under the Code by providing Mr J with a copy of that summary. The Ombudsman held that while the summary did include much of the information which should have been disclosed under the Code, there was still further information which should have been provided. Exemption 7(b) did, however, apply to some of the information requested. The Ombudsman also found Mr J’s requests to have been poorly handled. Mr J’s complaint was partially upheld.

In reaching his decision, the Ombudsman considered the public interest in relation to Exemption 7(b), where he stated: -

“In assessing the application of this exemption I am required to consider whether any public interest there might be in knowing the identities of those attending meetings of this group would be outweighed by any harm releasing those identities might cause. In general, I consider that the balance of public interest will normally favour disclosure of information regarding which organisations are represented on a body such as CPWG [(Cryptographic Policy Working Group)]; it is also likely to be reasonable to indicate the seniority of the representatives. However, it is less likely to be in the public interest to disclose the names of individual members.”

**Refusal to release copies of four internal performance reports**

Mr M complained that the Ministry of Defence (MOD) refused to provide him with copies of four internal MOD reports. Mr M wrote to MOD and asked them to provide him with copies of the 1997 Mid-Year and End-Year Performance Reports. MOD refused, telling him that the reports were internal planning documents and contained information which might harm national security or defence. They cited Exemption 1 and 2 of the Code in support of their decision. Mr M was directed towards the published Departmental Performance reports, which they said contained much of the information contained within the two internal reports. Mr M also wrote separately to MOD and asked for copies of the End-Year performance reports for the Royal Air Force (RAF) for both 1996-97 and 1997-98. Again MOD refused, citing Exemptions 1 and 2 and directed Mr M towards the published Annual Performance Reports for the years that Mr M was interested in. The decision was upheld following a review. The Permanent Secretary said that he was satisfied with the way in which the complaint had been handled and maintained that the two Exemptions had been applied correctly. The Ombudsman examined the four reports concerned and, mindful of the exemptions cited, compared the reports with the Published Departmental Reports, which had been highlighted in the MOD’s response to Mr. M. The

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18 Case number A.2/00 (www.ombudsman.org.uk/pca/document/hc494-a2.htm)
Ombudsman concluded that some of the information in the four reports could indeed be withheld under Exemptions 1 and 2. However, he also found that while some of the remaining information not covered by Exemptions 1 and 2 was already in the public domain, other information existed in the reports which could also be disclosed to Mr. M. MOD recognised that more information could be disclosed to Mr. M and agreed to do so along with the information already in the public domain, in the format found in the original reports. The Ombudsman partially upheld the complaint.

The Ombudsman stated that in the application of both Exemptions 1 and 2, it is necessary to take the ‘harm test’ into account. He went on to say that when considering the harm test, it is necessary to balance the potential for harm against the public interest in making the information available. The potential for harm must be considered at the time of the proposed disclosure, not at the time that the information was created.

**Refusal to release information about a London Transport project**¹⁹

Mr D asked for the data that was available to DETR Ministers when making their decision to award the Prestige contract to an international consortium of companies known as Transys. In particular, Mr D wanted the data that had been used in the evaluation that is known as the public sector comparator (PSC). DETR said that Prestige was a contract between London Transport and TranSys and DETR’s role was solely to consent to the deal. In doing so, they did not consider detailed information on the PSC, which they therefore had no reason to see, but only advice from officials on the value for money aspect of the deal. They judged that information to fall within Exemption 2 of the Code. The Ombudsman accepted that DETR did not possess the raw data requested by Mr D. He also accepted that Exemption 2 had been correctly applied to the information that was available to DETR. However, having applied the harm test, he concluded that any harm to the frankness and candour of internal discussion that might be caused by the release of this information was outweighed by the public interest in making it available. He therefore proposed that the information should be released. DETR then provided further reasons for not releasing the information requested and cited three more exemptions: Exemptions 7, 13 and 14. The Ombudsman agreed that Exemption 13 applied to the information in question but criticised DETR for not citing earlier all the exemptions on which they were relying. However, he welcomed DETR’s decision to provide Mr D with two documents, prepared by London Underground, that explained the reasons for the contract award. The Ombudsman saw this as a satisfactory outcome to a partially upheld complaint.

In making his decision, the Ombudsman had to decide where the public interest lay in relation to the analysis of alternative and rejected opinions. He found that there is a very strong public interest in relation to public transport in London and that the release of such information could only aid debate and the public’s understanding of the government’s decision in this area. He also felt that the sensitivity of the information at the time of the request was significantly lower than when it was created.

**Refusal to disclose information about direct-to-consumer advertising**²⁰

Mr J asked the Medicines Control Agency (MCA) for any information they held relating to the topic of direct-to-consumer advertising. MCA said that a discussion paper had been prepared for the Medicines Commission to highlight the issues surrounding the subject but quoted Exemption 2 as justification for not releasing the information contained in the paper. At Mr J’s request, MCA reviewed that decision. They concluded that although it was reasonable to withhold the original document under Exemption 2 (and also Exemption 10), Mr J could be provided with information about the content of the paper without harming the frankness and candour of MCA’s consultations with the Medicines Commission. MCA therefore provided Mr J with an outline of the paper. Mr J was not satisfied with the amount of information provided or

¹⁹ Case number a.2/01 (www.ombudsman.org.uk/pca/document/aoi/a2_01.htm)
²⁰ Case number A.16/01 (www.ombudsman.org.uk/pca/document/aoi/a16_01.htm)
the way in which his request had been handled. The Ombudsman accepted that Exemption 2 applied to the opinion and comment contained in the discussion paper but said that the remaining amount of unreleased information was essentially factual and could be released. The Ombudsman considered that the easiest way to release the information would be to provide an edited version of the paper, which MCA agreed to do. The Ombudsman also criticised MCA for the time taken to reply to Mr J’s request for information. The Ombudsman partially upheld the complaint.

In making his decision, the Ombudsman considered the harm test in relation to Exemption 2. The question that he posed was whether the harm that would be caused by the disclosure of the protected information be outweighed by the public interest in making it available. He found that the information in question was in relation to a very sensitive issue, where government policy was still evolving and that giving Mr J access to the comments and opinions around the issues posed potential harm to the frankness and candour of future discussions.

Refusal to provide information about the constitutional implications of joining the European Economic and Monetary Union

Mr R asked the Treasury and Foreign and Commonwealth Office (FCO) for copies of any paper in which the Government had set out the constitutional issues involved in our joining the EMU and stated why they considered that those issues raised no objection to joining. Both departments persistently failed to provide the information sought by Mr R. The Treasury eventually cited Exemptions 2, 6 and 10 of the Code. The Ombudsman accepted that the Treasury were the lead department on the Euro and that is was not for FCO to conduct the sort of analysis requested by Mr R. However, he criticised FCO for not explaining that to him. The Ombudsman found that the way in which both FCO and the Treasury handled Mr R’s request was unacceptable. Both departments agreed to apologise to him. As regards the information held by the Treasury, the Ombudsman could not agree that Exemption 10 was applicable but he accepted that the analysis they had conducted could be withheld under Exemption 2: he therefore saw no merit in considering the applicability, or otherwise, of Exemption 6. The Ombudsman did suggest, however, that the Treasury provide Mr R with some information about the basis for the Chancellor’s October 1997 statement on the constitutional implications of EMU. The Treasury agreed to do so. The Ombudsman partially upheld the complaint.

In this case, the Ombudsman examined the public interest in relation to Exemption 2. He said that the public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue that is subject to current national debate. However, he felt that in this situation, the particular information had been prepared as part of the internal deliberative process, it had not informed Ministerial process and, therefore, it would not be in the public interest to disclose information that did not constitute a Treasury view.

Failure to give full information about an exceptional granting of legal aid

Mr S asked the Lord Chancellor’s Department (LCD) a series of questions about the granting of legal aid made to families of the victims of the ‘Marchioness’ disaster in respect of the second Coroner’s inquest. LCD provided some of the information requested but did not give details of the fees paid to senior and junior counsel and the instructing solicitors. Mr S’s Member of Parliament subsequently tabled six Parliamentary Questions, which elicited some further information, but not that related to the fees paid to the lawyers. During the course of the Ombudsman’s investigation, LCD reviewed their position and decided to release the remaining information to the complainant. The Ombudsman criticised the Department for not handling the request in accordance with the Code, but praised their decision to release the information and to remind their staff of their responsibilities under the Code. The Ombudsman partially upheld the complaint.

21 Case number A.11/02 (www.ombudsman.org.uk/pca/document/aoi02fa/a11-02.htm)
**Failure by Companies House to release information about their choice of personal identifiers as authentication for the electronic filing of documents by companies**

Mr J complained that Companies House (CH), an executive agency of the Department of Trade and Industry (DTI), refused to disclose to him information about Counsel's view of their proposed system for the authentication of electronically filed documents in relation to section 707 of the Companies Act 1985. Companies House at first cited Exemption 2 in Part II of the Code in support of their refusal to disclose either their instructions to Counsel or his opinion and later claimed Exemption 4(d) as well. He Ombudsman found CH were entitled to withhold the legal advice given to them under Exemption 4(d) but should have disclosed the reasoning behind their decision to adopt the particular system they chose. CH accepted that recommendation and agreed to disclose the information.

In his reasoning, the Ombudsman explained that he felt that there was a significant public interest in the electronic authentication of documents, as it effects a wide range of companies and individuals.

**Refusal to release a copy of an application for export credit support**

Mr E, legal advisor to an interest group, complained that the Exports Credit Guarantee Department (ECGD) failed to provide him with copies of the export credit support application and supporting documents, submitted by Company X in relation to the Ilisu Dam project in Turkey. ECGD said that the application and its supporting documents could be withheld under Exemption 13 and 14(a) of the Code and that the information was also protected by the law of confidence. The Ombudsman widened the scope of the investigation to include all correspondence between ECGD and Company X, including an Environmental Impact Assessment Report (EIAR) submitted by them in support of their application. However, the EIAR had already been the subject of another request by the interest group, which ECGD had refused under the Environmental Information Regulations 1992. The Ombudsman said that he could not consider the EIAR under the Code since it had already been dealt with under the 1992 Regulations, which took precedence. Turning to the remaining information, the Ombudsman accepted that Exemption 13 was relevant to the type of information sought by Mr E but that, if the matter were being considered solely in terms of the Code, he believed that wider public interest should override the provisions of Exemption 13. However, the Code cannot set aside statutory or other restrictions on disclosure. The Ombudsman noted legal advice obtained by the ECGD that, if they disclosed the information sought by Mr E without the consent of Company X, a court would be likely to conclude that ECGD had unlawfully disclosed confidential information. The Ombudsman concluded that ECGD were justified in refusing to supply the specific information sought by Mr E. Consideration of the applicability of Exemption 14(a) was therefore unnecessary. ECGD did agree to provide Mr E with a separate paper detailing, in general terms, the type of information included in the application for export credit support and the considerations that Company X would need to address in order to satisfy ECGD's requirements. The Ombudsman saw this as a reasonable response to the request for information.

**Refusal to release a copy of an engineer's report**

Mr C, a solicitor, was instructed by a vehicle testing station (VTS) to appeal against a Vehicle Inspectorate (VI) decision to withdraw their VTS status. As part of the appeal, a VI engineer was asked to undertake an assessment of the technical evidence that had contributed to the decision. The engineer's report concluded that the technical evidence did not justify withdrawal and the appeal was subsequently allowed. When Mr C asked for a copy of he engineer's report VI refused to provide it, citing Exemption 2 of the Code and stating that the salient points of

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24 Case number A.31/00 (www.ombudsman.org.uk/pca/document/aoi/a31_00.htm)
25 Case number A.29/00 (www.ombudsman.org.uk/pca/document/aoi/a29_00.htm)
the report had been conveyed to the VTS in the decision letter allowing the appeal. The Ombudsman found that, although VI had correctly applied Exemption 2 to the opinion and advice contained in the report, there was no reason why the factual information, and those parts of the report containing opinion and advice that had already been given to Mr C, should not be disclosed. The Ombudsman therefore recommended that VI provide Mr C with an edited version of the report, which they did. The Ombudsman partially upheld the complaint.

In making his decision, the Ombudsman considered the harm test in relation to Exemption 2 in Part II of the Code. He found that the public interest in having access to the additional amount of information in the engineer’s report was strong enough to outweigh the potential harm to the frankness and objectivity of future advice, which might result from its disclosure. Nor did he consider that the non-disclosure would cause any injustice to the complainants.

Refusal to provide copies of correspondence between FCO and DTI relating to human rights issues and the Ilisu Dam

Following exchanged between the then Minister for Europe and Mr Wells, the then Chairman of the House of Commons Select Committee on International Development, concerning human rights issues and the Ilisu Dam project in Turkey, Mr Wells asked the Minister to provide him with copies of all relevant correspondence between the Foreign and Commonwealth Office (FCO) and the Department of Trade and Industry (DTI). The Minister refused, citing Exemption 2 of the Code. In his comments on the complaint, the Permanent Secretary of the FCO said that the release of written ministerial exchanges on policy issues would harm the frankness and candour of internal discussion and that Exemption 2 applied. He also said that Exemption 1(b) applied to some of the correspondence. The Ombudsman closely examined 25 files of documentation directly relevant to Mr Wells’ complaint. He concluded, that while much of the information was already in the public domain, some of the correspondence sought by Mr Wells did contain information that fell within the ambit of Exemption 1(b) and was therefore exempt from disclosure. In addition, he also concluded that Exemption 2 had been applied to correctly to the information sought by Mr Wells. However, the Ombudsman also recognised the considerable public interest in the Ilisu Dam project and the strength of the argument supporting disclosure of the correspondence. The Ombudsman concluded that, in order to protect the confidentiality of the decision-making process [and recognising that, under the Code, Mr Wells did not have a right to documents, only to information], the documents involving correspondence at Ministerial and official level should not be released, but that a summary of their contents should be made available to Mr Wells. The complaint was partially upheld.

The Independent Police Complaints Commission

The Independent Police Complaints Commission (IPCC) is a new body that has been set up to oversee investigations into complaints against the Police. Like the Freedom of Information Act, there is a presumption that information that has been requested will be disclosed. This is subject to the sensitivity test, which will be provided under regulation at a future date. Although it has not yet been defined, the sensitivity test has already been limited by section 20 of the Police Reform Act 2002 to preventing:
(a) the premature or inappropriate disclosure of information that is relevant to, or may be used in, any actual or prospective criminal proceedings;
(b) the disclosure of information in any circumstances in which it has been determined in accordance with the regulations that its non-disclosure:
   (i) is in the interests of national security;
   (ii) is for the prevention or detection of crime, or the apprehension or prosecution of offenders;
   (iii) is required on proportionality grounds;

26 Case number A.26/01 (www.ombudsman.org.uk/pca/document/a01jj/a26-01.htm)
is otherwise necessary in the public interest.

At this time, it is unclear as to exactly what the basis for the sensitivity test will be. It was originally envisaged that this would be guided by the decision of the House of Lords in *R v PCA ex parte Green*\(^\text{27}\). However, in this case the House of Lords declined to give any guidance regarding disclosure under the operation of the IPCC.

**Existing Restrictions on the Disclosure of Information**

The police are already restricted as to what information pertaining to a criminal investigation they can release into the public domain. In the case of *Marcel v Commissioner of Police of the Metropolis*\(^\text{28}\), a civil action had been brought involving two companies. One of the parties to the action had served a *subpoena duces tecum*\(^\text{29}\) against the police, relating to documents that the police had obtained in the course of a criminal investigation. Relief was sought to prevent the use of documents obtained by the police in the course of a criminal investigation, in civil proceedings. The court held that since the police were authorised to retain and use documents which they had seized in relation to an investigation solely for public purposes related to the investigation and prosecution of crime and the return of stolen property to the true owner, they were not entitled to disclose documents to a party for use in civil proceedings. In the judgement, Sir Nicholas Browne-Wilkinson V-C stated:

"I would regard the public interest in ensuring that confidential information obtained by public authorities from the citizen under compulsion remains inviolate and uncommunicable to anyone as being of such importance that it admitted of no exceptions and overrode all other public interests."

It was also stated that:

"Powers to seize and retain are conferred for the better performance of public functions by public bodies and cannot be used to make information available to private individuals for their private purposes."

In *R v Chief Constable of North Wales Police ex parte Thorpe*\(^\text{30}\), the Police had disclosed conviction details relating to two paedophiles. The information disclosed was already in the public domain, by virtue of a number of press articles. An application for judicial review was made to make the Police reconsider their decision to disclose the information.

In deciding the case, Lord Bingham CJ set out the considerations that should be taken when deciding whether to disclose such information:

"When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other body to perform its public duty."

The view was reinforced by Lord Woolf MR at the Court of Appeal where he stated:

"...the information having come into the police’s possession to enable them to perform their functions, as a public body they were only entitled to

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\(^{27}\) [2004] UKHL 6

\(^{28}\) [1992] Ch 225

\(^{29}\) A subpoena used to compel a party to attend court to give evidence and also to provide certain documents in his possession

\(^{30}\) [1998] 3 All ER 310
use that information when this was reasonably required to enable them properly to carry out their functions.”

This approach was approved in *R v Local Authority in the Midlands ex parte LM*31. This case related to an individual who ran a bus company, against whom a number of allegations of sexual abuse had been made. It was decided that the power to disclose information relating to an individual’s intimate personal life was not free from restraint, having protection under Human Rights legislation, and that the disclosure of the information should not have occurred as a ‘pressing need’ for disclosure had not been demonstrated. In this case, it was stated that “disclosure should be the exception, and not the rule.”

The above cases show that when deciding whether or not to disclose information, the police cannot apply blanket rules and need to consider each case on an individual basis. The courts have indicated that the following should be considered:

- all matters tending against disclosure, such as:
  - the public interest in protecting the free flow of information to the police by protecting confidentiality;
  - not using information received for one purpose for another purpose without convincing public interest justification;
  - privacy considerations;
  - the sensitivity of the information; and
  - the potential or likely harm that would be done by disclosure
- all matters tending in favour of disclosure;
- whether restrictive disclosure would be sufficient to protect the interests involved i.e. limit the audience for the information.

However, it should be said at this time that under Freedom of Information, once the information is disclosed, it is considered to be in the public domain and therefore cannot have limited disclosure, so it is unlikely that this would ever be a consideration.

The courts approach to information collected by the police in relation to a criminal investigation shows that there are a number of restraints relating to disclosure. In addition to issues relating to the Human Rights Act and confidentiality, the public interest is a key factor in deciding whether the information should be disclosed. Common factors against disclosure are:

- the public interest in protecting free flow of information to the police;
- the public interest in restricting to the greatest extent the disclosure of material obtained under compulsion;
- the privacy interests of the subject of the information;
- the confidentiality and privacy interests of the provider of the information;
- the nature and extent of potential harm to the subject of the information in disclosure.

Common factors in favour of disclosure are:

- whether disclosure would serve a core policing purpose (preventing / detecting crime, protecting the public and especially the vulnerable). The more immediate and direct the service would be, the weightier this factor would be;
- whether, if a core policing purpose would not be served, there is a real public interest in disclosing. The further this public interest is from the core policing purpose, the lighter the factor.

Expert advice32 states that in conducting the disclosure balance, the police should proceed on the assumption that disclosure will only be permissible outside of the context of a criminal investigation itself if there is a convincing justification for doing so. The practical presumption should be against disclosure.

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31 [2000] 1 FCR 736
32 Advice from James Eadie QC “Disclosure of Prosecution Materials to the Media”
The advice goes on to state that if the balance favours disclosure, the next issue to be considered is whether steps could be taken to limit the extent or nature of the disclosure to lessen the impact of the disclosure on the privacy interest of those involved. Due to the nature of Freedom of Information and the fact that disclosed information is considered to be in the public domain, the answer to this will invariably be ‘no’.

It is to be noted that the advice states that disclosure of information relating to successful cases, to bolster public confidence in the administration of justice and the police is considered to be “at best tenuous”.

From this, it can clearly be seen that information relating to a criminal investigation should rarely be disclosed, unless the disclosure is serving a ‘core policing purpose’, including:

- taking all steps which appear to be necessary for keeping the peace, preventing crime and protecting property from criminal injury
- detecting crime
- bringing offenders to justice

Disclosure of information relating to criminal investigations which does not serve a core policing purpose should only occur where it can be clearly demonstrated that the public interest demands disclosure.

**Decisions of the Information Commissioner**

The Information Commissioner regulates compliance with the Freedom of Information Act 2000 and as such, decisions made by the Information Commissioner in relation to precious cases should provide a good insight into what considerations are valid. However, it should be noted that the Information Commissioner stated in the Statement of Reasons which accompanied the Decision Notice of 2nd August 2005 following an appeal against a decision made by Hampshire Constabulary:

> "The Commissioner has formed the view that temporary release of information by one police authority does not establish a compulsory precedent for other safety camera partnerships. The Commissioner will consider each case on its own facts."

Therefore, decisions made by the Information Commissioner should not be seen as setting any precedent, although the reasoning behind the decisions can be used as guidance in cases of a similar nature.

Following are a selection of cases that have been reviewed by the Information Commissioner’s Office.

**Case 1 – Safety Cameras**

In this case, a request was made for details of the number of speeding tickets (and monetary revenue) issued per camera across specific sited. The information was withheld under sections 31 and 38 of the Freedom of Information Act 2000, both of which are subject to the public interest test. The public interest considerations made were as follows:

**Favouring Disclosure**

- awareness
- accountability

**Against Disclosure**

- exemption applies
- efficient and effective conduct of the road safety partnership

It was argued, in favour of disclosure, that knowledge of areas where the safety cameras were situated would assist individuals in gaining an understanding of road safety in the areas where
the cameras were situated and that disclosure of the information would make the Camera Partnership more accountable for the decisions that they make in relation to camera sites. It was also argued that disclosure of the information would be against the public interest since it would diminish the impact that the cameras would have on road safety and also compromise the aim of the Camera Partnership to improve road safety and reduce the number of people killed and injured on the roads by excessive speed. It was claimed that, on balance, the public interest in maintaining the exemptions outweighed the public interest in disclosure.

On appeal, the Information Commissioner considered representations made by both the complainant and the public authority. Having reviewed both, it was decided that the considerations made by the public authority were correct and that the public interest in withholding the information outweighed the public interest in disclosure.

**What is Public Interest?**

The ‘public interest’ refers to considerations affecting the good order and functioning of community, government and public service affairs, for the well being of citizens. In general, a public interest consideration is one which is common to all members of the community (or a substantial part of them), and for their benefit.

The public interest should normally be treated as distinct from matters of purely private or personal interest. Some public interest considerations may however apply for the benefit of individuals, for example:

- the public interest in public services respecting privacy principles in their handling of information about the private affairs of citizens;
- the public interest in individuals receiving fair treatment, in accordance with the law, in their dealings with public services.

The public interest does not however extend to matters which are merely of interest to the public to know, in the sense of gratifying curiosity or providing amusement.

The basic structural principle of the Freedom of Information Act 2000 is that in a democratic society, interested citizens should have the right to examine the operations of their public services through access to information and records held by those services. This ‘individual right of access’ holds good except to the extent that disclosure of certain information would be harmful to the wider public interest, or indeed to specific private interests deemed worthy of protection.

The notion of public interest is a unifying principle throughout the scheme of the Freedom of Information Act 2000. The exemption provisions reflect Parliament’s assessment of the public interest considerations which may warrant information being withheld from access. Indeed, in some cases, Parliament decided that the public interest considerations favouring non-disclosure were so strong as to make the exemptions absolute, irrespective of whether or not there were also strong public interest considerations favouring disclosure.

However, Parliament included, in most exemption provisions, a requirement to consider the ‘public interest test’, which would require disclosure of information / records where the public interest considerations favouring disclosure outweighed those favouring non-disclosure.

**The Public Interest Test**

The public interest test in itself is a somewhat complex matter with many potential interpretations of each and every scenario. To provide a definitive guide to the application a decision to be taken on each and every scenario would not be possible. There are many facets
to each problem with greater or less relevance and each of these can tip the balance in a
different direction.

It is the intention of this guidance therefore to try and provide a methodical and clear
framework. Use of the framework will provide a clear and unambiguous audit trail of fact
interpretation to support the making of a balanced public interest decision.

Through the use of the framework, the interpretation by each user will be clear and any
reviewer will clearly understand the interpretation used for each area. This enables focussed
debate on interpretations in specific areas rather than an all-embracing review. In itself, this
method will further focus review on many areas – an appreciation of other points of view and
provide an informed review process for a well considered and balanced review or appeal
decision.

From the outset however, a decision maker/reviewer should consider starting from the
standpoint which is the essence of the Act. This standpoint is simply that information/records
should be disclosed unless the structured and reasoned application of an exemption and
the public interest test considerations favours non-disclosure

It would be good practice to record in some format the structured reasoning for applying both
the exemption and the considerations within the application of the public interest test, so that
they are obviously clear and unambiguous for future reference.

If we are applying a structured and methodological application of a framework that allows this
clear ‘audit trail’ of the decision between disclosure and non-disclosure we also need to record
the comparative strengths and importance of each area of the matter in issue.

It should not be enough that a matter in issue relates in some way to an issue which gives rise
to a public interest consideration. For public interest considerations to be relevant in the
application of the public interest test, there must be a direct link between the disclosure of the
information in issue and the advancement of, or prejudice to, the public interest.

If there are no public interest considerations favouring non-disclosure, the relevant
information/record (or part thereof) is not exempt. If it can be shown that there are public
interest considerations favouring non-disclosure, the matter will be exempt only if those
considerations outweigh all public interest considerations favouring disclosure.

What Public Interest Considerations Favour Disclosure?

Remembering that there is no fixed list of relevant public interest considerations, we believe
that the following can be relied upon in favour of disclosure (provided they would be advanced
by the disclosure of the particular information/record in issue):

- **Accountability**
  When information disclosed relates directly to the efficiency and effectiveness of the force
  or its officers in their public duties. The purpose of the Act is to make public authorities
  more accountable and this factor, therefore, may be applied to a wide range of scenarios
  from how an individual or the force fulfils their role or function, to policy decisions that
  have been taken in relation to investigations or general policy issues.

- **Public participation**
  Where the service would benefit from public participation and the input of the community
  at large, this would favour disclosure. This must be related to the debate and decision-
  making function of the force. This factor may be used when policies are being reviewed
  that have had, or may subsequently have, an impact on the local community.
• **Public awareness**
   Where disclosure of information about issues of general concern can assist individuals in making decisions about their own activities e.g. information about crime prevention methods, road safety/crime initiatives, trends of burglary etc. This factor may also apply in relation to raising general levels of awareness about issues that may affect the community.

• **Public debate**
   Where release of information would contribute to the quality and accuracy of public debate. This factor applies where the release of accurate information will inform and enhance public debate on particular subjects that may be topical.

• **Justice to an individual**
   The public interest may be served by providing individuals with information of particular reference to them and their situation e.g. information that would assist the applicant to understand the steps taken by the service in dealing with their request/complaint, information which would assist them to assess whether to pursue a legal remedy or otherwise. **However, it should be noted that such requests will normally be dealt with under the ‘Business as usual’ philosophy.**

• **Research**
   In appropriate cases, providing information/records may assist in research that could benefit the community at large. **These requests will also more usually be dealt with under the Business as usual philosophy.**

• **Accountability for public funds**
   Where public funds are being spent, there is a public interest in accountability and justification. This is another factor that has wide-ranging application to numerous scenarios and represents one of the fundamental principles of the Act. There is an obvious public interest in how public funds are utilised by public authorities i.e. details of contracts etc. This may also assist in ensuring that public authorities obtain value for money.

• **Public safety**
   There may be occasions when it is appropriate to disclose information that would have an impact on public safety, such as emergency contingency plans. This may be applied where the public would benefit from having enhanced knowledge and would therefore be able to take the necessary precautionary steps to protect themselves.

• **Improper actions of public officials**
   Disclosure of information relating to the abuse of office where public officials have used their office improperly. This applies at all levels within the organisation.

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**What Public Interest considerations favour non-disclosure?**

Public interest considerations that can be relied on in favour of non-disclosure (provided disclosure of the particular information in issue would cause relevant prejudice) include:
• **Investigations**

Information relating to an investigation will rarely be disclosed under FOIA and only where there is a strong public interest consideration favouring disclosure. It is the Association of Chief Police Officer's approach that information relating to a criminal investigation will rarely be disclosed under the provisions of the Freedom of Information Act. Whilst such information may be released in order to serve a 'core policing purpose' – to prevent or detect crime or to protect life or property - it will only be disclosed following a Freedom of Information request if there is are strong public interest considerations favouring disclosure. The further the considerations favouring disclosure are from a core policing purpose, the lighter the considerations will be.

• **Exemption provisions**

Where multiple exemptions apply to a piece of information, this would favour non-disclosure.

• **Interests of third parties**

Where third party interests might be jeopardised by release of information that relates to personal affairs of individuals and/or sensitive commercial information held about business, financial, contractual or operational issues. See also Data Protection issues.

• **Efficient and effective conduct of the service/a force**

Where current or future law enforcement role of the force may be compromised by the release of information. This is a very wide-ranging factor and when applied, evidence should be provided to demonstrate the impact.

• **Flow of information to the service/force**

Where releasing information would act as a deterrent to the public to provide information to the force. With this relationship impeded, it would be more difficult for the force to gather information required to perform its public service functions. Examples of this would be to protect flow of information from, and identity of, informants to the public having confidence that their information will be treated sensitively and appropriately.

• **Fair treatment of an individual**

There can be public interest in non-disclosure of information that adversely affects the reputation of an individual e.g. where they have been the subject of unsubstantiated allegations.

• **Public safety**

There may be occasions where the release of information relating to public safety may not be in the public interest. Public safety is of paramount importance to the policing purpose and must be considered in respect of every release.

• **On-going investigations**

It would not be in the public interest to release information that may be of assistance to offenders/prevent an individual from being brought to justice. The right to a fair trial is of paramount importance and any disclosure could be subject to subjudicy.

• **Fishing expeditions**

It would not be in the public interest to release all information relating to a vague ‘catch all’ type request. In these circumstances, the applicant should be contacted to determine
exactly what information is required.

- **Existing procedures**
  It would not be in the public interest for Freedom of Information to be used to obtain information which is already available under existing procedures.

- **Tortuous duty**
  In circumstances where the service/force is under a legal obligation to maintain confidences, it would not be in the public interest to release the information if the grounds for this duty can be shown to be valid and it could leave the force vulnerable to civil proceedings.

- **Commercial Interests**
  There may be occasions where the commercial interests of a party may be affected by the disclosure of information, but where this is not sufficient for an exemption under section 43 to be claimed. In such cases, a public interest consideration favouring non-disclosure can arise.

- **Timing of Request**
  In certain circumstances, such as requests relating to commercial contracts, the timing of the request may create a public interest against disclosure. If the request is received before the tendering process has been completed, it is envisaged that an exemption under section 43 could be maintained at that time. However, it should be made clear to the applicant that a different decision may be reached if the request were to be resubmitted once the tendering process had been completed.

**Considerations That Are Invalid**
In addition, there are a number of criteria that may be not be considered as part of the public interest test or may be applied only in limited circumstances:

- **Embarrassment**
  Potential embarrassment to the force, Police Service or an individual officer on release of information is not a valid public interest consideration in favour of non-disclosure.

- **High public office**
  Where the subject of the information, the giver or the recipient of the information holds high office, this is not in itself sufficient to weigh against disclosure. An assessment of the consequences of the disclosure of the particular issue is required.

- **Policy development**
  Even where information relates to policy development, this does not establish a public interest consideration favouring non-disclosure. Even if policy is under review, it still may be in the public interest to release.

- **Candour and frankness**
  Claims that disclosure would prejudice the supply of frank and candid information in the future can only be considered where there is a very particular factual basis to support this view. The possibility of future publicity through disclosure may deter immediate release
and should provide an incentive to improve the quality of the information/record prior to disclosure.

- **Disclosure of confusing or misleading information**
  In most cases, the force would have a means of avoiding such a prejudicial effect by releasing new or revised information to rectify any inaccuracies or clarify the situation. If a certain course of action has not been considered and should have been, this is not enough to withhold.

- **Information/records held do not fairly reflect the reasons for a decision**
  Where this occurs, the force would have the opportunity to provide additional information that accurately explains the reason for the decision.

- **Draft documents**
  There may be benefits of public access to draft material, to further the accountability and public planning process. Draft documents may therefore be disclosed. Disclosure of this kind allows members of the public to examine the process by which a decision has been reached, thus serving the public interest.

- **Government Protective Marking Scheme**
  The marking of material under the GPMS will not, in itself, be valid grounds for withholding information. GPMS indicates how a document should be transported and stored. The content of the material should be examined and the relevant exemptions applied only after discussion with the data owner and other relevant parties. Time elapsed since the document was marked under GPMS may also be factor in any decision to release or withhold.

The Information Commissioner for Ireland expressed the hope (in decision re Wall) that Freedom of Information would lead to a greater involvement in public participation on important issues. This view was echoed with the Information Commission in the UK. It was suggested that one of the purposes of the Act was to allow interested citizens to inform themselves better so that they could contribute to public debate in the formulation of policy and developments which would affect the community at large.

The nature of “public interest” as a test is likely to be a dynamic and ever evolving interpretation of fact in considering the disclosure of information to each individual request. The interpretation itself will be guided by the constant update of Information Commission decisions. However, the general principle of using this framework will provide an audit trail of transparent assessment and application of public interest considerations within the decision making process. This in itself will allow a development of guidance by the Information Commissioner of the specific points and therefore lead to a consistent standard of applying interpretations across the UK.
APPENDIX D2
PUBLIC INTEREST CONSIDERATIONS

INTRODUCTION
The aim of this paper is to give some guidance as to what considerations should be made when deciding where the public interest lies in relation to specific information for the purposes of the Freedom of Information Act 2000. It should be read in conjunction with the paper ‘Public Interest Test’ (above).

It is not intended that this list be exhaustive, only that it should outline some of the considerations that may be relevant.

What Public Interest Considerations Favour Disclosure?

Remembering that there is no fixed list of relevant public interest considerations, we believe that the following can be relied upon in favour of disclosure (provided they would be advanced by the disclosure of the particular information/record in issue):

- **Accountability**
  When information disclosed relates directly to the efficiency and effectiveness of the force or its officers in their public duties. The purpose of the Act is to make public authorities more accountable and this factor, therefore, may be applied to a wide range of scenarios from how an individual or the force fulfils their role or function, to policy decisions that have been taken in relation to investigations or general policy issues.

- **Public participation**
  Where the service would benefit from public participation and the input of the community at large, this would favour disclosure. This must be related to the debate and decision-making function of the force. This factor may be used when policies are being reviewed that have had, or may subsequently have, an impact on the local community.

- **Public awareness**
  Where disclosure of information about issues of general concern can assist individuals in making decisions about their own activities e.g. information about crime prevention methods, road safety/crime initiatives, trends of burglary etc. This factor may also apply in relation to raising general levels of awareness about issues that may affect the community.

- **Public debate**
  Where release of information would contribute to the quality and accuracy of public debate. This factor applies where the release of accurate information will inform and enhance public debate on particular subjects that may be topical.

- **Justice to an individual**
  The public interest may be served by providing individuals with information of particular reference to them and their situation e.g. information that would assist the applicant to understand the steps taken by the service in dealing with their request/complaint, information which would assist them to assess whether to pursue a legal remedy or otherwise. **However, it should be noted that such requests will normally be dealt with under the ‘Business as usual’ philosophy.**
• **Research**  
In appropriate cases, providing information/records may assist in research that could benefit the community at large. These requests will also more usually be dealt with under the Business as usual philosophy.

• **Accountability for public funds**  
Where public funds are being spent, there is a public interest in accountability and justification. This is another factor that has wide-ranging application to numerous scenarios and represents one of the fundamental principles of the Act. There is an obvious public interest in how public funds are utilised by public authorities i.e. details of contracts etc. This may also assist in ensuring that public authorities obtain value for money.

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Disclosure of information relating to the abuse of office where public officials have used their office improperly. This applies at all levels within the organisation.

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Public interest considerations that can be relied on in favour of non-disclosure (provided disclosure of the particular information in issue would cause relevant prejudice) include:

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Information relating to an investigation will rarely be disclosed under FOIA and only where there is a strong public interest consideration favouring disclosure. It is the Association of Chief Police Officer’s approach that information relating to a criminal investigation will rarely be disclosed under the provisions of the Freedom of Information Act. Whilst such information may be released in order to serve a ‘core policing purpose’ – to prevent or detect crime or to protect life or property - it will only be disclosed following a Freedom of Information request if there is are strong public interest considerations favouring disclosure. The further the considerations favouring disclosure are from a core policing purpose, the lighter the considerations will be.

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Where multiple exemptions apply to a piece of information, this would favour non-disclosure.

• **Interests of third parties**  
Where third party interests might be jeopardised by release of information that relates to personal affairs of individuals and/or sensitive commercial information held about business, financial, contractual or operational issues. See also Data Protection issues.
• **Efficient and effective conduct of the service/force**
  Where current or future law enforcement role of the force may be compromised by the release of information. This is a very wide-ranging factor and when applied, evidence should be provided to demonstrate the impact.

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  Where releasing information would act as a deterrent to the public to provide information to the force. With this relationship impeded, it would be more difficult for the force to gather information required to perform its public service functions. Examples of this would be to protect flow of information from, and identity of, informants to the public having confidence that their information will be treated sensitively and appropriately.

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  There may be occasions where the commercial interests of a party may be affected by the disclosure of information, but where this is not sufficient for an exemption under section 43 to be claimed. In such cases, a public interest consideration favouring non-disclosure can arise.
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   Potential embarrassment to the force, Police Service or an individual officer on release of information is not a valid public interest consideration in favour of non-disclosure.

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   Where the subject of the information, the giver or the recipient of the information holds high office, this is not in itself sufficient to weigh against disclosure. An assessment of the consequences of the disclosure of the particular issue is required.

3. Policy development
   Even where information relates to policy development, this does not establish a public interest consideration favouring non-disclosure. Even if policy is under review, it still may be in the public interest to release.

4. Candour and frankness
   Claims that disclosure would prejudice the supply of frank and candid information in the future can only be considered where there is a very particular factual basis to support this view. The possibility of future publicity through disclosure may deter immediate release and should provide an incentive to improve the quality of the information/record prior to disclosure.

5. Disclosure of confusing or misleading information
   In most cases, the force would have a means of avoiding such a prejudicial effect by releasing new or revised information to rectify any inaccuracies or clarify the situation. If a certain course of action has not been considered and should have been, this is not enough to withhold.

6. Information/records held do not fairly reflect the reasons for a decision
   Where this occurs, the force would have the opportunity to provide additional information that accurately explains the reason for the decision.

7. Draft documents
   There may be benefits of public access to draft material, to further the accountability and public planning process. Draft documents may therefore be disclosed. Disclosure of this kind allows members of the public to examine the process by which a decision has been reached, thus serving the public interest.
• **Government Protective Marking Scheme**
  The marking of material under the GPMS will not, in itself, be valid grounds for withholding information. GPMS indicates how a document should be transported and stored. The content of the material should be examined and the relevant exemptions applied only after discussion with the data owner and other relevant parties. Time elapsed since the document was marked under GPMS may also be a factor in any decision to release or withhold.
APPENDIX E
APPEALS WHERE A MINISTERIAL CERTIFICATE HAS BEEN SERVED

GENERAL
Where a certificate under s23(2) or s24(3) has been served, either the Commissioner, or any applicant whose request for information is affected by the issue of the certificate, may appeal to the tribunal against the certificate. In cases where a certificate is served, this is the second stage of the appeal process.

Thus where a ministerial certificate under s23 or s24 has been served, any appeal against it is made to the tribunal under s60, and not to the Commissioner. The tribunal will consist of a panel specially constituted to consider such appeals.

Once the tribunal has made a determination under s60, there is no appeal. The tribunal’s determination would, however, be susceptible to judicial review.

APPEALS AGAINST S23 CERTIFICATES
Where the appeal is against a certificate served under s23, the tribunal will consider whether the certificate is accurate or not (i.e. whether the information was in fact directly or indirectly supplied by one of the security bodies or whether it relates to one of the security bodies). If it finds the certificate to be inaccurate, the tribunal may allow the appeal and quash the certificate.

APPEALS AGAINST SECTION 24 CERTIFICATES
Where a Minister issues a certificate under s24, it may be challenged on two separate grounds by means of an appeal to the tribunal.

First, the issue may be whether the certificate is correct, i.e. whether the Minister had reasonable grounds for claiming that the information does require exemption on national security grounds. In that case, the tribunal’s powers under section 60 are limited. The tribunal can only review the certificate using judicial review principles.

Second, the applicant may claim that the information requested falls outside the scope of a certificate (which identifies a general category of information as subject to the exemption). In that case, the tribunal can decide the issue one way or the other without being constrained by judicial review principles.

In either case, in relation to a general and prospective certificate, if the tribunal gives an unfavourable decision and decides to quash the certificate, there is nothing to stop the department from making a fresh certificate specifically relating to the particular information for which it is claiming an exemption. Where a certificate is specific to the request for information, it will be much harder for the department to make a fresh certificate since the one that has been quashed should already have been tailored to the specific information which the department was trying to protect, leaving little room for further refinement.

There is no power for the tribunal to review the decision reached by the department on the balance of the public interest in disclosure to the extent that it is distinct from the determination of whether an exemption is required for the purposes of safeguarding national security on a challenge to a certificate. Any challenge to this will therefore need to be made by the claimant by way of separate application to the Information Commissioner.

Where an application is made to challenge the assessment of the public interest in disclosure
the two appeals (to the specially constituted tribunal, and to the Commissioner), could run in parallel. However, the issues may be disposed of by the tribunal if the certificate is quashed. In practice, it is therefore likely that the application to the Commissioner would be adjourned pending the outcome of the appeal to the tribunal.

If the application to the Commissioner does proceed, the Commissioner may serve an information notice on the department under s51 to obtain access to the information which would be needed by him to judge if the public interest in disclosure had been properly assessed.

Where the Commissioner issues a decision notice (s50) or enforcement notice (s52), both of these have effect subject to s53. s53 provides an exception to the duty to comply with a decision notice or an enforcement notice. It allows for a Minister to sign a certificate stating that he/she has on reasonable grounds formed the opinion that there has been no failure on the part of the public authority to comply with the relevant notice. However a s53 certificate can only be used where the relevant notice relates to information that is exempt from the s1 duties (the duty to confirm whether or not the information is held and the duty to communicate it). The certificate must also be laid before both Houses of Parliament and in any event it is amenable to judicial review.

Alternatively the department could appeal to the normally constituted tribunal against either form of notice under s57. At this stage this tribunal would be able to consider the assessment of the public interest as part of its determination if relevant.
APPENDIX F

APPLICATION TO COMMISSIONER WHERE NO MINISTERIAL CERTIFICATE SERVED

As noted earlier, it is not necessary for a department to serve a ministerial certificate under either s23 or s24 in order to apply those exemptions. In practice, however, it will often be beneficial to do so as the procedural consequences are that the matter is then brought before a specially constituted panel of the information tribunal rather than the Commissioner. This is preferable in most cases since, unlike the tribunal, there is no special statutory provision for the Commissioner to deal with sensitive information.

A ministerial certificate can be obtained at any time, even after an applicant has exhausted the internal review procedure and applied to the Information Commissioner under s50 for a decision as to whether a request for information made by him to a department has not been dealt with in accordance with the provisions for dealing with requests. This should ensure that the case is heard by the specially constituted panel of the tribunal. If for any reason a Ministerial Certificate is not deemed appropriate, the second stage of the appeal process would be as follows (the applicant is, from this stage on, referred to as the appellant).

When the Commissioner receives a request for a decision from an appellant, he will need to make a decision on whether the particular exemption has been correctly applied.

Where an exemption under s23 has been claimed, the Commissioner will need to consider whether the information falls within the scope of the exemption. It will be a matter of fact whether or not the information was directly or indirectly supplied by, or relates to, one of security bodies. However, an element of doubt may arise where the information appears to be a composite made up from material provided by different sources or may have passed through a number of hands so obscuring its origins. The Information Commissioner will then have to consider the issue and make a decision.

Where an exemption under s24 is claimed, the Commissioner will consider both whether the exemption is required for the purpose of safeguarding national security and whether the public interest in disclosure has been properly assessed.

The Commissioner will usually require further information in order to make a decision. To acquire this, he will serve on the department a notice known as an ‘information notice’. In particular he will want a copy of the information itself to enable him to judge whether it properly falls under the ambit of the exemption, or (in a case where the national security exemption has been relied upon) if the public interest in disclosure had been properly assessed. The Commissioner’s powers of inspection and seizure under a warrant do not apply to information that is exempt under s23(1) or s24 (1) however.

The department can appeal against the information notice under s57(2). Such an appeal would be on the grounds that the Commissioner had gone too far in respect of the information being sought. The tribunal would then determine this particular issue and remit the matter back to the Commissioner who would then reconsider as necessary, and then proceed to decide whether or not to issue a decision notice (s50) or an enforcement notice (s52).

Alternatively if a department failed to comply with an information notice, the Commissioner could make a decision on the basis of the information he already had, and issue a decision notice or enforcement notice. Alternatively, he could certify to the High Court that the department had failed to comply with the information notice; the High Court would hear
evidence and argument and then deal with this as a contempt of court under s54.

Once the Commissioner has reached a decision he will issue a decision notice. If he has found in favour of the appellant, this notice will stipulate the action that the department must take, including the time period for action.

The Commissioner may subsequently issue an enforcement notice if the department fails to act in accordance with the decision notice.

Under s57 of the Act, the department will have a right of appeal to the tribunal against any information, decision or enforcement notice.
APPENDIX G

THE NEED FOR AND USE OF THE ‘NEITHER CONFIRM NOR DENY’ EXEMPTION.

When answering an FOI request officials will need to consider the ‘neither confirm nor deny’ (NCND) exemption.

It has been a long-standing policy of successive governments to use a non-committal reply, neither confirming nor denying, to questions in cases where either a positive or negative response would be harmful to national security or would confirm or deny a security body’s interest.

The point here is that a positive or negative response to an FOI request may provide information confirming or denying whether the security bodies have (or have not) an interest in a particular individual, organisation, area of information or subject.

In the FOI context (where requests will be for information, not personal data which is covered by the Data Protection Act 1998) it is likely that the NCND exemption will be needed to prevent security bodies’ interests or national security issues from being confirmed or denied.


The Official Secrets Act 1989 makes it unlawful for any Crown servant or government contractor to make any unauthorised disclosure of certain limited classes of information held by virtue of their work. In the case of security and intelligence information this includes any unauthorised statement that purports to be a disclosure or is intended to be taken as such.

The NCND exemption is also reflected in the current Data Protection Act, as it was in the previous Data Protection Act. The Code of Practice on Access to Government Information, Second Edition 1997, gives ‘information whose disclosure would harm national security’ as a category of information that is exempt from the provisions of the Code.

The NCND exemption is particularly important in protecting the secrecy of the work of the security bodies, where that is necessary to protect national security. The fact that these bodies are specifically excluded from the ambit of the FOI Act (they are not ‘public authorities’ for FOI purposes) and also that information directly or indirectly supplied by them or relating to them is excluded from the FOI Act (s23) underlines the importance of this.

The NCND exemption may be relevant to a wide range of FOI requests involving security body information which may be protected by exemptions under s23 and s24.
APPENDIX H
LEGAL PROFESSIONAL PRIVILEGE

INTRODUCTION
The purpose of this paper is to provide guidance around s42 of the Freedom of Information Act 2000, a 'public interest' exemption. It will examine the historical interpretation of legal professional privilege and some recent developments at common law.

It will not examine the operation of the legal professional privilege exemption in other jurisdictions as, in the majority of cases, this is an absolute, not public interest, exemption.

WHAT IS PRIVILEGE?
As a general rule, evidence which is pertinent in legal proceedings should be disclosed. The evidence should be withheld if its reliability is in question or disclosure would be contrary to public policy. The common-law doctrine of privilege, of which legal professional privilege (LPP) is a subset, is a method by which disclosure can be resisted on the grounds of public policy.

PRIVILEGE AGAINST SELF INCRIMINATION
Historically, it was a well founded common law rule that an individual can refuse to answer questions on the basis that doing so would incriminate them. In Blunt v Park Lane Hotel Ltd, Goddard LJ said:

‘The rule is that no one is bound to answer any question if the answer thereto, would in the opinion of the judge, have a tendency to expose the defendant to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.’

During criminal proceedings, the defendant had the right to decline to give evidence and this was not taken as evidence of their guilt. This is illustrated by R v Martinez-Tobon, which was a case involving the alleged importation of drugs. The defendant was arrested following the arrest of his co-defendant, who had pleaded guilty to the charges. The defendant stated that he was unaware that drugs were being delivered and that he believed that the consignment was emeralds, not drugs. He declined to give evidence at trial.

In summing up, the trial judge directed the jury not to infer that the defendant was guilty from the fact that he had not given evidence. He went on to say that if the defendant believed that his co-accused was bringing emeralds, not drugs, it might be thought that he would be anxious to say so. The defendant appealed on the grounds that the judge misdirected the jury.

During the appeal, Lord Taylor of Gosforth CJ, quoting from the Judicial Studies Board’s specimen directions, stated:

‘The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict, or explain the evidence put before you by the prosecution.’

33 [1942] 2 All ER 187
34 [1994] 2 All ER 90
Some abrogation has been made by statute\(^\text{35}\), in particular the \textit{Criminal Justice and Public Order Act 1994}. The current position is that if a suspect maintains their right to silence whilst being questioned under caution, adverse inferences can be drawn from their silence\(^\text{36}\).

Section 35\(^\text{37}\) deals with silence at trial. The situation is best explained by Lord Taylor CJ in the case of \textit{Cowan}\(^\text{38}\), during which he laid down five essentials for direction when the defendant does not give evidence:

1. The judge must tell the jury that the burden of proof remains upon the prosecution throughout and what the required standard is;
2. The judge must make clear to the jury that the defendant has the right to remain silent;
3. An inference from failure to give evidence can not on its own prove guilt;
4. Therefore the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. The jury may not believe witnesses whose evidence the judge thought raised a \textit{prima facie} case; and
5. If, having considered the defence case, the jury concludes that silence can only be sensibly attributed to the defendant’s having no answer or none that would stand up to cross-examination, they may draw an adverse inference.

\textbf{WITHOUT PREJUDICE CORRESPONDENCE}

It is in the interest of the Court that disputes are settled as early as possible, without recourse to the Courts. In light of this, the ‘without prejudice’ rule has been developed. The rule prevents statements, either oral or written, which are made by parties in a dispute, with the intention of finding a settlement, from being used in subsequent legal proceedings. The aim of this is to protect litigants from being compromised by statements made and to enable free and frank discussion between the parties before litigation has commenced.

\textbf{LEGAL PROFESSIONAL PRIVILEGE}

Legal professional privilege (LPP) is an exception to the general rule that there is no privilege in relation to confidential statements made between a legal advisor and their client. It attaches to certain communications made between a legal advisor and client and also certain communications relating to contemplated or pending litigation. The rationale behind LPP was given in \textit{Greenough v Gaskell}\(^\text{39}\):

‘To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases justifies it.’

LPP is a concept that has evolved through the common law and is therefore difficult to define. However, a definition of LPP can be found in s.10 of PACE\(^\text{40}\):

\begin{quote}
\textbf{10. – (1) Subject to subsection (2) below, in this Act ‘items subject to legal professional privilege’ means –}

(a) communications between a professional legal advisor and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal advisor and his client or any person representing his client or between such an advisor or his client
\end{quote}

\(^{35}\) see also \textit{R v Hertfordshire County Council ex p. Green Environmental Industries Ltd and another} \([2000]\) 1 All ER 773

\(^{36}\) section 34 Criminal Justice and Public Order Act 1994

\(^{37}\) Criminal Justice and Public Order Act 1994

\(^{38}\) \([1995]\) All ER 939

\(^{39}\) (1833) 1 My. & K. 98

\(^{40}\) \textit{Police and Criminal Evidence Act 1984}
client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings; and

(c) items enclosed with or referred to in such communications and made –

(i) in connection with the giving of legal advice; or

(ii) in connection with or in contemplation of legal proceedings and for the purpose of such proceedings, when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.’

This definition has been upheld by the Courts.\(^{41}\)

LPP has always been, and continues to be, absolute in it operation. If a claim to LPP can be legitimately made, it cannot be overridden by the public interest or in the interests of justice. The significance of this was given by Lord Taylor in \( \textit{R v Derby Magistrates’ Court ex parte B}^{42} \):

’a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests….Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms.’

LPP can be divided into two categories:

1. Advice privilege
2. Litigation privilege

\textbf{Advice Privilege}

The general rule of advice privilege is that any communication between a legal advisor and their client, made confidentially and for the purpose of giving or receiving legal advice, will be privileged. The exact scope of privilege is not as clear as that of litigation privilege, although the Courts have attempted to provide clearer guidance in a number of recent cases.

\textbf{Litigation Privilege}

Communications between a legal advisor and their client, a legal advisor and a third party, or the client and a third party, which are made for the purpose of giving or receiving legal advice or assistance in relation to ongoing or envisaged legal proceedings, or for the purpose of obtaining evidence in relation to those proceedings, will be privileged by litigation privilege.

\textbf{DEVELOPMENT OF LPP}

The first time the Courts upheld a claim to what is now known as advice privilege was in \( \textit{Greenough v Gaskell}^{43} \). At this early stage, no clear distinction was drawn between advice privilege and litigation privilege. LPP as a whole was deemed to include communications between a legal advisor and their client, regardless of whether legal proceedings were contemplated or had commenced at the time that the communication was made.

\(^{41}\) \( \textit{R v Central Criminal Courts ex parte Francis and Francis} \) [1988] All ER 775

\(^{42}\) [1996] AC 487; [1995] 4 All ER 526

\(^{43}\) Ibid
In *Anderson v Bank of British Columbia*\(^{44}\), the question put to the Courts was whether a claim for LPP could be maintained for correspondence between the client and a third party, which was made in anticipation of a legal action. In the first instance, Jessel MR held that the document was not privileged as it did not attract the necessary level of confidence. He stated, in relation to the rule of confidence:

‘The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbound confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.’

He then went on to examine the extent of the rule:

‘It goes not merely to a communication made to the professional agent himself by the client directly, it goes to all communications made by the client to the solicitor through intermediate agents, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letter through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor, with a view to his prosecuting a claim, or of substantiating his defence’

On appeal, Mellish. LJ set the criteria for privilege to apply as follows:

‘To be privileged it must come within one of two classes of privilege, namely, that a man is not bound to disclose confidential communications made between him and his solicitor, directly or through an agent who is to communicate them to the solicitor; or, secondly, that he is not bound to communicate evidence which he has obtained for the purpose of litigation.’

This was the first time that advice privilege and litigation privilege were recognised as separate entities with their own operation.

In *Southwark and Vauxhall Water Company v Quick*\(^{45}\) a number of documents had been prepared in relation to an envisaged legal action and had been forwarded to the company solicitor. Cockburn CJ stated:

‘The relation between the client and his professional legal advisor is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well being of society. Though it might occasionally happen that the removal of privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk.’

\(^{44}\) (1876) 2 Ch D 644  
\(^{45}\) (1878) 3 QBD 315
In examining whether the documents fell within the remit of privilege, he went on to say:

'I think they are [privileged documents]. It is clear that they were documents containing information which had been obtained by the plaintiffs with a view to consulting their professional advisor....It is admitted upon the decisions that where information has been obtained on the advice of the party's solicitor it is privileged. I can see no distinction between information obtained upon the suggestion of a solicitor, with the view of it being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose. Again, I see no distinction between the information so voluntarily procured for that purpose and actually submitted to the solicitor, and that so procured but not yet submitted to him. If the Court or the judge in chambers is satisfied that it was bonâ fide procured for the purpose, it appears to me that it ought to be privileged.'

The decision was appealed. The position of the Court of Appeal is best summarised by Cotton LJ when he said:

'[The true principle is] that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor....The fact that it was not laid before him can in my opinion make no difference.'

In Wheeler v Le Marchant\(^{46}\), it was proposed that advice privilege should be extended to included communications between a legal advisor and a third party. The Court rejected this argument, stating:

'the principle protecting confidential communications is of very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged.'

The Court also took the opportunity to clarify exactly where advice privilege will apply, where Jessel MR stated:

'a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose.'

It can be seen from the above cases that by this time, the common-law principle of LPP was well founded and was recognised to consist of advice privilege and litigation privilege. It was accepted that advice privilege extended to all communications between a legal advisor and their client which were made for the purpose of giving or obtaining legal advice. It was further well established that advice privilege could not be claimed for documents obtained from third parties which were to be shown to the legal advisor for advice.

Litigation privilege extended to communications between:

\(^{46}\) (1881) 17 Ch D 675
(a) A legal advisor and their client;  
(b) A legal advisor and a third party;  
(c) The client and a third party;

which were made for the purpose of giving or obtaining legal advice in relation to an ongoing or envisaged legal action, or for the collection of evidence to support or defend such an action.

The question of how far litigation extends in relation to communications with third parties was raised in *Re L (A Minor)*. In this case, the House of Lords ruled that, whilst LPP relating to communications between a legal advisor and client is absolute, the application of LPP to communications with a third party is not absolute.

**DOMINANT PURPOSE**

The Court had previously answered the question of how far LPP extends to communications which have more than one purpose i.e. the giving or obtaining of legal advice and another, or other, purpose(s). This had been definitely answered in *Waugh v British Railways Board*. In this case, the plaintiff’s husband, who was employed by the respondent company, had been killed in an accident at work. The plaintiff brought an action of negligence, seeking discovery of a number of documents prepared by the respondent. The respondent resisted the production of one of these documents, on the grounds that it was covered by litigation privilege, as one of the principle purposes of preparing the document was for it to be sent to the company solicitor to advise on legal liability and, if necessary, conduct their defence.

The House of Lords found that, in this instance, LPP did not extend to the document in question. In making the decision, the Court developed the ‘dominant purpose’ test, which was to be used in determining whether LPP would extend to a document which has been prepared for more than one purpose. LPP will only cover communications which are made with the dominant purpose of giving or receiving legal advice. If this is an ancillary purpose, LPP does not extend to the communication.

The question of the dominant purpose test was revisited in *Guinness Peat Properties and others v Fitzroy Robinson Partnership (a firm)*, where it was contended that LPP did not extend to a communication if the author did not intend for it to be used to obtain legal advice or assistance. The Court of Appeal held that they could look beyond the intention of the author to the intention of the person who originally procured the communication. If it was their intention for it to be used to obtain legal advice or assistance, then it would be privileged.

Further guidance on the extent of advice privilege was given in *Balabel v Air India*. The question put before the Court was summed up by Taylor LJ:

‘Broadly, the issue is whether such privilege extends only to communications seeking or conveying legal advice, or to all that passes between solicitor and client on matters within the ordinary business of a solicitor.’

In this case, the respondent sought three headings of documents. Namely:

(a) Communications between the appellant and its solicitors other than those seeking or giving legal advice;  
(b) Drafts, working papers, attendance notes and memoranda of the appellant’s solicitors relating to the issue in dispute; and

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47 [1997] AC 16  
48 *R v Derby Magistrates’ Court ex parte B* ibid  
49 [1980] AC 521  
50 [1987] 2 All ER 716  
51 [1988] Ch 317
(c) Internal communications of the appellant other than those seeking advice from their legal advisors abroad.

The appellant’s solicitors claimed LPP for all of the above documents. In the first instance, the claim to LPP was upheld and the respondent appealed.

The Court accepted that the basis of LPP was well founded, but it was the extent of it that was in question:

‘It is common ground that the basic principle justifying legal professional privilege arises from the public interest requiring full and frank exchange of confidence between solicitor and client to enable the latter to receive necessary legal advice....There is no doubt that legal professional privilege now extends beyond legal advice in regard to litigation. But how far?’

In giving judgement, Taylor LJ developed the ‘purpose of legal advice test’, which is as follows:

‘the test is whether the communication or other document was made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from the solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships...there will be a continuum of communication and meetings between the solicitor and client....Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach....legal advice is not confined to telling the client the law; it must include advice as to what should be prudently and sensibly done in the relevant legal context.’

He went on to say that after applying the test, there may be certain communications which do not attract LPP. However, this does not mean that they are automatically disclosable. They must be material and relevant to the case in order to be disclosable. This would mean that the majority of communications passing between a legal advisor and their client would not be disclosed on the grounds that they were exempt under advice privilege or immaterial or irrelevant.

On the facts of this case, the claim for LPP in relation to the documents was upheld.

LIMIT TO LPP
When a valid claim to LPP can be made, it is absolute in its operation. However, it can be limited in various ways. The main limits to LPP are discussed below.

WAIVER
General Principle
It all cases, LPP belongs to the client, not the legal advisor\(^\text{52}\). The client has the capacity to waive their right to LPP, but this cannot be done by the legal advisor without the client’s consent\(^\text{53}\). Once the client has waived their right to LPP, they cannot reassert it at a later date.

What is Waiver

\(^{52}\) Anderson v Bank of British Columbia \(\text{Ibid}\)
\(^{53}\) Calcraft v Guest [1898] 1 QB 759
  \(\text{Proctor v Smiles} \ (1886) 55 \text{LJ QB 467}\)
Waiver occurs where the client gives up their right to maintain the confidentiality of the correspondence. However, LPP is not waived in respect of documents which are placed before a judge in a private hearing to determine whether they attract LPP\(^{54}\), nor if they are referred to in a statement of case\(^{55}\).

If part of a document subject of LPP is disclosed in the public domain, this will waive privilege relating to the rest of the document, unless it can be shown that the remaining parts of the document are so different in content as to form a distinctly separate document\(^{56}\). The decision of whether this is the case or not should only be made by the judge, after reading the whole document\(^{57}\).

**ADVICE GIVEN TO ASSIST IN THE COMMISSION OF A CRIME OR FRAUD**

**General Principle**

LPP will not extend to advice which is given for the furtherance of a crime or fraud\(^{58}\). This is evidenced by s.10(2) of PACE\(^{59}\).

**What is a Crime or Fraud**

The Courts will interpret crime or fraud in a relatively wide sense\(^{60}\).

**HISTORICAL INTERPRETATION OF LPP**

By the end of the twentieth century, the principles of LPP had been well established. It was widely accepted that LPP could be divided into two parts:

1. Advice privilege
2. Litigation privilege

Advice privilege was strictly limited to communications between a legal advisor and their client, which were made for the dominant purpose of obtaining or giving legal advice or assistance. It was absolute in its operation, unless given to assist in the commission of a crime of fraud, or the client had waived their right to privilege.

Litigation privilege applied to:
   1. Communications between a legal advisor and their client;
   2. Communications between a legal advisor and a third part; and
   3. Communications between a client and a third party

which were made for the purpose of obtaining or giving legal advice in relation to an envisaged or ongoing legal action, or to collect evidence to support or defend such an action.

It was further accepted that litigation privilege was absolute in its operation in relation to communications between the legal advisor and client, but not in relation to communications with third parties.

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\(^{54}\) *Goldstone v Williams* [1899] 1 Ch 47

\(^{55}\) *Roberts v Oppenheim* (1884) 26 Ch D 724 CA

\(^{56}\) *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529

\(^{57}\) *Derby & Co Ltd v Weldon (No 10)* [1991] 2 All ER 908

\(^{58}\) *Bullivant v Attorney General of Victoria* [1901] AC 196

\(^{59}\) *Police and Criminal Evidence Act 1984*

\(^{60}\) *Barclays Bank plc v Eustace* [1995] 1 WLR 1238
RECENT DEVELOPMENTS

There have been a number of recent cases that have resulted from the collapse of the Bank of Credit and Commerce International (BCCI), which are purported to have restricted the operation of LPP. Due to this fact, the most pertinent of these cases will be examined in more detail below.

After the collapse of BCCI, the Bank of England (‘the Bank’) and the Chancellor of the Exchequer convened the Bingham Inquiry Unit (BIU) to:

‘enquire into the supervision of BCCI under the Banking Acts; to consider whether the action taken by all the UK authorities was appropriate and timely; and to make recommendations.’

Due to the fact that the enquiry did not constitute adversarial proceedings, it was accepted by all parties that litigation privilege did not apply in this case and that only advice privilege could be relied upon. It was further accepted that the client in this case was the BIU, not the Bank and therefore, all correspondence passing between the BIU and the legal advisors would be privileged by virtue of advice privilege. However, this acceptance was retracted at a later date.

The first of the cases to be discussed is Three Rivers District Council & others v The Governor and Company of the Bank of England (No 5)61. In essence, there were four questions that were put to the Court:

1. Does advice privilege extend to documents prepared by employees of the Bank, which were sent to the BIU’s legal advisors?
2. Does it extend to documents prepared by the Bank’s employees with the dominant purpose of obtaining legal advice but not actually sent to the legal advisors?
3. Does it extend to documents prepared by Bank employees, without the dominant purpose of obtaining legal advice which were sent to the legal advisors?
4. Are the answers to the above questions any different if the employees have subsequently left the employment of the Bank?

The position of the appellant was that only communications between the legal advisor and the client and evidence of the content of the communications, were privileged. The respondents claimed that any document with the dominant purpose of obtaining legal advice, other than documents communicated by or to third parties, was privileged under advice privilege, regardless of whether it was in fact communicated to the legal advisor.

In the first instance, the Court ruled in favour of the respondent Bank, finding:

’an internal confidential document, not being communicated with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production.’

The appellants appealed the decision.

Upon appeal, the Court found that:

‘the Bank is not entitled to privilege in any of the four categories itemised [above]’

The Court found that advice privilege did not extend to the documents in question since advice privilege only extends to communications between the client and the legal advisor. The ‘client’ in this case was the BIU, not the Bank. Therefore, only communications between the BIU and the legal advisor attracted advice privilege. The Court went on to say that even if the bank were the

61 [2003] EWCA Civ 474
client, it would not be able to claim advice privilege in relation to the documents in question as they had been prepared for the dominant purpose of the Bank complying with its duty of putting all relevant material before the Bingham Inquiry, not to obtain legal advice or assistance.

It was the decision of the court that advice privilege extended to communications passing between a legal advisor and their client which were made for the purposes of requesting and communicating legal advice, documents evidencing such communications and documents intended to be such communications.

Following the Court’s decision, the appellant retracted acceptance of the fact that all communications passing between the legal advisor and the client (the BIU) were privileged. The respondents had asserted that all communications between the client and legal advisor automatically attracted advice privilege, regardless of their content. It was the appellant’s contention that, for the communications to attract advice privilege, they would need to satisfy both of the criteria for advice privilege, namely:

(i) They were communications between the client and legal advisor; and
(ii) They were made for the dominant purpose of giving or seeking legal advice or assistance.

The appellants claimed that whilst they passed the first criteria, some of the communications would fall at the second hurdle due to the fact that the dominant purpose of the communication was a purpose other than seeking or giving legal advice or assistance.

This was examined in Three Rivers District Council & Ors v The Governor and Company of the Bank of England (No 10)62.

In this case, the Court decided that a large proportion of communications passing between the BIU and the legal advisor would be likely to include communications relating to the provision of legal advice and assistance and also advice on to present material to the Bingham Inquiry to cast the Bank in the best possible light. This, the Court said, would be advice on presentation. The question the Court posed itself was whether such advice would attract advice privilege.

In considering the question, the Court examined the development of advice privilege at common law and developed the following summary for advice privilege:

‘where a solicitor-client relationship is formed for the purpose of obtaining legal advice or assistance in relation to rights and liabilities, broad protection will be given to communications passing between solicitor and client in the course of that relationship. In all the cases, however, the primary object of the relationship was to obtain assistance that required knowledge of the law. We do not consider that the same principle applies to communications between solicitor and client when the dominant purpose is not the obtaining of advice and assistance in relation to legal rights and obligations.’

The Court held that advice privilege applies to communications between legal advisor and client which are made for the dominant purpose of giving or obtaining legal advice or assistance, but not to communications made for a dominant purpose other than obtaining legal advice or assistance. In the judgement, Lord Phillips MR expressed concern over the clarity around the exact extent of advice privilege:

‘We have found this area of law not merely difficult but unsatisfactory. The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated it is not easy to see why communications with a solicitor should be privileged. Legal advice privilege attaches to matters such

62 [2004] EWCA Civ 218
as the conveyance of real property or the drawing up of a will. It is not clear why it should. There would seem little reason to fear that, if privilege were not available in such circumstances, communications between solicitor and client would be inhibited. Nearly fifty years have passed since the Law Reform Committee looked at this area. It is perhaps time for it to receive further review.’

The operation and scope of LPP had been examined by the Department for Constitutional Affairs in July 2003 in the consultation paper ‘Competition and regulation in the legal services market’. This paper put forward three options for consideration:

i) Restrict LPP and rely on litigation privilege alone;
ii) Maintain LPP as it currently operates; and
iii) Extend LPP, either by reference to the profession of the person concerned, or by reference to the nature of the communication.

After a period of consultation, the conclusion was ‘that there should be no alteration to the scope of LPP.’

Another case which is alleged to have encroached on the principles of LPP is United States of America v Phillip Morris Inc & Others and British American Tobacco (Investments) Ltd. This case examined the operation of advice privilege and litigation privilege.

In considering litigation privilege, Brooke LJ stated:

‘There is, in my judgement, a clear distinction to be made between adversarial proceedings (pending or contemplated) between two or more parties which are destined, in theory at any rate, for a contested hearing in a court or court-like body, and proceedings whereby a party may compel a non-party to produce relevant documents for the purposes of the main proceedings. The non-party may well wish to seek legal advice about his obligations in this regard, but all that will be in issue is whether he is or is not legally obliged to do what is required of him. In this context there is never any question of collection evidence form third parties as part of the material for the brief in the action, or of seeking information which might lead to the obtaining of such evidence...If the non-party wishes to notify somebody else that it had received the application, and that other party may wish to take steps to assert a claim for confidentiality or privilege in the documents sought, it is difficult to see why litigation privilege should attach to that communication.’

This effectively reasserts the well established principle that litigation privilege only attaches to communications that are made for the purpose of giving legal advice or assistance in relation to an envisaged or ongoing legal action, or collecting evidence to support or defend such an action.

In considering advice privilege, Brooke LJ approved of the judgements in Balabel and Three Rivers (No 10) and concluded that advice privilege only extends to communications between a legal advisor and their client, made for the dominant purpose of giving or receiving legal advice.

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63 Paragraph 61 Competition and regulation in the legal services market. A report following the consultation “In the public interest?” July 2003
64 [2004] EWCA Civ 330
65 Ibid
66 Ibid
FURTHER DEVELOPMENTS

The issue put before the courts in *Three Rivers (No. 5) and (No. 6)*\(^{67}\) was revisited in an appeal before the House of Lords in *Three Rivers District Council and Others v Governor and Company of the Bank of England*\(^{68}\), which was an appeal of the decision that advice privilege did not extend to advice given by solicitors as to the presentation of evidence to be put before an enquiry.

In this case, the House of Lords re-examined the operation of and principles behind Legal Professional Privilege. In relation to advice privilege, Lord Scott of Foscote stated:

‘Firstly, legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement.

Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute…, but it is otherwise absolute…Certainly in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires it to be done.

Thirdly, legal advice privilege gives the person entitled to it the right to decline to disclose or allow to be disclosed the confidential communication or document in question. There has been some debate as to whether this right is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterisation as procedural or substantive neither adds nor detracts from its features.

Fourth, legal advice privilege has an undoubted relation with litigation privilege…If it is sought or given in connection with litigation, then the advice would fall into both of the two categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted.’

In examining litigation privilege, Lord Carswell stated:

‘The conclusion to be drawn from the trilogy of 19\(^{th}\) century cases which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplating litigation are privileged, but only when the following conditions are satisfied:

(a) litigation must be in progress or in contemplation;

\(^{67}\) Ibid
\(^{68}\) [2004] UKHL 48
(b) the communications must have been made for the sole or dominant purpose of conducting that litigation;

(c) the litigation must be adversarial, not investigative or inquisitorial.’

LEGAL PROFESSIONAL PRIVILEGE AND FREEDOM OF INFORMATION

Under s42 of the Freedom of Information Act 2000 ('the Act'), information for which a claim to LPP can be asserted is exempt material. As previously indicated, this is a public interest exemption. The exact wording of the exemption is as follows:

'42. (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not actually recorded) in respect of which such a claim could be maintained in legal proceedings.’

By virtue of s63 of the Act, this exemption will no longer apply after a period of 30 years following the year after the record in question was created.

As examined above, legal professional privilege can be divided into two parts:

1. Advice privilege
2. Litigation privilege

Advice privilege extends to communications between a legal advisor and their client which have been made for the dominant purpose of giving or receiving legal advice.

Litigation privilege extends to communications between:

i) A legal advisor and their client;
ii) A legal advisor and a third party; or
iii) The client and a third party;

made in for the sole or dominant purpose of conducting proposed or ongoing adversarial litigation.

The recent cases discussed above have not changed the operation of legal professional privilege in any way. They have simply reaffirmed the long accepted common-law principles of LPP and acted as a reminder of exactly what these are and when they apply.

APPLYING THE EXEMPTION

s42 of the Freedom of Information Act 2000 is a public interest exemption. This means that in applying the exemption, the public interest considerations in favour of disclosure should be balanced against the public interest considerations in favour of resisting disclosure. However, in the House of Lords decision in the Three Rivers case69, Lord Scott stated ‘if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest...Certainly in this country legal professional privilege, if it is attracted by a particular communication between a lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done.’

69 Ibid

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Therefore, it is the approach of the Association of Chief Police Officers (ACPO) that where a request is made under the Freedom of Information Act 2000 relating to information for which a claim to legal professional privilege can be maintained, this information will not be disclosed due to the exemption contained in s42 of that Act, unless s63 has overridden the exemption.
APPENDIX I
PROCUREMENT PACKAGE & LETTERS

Guide for Procurement Officers (ACPO).pdf
Dear [insert]

[insert contract]

**Implication of Freedom of Information Act 2000**

As you may be aware, the Freedom of Information Act 2000 will come fully into force on 1st January 2005. Due to the implications of the Act, I am contacting all suppliers who have provided or are currently providing goods or services to the Police Service.

With certain exceptions, this Act will enable any person who makes a request to a public authority (such as the Police Service) to be informed in writing, whether or not it holds information of the description specified in the request ('the duty to confirm or deny') and if it does hold such information, to have that information communicated ('the obligation to disclose').

Section 10 of the Act requires a public authority to confirm or deny and, if necessary, to disclose such information (or to give notice of any ground of exemption) not later than the 20th working day following receipt of the request.

It is quite possible that a person or company (possibly another supplier of goods and services to the Police Service) will make a request for information relating to a particular tendering exercise. The law does not allow the Police Service (or any other public authority) to contract out of the Act by agreeing not to disclose certain information. The Act applies to all information held by the Police Service, whenever created and no matter from whom it was received, subject to certain specific exemptions.

In a tendering exercise, suppliers will have supplied the Police Service with detailed information to enable us to decide on whom to award a contract. The subsequent successful tenderer may also have supplied information during the life of the contract. Some of that information may be disclosable without concern. We may not be obliged to disclose information, if such disclosure would be likely to harm the commercial interests of the Police Service, one of its suppliers or any other person. We may not be obliged to disclose information constituting a trade secret of one of our suppliers. We are not obliged to disclose information if such disclosure would amount to an actionable breach of confidence. There are a number of other exemptions within Part II of the Freedom of Information Act 2000, which may be applicable to the Police Service, given its functions. In relation to information provided to the Police Service by suppliers of goods and services, it seems that the most obvious exemptions are those contained within section 41 (Information Provided in Confidence) and section 43 (Commercial Interests).

Given the 20 working day time limit for the Police Service to respond to requests for information, there will be very limited (if any) opportunity to then consult with you on any information relating to your company requested under the Freedom of Information Act 2000. Accordingly, I would now invite your comments and views as to any information, which you consider is held by us, which falls within one of the exemptions, contained in Part II of the Act (for example, trade secrets and information which if disclosed would prejudice your commercial interests). The more detail you can give in relation to the information concerned and the reason why the exemption applies, the better.
I would strongly urge you to take legal advice if you feel that we hold information affecting you, which you consider we should not disclose (or confirm the existence of) pursuant to the Act.

Yours sincerely

(NAME OF DECISION MAKER)
(POSITION/DESIGNATION)
THE FREEDOM OF INFORMATION ACT 2000

(i) The Authority is a public authority to which the Freedom of Information Act 2000 applies. The Authority is obliged to consider written requests for information from members of the public and must disclose the requested information unless an exemption is available under the Act. In response to a request for information (including information provided by you in the course of this tendering exercise), the Authority may be required to confirm or deny it holds information and communicate the information to the applicant.

(ii) The Authority will generally make the following information available on request:-

- the names of successful bidder(s)
- the duration of the contract; and
- the goods or services supplied.

(iii) The Authority must respond to requests for information by the 20th working day after the request is received and, whilst the Authority may consult with you (but will not necessarily do so) about specific requests, any such consultation will have to be completed within a very short timescale. Accordingly, you must consider whether any of the information supplied by you (or relating to you) in this tendering exercise falls within one or more of the exemptions contained in Part II of the Freedom of Information Act 2000. If you do consider any such exemption to exist, then you must set out for us, in detail, at the earliest opportunity (preferably when providing the information) the particular information to which any exemption applies and the specific grounds for contending that the exemption exists.

(iv) You must provide the Authority with all reasonable assistance and cooperation to enable it to comply with any requests for information received under the Freedom of Information Act 2000 within the prescribed time limits.

(v) You must take any necessary legal advice in relation to the operation of the Freedom of Information Act 2000 at the earliest opportunity.

(vi) No liability shall arise on the part of the Authority in respect of the disclosure of any information by it in proper compliance with the Freedom of Information Act 2000.
Dear ...............  

**FREEDOM OF INFORMATION ACT 2000**

I am writing to you as a consequence of the above Act, which comes into force on 1 January 2005.

The purpose of the Act is to enable any person or organisation worldwide to request access to information held by public authorities. Subject to certain restrictions, the information must be made available. The Police Service is not exempt from the legislation and will be obliged, therefore, to comply with the Freedom of Information Act. Failure to do so could result in legal proceedings being instituted against it.

As you are contracted by the Police Service, I am writing to inform you that we are currently assessing the likely impact of the Act should a third party request information about our contract with yourselves.

I should point out that whilst the Act provides the public with the opportunity to access previously withheld information, the legislation recognises that there is a need for public authorities to maintain confidentiality and protect essential private interests. Thus, we are anxious to determine whether the legislation will affect the commercial aspect of our business. We are naturally keen to prevent access to information that may damage the commercial effectiveness of the Police Service or adversely affect your competitive advantage.

The scope of exemption from the legislation is extensive and part of the aforementioned review will be to determine to what extent details of our contracts may be exempt. At the same time, we will be considering how best to pre-empt requests for information by proactively publishing information of interest under the Publication Scheme provided for in the legislation. Lastly, we will be reviewing the classification of our information to determine whether our current protective markings are appropriate.

Let me assure you that the protection of commercial information exempt from disclosure under the Freedom of Information Act is uppermost in our minds. As soon as the review has been completed, I will write to you again about the implications of the Act and the level of information we feel we may have to disclose.

Yours sincerely

*(NAME OF DECISION MAKER)*  
*(POSITION/DESIGNATION)*