

Section 34 Formulation of policy

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 34 qualified exemption for formulation of policy. 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 34 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

Assess whether the exemption applies in any respect?

<p>Is the information held by a public authority that is Government Department or the Cabinet Office? If the answer is "no" the exemption won't apply. (s34(1)(a)(i)&(ii))</p>	
<p style="text-align: center;">If the answer is "yes" move on to the next question</p>	

Each one of the following operates as a separate exemption. More than one might be relevant in any particular case and therefore they may overlap.

"Relates to" can be any significant link between the information and the activity and has a broad interpretation.

¹ s19 of the Act and further guidance on NCND
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<p>Does the information relate to the formulation or development of government policy² (s34(1)(b)(i)?</p> <p>(Note, it cannot apply where there is a finished product, or a policy which has been agreed, is in operation or has already been implemented).</p>	
<p>Does it relate to the "formulation of government policy" (undefined but covers the situations where options are generated, risks identified, consultation occurs and recommendations and submissions are put to Ministers. Formulation does not have to occur at once, there may be different stages to this and it can be considered at each stage).</p>	
<p>Does it relate to the "development of government policy" (- undefined but goes beyond formulation and involves processes involved in improving or altering policy through piloting, monitoring, reviewing, analysing or recording the effects of existing policy. It suggests something dynamic i.e. that something must be happening to the policy).</p>	
<p>If "yes" or "no" move on to the next question.</p>	
<p>Note that once a decision as to policy has been made, statistical information used to provide an informed background to the taking of the decision is not qualified information for the purposes of this exemption.</p> <p>Only apply this exemption when it can be evidenced that the formulation and development of government policy would be materially undermined by the threat of disclosure under the FOIA.</p>	

<p>The following questions may assist in interpreting the exemption?</p> <p>(No information will be exempt purely on account of its status, classification or the seniority of those involved)</p>	
<p>Would release of the information in this particular case make civil servants less likely to provide full and frank advice or opinions on policy proposals? Would it prejudice working relationships by exposing dissenting views?</p>	
<p>Would the prospect of future release inhibit consideration and debate of the full range of</p>	

² The following are non-exhaustive examples of items that can be included in the formulation/development of policy – white papers, bills, the legislative process, initiatives to amend existing policy, speeches, reaction to external events, decisions on implementation requiring political judgement, answering questions
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policy options (e.g. if on reflection some of them seem extreme)?	
Would the prospect of release lead to civil servants defending everything that is or has been raised during deliberation (in anticipation, for example, of certain things being later discounted)?	
Would the possibility of future release deter the giving of advice which is ill-considered, vague, poorly prepared or written in unnecessarily brusque or defamatory language and therefore would the prospect of release in fact enhance the quality of future advice? If so then this would weigh in favour of release.	
Is the main reason for applying the exemption to spare a civil servant or Minister embarrassment? If so, the exemption is not appropriate, although decisions have noted a clear distinction between protecting civil servants, especially those who are more junior, compared to politicians.	
Is the intention of government to make a real change?	
When making a final decision is the political judgment of ministers required?	
What are the wider consequences of the decision?	
Is there any political sensitivity attached to the decision?	
The timing of the request is fundamental. Compare whether the policy is in the height of its formulation compared to 2 years later when it has already been implemented.	
The central question in every case is the content of the particular information in question – every decision must be specific to the particular facts and circumstances under consideration.	

Does the information relate to communications between Ministers, proceedings of the Council of Ministers or any committee of the Council of Ministers?

What type of communication? ("Communications" includes letters, memos, emails and other documents and meetings and telephone conversations between ministers. Examples include communications, drafts of communications, minutes of meetings and	
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notes of conversations (formal, informal and aide memoires).	
Does the communication come from the Minister or the Minister's private secretary, writing on behalf of the Minister? (Answer must be "yes")	
Is the communication between a Minister and a non-Minister (Answer must be "no")	
If it is not a communication itself, does it relate to the communication i.e. does it recount or refer to a ministerial communication (for example, letters between civil servants that might refer to a letter written from one Minister to another Minister?)	
Are there any documents attached or enclosed to the ministerial communication that the exemption will need to extend to?	
Should not be used to protect ministers from embarrassment or from being held accountable for their decisions.	

Does the information relate to the provision of legal advice or any request for such advice?

- Reflects the convention that government does not reveal whether lawyers have advised on a particular issue or the content of such advice.
- Protects fully informed decision making by allowing government to seek legal advice in private without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought.
- Ensures that government is neither discouraged from seeing advice in appropriate cases nor pressured to seek advice in appropriate cases.
- Will usually also engage LPP exemption and both can be claimed for the same piece of advice but the public interest arguments may differ slightly. This is wider than LPP though and can cover non-legal advice given by such officers.
- Consider NCND.

Does the information relate to the operation of a Ministerial private office?

(this means any part of the Isle of Man Government that provides administrative support to a Minister).

Apply the public interest test³

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.

(Ask what is the content and the sensitivity of the information and the effect its release would have in all the circumstances of the case)?	
Public interest factors in favour of disclosure	Public interest factors in favour of maintaining the exemption
Where it is an impartial record of Cabinet business (even if other accounts are already available) especially for politically or historically significant events or where published accounts are inconsistent.	Preserving the convention of collective responsibility Ensure it applies to the particular information in question For Cabinet minutes the public interest in preserving collective responsibility is always substantial and the disclosure is rarely ordered
There's a public interest in disclosing factual information used to provide an informed back-ground to decision taking.	Protecting ministerial discussions and collective decision making processes
The policy process is complete and can no longer be harmed.	Preserve a safe space for ministers to debate live issues away from external interference and distraction
Significant public interest in allowing public scrutiny of the details of the policy while the policy is still in the public consciousness.	To prevent a chilling effect on free and frank ministerial debate in future
If it contains factual information about the background to the policy there is particular public interest in disclosing background factual information	Protecting ministerial unity and effectiveness
Public participation in the policy is appropriate, in the sense of permitting people to contribute to policy prior to a final decision. Note – <ul style="list-style-type: none"> • Participation cannot be meaningful without access to relevant recorded information about how policy decisions are reached, what options are being considered and why some are excluded and others preferred. • Without public participation in key policy decisions, certain individuals or groups will enjoy undue influence in the policy making process. • A key driver for FOI is to provide access to information which will facilitate informed participation in the development of government proposals or decisions which are of concern to them. Information disclosed prior to a decision being taken will facilitate more informed public debate.	Public exposure of the information may compromise candid and robust discussions about policy, the exploration of extreme options, the keeping of detailed records and the taking of hard choices, where it might prejudice good working relationships, the neutrality of civil servants and ultimately the quality of government. The potential damage to policy making from the content of the specific information and the timing of the request. The need to maintain the quality of government policy making by facilitating free and frank exchanges between civil servants ("the chilling effect" and the thorough consideration of all policy options, however extreme, without inducing the need to defend them ("safe space").

<p>Accountability for government decisions:</p> <ul style="list-style-type: none"> • Disclosure of information is desirable where it may expose wrongdoing, the fact that wrong doing has been dealt with and to dispel suspicions of wrong doing or of spin. • Access to information under FOI may facilitate objective assessment, particularly where information obtained direct from the civil service (as opposed to government press offices) has not been spun. • There will usually be a strong public interest in favour of disclosing where a policy decision is going to lead to large-scale public expenditure. • There will usually be a strong public interest in favour of disclosure where a policy decision involves departure from routine procedures or standard practice. 	<p>To protect collective responsibility if the information reveals the views of an individual minister on a government decision.</p>
	<p>The policy is live</p>
	<p>To protect the deliberative process and provide a safe space to protect information in the early stages of policy formulation and development.</p>
	<p>The need to maintain the quality of records, working relationships and a neutral civil service (although arguments that disclosure may lead to poor record keeping will be disregarded).</p>
	<p>The fact that the particular circumstances of the case indicate that public participation in the policy is inappropriate.</p>
	<p>Re ministerial private office – focus on potential damage to the effective administration of the private office from the content of the specific information.</p>

Further Information

The Information Commissioner has published guidance on the application of this exemption.
https://www.inforights.im/media/1306/exempt34q_formulation_policy.pdf