

Summary guide of Exemptions under the Freedom of Information (Scotland) Act 2002

The FoISA contains 17 exemptions to the general right of access to information under the act. It is important to note that many of these exemptions are not absolute and are subject to the public interest test. In applying the public interest test the University must show that the public interest in withholding the information is greater than the public interest in releasing it. If this can't be proved then the information would have to be released.

The following is a summary of the exemptions. Many of them are only or mainly relevant to central government and those most likely to apply to the University have been indicated with a tick (✓). For full details of these and all exemptions please consult the Act, available on the OSIC website. Please see the end of this guidance note for details of how to find out about exceptions that apply to the Environmental Information (Scotland) Regulations 2004 (EIRs).

Any refusal to release information on grounds of an exemption **must** be ratified with the University's FOI Unit (foiunit@stir.ac.uk, x6670), who will handle **all refusals** centrally.

- ✓ **Section 25 Information otherwise accessible (absolute)**
Information is exempt where the applicant can reasonably obtain it by means other than by making a request under Section 1 of the act, even if payment is required to access it. This would include information available through the University's publication scheme, information available in published form to purchase such as a book, or information generally available in a public library.
- **Section 26 Prohibitions on disclosure (absolute)**
Information is exempt if its disclosure is prohibited by an enactment, is incompatible with an EC obligation or would constitute or be punishable as a contempt of court.
- ✓ **Section 27 Information intended for future publication (public interest test)**
This exemption is particularly relevant to the University.
Under 27(1) information is exempt if is due to be published within 12 weeks at the point of the request, where it is reasonable in all the circumstances that the information be withheld until the publication date. This would apply to information such as University policy documents or reports which are in the process of being written or approved and are due to be released within 12 weeks of the request.

Under 27(2) (**research exemption**) information is exempt if it is part of an ongoing programme of research where there is an intention to publish a report of the research and disclosure would **substantially prejudice** the programme, the interests of the participants, the public authority or the publisher. This would apply to ongoing programmes of active research.

- **Section 28 Relations within the United Kingdom (public interest test)**
 Information is exempt if it is likely to *substantially prejudice* relations between the UK administrations; UK Government, Scottish Executive, Welsh and Northern Irish Assemblies.
- **Section 29 Formulation of Scottish Administration policy (public interest test)**
 Information held by the Scottish Administration is exempt if it relates to policy development, ministerial communications, advice provided by law officers or the operation of any Ministerial private office.
- ✓ **Section 30 Prejudice to effective conduct of public affairs (public interest test)**
 Information is exempt if its disclosure would *substantially prejudice* a) the maintenance of the convention of the collective responsibility of the Scottish ministers or b) would substantially inhibit the free and frank provision of advice and exchange of views or c) would prejudice substantially the effective conduct of public affairs. Parts b) and c) of this exemption could apply where the University wished to prevent disclosure of information on matters and decisions still under consideration and discussion.
- **Section 31 National Security and Defence (public interest test)**
 Information is exempt if it is required for the purposes of safeguarding national security or where disclosure would *substantially prejudice* the defence of the British islands or any colony or the capability or security of any relevant forces.
- **Section 32 International relations (public interest test)**
 Information is exempt where it would *substantially prejudice* the UK's international relations or interests.
- ✓ **Section 33 Commercial interests and the economy (public interest test)**
 Part of this exemption is particularly relevant to the University.
 Under 33(1) information is exempt if it constitutes a trade secret or its disclosure would *substantially prejudice* the commercial interests of any person, including the University. This exemption could apply where the University wished to protect its research, teaching materials or information provided by contractors.

33(2), where information is exempt if disclosure would *substantially prejudice* the economic interests of the UK or its administrations is unlikely to apply.
- **Section 34 Investigations by Scottish public authorities (public interest test)**
 Information held for the purpose of criminal investigations and proceedings, and information obtained from confidential sources relating to these or civil proceedings arising out of them is exempt. Information is also exempt where it is held for purposes of an inquiry or investigation into a fatal accident or sudden death.
- **Section 35 Law enforcement (public interest test)**
 Information is exempt where it would *substantially prejudice* a range of investigations and conduct including the prevention or detection of crime, apprehension or prosecution of offenders, tax assessment and collection, immigration controls, regulatory enforcement, health and safety and civil proceedings.

- ✓ **Section 36 Confidentiality (part absolute/part public interest test)**
Under 36(1) information is exempt where a claim of confidentiality of communications could be claimed in legal proceedings. This is subject to the **public interest test**.

Under 36(2) information is exempt where disclosure would constitute an actionable breach of confidence. This is an **absolute** exemption.

- **Section 37 Court records (absolute)**
Information is exempt that is only held as part of the documentation for a court or tribunal case or a statutory enquiry.

- ✓ **Section 38 Personal information (part absolute/part public interest test)**
Under 38(1) information which constitutes personal data under the Data Protection Act 1998 is exempt if the applicant is requesting information about themselves (the request should be handled as a subject access request under the DPA), or if the information is personal census information or a deceased person's health record. There is also an exemption if the information being requested is the personal data of a third party and disclosure would breach one of the eight Data Protection Principles. These exemptions are **absolute**.

Under 38(1)(b) Where the University believes that disclosure would not breach any of the DP principals and is not personal census information or a deceased person's health record, but the individual who is the subject of the information has served notice under s.10 DPA that disclosure would cause damage or distress, or the individual who is subject of the information would not have a right to access it under the DPA, there is no absolute exemption and the University should apply the **public interest test** in deciding whether to release the information.

- ✓ **Section 39 Health, safety and the environment (public interest test)**
Under 39(1) information is exempt if its disclosure would endanger the physical or mental health or the safety of an individual. This could be applied to prevent disclosure of information that might enable individuals working in areas such as animal testing, or on a project of particular concern to a pressure group, to be identified and targeted. For example, information on security procedures, the location of laboratories and staff involved.

Under 39(2) information is exempt if it constitutes environmental information as defined in the Environmental Information Regulations. The request should instead be dealt with under these regulations. If the information is subject to a discretionary exemption under the EIRs then the FoISA public interest test would apply.

- **Section 40 Audit Functions (public interest test)**
Information is exempt where it is held by a Scottish public authority with a statutory duty to audit the accounts or examine the economy, efficiency and effectiveness of the use of resources of other public authorities and where release of the information would **substantially prejudice** those functions.

- **Section 41 Communications with Her Majesty etc. and honours (public interest test)**

Information is exempt if it relates to communications with Her Majesty, members of the Royal Family or Royal Household or the conferring of honours.

Although not strictly speaking exemptions there are other provisions within FoISA under which a request for information can be refused. One of these is:

- **Section 18 Neither confirm nor deny**

Where information is exempt by virtue of any sections 28 to 35, 38, 39(1) or 41, there is the right to refuse to reveal whether information exists or is held where it would be contrary to the public interest to do so. For instance where there are security implications, not just by releasing information, but by revealing whether the information exists in the first place.

As with FoISA, where exemptions may be applied in certain circumstances, there are instances when environmental information requests may be refused under the EIRs if an exception applies. Details about EIR exceptions can be found on the OSIC website at:

<http://www.itspublicknowledge.info/Law/EIRs/EIRsExceptions.asp>