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INVEST NORTHERN IRELAND

Access to Information Procedures Manual

***Freedom of Information
Environmental Information Regulations***

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1. Introduction

This manual is intended to support those who are responsible for dealing with Access to Information requests. Its aim is:

- To encourage consistency and best practice in the operation of the Freedom of Information Act (FOIA) and the Environmental Information Regulations (EIRs) , and
- To answer frequently asked questions about Access to Information.

This manual sets out a generic approach to managing Access to Information requests made under either the Freedom of Information Act (FOIA) or the Environmental Information Regulations (EIRs). **It does not deal with the management of Subject Access Requests under the Data Protection Act – please see the [intranet](#) or contact the Information Governance Manager for guidance.**

2. Access to Information Regimes

[The Freedom of Information Act 2000](#) and the [Environmental Information Regulations 2004](#)

All Public Authorities are required to respond to individual Access to Information Requests from 1st January 2005.

What do these “Access to Information” regimes do?

These Access to Information regimes, which are **totally retrospective**, establish statutory rights:

- To be told whether the requested information is held by us;
- The right of access to that information (and where possible in the manner requested e.g. copy)

These rights are subject to certain **exemptions (FOI)** and/or **exceptions (EIRs)**.

It also establishes arrangements for **enforcement and appeal**.

All Access to Information requests must be responded to promptly, or in any event within **20 working days** of receipt.

[For Environmental requests the deadline may be extended to 40 days if the public authority reasonably believes that the complexity or volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so].

3. Processing a Request

3.1 An Access to Information request must be processed where:

For FOI requests

- It has been received in writing (including email);
- States the name of the applicant and an address for correspondence; and
- Describes the information requested.

For EIR requests

- Requests for environmental information may be made in writing **or orally**.

However the applicant does **not** have to quote either the FOI Act or the EIRs to have his/her request treated as such.

Where the information would be provided within 20 days as part of normal business processes, it should be processed as 'business as usual' and not recorded as an access to information request.

3.2 Decision Maker

A Decision Maker is the person within the team responding to the request who is responsible for the response. They are responsible for the coordination of the response and the decision to disclose or withhold information under the legislation. Decision Makers in Invest NI are generally at **Grade 7/Client Manager** level.

3.3 Tracking System and Letter Templates

An excel spreadsheet will be used by the Information Governance Team to track all Access to Information requests. In addition a series of template letters have been developed to be used for the purposes of handling requests under Freedom of Information /Environmental Information Regulations (EIRs).

The use of the [template letters](#) is essential to ensure consistency in practice within Invest NI and that all aspects of a request are fully addressed.

3.4 Logging the Request

All non 'business as usual' written requests, should be notified to the Information Manager immediately. This is to enable request details to be tracked. The recipient of the request should advise the Information Governance team who will log, allocate a reference number and then pass it to the most appropriate Division(s) in Invest NI to deal with it.

3.5 Acknowledgement

An acknowledgement letter/email should be sent by the person using [Template letter 1](#). This should be completed no later than 5:00 pm on the day following receipt of the request. A copy should be emailed / scanned to foi@investni.com

3.6 Accessible by other means

The Decision maker should carry out an initial review to determine if the information is accessible by other means (e.g. already published and included in the Publication Scheme). If the information is available by other means, the applicant should be informed where the information is available (see [Template letter 2](#)). If the information is inaccessible to the applicant in this format then you should consider providing the information by alternative means.

3.7 Clarify nature of request if necessary

If the request is unclear or is very broad, the Decision Maker should contact the applicant to seek clarification or a narrowing of the request. [Telephone call and/or [Template letter 3](#)].

3.8 Fee Regulations (if appropriate)

In line with the NICS, there is no charge for making a freedom of information request to Invest NI. However, if a request will cost us more than £450 (equivalent to 18 hours) to locate, retrieve and extract information, we are not obliged to supply the information.

If a request will exceed the appropriate limit [[see Part 4](#)] advise the applicant **immediately** [using [Template letter 4](#)]. Once any redefined request which brings us within the scope of the fees regulations has been received proceed to the next step.

If no clarification has been received within 3 months close the request and notify the Information Governance Team so that the tracking system can be updated.

3.9 Retrieve records and Prepare schedule

The Decision Maker should, **as soon as possible**, arrange for the search and retrieval of the relevant records (this search should cover **all** information storage (paper files, PC and Network drives, Meridio) and business area staff **must** co-operate.

A schedule of information items [[see Part 9](#)], containing an index and a brief description of the records covered by the request should be prepared.

3.10 Review Schedule considering possible exemptions/exceptions

Each item of information listed on the schedule should be examined to evaluate whether any of the [FOI exemptions](#) and/or [EIR exceptions](#) apply [[see Part 5](#)].

The Decision Maker should carry out this evaluation seeking guidance from the Information Governance Manager / Information Governance Management Officer.

If none of the exemptions/exceptions apply the item is considered disclosable.

If one or more exemptions apply the decision maker should establish whether the exemption is absolute or is subject to a [public interest test](#) [[see Part 5](#)]. If the exemption is absolute, or withholding disclosure of the information on the basis of the particular exemption is supported by the public interest test, then the item should

be withheld. If information is being withheld the decision maker should review which exemptions are being invoked and decide whether it is appropriate to confirm that the information is held by Invest NI.

3.11 Consult any third parties

If necessary, other public authorities or other third parties affected by disclosure of the information should be consulted [see [Part 8](#)]. If the business area(s) or the consulted groups wish to withhold any information this will need to be considered within the scope of the exemptions/exceptions and any relevant public interest test. The decision to release always rests with Invest NI but the decision can be informed by the third party, especially if they can demonstrate potential detriment caused by the release.

If the business areas or consulted groups are happy to disclose all requested information then move to next step.

[N.B. Where consultation is required but no exemption applies the request must be responded to within 20 working days.]

3.12 Response is drafted, reviewed & approved by Divisional Director

A response should be drafted by the Decision Maker using the [applicable template letter](#). If **any** information is being withheld the applicant must be advised which exemption/exception applies within the response. The decision letter should set out which exemptions/exceptions, if any, apply and explain why it is in the public interest to withhold each item not being released [see [Part 6](#)].

The response should also include the [schedule of records for release](#). If requests are made for information where the duty to confirm or deny is not applicable, there is no need to refer to these records in the schedule.

All Decision Makers are encouraged to seek guidance and advice from the Information Governance Team throughout the handling of the request in respect of the application of exemptions/exceptions and any other FOI issues. This should be done as early in the process as possible and not left to the last minute.

The draft response must be reviewed and approved by the Divisional Director. Directors may find it helpful to confirm with the Decision Maker that any guidance provided by the Information Governance Team has been incorporated into the response prior to their review.

The review by Directors must be undertaken from a consideration of the quality of the response, how it sits in a corporate context, including rationale for any decisions based on information release or the application of an exemption/exception to information pertaining to their business area.

3.13 Consideration by Information Governance Team & TMT

When approval is received by the Divisional Director, the final draft response should be sent to the Information Governance team **on or before day 15**. This timescale is to provide sufficient time for full consideration of all the facts of each case by SMP, and if necessary TMT, and allow time for feedback. This consideration is an assurance that all requirements of the response are made in line with the legislation including application of exemptions. The final draft response may also be sent to TMT for consideration depending on the nature of the FOI request.

In the referral the Decision Maker will detail his/her reasons for recommending partial or full exemption/exception; this should include any public interest considerations.

The decision regarding release will remain with the Director of the Division providing the response.

3.14 Response is issued

SMP will return the draft response to the Division (following review by SMP and if necessary TMT) by close of play on or before day 18, to enable feedback to be incorporated by the Division for issue to the applicant by **no later than COP on day 20**.

The information being released and the schedule should be issued to the applicant. The response to the applicant should contain the information requested, subject to any exemptions/exceptions that may apply as detailed on the schedule.

A full copy of all issued responses, including full information sent, should be copied to the Information Governance team (foi@investni.com). Divisions should ensure that a copy of any redacted information and the related unredacted source of the information and details of any decision making process should be provided to the Information Governance team to ensure a full record of the approach to the request.

4. Fees

The FOI fees provisions have two purposes:

1. To allow a public authority to ascertain whether it has to comply with an FOI request?
2. To enable it to ascertain how much it can charge for supplying the information?

The appropriate limit for Invest NI in processing FOI requests is £450 (for government departments the limit is £600). If the cost of finding the information relating to an FOI request will be:

Below the Appropriate Limit - you cannot charge the applicant anything other than Disbursements incurred in supplying the information i.e. postage and photocopying.

Over the Appropriate Limit – you don't have to comply with the request

Working out the Appropriate Limit i.e. the £450 limit

Upon receiving the request, estimate the staff time to be taken do any or all of the following and cost the time at £25 per hour (Regulation 4 Costs):

- Determining whether you hold the information
- Locating the information or a document which may contain the information
- Retrieving the information, or a document, which may contain the information
- Extracting the information from a document containing it

Cumulative or Campaign Requests:

These are: Two or more requests made by one person or different persons in acting concert or in pursuance of a campaign.

The Rule: When calculating whether the Appropriate Limit has/may be reached in complying with any one request, you aggregate the cost of complying with all of them. However you must have received:

- two or more requests relating to same or similar information and
- they must be received within any sixty consecutive working day period

The Fees Regulations do not apply to the Environmental Information Regulations 2004.

If the Fee Regulations apply then a [Fees Regulations Notice](#) must be issued [see [Part 7](#)].

5. Exemptions / Exceptions

5.1 FOI Exemptions

The Exemptions are included at sections 21 to 44 of the [FOI Act 2000](#).

(a) The Absolute Exemptions

There are **8 absolute exemptions**.

[I.e. if the exemption applies it is not necessary to go on to consider disclosure in the public interest.]

[Section 21](#): Information is accessible by other means (even if only by payment).

[Section 23](#): Information supplied by or relating to bodies dealing with security matters, e.g. the Security Service or N CIS.

[Section 32](#): Court records (including tribunals).

[Section 34](#): Parliamentary privilege.

[Section 36](#): Information held by the House of Commons or the House of Lords.

[Section 40](#): 40(1) Personal data, if the applicant is the data subject.
40 (2) Personal information relating to a third party.

[Section 41](#): Information provided in confidence.

[Section 44](#): Disclosure is already prohibited under another Statute, is incompatible with community obligations, or could result in contempt of court proceedings.

(b) Qualified Exemptions (where the public interest test applies)

[I.e. if the exemption applies would the public interest in withholding outweigh the public interest in disclosing?]

There are **17 Qualified Exemptions**.

[Section 22](#): Information intended for future publication.

[Section 24](#): Safeguarding national security.

[Section 26](#): It would prejudice defence.

[Section 27](#): It would prejudice international relations.

[Section 28](#): It would prejudice relations within the UK, e.g. between NI Assembly and National Assembly for Wales.

[Section 29](#): It would prejudice the economy.

[Section 30](#): Investigations and proceedings conducted by authorised public bodies.

[Section 31](#): It would prejudice law enforcement.

[Section 33](#): Audits of accounts.

[Section 35](#): Information held in relation to –

- Government policy
- Ministerial communications
- Advice by law officers
- Ministerial Private Office operations

[Section 36](#): It would prejudice the effective conduct of public affairs.

[Section 37](#): Communications with HM/honours details.

[Section 38](#): Disclosure would endanger the physical or mental Health or safety of an individual.

[Section 39](#): Environmental information.

[Section 40](#): Personal information (qualified in limited circumstances).

[Section 42](#): Legal professional privilege.

[Section 43](#): Commercial interests.

5.2 EIR Exceptions

The Environmental Information Regulations give the general public a right to environmental information held by a public authority.

There is a presumption under the regulations that environmental information must be released, unless there are reasons to withhold it.

Regulation 12 lists the exceptions under which a public authority can refuse to disclose information. All the exceptions are subject to a public interest test.

EXCEPTIONS TO THE DUTY TO DISCLOSE ENVIRONMENTAL INFORMATION

Reg. 12 (4) (a) Does not hold that information when an applicant's request is received

Reg. 12 (4) (b) Is manifestly unreasonable

Reg. 12 (4) (c) Is formulated in too general a manner (provided assistance has been given to the applicant with a view to re-framing the request)

Reg. 12 (4) (d) Relates to unfinished documents or incomplete data

Reg. 12 (4) (e) Would involve disclosure of internal communications

And if disclosure would adversely affect:

Reg.12 (5) (a) International relations, defence, national security or public safety

Reg.12 (5) (b) The course of justice, fair trial, conduct of a criminal or disciplinary inquiry

Reg.12 (5) (c) Intellectual property rights

Reg.12 (5) (d) Confidentiality of public authority proceedings when covered by law

Reg.12 (5) (e) Confidentiality of commercial or industrial information, when protected by law to cover legitimate economic interest

Reg.12 (5) (f) Interests of the person who provided the information

Reg.12 (5) (g) Protection of the environment

Reg.13 Personal data

NB If the information requested is information on emissions, exceptions 12(5)(d) to (g) cannot be used

6. The Public Interest Test

Where the public interest test applies to exemptions/exceptions [see 5(b)] the circumstances of each particular case and the exemption/exception that covers the information will require careful consideration.

The FOIA / EIRs do not define ‘**the public interest**’ and the following information is merely indicative.

There is an assumption in the FOIA that openness is, in itself, to be regarded as something which is in the public interest. The EIR expressly state in regulation 12(2) that “A public authority shall apply a presumption in favour of disclosure”. In applying the public interest test, a public authority should bear this in mind along with other considerations.

The application of the public interest test is a balancing exercise. An authority must weigh up opposing, pertinent considerations as to what would be in the public interest.

Some examples of the kinds of public interest considerations that might be taken into account include:

i. In favour of disclosure -

- General arguments in favour of promoting transparency, accountability and participation
- Disclosure might enhance the quality of discussions and decision making generally.
- The balance might be tipped in favour of disclosure by financial issues. For instance, if the information requested involved a large amount of public money, this might favour disclosure.
- The specific circumstances of the case and the content of the information requested in relation to those circumstances.
- The age of the information might tip the balance in favour of disclosure. The passage of time may impact upon the strength of the public interest arguments.
- The timing of a request, in respect of information relating to an investigation, may be relevant. This would depend on the stage the investigation had reached and how much information was in the public domain.

- The impact (beneficial or otherwise) of disclosure upon individuals and /or the wider public.

ii. In favour of non-disclosure –

- The specific circumstances of the case and the content of the information requested in relation to those circumstances.
- The age of the information might tip the balance in favour of maintaining the exemption or exception. The passage of time may impact upon the strength of the public interest arguments.
- The likelihood and severity of any harm or prejudice that disclosure could cause.
- The significance or sensitivity of the information. For instance, is it “live”?
- The need for a “safe space” for government and civil servants to formulate and debate issues away from public scrutiny.
- The balance might lie in favour of maintaining the exemption or exception in view of the risk of disclosure inhibiting frankness and candour in debate and decision making, especially within government. The strength of this argument depends on clear evidence that it will have this effect.
- In respect of information relating to an investigation, the timing of the request may be relevant, depending on the stage the investigation had reached, and how much information was in the public domain.
- The impact (beneficial or otherwise) of disclosure upon individuals and /or the wider public.

Irrelevant considerations in applying the public interest test

- The identity of the person making the request.
- The possibility that the information requested could be misunderstood or regarded as too technical or complex.
- The “status” of the information; for instance if it is classified, or if it relates to senior individuals.
- The number of exemptions being claimed.
- In relation to maintenance of the exemption, factors concerning a different exemption to the one being used are irrelevant.
- The accuracy of the information.
- Arguments that disclosure will lead to poorer record keeping.

If invoking any grounds for non-disclosure, **the decision maker must set out a reasoned argument** as to why they apply and what precisely the effect of disclosure would be.

When considering the public interest, appropriate weighting should be given to the arguments both **for** and **against** release. If the arguments are equally balanced

then disclosure must be favoured over retention. Such an approach is consistent with the Act and more likely to withstand any subsequent review or appeal.

7. Time Limit for Replies: Points to Note

The Act states that all requests should be dealt with promptly, and in any event within 20 working days. The 20 working day deadline is the maximum, not the minimum, time limit.

However, the commencement of the 20 working day time limit may be delayed for the following two reasons:

1. The request contains insufficient particulars to identify the records concerned.

In this circumstance: -

- (a) Request clarification from applicant by telephone if possible
- (b) [Template letter 3](#) requesting written clarification must be issued **immediately**,
- (c) The following data should be recorded by the Information Governance Team:
 - 1) date clarification sought
 - 2) date clarification received
 - 3) date reply issued
- (d) The decision letter [[Template letter 9/10/11](#)] issued should quote the specific, agreed, revised request wording.

2. A fees regulations notice is issued.

In this circumstance:

- (a) Fees regulations notice [[Template letter 4](#)] must be issued immediately. A number of supplementary points must be noted before this letter is used:
 - (i). Under the Section 46 FOI Code of Practice Invest NI must have appropriate measures in place to ensure adequate Records Management to respond effectively to FOI requests. These measures include use of EDRMS (Meridio) and other appropriate systems (Financial systems, CCMS etc).
 - (ii). In the event that the reasonable estimate of time spent **locating, retrieving and extracting** the requested information would exceed the appropriate limit (18hrs), all calculations must be recorded and

kept on file to provide evidence in the event of a review of the decision. The Information Commissioner can investigate the way in which an estimate has been arrived at, and, if he considers it to be unreasonable, he can substitute his own reasonable estimate.

(iii). The activity “extracting the information from a document containing it” refers to the extraction of the information that has been requested out of a document which contains other information, **not** to the extraction of exempt material from the information that has been requested.

(iv). Once the documentation containing the information has been located and retrieved, a public authority **cannot** take into account the time taken, or likely to be taken, to consider whether any of the requested information is exempt. Nor can it take into account the time taken, or likely to be taken, to remove the exempt information in order to leave the information that is to be disclosed in response to the request.

(v). The Fees Regulations do not apply to the Environmental Information Regulations 2004.

- (b) The following data should be recorded by the Decision Maker in a note to the Information Governance Team:
 - (i) date the fee notification issued;
 - (ii) the calculation used to demonstrate that the fees regulations have been exceeded (this must be reasonable and defensible to the ICO)

- (c) If a redefined request is not received within 3 months, the request will be considered closed and this will be updated on the FOI monitoring log.

The time limit for response **can only be extended** for the following reasons:

3. (i) Under FOI more time is required to reach a decision as to the balance of the public interest.

Where the decision maker and/or the Information Governance Manager cannot reach a decision within 20 working days it must be reached within a reasonable period but no later than 40 working days.

In this circumstance:

- (a) [[Template letter 5](#)] must be issued **as soon as possible**, A number of supplementary points must be noted before you use this letter.

(i). If there is some information to which no exemption applies that must be released within 20 working days and the template letter will need to be modified to reflect the fact that information is being disclosed.

(ii). If absolute exemptions apply to some of the information (i.e. no public interest test is required), you must provide the applicant with a full explanation as to why they apply to the information in the template letter as well (see Annex in Template letter 10). The extension in respect of the time for complying with requests applies only where you need to consider the balance of the public interest.

(iii). In some situations, a qualified exclusion may apply to the duty to confirm or deny and, due to the need to consider the balance of the public interest, you may not be in a position to confirm or deny whether you hold the information within the 20 working day deadline. If you need to extend time for complying with the duty to confirm or deny, the letter to the applicant must be very carefully drafted and you should seek advice before responding.

- (b) The following data should be recorded by the Decision Maker and passed to the Information Governance Team:

- 1) date the notification of public interest consideration was issued;
- 2) details of the consideration inc. date decision was reached and
- 3) date reply issued

- c) the decision letter [Std letter 10/11] should refer to the fact that public interest was considered.

3. (ii) Under EIRs more time is required to respond because of the complexity or volume of the information.

The time limit can be extended to 40 working days if the **complexity or volume** of the information requested means that it is impracticable to respond within 20 days, but if so, you must notify the applicant of this within 20 days.

8. Consultation Procedures

Please read in conjunction with Part VII of the FOI [Lord Chancellor's Section 45 Code of Practice](#) or with Part VII if the [Code of Practice for Public Authorities regarding their discharge of functions under the EIRs](#)

Formal Consultation

Formal consultation should be carried out when the release of records covered by the following exemptions is being considered on public interest grounds [see 5(b)]:

1. [Section 40](#): Third party information or
2. [Section 43](#): Commercial interests.

When dealing with such requests for information decision makers should bear the following points in mind:

1. The consideration of these exemption provisions is important. They require that a decision maker shall only disclose information in response to a request of a personal, commercially sensitive or confidential nature after having carefully considered whether disclosure of the information sought would be in the public interest bearing in mind the strong privacy rights of individuals who supply personal or other sensitive information to a public body.
2. Consideration must be given to relevant public interest factors for and against release. Thus public interest factors must be clearly set out in favour of both
 - a) protection and
 - b) disclosure.
3. Release in the public interest should occur unless the public interest factors in support of protection of the information (including the privacy rights of the person) are of such significance that they outweigh the public interest factors in favour of disclosure
4. Where such release is contemplated in the public interest, formal consultation must take place prior to any decision to release being taken.
5. If, following such consultation, the consultee remains opposed to the disclosure of the information then the final decision rests with Invest NI.
6. In all cases where formal consultation is being initiated the template letter [\[letter 6\]](#) must be used.
7. Formal consultation must be initiated **as soon as possible** following receipt of the request.

8. There is no provision for such formal third party consultation at the [Internal Review](#) stage.

Informal Consultation

Decision makers should consult, informally, with

- Applicants and/or 3rd parties where dialogue may improve understanding
- colleagues and senior management and
- **[If appropriate]** other Departments or public bodies (including NDPBs).

Informal consultation can be very helpful in terms of:

- (i) obtaining supporting views on the application of an exemption;
- (ii) supporting the basis for a decision;
- (iii) identifying the context of records which may be helpful in terms of establishing the sensitivity or otherwise of the records and
- (iv) assisting in a decision regarding the possible need for formal consultation.
- (v) refining the exact nature of a request for information
- (vi) discussing potential disclosure of 3rd party information

Identity of the applicant (during formal or informal consultation)

During the consultation process the identity of the applicant should **not** be disclosed to the third party. If a third party wishes to know the identity of an applicant against the applicant's wishes the third party should be advised to submit his/her request **in writing** for consideration by Invest NI (i.e. as an FOI request).

9. The Schedule

1. *Why a schedule should be prepared.*

The use of a schedule to list and describe the records, identified as being within the ambit of the request, is required by Invest NI for both the initial decision and at internal review.

Its purpose is to assist decision makers to discharge their duties under the FOI Act by:

- providing a means of ordering the records under consideration;
 - setting out clearly the considerations attaching to each;
- And
- providing an essential reference source for an internal reviewer or the Information Commissioner.

A version of the schedule – minus any information that is considered exempt and where there is no duty to confirm or deny the existence of this exempt information (exemptions 22-24 and 26-44) should be attached to the decision letter [\[Template letter 9/10/11\]](#) issued to the applicant. It will assist him/her by giving a clear overview of the records considered and the decision made in relation to each one.

2. *What a schedule should contain.*

The level of detail contained in a schedule will depend to a large extent on the nature of the request under consideration. It is recommended however, that every schedule lists each record sequentially by number and contains the following information:

- (a) the date of the record;
- (b) the author of the record and **either** the person or persons to whom it is addressed **or** the title of the record if it is a report or a submission of some kind;
- (c) a brief but sufficient description of the record or its contents;
- (d) **[if appropriate and a complete record]** the specific exemption claimed;
- (e) **[if appropriate and part(s) of a record]** a clear indication of the parts(s) relevant to the request, e.g. “paragraph 5 or lines 2 – 14 on page 3” and
- (f) **[if appropriate]** any public interest considerations.

There may be rare occasions when records can be grouped rather than listed individually. This should only be used as a last resort where the number of records is particularly voluminous. This approach **must** not deprive the applicant of any

specific information that he/she might need to make an informed decision about seeking a review.

A [Schedule template](#) is available on the intranet.

Information released should be clearly identified so as to relate to the schedule e.g. 'Record 1' etc..

3. *When a schedule is not required.*

The FOI Act allows public bodies to respond to requests on the basis of refusing to confirm or deny the existence of such records (exemptions 22-24 and 26-44). These provisions are necessary because in some instances merely confirming the existence of information will directly or implicitly disclose **withheld** information.

The use of the refusal to confirm or deny provision will be justified **only in certain situations**.

10. Internal Review Process

When an applicant requests a review of the public authority's response to their request for information the internal review process must be initiated.

An officer at least a grade higher than the person who made the original decision **must** always carry out this review. Within Invest NI there is a designated Internal Review Panel consisting of members of SMT and the Corporate Services Managing Director. The Director responsible for the review panel is Damian McAuley, Strategic Management & Planning.

The review is a fresh decision and the reviewer must start from scratch in terms of the evaluation of the evidence and the application of the Act. The reviewer can consider new arguments put forward by the applicant.

Procedures to be followed on receipt of a review application

- (a) register the request on the tracking system,
- (b) acknowledge the request including target completion date,
- (c) open a sub-folder and
- (d) pass the sub-folder to the relevant reviewing officer
within 1 – 2 days.

Procedures to be followed by the Reviewer

The Reviewer should try to come to a decision within 10 working days of receiving the papers if at all possible and if the decision is to disclose information, then this should be sent to the applicant immediately. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the applicant should be informed and the reason for the delay explained.

The Reviewer will probably wish to discuss details of the case under review with the Information Governance Manager and/or the original decision maker. The results of the review process should be recorded on the tracking system by the Information Governance Team.

The target for completion of Internal Reviews is **15 working days**. No review should take longer than 40 working days.

11. Review by the Information Commissioner

An independent review may be sought from the Information Commissioner if an applicant is not satisfied with the decision of the internal reviewer.

The applicant should be advised that such a complaint

- must be made in writing,
- should include copies of all relevant correspondence and
- should be sent to:

Information Commissioner's Office
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF

Procedures to be followed by the Information Governance Manager on receipt of a request for papers by the Information Commissioner

The Information Governance Manager should send all relevant papers to the Information Commissioner without delay and the following information should be recorded on the tracking system:

- 1) date request received from Information Commissioner;
- 2) date papers forwarded to Information Commissioner;
- 3) Commissioner's decision
- 4) Date of Commissioner's decision
- 5) **[If appropriate]** Date information sent to applicant
- 6) **[If appropriate]** Records now sent to applicant

It should be noted that the Information Commissioner has the statutory authority to access all documents including those where an exemption has been claimed. Therefore the complete set of records coming within the scope of the request should be sent to the Information Commissioner, showing what information has been withheld and grounds for non-disclosure specifying the exemption(s) that apply.

Appendix A

FOI Exemptions – Factors to be considered

This section provides a summary of each of the exemptions and the factors to be considered in order to decide if the exemption is appropriate.

(a) The Absolute Exemptions

There are 8 absolute exemptions. [*I.e. if the exemption applies it is not necessary to go on to consider disclosure in the public interest.*]

Section 21: Information is reasonably accessible by other means

Under section 21 a public authority does not need to provide information if it is reasonably accessible to the applicant by other means. This is an absolute exemption and is not subject to a public interest test.

If there is another route by which someone can obtain information, there is no need for the Act to provide the means of access. Public authorities are under a duty, set out in section 16 of the Act, to “provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made requests for information.” This means that there should be no possibility of applicants being left in any doubt as to how they can obtain the information which they want.

In the great majority of cases, it will be obvious whether the exemption applies. Occasionally there may be some doubt as to whether the information is genuinely accessible to the particular applicant and whether the authority must therefore do more than simply advise applicants as to how they can obtain the information they want. This guidance looks at the questions which may arise.

Payment

Applicants may complain that information is not reasonably accessible because it is not free. However, section 21 makes it clear that information may be reasonably accessible to the applicant even though there may be a charge. There are two cases where charges may be made:

- Where there is a specific statutory scheme under which information is provided for a fee, such as information from the local land charges registry.
- Where the information is provided under the authority’s publication scheme and the scheme indicates that a charge may be made for information falling within a particular class.

Disclosure required by law

If there is a legal duty to make information available, then it can be considered to be reasonably accessible even though it is not described in a publication scheme. This provision applies even if the information requested is available under statute from another public authority. For instance, a public authority might be asked for information relating to a company which it regulates. If that information is in fact available under statute from Company’s House, then it can be considered as

reasonably accessible to the applicant.

There is an important exception to this general rule: information which is only available on inspection, for instance by visiting the premises of the authority, is not to be considered reasonably accessible even though it is disclosed or published under statute unless it falls within a class of information included in the authority's publication scheme.

Information whose disclosure is not required by law

Where information is not published or made available under statute (other than the FOI Act) but is only available on request from the authority, then it cannot be considered as reasonably accessible unless it falls within a class of information defined in the authority's publication scheme.

It will generally be fair to assume that any information described within a publication scheme and made available under it is reasonably accessible to an applicant and that all the public authority needs to do, therefore, is to draw the applicant's attention to the scheme.

Occasionally this may not be sufficient. The Act does not give public authorities the right to enquire into the circumstances of the applicant. However, if the authority knows or is told of circumstances which will affect the applicant's ability to access the information it should take account of this when handling the request.

Invest NI should be aware of its responsibilities under Section 75 of the NI Act 1998 and the requirements to make reasonable adjustments.

Publication schemes must specify the manner in which information is published. For Invest NI the preferred form of publication is by the web. If this is the only form of publication, then information should be provided in hard copy form to applicants who do not have access to the internet on the basis that the information is not reasonably accessible to the applicant.

Section 23: Information supplied by or relating to bodies dealing with security matters, e.g. the Security Service or National Criminal Intelligence Service.

Section 23 of the FOIA gives an exemption for information “if it was directly or indirectly supplied to the public authority by, or relates to” any of the security bodies listed in section 23(3). This is an absolute exemption and is not subject to a public interest test.

Bodies dealing with security matters

This exemption can only be claimed for information supplied by or relating to the following bodies:

- The Security Service (MI5) and the Secret Intelligence Service (MI6).
- The Government Communications Headquarters (GCHQ) including any part of the armed forces which is for the time being assisting GCHQ in its functions.
- The special forces, such as the Special Air Service (SAS).
- The Investigatory Powers Tribunal.
- The Security Commission and the Security Vetting Appeals Panel.
- The Serious Organised Crime Agency (SOCA).

Note that this is an updated list correct as of January 2009.

This exemption is not based on the content of the information or the likely effect of disclosure. It applies to all information supplied by or relating to one of these bodies, even if it does not relate to national security, or would not have a damaging effect if disclosed.

It will not apply to all information with a national security element or to all information received from a body with some national security responsibilities, such as the police. Where section 23 does not apply, but an exemption is required for the purpose of safeguarding national security, an alternative exemption is available at section 24.

The exemption applies to any information which:

- was directly supplied to the public authority by one of the specified security bodies;
- was indirectly supplied by one of the specified security bodies; or,
- relates to one of the specified security bodies.

Confirm or deny

According to section 23(5) of the FOIA, an authority can give a “neither confirm nor deny” (NCND) response if confirming or denying that information is held would reveal information (including unrecorded information) supplied by or relating to one of the specified security bodies.

Section 32: Court records (including tribunals).

Court transcripts are documents created for the purposes of court proceedings by members of the administrative staff of the court and information in them is exempt under section 32. This is an absolute exemption and is not subject to a public interest test.

For these purposes, any person engaged to assist the proceedings of a court by carrying out administrative duties is a member of the administrative staff of the court. The individual does not have to be employed by the public authority providing administrative support for the court or tribunal. It extends to anyone employed, contracted or otherwise engaged for these purposes.

As the exemption applies to the information contained in the document, it continues to apply if a transcript or copy is held by any public authority.

Court transcripts will contain personal information. Public authorities need to be aware of their responsibilities under the Data Protection Act 1998 (DPA) for personal information contained in a court transcript. They will also need to be aware of the circumstances when a request for a court transcript should be treated as a subject access request under the DPA.

Section 34: Parliamentary privilege.

Section 34 of the Act provides that:

- Information is exempt information if exemption from section 1(1)(b) (the right to have the information communicated to the individual) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament;
- The duty to confirm or deny does not apply if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

A certificate signed by the Speaker of the House, in relation to the House of Commons, or the Clerk of the Parliaments, in relation to the House of Lords, certifying that exemption from section 1(1)(a) or 1(1)(a) and (b) is, or at any time was, required for the purpose of avoiding an infringement of the privileges of either House of Parliament, is conclusive evidence of that fact.

That being the case, the Commissioner cannot challenge the application of this exemption where it is supported by the appropriate certificate. However if no certificate is provided, the Commissioner can challenge the claim to this exemption.

Further information on Parliamentary privilege, including the report and recommendations from the Joint Committee on Parliamentary privilege can be found on the Houses of Parliament website "www.parliament.uk".

In the view of the Joint Committee, Parliamentary privilege would include, but not be limited, to:

- a) The giving of evidence before a House or a committee or an officer appointed by a House to receive such evidence;
- b) The presentation or submission of a document to a House or committee or an officer appointed by a House to receive it, once the document is accepted;
- c) The preparation of a document for the purposes of transacting the business of a House or committee, provided that any drafts, notes, advice or the like are not circulated more widely than is reasonable for the purposes of preparation;
- d) The formulation, making or publication of a document by a House or a committee;
- e) The maintenance of any register of the interests of the members of a House and any other register of interests prescribed by resolution of a House;
- f) A letter of complaint to the House of Commons Commissioner for standards, only after it has been taken up by the Commissioner for investigation;
- g) The register of members' interests and related proceedings.

Section 36: Prejudice to the effective conduct of public affairs, Information relating to the House of Commons or the House of Lords.

This exemption is an absolute exemption in so far as it relates to information held by the House of Commons or the House of Lords. A certificate signed by the Clerk to the Parliaments or by the Speaker of the House of Commons which certifies that in his reasonable opinion disclosure of the requested information by either House of Parliament, or compliance with the duty to confirm or deny would, or would be likely to, have any of the effects referred to above, shall be conclusive evidence of that fact.

This exemption cannot be claimed in respect of information contained in an historical record.

The words "in the reasonable opinion of a qualified person" do not apply in respect of statistical information.

Section 40: Personal data, if the applicant is the data subject & Personal information relating to a third party.

The exemption contained in section 40 of the Act concerns any information that constitutes personal data. The term “personal data” is taken from the Data Protection Act 1998 (the “DPA”).

General principles of exemption

Section 40 of the FOIA sets out an exemption from the right to know if the information requested is personal information protected by the DPA. The section has a fairly complex structure and refers in detail to DPA provisions and concepts.

The exemption is designed to address the tension between public access to official information and the need to protect personal information. Freedom of information requires the release of publicly held non-exempt information, and wrongly withholding information will breach the FOIA. However, wrongly releasing an individual’s personal information will breach the DPA. It is therefore very important to understand and apply this exemption correctly to ensure compliance with both regimes.

The exemption is an absolute exemption (except in some limited circumstances). This means that if the information falls within the exemption, there is no need to consider an additional public interest test.

However, information is not automatically exempt just because it is personal data. You will need to consider the details of the exemption. Any refusal notice will need to explain exactly which subsection applies, and why.

Section 40(1) sets out the exemption if the applicant is requesting their own personal data. These requests should be considered instead as subject access requests under section 7 of the DPA.

Section 40(2) sets out the exemption for someone else’s personal data (third party data) if one of the conditions in section 40(3) or 40(4) is met. These conditions require you to refer back to the DPA. The most common condition for the exemption to apply is where disclosure would breach one of the data protection principles contained in Schedule 1 of the DPA. You will therefore generally need to start with two broad questions:

- Is the information “personal data”?
- If so, will disclosure breach one of the data protection principles?

Is the information personal data?

The first step is to determine whether the requested information is (or contains) personal data. Section 40(7) of the FOIA confirms that the relevant definition is set out in section 1(1) of the DPA:

“personal data” means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

The information itself can be in any form, including electronic data, images, and paper files or documents. It does not have to be held in a database or filing system to be caught and will include so-called “category (e) data” – recorded information held in a manual, ‘unstructured’ form by a public authority. Essentially any reference to an individual in any document or other information held by a public authority can be personal data.

Whether information is personal data will often be obvious. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

Applicant’s own personal data

If the requested information is the applicant’s own personal data, there is an absolute exemption from FOIA access rights under section 40(1). In addition, section 40(5)(a) provides an exemption from the duty to confirm or deny.

Instead, the request will be a DPA subject access request and you will need to deal with it in accordance with the DPA. You must comply with the subject access request promptly and in any event within 40 calendar days.

If the requested information is the applicant’s own personal data but also includes information about other people, you should still deal with it as a subject access request. Section 40(1) of the FOIA still applies and you should handle the third party data in accordance with the relevant subject access provisions under the DPA.

You should only use section 40(1) and deal with a request as a subject access request if the identity of requester is clear and you can confirm that the information is their personal data.

Someone else’s personal data

If the requested information is (or contains) other people’s personal data, section 40(2) may apply. Section 40(2) sets out an exemption for third party data if one of the four conditions set out in section 40(3) or 40(4) is met.

The usual situation where the exemption will apply – and the focus of this guidance – is where disclosure of the personal data would breach one of the data protection principles set out in schedule 1 of the DPA. This is an absolute exemption, which means that if the condition is satisfied there is no additional public interest test to consider.

You may however still need to confirm or deny whether you hold the information, even if the information itself is exempt. Section 40(5)(b)(i) provides that the duty to confirm or deny still arises unless the confirmation or denial itself would breach the data protection principles or section 10 of the DPA (data subject’s right to prevent processing), or is exempt from section 7(1)(a) DPA (data subject’s right to be informed whether personal data is being processed).

Breach of the data protection principles

Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

The key question will be: is it fair and lawful to release the information under the first principle?

The first data protection principle

The first data protection principle states:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Disclosure must therefore be fair, lawful and meet one of the relevant DPA Schedule conditions. In the context of the FOIA, we recommend that you consider whether disclosure satisfies one of the specific conditions first, before moving on to the general consideration of fairness and lawfulness.

There are six conditions in Schedule 2, but only condition 1 (consent) or condition 6 (legitimate interests) should be relevant to disclosure under the FOIA. The other conditions all refer to disclosure for a specific purpose, which cannot apply as the FOIA is applicant- and motive-blind: you are disclosing to the public at large and cannot take the identity, intentions or purpose of the applicant into account. You should also note that the FOIA itself cannot be used to meet the third condition (that disclosure is necessary for compliance with a legal obligation). Section 40(3) of the FOIA makes clear that disclosure “otherwise than under this Act” must not breach the principles, which means that you cannot circumvent the requirements of the DPA in this way.

Unless all individuals whose personal data falls within the scope of the request have consented to the release of their information, you will need to consider Schedule 2 condition 6.

Schedule 2 condition 6

Condition 6 requires that:

6.—(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

As disclosure under the FOIA is considered disclosure to the public at large and not to the individual applicant, you will therefore need to balance the legitimate public interest in disclosure against the interests of the individual whose data it is. Although this requires consideration of the public interest in disclosure, the test is not the same as the public interest test used for qualified exemptions and there is no assumption of disclosure.

The ICO recommends that public authorities approach condition 6 as a three-part test:

1. there must be a legitimate public interest in disclosure;
2. the disclosure must be necessary to meet that public interest; and
3. the disclosure must not cause unwarranted harm to the interests of the individual.

Firstly, you should identify any legitimate public interest in disclosure. There must be genuine public interest at stake, not mere public curiosity. There is always some public interest in the principle of freedom of information and this will be one relevant factor to consider, but you should also consider the particular circumstances of the case.

Relevant considerations could include arguments relating to transparency, accountability, the number of people affected by a decision or how public money is being spent. You will then need to assess whether disclosure is necessary to achieve each of these aims, or whether there is another way to address the public interest that would interfere less with the privacy of individuals. Can any other existing mechanisms achieve the same result without the disclosure? Factors to consider could include a current lack of transparency and absence of other effective controls – for example, because a directly elected official is accountable mainly to the public, or because a system is self-certified without independent oversight – or a long history of controversy, which could suggest that other means have proved ineffective.

Finally, even if the disclosure is necessary to meet a legitimate public interest, you will need to weigh up whether that disclosure would nevertheless be an unwarranted interference with the individual's privacy. Essentially, this stage involves balancing the interests of the individual against the public interest in disclosure you have identified – i.e. against the collective weight of the public interest factors that have passed the necessity test. Factors to consider when weighing the interests of the individual may include:

- Whether the information relates to the individual's public life (ie their work as a public official or employee) or their private life (ie their home, family, social life or finances). Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position, and whether they have a public-facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (e.g. the official's family).
- The potential harm or distress that may be caused by the disclosure. For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. details of bank accounts) or pose a security risk (e.g. addresses, work locations or travel plans where there is a risk of harassment or other credible threat to the individual), which is unlikely

to be warranted. However, the focus should be on harm or distress in a personal capacity. A risk of embarrassment or public criticism over administrative decisions, or the interests of the public authority itself rather than the individual concerned, should not be taken into account.

- Whether the individual has objected to the disclosure. However, although such an objection would be a relevant factor, it is not automatically enough to make the disclosure unwarranted or unfair. You must consider all the circumstances of the case.
- The reasonable expectations of the individual as to whether their information would be disclosed. However, in the absence of other factors disclosure will not be automatically unwarranted or unfair just because the person was not aware of the possibility of disclosure. It is not possible to avoid your duties under the FOIA by not telling individuals that their data may be disclosed, or by stating that data will not be disclosed, and then arguing that disclosure would be unwarranted and unfair.

Disclosure will always involve some intrusion with privacy, but that intrusion will not always be unwarranted. You must consider all the circumstances of each case. If you think that full disclosure is unnecessary or would cause an unwarranted interference, you should consider whether disclosure of part of the information would be possible instead. If disclosure does not meet this condition, the information cannot be disclosed and there is no need to go on to the general consideration of fairness and lawfulness.

Is disclosure otherwise fair and lawful?

In addition to meeting a Schedule 2 condition, to comply with the first principle any disclosure must also be fair and lawful.

This requires a more general consideration of fairness. For practical purposes, disclosure will generally be fair if Schedule 2 condition 6 has been satisfied. This is because a general consideration of fairness will involve balancing very similar issues to those set out above.

If you have the data subject's consent to the disclosure under Schedule 2 condition 1 and have therefore not already considered condition 6, you will now need to consider whether the disclosure would be fair. It is likely that disclosure with consent will usually be fair, but you should take care to look at all the circumstances, particularly if consent was not explicit or where the individual concerned is young or otherwise vulnerable.

Disclosure under the FOIA will usually be lawful, unless there is a specific law forbidding disclosure. However, in those cases another exemption will generally be easier to apply: for example, section 44 (for any statutory prohibitions) or section 41 (for a breach of confidentiality).

The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law. One of these rights is the right to respect for private and family life of living persons (Article 8).

Public authorities should be aware of Article 8 when considering the relevance of the exemptions for personal information and confidential information. However, the Tribunal has confirmed that Article 8 does not act as a separate exemption from disclosure under FOIA.

The Human Rights Act 1998 will not make any fair disclosure unlawful, as the right to privacy will have been fully taken into account when considering the balance of fairness and the Schedule 2 conditions.

Section 41: Information provided in confidence.

Information is exempt information if:

- It was obtained by the public authority from any other person, including another public authority; and
- The disclosure of that information to the public (otherwise than under the Act) by the public authority would constitute a breach of confidence actionable by any person.

The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial would constitute an actionable breach of confidence. This is an absolute exemption and is not subject to a public interest test.

Information is only exempt information under section 41 where it is obtained by the public authority from another person, including another public authority, under a duty of confidence. For the exemption to apply, it must still be an actionable breach of confidence to disclose the information at the time the application is made. The exemption will not apply where the information passes between different parts of the same public authority.

Public authorities should note that this is a narrow exemption that only applies in the very limited circumstances outlined below. It will **not** automatically apply to all documents marked “confidential”.

Actionable breach of confidence

Where information is provided by one party to a contract to another party to the same contract, a court will look to the terms of the contract to ascertain whether there has been an actionable breach of confidence.

Where no contract exists or the terms of the contract do not sufficiently clarify the situation, an actionable breach of confidence will have occurred where:

- The material communicated had the necessary quality of confidence (in that it is of limited public availability and of specific character capable of clear definition);
- It was communicated or became known to the original recipient in circumstances entailing an obligation of confidence; and
- There has been an unauthorised use or disclosure of that material.

Information that is in the public domain or that is trivial in nature will not be protected by the law of confidence.

An obligation of confidence can arise in statute, contract or in equity. It can attach to a wide range of information such as trade secrets, technological information and artistic and literary ideas and may be implied from the relationship between the parties, such as medical adviser and patient or employer and employee.

The law of confidence applies to public authorities in their relationships with third parties just as it applies to individuals. Public authorities must, therefore, be alert to the circumstances in which they receive information that may be subject to a duty of confidence.

Information, to which an obligation of confidence applies, may in certain circumstances be disclosed by the recipient of the information where it is in the

public interest to do so and this may apply in both the private and the public sector. Accordingly, although the exemption under section 41 is expressed to be an absolute exemption, there is a public interest test in the law of confidence itself.

Confidentiality

A duty of confidence arises when one person (the “confidant”) is provided with information by another (the “confider”) in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected (for instance a person whose details were included in the information confided) may have the right to take action through the courts.

The law of confidence is a common law concept; it has been developed by the courts as individual cases have been brought before them.

For the purposes of FOI, the key issue is the disclosure rather than the use of information. In trying to determine whether an obligation of confidence has arisen in a particular case, it is likely to be necessary to think first about the circumstances under which information was provided and second about the nature of that information.

The circumstances under which the information was provided

There are essentially two cases:

- When the confider provides information to the authority, explicit conditions are attached to its subsequent use or disclosure. This may take the form of a contractual term or may be stated, for instance, in a letter.
- Conditions are not stated explicitly, but are obvious or implied from the circumstances. For instance a patient does not need to tell a doctor not to pass his or her information on to a journalist; it is simply understood that those are the rules.

The second case is more likely to give rise to some uncertainty since there is always the risk that the expectations of the confider and the confidant may be different.

The nature of the information

Information which is protected from disclosure by an obligation of confidence must have the necessary “quality of confidence”. There are two key elements to this:

- The information need not be highly sensitive, nor can it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion is undermined if it is argued that even trivial matters are covered.
- The information must not be readily available by other means. Information which has been reported in the press or a chemical formula which can be worked out by any chemical analyst, for instance, are unlikely to be viewed by the courts as being confidential.

When can confidential information be disclosed?

The duty of confidence is not absolute and the courts have recognised three broad circumstances under which confidential information may be disclosed. These are as follows:

- Disclosures with consent. If the person to whom the obligation of confidentiality is owed (whether an individual or an organisation) consents disclosure will not lead to an actionable breach of confidence.
- Disclosures which are required by law. "Law" in this context includes statute, rules of law, court orders etc. (Note, however, that if disclosures are requirements of law, it is unlikely that the person seeking the information will attempt to make use of FOIA in order to obtain it.)
- Disclosures where there is an overriding public interest required by the development of the common law. There are no hard and fast rules, but the important thing to note is that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong. A duty of confidence should not be overridden lightly.

Public authorities should weigh up the public interest in disclosure against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure would have on the interests of the confider. Much will depend on the circumstances of each case, but particular weight should be attached to the privacy rights of individuals.

The weight of the wider public interest in confidentiality will also depend to some extent on the context. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.

Actionable Breaches of Confidence

As noted above public authorities relying upon the exemption must be satisfied that any breach of confidence would be actionable. "Actionable" means that an aggrieved party would have the right to take the authority to court as a result of the disclosure. There are essentially two considerations.

- **The authority must be satisfied that the information in question is in fact confidential. If in doubt, it may be necessary to take advice, including from the person affected. In the final analysis, however, the authority itself must be satisfied that an obligation of confidence exists: there is no veto given to third parties who object to disclosure.**
- **The aggrieved party must have the legal standing to take action. The FOIA makes clear, for instance, that one government department cannot sue another.**

Practical Issues

Consideration will need to be given to information which has been provided to a public authority marked, “Confidential” or “Commercial in Confidence” and so on. Very often such markings do not provide a good indication of whether information has the necessary “quality of confidence”. What was confidential at the time of writing may no longer be at the time of a request for disclosure. It is also quite likely that some information will have been provided to an authority in the expectation that it would not be disclosed, even though no explicit restriction was placed upon it. In all these cases, if in doubt, it will be sensible to check the position with the provider of the information and any third parties, bearing in mind that it is the authority and not a third party which must decide if the exemption is relevant.

A document which contains only information generated by the public authority itself cannot be exempt under section 41, irrespective of any “confidential” marking, as the information must have been obtained from another to fall within the exemption.

However the information can be considered under another exemption such as [Section 43](#), information that is likely to prejudice the commercial interests of any person.

Section 44: Disclosure is already prohibited under another Statute, is incompatible with community obligations or could result in contempt of court proceedings.

Information is exempt information if its disclosure by the public authority holding it:

- Is prohibited by or under any enactment;
- Is incompatible with any Community obligation;
- Would constitute or be punishable as a contempt of court.

This is an absolute exemption and is not subject to a public interest test.

The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would fall within any of the above provisions.

Section 75 of the Act gives the Lord Chancellor the power to make Orders to repeal or amend any enactment capable of preventing the disclosure of information under section 1 of the Act.

The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law. One of these rights is the right to respect for private and family life of living persons (Article 8).

Public authorities should be aware of Article 8 when considering the relevance of the exemptions for personal information and confidential information. However, the Tribunal has confirmed that Article 8 does not act as a separate exemption from disclosure under FOIA. It does not come within section 44 (the exemption for disclosures prohibited by law).

When dealing with requests for information, public authorities should obtain their own legal advice on whether any information they hold is subject to a statutory prohibition. Public authorities should check whether the relevant prohibitions have been amended or repealed.

(b) Exemptions where the public interest test applies

There are 17 such exemptions.

[I.e. if the exemption applies does the public interest in excluding outweigh the public interest in disclosing?]

Section 22: Information intended for future publication.

Information is exempt information if:

- the information is held by the public authority with the intention of future publication by the public authority, or by some other person, whether or not the date for future publication has been determined;
- the information was already held with the intention of such publication at the time when the request for information was made; and
- it is reasonable in all the circumstances that the information should be withheld from disclosure until such time as the information is published by the public authority.

A public authority is not under a duty to confirm or deny the fact that it holds the requested information if to do so would involve the disclosure of information (whether or not already recorded) which falls within the conditions referred to above.

The Commissioner will expect public authorities seeking to rely upon this exemption to be able to produce some evidence to substantiate the claim that there was, at the time the request was made, a settled intention to publish.

The exemption also covers information held by the authority which another person (whether an individual, a company or another public authority) intends to publish. For instance one public authority may have been given a draft of a document which another intends to publish.

The exemption is not, however a blanket one. A public authority may only rely upon it "if it is reasonable in all the circumstances to do so". The public authority must consider whether it should keep to the original timetable for publication or whether the circumstances of the case, including the public interest, would warrant earlier disclosure.

The exemption may also cover some information which has not yet been prepared for publication. Although it does not apply to drafts in general, it may cover drafts of documents intended for publication. These may be the subject of an internal consultation exercise or an exercise involving a limited number of third parties.

The key issue is the likelihood of publication. For the exemption to be claimed there must be a firm intention to publish the information at the time the request is received. The fact that the information contained in a draft may be subject to amendment or may be omitted from the final published version of the information does not mean that it would be wrong to claim the exemption.

Information in an historical record in The National Archives or the [Public Record Office of Northern Ireland](#) will not be exempt information by virtue of this section.

Section 24: Safeguarding national security.

Information, which does not fall within section 23, is exempt information if exemption from the duty to communicate the information pursuant to section 1(1)(b) of the Act is required for the purpose of safeguarding national security.

The duty to confirm or deny does not arise if exemption from that duty is required for the purpose of safeguarding national security.

A certificate signed by a Minister of the Crown certifying that exemption from the duty of a public authority to communicate information, or from the duty to confirm and deny and to communicate information is, or at any time was, required for the purposes of safeguarding national security is (subject to the provisions set out in paragraph 3.2.4.1 below) conclusive evidence of that fact.

A certificate under [section 24](#) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

The Commissioner or any applicant whose request for information is affected by the issue of the certificate may appeal certificates issued under section 24 to the Information Tribunal.

Section 26: It would prejudice defence.

Information is exempt information if its disclosure would, or would be likely to prejudice:

- the defence of the British Islands or of any colony; or
- the capability, effectiveness or security of the armed forces of the Crown and any forces co-operating with those forces, or any part of any of those forces.

The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice any of the matters referred to above.

Section 27: It would prejudice international relations.

Information is exempt information if its disclosure would, or would be likely to, prejudice:

- relations between the United Kingdom and any other State;
- relations between the United Kingdom and any international organisation or international court;
- the interests of the United Kingdom abroad; or
- the promotion or protection by the United Kingdom of its interests abroad.

Information is also exempt information under this section if it is confidential information obtained from a State other than the United Kingdom or from an international organisation (one whose members include two or more states) or international court.

Any information obtained from a State, organisation or court is confidential at any time while it is required to be held in confidence, or, while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice any of the matters referred to above, or would involve the disclosure of information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom, or from an international organisation or international court.

Section 28: It would prejudice relations within the UK, e.g. between NI Assembly and National Assembly for Wales.

Information is exempt information if its disclosure under the Act would, or would be likely to, prejudice relations between any administration in the United Kingdom (which is defined as the government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly, or the National Assembly for Wales) and any other such administration.

The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would or would be likely to prejudice any of the matters referred to above.

This exemption cannot be claimed in respect of information contained in an historical record.

Section 29: It would prejudice the economy.

Information is exempt information if its disclosure under the Act would, or would be likely to, prejudice:

- the economic interests of the United Kingdom; or
- the financial interests of any administration in the United Kingdom; the expression “administration in the United Kingdom” having the same meaning as in section 28 above.

By referring to the “economic interests of the UK or any part of it”, the exemption seeks to protect communal interests rather than those of the individual. It is concerned with information that would damage the economy of the UK as a whole or a regional or local economy. The exemption does not prevent a public authority considering the effect of the release of information on an individual company where that company’s performance has a major influence on the national or local economy.

The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice any of the matters referred to above.

Section 30: Investigations and proceedings conducted by public bodies.

Section 30 creates an exemption for information:

- which is or has been held for the purposes of a criminal investigation;
- which is or has been held for criminal proceedings conducted by a public authority; or,
- which was obtained or recorded for various investigative functions and relates to the obtaining of information from confidential sources.

Criminal investigations and proceedings include matters dealt with in the Armed Forces either summarily or before a court-martial.

Section 30 provides a class based exemption. This means it is not necessary to identify some prejudice that may arise as a result of disclosure in order to engage the exemption.

As the exemption is subject to the public interest test, a public authority must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Although you do not have to identify some prejudice in order to engage the exemption, it will be an important factor when applying the public interest test.

The information described in section 30 is exempt only where the public authority has a duty, or the power, to carry out investigations or has a power to conduct the proceedings described below. Public authorities relying on the exemption need to be aware of the legal basis of any investigations or prosecutions which they carry out.

In the area of law enforcement and investigation, some powers and duties are conferred upon officers and officials rather than the organisations to which they belong. For example, the duty to investigate potential criminal activity is conferred on the individual constable rather than the police force. Similarly, it is individual officers of Her Majesty's Revenue and Customs who are granted powers of investigation. For the purposes of this exemption, a public authority is deemed to have the authority to investigate or prosecute that is held by the individual officers of the authority. Similarly, where the duty is invested in a Minister, it is deemed to be the duty of the relevant government department.

Section 31: It would prejudice law enforcement.

Section 31 of the FOIA creates an exemption from the right to know if releasing the information would or would be likely to prejudice:

- the prevention or detection of crime;
- the apprehension or prosecution of offenders;
- the administration of justice;
- the assessment or collection of tax, duty or similar imposition;
- the operation of immigration controls;
- the maintenance of security and good order in prisons and similar institutions;
- exercising functions for specified purposes; or,
- civil proceedings, or a fatal accident inquiry in Scotland, arising from investigations carried out for the specified purposes.

The exemption is qualified, which means it is subject to a public interest test.

Section 31 makes clear that in cases where information engages section 30, section 31 cannot be used. This does not mean that a public authority cannot consider both exemptions in relation to the same information. It does mean that an authority should make it clear in any refusal notice when both exemptions have been considered that section 31 can apply only to the extent that the information does not fall within the definition in section 30.

Information falls within the exemption if disclosure would, or would be likely to, prejudice a range of law enforcement functions and activities.

In considering the application of the exemption, a public authority should concentrate on the effect of disclosure in order to assess whether there is any likely prejudice to any of the law enforcement activities listed in the exemption. There is no need to consider why the information is held. This contrasts with the class-based exemption in section 30 which only applies to information that is held for specific purposes or functions.

This also means that the exemption can be applied by a public authority even though it does not itself carry out the law enforcement activity.

Section 33: Audits of accounts.

Unlike most of the exemptions in the Act, the public audit exemption can only be used by a limited number of public authorities, in particular, those which have “functions” in relation to:

- the audit of the accounts of other public authorities, or
- the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

This will clearly include the obvious public audit bodies such as the National Audit Office, the Audit Commission or the Northern Ireland Audit Office.

Public authorities who are subject to audit and who may, therefore, hold information which relates to public audit, for instance correspondence with auditors, draft reports and comments upon them etc, **cannot** claim the exemption.

The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice any of the functions of the public authority in relation to any of the matters referred to above.

This exemption cannot be claimed in respect of information contained in an historical record.

Section 35: Information held in relation to Government policy: Ministerial communications; Advice by law officers; Operation of a Ministerial private office.

Information held by a government department is exempt information if it relates to:

- the formulation or development of government policy;
- Ministerial communications;
- the provision of advice by any of the Law Officers or any request for the provision of such advice; or
- the operation of any Ministerial private office.

Section 35 is closely related to section 36 (Prejudice to the effective conduct of public affairs), although section 35 is only available for government departments and the Welsh Assembly. Information which is exempt under section 35 cannot also be exempt under section 36. Government department is defined in section 84 as including a Northern Ireland department, the Northern Ireland Court Service and any other body or authority exercising statutory functions on behalf of the Crown.

The information need only relate to the topics listed above. This means that it is broad enough to capture documents not only which themselves are ministerial communications etc, but which refer to those ministerial communications etc.

Section 35 is a qualified exemption, which means that even if information is exempt a public authority must consider whether there is an equal or greater public interest in disclosure.

As a general rule, the sensitivity of information is likely to reduce over time, so that the age of the information, or timing of the request may be relevant in determining

whether to apply the exemption or where the public interest may lie. Section 35 cannot be applied to information more than 30 years old as at that point it becomes a “historical record”.

Statistical information

The Act specifies that once a decision about government policy has been taken, statistical information used to provide a background to that decision taking will no longer be regarded as related to either the formulation or development of government policy, or to Ministerial communications. In other words, after policy decisions are made, in requests for information which relate to policy formulation or ministerial communications, statistical information is not exempt under s.35 and must be disclosed.

Indicators of a decision taken include public announcements about a policy or ministerial communication, or where a policy in its current form is capable of being applied or used.

Factual information

Subsection 35(4) provides an explicit indication that there is a strong public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. The ICO advises it is only where factual information is inextricably interlinked with advice etc, that it might not be disclosable in the public interest.

However, in distinguishing factual material from opinion, advice and recommendation, it must be stressed that just because something is not factual, it is not automatically exempt but, on the contrary, any decision not to release the information is subject to the public interest test.

35(1)(a) FORMULATION OR DEVELOPMENT OF GOVERNMENT POLICY

Government policy

Policy is not a precise term and to some extent what is regarded as policy depends on context. However, there is a general consensus that policy is about the development of options and priorities for ministers, who determine which options should be translated into political action and when.

The information must relate to government policy as compared to ‘departmental policy’ or any other type of policy. This suggests that it is policy which requires Cabinet input, or represents the collective view of ministers or that it applies across government. This also suggests that it is a political process. Departmental policy will frequently be derived from and be identical to government policy, however where a departmental policy applies only to the internal workings of the department it would not be caught (for instance, departmental policy about working hours or estate management).

An example of a government policy might be a policy to promote equality of opportunity by imposing a positive duty across the public sector. By contrast, the policies developed in support of that policy by a department’s personnel unit would be departmental policy.

Section 35(5) specifically includes the policy of the Executive Committee of the Northern Ireland Assembly in the definition of government policy.

The thinking behind this exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. The arguments for maintaining the privacy of this information are essentially that the threat of public exposure of this information will lead to less candid and robust discussions about policy, a fear of exploring extreme options, poorer recordkeeping, hard choices being avoided, good working relationships and the neutrality of the civil service being threatened. Ultimately the quality of government policy making could be undermined.

35(1)(b) MINISTERIAL COMMUNICATIONS

In the context of this exemption 'communications' should be taken to include written correspondence in any form (such as email), memoranda, ministerial submissions etc. Section 35(5) defines the extent of ministerial communications, i.e. communications between Ministers of the Crown, or between Northern Ireland Ministers, or between Assembly Secretaries. Communications between civil servants on behalf of their minister are also likely to be included.

Communications outside of these lines will not be caught i.e. between, for example a Minister of the Crown and a Northern Ireland Minister, or between a Welsh Assembly Secretary and a Northern Ireland Minister.

The presence of a ministerial signature on a document may bring that communication within the scope of the exemption, irrespective of its content. In applying the public interest however, the content of the communication is likely in itself to have a significant bearing on the decision to disclose in that the public interest test will be applied to the content of the information. Not all communications will cause such harm and in the absence of good reason to believe that such harm will occur, it will be difficult to justify a decision to withhold.

Passage of time may also be critical in determining the outcome of the public interest test in relation to disclosure of information contained within ministerial communications.

Public interest arguments in favour of disclosure would also challenge the assumption that the public are not already aware that there are differences of opinion between ministers. As such, disclosure would in fact promote accountability and transparency by showing that decisions have been made after a variety of views has been expressed and a robust debate has occurred. On the other hand, collective responsibility protects high level government decisions from becoming personalised and also enables ministers to be totally frank and candid in their discussions.

Finally, a public authority may, in applying the public interest test, seek to justify withholding information because of the embarrassment likely to be caused to an individual minister. It is important to understand, however, that there is no such exemption and any consideration of likely ministerial embarrassment cannot be justified.

35(1)(c) PROVISION OF ADVICE BY THE LAW OFFICERS

The Law Officers are listed in section 35(5) as the Attorney General, Solicitor General, Advocate General for Scotland, Lord Advocate and Attorney General for Northern Ireland.

Given the roles and functions of the various Law Officers it is most likely that information sought under the Act will be that which relates to the advice of the Attorney General, the government's principal legal advisor.

35(1)(d) MINISTERIAL PRIVATE OFFICE

Private offices form the bridge between the minister and their department and have a vital role in assisting the minister in achieving the best possible service from their department whilst ensuring that ministers efficiently dispatch the work generated by the department. The private office's role is to regulate the ministerial workload by allocating to others every possible task except that of making decisions.

Many aspects of the operation of ministerial private offices are not related to policy formulation. The exemption reflects the convention that whilst advisers advise on policy matters only a minister may decide and dispense that policy. **The purpose of the exemption therefore is to protect civil servants in order that the 'drafter' of a ministerial speech or letter of response will remain anonymous.**

In applying the public interest test, the exact nature of the information requested in relation to the operation of the ministerial private office is likely to have a significant bearing on the decision to disclose. The Information Commissioner will expect government departments to apply the public interest test in a manner that allows maximum information to be made available.

Requests for information regarding ministerial diaries and meetings will need to be decided on a case by case basis. Whilst in some cases the information requested is likely to be innocuous, for example the fact a meeting took place, in other cases the authority may judge it not to be in the public interest to confirm that a meeting took place as it would not wish to identify that a minister met with a specific individual. Additionally, the authority may be unwilling to release information regarding the details of the meeting itself claiming that it is not in the public interest to do so. An authority may also seek to use the public interest test to withhold details of the meeting arguing that to disclose information would prejudice future relationships between the parties to the meeting.

It is likely that a distinction will be made when deciding the public interest between a request for information concerning a minister's private and official business. Authorities will likely take the view that details of a minister's private arrangements should be withheld.

Concerns regarding security issues may also be given as a public interest justification for refusal of information regarding details of those working within the ministerial private office, their working hours and arrangements etc. In considering requests for information regarding the details of those working within the private office, Section 40 may also apply.

In dealing with requests for information falling outside the narrow interpretation of section 35(1)(d) a public authority will only be able to withhold the information by claiming one of the other exemptions within either section 35 or section 36 and confirming that on balance the public interest test permits withholding the information requested.

Section 36: It would prejudice the effective conduct of public affairs.

Section 36 of the Act sets out an exemption from the right to know if the disclosure of information, in the reasonable opinion of a qualified person, would prejudice the effective conduct of public affairs through:

- Prejudice or likely prejudice to the maintenance of the convention of collective responsibility of Ministers of the Crown, the work of the Executive Committee of the Northern Ireland Assembly or the work of the executive committee of the National Assembly for Wales
- Inhibition or likely inhibition of the free and frank provision of advice or exchange of views,
- Any other prejudice to the effective conduct of public affairs.

For information (other than 'statistical information') to be exempt under section 36, it must in the 'reasonable opinion of a qualified person' be capable of either prejudicing or inhibiting the matters listed above.

Who is the 'qualified person'?

Within Invest NI the qualified person is the Chief Executive.

What is a 'reasonable opinion'?

A reasonable opinion should be both reasonable in substance and reasonably arrived at.

The opinion must be objectively reasonable in substance. This does not need to be verified by evidence, as by its nature it will be a hypothetical judgment about what might happen in the future. Depending on the facts, it may be possible for conflicting opinions to have been reasonable. The Commissioner may well take a different view of what would have been the best decision in the circumstances, but this will not affect whether the opinion is considered reasonable in substance.

The process of reaching the decision must also have been reasonable. This should be supported by evidence, for example, that all relevant factors were taken into account.

The Information Commissioner is most likely to find an opinion to be overwhelmingly reasonable in substance where there is a wide-ranging and severe prejudicial effect on the ability of a public authority to carry out a core (rather than a subsidiary or support) function and where this effect would (rather than would be likely to) occur.

S36 (2) (b) (i) AND (ii) LIKELY TO INHIBIT THE FREE AND FRANK PROVISION OF ADVICE OR THE FREE AND FRANK EXCHANGE OF VIEWS FOR THE PURPOSES OF DELIBERATION

Section 36(2)(b)(i) and (ii) allow for the exemption of information if its disclosure would, or would be likely to inhibit the ability of public authority staff and others, when deliberating or providing advice, to express themselves openly, honestly and completely, or to explore extreme options. The exemption allows for information to

be withheld if its disclosure would inhibit the imparting or commissioning of advice, or the offering or requesting of opinions or considerations, subject to the public interest test.

'Inhibit' is not defined in the Act. The Information Commissioner's view is that in the context of s36 it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.

In this context 'advice' may refer, for example, to recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified government employees, advice from external sources, or advice supplied to external sources. There may be elements of advice from, for example, legal officers that would not fall within the exemption at s42 relating to legal professional privilege, such as presentational guidance from lawyers.

'Deliberation' tends to refer to the evaluation of the competing arguments or considerations that may have an influence on a public authority's course of action. It will include expressions of opinion and recommendations but will not include purely factual material or background information. The information must reveal the 'thinking process' or reflection that has gone into a decision.

Section 36(2)(b) acknowledges that the disclosure of information which reveals internal thinking processes may be detrimental to the ultimate quality of either policy-making (for non-section 35 bodies) or to other decision-making within a public authority. Some disclosures may lead to less candid and robust discussions, hard choices being avoided and ultimately the quality of government being undermined.

The Information Commissioner's view is that **there must be some clear, specific and credible evidence that the substance or quality of deliberations or advice would be materially altered for the worse**, by the threat of disclosure under FOIA.

S36 (2) (c) OTHERWISE PREJUDICE THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS

The Act does not define 'effective conduct' or 'public affairs'. Arguably, everything that a public authority does could be labelled 'public affairs'. Although section 36 (2) (c) has been described as a 'catch all' exemption, this is misleading. During the parliamentary debates on the FOI Bill, the government had indicated that the intention of the section was to cover those rare situations which could not be foreseen and which cannot be covered by another exemption, where it would be necessary to withhold information in the interests of good government, rather than catching anything and everything which is not otherwise going to be exempt.

S36 (2) (c) refers to the effective conduct of public affairs. The section is not, therefore, restricted solely to the functions of a public authority and its ability to perform those functions, nor to individual or discrete public authorities. S36 (2) (c) places the harm outside of the individual public authority and in the realm of 'public affairs'. The Commissioner considers that s36 (2) (c) would only be available in cases where the **disclosure would prejudice the public authority's ability to offer an effective public service, or to meet its wider objectives or purpose** (rather than simply to function) due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.

Section 37: Communications with HM/honours details.

Information is exempt information if it relates to:

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household; or
- (b) the grant of any honour or dignity by the Crown.

Section 37(1)(b) is intended to protect from disclosure information that relates to the conferring by the Crown of any honour or dignity. It is worth noting that only honours conferred by the Crown are included within the exemption; honours awarded by local authorities or institutions are not covered.

The duty to confirm or deny does not arise in relation to information that is (or if it were held by the public authority would be) exempt information because it falls within the matters referred to above.

Information falling within a) above contained in an historical record cannot be exempt information by virtue of this section.

Information falling within b) above cannot be exempt information by virtue of this section after the end of the period of sixty years beginning with the year following that in which the record containing the information was created.

Section 38: Disclosure would endanger the physical or mental health or safety of an individual.

Section 38 provides an exemption from disclosing information if such disclosure would endanger *any* individual (including the applicant, the supplier of the information or anyone else). In particular the section provides that information is exempt if its disclosure under the Act would, or would be likely to:

- endanger the physical or mental health of any individual, or
- endanger the safety of any individual.

Insofar as the information under request involves living individuals it will be covered by section 40 relating to personal information. The focus of section 38 will be on other information whose disclosure might pose a risk and this may include:

- Information about sites of controversial scientific research which may be targets for sabotage. There may be well founded fears that if the location of such sites were disclosed to individuals or groups opposed to the research there would be risks to the physical safety of staff;
- Information relating to the dead (not therefore covered by the personal information exemption) whose disclosure might endanger the mental health of surviving relatives;
- Information whose disclosure might have an adverse effect on public health.

Unlike the other exemptions in the Act subject to the prejudice test, the word “endanger” is used in section 38 rather than the word “prejudice”. The word “endanger” is perhaps used because it is more meaningful in the context of the individual than “prejudice.” In any event, the Commissioner does not consider that the use of the term “endanger” represents a departure from the test of prejudice to which section 38 is subject.

The Information Commissioner takes the view that the phrase ‘would or would be likely’ to prejudice or endanger means that there should be evidence of a significant risk to the physical or mental health or the safety of any individual.

The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would, or would be likely to, endanger the physical or mental health or the safety of any individual.

Section 38 is a qualified exemption. This means that even if the information requested is exempt the public authority must decide whether the public interest in maintaining the exemption outweighs the public interest in its disclosure. In other words the harm that would be likely to be caused to any individual by the disclosure would be greater than the public interest in the disclosure.

Applying the public interest test means weighing the harm that is identified in a particular exemption against the wider public interest that may be served by disclosure. The test must be applied on a case by case basis.

The Commissioner advises that, if a public authority wishes to withhold information because it poses a risk to mental health, it should consider obtaining an expert opinion confirming that the disclosure of the information would be likely to endanger the mental health of the applicant or any other individual.

Section 39: Environmental information.

Section 74 of the Act provides that the Lord Chancellor may make regulations to implement the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the “Aarhus Convention”) in so far as the Aarhus Convention relates to the provision of access to environmental information.

Section 39 of the Act provides that information is exempt information if a public authority is obliged to make it available under the Environmental Information Regulations, or if the public authority would be obliged to make it available but for any exemption in the regulations.

The duty to confirm or deny does not arise in relation to information that is (or if it were held by the public authority would be) exempt information by virtue of the above.

Section 40: Personal information.

The exemption contained in section 40 of the Act concerns any information that constitutes personal data. The term “personal data” is taken from the Data Protection Act 1998 (the “DPA”).

See [Section 40\(1\) & 40\(2\)](#) for the absolute exemption regarding the applicant requesting their own personal data or someone else’s personal data (third party data).

Section 40(3)(a)(ii) provides a qualified exemption where disclosure of personal data to a third party would contravene s10 of the DPA , that is, the right to prevent processing likely to cause distress.

Section 40(4) provides a qualified exemption where personal data is exempt from the data subject’s own right of access by virtue of any provisions of Part IV of the DPA, that is, the exemptions in ss27-39 which apply to areas such as national security, crime and taxation, and regulatory activity.

Section 42: Legal professional privilege.

Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

Section 42 sets out an exemption from the right to know for information protected by LPP. The exemption is qualified, meaning that it is subject to a public interest test.

LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the “dominant” (main) purpose of litigation. LPP can be lost (waived) if the information is shared with others.

If LPP applies, there will need to be strong public interest in disclosure to offset the inevitable strong public interest in favour of the exemption.

Public interest factors to consider may include whether the advice is still recent or live, how many people are affected, how much money is at stake, or a reasonable suspicion of illegality or misrepresentation.

You should use section 42 where you are the client or legal adviser. If you have obtained information from a third party it will often be easier to use the section 41 exemption for information provided in confidence instead.

Remember that you do not have to use the exemption. A client can always choose to waive their LPP and disclose the information in the interests of transparency.

The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

This exemption cannot be claimed in respect of information contained in an historical record.

Section 43: Commercial interests.

Section 43 of the Act sets out an exemption from the right to know if:

- the information requested is a trade secret, or
- release of the information is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the public authority itself or any other legal entity.)

Where the information requested constitutes a trade secret, there is no need to consider the harm its release may cause. The fact that the information is a trade secret is reason enough to withhold the information (subject to the public interest test).

Information which does not constitute a trade secret can only be withheld under this exemption if the public authority is satisfied that to release the information would damage someone's commercial interests. This is referred to as the prejudice test.

Section 43 does not apply beyond 30 years, the point at which information becomes a "historical record".

The Act provides that in responding to a request for information a public authority is obliged to inform the applicant whether it holds the information (known as "the duty to confirm or deny"), and if so to communicate it to them. In relation to trade secrets, section 43 does not remove the obligation to inform an applicant whether it holds the information that constitutes the trade secret.

By contrast, where the information requested is likely to prejudice commercial interests, section 43 not only provides an exemption from the obligation to communicate the information to the applicant, but can also provide an exemption from the requirement to inform the applicant whether the information is held. However a public authority can only refuse to confirm or deny whether it holds such information where this in itself would prejudice commercial interests.

Generally speaking, the public interest is served where access to the information would:

- further the understanding of, and participation in the debate of issues of the day;
- facilitate the accountability and transparency of public authorities for decisions taken by them;
- facilitate accountability and transparency in the spending of public money;
- allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions;
- bring to light information affecting public safety.

In considering the public interest it may also be helpful to bear in mind that certain considerations will not be relevant. For instance, if information is complex or

incomplete and therefore potentially misleading these factors should not, in themselves be used to justify non-disclosure.

COMMERCIAL INTERESTS

Trade secrets are one example of commercial interests. The concept is, however, far wider. A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.

While the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. For instance, it is the duty of an employer proposing to make over 100 employees redundant within 90 days to inform the Department for Business, Enterprise and Regulatory Reform. While this information does not relate directly to a commercial activity, it is easy to see how its disclosure would be likely to undermine a trading position.

There is a distinction to be drawn between commercial interests and financial interests. While there will be many cases where prejudice to the financial interests of a public authority may affect its commercial interests, this is not necessarily the case.

Types of Information that may affect Commercial Interests

Public authorities possess commercial information in numerous circumstances. This list is only indicative and there may be other situations in which a public authority holds such information.

- **Procurement** – public authorities are major purchasers of goods and services and will hold a wide range of information relating to the procurement process. This could be future procurement plans, information provided during a tendering process, including information contained in unsuccessful bids right through to the details of the contract with the successful company. There may also be details of how a contractor has performed under a contract.
- **Public authority's purchasing position** – a public authority will hold information about its own position as a purchaser in a commercial environment.
- **Regulation** – public authorities may be supplied with information in order to perform their regulatory functions e.g. the issuing of licences. Alternatively they may obtain commercial information whilst investigating potential breaches of regulations that they are responsible for.
- **Public authority's own commercial activities** – some public authorities, for instance publicly owned companies, are permitted to engage in commercial activities. Any information held in relation to these will potentially fall within the scope of the exemption.
- **Policy development** – during the formulation or evaluation of policy a public authority may seek information of a commercial nature. For example in developing a policy aimed at promoting a particular industry a public authority may solicit information from companies in that sector.

- **Policy Implementation** – e.g. policy of encouraging economic development via awarding grants, public authority will hold information in relation to the assessment of the business proposals when awarding those grants.

- **Private Finance Initiative/Public Private Partnerships** – the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life. In this context public authorities are likely to hold a good deal of information both related to the particular project in which a private partner is involved and more generally to the private partner's business.

It is important to note that the list above only refers to how a public authority, in the exercise of its functions, may come to hold information relating to commercial activities. It does not imply that all such information would be exempt. In order to apply the exemption it is necessary to consider whether the release of such information would prejudice someone's commercial interests. It will then be necessary to apply the public interest test.

THE TEST OF PREJUDICE

When deciding whether the release of information would, or would be likely to, harm someone's commercial interests it will be necessary to consider fully all the circumstances in question. For example whether the price of goods is commercially sensitive will depend on a number of factors. Releasing information on the price of goods purchased from a catalogue that was freely available to all would not prejudice the supplier's commercial interests. The price submitted by a contractor is likely to be commercially sensitive during the tendering process, but less likely to be so once the contract has been awarded. It could be misleading to present an indicative list of the sorts of information likely to prejudice someone's commercial interest. Instead below are some of the questions that should be considered in order to determine the impact that releasing the information would have:

a) Does the information relate to, or could it impact on a commercial activity?

As mentioned above there is a distinction between commercial interests and financial interests. Commercial information relates to the activity of buying or selling goods and services. Some information may have a very direct relationship with commercial activity e.g. the price at which goods are offered for sale. Other information may have a less direct link to a commercial transaction, for example, information that a company is considering relocating may have repercussions for labour relations which the company would wish to manage properly in order to minimise disruption to production.

b) Is that commercial activity conducted in a competitive environment?

The level of competition within an industry will affect whether the release of information will harm someone's commercial interests. Where a company enjoys a monopoly over the provision of the goods or services in question it is less likely that releasing the information will have a prejudicial impact on that company. Alternatively some public authorities may be the sole purchasers of specialist equipment, for example military hardware or medical supplies. In such situations the commercial

interests of the company could be more dependent on the procurement plans of the public authority in question rather than the effect of releasing commercial information.

c) Would there be damage to reputation or business confidence?

There may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance. In these circumstances the commercial interest exemption may be engaged. However it should be noted that there is no exemption for embarrassment, only where there is a real risk of such harm being caused could the exemption be engaged.

d) Whose commercial interests are affected?

In many cases it will be clear whose commercial interests are likely to be prejudiced by a disclosure of information. However, in other circumstances more thought may be required to identify the stakeholders. Could the release of information operate to the disadvantage of the public authority? For instance, by disclosing the budget set aside for a purchase, would this encourage suppliers to raise their prices? Could the information prejudice the bargaining position of the public authority? Will the information impact on the commercial interests of a contractor's suppliers or investors?

e) Is the information commercially sensitive?

Companies compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered, but that difference may also relate to quality or specification. Information which identifies how a company has developed that unique element is more likely to be commercially sensitive. For example where a company competes on price, it may be that the final price charged is readily available, however information disclosing how the company is able to offer the product at that price may not be. That is, information revealing profit margins is more likely to be commercially sensitive. This argument can extend to working practices etc. that allow a quality of service to be more efficiently delivered.

f) What is the likelihood of the prejudice being caused?

Deciding whether or not a particular disclosure would be likely to cause prejudice will often require the exercise of judgement. It will be necessary to judge, in other words, what may be the nature of the harm that would be caused and, also, the likelihood of that harm. While the "prejudice" that may be caused by disclosure may not be substantial, nor should it be completely trivial. As for likelihood, while prejudice need not be certain, **there must be a significant risk rather than a remote possibility of prejudice.**

THE PUBLIC INTEREST

Whether the information requested forms a trade secret or relates to another type of commercial interest, a public authority considering the section 43 exemption must consider whether there is an overriding public interest in providing the information. In practice this is likely to involve weighing the prejudice caused by possible disclosure against the likely benefit to the wider public.

a) General public interest factors

The factors discussed here are not the only ones that should be considered. However, they illustrate the sort of approach that public authorities should take. Although there is a strong public interest in openness, this does not necessarily override all other considerations.

1. Accountability for the spending of public money

Clearly there is a public interest in the scrutiny of how public money is spent. This will be equally true whether a public authority is purchasing goods or services or responsible for awarding grants to private sector companies. Transparency of decisions on how public funds are spent will also generate confidence in the integrity of the procedures involved.

Where a public authority is purchasing goods or services there is a public interest in ensuring it gets value for money. This is particularly relevant at a time when there is a public debate around the increasing role private companies have in delivering public services.

2. Protection of the public

In the course of its role as a regulator, a public authority may hold information on the quality of products or on the conduct of private companies. There would be strong public interest arguments in allowing access to information which would help protect the public from unsafe products or dubious practices, even though this might involve revealing information that is likely to harm the commercial interests of a company.

3. Circumstances under which the public authority obtained the information

Where a public authority obtained information using statutory powers, the disclosure of that information is unlikely to prevent the obtaining of similar information in the future. (Before making a disclosure, however, authorities should also consider whether they are prevented from doing so by the legislation used to obtain the information or by a duty of confidence.) Where there has been no obligation to provide information, for instance in the course of research being conducted by the authority, the general presumption in favour of disclosure would have to be carefully weighed against the risk of discouraging private companies from participating in research in the future.

4. Competition issues

There is a public interest in ensuring that companies are able to compete fairly. There is also a public interest in ensuring that there is competition for public sector

contracts. In considering the release of information, authorities should therefore take these issues into account, including any reputational damage that disclosure might cause.

Policies on industrial regeneration, for example, may be implemented through a scheme offering assistance to private companies. The authority sponsoring the scheme may carry out a check on a company's standing before making a grant to it. Companies may be discouraged from participating in the scheme if they felt it could result in the disclosure of information relating to their general business. In this example, although the public interest would not be served by reducing the participation in the scheme, there is also a public interest in understanding the circumstances in which public money is provided to private companies.

The Information Commissioner has advised that public authorities should be wary of accepting arguments that the potential for commercial information to be released would reduce the number of companies willing to do business with the public sector, leading to reduced competition and increased costs. In practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the overall value of public sector contracts is a great incentive to tender for them.

It is the view of the Information Commissioner that increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition.

b) Timing

Very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made. Circumstances will change over time. Information submitted during a tendering process is more likely to be commercially sensitive whilst the tendering process is ongoing compared to once the contract has been awarded. Information refused at one point in time does not mean that the information can be permanently withheld. Market conditions will change and some information, such as those relating to costs, may very quickly become out of date.

PRACTICAL ISSUES

a) Consultation

In order to determine whether the disclosure of information would prejudice a commercial interest, a public authority should, in accordance with the Secretary of State's Code of Practice, consult with the parties likely to be affected by any disclosure. Time is, however, likely to be limited since the public authority must decide whether the exemption applies within 20 working days. A failure to respond by those being consulted does not remove the obligation to respond within that time

limit. It will be helpful therefore to have discussions with suppliers and contractors as to the types of information whose disclosure they would consider would harm their commercial interests. It may also be helpful to agree the circumstances under which the public authority will consult in the event of requests in the future.

It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal.

Although public authorities should consider the views of the affected party, **it is the responsibility of the public authority to decide whether or not the exemption applies.** The public authority can only withhold information if it is satisfied that any arguments for withholding the information are justified.

Appendix B

Exceptions – Factors to be considered

This section provides a summary of each of the exceptions and the factors to be considered in order to decide if the exception is appropriate.

- Regulation 12(4) applies to certain circumstances and categories of information.
- Regulation 12(5) applies where the disclosure would have one of the adverse effects listed in that regulation.

Reg. 12 (4) (a) Does not hold that information when an applicant's request is received

“Hold” is to be interpreted widely here. Any information in the possession of the public authority or which is stored elsewhere and is held by a natural or legal person on behalf of, or solely in connection with, services provided to a public authority is ‘held’ by it.

It follows that this exception only applies if the body receiving the request does not hold the information nor make use of the services of another body or person to hold this information on its behalf, and would therefore have no other option but to provide relevant advice and assistance and ask the applicant if they would like the request to be transferred where it appears the information is held by another public authority.

A public authority is under no duty to use its resources to create new data in response to an information request. However, a public authority may consider it appropriate to advise the applicant of any similar or related information that is “held”.

Reg. 12 (4) (b) Is manifestly unreasonable

These requests could include requests for information that place a substantial and unreasonable burden on the resources of a public authority. Examples might be when the amount of information sought is considerable, when extensive scans of historic files prove necessary, or when significant searching in large databases or files of information is necessary.

One of the factors to be taken into consideration is whether the work involved would require an unreasonable diversion of resources from the provision of the public services for which the public authority is mandated. In some cases it may be possible to provide the applicant with access to the information so that they can research the topic for themselves.

Manifestly unreasonable would include vexatious requests, or requests where the authority has evidence that the purpose of the request is to waste the time of the authority.

Reg. 12 (4) (c) Is formulated in too general a manner (provided assistance has been given to the applicant with a view to re-framing the request)

A public authority may only refuse a request on the grounds that it is formulated in too general a manner to permit the information to be identified and supplied if the public authority has complied with its duty to provide advice and assistance set out in Regulation 9 and in the Code of Practice.

It would not be appropriate to refuse a request simply because the applicant was unfamiliar with the correct terminology or unfamiliar with the way in which records are stored by the public authority. A request, for example, for all the information you hold on a particular subject, may be too general. In most cases, however, talking to the applicant about the information held and their request leads to the applicant being able to be more specific about the information they want.

Reg. 12 (4) (d) Relates to unfinished documents or incomplete data

This exception covers most work in progress. The authority must consider the status of the information at the time of the request. The public interest test is an important consideration; the ICO consider that the public interest in maintaining this exception will decline once the final version of a document has been completed.

When refusing a request under this exception, the authority must specify the information together with “the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed”.

If a document is, for all practical purposes, completed and no other exception, applies, consideration may be given to making the information available, albeit with any necessary explanation that there may be further revision, or a reasonable date for its publication should be set. Any such considerations will need to take account of the public interest factors surrounding the disclosure of such a document.

Reg. 12 (4) (e) Would involve disclosure of internal communications

This exception should be interpreted broadly and may cover a wide range of internal communications. In practice the scope of this exception is likely to be narrowed by the application of the public interest test.

The ICO consider that it may cover circumstances similar to those in [Section 35](#) of the FOIA (Policy Formulation, ministerial communications, Law Officers’ advice and the operation of a Ministerial Private Office) or [Section 36](#) (The Effective Conduct of Public Affairs), covering a “private thinking space” for officials.

The EIR state that “internal communications include communications between government departments”. This also covers communications between central government departments and their internal executive agencies.

Communications between a central government department and a local authority or two local authorities will **not** constitute “internal communications” under this regulation.

In general terms a communication from an external adviser would **not** amount to an internal communication but would depend on the facts of the case. In exceptional circumstances the tribunal has found that such a communication to constitute an internal communication. However regulation 12(4)(e) will not be applicable in all situations involving external advisers.

When applying this exception to information from another body, consideration should be given to the relationship between the two bodies. An authority needs to explain why it considers a particular communication from another body or person is covered by this exception.

Reg.12 (5) (a) International relations, defence, national security or public safety

When using the exceptions under Regulation 12(5) it is important for the public authority to consider how the interest protected would be adversely affected or prejudiced by the disclosure.

The term “international relations” refers to relationships between the UK and other governments or international bodies such as the UN, EU or an international court.

The term “national security” relates to some defence matters and wider security concerns. “Public safety” may be interpreted widely. It covers information whose disclosure would adversely impact upon the protection of the public, public buildings and industrial sites from accident or acts of sabotage and where the disclosure of information would have an adverse effect upon the health and safety of the public.

In relation to national security, regulation 15 allows a Minister of the Crown (or a person designated by a minister) to approve a refusal to disclose the information by certifying that disclosure would adversely affect national security and would not be in the public interest.

In accordance with regulation 12(6), an authority is able to opt neither to confirm nor deny whether the information exists and is held, if this would adversely affect any of the matters listed under regulation 12(5)(a). This is subject to the public interest test.

Reg.12 (5) (b) The course of justice, fair trial, conduct of a criminal or disciplinary inquiry

When using the exceptions under Regulation 12(5) it is important for the public authority to consider how the interest protected would be adversely affected or prejudiced by the disclosure.

The meaning of “the course of justice” is quite broad and would include the concept of legal professional privilege. The meaning of “an enquiry of a criminal or disciplinary nature” is also broad but its precise limits are not yet clear.

Please note, in addition, that regulation 3(3) provides that when a public authority is acting “in a judicial or legislative capacity”, it is not covered by the EIR. The extent to which this regulation applies depends upon the interpretation of it in relation to the function of the authority in question.

The ICO view is that “judicial capacity” excludes courts and tribunals from the EIR.

Reg.12 (5) (c) Intellectual property rights

When using the exceptions under Regulation 12(5) it is important for the public authority to consider how the interest protected would be adversely affected or prejudiced by the disclosure.

An authority may refuse a request for information protected by intellectual property rights. “Intellectual property rights” are rights granted to creators and owners of works that are the result of human intellectual creativity. These works could be in the industrial, scientific, literary or artistic domain. Intellectual property rights include copyrights, patents, trademarks and protected designs. They may be in the form of, for example, an invention, a manuscript, a suite of software, or a business name.

Intellectual property rights have more protection under the EIR than under the FOIA. The exception protects the rights of the authority as well as third parties. An authority must be able to demonstrate that there is a real risk that disclosure would undermine the intellectual property rights.

Reg.12 (5) (d) Confidentiality of public authority proceedings when covered by law

When using the exceptions under Regulation 12(5) it is important for the public authority to consider how the interest protected would be adversely affected or prejudiced by the disclosure.

A public authority cannot use this exception for environmental information that relates to information on emissions.

The proceedings in question may be those of the public authority receiving the request or any other public authority. The meaning of the term “proceedings” is not limited to formal proceedings and it will not include all activities of a public authority. However, it may not, for example, include papers discussed at meetings, where those have not been prepared exclusively for the purpose.

There must be a duty of confidence in relation to the information in question, provided by law either on the basis of statute or by common law. It may also be helpful to refer to the notes on regulation 12(5)(e), below.

The marking of a document as ‘Restricted’ or ‘Secret’ should be taken only as an indication of the sensitivity of the contents, and should not automatically mean refusal of all environmental information therein.

Reg.12 (5) (e) Confidentiality of commercial or industrial information, when protected by law to cover legitimate economic interest

When using the exceptions under Regulation 12(5) it is important for the public authority to consider how the interest protected would be adversely affected or prejudiced by the disclosure.

A public authority cannot use this exception for environmental information that relates to information on emissions.

This regulation should be taken to apply where the following conditions are met:

- (1) the information in question is commercial or industrial in nature;
- (2) the information is confidential;
- (3) the confidentiality of the information protects a legitimate economic interest; and
- (4) disclosure would adversely affect the confidentiality of the information.

Unlike the FOIA, the EIR do not require a potential breach of confidence to be “actionable”. This exception may cover a wide range of “commercial or industrial information” in the circumstances specified. It could cover either an individual or a body or the public authority itself. For instance, it could include information supplied in relation to a tendering or procurement process and information held by regulators.

The confidentiality of commercial or industrial information must safeguard a legitimate economic interest. Confidentiality per se is not determinative – it must also relate to the protection of legitimate economic interests.

Reg.12 (5) (f) Interests of the person who provided the information

When using the exceptions under Regulation 12(5) it is important for the public authority to consider how the interest protected would be adversely affected or prejudiced by the disclosure.

A public authority cannot use this exception for environmental information that relates to information on emissions.

This exception covers the interests of a person who:

- supplied information voluntarily,
- supplied it in the expectation that it would not be disclosed to a third party, and
- has not consented to disclosure of the information supplied.

Examples of the sort of information this exception covers could be where individuals provide information in response to a survey (where they have not given consent to release into the public domain), or in relation to privately owned papers deposited in a public record or archive.

If the public authority could have required the information pursuant to a legal obligation had it not been provided voluntarily then that information will not fall within this exception.

Reg.12 (5) (g) Protection of the environment

When using the exceptions under Regulation 12(5) it is important for the public authority to consider how the interest protected would be adversely affected or prejudiced by the disclosure.

A public authority cannot use this exception for environmental information that relates to information on emissions.

This exception reflects the purpose of the EIR, and the EU Directive and Aarhus Convention upon which they are based. The purpose is to increase the protection of the environment by ensuring greater access to environmental information. For instance, it would clearly be contradictory if disclosure of information led to damage to the environment. An example of a disclosure which could have this effect might be information relating to the nesting sites of rare birds, or the location of vulnerable archaeological sites.

Reg.13 Personal data

The fact that environmental information that has been requested contains personal data will not necessarily mean that this part of the request must be refused. Disclosure of personal data is permissible if there is no breach of the Data Protection Principles or the other conditions. Where the disclosure is not permitted, as with other exceptions, it may be possible to separate the personal data from the other information requested, or to provide a summary that excludes any personal data, where these cannot be disclosed.

See [FOIA Section 40](#) Data Protection

APPENDIX C

Standard Template letters to use when handling FoI / EIR Requests

- Letter 1 - [Acknowledgement](#)
- Letter 2 - [Pointers to existence of information in published form](#)
- Letter 3 - [Clarification of Request](#)
- Letter 4 - [Exceeds appropriate limit re FEE REGULATIONS](#)
- Letter 5 - [Extension of time limit – Public Interest Test](#)
- Letter 6 - [Third Party Consultation - First letter](#)
- Letter 7 - [Informs Third Party of decision](#)
- Letter 8 - [Informs 3rd party of appeal to ICO re withheld information](#)
- Letter 9 - [Response: Provides information requested](#)
- Letter 10 - [Response: Informs all information is being withheld](#)
- Letter 11 - [Response: Some information is being withheld Some Provided](#)
- Letter 12 - [Information not held, cannot be located or has been destroyed](#)

**Letter 1
Acknowledgement**

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our FOI/EIR ref no.
reference:**

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

Thank you for your request for information about [*subject*]. Your request was received on [*date*] and I am dealing with it under the terms of the above legislation.

We will aim to respond to your request as soon as possible but no later than 20 working days.

In some circumstances a fee may be payable but if that is the case I will let you know the likely charges before proceeding.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc
[Name and title of issuing officer]

**Letter 2
Acknowledgement and pointers to
existence of information in published form**

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our FOI/EIR ref no.
reference:**

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

Thank you for your request for information about [*subject*]. Your request was received on [*date*] and I am dealing with it under the terms of the above legislation.

Under the legislation Invest NI is not required to provide information that is already available in a form accessible by the public. The information you requested is available [¹*from the Stationery Office, price £XX*] [*on the Invest NI website (url)*]. *If you do not have access to the Internet at home, you may be able to use facilities at your local public library, or you can request a paper copy by contacting me*].

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc
[Name and title of issuing officer]

¹ Amend as appropriate. This letter should be used to confirm an earlier telephone conversation with the applicant. REMOVE THIS FOOTNOTE

Letter 3
Clarification of Request

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our FOI/EIR ref no.
reference:**

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I am writing regarding your request for information, which I received on [date]. In that request, you asked us for [outline of request]

[As discussed by email/telephone] I will be unable to proceed with your request without clarification of the information you wish to receive. To help us do so, I would like to know [specific question].

Please note that if I do not receive appropriate clarification of your information requirements by [date], which is three months from the date of this letter, then I will consider your request closed.

If you wish to discuss any of the above, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc
[Name and title of issuing officer]

Letter 4
Redefine request as exceeds appropriate
limit of FEE REGULATIONS

*see Footnote before use

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our
reference: FOI**

Date

Dear [Dr, Mr Mrs, Ms etc]

Freedom of Information Act 2000

I am writing regarding your request for information, which I received on [date]. In that request, you asked us for [outline of request].

I can confirm that Invest NI holds information that falls within the description specified in your request. [unless to do so exceeds appropriate limit] However, I have estimated that it will cost more than the appropriate limit to consider your request.

The Fees Regulations associated with the UK Freedom of Information legislation permit an authority to charge for costs it reasonably expects to incur in determining whether it holds the information requested, locating the information (or documents containing the information), retrieving such information or documents and extracting the required information from said documents. We may take into account the costs attributable to the time that staff are expected to spend on these activities at the rate of £25/hour.

The Regulations also remove the obligation from public authorities to respond to requests for information should the cost of doing so exceed their appropriate limit. In the case of Invest NI this limit is £450.

Given the length of time that would need to be spent to locate, retrieve and extract the requested information this would exceed our limit. *[brief explanation for search exceeding 18hrs]*.

Under section 12 of the legislation Invest NI is not obliged to comply with your request and we will not be processing your request further. In view of this you may wish to consider being more specific regarding the information you require so that your request can be refined to a more manageable level, or resubmitted in part, to bring it below the £450 limit. We have estimated that we can provide *[provide suggestion that would bring request within scope]*.

Please note that if I do not receive appropriate redefinition of your information requirements, to bring it in scope with the fees regulations, by *[date]*, which is two months from the date of this letter, then I will consider your current request closed.

You have the right to request a formal review by Invest NI within two calendar months of the date of this letter and if you wish to do so, please write to Danny Smyth, Information Governance Manager, Bedford Square, Bedford Street, Belfast, BT2 7ES.

If after such an internal review you are still unhappy with the response, you have the right to appeal to the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, who will undertake an independent review.

If you wish to discuss any of the above, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc

[Name and title of issuing officer]

*REMOVE THIS FOOTNOTE:

A number of supplementary points must be noted before you use this letter.

1. Under the Section 46 FOI Code of Practice we must have appropriate measures in place to ensure adequate Records Management to respond effectively to FOI requests. Our measures include use of EDRMS (Meridio) and other appropriate systems (Financial systems).

2. In the event that the reasonable estimate of time spent locating, retrieving and extracting the requested information would exceed the appropriate limit, all calculations must be recorded and kept on file to provide evidence in the event of a review of the decision. The Information Commissioner can investigate the way in which an estimate has been arrived at, and, if he considers it to be unreasonable, he can substitute his own reasonable estimate.

3. The activity "extracting the information from a document containing it" refers to the extraction of the information that has been requested out of a document which contains other information, **not** to the extraction of exempt material from the information that has been requested.

4. Once the documentation containing the information has been located and retrieved, a public authority cannot take into account the time taken, or likely to be taken, to consider whether any of the requested information is exempt. Nor can it take into account the time taken, or likely to be taken, to remove the exempt information in order to leave the information that is to be disclosed in response to the request.

5. The Fees Regulations do not apply to the Environmental Information Regulations 2004.

**Letter 5
Extension of time limit – Public Interest
Test**

*see Footnote before use

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our FOI/EIR ref no.
reference:**

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I am writing to advise you that I need to extend the time limit for responding to your request for information under the above legislation, which Invest NI received on [date].

The legislation obliges us to respond to requests promptly and, in any case, no later than 20 working days after receiving your request. However, when a qualified exemption applies to the information and the public interest test is engaged, the Act allows the time for response to be longer than 20 working days, and a full response must be provided within such time as is reasonable in all circumstances of the case.

We do, of course, aim to make all decisions within 20 working days, including in cases where we need to consider where the public interest lies in respect of a request for exempt information. In this case, however, we have not yet reached a decision on where the balance of the public interest lies.

In your case we estimate that it will take an additional [xx] days to take a decision on where the balance of the public interest lies. Therefore, we plan to let you have a response by [date]. If it appears that it will take longer than this to reach a conclusion, we will keep you informed.

The specific exemption(s) which apply in relation to your request [is/are] included in the Annex to this letter [*Use Annex from Template 10*].

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc
[Name and title of issuing officer]

***REMOVE THIS FOOTNOTE:**

A number of supplementary points must be noted before you use this letter.

1. If there is some information to which no exemption applies that must be released within 20 working days and this letter will need to be modified to reflect the fact that information is being disclosed.
2. If absolute exemptions apply to some of the information, you must provide the applicant with a full explanation as to why they apply to the information in this letter as well (see Annex in Template 10). The extension in respect of the time for complying with requests applies only where you need to consider the balance of the public interest.
3. In some situations, a qualified exclusion may apply to the duty to confirm or deny and, due to the need to consider the balance of the public interest, you may not be in a position to confirm or deny whether you hold the information within the 20 working day deadline. If you need to extend time for complying with the duty to confirm or deny, the letter to the applicant must be very carefully drafted and you should seek advice before responding.

Letter 6
First letter to third party

**Third party's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our FOI/EIR ref no.
reference:**

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I am writing to you in connection with a request for information received by Invest NI under the above legislation. Part of the information requested [was supplied by/relates to] you and a [copy of this/description of the information] is enclosed.

Invest NI will normally disclose information unless the public interest is better served by withholding it.

If you consider that the information supplied by you should not be disclosed, please let me have written details of how, in your view, disclosure of the information would be harmful to your interests.

Your response must reach me by [date] to enable us to take your views into account in deciding whether to disclose the information. If you do not make a submission by that date, we will assume you have no objections to the information being disclosed.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc

[Name and title of issuing officer]

**Letter 7
Informs 3rd party that Invest NI [is / is not]
providing 3rd party information**

Third party's name &
address

Official's address

Telephone:

Email:

Your
reference:

Our FOI/EIR ref no.
reference:

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I refer to my letter of [date] [and your response on (date)]. I am writing to advise you that, [having taken your comments into consideration], Invest NI has decided [to /not to] disclose the information concerned.

[(REMOVE THIS LINE IF DISCLOSING). You should note that the applicant has the right to seek a review of this decision. I will advise you if the applicant requests such a review.]

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours sincerely

Yours etc
[Name and title of issuing officer]

**Letter 8
Informs 3rd party of appeal to ICO re
withheld 3rd party information**

**Third party's name &
address**

Official's address

Telephone:

Email:

**Your
reference:
Our
reference:**

FOI/EIR ref no.

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

In my letter of [*date*] I advised you that in relation to a request for information [relating to you / supplied by you] Invest NI had decided not to disclose the information. The applicant subsequently appealed this decision and following an internal review the original decision not to disclose the information concerned was [upheld / overturned].

[REMOVE THIS LINE IF DISCLOSING ON APPEAL]. The applicant has now appealed to the Information Commissioner who will undertake an independent review. It is possible that the Information Commissioner will contact you in the course of this review.

You will be advised of the outcome of the review in due course.

Yours etc
[Name and title of issuing officer]

**Letter 9 – 3 variants needed
Provides applicant with information
requested**

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our
reference:**

FOI/EIR ref no.

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I am writing to confirm that Invest NI has now completed its search for the information which you requested on [date].

[A copy of the information is enclosed.]

or

[A copy of the information is enclosed in the format you requested].

or

[As you have asked to view the records in which the information is contained, please telephone me to make the necessary arrangements.]

If you feel that the information we have provided does not fully meet your request please contact me on [Tel No.] in the first instance. You have the right to request a formal review by Invest NI within two calendar months of the date of this letter and if you wish to do so, please write to Danny Smyth, Information Governance Manager, Bedford Square, Bedford Street, Belfast, BT2 7ES.

If after such an internal review you are still unhappy with the response, you have the right to appeal to the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, who will undertake an independent review.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc

[Name and title of issuing officer]

**Letter 10
Informs applicant all information sought is
being withheld**

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our FOI/EIR ref no.
reference:**

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I am writing to advise you that Invest NI has decided not to disclose the information you requested on [date] for [the reasons given in the attached annex(es).]

You have the right to request a formal review by Invest NI within two calendar months of the date of this letter and if you wish to do so, please write Danny Smyth, Information Governance Manager, Bedford Square, Bedford Street, Belfast, BT2 7ES.

If after such an internal review you are still unhappy with the response, you have the right to appeal to the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, who will undertake an independent review.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc
[Name and title of issuing officer]

FOI [Ref] - [For each exemption applicable, provide explanation of why the exemption applies to the information sought]

ANNEX 1 – INFORMATION NOT DISCLOSED

Invest NI has not disclosed all of the information requested by applying the following exemption(s):

Exemption	Basis for the Exemption being applied	Reasoning
<i>[State exact section of the Act that applies e.g. s44 (1) (a)]</i>	<i>[Quote section of Act that applies e.g. Information is exempt information if its disclosure...is prohibited by or under any enactment]</i>	<i>[include a brief explanation of why exemption applies e.g. This data has been collected under Article 5 of the Statistics of Trade and Employment (Northern Ireland) Order 1988. On this basis there is an existing statutory bar to the disclosure of information under section 44 of the Freedom of Information Act.]</i>

Invest NI
[DATE]

FOI [Ref] – **[If a qualified exemption applies you must explain why the balance of the public interest test determines that the information is exempt from release]**

ANNEX 2 – PUBLIC INTEREST FACTORS RE EXEMPTION [Enter section e.g. 43]

- **Sec [Enter full section e.g. 43(2)]:**

- Factors in the Public Interest to Disclose:

- The public interest is served by demonstrating accountability for the use of public funds.
- The public interest is served by transparency and openness of Invest NI's decision making process.

- Factors against the Public Interest to Disclose - i.e. maintaining the exemption and withholding the information requested:

- Release of information relating to **[GENERAL DESCRIPTION OF DATA BEING REDACTED]** may seriously cause financial harm to the company.
- Release of information relating to the activities and aspirations of the company may provide an unfair advantage to the company's competitors and result in financial loss to the company. It is not in the public interest for private companies to be damaged through the release of information under the Act.

- Invest NI Decision

- Having examined the above factors, it is considered that, on balance, it [would / would not] be in the public interest to disclose the information being withheld under the exemption.

Invest NI
DATE

REMOVE THIS FOOTNOTE:

The above Public Interest Test is an example. The reasons used may, if relevant, be applied to the request you are considering however should be adjusted to be specific to the request at hand.

**Letter 11 – 3 variants needed
Informs applicant some information sought
is being withheld, some provided**

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our FOI/EIR ref no.
reference:**

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I am writing to confirm that Invest NI has now completed its search for the information you requested on [date].

[A copy of the information which can be disclosed is enclosed at Annex 1.]

or

[A copy of the information which can be disclosed is enclosed in the format you requested].

or

[As you have asked to view the records in which the information is contained, please telephone me to make the necessary arrangements. Access to records will, of course, be limited to those containing the information which can be disclosed.]

I wish to advise you that some of the information cannot be disclosed for the reasons given in the annex(es) attached to this letter.

You have the right to request a formal review by Invest NI within two calendar months of the date of this letter and if you wish to do so, please write to

Danny Smyth, Information Governance Manager, Bedford Square, Bedford Street, Belfast, BT2 7ES.

If after such an internal review you are still unhappy with the response, you have the right to appeal to the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, who will undertake an independent review.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc

[Name and title of issuing officer]

FOI [Ref] - [For each exemption applicable, provide explanation of why the exemption applies to the information sought]

ANNEX 1 – INFORMATION NOT DISCLOSED

Invest NI has not disclosed some of the information requested by applying the following exemption(s):

Exemption	Basis for the Exemption being applied	Reasoning
<p><i>[State exact section of the Act that applies e.g. s44 (1) (a)]</i></p>	<p><i>[Quote section of Act that applies e.g. Information is exempt information if its disclosure...is prohibited by or under any enactment]</i></p>	<p><i>[include a brief explanation of why exemption applies e.g. This data has been collected under Article 5 of the Statistics of Trade and Employment (Northern Ireland) Order 1988. On this basis there is an existing statutory bar to the disclosure of information under section 44 of the Freedom of Information Act.]</i></p>

Invest NI
[DATE]

FOI [Ref] – **[If a qualified exemption applies you must explain why the balance of the public interest test determines that the information is exempt from release]**

ANNEX 2 – PUBLIC INTEREST FACTORS RE EXEMPTION [Enter section e.g. 43]

- **Sec [Enter full section e.g. 43(2)]:**

- Factors in the Public Interest to Disclose:

- The public interest is served by demonstrating accountability for the use of public funds.
- The public interest is served by transparency and openness of Invest NI's decision making process.

- Factors against the Public Interest to Disclose - i.e. maintaining the exemption and withholding the information requested:

- Release of information relating to **[GENERAL DESCRIPTION OF DATA BEING REDACTED]** may seriously cause financial harm to the company.
- Release of information relating to the activities and aspirations of the company may provide an unfair advantage to the company's competitors and result in financial loss to the company. It is not in the public interest for private companies to be damaged through the release of information under the Act.

- Invest NI Decision

- Having examined the above factors, it is considered that, on balance, it [would / would not] be in the public interest to disclose the information being withheld under the exemption.

Invest NI
DATE

REMOVE THIS FOOTNOTE:

The above Public Interest Test is an example. The reasons used may, if relevant, be applied to the request you are considering however should be adjusted to be specific to the request at hand.

**Letter 12 – 3 variants needed
Informs applicant information not held, can
not be located or has been destroyed**

**Applicant's name &
address**

Official's address

Telephone:

Email:

**Your
reference:**

**Our
reference:**

FOI/EIR ref no.

Date

Dear [Dr, Mr Mrs, Ms etc]

**[Freedom of Information Act 2000] or
[Environmental Information Regulations
2004]**

I refer to your request under the above legislation for information about [*subject*].

I am writing to advise you that following a search of our paper and electronic records, I have established that the information you requested is

[*not held by this Agency*]

or

[*cannot be located*]

or

[*has been destroyed in accordance with best records management practice*]

You have the right to request a formal review by Invest NI within two calendar months of the date of this letter and if you wish to do so, please write to Danny Smyth, Information Governance Manager, Bedford Square, Bedford Street, Belfast, BT2 7ES.

If after such an internal review you are still unhappy with the response, you have the right to appeal to the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, who will undertake an independent review.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours etc

[Name and title of issuing officer]