

## Section 28 National security and defence

### Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 28 qualified exemption for national security and defence. 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 28(1) states that information is qualified exempt information if the exemption is required to safeguard national security. It 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).

Section 28(5) states that information is qualified exempt information if its disclosure would, or would be likely to prejudice the defence of the British Islands or any of them or the capability, effectiveness or security of any relevant forces.

Section 28(5) is a prejudice based qualified exemption and **cannot** be engaged unless a public authority is satisfied that disclosure of the requested information would, or would be likely to, cause prejudice to those relationships and interests detailed within the exemption.

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.<sup>1</sup>

### **S28(1) National Security**

In an age of global terrorism, the security of the Isle of Man will often depend on co-operation with other countries. Case law shows that taking precautions is the proper approach and the concept of national security has to be sufficiently flexible to meet the needs of the nation.

The exemption covers protecting the domestic territory of the Isle of Man, the Manx system of government and the protection of Manx citizens or assets wherever they may be.

A public authority should consider circumstances where actual harm has occurred or will occur to national security and also the necessity to prevent harm or the risk of harm occurring.<sup>2</sup> A risk to national security need not be direct or immediate.

Examples of what national security will cover:

- The well-being of the Isle of Man and the Manx system of government.
- The protection of the Isle of Man's defence and foreign policy, interests and survival.
- The protection of Manx citizens and Manx assets wherever they may be.
- The security of the Isle of Man and its people.
- The protection of democracy and the legal and constitutional systems of the Isle of Man in addition to defence.
- Action against a foreign state which indirectly affects the Isle of Man.
- Reciprocal co-operation between states in combating international terrorism.

Threats to national security include but are not limited to:

Terrorism, espionage, subversion, the pursuit of the Government's defence and foreign policies, the economic well-being of the Isle of Man and protection of the national infrastructure from actions intended to cause catastrophic damage.

<b>Assess whether the exemption is engaged</b>	
Is non-disclosure required for the purpose of safeguarding national security? This means more than if the information "relates" to national security. Ask is non-disclosure reasonably necessary in order to safeguard national security?	
Is there a real possibility that disclosure will undermine national security? The impact does not have to be direct or immediate.	

<sup>1</sup> s19 of the Act and further guidance on NCND

<sup>2</sup> Secretary of State for the Home Department v Rehman [2001] UKHL 47

Section 28 National security and defence

201708

v.1

What will be the impact of the disclosure? (Consider this over the content and source of the information).	
Are you able to demonstrate the need to withhold the information requested?	
Would disclosure of the information discourage co-operation with other nations/territories?	
Is disclosure necessary to protect potential targets even if there is no evidence that an attack is imminent?	
Is it necessary to prevent a disclosure that would have adverse consequences for one of the Isle of Man's allies or affect the ability to build relations with prospective allies?	
Can any steps be taken to allow information to be disclosed while safeguarding national security in some other way? If so, these should be considered.	
Can the information be pieced together with other publicly available information to form a "mosaic" of information which can threaten national security? <sup>3</sup> Ask, will the combination of this information (even if anodyne) with other information in the public domain, cause harm?	
<b>If the exemption is engaged continue to consider the public interest test.</b>	

### Ministerial Certificates

Under section s8(2) A certificate signed by the Chief Minister, or in his absence, by the Minister for Home Affairs certifying that a refusal to supply the information (or information of a description that includes the information requested), is necessary to safeguard national security, is conclusive evidence that the exemption is engaged.

#### Content of the certificate

The certificate may identify the information by way of a general description and may apply to information that the public authority doesn't currently hold or has been requested at the time the request is made but the public authority envisages that it will hold the information in the future.

Even when a certificate is issued a public authority must still continue to consider the public interest test.

The use of the exemption is not contingent upon a ministerial certificate.

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<sup>3</sup> Summers v Information Commissioner and Commissioner of Police for the Metropolis (EA/2011/0186)  
Section 28 National security and defence  
201708  
v.1

In practice certificates are more relevant when formal action becomes a possibility and a challenge is likely to reach the Information Commissioner.

If there is a general and prospective certificate the public interest test must be carried out each time that the certificate is relied upon.

Any certificate will also need to be kept under review as the information that it applies to may vary over time.

<b>Public Interest Test<sup>4</sup></b>	
<b>Factors in favour of disclosure</b>	<b>Factors in favour of maintaining the exemption</b>
To reassure the public over concerns they may have with regard to their civil liberties and human rights.	Providing the information would undermine national security.
The public may be more willing to co-operate with procedures if they understand the need for them. (For example, security checks).	The severity of the type of the harm that would be caused by disclosure (even if the chance of that harm occurring is low).
To reassure the public that the measures in place to safeguard national security are effective.	The information in question does not serve the public interest that is being argued.
If the public interest in disclosure outweighs the public interest in withholding the information, the exemption does not apply and the information cannot be withheld under the exemption. If the public interest in withholding the information outweighs the public interest in disclosing the information then the information can be withheld.	

## **S28(4) Defence**

It is not defence information that is necessarily exempt but information which, if disclosed, would or would be likely to prejudice defence matters. It covers both internal and external threats.

Examples of what it includes:

- Defence policy and strategy, military planning and defence intelligence.
- Size, shape, organisation, logistics, order of battle, state of readiness and training of the armed forces.
- The actual or prospective deployment of those forces including operational orders, tactics and rules of engagement.
- The weapons, stores, transport or other equipment of those forces and the invention, development, production, technical specification and performance of such equipment and research relating to it.

<sup>4</sup> 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.

- Plans and measures for the maintenance of essential supplies and services that are or would be needed in time of conflict.
- Plans for future military capabilities.
- Plans or options for the defence or reinforcement of a colony or another country.
- Analysis of the capability, state of readiness, performance of individual or combined units, their equipment or support structures.
- Arrangements for co-operation, collaboration, consultation or integration with the armed forces of other countries, whether on a bilateral basis or as part of a defence alliance or other international force.
- Covers external and internal threats.
- Fuel supplies.
- Emergency planning information.

<b>Assess whether the exemption is engaged</b>	
If the information requested were disclosed would or would it be likely to prejudice the defence of the British Islands or any of them?	
If the information requested were disclosed would or would it be likely to prejudice the capability, effectiveness or security of either the armed forces of the Crown and/or any forces co-operating with the armed forces of the Crown or any part of any of those forces?	
What is the risk of prejudice that the disclosure of information may cause?	
Is the current political climate relevant to the nature of the prejudice?	
What is the particular harm that may arise?	
Is the timing of the request relevant to the question of prejudice?	
Is there information already in the public domain and if so, what is the nature of the information, is it speculative or reliable?	
Consider whether the prejudice "would" occur or "would be likely" to occur.	
<b>If the exemption is engaged continue to assess the public interest test.</b>	

<b>Public Interest Test<sup>5</sup></b>
<b>The public interest in avoiding prejudice to defence matters will be strong in</b>

<sup>5</sup> 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.

<b>most cases, so will outweigh the public interest in disclosure unless the harm or prejudice likely to result from disclosure would be trivial or minor.</b>	
<b>Factors in favour of disclosure</b>	<b>Factors in favour of maintaining the exemption</b>
Further public understanding of and participation in debate of the issues of the day, leading to improved decision making and an increase in public confidence.	Where disclosure would be would contravene an objection from an allied country, or in breach of a clear undertaking to preserve confidentiality.
Widespread public interest in defence policy and the activities of the armed forces so it is appropriate that the public should be able to understand how and why key decisions are taken to promote accountability.	Where disclosure will undermine the conduct of a specific military operation.
Where disclosure will inform public debate such as in the following scenarios: <ul style="list-style-type: none"> <li>• The safety of military personnel or loss of life.</li> <li>• Risks to the safety of civilians.</li> <li>• The use of land or the environmental impact of military activity.</li> <li>• The factual and analytical bases used to develop defence policies.</li> <li>• The use of public funds.</li> </ul>	Where disclosure will have an adverse impact on security or safety.
Promoting accountability and transparency by public authorities for decisions taken by them.	May prejudice the Isle of Man's defence relations by restricting exchanges of information or military co-operation.
Promoting accountability and transparency in the spending of public money.	
Bringing to light information affecting public health and public safety.	

### Further Information

The Information Commissioner has published guidance on the application of this exemption.  
[https://www.inforights.im/media/1305/exempt28q\\_national\\_security.pdf](https://www.inforights.im/media/1305/exempt28q_national_security.pdf)