

Information reasonably accessible to the applicant by other means (section 21)

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 how public authorities should apply the exemption in section 21 of FOIA and provides examples of circumstances where information can be considered to be reasonably accessible to an applicant by other means.

Overview

- The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route.
- Section 21 is an absolute exemption which means there is no requirement to carry out a public interest test if the requested information is exempt.
- Unlike most exemptions, the circumstances of the applicant can be considered as the information must be reasonably accessible to the particular applicant.
- In general, information available via the public authority's publication scheme will be reasonably accessible to an applicant.

What FOIA says

5. Section 21 states:

21.

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even

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though it is accessible only on payment, and (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

General principles of the section 21 exemption

6. The purpose of the exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route.
7. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.
8. This exemption is one of only two in FOIA where there is no exclusion from the duty to confirm or deny that the information is held. As an applicant still accesses requested information where section 21 is relevant, there is no value in neither confirming nor denying that the information is held. It is therefore reasonable for a public authority to inform the applicant that it holds the information in order to give them the opportunity to access it by another route.
9. It is important to emphasise that a public authority must know that it holds the information in order to be able to apply the section 21 exemption. When a public authority receives a request for information it has a duty to establish whether it holds that specific information, as, under section 1(1)(a), the requester is entitled to be told whether the authority holds the information. In other words, it has a duty to confirm or deny

whether it holds the requested information. Consequently, a public authority cannot claim the section 21 exemption on the basis that it probably holds the information or information of the same type. The authority must know whether it holds the information as specified in the request.

10. If the information is held but is covered by another exemption in Part II of FOIA, section 21 cannot apply because, for that very reason, the information is not, in fact, reasonably accessible to the requester.
11. Although the information that is requested may be available elsewhere, a public authority will need to consider whether it is actually reasonably accessible to the applicant before it can apply section 21. For example, the authority may still need to direct the applicant to where in the public domain the information can be found. Similarly, if the information is available to the applicant via another access regime, the authority should ensure that the applicant is familiar with the details of the regime and how it operates. In such ways, public authorities can demonstrate that section 21 is applicable and that the applicant has no right of access to the information via FOIA.
12. In most cases it will be obvious whether the exemption applies. However, occasionally, there may be some doubt as to whether the information is genuinely accessible to the particular applicant, and so the authority may need to do more than simply explain to the applicant how the information requested can be obtained. This is considered in more detail in the guidance.

Information that is reasonably accessible to the applicant

13. Subsection (1) describes the fundamental principle underlying section 21, which is that, in order to be exempt, information must be reasonably accessible to the applicant. Unlike consideration of most other exemptions in FOIA, this allows a public authority to take the individual circumstances of the applicant into account. Note the importance of the phrase “to the applicant” – in effect a distinction is being made between information that is reasonably accessible to the particular applicant and information that is available to the general public. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can

reasonably access the information outside of FOIA. For example, some people will have access to certain information by means of other legislation, such as the access rights afforded to specific persons under the Access to Health Records Act 1990.

14. An assessment of whether the section 21 exemption can be successfully applied will be dependent on whether or not requested information is reasonably accessible to the particular applicant who requested it. However, this is not to say that all the specific circumstances of an individual requester can override the test of reasonable accessibility. For example, in cases where information is only available by inspection, it may still be possible to regard this information as being reasonably accessible to all applicants on the basis that it is reasonable that information is only available in a certain location. That is to say, although section 21 allows a public authority to consider the circumstances of the individual applicant, it is important to note that the use of the word "reasonable" qualifies what information can be considered to be "accessible" to the applicant.
15. Some of the issues relating to reasonable accessibility are illustrated by the following:

Information in the public domain

16. Information is regarded as being in the public domain if it is reasonably accessible to the general public at the time of the request.
17. If only part of the requested information is in the public domain, section 21 can only apply to that part of the request (subject to the circumstances of the individual applicant).
18. It is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public until it becomes aware of any particular circumstances or evidence to the contrary.
19. Even if the requested information is fully in the public domain, this does not mean that it is automatically exempt under section 21. Public authorities should consider an applicant's particular circumstances (if and when they become aware of them) when deciding whether publicly available information is in fact reasonably accessible to that individual. For example, the applicant may not have reasonable access to the internet or

there may be special circumstances that mean that the applicant cannot access the information from the public source.

Example

In [Anthony Craven v Information Commissioner \(EA/2008/0002, 13 May 2008\)](#) the applicant had requested a report, parts of which were in the public domain as a result of leaks by the author, media reporting and statements made in open court. The Tribunal said that if the report was fully in the public domain it would be exempt from disclosure under section 21. It also noted that the applicant had said that he had "*readily obtained*" the minutes of the Select Committee meetings and media reports that were available to the public, and on this basis was satisfied that these parts of the report were reasonably accessible to the applicant by means other than a request under FOIA (and so section 21 could have been applied to those parts of the requested information).

The key point to note is that the information could be "*readily obtained*" by the applicant, and it was this that meant the section 21 exemption could be applied. Had it not been readily obtainable, supplementary evidence may have been required to determine that the information was reasonably accessible to the applicant, even though it was in the public domain.

Example

In [Christopher Ames v Information Commissioner and the Cabinet Office \(EA/2007/0110, 24 April 2008\)](#) the applicant requested specific information relating to the executive summary of the Iraq Weapons of Mass Destruction dossier. Section 21 was applied by the public authority on the basis that the information was available on the Hutton Inquiry website.

Although the Tribunal found that the information was not in fact on the website, it went on to make the point that should there have been any information on the website that answered the request, "*it would not necessarily follow that the material was reasonably accessible to Mr Ames so as to allow the Cabinet Office to rely on section 21.*" The Tribunal expressed doubt that, where a public authority is asked for a very

specific piece of information which it holds, it would be legitimate for the authority to tell the applicant that the information can be found on a large website (such as that of the Hutton Inquiry), even if the applicant is well informed. In other words, it is unlikely to be reasonably accessible to the applicant if a large amount of searching is required in order to locate the information. In such circumstances, the authority would be expected to provide a precise link or some other direct reference as to where the information could actually be found.

20. From these two examples, it can be seen that information, although generally available elsewhere, is only reasonably accessible to the applicant if the public authority:
- knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information.
21. Both the above examples emphasise that for section 21 to apply, the circumstances of the individual applicant must be considered and an assessment made as to whether the information is reasonably accessible to that applicant.

Part of the requested information is accessible

22. In the case of [*The London Borough of Bexley and Colin P England v Information Commissioner \(EA/2006/0060 & 0066, 10 May 2007\)*](#) the Information Tribunal considered whether the fact that 70% of the requested information was available to the applicant meant that it was reasonably accessible or whether all the information had to be reasonably accessible.
23. As we have seen, the word “reasonably” does qualify the word “accessible”, but it does so in the sense that the mechanism available to the particular applicant for accessing the information must be reasonable, rather than whether a reasonable amount of the information is available elsewhere. Therefore, for section 21 to apply, it is necessary to consider

whether the entirety of the information is reasonably accessible to the applicant. Section 21 will only apply to the extent that any of the requested information is in fact reasonably accessible to the applicant.

Information available to the applicant via other legislation

24. The principle that information is reasonably accessible to the applicant rather than the general public is also illustrated in cases where the information requested is available via other legislation, but only to a particular class of people. This reinforces the idea that FOIA should not circumvent other access regimes.
25. For example, the Access to Health Records Act 1990 (the AHRA) gives, in broad terms, a right of access to the health records of the deceased to their personal representatives, or to persons who may have a claim arising out of the death of the individual. This means that where the applicant for health records is the personal representative of the deceased, the information they would be entitled to under the AHRA will be exempt from disclosure under section 21 of FOIA because it is reasonably accessible to them by other means (ie the AHRA). In order to apply section 21, the public authority must be able to demonstrate that the applicant has a right of access via the AHRA.
26. Another example is the right of access to information under the Audit Commission Act 1998 (the ACA). This is slightly different, in that, in addition to the right of access only being available to certain people, it is only available for a limited period of time. Section 15 of the ACA provides a right for "any persons interested" to inspect the accounts (and related documents) of public authorities within local government and the fire and police sectors that are due for audit. They also have the right to make copies of them. A "person interested" is a person who has an "interest" in the finances of the authority, whether direct or indirect. This would include, for example, council tax and non-domestic ratepayers. The accounts and other documents are only available for a specific 20 day period each year. Consequently, information to which section 15 of the ACA applies may be considered to be reasonably accessible to the applicant by other means only where:
 - the timing of the request coincides with the time that the information is made available for inspection; and

- the applicant is an “interested person”.

Restrictions on use

27. Where a public authority claims that information is available to the applicant via an alternative access regime, in order for section 21 apply, that regime must not place restrictions on the use of the information. This was confirmed by the First-tier Tribunal (Information Rights) in the case of [Newcastle upon Tyne NHS Foundation Trust v Information Commissioner \(EA/2011/0236; 6 January 2012\)](#) which said that information made available to the applicant via an Employment Tribunal would have restrictions placed on it, and so section 21 could not apply.
28. In order for section 21 to apply the applicant should be as free to use the information provided under any alternative access regime as they would be had it been disclosed under FOIA. This will include any conditions attached to further use that would apply when information is disclosed under FOIA, such as copyright restrictions.

Information accessible only on payment

29. Section 21(2)(a) states that information may be regarded as reasonably accessible to the applicant “even though it is accessible only on payment”.
30. There are two main areas where information will be considered reasonably accessible even though payment is required – information that is available by means of other legislation which also permits a charge to be made, and information that is made available via a public authority’s publication scheme. For example, Companies House is able to charge fees under various statutory regulations for the inspection or provision of copies of documents relating to the registration of companies and partnerships; and any public authority can charge for publications, which may include journals or books which it makes available on a commercial basis, as long as they are listed, together with the cost, in its publication scheme. In such cases, information is generally reasonably accessible even though the payment may exceed that which would be payable via FOIA.

31. There will be some cases where the fact that there is a charge for information may mean that it is not reasonably accessible to the applicant. For instance, a public authority may be asked for information contained in its annual report. It is unlikely to be reasonable to require the applicant to purchase a copy of the report if the request is only for a small amount of the information contained in it.

Information whose disclosure is required by law

32. Section 21(2)(b) states that where there is a legal duty to make information available, it can be considered to be reasonably accessible to the applicant, whether or not payment is required. The provision applies if the information is available either from the public authority receiving the request, another public authority or indeed any other person.
33. Examples of where this provision will apply include the following:
- The Transport Act 2000, which requires the Civil Aviation Authority to make the contents of the register of licences granted to companies for the provision of air traffic services available for inspection and to supply copies when requested.
 - Section 33(1) of the Births and Deaths Registration Act 1953, which provides that on payment of a fee an applicant is entitled to a short certificate of a person's birth.
 - The Companies Act 2006, under which a company has the duty to make the register and index of members' names to be open for inspection and to provide a copy of the company's register of members on payment of the prescribed fee. (For instance a public authority might be asked for information relating to a company which it regulates.)
34. Where the legal duty only extends to making the information available for inspection, it cannot automatically be considered as reasonably accessible and so exempt under section 21(1) by virtue of section 21(2)(b). One example of this is as follows:

- Under the Local Government Act 2000, a principal council has a duty to make certain information available following the making of executive decisions, but for inspection only.
35. However, information that is only available for inspection can still be considered to be reasonably accessible to the applicant under other parts of section 21. In this context, and in view of the necessary test of reasonableness, this means that in most cases an applicant will need to present strong arguments that the information was not reasonably accessible.

Access to court records

36. In certain circumstances, as is made clear in the Civil Procedure Rules (the CPR), an individual has the right to obtain a copy of a court order or judgment. This means that, where the relevant requirements of the CPR are met, such information must be made available to a member of the public on request and therefore would be reasonably accessible to the applicant under section 21(2)(b). In other circumstances, access to information is at the discretion of the Court and so section 21 cannot apply.
37. For example, in a case that is governed by the CPR, where judgment has been entered and was made or given in public, and the restrictions within the CPR on access to certain documents do not apply, then any third party has an absolute right to a copy of the judgment by making a written request to the Court.
38. On the other hand, the Court has the discretion whether or not to grant access to documents in certain cases, for example those relating to mediation settlements. Here there is no definite right of access and so section 21 cannot automatically apply by virtue of subsection 2(b).
39. Each case involving a request for information held in court records must be considered on its own merits in order to assess whether section 21 applies. The nature of the information requested, the applicable court rules, whether the applicant was a party to the proceedings, the stage of the proceedings (and whether they are public) and whether there are any exceptions to the general right of access are all relevant factors.

Information whose disclosure is not required by law

40. Section 21(3) states that where information is not published or made available under statute (other than FOIA) but is only available on request from the authority, it cannot be considered as reasonably accessible to the applicant unless it is “made available in accordance with the authority’s publication scheme and any payment required is specified in, or determined in accordance with, the scheme.” This is another example of section 21 reinforcing the principle that a public authority cannot ‘opt out’ of FOIA by claiming the section 21 exemption because it would have made the information available anyway. There is a requirement for some form of structured mechanism by which information is made available, and a publication scheme is one way of achieving this.
41. The default position to be taken by a public authority is that information made available in accordance with its publication scheme is to be considered as being reasonably accessible to the applicant. This can be seen in the context of the intention of a publication scheme as making available a significant amount of information that is readily obtainable by members of the public. As long as an authority draws the attention of the applicant to the scheme such that it is clear how the requested information can be accessed, its obligations in this respect will generally be fulfilled.

Example

This approach has been confirmed by the First-tier Tribunal.

In [*Ian Benson v Information Commissioner and the Governing Body of the University of Bristol \(EA/2011/0120, 10 November 2011\)*](#) the Tribunal was clear in its conclusion that “*information which is available under the terms of a publication scheme is to be regarded as reasonably accessible.*”

Example

In [*Matthew Davis v Information Commissioner and the Health and Social Care Information Centre \(EA/2012/0175, 24 January 2013\)*](#) the Tribunal came to the same conclusion in a

more detailed judgment. Here, the requested information was health statistics which the public authority (the HSCIC) said was available from its publication scheme at a charge of £1,550. The appellant maintained that such a high charge meant that the information was not reasonably accessible to him. As the HSCIC had adopted the model publication scheme approved by the Information Commissioner, the Tribunal was able to decide that the information was reasonably accessible to the applicant by virtue of section 21(3). It said that "*whilst the wording of section 21(3) is not unambiguous, it is hard to see why Parliament should enact such a detailed system for approval of publication schemes and such specific requirements as to notification for charges if compliance simply made the authority's published information eligible for an assessment as to whether it was reasonably accessible.*" The Tribunal did go on to acknowledge, though, that both the Information Commissioner and public authorities should be alert to the possibility of the level of charges deterring requests.

42. However, as referred to in the Davis case, this position can only be taken where a public authority is publishing information in accordance with a publication scheme that has been approved by the Information Commissioner. This means that a public authority should have adopted the [model publication scheme](#) approved by the Commissioner and which came into effect on 1 January 2009.
43. Public authorities may include some information within its publication scheme that is only available by means of inspection, and this may bring into question whether it is reasonably accessible to all applicants. However, one requirement of the model publication scheme is that "only in exceptional circumstances" will information in the scheme be made available only by viewing in person. Consequently, the issue of the reasonable accessibility of such information should only crop up rarely in practice. Once again, the requirement for accessibility to be reasonable will limit the possibility of an applicant questioning the application of section 21 by a public authority in this regard. In some situations it may also be possible to provide the information by other means, such as the provision of copies. The accessibility of information available for inspection only via a publication scheme may also

be dependent on the nature of the information itself. In other words, there may be cases where the information can only be reasonably made available by means of inspection.

44. If a public authority has not adopted the model publication scheme, not only will it be in breach of section 19 of FOIA, but it will also be unable to apply the exemption at section 21(3) to information that is made available via its publication scheme.
45. As highlighted in the Davis case, it should also be noted that payment for information made available in accordance with the public authority's publication scheme should be specified in, or determined in accordance with, the scheme. This means that, for section 21(3) to apply, such payments must be in line with the charging provisions of the Information Commissioner's model publication scheme. The reasonableness of the charge (and thereby the accessibility of the information) is determined by compliance with the requirements of the approved model publication scheme rather than the individual applicant's ability to pay.
46. In this way it can be seen that section 21(3) differs from other aspects of section 21 in that there is no requirement for any specific consideration of the circumstances of the individual applicant who has requested the information.

Other considerations

47. When justifying that information is reasonably accessible by other means and therefore exempt under section 21, public authorities need to be aware of their obligations under other legislation, for example the Equalities Act 2010 and the Welsh Language Act.
48. This guidance relates only to FOIA. It should be noted that there is no direct equivalent to section 21 under the EIR.
49. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.

More information

50. 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.
51. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
52. If you need any more information about this or any other aspect of freedom of information, please [contact us](#): see our website www.ico.org.uk.