

Section 26 – Information provided in confidence

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 26 absolute exemption for information provided in confidence. 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.

A public authority can only rely on the exemption if the information falls within it. There is no prejudice test or public interest test.

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 under this section.¹

Assess whether the exemption applies in any respect:-

- A public authority should be wary of documents labelled as confidential or with some other marking. They may not meet the test of being provided by someone else or it may be the case that information that was once confidential is not any more due to the passage of time.
- If a request is made for confidential information a public authority may consider discussing with the person who provided the information if it is still confidential. However, note that there is no extension to the 20 day standard processing period to enable a public authority to do this.

The Exemption	
<p>Was the information obtained by the public authority from another person (including another public authority)?</p> <ul style="list-style-type: none"> • A public authority cannot apply this exemption to information that it has generated itself, but the exemption can be applied to confidential information obtained from officers and staff (where relevant). • Note, a contract between a public authority and another person is not "obtained" information. However, 	<p>Answer must be yes for the exemption to be engaged.</p>

¹ s19 of the Act and further guidance on NCND
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<p>technical or other information contained within a contract could be confidential.</p> <ul style="list-style-type: none"> Note that contracts may have the benefit of section 30 (Economy and Commercial Interests). 	
<p>Would the disclosure of the information to the public constitute an actionable breach of confidence by the person who imparted it?</p>	<p>See below</p>

Test of Confidence	
<p>There must be an obligation of confidence.</p> <p>A public authority should assess why it believes that the information is confidential and why it thinks that the information has the necessary quality of confidence to justify an obligation of confidence?</p> <ul style="list-style-type: none"> If the information is trivial or useless, it is unlikely that confidence will attach to it if the information is in the public domain, it is unlikely that confidence will attach to it. 	
<p>How was the information communicated? Was the information communicated in circumstances that created such an obligation of confidence?</p>	
<p>Would disclosure be an unauthorised use of the information?</p>	
<p>Will there be any detriment suffered by the communicating party if the information is disclosed?</p>	
<p>If the first part of this test is satisfied, go on to consider:-</p>	
<p>Does a public authority have a defence to a claim for breach on confidence based on the public interest in the disclosure of the information? See below.</p>	

Assess the following when considering whether the information is confidential	
<p>Is the duty of confidence set out in a document (e.g. a contract), implied into a relationship (doctor and patient), or generally accepted as confidential? It will depend upon the nature of the information provided and/or the type of provider of the</p>	

information or the authority's relationship with them.	
What are the nature and the circumstances in which the information was obtained? Did the authority expressly agree to keep it confidential?	
What is the nature of the interest to be protected? Is it necessary to hold information in confidence to protect that interest?	
Is the information personal information/data?	
If the information is only provided on the condition that it is kept confidential, how important is the information in relation to the authority's functions?	
How much information does the confidentiality attach to? Does the duty only attach to certain information? For example, with regard to anything commercially confidential, it may only attach to information needed to remain confidential in order to protect any competitive position rather than to protect general knowledge of a business organisation or methods.	
Does a public authority have any of the following, which will allow it to disclose the information:- <ul style="list-style-type: none"> • The third party's consent (express or implied e.g. if they have put the information into the public domain); • A law/court order requiring a public authority to disclose it; • A defence to an actionable breach of confidence (which may mean that the exemption cannot be engaged), see below. 	

Assessing whether a public interest defence applies

- This is different to the public interest test for qualified exemptions.
- If there is a public interest in disclosure of the information, this is a defence to an action for breach of confidence. This means that an action for breach of confidence will fail if the disclosure is in the public interest.
- If a public authority decides that a breach of confidence will not be actionable because there is a public interest defence to claim, then it will normally have to disclose that information notwithstanding its confidentiality.
- It is rare for a public interest defence to override an obligation of confidence because if

<p>the arguments are evenly balanced, the obligation of confidence should remain and not be overridden.</p> <ul style="list-style-type: none"> If it does have a public interest defence, a public authority will need to weigh this against the duty of confidence as it may mean that the exemption cannot be applied. 	
Public interest in maintaining confidentiality	Public interest in disclosure of the information
Where a duty of confidence exists there is a general public interest in favour of keeping that confidence.	<p>There is a public interest in ensuring public scrutiny of the activities of public authorities so if disclosure would enhance this scrutiny, this will weigh in favour of disclosure e.g. information revealing misconduct or mismanagement of public funds, information demonstrating that a public contract is not providing value for money, information which would correct untrue statements or misleading acts by an authority.</p>
There is no general public interest in the disclosure of confidential information in breach of a duty of confidence. For a specific public interest defence to arise there must be a specific factor in favour of disclosure.	
Where the interests of a private person (individual or organisation) are protected by a duty of confidence; the public interest in scrutiny of public authority information is unlikely to override that duty.	
Where the confidence arises from a professional relationship.	
Disclosure would affect the continued supply of important information (e.g. from whistleblowers).	
Disclosure would involve some risk to public administration or public or personal safety.	

If a public authority is applying this exemption, has it explained and evidenced...	
The fact the information has been received from outside a particular public authority?	
The circumstances in which the information was received?	
Why those circumstances mean that there is an obligation of confidence?	
Details of why and how disclosure of this particular information at the time of the request would cause damage to the person or organisation which had imparted that information?	
Whether there is any evidence that a third party will be harmed by the disclosure?	

Further Information

The Information Commissioner has published guidance on the application of this exemption.
https://www.inforights.im/media/1161/exempt26a_confidence.pdf