

Section 38 Qualified exempt communications with the Crown

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 38 qualified exemption for communications with the Crown. 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.

Section 38 is a class based qualified exemption and **cannot** be engaged unless the information concerned falls within the class of information described by the exemption.

The first step in applying class based qualified exemptions is to establish whether the information concerned falls within the class of information described by the exemption. 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. If a public authority is satisfied that the information does fall within this class, it will then have to carry out the public interest test to determine whether the public interest in withholding the information is equal to or greater than the public interest in releasing the information (see part 3 of the Freedom of Information Act 2015 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

About the exemption

This exemption applies broadly to information being either

- (a) communications/information relating to communications with other members of the Royal Family who are not covered by the s23 absolute exemption; and made or received on behalf of:
 - (i) the Sovereign of the UK;
 - (ii) the heir to or the second in line of succession to the Throne; or
 - (iii) a person who has subsequently acceded to the Throne or become heir to, or second in line of succession to the Throne.
- (b) Information relating to the conferring of an honour or dignity

¹ s19 of the Act and further guidance on NCND
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s38(1) Assess the information (the answers to all of these must be "yes")	
Is the request for information concerning a public role? If it concerns a private role consider the s25 absolute exemption for personal information.	
Is the information requested a communication with a member of the Royal Family or the Royal Household? See www.royal.gov.uk for further guidance.	
Is the information made or received on behalf of <ul style="list-style-type: none"> • The Sovereign • The heir to or second in line to the Throne • A person who has subsequently acceded to the Throne or become heir to, or second in line of succession to, the Throne? 	
If the answer to all of these is "yes" then continue to consider the public interest test	

s38(2) Assess the information	
Does the information relate to the conferring by the Crown of an honour or dignity? ² If yes also consider the s25 absolute exemption for personal information and the s41 absolute exemption for information provided in confidence.	
Re the honours system, consider if the request for information concerning the process of and policy behind the awarding of honours and dignities rather than specific information?	

If the exemption is engaged continue to assess the public interest test and whether the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Apply the public interest test³
It is the nature of the information requested that should be considered rather than the

² Only honours conferred by the Crown are included not honours awarded by other institutions.

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.

status of the member of the Royal Family.	
Public interest factors in favour of disclosure	Public interest factors in favour of maintaining the exemption
Ensures transparency and accountability in respect of the honours system so ensure that the process of awarding the honour/dignity is objective.	Protection of the neutrality of the Sovereign
	Ensuring that diplomatic and goodwill work is not undermined.
	The nature of the public role may depend upon confidentiality being maintained by public authorities.
	Timing, for example, if a royal visit is imminent there will be a stronger public interest in maintaining the exemption.
	To uphold the practice that the honours system is a highly secretive process from nomination to announcement.
	Recognising the need for public confidence in the integrity of the honours system including deliberations based on full information and fully expressed views.

Further Information

The Information Commissioner has published guidance on the application of this exemption.
https://www.inforights.im/media/1172/exemption38q_crown.pdf