

Freedom of Information exemptions

Introduction

The Freedom of Information Act 2000 (FOI Act) came into force on 1 January 2005.

It is a new law that means all recorded information held by public authorities is open to the public, unless an exemption applies. Anyone, regardless of age or location, can request information held by public authorities. This includes central Government departments, all local authorities, schools, universities, the National Health Service, the police and many more.

Who can make an information request?

Anyone, regardless of age or location, can make a request for information. An FOI request must be in writing, contain a contact name and address (this can be an email address) and must sufficiently describe the information required. The request must not be vexatious or repeated.

What information can be requested?

Any recorded information held by a public authority is eligible for release. Contracts, letters, faxes, emails, voicemail messages and even scribbles in the margin and on post-it notes will be covered. However, a number of exemptions may be applied to protect information from being disclosed.

An example of this is if the information requested relates to personal information of a patient. Requests for personal information of a living, identifiable person should be dealt with as subject access requests made under the Data Protection Act 1998, and are covered by an absolute exemption under the FOI Act.

How must the Trust respond?

Subject to the exemptions mentioned in paragraph 8 below, the Trust must confirm or deny whether it holds the information. If it does hold the information, it must then communicate the information to the applicant. All of this must be completed within 20 working days of receipt of the request.

Can the Trust charge a fee?

The FOI Act makes provisions for authorities to ascertain if and when they can charge for supplying information in relation to a FOI request. These provisions are known as the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

The Trust will not normally be able to charge a fee except where the cost of meeting a request exceeds £450. If the cost of locating, retrieving or collating the information exceeds £450 the Trust has discretion as to whether or not they respond to the request. If they respond, they can pass on the costs to the applicant, but the applicant should be notified beforehand. If the cost of responding to the request does not exceed £450, the trust will be entitled to charge a reasonable sum to cover costs, such as photocopying and postage costs.

A request for fees should be made within the 20 working days. Fees should be paid within three months of the date the fee was asked for otherwise there is no need to respond to the request. Further guidance will follow shortly.

What information is not covered?

The FOI Act lists 23 categories of information that are exempt. These are split into **absolute exemptions** and **qualified exemptions**.

Absolute Exemptions are exemptions where the authority can deny the request without having to make a judgement on whether it would be in the public interest to do so.

Qualified Exemptions are exemptions where the authority can only deny the request after having made a judgement as to whether it is in the public interest to do so. This is known as the public interest test.

Generally speaking, anyone making a request for information is entitled to be informed in writing by the Trust whether it holds information of the type requested and to have that information supplied, unless an absolute exemption applies or a qualified exemption applies and the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosure that the trust holds some information

If an exemption is absolute, there is no general right of access to the information. If an exemption is qualified, the public authority must decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Trust does not even need to confirm or deny that it holds the information. Below is a full list of the exemptions and a short note is provided on each of the most relevant ones.

Eight of the exemptions are absolute. Even where an exemption is absolute, it does not mean you cannot disclose in all cases. It means that the FOI Act does not require disclosure. You can still disclose, taking into account all the facts of the case.

There is still a legal obligation to provide reasonable advice and assistance to the enquirer.

Section 21 - Information reasonably accessible to the applicant by other means This could include, for example, information contained already in our Publication Scheme.

The absolute exemptions are:

Section 22 - Information intended for future publication

Here there has to be a genuine intention to publish at the time the request is made. It is not necessary to have set a publication date but the exception can be claimed only if it is reasonable in all the circumstances to do so.

Section 23 - Information supplied by, or relating to, bodies dealing with security matters (e.g. a warning of a possible terrorist attack)

Section 32 - Court records (e.g. care proceedings)

Section 34 - Parliamentary privilege

Section 40 - Personal information

Part (1) - personal data. If information is the personal data of the person making the request, it will be exempt under Part (1) of section 40. In other words, if a request for information that constitutes personal data is received from the data subject (i.e. you), it is exempt from the FOI Act. This is in accordance with the Data Protection Act 1998. Any applications for personal data should be treated as a data Subject Access Requests (e.g. details about an individual's own patient records). If information constitutes the personal data of the applicant, the duty to confirm or deny will also be excluded in respect of that information even if confirmation or denial would not in itself have disclosed personal data. The Data Protection Act subject access fee rules will apply if your department require a fee to be paid.

Part (2) - personal data of a third party. This relates to information which constitutes the personal data of a third party (which is not at the same time the personal data of the applicant). In the first instance this will be dealt with as a FOI request. However, personal data of a third party will be exempt if its disclosure to a member of the public would:

- contravene any of the data protection principles (or, in the case of category (e) data would contravene any of the principles if they applied)

- contravene section 10 of the Data Protection Act
- not be required to be disclosed in response to a subject access request due to the operation of one of the exemptions in Part IV of the DPA

Part (3) - If the information constitutes the personal data of a third party and its disclosure to a member of the public would contravene one or more of the data protection principles, the information will be exempt under section 40(3)(a)(i) (or section 40(3)(b)), and the FOI Act request must be refused.

Section 41 - Information provided in confidence

This relates to information obtained from a person if its disclosure would constitute a breach of confidence actionable by that, or another person (e.g. a contract genuinely containing sensitive commercial information protected by a confidentiality clause).

Section 44 - Prohibitions on disclosure

This relates to disclosure prohibited by court order where it would constitute contempt of court or be incompatible with EU obligations.

The remaining 15 are qualified and subject to the Public Interest test.

The trust need only disclose the information if this is in the public interest (see 10 below on how to apply this test). Qualified exemptions do not justify withholding information unless, following a proper assessment, the balance of the public interest comes down against disclosure.

The qualified exemptions are:

Section 24 - National security

Section 26 - Defence

This likely does not affect NHS trusts.

Section 27 - International relations

This likely does not affect NHS trusts.

Section 28 - Relations with the United Kingdom

This likely does not affect NHS trusts.

Section 29 - The economy

This covers the communal economic interests of the UK and the financial interests of any administration in the UK, which do not include local authorities.

Section 30 - Investigations of proceedings conducted by public authorities

This will cover:

- information held in connection with prosecutions being brought by the Trust
- information held in connection with civil proceedings such as cases of clinical negligence or misconduct.

Section 31 - Law enforcement disclosure

There must be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders or the administration of justice.

Section 33 - Audit functions

Generally speaking, public authorities cannot claim the exemption, although there may be other exemptions that would be appropriate to consider. This could, for example, be applicable to auditing of the Trust's accounts by an independent third party.

Section 35 - Formulation of government policy etc.

Section 36 - Prejudice to the effective conduct of public affairs

Information can be withheld under this section if, in the opinion of the Trust's Qualified Person (the Chief Executive), that its disclosure would inhibit the full and frank provision of advice or exchange of views, or prejudice the effective conduct of public affairs (also see the reference to Section 33 above).

Section 37 - Communications with Her Majesty, etc. and Honours

Section 38 - Health and Safety

This is exempt if disclosure would be likely to endanger the safety or physical or mental health of anyone. In this context, the information covered will relate either to physical health and medical matters, or physical safety (i.e. the risk of accident and the security of individuals).

Section 39 - Environmental information

This is covered by the Environmental Information Regulations 2004 and is dealt with as a request for information under them. Environmental information relates to any information in written, visual, aural, electronic or any other material form on:

- the state of the elements of the environment (air, water, soil, land)
- factors that affect or are likely to affect the elements of the environment referred to in (a) (energy, noise, radiation)
- policies, legislation, plans, programmes etc. affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements
- reports on the implementation of environmental legislation
- cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)
- the state of human health and safety (conditions, cultural sites etc.) inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

Section 42 - Legal Professional privilege

This covers advice given in communications by legal advisers, solicitors or barristers. Legal professional privilege can be:

advice privilege (where no litigation is contemplated or pending)

or

litigation privilege (where it is).

Section 43 - Commercial interests

This information is exempt if it constitutes a trade secret or if disclosure would prejudice the commercial interests of any person or body.

Applying the Public Interest Test

Background

Having established that a qualified exemption definitely applies to a particular case, the Trust must then carry out a Public Interest Test to identify if the public interest in applying the exemption outweighs the public interest in disclosing it. In other words, unless it is in the public interest to withhold the information, it has to be released. Although precedent and developed case law will play a part in this, individual circumstances will vary and each case will need to be considered on its own merits.

Carrying out the Test

What is in the public interest is not necessarily the same as what the public are interested in. It may be irrelevant that a matter is the subject of public curiosity. In most cases it will be relatively straightforward to decide where the balance of the public interest in disclosure lies. However, there will inevitably be cases where the decision is a difficult one. Applying such a test depends to a high degree on objective judgement and a basic knowledge of the subject matter and its wider impact. Any public interest test will provide reasons both for and against the disclosure of the information and provide a balanced judgement as to why the information has either been withheld or released.

In applying the Public Interest Test, please note the following.

- Potential or actual embarrassment to or loss of confidence in the Trust is not a valid factor.
- The fact that the information is technical, complex to understand and may be misunderstood is not of itself a reason to withhold information.
- The potential harm of releasing information will reduce over time and should be considered at the time the request is made rather than by reference to when the relevant decision was taken originally.
- A decision not to release information may seem unjust - i.e. not releasing the information could result in harm or prejudice to public safety, the environment or a third party.

Possible factors to take into account when weighing the public interest include:	
For disclosure	Against disclosure
To increase access to information held by the Trust?	To distort public reporting or be misleading because it is incomplete?
To allow individuals to understand decisions taken that affect their lives or assist them in challenging those decisions?	Is premature disclosure likely to prejudice scrutiny or release sensitive issues still on the internal agenda or evolving?
To improve the accountability and transparency of the Trust in its use of public funds and/or help to show that it obtains value for money?	To cause unnecessary public alarm or confusion?
To contribute to public debate and assist the understanding of existing or proposed policy?	To seriously jeopardise the legal or contractual position of the Trust?
To increase public participation in decision-making?	To infringe other legislation - e.g. the Data Protection Act?
To increase public participation in political processes in general?	To create a controversial precedent on the release of information or impair your ability to obtain information in the future?
To bring to light information affecting public health or safety?	To adversely affect the trust's proper functioning and discourage openness in expressing opinions?
To reduce further enquiries on the topic?	If a large amount of information on the topic has already been made available, to shed any more