

# Health and safety (section 38)

## 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 considers section 38, which is about the exemption from the duty to provide information if its disclosure under FOIA would, or would be likely to endanger health and safety.

## Overview

- Section 38 provides an exemption from disclosing information if it would endanger **any** individual (including the applicant, the supplier of the information or anyone else).
- The exemption does not necessarily deal with what are commonly thought of as health and safety matters such as establishing the cause of an accident.
- Section 38 focuses on two particular areas where disclosure of information would or would be likely to endanger:
  - the physical or mental health of any individual, or
  - the safety of any individual.
- Section 38 is a qualified exemption. This means that even if information is exempt, a public authority is under a duty to consider whether disclosure should nevertheless be made in the public interest.

## What FOIA says

### 5. Section 38 states:

**38.**—(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

## The main provisions of section 38

6. Information involving living individuals will be covered by section 40 (personal information). The focus of section 38 is on other information that might pose a risk, if disclosed. This may be information about:

- sites of controversial scientific research where disclosure could lead to sabotage and therefore there would be risks to the physical safety of staff;
- someone who has died (and is therefore not covered by the personal information exemption) where disclosure might endanger the mental health of surviving relatives, particularly if they had been unaware of it;
- an issue where disclosure might have an adverse effect on public health (for example, research into the safety of a particular medication);
- any plans or policies relating to the accommodation of individuals, or groups of individuals where disclosure could

lead to them being threatened or harassed (for example asylum seekers, ex-offenders);

- the identity of informers or undercover officers.

### **Example**

In [Greg Callus v Information Commissioner and the Home Office EA/2013/0159, \(6 May 2014\)](#) the First-Tier Tribunal decided that the names and ranks of the persons who held certain roles under the Regulation of Investigatory Powers Act (RIPA) 2000, on behalf of the police forces of England and Wales, was exempt information under section 38.

It accepted that the disclosure of names may create “a risk of Single Points of Contact (SPoCs) being approached by criminals or others intent on undermining the effectiveness of the RIPA regime”.

Although they felt that there was less evidence to support the Home Office’s claim that such an approach may be accompanied by actual or threatened violence they said that

...“the conclusion they feared, however, is one that would flow logically from initiating communications designed to corrupt the relevant official. It is therefore justifiable to regard it is a result that would be likely to flow from the disclosure of names and to conclude that the exemption is engaged.”

The Tribunal further concluded that the public interest in maintaining the exemption would again outweigh the public interest in disclosure, given the very limited public interest in disclosure and the risk of physical harm to individual SPoCs which may, for example, be caused by a refusal to co-operate.

### **Definition of terms**

7. In section 38 the word ‘endanger’ is used instead of the word ‘prejudice’.
8. Our view is that the use of the term ‘endanger’ equates to ‘prejudice’ and that section 38 is subject to the prejudice test.

9. This view was confirmed by the First-Tier Tribunal in [PETA v ICO & University of Oxford EA/2009/0076, \(13 April 2010\)](#) where the Tribunal said "All parties agreed that in the context of section 38 'endangering' and 'prejudicing' came to the same thing and that consequently the Tribunal could read across the existing body of case law".
10. 'Any individual' includes any specific individuals, any member of the public, or groups within society.

## The endangerment test under section 38

11. In order to engage this exemption the public authority must demonstrate that there is a causal link between the endangerment and disclosure of the information.
12. The public authority must also show that disclosure would or would be likely to have a detrimental effect on the physical or mental health of any individual, or the safety of any individual. The effect must be more than trivial or insignificant.
13. The term "would...endanger" means that it is more likely than not to occur (ie a more than 50% chance). "Would be likely to endanger" is a lower threshold; this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring. The authority must decide the likelihood of endangerment arising on the facts of the case. For more details on this, please see our guidance on [the prejudice test](#).
14. The assessment of endangerment is relevant to the public interest test. Note that the choice between "would" and "would be likely" is important because it affects the balance of factors in the public interest test. The greater the likely endangerment to the physical or mental health of any individual, or the safety of any individual, the stronger the public interest in not disclosing the information requested.

### **Section 38(1)(a) - Endanger the physical or mental health of any individual**

15. Endangering physical health usually means an adverse physical impact and often involves medical matters. This can relate to individuals or groups.

### **Example**

A health authority is asked to disclose details of research that it has commissioned into the safety of a particular medication.

Disclosure could endanger physical health if the disclosure caused people to stop taking the medication.

This should be balanced against the overall public interest in disclosing the information to enable wider public debate about how health authorities ensure the safety of medicines that are prescribed to the public.

16. Endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it has a greater impact than stress or worry.
17. A public authority may find it difficult to demonstrate a danger to mental health. They might 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; however the Commissioner considers that clinical evidence of a psychiatric condition is not always necessary.

### **Example**

This was confirmed by the First-Tier Tribunal in [PETA v ICO & University of Oxford EA/2009/0076, \(13 April 2010\)](#). The Appellant suggested that in order to be satisfied that there was a danger to mental health, positive evidence from, for example, a psychiatrist as to the clinical impact of the campaign upon the mental health of those affected would be necessary.

The University had already provided significant evidence on the serious nature of the physical threat in this case to include life threatening incendiary devices and arson; therefore the Tribunal did not consider a clinician's report was required, saying that:

“the nature of the physical threat was sufficient that on a balance of probabilities the effect upon the mental health of those involved would go beyond stress or worry and constitute an endangerment to their mental health.”

### **Section 38(1)(b) - Endanger the safety of any individual**

18. Endangering safety is usually connected to the risk of accident and the protection of individuals.

#### **Example**

Information requested about the number of speeding tickets issued at a particular camera site could result in more drivers speeding at that site because they have deduced that enforcement is less likely at that location. This could increase the risk of a serious accident and endanger the safety of individuals.

19. Some people or groups of society are particularly vulnerable and their safety may be more easily endangered than that of others. For example information about individuals, or groups involved in controversial work, such as:
- animal experimentation;
  - awarding grants to anti-fascist groups;
  - decisions against a particular, disgruntled service user.
20. Information that could endanger an individual’s safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied upon.

### **Application of the exemption**

21. The public authority must be satisfied that the endangerment would result from disclosure of the information. They must be

able to show a connection between the disclosure and the endangerment.

### **Example**

ICO decision notice [FS50092069](#) concerned a request to Sunderland City Council for information about the Tyne and Wear Anti-Fascist Association (TWAFA). The council provided some information but argued against the disclosure of names and contact details of TWAFA officials and certain council staff, citing sections 38, 40 and 41.

The council provided evidence of previous incidents of harassment, including physical and oral abuse, following disclosure of similar information and also explained why it had concerns for the safety of its staff.

It was not absolutely certain that the release of the withheld information would put the individuals and organisations concerned at risk, however there was sufficient evidence for the Commissioner to conclude that there was a likelihood that they would be singled out for harassment, intimidation and possible violence by others. The Commissioner was therefore satisfied that section 38 was engaged.

### **Public domain**

22. Another issue for public authorities is whether the same or similar information is already available in the public domain. They need to consider whether the consequences of disclosure are therefore more or less serious, in each particular case.

### **Example**

The Information Rights Tribunal (IRT) took both arguments into account in [PETA v Information Commissioner and University of Oxford EA/2009/0076, \(13 April 2010\)](#). The request was for details from a licence to conduct experiments on a macaque monkey named Felix, including references to other scientists' work that had been used to support the application. The university argued that releasing the names of anyone associated with the application, however tangentially, would put



them at risk from animal rights activists and thus endanger their health and safety under section 38.

The details of the scientists' works were in the public domain and their identities and association with this area of science could be found by searching the internet. However, the Tribunal found that the context of the request would reveal something new:

"The new piece of information provided by way of disclosure of these references in this context was the link to Felix; namely that the work done by these co-authors had been used to support the application to experiment upon Felix. Consequently there was now a direct link between the authors and the experimentation upon Felix."

The Tribunal accepted that the scientists referred to in the licence application may already have been at risk from animal activists as their names were in the public domain. However, releasing their names during the specific campaign over experiments on Felix was likely to cause additional danger:

"disclosure in this atmosphere both raised their profile, placed them in a new context... and consequently put them into a context of a suggested target. To use a colloquialism this was placing them in the cross hairs."

The Tribunal also considered that, although the information was already published, it was not easy to find and collate.

This meant that disclosure was likely to increase the risk that these particular individuals would be targeted, which was enough to show additional harm.

23. Further guidance on [information in the public domain](#) is available on our website.

## The duty to confirm or deny

24. Section 1(1)(a) of FOIA requires a public authority to inform the requester "whether it holds information of the description

specified in the request". This is known as the duty to confirm or deny.

25. Section 38(2) removes the duty to confirm or deny:

"if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)"

26. Therefore public authorities need to consider whether simply confirming or denying that information is held would endanger the health or safety of any individual.

### **Example**

A public authority considering converting hostels under its management into residential centres for convicted offenders may wish neither to confirm nor deny that it holds such information.

The safety of existing residents may be endangered if the information was disclosed that hostels were being considered for conversion. In other words, even confirming or denying that such information was held may endanger public safety, as any or all hostels managed by the public authority may be vulnerable to attack.

27. A public authority seeking to claim section 38(2) must be able to explain how confirming or denying that information is held would be likely to endanger the physical or mental health or safety of an individual defined in section 38(1)(a) and (b).

### **Example**

ICO decision notice [FS50521978](#) concerned a request for information from Greater Manchester Police (GMP) about the discovery of a body in November 2011. GMP disclosed certain information but refused to confirm or deny whether it held other information under section 38(2).

The information in question was particularly sensitive. GMP

considered that mere confirmation or denial would be upsetting to relatives of the individual in question, to the extent that it would be likely to endanger their mental health.

In recognition of the sensitive subject matter, the Commissioner accepted GMP's reasoning and agreed that the exemption from the duty to confirm or deny provided by section 38(2) was engaged.

28. Further advice on neither confirm nor deny provisions in FOIA is available in our separate guidance on [when to refuse to confirm or deny information is held](#).

## The public interest test

29. Section 38 is a qualified exemption. This means that, even if the information requested is exempt from disclosure, the public authority must go on to consider and decide whether the public interest in maintaining the exemption outweighs the public interest in its disclosure.
30. In the case of section 38 this would involve weighing up the risks to the health and safety of an individual or group against the public interest in disclosure in all circumstances of the case. The test must be applied on a case by case basis.

### Example

ICO decision notice [FS50520884](#) concerned an individual's request to the Metropolitan Police Service (MPS) for photographs taken at the scene of their brother's death. MPS withheld the information under section 38 and section 30 (investigations and proceedings).

MPS said that the photographs were of a particularly graphic nature and that the release into the public domain would not be in the public interest.

The Commissioner acknowledged that the physical or mental health of family members (rather than just the person making the request), and other members of the public, needed to be considered when disclosure to 'the world at large' is being made under FOIA.

The Commissioner accepted that for these family members to discover that photographs of the deceased had been released into the public domain could have a significant impact on their physical and mental health.

The Commissioner did not consider that disclosure of the photographs for the requester's private requirements justified the apparent risk to the health and safety of others, primarily the immediate family and any other people who knew the deceased.

Disclosure under FOIA is not discretionary and must be suitable for everyone. On this occasion, access to the required information via FOIA was not appropriate.

31. FOIA itself does not list the factors that would favour disclosure however these include:

- furthering the understanding and participation in the public debate of issues of the day;
- promoting accountability and transparency by public authorities for decisions taken by them;
- promoting accountability and transparency in the spending of public money;
- allowing individuals, companies and other bodies to understand decisions made by public authorities which affect their lives;
- bringing to light information affecting public health and safety; and
- circumstances where disclosing information would reduce potential danger to people by making them aware of various risks and enabling them to take appropriate action.

32. Both the content and context of the information will be relevant when considering this test and determining the appropriate weight to be given to the benefits and detrimental effects of disclosure.

### **Example**

There will be occasions where disclosure could have both a

positive and negative impact on public health.

Information on an established vaccine may discourage some people from having the injection. This may protect a few people who could have a bad reaction to the vaccine; however it would undermine a national immunisation campaign.

33. Factors that favour withholding information include:

- the disclosure of speculative or incomplete information that could mislead individuals or the general public and cause them to act or fail to act against their own interests;
- the disclosure of information that would undermine the functioning of a system established to protect public health or safety, for example speed cameras, drug trials; or
- the disclosure of information that would provide intelligence allowing known individuals to be targeted.

**Example**

ICO decision notice [FS50402662](#) concerned a request to the Foreign and Commonwealth Office (FCO) for information about the funding of non-governmental organisations (NGOs) in the Middle East.

The FCO provided some information in the form of a table but withheld the rest under sections 38(1)(a) and (b) of FOIA.

The FCO provided background on the hostile political situation in the various areas of the Middle East involved, including details on the political regime's ban on all international regimes working in its domain. It provided evidence based on experience of previous similar events which had taken place. This identified a real risk of arrest and interrogation by the relevant authorities controlling the Middle Eastern areas, with reports of interrogation methods involving psychological and physical torture being used. Subsequent convictions often carried severe penalties including lengthy prison sentences or more seriously the death penalty.

The Commissioner accepted that the endangerment described would be “real, actual and of substance”. The Commissioner considered that it was not only the individuals working for or participating in the functions of the NGOs who would be at risk, but potentially also their families. The evidence supplied by the FCO showed a clear potential chain of events to demonstrate a strong causal link between disclosure and endangerment.

The Commissioner acknowledged the public interest argument that disclosure would improve the public’s understanding of the funding of organisations across the Middle East and globally. Balanced against this was the substantial risk to the health and safety of those working, volunteering and participating with the NGOs, and the risk to their families.

The likely impact was demonstrated to be significant in terms of severity and the strong risk of its occurrence. This added considerable weight to the argument for maintaining the exemption as well as the fact that a high number of individuals would be at risk.

Taking all the factors into consideration, the Commissioner considered that the public interest in maintaining the exemption outweighed the public interest in disclosure.

34. Once section 38 is engaged and it has been established that there is a real and actual danger to someone’s health and safety, it is difficult to find in favour of disclosure.

### **Example**

This was borne out by the First-tier Tribunal decision in [British Union for the Abolition of Vivisection vs Information Commissioner and Newcastle University EA/2010/0064, \(10 November 2010\)](#).

The Tribunal said “the public interest in maintaining the s38 (1) exemption, where it is engaged, is also strong. Self-evidently, there would need to be very weighty countervailing considerations to outweigh a risk to health and safety which was of sufficient severity to engage s38 (1)”.

35. Public authorities can of course always consider whether there are any steps they can take to mitigate or manage the risk that disclosure would cause.

## Interaction with other exemptions

36. A public authority should consider whether there is an interaction between section 38 and other exemptions in FOIA. A public authority should identify the most appropriate exemption, or exemptions, that apply to the information requested in each case.
37. Other exemptions which may be relevant include:
- Section 40 - requests may include personal information that would be exempt under section 40, for example disclosure of information that could assist terrorists targeting a specific individual or would identify 'whistle-blowers';
  - Sections 30 and 31 (investigations and law enforcement) – when information relates to an investigation or proceedings or when the disclosure might prejudice matters such as the administration of justice, prosecution of offenders or the prevention or detection of crime; and
  - Section 32 (court records) – restrictions on the disclosure of information contained in court records may be relevant to the protection of the health and safety of individuals, for example victims and witnesses.

## Other considerations

38. Other legislation exists which may prevent the disclosure of information which would endanger an individual's health and safety such as:
- Rehabilitation of Offenders Act 1974
  - Health and Safety at Work Act 1974 (Section 28)
  - Human Rights Act 1998
  - Data Protection Act 1998 - in particular the Data Protection (Subject Access Modification)(Health) Order 2000 (SI 2000/413). This covers information on the physical or mental

health of an individual where disclosure is likely to cause serious physical or mental harm to that individual or another person.

39. This guidance relates only to FOIA. If the information is environmental, public authorities will instead need to consider exceptions under the EIR.

## More information

40. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.
41. 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.
42. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
43. 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](http://www.ico.org.uk).