

Section 35 – Conduct of Public Business

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 35 qualified exemption for the conduct of public business. It is not intended to be a comprehensive assessment of the law in this area and a public authority is required to assess each request on the basis of its own individual facts.

When assessing the application of prejudice based qualified exemptions a public authority must establish the likelihood of any prejudice/harm being caused as a consequence of the disclosure. If a public authority cannot establish this then it will not be able to rely upon the exemption when answering a freedom of information request (see further guidance on applying the prejudice test). If a public authority is satisfied that the disclosure of information would/would be likely to cause prejudice/harm, the public authority must then carry out a public interest test to ensure that the public interest in withholding the information is equal to or greater than the public interest in disclosing the information (see Part 3 of the Freedom of Information Act Code of Practice).

A public authority should consider whether other exemptions, in addition to this one, may also apply to the requested information, bearing in mind that other exemptions might be more appropriate (see other exemptions guidance). Different exemptions may apply to different aspects of the requested information, although only one exemption needs to be engaged for information to be withheld.

A public authority may also need to consider whether to neither confirm nor deny that the information is held, if to do so would, in itself, be absolutely exempt or qualified exempt information under this section.¹

S35(a) Assess the information	
If the information was disclosed would it prejudice the work of the Council or Ministers or would it be likely to prejudice the work of the Council of Ministers?	
How would disclosure cause the prejudice envisaged?	
Ask: <ul style="list-style-type: none"> • Will disclosure prevent the Ministers from being able to present a united front after a decision has been made? • Will disclosure affect any other aspect of the work of the Council of Ministers? 	
Would the prejudice occur or would the prejudice be likely to occur?	

¹ s19 of the Act and further guidance on NCND
 Section 35 Conduct of public business
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S35(b)(i) Assess the information	
If the information is disclosed would or would it be likely to inhibit the free and frank provision of advice?	
<p>Take the following into consideration in assessing this: "Advice"</p> <ul style="list-style-type: none"> • can be internal. • recommendations/opinions made by more junior members of staff to more senior members of staff or advice and opinions from officials to Ministers). • can be external (e.g. received from third parties). • Can be provided to external sources. • Does not include the exchange of data or exchange of purely factual information. 	
How would disclosure inhibit the advice?	
Will disclosure make it more likely that the person offering advice will be unwilling to do so in the future?	
Will disclosure inhibit that person from offering unwelcome advice?	
Would disclosure inhibit or would it be likely to inhibit?	

S35(b)(ii) Assess the information	
If the information is disclosed would or would it be likely to inhibit the free and frank exchange of views for the purposes of deliberation?	
<p>The following can be taken into consideration when assessing this:- "Exchange of Views"</p> <ul style="list-style-type: none"> • Limited in that it has to be for the purposes of deliberation. • Includes processes of decision making, opinion forming or evaluation. • Will not include casual or trivial exchanges. • The circumstances surrounding the giving of the views. • The identity/status of the author and the recipient. • The sensitivity of the advice/views. 	
How would disclosure inhibit the free and frank exchange of views?	
Would disclosure inhibit or would it be likely to inhibit?	
<p>Ask</p> <ul style="list-style-type: none"> • Will disclosure make it more likely that the person being advised will not ask for advice in the future? • Will disclosure have a similar inhibiting effect on other people in the future? • Will disclosure make it more likely that advice will be given that is materially different because of the possibility of disclosure? 	

- Will disclosure make people less likely to engage in discussion (whether oral or written) as part of the deliberative process?
- Will disclosure distort or restrain that discussion?
- Will disclosure result in pressure being brought to bear on officials to provide particular advice?

S35(c)² Assess the information	
If the information were to be disclosed would it or would it be likely to otherwise prejudice the effective conduct of public business?	
Consider the following in assessing this	
<ul style="list-style-type: none"> • That disclosure could have an adverse effect on the ability of the authority to offer an effective public service or to meet its wider objectives or purpose. • The effect does not have to be on the authority – it could be an effect on other bodies or the wider public sector. • “otherwise prejudice” means it must be different prejudice to that in s35(a) and s35(b). 	
Would disclosure prejudice or would it be likely to prejudice?	

If the exemption is engaged continue and assess whether the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

Public Interest Test³	
Public interest factors in favour of disclosure	Public interest factors in favour of maintaining the exemption
The passage of time from when the advice etc. was given. The more historic the information, the less impact there is likely to be.	The information is going to be made available in the future – this will accelerate disclosure which may not be a good idea for stated reasons.
Where a decision is particularly sensitive and complex there may be a greater public interest than in simple decisions. This is because the cases tend to be more important and full disclosure may dispel suspicions of spin and improve	Impact of disclosure on core authority functions e.g. if disclosure may leave the authority unprepared or unable to cope with a reaction, which might affect the performance of core functions, disclosure may not be in the public interest.

² The exemption is intended for those cases where it is necessary to withhold information in the interests of good government but which are not covered by another exemption. For example, disclosure would prejudice the public authority’s ability to offer an effective public service or to meet its wider obligations or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure.

³ Examples of public interest arguments are listed for illustrative purposes and each request should be looked at on the basis of its own individual facts. Further guidance on carrying out the public interest test can be found in Part 3 of the Freedom of Information Act 2015 Code of Practice.

understanding.	
Release of information would give an insight into whether a process was followed correctly.	If the information is about a process and by releasing the information it would allow someone to circumvent the process.
Open policy making will increase trust in Government.	Disclosure would undermine the importance of the work of the Cabinet Office and the ability of the Ministers, through collective responsibility, being able to take part in a debate and subsequently present a united front after a decision has been made.
Increased confidence in the decision making process.	Disclosure would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. Disclosing such information could therefore impair the quality of decision making by the public authority. It may also impair the subsequent record keeping of advice (the "chilling effect").
Informing public debate on important matters.	The authority needs a "safe space" in which to develop ideas or make decisions and disclosure may prejudice this and/or interfere with or distract from the processing any other way, or would prejudice or undermine the decision itself, rather than the frankness of the discussions specifically. (Note, that this is time specific and will likely only be relevant until a decision has been made, or not long thereafter).
	Where a matter is live.
	Where minutes are in their raw form only.
	Consider severity, extent and frequency of the prejudice.

Further Information

The Information Commissioner has published guidance on the application of this exemption.
https://www.inforights.im/media/1315/exempt35q_conduct_public_bus.pdf