

Prejudice Test

Introduction

For the most part the term “prejudice” can be associated with harm. Other words used within the exemptions that can be viewed in a similar manner are “inhibit” and “endanger”. It is applicable to certain qualified exemptions, see below.

Where an exemption is a prejudice based exemption, the prejudice test has to be carried out in order to assess whether an exemption is relevant to the information that has been requested.

To allow a public authority to consider this, the Act allows for an extended processing period. This means that a public authority is allowed more than 20 working days to consider if the exemption is engaged and to carry out the public interest test. However, a public authority must advise the requester of this within the standard processing period of 20 working days of the request being received.¹

The fact that a public authority is permitted an extended processing time beyond 20 working days must not be used as a delaying tactic. The law still requires a public authority to respond to a request for information as soon as is reasonable in the circumstances and give reasonable notice to the requester.

The prejudice exemptions	
s28 National security and defence	s33 Audit functions
s29 International relations	s35 Conduct of public business
s30 Economy and commercial interests	s36 Health and safety
s32 Law enforcement	s37 Research and natural resources

Determine if the exemption is going to apply by applying the prejudice test	
1. Identify the applicable interests within the relevant exemption, which are affected.	
What is the interest that the exemption is trying to protect? This should relate to the specific subsection of the exemption. For example, don't just say s30 Economy and commercial interests, say s30(1)(c) the ability of the government to manage the national economy.	
How does the prejudice affect that interest?	

¹ Section 13 of the Act and Part 7 of the Freedom of Information Code of Practice
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2. Identify the nature and severity of the prejudice which will be caused by the disclosure of the information.	
Identify how the prejudice claimed is "real, actual or of substance?" Explain why the disclosure of information is capable of harming the interest in some way.	
3. Identify the causal link	
Identify the causal relationship between the potential disclosure and the prejudice. For example, if the information was disclosed it would cause the following prejudice..... Provide some logical connection.	
3. Explain the likelihood of such prejudice arising. A public authority must set out that as a consequence of disclosure, either that the prejudice "would" occur or that the prejudice "would be likely" to occur .	
How frequently will the prejudice occur? It is possible that prejudice can occur even if something is only going to happen once or affect one person but if the number of cases in which it might occur is high then the prejudice could be said to be more likely to occur.	
If you are claiming "would prejudice" the likelihood of prejudice does not have to be a definite however it must be more likely than not, i.e. more than a 50% chance of occurring. ²	
If you are claiming "would be likely" to prejudice the risk needs to be more than hypothetical and remote. There must be a real and significant risk even if this chance is less than 50%.	

The prejudice test should be applied to the circumstance at the time when the request is received (or it can be within the standard processing period). This means that a more comprehensive assessment can be carried out.

If no prejudice would be caused by the disclosure of the information then the exemption is not applicable and unless any other exemptions apply, the information must be disclosed. If you determine that disclosure of the information either would cause some specified prejudice or would be likely to cause some specified prejudice then you must continue by carrying out the public interest test. The information must still be disclosed unless you can

² If you are claiming "would" prejudice, there is a stronger evidential burden as this will carry more weight.

show that the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information. Guidance on carrying out the public interest test is contained in Part 3 of the Code of Practice.

Further Information
Further information can be found on the Information Commissioner's website. https://www.inforights.im/media/1301/exemptions_prejudice_note.pdf