Prohibitions on disclosure (section 44)

Freedom of Information Act

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Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

2. An overview of the main provisions of FOIA can be found in The Guide to freedom of information.

3. This is part of a series of guidance, which goes into more detail than the guide, to help public authorities to fully understand their obligations and promote good practice.

4. This guidance explains to public authorities how to apply the exemption from the duty to provide information if its disclosure is prohibited under the conditions specified in section 44.

5. It discusses statutory prohibitions that we have considered in cases we have dealt with and draws general conclusions from them. It is not a complete list of all statutory prohibitions or a comprehensive guide to legislation other than FOIA.

Overview

- Section 44 is an absolute exemption, which means that if information is covered by any of the subsections in section 44 it is exempt from disclosure. It is not subject to a public interest test.

- Section 44(1)(a) exempts information where its disclosure is prohibited by other legislation.

- If a statutory prohibition refers to the functions of a public authority and these are defined in the legislation, this definition must be followed. If the functions are not defined then we consider that functions constitute the powers and duties that have been specifically entrusted to that authority.

- Statutory prohibitions may contain 'gateways' allowing disclosure in certain circumstances. Unless they specifically refer to FOIA, these gateways are unlikely to be relevant to FOIA disclosures because:

    - FOIA is a general duty on all public authorities, not a function specifically entrusted to an authority;
    - the reference in section 44(1) to disclosure "otherwise than under this Act" means that FOIA itself cannot provide an

exemption from a statutory prohibition; and
    - gateways allow disclosure for specific purposes but FOIA is about general disclosure to the world.

- If a public authority has discretion as to whether to disclose information under a gateway, the Commissioner will check that it has made that decision but will not question the reasonableness of its decision.

- Section 44(1)(b) exempts information if disclosing it would be incompatible with any retained European Union obligation. If the EU obligation had been transposed into UK domestic law, then the relevant exemption would be section 44(1)(a), not 44(1)(b).

- Section 44(1)(c) provides an exemption where disclosure would constitute or be punishable as a contempt of court.

- There is no duty to confirm or deny whether information is held, if to do so would disclose information that is exempt from disclosure under section 44(1)(a)-(c).

- There is no equivalent of section 44 in the EIR.

What FOIA says

6. Section 44 states:

> **44.**—(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—
> (a) is prohibited by or under any enactment,
> (b) is incompatible with any retained EU obligation, or
> (c) would constitute or be punishable as a contempt of court.
>
> (2) 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 (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

7. Although FOIA creates a duty for public authorities to provide information on request, there are prohibitions on disclosure created by other legislation, retained EU obligations and contempt of court. The effect of section 44 is that, if one of

these other prohibitions applies, the information is exempt from disclosure under FOIA.

8. Section 44 does not apply to common law restrictions on the disclosure of information, such as a duty of confidence. However, these may be covered by other exemptions in FOIA, such as the exemption in section 41 for information provided in confidence.

9. Section 44 is an absolute exemption, which means that, if information is covered by any of its subsections, it is exempt from disclosure. It is not subject to the public interest test.

Section 44(1)(a) – disclosure of information is prohibited under any enactment

10. Section 44 (1)(a) exempts information if its disclosure is prohibited by other legislation. Such provisions are referred to as statutory prohibitions or statutory bars and they prevent public authorities from disclosing specific types of information.

11. Information is exempt under this subsection if its disclosure would breach any of the following:

    - primary legislation (an Act of Parliament); or
    - secondary legislation (a Statutory Instrument).

12. There are many statutory provisions preventing the release of information in particular circumstances. The following case is an example of where section 44(1)(a) was engaged because there was a prohibition in another Act:

Example

In the Information Tribunal case of David Barrett v the Information Commissioner and the Office for National Statistics EA/2007/0112, 23 April 2008, Mr Barrett had requested a copy of the records from the 1921 census relating to his great uncle and aunt from the Office for National Statistics (ONS). The ONS withheld the information under section 44(1)(a) because there was a prohibition on disclosure in section 8(2) of the Census Act 1920, which says that:

"if the Registrar-General for England and Wales or the

Registrar-General for Scotland ("the Registrars") or any person who is-
(a) under the control of either of the Registrars; or
(b) a supplier of any services to either of them,
discloses any personal census information to another person, without lawful authority, he shall be guilty of an offence."

In FS50147944 the Information Commissioner found that the information was exempt under section 44, by virtue of the Census Act. The Information Tribunal agreed. They said that the ONS was under the control of the Registrar General. They considered whether there were any circumstances that might provide lawful authority for disclosure and found that none applied in this case. Therefore, the information was exempt under section 44(1)(a) of FOIA.

13. In that case there was a statutory bar because disclosure would have been an offence under the other legislation cited. The Tribunal also considered whether FOIA itself provided lawful authority for disclosure, and found that it did not; we discuss this point further in the section on Otherwise than under this Act below.

14. By contrast, the following case is an example of where section 44(1)(a) was applied incorrectly:

Example

Decision notice FS50517099 concerned a request to Staffordshire County Council for a list of internal audit reports. The Council withheld the information under section 44(1)(a), with reference to Part 1 of Schedule 12A of the Local Government Act 1972 (LGA 1972).

The Commissioner found that the exemption was not engaged. Part 1 of Schedule 12A lists the types of information that are exempt from the requirements of Part VA of the LGA 1972. Part VA contains a requirement for councils to make certain information available to the public proactively, for example the agendas, minutes and reports from council meetings. If a report that is to be considered at a meeting is of the type listed in Part 1 of Schedule 12A (eg information relating to individuals or financial and business affairs), the council does not have to make it available under the LGA 1972. However, this does not mean that it cannot be disclosed at all. An exemption from a duty to publish information is not the same

> as a prohibition on disclosing it. If, as in this case, the council receives a FOIA request for it, the LGA 1972 does not prohibit disclosure, and so section 44 is not engaged (although other FOIA exemptions may apply in particular cases).

15. This shows that deciding whether section 44(1)(a) is engaged inevitably leads to a consideration of the other legislation that may provide a statutory bar. A public authority wishing to rely on a statutory prohibition should carefully examine how it is worded, to ensure that it applies and check whether it has been amended or repealed. If necessary they should obtain their own legal advice on whether the information is subject to a statutory prohibition.

Statutory bars and public authority functions

16. Some statutory prohibitions refer to the functions of a public authority. If those functions are defined in the relevant legislation, then that definition must be followed, irrespective of whether they are defined narrowly or widely. In some cases this may prohibit the disclosure of a large amount of information.

17. The Commissioners for Revenue and Customs Act 2005 (CRCA) is an example of a statutory prohibition referring to the functions of a public authority. The functions of Revenue and Customs relate to the collection and management of taxes, duties and National Insurance, including investigations and prosecutions. Their functions and powers are set out in detail in sections 5-10 of the CRCA, including at section 9 the power to do anything which they think is necessary, expedient, incidental or conducive to the exercise of their functions. Section 51 confirms that the term 'function' means "…any power or duty (including a power or duty that is ancillary to another power or duty)". The CRCA therefore provides for a wide interpretation of the term 'functions'.

18. Section 18(1) of the CRCA creates a prohibition on disclosure:

> 18(1). Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.

19. There are some circumstances, set out in sections 18(2) and 18(3), in which this prohibition does not apply, but these are not relevant to FOIA. However, the scope of the prohibition is

limited, in relation to FOIA disclosures, by section 23. This says that the prohibition on disclosing information in section 18(1) of the CRCA only applies to FOIA disclosures if the information relates to an identifiable person:

> **23 Freedom of information**
>
> (1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c. 36) (prohibitions on disclosure) if its disclosure—
>
> (a) would specify the identity of the person to whom the information relates, or
>
> (b) would enable the identity of such a person to be deduced.
>
> …
>
> (2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.

20. The Explanatory Notes to the CRCA (at section 19) make it clear that a 'person' in this context means a natural or legal person, and so this includes, for example, a company. However, information relating to a person does not include information about internal administrative arrangements at HMRC (section 19(2) of the CRCA).

21. Therefore, in this case, the wide definition of functions in the CRCA potentially brings a large amount of information within the prohibition on disclosure, but this information can only be exempted under section 44 of FOIA if disclosing it would allow a person to be identified.

22. The functions of the authority may not always be specifically defined in legislation. In those cases, we consider that the decision of the House of Lords in Hazell v Hammersmith and Fulham London Borough Council and Others provides guidance on defining what constitutes a public authority's functions, even though it was not a FOIA case.

> **Example**

Hazell v Hammersmith and Fulham London Borough Council and Others [1991] 1 All ER 545 concerned section 111 of LGA 1972, which sets out various subsidiary powers of local authorities. In particular, the judgment considered whether swap transactions were conducive or incidental to the Council's acknowledged function of borrowing under this section.

Section 111 LGA 1972 reads as follows:

"Subsidiary powers of local authorities.
(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

Lord Templeman said at paragraph 554 that:

"… in section 111 the word "functions" embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions. Accordingly a local authority can do anything which is calculated to facilitate or is conducive or incidental to the local authority's function of borrowing.

So the question is whether a swap transaction is "calculated to facilitate, or is conducive or incidental to", the discharge of the local authority's function of borrowing."

23. Lord Templeman was speaking with specific reference to section 111 LGA 1972, but we consider that this interpretation could be applied to other legislation that refers to the functions of an authority.

24. This judgment suggests a wide interpretation of functions, that includes "all the powers and duties" of an authority, as well as activities that "facilitate" or are "conducive or incidental" to carrying out those functions. However, we consider that this wide interpretation has been limited by the phrase: "the activities Parliament has entrusted to it". This implies functions that have been specifically given to one or more public authorities, rather than an activity which is a general obligation on all authorities. For example, the Health and Safety

Executive is tasked with specific functions relating to the promotion of health and safety and investigating accidents at work. As an employer it also has legal obligations to do with the management of its human resources, but these are obligations on all employers and they have not been specifically entrusted to the HSE to the exclusion of other authorities.

25. If a public authority is applying section 44(1)(a) by virtue of a statutory bar that refers to its functions, then the functions must be those given to that authority specifically, and not general obligations on all authorities, and the authority should be able to:

    - explain the nature of the relevant function, and

    - point to the applicable legislation or other source form which it derives its authority for this function.

26. If a public authority cannot point to a particular piece of legislation that designates or specifies its functions then it should explain where it derives its authority from. For example, a government department may derive its legal authority to carry out certain functions from the Crown rather than from statute.

Functions and gateways to disclosure

27. Some statutory bars contain 'gateways' permitting disclosure under certain conditions. These conditions in turn may refer to the authority's functions. An example of this is the Financial Services and Markets Act 2000 (FSMA 2000). This provided for the regulation of financial services and markets, and conferred regulatory functions on the former Financial Services Authority (the FSA), which has now been replaced by two bodies, the Financial Conduct Authority and the Prudential Regulation Authority.

28. The FSMA 2000 section 348 contains prohibitions on disclosure of confidential information by these Authorities, the Secretary of State and other parties. Section 349 contains exceptions to this prohibition, permitting disclosure in certain circumstances; in other words, it provides a gateway to disclosure. It includes the following:

> **349. Exceptions from section 348**
>
> (1) Section 348 does not prevent a disclosure of confidential

information which is—

(a) made for the purpose of facilitating the carrying out of a public function; and

(b) permitted by regulations made by the Treasury under this section.

…

(5) "Public functions" includes—

(a) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation;

(c) similar functions to those referred to in paragraph (a) conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom;

(d) functions exercisable in relation to prescribed disciplinary proceedings.

29. The regulations referred to in section 349(1)(b) are the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001 No. 2188). These allow the Authorities, the Secretary of State or the Treasury to disclose confidential information for the purpose of discharging any of their public functions.

30. This gateway therefore allows disclosure for the purpose of carrying out public functions. However, gateways such as this are unlikely to allow disclosure under FOIA. There are three main reasons for this:

- disclosure under FOIA is not a function specifically entrusted to a public authority;
- section 44 refers to "disclosures otherwise than under this Act"; and
- FOIA disclosures are not for specific purposes.

Disclosure under FOIA is not a function specifically entrusted to a public authority

31. Firstly, a public authority's functions are those that have been specifically conferred on it (as noted above in the section on Statutory bars and public authority functions). FOIA, by contrast, creates general duties for all public authorities. This point was made clear in relation to gateways in the following case:

> **Example**
>
> In Slann v the Information Commissioner and the Financial Services Authority EA/2005/0019, 11 July 2006 the Information Tribunal found that disclosure of information held by the Authority was prohibited under FSMA 2000 section 348, and the information was therefore exempt under FOIA section 44(1)(a). At paragraph 38 the Tribunal said that section 349 did not provide a gateway to disclosure in this case because it agreed with the FSA when it contended that:
>
> > "…section 349(5)(a) with its reference to public function is referring to and is directed to functions and powers conferred on the FSA by statute or by statutory instrument other than the FSMA and not legislation such as the 2000 Act [ie FOIA] to which other persons including the FSA are or might be subject…".

Otherwise than under this Act

32. Section 44(1) says that information is exempt if its disclosure is prohibited "otherwise than under this Act". This means that if there is a prohibition elsewhere on disclosure, FOIA itself does not provide any exemption from that prohibition, or any basis for disclosing the information. This was explained by the First-tier Tribunal in the following case:

> **Example**
>
> In Steven Smyrl v the Information Commissioner and the Statistics Board EA/2011/0241 3 April 2012, Mr Smryl had requested information from the 1921 Census about an individual. The Office of National Statistics (an executive office of the Statistics Board) withheld the information under section 44(1)(a) of FOIA, relying on section 39(1) of the Statistics and Registration Services Act 2007 (SRSA). This prohibited

disclosure of any personal information held by the Statistics Board in relation to the exercise of any of its functions. "Personal information" in SRSA can include information about deceased people.

Section 39(4)(a) SRSA provided an exemption from the prohibition in section 39(1) if the disclosure is, "required or permitted by any enactment". Mr Smryl argued that the duty to disclose information in section 1 of FOIA meant that the disclosure was required under that Act, and hence not prohibited by SRSA. The Tribunal dismissed this argument:

"FOIA cannot provide lawful authority for disclosure of the disputed information because the terms of s44 FOIA refer to disclosure "otherwise than under this Act" which explicitly excludes disclosure under FOIA as a means of defeating a statutory prohibition." (paragraph 21)

33. The Information Tribunal also took this approach in the Slann case mentioned previously. It stated that:

> *"…* section 44 on its face makes it clear beyond doubt that disclosure under the 2000 Act is to be ignored for this purpose by virtue of the dispensing words "otherwise than under this Act" (Slann v the Information Commissioner and the Financial Services Authority EA/2005/0019, 11 July 2006 paragraph 38)

FOIA disclosures are not for specific purposes

34. Usually, gateways only permit disclosure for specific purposes, eg for legal proceedings. By contrast, disclosure under FOIA is to the general public. Information released in response to a FOIA request must be disclosable to any member of the public who requests it, irrespective of the purpose or reason for the request. In view of this, in most instances gateways that permit disclosure for a specified purpose are likely to be irrelevant when considering a response under FOIA. For example, if a particular gateway permitted disclosure for the purpose of legal proceedings, the fact that a requester may be a party to those proceedings would not be relevant when considering whether information should be disclosed to them under FOIA. This is because the FOIA disclosure would in effect be to the world, not solely to the requester.

Gateways and the Commissioner's regulatory role

35. Where a public authority has discretion about applying a gateway to disclosure, the Commissioner will not question or examine the reasonableness of the authority's decision. If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable. So, if there is a statutory prohibition on disclosure and the authority has decided that it is not disapplied by a gateway, then the Commissioner will accept that section 44(1)(a) applies.

36. This position was established by the binding decision of the Upper Tribunal in the following case.

Example

In Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AAC, Mr Morrissey had requested from Ofcom statistics about the employees of the broadcasters regulated by Ofcom. The information was provided to Ofcom in order for it to check that broadcasters were meeting their obligations under equal opportunities legislation. Ofcom published some information on this, but not at the level of detail requested. Under section 393(1) of the Communications Act 2003 there was a prohibition on disclosing information about a particular business obtained under that Act or other specified legislation, without the consent of that business. Ofcom withheld the detailed statistics under section 44(1) FOIA by virtue of that section of the Communications Act.

There was also a gateway to disclosure in section 393(2), for the purpose of facilitating the carrying out by Ofcom of any of their functions. The requester had argued that, since one of Ofcom's functions was to promote equal opportunities in the broadcasting industry, they should have used this gateway to disapply the statutory bar.

In the decision notice FS50184499 the Commissioner considered whether it was reasonable for Ofcom to have decided that the gateway did not apply in this case. The Upper Tribunal however found that it was not up to the Commissioner (or the First-tier Tribunal) to assess the reasonableness of Ofcom's decision:

"In short, the task of the Commissioner is to make a decision

whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. That may well require a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not extend to asking the questions which might be asked on the subject of reasonableness by a court of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise powers available to it under the 2003 Act" (paragraph 63)

Statutory prohibitions of ombudsmen and regulators

37. There are a number of statutory prohibitions that relate to information held by particular ombudsmen or regulatory bodies. In these cases it is important to establish precisely what information is covered by the prohibition. The following examples illustrate some of the issues that have arisen in cases we have dealt with.

Local Government Act 1974

38. Part III of the Local Government Act 1974 (LGA 1974) covers investigations by what is now known as the Local Government Ombudsman (LGO), into complaints about maladministration in local government. LGA 1974 refers to the Commissions for Local Administration in England and in Wales (though Wales is now covered by the Public Services Ombudsman for Wales). Complaints can be made by any member of the public and the scope of the authorities that can be investigated extends to English local authorities (except town and parish councils), police and crime bodies, school admission appeal panels and a range of other bodies providing local services. The Local Government Ombudsman's website www.lgo.org.uk explains which bodies are covered.

39. Section 32(2) LGA provides that, "Information obtained by a Local Commissioner, or [any person discharging or assisting in the discharge of a function of a Local Commissioner], in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed" except in certain circumstances. None of these exceptions will apply to a disclosure that is made for the purpose of complying with a FOIA request.

40. The interpretation of information "obtained" by the Ombudsman arose in the following case:

> **Example**
>
> The Information Tribunal case of the Commission for Local Administration in England v the Information Commissioner, EA/2007/0087, 11 March 2008, concerned a request for all the papers in a particular complaint file held by the Commission for Local Administration (CLA). The CLA argued that all the documents held on the file, apart from information about the handling of complaints in general, were covered by the prohibition.
>
> The Tribunal disagreed. They found that "internal memoranda, prepared by CLA staff, dealing with the mechanics of the investigation but making no reference to the matters complained of or any facts or matters that came to light during the investigation" were not covered. Similarly, communications with the local authority concerned about the handling of the investigation were not covered, because they contained no information about the matters investigated (paragraph 10).
>
> The Tribunal also found that information was not 'obtained' simply because it was passed between officials at the CLA:
>
> "We conclude, therefore, that it is only information obtained from a third party, and not information passed between a Local Commissioner and an individual working with him, that falls within the prohibition against disclosure set out in section 32(2) and therefore the exemption provided by FOIA section 44" (paragraph 16).

41. The information has to be obtained from a third party, but it could be included in a document created internally. A later Tribunal, in Lloyd Purser v the Information Commissioner and the Local Government Ombudsman EA/2010/0188 24 May 2011 (paragraph 20), found that a document generated internally by the Ombudsman may be covered by the prohibition if contains information obtained externally about the matters being investigated.

Heath Service Commissioners Act 1993

42. The Parliamentary and Health Services Ombudsman deals with complaints from individuals against government departments, other public bodies and the health service in England. In her role as Health Services Commissioner, her powers are mainly drawn from the Health Service Commissioners Act 1993 (HSCA), as amended. Section 15 of the HSCA provides that information obtained by a Commissioner or her officers in the course of, or for the purposes of, an investigation shall not be disclosed except for the purposes of the investigation and any report made in respect of it, or for certain other specified purposes, none of which are relevant to FOIA disclosures. Section 15 of the HSCA can therefore operate as a statutory bar under section 44(1)(a) of FOIA.

43. It is clear that this prohibition covers the Ombudsman and her officers, but the question of whether this prohibition extends to public authorities that provided the information, or to bodies that the Ombudsman may have shared the information with, was considered in the following case:

Example

In Miguel Cubells v The Information Commissioner and Wrightington, Wigan and Leigh NHS Foundation Trust EA/2011/0183 30 May 2012, Mr Cubells had requested information from the Trust that it had forwarded to the Ombudsman regarding a complaint his family had made. The Trust withheld the information under section 44(1)(a) of FOIA, with reference to section 15 of the HSCA.

In decision notice FS50356737 the Commissioner had found that section 15 prohibited not only disclosure by the Ombudsman, but also by those who had provided the information to the Ombudsman ie the Trust in this case.

The First-tier Tribunal did not accept this interpretation. They said "the prohibition in section 15 of the HSCA does not extend to the Trust" (paragraph 32). They referred at paragraph 29 to the "profoundly unattractive consequences" if for example, a health service body were prevented from sharing medical records with a patient's GP, simply because they had previously provided them to the Ombudsman as part of an investigation.

We accept that the statutory prohibition in section 15 does not extend to bodies that provide information to the Ombudsman

for an investigation. However, we do consider that the prohibition applies to any third party to whom the Ombudsman passes the information. This view is based on a non-FOI case from the High Court, R(on the application of Kay) v Health Service Ombudsman [2008] EWHC 2063 (Admin), which found that the prohibition in section 15 HSCA applied to information that the Ombudsman had passed to a third party:

"I take section [15] to mean what it says, namely that information disclosed to the ombudsman in the course of or the purpose of the litigation shall not be disclosed except for the purposes of the investigation and any report to be made in respect of it. In my judgment, that applies to those receiving the information from the Commission itself". (paragraph 59)

Section 44(1)(b) - disclosure is incompatible with retained European Union obligations

44. Section 44(1)(b) provides an exemption where disclosing information is incompatible with any retained European Union obligation.

45. Following our departure from the EU the UK has preserved some EU law. This body of law, now called 'retained EU law' has a number of different sources. As a consequence, certain bars on disclosure that were originally contained in EU law have also been preserved. Where a bar to disclosure is contained in UK domestic legislation which was originally derived from EU law, for example implementing an EU directive, or is contained in 'retained direct EU legislation', then the relevant exemption is section 44(1)(a). However, section 44(1)(b) will be relevant where information is exempt from disclosure under any other form of retained EU law.

46. When dealing with requests for information public authorities should obtain their own legal advice on whether any information they hold is subject to the application of any relevant retained EU obligations.

Section 44(1)(c) –disclosure would constitute contempt of court

47. Section 44(1)(c) provides an exemption if disclosure of the information would constitute or be punishable as a contempt of court. Contempt of court is designed to protect the integrity of court proceedings.

48. Where the disclosure of information would be contrary to the Contempt of Court Act 1981 (CCA), this would be covered by section 44(1)(a) rather than section 44(1)(c). The CCA covers publication of information that would lead to a substantial risk of serious prejudice to justice, but only whilst the proceedings are active, ie once somebody has been arrested, summonsed or charged. Authorities should be particularly careful about releasing information that relates to matters subject to legal proceedings at the time a request is received.

49. A public authority may be subject to a court order requiring it not to disclose particular information. Such information would be covered by section 44(1)(c) and disclosing it would be in contempt of court. It is also important to note that a person can be in contempt of court even when they are not subject to a court order or party to proceedings.

Example

Decision notice FS50533887 concerned a request to the Legal Aid Agency, which is an executive agency of the Ministry of Justice (MoJ), for information about a tender bid process for legal aid work in 2010.

The MoJ relied in part on section 44(1)(c). They explained that there was a High Court Order relating to this information, under which specific information shall not be disclosed without the express permission of the Court. The Commissioner accepted that to disclose the information in response to the request would breach the High Court Order and would therefore constitute contempt of court. Accordingly, he accepted that the information was exempt under section 44(1)(c).

This decision was appealed to the First-tier Tribunal in the joined cases of Nadarajah v the Information Commissioner EA/2014/0226 and Abdalla v the Information Commissioner EA/2014/0228, 16 July 2015. The Tribunal agreed with the

Commissioner that the information was protected by a Court order and therefore exempt under section 44(1)(c).

50. If a public authority is subject to a court order requiring it not to disclose particular information, or if a disclosure of information by a public authority might prejudice the outcome of court proceedings, the authority should seek legal advice on whether the disclosure is likely to constitute a contempt of court.

51. If disclosure would not constitute a contempt of court but may prejudice court proceedings, the public authority should consider whether another FOIA exemption is applicable.

The duty to confirm or deny

52. Section 44(2) provides an exemption from the duty to confirm or deny whether information is held if this would fall within sections 44(1)(a), (b) or (c). In other words, the duty to confirm or deny is removed if confirming or denying whether the information is held is itself prohibited by an enactment, or is incompatible with a retained EU obligation or would constitute a contempt of court.

Example

Decision notice FS50498896 concerned a request to the Office of Fair Trading (OFT) for OFT documents on Jaguar Landrover Automotive plc. The OFT refused to confirm or deny whether the information was held, under section 44(2) of FOIA. It maintained that to give a conformation or denial would breach the statutory prohibition in section 237(2) of the Enterprise Act 2002.

Section 237 of the Enterprise Act creates a general restriction on disclosing specified information relating to a business while the business continues in existence. Specified information is that which comes to a public authority in connection with the exercise of any function it has under the Enterprise Act or other legislation listed in that Act.

The Commissioner accepted that if the requested information were held, it would be specified information and to confirm that it was held would contravene the prohibition on disclosure

in section 237. He therefore decided that the OFT had correctly applied section 44(2) of FOIA.

The decision notice commented further on the issue of neither confirm nor deny:

"Importantly when applying section 44(2) a public authority is not restricted to considering only the response it would have to provide. It can also consider whether either a hypothetical confirmation or a hypothetical denial would engage the exemption. For example, if the public authority did not hold the information, it should not just consider whether denying the information was held would breach the statutory prohibition, it should also consider the consequence if it had to confirm the information was held." (paragraph 12)

53. The issue of whether a hypothetical confirmation or denial would engage the exemption, regardless of whether the information is actually held, is discussed further in our guidance on When to refuse to confirm or deny that information is held.

Environmental information

54. This guidance relates to FOIA. If information is environmental then the request must be handled under the Environmental Information Regulations (EIR). There is no equivalent of section 44 in the EIR. Instead, regulation 5(6) of the EIR says that "any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply". Therefore a statutory bar in other legislation cannot prevent the disclosure of environmental information under the EIR. The information must be disclosed unless it is exempt by virtue of an exception in the EIR themselves. The existence of a statutory bar in other legislation may however be relevant to engaging an EIR exception and in the public interest test.

More information

55. Additional guidance is available on our guidance pages if you need further information on the public interest test or other FOIA exemptions.

56. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, tribunals and courts.

57. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

58. If you need any more information about this or any other aspect of freedom of information, please contact us, or visit our website at www.ico.org.uk.