Steven Dickinson

FOI/EIR FOI Section/Regulation s36 Issue Section 36: Common problems and issues
Line to take:

The table below lists some problems and issues that may arise in section 36 cases and explains how we should address them.

Further Information:

Problem/ issue	**Our response**
There is insufficient evidence of the QP opinion e.g. • The PA has not provided the submission made to the QP • There is no documentary record of the QP's opinion It is not clear whether the PA's arguments are actually those considered by the QP.	If the PA has no record of the submission or the QP's opinion, we would accept a signed statement from the QP stating whether they saw the information in question, what factors they took into account and what their opinion was and when they gave it. There is a form on our website that PAs can use to provide us with a record of the QP opinion. Note that this is a *minimum* requirement in cases where are no records of the actual process i.e. where we only have the PA's word for what happened.
There were flaws in the process (e.g. QP opinion not obtained) but these were corrected at internal review.	We accept that errors in applying an exemption can be corrected at the internal review stage. If the QP opinion was not given before the refusal notice was issued, s36 can still be engaged if the QP gives a reasonable opinion at internal review. The QP should base their opinion on the situation at the time of the request.
S36 is claimed for the first time at internal review or during our investigation	Public authorities have the right to raise s36 exemptions for the first time at internal review or during our investigation. In each case they are still required to obtain the reasonable opinion of the QP.
The QP has not specified level of prejudice (would/ would be likely to)	Give the PA an opportunity to confirm what the QP meant. If no confirmation received, apply 'would be likely to' unless there is clear evidence that the QP meant 'would'. For example, the QP's opinion may talk about the consequences of disclosure rather than possible consequences. If there is any doubt then apply 'would be likely to'
The PA claims s36 but has not obtained the QP opinion	If there is no QP opinion the exemption is not engaged. This applies in all cases except in relation to statistical information under s36(4).
The opinion has been given by someone other than the QP.	If another person is formally acting up i.e. they have been given the responsibilities of the QP's post, then accept it as a QP opinion. Otherwise, do not accept it as a QP opinion. For example, if a more junior official is merely 'covering' while the QP post holder is on leave, they are not the QP.
A QP has not been authorised for this PA (i.e. the PA is not listed in s36(5)(a)-(n), or in the archived list produced by the Ministry of Justice and there has been no specific authorisation by a Minister previously)	The PA should request an authorisation from a Minister of the Crown via the most relevant government department. If in doubt they should contact informationrights@justice.gsi.gov.uk If no QP has been authorised s36 cannot be engaged (other than for statistical information). If a QP has been authorised after the time for compliance but by the time of the internal review they can give their opinion and engage s36.
The PA has extended the time for considering the PIT under s10(3) without first obtaining the QP opinion.	There is a procedural breach of s17(1). S36 cannot be engaged until the QP opinion has been given.
Case officer doesn't really agree with QP opinion	The test is not whether we accept or agree with the opinion but whether it is a reasonable opinion to hold. It is only not reasonable if no reasonable person could hold it.

	This approach means that it is likely that we will accept that the exemption is engaged more often than we used to.
The submission or the QP's reasoning includes irrelevant factors.	Concentrate first on the actual opinion rather than the reasoning process that led up to it. The opinion is simply that prejudice/ inhibition would/ would be likely to occur. Consider whether this is an opinion that any reasonable person could hold. If on the face of it, the opinion is not one that a reasonable person could hold or this is doubtful, consider the reasoning and the supporting arguments. They may shed light on why the QP came to their opinion. We are not concerned with the quality of the reasoning process itself, only the substantive opinion.
QP specifies "would"; case officer thinks "WBLT" more realistic but difficult to say "would" not reasonable	In theory we may consider that it is unreasonable to say that prejudice/ inhibition would occur but reasonable to say it would be likely to occur. This possibility is stated in our external guidance because we do not want PAs to claim 'would' in every case, simply in order to gain extra weight in the PIT. Remember that we have to accept or reject the QP's opinion as stated and if they say 'would' this will carry a greater weight over into the PIT than WBLT. In practice such situations are likely to be rare. It is more likely that we would accept 'would' as a reasonable opinion, even if we do not agree with it.
I have had to accept the QP opinion as reasonable even though I don't agree with it. Doesn't giving due weight to the QP opinion mean that the PI will always favour maintaining exemption?	No. The QP opinion is only about the likelihood of prejudice / inhibition (i.e. it would or would be likely to occur). If we accept that the opinion is reasonable we accept that the specified prejudice/ inhibition would or would be likely to occur, but we then go on to consider the severity, extent and frequency of that prejudice/ inhibition. If we consider that it would not be particularly severe or extensive or occur frequently then it is possible to find that the PI in maintaining the exemption does not outweigh the PI in disclosure.
The PA has applied s36(2)(b)(i) or (ii) but the content of the information is not notably 'free and frank'	S36(2) is about the effects of disclosing the information, not the content of the information. If the content clearly represents a free and frank exchange of views/ advice then it may be easier to accept that disclosing it could lead to prejudice / inhibition but disclosing more anodyne, less controversial information could also have that effect, depending on the circumstances of the case. Concentrate on how the prejudice/ inhibition could happen rather than how free and frank the information is.
Officials have applied the QP's opinion to information that the QP does not appear to have considered.	Consider whether the QP's opinion could be construed broadly to cover the exempted information, even if they did not specifically consider it. Bear in mind that it may not be feasible for the QP, who is a very senior official, to look at every piece of relevant information. If the QP's opinion can be broadly construed to cover the withheld information, accept that is covered by the QP's opinion. If the withheld information is not part of and clearly different from the information that the QP considered, then there is no QP opinion relating to that information.

Source	Details		
Related Lines to Take			
Related Documents		Casework Advice Note 2,	
Contact		CW	
Date	21/11/2011	Policy Reference	**CWAN001**

- Information Commissioner's Office intranet

FOI/EIR FOI Section/Regulation s36 Issue Section 36: Reasonable opinion
Line to take:

This document explains our change of approach to the definition of a 'reasonable opinion' in section 36 FOIA. It sets out the problems with our previous approach, the options for change we considered and the reasons for our new approach. It is intended as a background document for case workers and others who require a further explanation of how we have arrived at our new approach. It should be read in conjunction with the guidance document itself and the internal guidance for caseworkers on common problems and issues.

Further Information:

1. Introduction

Our previous approach was that, in order to be reasonable, the qualified person's (QP's) opinion must be both reasonable in substance and reasonably arrived at. This is taken from the Tribunal in *Guardian and Brooke (*at §64), which was endorsed in *McIntyre (*at §31) with the caveat that even where '*the method or process by which that opinion is arrived at is flawed in some way*' (i.e. it is not reasonably arrived at) the opinion may still be reasonable if it is '*overridingly reasonable in substance*'.

However, this approach creates problems of interpretation and terminology and problems in practice.

2 Problems with our previous approach

2.1 Problems of interpretation

The basis for the two part test is not entirely clear. The Tribunal in *Guardian and Brooke* appear to have derived the requirement that the opinion be reasonably arrived at from a 'golden rule' interpretation of the Act ('*we derive this conclusion from the scheme of the Act and the tenor of s36*' – at §64). They said that the fact that the reasonable opinion of the QP is required for the exemption to be engaged "*is a protection which relies on the good faith and proper exercise of judgment of that person.*" The QP is therefore "*required by law to give proper rational consideration to the formation of the opinion*". Finally, because the opinion is a judgment about what will happen in the future, if the basis of the opinion (i.e. the process) could not be examined it would in many cases be effectively unchallengeable - to which they added '*we cannot think that that was the Parliamentary intention*.' The question is whether this finding (which in any case is not binding on us) warrants the establishment of a rigid two part test, both parts of which must be 'passed', unless the *McIntyre* caveat applies.

Furthermore, there is a question as to what extent the *Guardian and Brooke* Tribunal's approach is influenced by, if not derived from, judicial review (JR) criteria. They made a point of saying (at §56) that they had not been referred to Lord Falconer's references to judicial review during the passage during the passage of the Freedom of Information Bill and so had not taken account of them. Nevertheless their comments at §64 on '*taking into account only relevant matters and ignoring irrelevant matters*' reflect the Wednesbury test of reasonableness and JR criteria.

2.2 Problems of terminology

Secondly, the terminology is still not clear. The Tribunal in *Guardian and Brooke* did not define what they understood by 'reasonable in substance'. When they considered it (at §60) they were mainly concerned with dismissing the reference in our earlier guidance document to an opinion within '*a range of reasonable opinions*'.

Similarly, the Tribunal in *McIntyre* did not define what they meant by an opinion that was 'overridingly reasonable in substance' as opposed to one that was merely 'reasonable in substance',yet this is an important distinction as it provides a way of finding that the QP opinion is reasonable when it does not satisfy the two part test. Our own suggested criteria in LTT35 are admitted not to be definitive.

2.3 Problems in practice

An analysis of DNs, together with feed back from case workers, shows the practical problems that flow from the interpretative issues. Despite ostensibly having a two part test, we are reluctant to find that an opinion was not reasonable purely on the basis that it was not reasonably arrived at. If we find that an opinion was not reasonably arrived at, we will consider whether it was nevertheless reasonable in substance; if it is, we are likely to class it as 'overridingly reasonable' in order to overlook the flaws in the reasoning process.

Case workers have suggested that we should either have a more prescriptive approach, insisting on reasonably arrived at and being willing to find that s36 is not engaged where this is lacking, or concentrate solely on whether an opinion is reasonable in substance.

3 Options considered

Three options for resolving these problems were considered:

Option 1: Base our understanding of 'reasonable' on JR criteria

This had the advantages of providing well established criteria and requiring consideration of the reasoning process and evidence of how the decision was reached.

However, this overlooks a fundamental difference between the two areas of law. Where the court in a JR case finds that an administrative decision was unreasonable, the outcome is that the decision is remitted back to the authority concerned; where we find that the QP opinion is unreasonable, the outcome is that the information is released (unless of course another exemption applies or the DN is appealed).

A rigid application of the two stage test based on JR criteria creates the risk of locking us in to an outcome that may not be appropriate, simply because the authority and the QP had not approached the decision making process properly.

Moreover, while Lord Falconer's comments can be read as a general statement about reasonableness, it is not clear that there is a *Pepper v Hart* justification for relying on them as an aid to interpretation.

Option 2: Develop our own definition of reasonable opinion

This has the advantage of allowing us to use elements of other approaches without being bound by them, in order to develop a definition we consider logical, clear, robust and workable. It also allows us to define the evidential requirements we are looking for. The disadvantage is that we are developing a definition by force of argument, against a background of Tribunal decisions which have largely accepted the *Guardian and Brooke*/ *McIntyre* approach

This was the option chosen.

Option 3: Continue and develop our current approach

This means accepting the current *Guardian and Brooke*/ *McIntyre* approach but doing more work to clarify and strengthen it. It is essentially the status quo but with more explanation. This has the advantage that it follows the approach followed by most Tribunals since *Guardian and Brooke*. The weakness of this approach is that it does not address the fundamental problems outlined above.

4. Our new approach to reasonableness

The new guidance document on section 36 is intended as a clear public statement of what we consider to be a reasonable opinion. The following comments support this and provide some further explanation.

We are basing our understanding of 'reasonable' on the plain meaning of the word. We will avoid adopting other definitions drawn from other areas of law or inventing a new meaning. For convenience, the definition in the Shorter Oxford English Dictionary can be used: "*in accordance with reason; not irrational or absurd*".

The opinion only has to be *a* reasonable opinion. An opinion that *a* reasonable person could hold is a reasonable opinion. It does not have to be the *only* reasonable opinion that could be held, or the 'most' reasonable opinion. We do not have to agree with the opinion; we only have to recognise that a reasonable person could hold it.

An opinion either is or is not reasonable. We should not say that the opinion is within a range of reasonable opinions. The term 'range' is misleading as it implies that some opinions are more reasonable than others. For this reason it was rejected by the *Guardian and Brooke* Tribunal at §60.

While an opinion that is absurd is not reasonable, that is not the same as saying that any opinion that is not absurd is reasonable. That was essentially the position we adopted before *Guardian and Brooke* and we should avoid saying it now because it is misleading. Rather, we should be asking whether the opinion is in accordance with reason, i.e. is it an opinion that a reasonable person could hold?

We are looking at the substantive opinion itself. The substantive opinion is simply whether the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. We are not assessing whether the process by which this opinion was reached was reasonable (i.e. whether it was reasonably arrived at). The guidance says that PAs should document the process by which the opinion was reached, the factors considered and the reasons for the final opinion. This is in order for us to decide whether the final, substantive opinion was reasonable. The guidance makes the point that there may be situations where an opinion may appear on the face of it not to be reasonable, but when the background to it is explained it may be accepted as a reasonable opinion to hold. If PAs do not record and provide this, they run the risk that we may find the exemption is not engaged.

All of this implies that reasonableness is not intended to be a high hurdle. Provided the criteria are met we can accept that the opinion is reasonable. We still have scope in the PIT to consider whether the exemption should be maintained. The main focus of our consideration is likely to be on the PIT rather than on the engagement of the exemption.

Source	Details
	McKinnon v Secretary, Department of Treasury [2006] HCA 45 - in particular §60 and §129 (plain meaning of reasonable), §121 (due deference) and §131 (one reasonable ground).

Related Lines to Take

Related Documents

Casework Advice Note 1,

Contact		CW	
Date	21/11/2011	Policy Reference	**CWAN 002**

- Information Commissioner's Office intranet

Steven Dickinson

FOI/EIR FOI Section/Regulation s41 Issue Anonymised information about individuals and the duty of confidence – standard DN wording
Line to take:

Where no individual can be reliably identified as the subject of information as a result of its release and reference to other material available to the general public, there will be no breach of confidence to action if that information is released.

Further Information:

This casework advice note only applies to cases in which the information under consideration is anonymous information about individuals. Case officers should continue to follow the approach set out in the lines to take in relation to all other cases involving section 41.

Where it is not possible to identify the subject of information from the material to be disclosed, either on its own or together with other information available to the general public, it is no longer necessary to consider each limb of the section 41 test of confidence.

If an individual cannot be reliably identified then there can be no expectation of confidence and no detriment to the confider by way of an invasion of privacy. It therefore follows that there can be no breach of confidence to action.

Case officers need to explain why identification of an individual is not possible. If it has been necessary to address the issue of identification in relation to section 40 the explanation in respect of section 41 will follow the same analysis. Once the identification point has been addressed the following wording can be used in decision notices to explain our conclusions regarding the duty of confidence.

> "In order for section 41 to apply it is necessary for all of the relevant elements of the test of confidence to be satisfied. Therefore if one or more of the elements is not satisfied then section 41 will not apply. The Commissioner has explained why he does not consider it possible to reliably identify an individual as the subject of the withheld information from its contents or if it is linked with other material available to the general public. In such circumstances he does not consider that there can be an expectation of confidence or that disclosure would cause detriment by way of an invasion of privacy. Therefore it follows that there can be no breach of confidence to action and section 41 does not apply".

Source	Details
Policy Team	
Related Lines to Take	
Related Documents	

FS50416106, FS50371108, FS50383013

Contact		JP	
Date	03/02/2012	Policy Reference	**CWAN 003**

FOI/EIR FOI Section/Regulation s12 Issue Exercising the Commissioner's discretion to accept late claims of section 12

Line to take:
The Commissioner has discretion to decide whether to accept a late claim of section 12 following the binding decision of the Upper Tribunal in the case of the All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & the Ministry of Defence (GIA/150-152/2011).
Further Information:

The Commissioner has discretion to decide whether to accept a late claim of section 12 following the binding decision of the Upper Tribunal in the case of the All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & the Ministry of Defence (GIA/150-152/2011). The Upper Tribunal commented that it could reach a different conclusion to that found in the DEFRA/Home Office case because the "…section 12 cost exemption is somewhat different and raises particular considerations of its own; and we note that this was not the kind of claim that was the subject of Judge Jacobs in DEFRA" (paragraph 45). This allowed this Upper Tribunal to find that:

"…If the raising of a new exemption before the Commissioner is subject to the Commissioner's discretion, to be exercised fairly and in light of the statutory purposes, this both restores some meaning to the time limits and avoids potential unfairness to requesters" (paragraph 43).

In exercising the Commissioner's discretion, case-officers should consider the particular circumstances of the case, including whether the authority has collated the information for the purposes of applying an exemption, as well as any unfairness or disadvantage caused to the requestor in accepting a late claim.

Example

A public authority receives a single request and issues a refusal notice citing section 43. The requestor does not accept that the exemption is engaged and makes a complaint to the ICO.

As part of the investigation, the authority is informed that the Commissioner is unlikely to find that section 43 is engaged. At this stage, the public authority makes a late claim of section 12 i.e. it is no longer seeking to rely on section 43 in relation to the original request.

The Commissioner has discretion to accept or decline this late claim. In exercising this discretion, case-officers should consider the extent to which the public authority compiled the information in order to apply the exemption.

It is unlikely that the Commissioner would exercise his discretion to accept a late claim of section 12 where:

- the public authority has collated all of the requested information in order to make strong arguments which are focussed on the relevant information in support of its claim of the exemption and the information remained in collated form at the time of the late claim of section 12; or
- where the public authority has collated some rather than all of the requested information but where the remaining costs of collation would be minimal.

This is because there would be no or minimal costs to incur at the time of the claim of section 12 and it would be disadvantageous to the complainant to allow such a late claim.

However, the public authority may have applied the exemption largely based on existing knowledge and without sight of the requested information. Although this is not a practice we would recommend; if none of the requested information has been collated or if the costs still to be incurred in collating the information are significant, then we are more likely to accept the late claim of section 12 in order to give effect to the purpose behind section 12 in avoiding unnecessary and burdensome work.

Similarly, the Commissioner may accept a late claim of section 12 where the authority has not already collated the requested information for other reasons such as:

- where the public authority initially claimed that it did not hold the requested information;
- where the public authority does not engage with the request at all and fails to provide a refusal notice or internal review;
- where the public authority interprets a request narrowly and only later realises later that the complainant is seeking a lot more information than originally thought.

Environmental Information Regulations:

It should be noted that the above does not apply to the equivalent provision under the Regulations (regulation 12(4)(b) – manifestly unreasonable) as the Court of Appeal (*) has determined that this provision should be treated as an exception. Accordingly, as the Commissioner has no discretion in deciding whether or not to accept a late claim of an exception, he is obliged to consider a late claim of regulation 12(4)(b).

(*) – [2011] EWCA Civ 1606 (Birkett / DEFRA)

Source	Details
Upper Tribunal	All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & the Ministry of Defence
Related Lines to Take	
Related Documents	
GIA/150-152/2011 (APPGER)	
Contact	HD
Date 21/03/2012	Policy Reference **CWAN 004**

Steven Dickinson

FOI/EIR EIR Section/Regulation reg 12(4)(e) Issue Email chains as 'internal communications'
Line to take:

This CWAN provides advice to case officers on how to investigate whether email chains are 'internal' for the purposes of regulation 12(4)(e).

We will expect a public authority claiming the exception to provide confirmation that all recipients at each stage of an email chain were internal.

Further Information:

NOTE: This CWAN is intended to provide detailed guidance to help in difficult cases involving lengthy email chains with a large number of recipients. In many straightforward cases it will not be necessary to refer to this in any detail.

A significant proportion of business communication is now done via email. Public authorities will therefore often claim the internal communications exception (regulation 12(4)(e)) for emails. However, they do not always distinguish between internal and external emails.

Unlike other forms of communication, emails will often be part of a 'chain' or 'string' of replies, forwards etc, which also include the text of all earlier emails. There may be different recipients at each stage of the chain. This raises particular issues when considering whether an email chain should be seen as an 'internal communication' for the purposes of regulation 12(4)(e) – it is possible that a single email chain may contain both internal and external sections.

Starting point - guidance

Case officers should first read our guidance: Internal communications (regulation 12(4)(e).

The guidance makes clear that if an internal email has been deliberately sent, copied or forwarded to someone outside the public authority, it is not an internal communication. This means that, to accept the exception is engaged, we need to establish that **all** of the recipients of an email were internal (including the sender and those in cc and bcc fields). If any of the recipients to an individual email are external, the email is not an internal communication.

For email chains, we need to establish that **all** of the recipients of **every** email in the chain were internal in order to find that the whole chain is an internal communication. If any of the recipients at any stage in the chain were external, this changes the outcome for the chain up to that point. In brief, this means there are three possible outcomes for an email chain:

- If the final email in the chain was sent or copied to someone outside the PA: the whole chain has been sent externally and none of it is an internal communication.
- If the final email (or emails) were purely internal, but an earlier email in the chain was sent or copied to someone outside the PA: the final email (or emails) are internal communications, but the chain up to that point is not.
- If all recipients of every email in the chain were internal: the whole chain is an internal communication.

Investigating whether recipients were internal

To uphold the exception we need to establish that all email recipients are internal. However, it is possible that the withheld information may run to hundreds of emails with multiple recipients. It is not practical for case officers to independently research and confirm the status of every individual recipient of each email.

Our starting point is that if a public authority wishes to claim the exception, it must demonstrate to our satisfaction that the exception is engaged. It cannot expect the ICO to do this work for it. Our primary source of evidence will therefore be a statement from the public authority, unless anything else clearly contradicts this. In most cases the statement will be all we need.

We will also consider the following:

- Any full email addresses listed in the emails.
- The content and context of the emails (there is no need for case officers to proactively search the content for indications of third party involvement, but if we become aware that it obviously points one way or another we will take it into account).
- Any arguments specifically raised by the complainant that the emails were not internal (we will then seek the PA's response and choose the more likely explanation).

Obtaining a statement from the PA

Case officers should refer PAs to our guidance, and highlight that the exception only covers purely internal emails that have not been forwarded or copied outside the PA. In order for an email to be an internal communication, every recipient must be internal. Case officers should then ask PAs the following:

- Can you confirm that everyone named in the 'from', 'to', 'cc' and 'bcc' fields of each email was an employee or official of the PA?
- Can you confirm that the email chain has not at any point been sent or copied to a third party (including contractors or external advisers)?

In many cases we anticipate that obtaining this statement will be enough to justify a finding that the exception is engaged.

Note that we are **not** asking the PA to go through every email and justify each individual name to us in detail. We are simply asking for a global confirmation. It is up to the PA to satisfy itself that the emails were internal in order to provide the confirmation – eg someone involved in the original email chain may be able to simply confirm from memory that the emails were not circulated to anyone outside the PA. We are simply asking the PA to provide us with a confirmation backed up by some sort of evidence. Whether it chooses to rely on fresh checks or the recollection of someone involved is up to the PA.

Case officers should also briefly scan through the names in the from/to/cc/bcc fields of the withheld emails to ensure there are no obvious external email addresses listed (ie name@another-organisation). This should be a quick scanning exercise - there is no need to consider the contact names in any detail, compile a list of names, or drill down to recipient properties. (We appreciate a quick glance will not uncover all or even many external contacts, as full email addresses are not always visible. However, the idea here is just to rule out clear evidence of external email addresses.)

Work backwards, from the latest emails to the earliest. This is because once any single email in a chain has been sent or copied externally, the whole chain up to that point becomes external and there will be no need to consider the earlier emails individually.

Once we have the PA's response, our position should be as follows:

- If the PA confirms that all recipients are internal, there are no obvious external email addresses, and there is no other obvious reason to doubt the PA, we will accept the PA's confirmation as sufficient evidence that the exception is engaged. This is not foolproof, but the standard of proof is the balance of probabilities (more likely than not). We consider this is a proportionate approach to establishing the facts on the balance of probabilities, in the absence of any other contradictory evidence.
- If the PA confirms that all recipients are internal, but the case officer becomes aware of potentially contradictory evidence (eg there is an apparently external email address, or the complainant raises specific allegations that a particular email was sent externally, or the content/context of the emails

suggest third parties must have been involved), the case officer should put this to the PA and ask it to explain the discrepancy. The case officer must then make a judgement on the facts as to which explanation is more likely. The exception is only engaged if the case officer is satisfied that on the balance of probabilities (ie more likely than not) all recipients are internal.

- If the PA states that an email was sent or copied to an external recipient, or the case officer is satisfied that an external email address is clearly listed, or it is clear that a third party was involved from the content of the information, that email (and any email chain up to that point) is not an internal communication.
- If the PA refuses to engage and give the confirmation (eg because it is not confident that all recipients were internal, or because it disagrees with our guidance and argues there is no need to confirm that every single recipient was internal), case officers should obtain signatory input via the CR07 form. However, we anticipate that such cases should be rare as it will be in the PA's interests to provide the confirmation to support their case.

Multiple copies of emails / emails in multiple chains

The nature of email chains means that the requested information could include multiple copies of the same email – eg the individual email, the same email in a chain of replies, and the same email in a separate chain of forwards and replies.

However, case officers do **not** need to compare the content of email chains and emails to identify any crossover or duplication. It is acceptable to simply consider each email or email chain on its own merits, ignoring any possible duplication. If there are multiple versions, this may mean, for example, that the original individual email is accepted as an internal communication, even though the same email within a later chain that was forwarded to a third party would not engage the exception.

Our position that each email or chain can be considered on its own merits (ignoring the existence of the same email in other chains) is for the following reasons:

- In effect, we are thinking of an email chain as multiple documents duplicating some of the same information. Each email in a chain is a separate document or communication, even if it includes some of the same text (ie the text of any preceding emails). The question is simply whether the particular email(s) caught by the request are internal communications. If the only version of the information within the scope of the request is contained in an individual internal email or internal chain, this is technically and factually part of an internal communication and so engages the exception. The later external email forwarding the same information would not engage the exception, but it is not caught by the request and so does not need to be considered.
- Practically speaking, it would be very difficult to establish that an individual email has definitely not been forwarded outside a PA later in another context. We are only likely to be able to consider the information actually falling within the scope of the request. The only practical position is therefore to limit the analysis to the actual emails caught by the request.
- If the request catches multiple versions of an email, some of which are internal and some of which are not, the requester will not be disadvantaged by accepting that some are internal. The same text will also be contained within any external email chain, and so all of the information from the original email would still be released to the requester.
- If the request catches the full email chain, our position (as set out above) is to work backwards through the chain. This ensures that each email is considered in its own right. If any of the emails have been sent outside, all of the information contained in that email (ie the text of the full chain up to that point) is part of an external communication and the exception is not engaged for that information. We do not need to go on to consider the status of the earlier emails individually, as there is no additional information contained in them.

Attachments to emails

Where there have been multiple documents attached at different stages of an email chain, it may be particularly difficult to establish which document (or version) was attached to which email.

See CWAN 006 for general advice on how to identify email attachments.

Note that documents attached to internal emails are not automatically internal communications. Nonetheless, it may be necessary to establish whether a document was attached to an internal or external email, as this can affect the outcome. See the guidance for more information on our position on attachments. In summary:

Email	Attached document	Is 12(4)(e) engaged?
Internal email	Internal document	Yes
Internal email	External document	No - if request would catch document in its own right. Yes - if request only catches document because it was attached to the email.
External email	Internal document	No
External email	External document	No

*Internal = created and circulated only within the PA

*External = received from or shared with a third party

If it is clear that several documents are within the scope of the request, but some of them were attached to external emails, and the PA cannot satisfactorily confirm which attachments were which: the PA has not established that the exception applies to any of the documents. We should find that the exception is not engaged for any of the documents.

Source	Details
Policy Delivery	
Related Lines to Take	
CWAN 006 (email attachments)	
Related Documents	

Guidance: Internal communications (regulation 12(4)(e))

Contact		LS	
Date	13/11/2012	Policy Reference	**CWAN 005**

- Information Commissioner's Office intranet

Steven Dickinson

Policy Delivery knowledgebase | About | Contact team

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FOI/EIR	FOI and EIR	Section/Regulation	s1, Part II exemptions reg 5, reg 12	Issue	Email attachments

Line to take:

A request for an email should generally be interpreted as including any documents attached to that email.

We will require public authorities to provide a written statement clearly identifying which documents were attached to each email.

Further Information:

If the withheld information includes multiple emails with attached documents, it may be difficult to establish which document (or version) was attached to which email. PAs often provide a bundle of printed emails (which simply list titles of attachments) and a bundle of associated documents, without clearly identifying which document corresponds to which email.

However, we will usually need to identify which documents were attached to which email in order to determine what information is actually within the scope of the request. It may also be necessary to identify attachments in order to decide whether an exemption or exception is engaged.

In such cases we will take the following approach to identifying attachments:

- There is no need for absolute certainty – the standard is the balance of probabilities (more likely than not).
- We will generally require the PA to provide us with a written statement (ie a letter or email) which identifies which documents were attached to which emails. This statement should be from either (1) someone personally involved in the email chain or (2) someone with appropriate records management knowledge and access. We do not anticipate that this will be difficult, as emails are generally stored electronically and it should be straightforward for the PA to identify attachments within its electronic record management systems (or from the email folders of the individuals concerned). We can accept this written statement as sufficient evidence, unless there is any obvious evidence pointing to a different conclusion (eg the PA claims that the same document corresponds to different attachment titles, or their explanation is otherwise self-contradictory). In such cases the PA should be asked to explain the discrepancy, and the case officer will then need to make a judgement on whether it is more likely than not that we have the correct document.
- If the PA cannot provided a satisfactory statement, but the case officer needs to correctly identify email attachments in order to know which documents are caught by the request (eg a request for all email discussions on a certain topic), we should consider issuing an Information Notice. (Alternatively, if we accept that the PA has conducted appropriate searches but is genuinely unable to identify the attachments, we can accept on the balance of probabilities that information on the attachments is not held. We should however consider raising concerns about the PA's records management.)
- If the PA cannot provide a satisfactory statement, but we know that particular documents must be caught by the request, and the case officer needs to correctly identify whether they were email attachments in order to apply an exemption or exception, the PA has not established that the exemption or exception applies to any of the documents and we should find that it is not engaged for those documents.

Source	Details
Policy Delivery	
Related CWANS	CWAN 005 (email chains)
Related Documents	

Contact		LS	
Date	13/11/2012	Policy Reference	**CWAN 006**

- Information Commissioner's Office intranet

Steven Dickinson

FOI/EIR FOI Section/Regulation s44 Issue ECHR as a statutory prohibition under s44(1) FOIA; in particular Article 8
Line to take:

The European Convention on Human Rights (ECHR), and in particular Article 8, can be a statutory prohibition under s44(1) FOIA, but there will be limited circumstances in which it will be necessary to consider it.

Further Information:

Basis for the view that the ECHR be a statutory prohibition

- Under section 6(1) of the Human Rights Act (HRA), "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless the conditions in s6(2) are met.
- Under s7(1) HRA a victim of such an unlawful act may bring legal proceedings against the authority. A person who would be a victim can bring proceedings in respect of a proposed action.
- In order for s44(1) FOIA to be engaged on this basis it would necessary to establish that a proposed disclosure would be incompatible with a Convention right.
- The Commissioner is also bound by s6(1) HRA. It would therefore be unlawful for the Commissioner to order the disclosure of information if it would infringe a Convention right.

Article 8 ECHR as a statutory prohibition

The view that Article 8 can provide a statutory prohibition is based on the plain meaning of the words in the HRA and the ECHR:

- Article 8(1) ECHR says that everyone has the right to privacy i.e. the right to respect for private and family life, home and correspondence.
- Article 8(2) says that public authorities shall not interfere with this right unless certain conditions are met i.e. the interference is in accordance with the law and necessary in a democratic society in pursuit of certain legitimate and specified interests.

On this basis, if disclosing information would be an interference with the right to privacy and it would not be justified in the terms of Article 8(2), then the public authority would be acting unlawfully, because they would be acting in a way which is incompatible with a Convention right. Only the victim of the unlawful act (or the proposed unlawful act) could bring proceedings against the authority.

Note: the contrary view, that Article 8 does not constitute a statutory prohibition, is often based on the decision of the Information Tribunal (as it then was) in *Pauline Bluck v Information Commissioner & Epsom and St Helier University NHS Trust* EA/2006/0090 at §§31-32. We consider that those comments were obiter, as the decision was made on the basis of s41, not s44, and furthermore an Information Tribunal decision is not a binding precedent.

Circumstances in which this could be used

We expect that in practice there will be few FOIA cases in which it is necessary to consider the s44 exemption on this basis. As usage as the primary exemption will be very rare the Commissioner does not currently cover it in external guidance. If the information in question constitutes personal data, then disclosure may contravene DPA principles, in which case it would be exempt under s40(2). If disclosure would or would be likely to endanger the physical or mental health or the safety of any individual then s38 FOIA may be engaged, and there is a weighty public interest in avoiding this danger. Nearly all of the issues covered in the ECHR are essentially reflected in the FOIA exemptions.

However, there may be cases in which the information does not meet the definition of personal data, because it does not identify a specific individual but to disclose it would be an unnecessary interference with the privacy of individuals. For example, if the information showed that one of a group of people living at a particular address was guilty of a sexual offence, but it was not possible to identify the individual concerned, then it would not constitute personal data, but it is conceivable that to disclose that information would impact on the privacy of all the people at that address, because of the likely repercussions. In such a case it is likely that s38 FOIA would be engaged, but if it is not, or if the balance of the PIT is not in favour of the exemption, then it may nevertheless be possible, depending on the circumstances, to show that the information is exempt under s44(1), on the basis that disclosure would be an unnecessary interference with Article 8 rights.

Applying this in practice

As explained above, we consider that in practice this exemption will rarely be used. However, there may be cases where it is put forward by a public authority; alternatively there may be cases where we have good reasons to think that the information should not be disclosed (e.g. the hypothetical example discussed above) and it is not otherwise exempt. In such cases, as a responsible regulator and as a public authority bound by s6 HRA, we should give it consideration.

We should consider the following:

- Would there be an interference with the rights in Article 8(1) of the Convention? There would have to be some cogent evidence that there would be such interference.
- Would it be in accordance with the law (apart from FOIA)?
- Would disclosure meet one of the legitimate aims listed in Article 8(2)? These include the protections of the right and freedoms of others. The right to information under FOIA is such a right.
- Is disclosure necessary to meet this aim? This means, is there a pressing social need for disclosure?
- Is the disclosure proportionate to the aim? Is there another way to meet the aim that would interfere less with the privacy right?

Note that while Article 8 is the ECHR right that is most likely to be relevant in s44(1) cases, public authorities may also cite other Convention rights, for example the right to a fair trial in Article 6.

In any FOIA case where ECHR is being considered as a statutory bar, it is essential to obtain signatory advice.

Source	Details
Counsel opinion	Counsel opinion (Tim Pitt-Payne) on s41 44 FOIA re deceased 25 09 06
MoJ guidance	MoJ guidance on s44
Internal working papers	Article 8 ECHR as a statutory bar under s44(1)(a)FOIA
	Article 8 of the European Convention on Human Rights and section 44 of the Freedom of Information Act 2000
Related Lines to Take	
Related Documents	
Contact	CW
Date 29/11/2012	Policy Reference **CWAN 007**

- Information Commissioner's Office intranet

Steven Dickinson

FOI/EIR FOI Section/Regulation s50 Issue Referencing Select Committee opinions and parliamentary proceedings in decision notices.

Line to take:

Following the High Court judgement in Office of Government Commerce v the Information Commissioner & HM Attorney General on behalf of the Speaker of the House of Commons [2008] EWHC 737 (Admin), it is clear that neither the ICO nor the Information Tribunals should rely on the opinion of a Select Committee, since to do so would breach parliamentary privilege. However it is permissible to rely on uncontentious opinions or the terms of reference of such a committee.

Following the Information Tribunal's decision in Gordon v Information Commissioner & Cabinet Office & Speaker of House of Commons (EA/2010/0115), this principle also extends to any doubts or allegations expressed about parliamentary proceedings.

Further Information:

The High Court judgement in Office of Government Commerce v the Information Commissioner & HM Attorney General on behalf of the Speaker of the House of Commons [2008] EWHC 737 (Admin) concerned the subject of gateway reviews of identity cards.

Amongst other issues, the court found that the Information Tribunal had been wrong to rely on the opinion of a Select Committee; this was a breach of parliamentary privilege. The court said, however, that it would be acceptable to refer, for instance, to the terms of reference of a Select Committee or to uncontentious opinions expressed by it, as well as to uncontentious evidence submitted to such a committee.

The reasoning behind this is that if, for example, the Tribunal made a decision in favour of a complainant in which it stated its agreement with the opinion of a Select Committee, then for the public authority respondent to disagree with that decision it would in effect be disagreeing with the Select Committee.

Following Gordon v IC & Cabinet Office & Speaker of House of Commons (EA/2010/0115), the same principle applies to any issues arising from accusations about the truth, motive or good faith of statements made in Parliament; neither the Tribunal nor the Information Commissioner should place any reliance on these.

In more detail

Stanley Burnton J said in the OGC High Court case:

"If it is wrong for a party to rely on the opinion of a Parliamentary Committee, it must be equally wrong for the Tribunal itself to seek to rely on it, since it places the party seeking to persuade the Tribunal to adopt an opinion different from that of the Select Committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the Tribunal either rejects or approves the opinion of the Select Committee it thereby passes judgment on it. To put the same point differently, in raising the possibility of its reliance on the opinion of the Select Committee, the Tribunal potentially made it the subject of submission as to its correctness and of inference, which would be a breach of Parliamentary privilege. This is, in my judgment, the kind of submission or inference, to use the words of 16(3) of the Parliamentary Privileges Act 1987, which is prohibited...."

"…….My conclusion does not lead to the exclusion from consideration by the Commissioner or the Tribunal of the opportunity for scrutiny of the acts of public authorities afforded by the work of Parliamentary Select Committees. They may take into account the terms of reference of Committees and the scope and nature of their work as shown by their reports. If the evidence given to a Committee is uncontentious, i.e., the parties to the appeal before the Tribunal agree that it is true and accurate, I see no objection to its being taken into account. What the Tribunal must not do is refer to evidence given to a Parliamentary Committee that is contentious (and it must be treated as such if the parties have not had an opportunity to address it) or to the opinion or finding of the Committee on an issue that the Tribunal has to determine. Nor should the Tribunal seek to assess whether an investigation by a Select Committee, which purports to have been adequate and effective, was in fact so".

In Gordon the case mainly concerned legal professional privilege. However part of the appellant's argument was that a Minister had misled Parliament during the passage of the Finance Act 2008 and that this was a public interest factor in favour of disclosure. As a result of these allegations the Speaker of the House of Commons intervened as he was concerned to ensure that there was no breach of Parliamentary privilege.

The Tribunal summarised: "the core of the Appellant's contentions is the fact that Parliament was in his words 'misled as to the reasons for the legislative change' and "no attempts were made to correct the error even though the error would have been immediately apparent to those advising the minister'. In those circumstances, the Appellant claims that the accuracy of statements made to Parliament 'is just as (if not more) essential to the legislative process as the instruction given to Parliamentary Counsel'". The Tribunal commented: "What is clearly in issue here is a challenge upon the truth, motive and good faith of what was said in the course of Parliamentary proceedings" and it concluded "the Tribunal simply cannot go into any public consideration which touches or concerns such an allegation". In relation to the PIT: "This Tribunal is not going to take into account in any way whatsoever the facts, consequences or possible repercussions of an allegation that a Minister has misled Parliament".

Source	Details
High Court	Office of Government Commerce v the Information Commissioner & HM Attorney General on behalf of the Speaker of the House of Commons [2008] EWHC 737 (Admin)
Information Tribunal	Gordon v IC & Cabinet Office & Speaker of House of Commons (EA/2010/0115)

Related Lines to Take

See ICO guidance on section 34

Related Documents
[2008] EWHC 737 (Admin), EA/2010/0115

Contact		VA	
Date	28/1/2013	Policy Reference	**CWAN 008**

- Information Commissioner's Office intranet

Steven Dickinson

FOI/EIR	FOI and EIR Section/Regulation	Section 2 Regulation 12(1)(b)	Issue	Handling a suspicion of wrongdoing by a public authority in DNs.

Line to take:

Case officers must take great care when drafting a DN in any case in which there is a suspicion of wrongdoing. If necessary, use a confidential annex rather than run the risk of revealing that there is a smoking gun.

Further Information:

In any case where there is a suspicion of wrongdoing by the public authority, and the content of the information either supports or refutes that suspicion, case officers should consider carefully how to handle this in the drafting of the decision notice. For instance, if we were to give away in the DN that the suspicion is justified ("the smoking gun"), this might reveal the content of the withheld information – which would remove any meaningful right of appeal.

Suggested approach

- The DN could say that there is an additional public interest in disclosure because the information is revealing one way or the other. (NB if the information does not help either way, there is no additional public interest).
- If necessary, use a confidential annex to the DN to reveal whether the information provides evidence either supporting the suspicion or refuting it.
- Case officers should discuss with a signatory the wording of the DN and the use of a confidential annex.

Source	Details		
Policy Delivery			
Related Lines to Take			
Related Documents			
External FOIA and EIR			
guidance on the public interest test; former LTT235			
Contact		VA	
Date	5/03/2013	Policy Reference	**CWAN 009**

FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI EIR	s2, Part II exemptions reg 12, reg 13	Public domain – practical guidance

Summary:

In cases involving the application of exemptions or exceptions we should conduct a very brief internet search for any relevant information already in the public domain.

Use discretion when deciding whether more detailed searches or analysis is required.

Take care when referring to parliamentary materials.

Further Information:

This CWAN supplements our guidance on Information in the public domain. It provides some supplementary practical guidance for caseworkers when investigating s50 cases.

Although the guidance explains in detail our approach to a number of common arguments, it will not be necessary or proportionate to go to this level of detail in every case. Many cases are likely to be straightforward.

Do a brief internet search at the start of the case

The question of whether the requested or related information is in the public domain has potential relevance in all cases. Therefore it would be useful to do a short internet search (just a few minutes) at the start of any case where we are considering exemptions. This should also minimise or avoid the issue of relevant information disappearing or depleting during the course of our investigation by flagging up this issue at the earliest opportunity.

In some cases a more thorough search will be required, but we should take a pragmatic approach to deciding whether this is necessary. Ask your line manager or seek signatory input if you are unsure. Generally a proper search will only be needed where:

1. issues about information in the public domain have been specifically raised by one of the parties,

2. the short search throws up evidence of information in the public domain and/or calls into question the public authority's position,

3. it is obvious from the context (taking into account the ICO's sectoral and subject-matter expertise and experience in previous cases) that some relevant information is likely to be in the public domain, or

4. there has been significant media coverage of the relevant issues which suggest that some relevant information is likely to be in the public domain.

Case officers should use their discretion as to whether or not to ask the public authority if it has conducted its own search, as this may not be relevant or appropriate in some cases.

In terms of the search itself, it is suggested that generally case officers spend no more than 20-30 minutes, for example, using multiple search terms via an internet search engine, unless more time is obviously required.

If any information is found:

If relevant information is found after this sort of search, for example, on the internet or in another publically accessible source (eg a published book) - that information is most likely in the public domain as being in practice accessible to a member of the public.

Case officers will then need to double check whether that information was also available at the time of the request before going on to consider its precise content and effect.

Parliamentary materials (eg Hansard or select committee reports)

DNs can refer to Hansard or other parliamentary proceedings (eg committee reports) as evidence of the fact that the information contained within them is already in the public domain. We must however be careful not to make any judgment (positive or negative) about the accuracy of such information, as this risks us breaching rules on parliamentary privilege.

In particular, arguments about misrepresentation or wrongdoing should not be applied to any information reflecting proceedings in parliament. This is because parliamentary privilege prevents the ICO from considering, questioning or relying upon the accuracy or reliability of such information. See also CWAN 008.

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes	CWAN 008		
Related Documents	ICO guidance: Information in the public domain		
Contact: LS			
Date: 27/03/2013		**Reference number: CWAN 010**	

- Information Commissioner's Office intranet

FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI	s30(1)(a)	Evidence required to engage section 30(1)(a)

Summary:

Information held by the police about an investigation to establish whether an offence has occurred will fall within section 30(1)(a). This is on the basis that it is an investigation with a view to ascertaining whether to charge someone with an offence.

Where it is unclear if an offence has actually occurred the police need to provide an indication, as far as is possible, of the offence or offences that are relevant in the circumstances.

If a decision is reached that no offence has occurred any information generated after that point will not fall within section 30(1)(a).

Public authorities with a duty to investigate a more limited number of offences will need to be more specific about the offence or offences relevant to the investigation.

Case officers should consult with the public authority to ensure that any details of an offence being investigated which is to be included in a decision notice will not prejudice any on-going investigation.

Further Information:

The section 30 guidance explains that in order to demonstrate that section 30(1)(a) applies, public authorities need to explain how the duty to investigate with a view to ascertaining whether to charge someone with an offence arises and to identify the relevant offence or offences.

Police forces

Generally the Commissioner expects police forces to provide the information stipulated above in cases involving section 30(1)(a). In many cases forces will be aware at the outset of an investigation which offence or offences they are investigating and this should not present a particular problem.

However, there will be instances where the police are under a duty to respond to an incident and to investigate whether an offence has actually occurred. For example, in the event of a suspicious death the police will start investigating with the mindset that an offence may have occurred even if it subsequently transpires that the person died as a result of an accident. The Commissioner accepts that information about such investigations will fall within section 30(1)(a) because the investigation is with a view to ascertaining whether to charge someone with an offence.

As far as possible police forces need to indicate the type of offence or offences that are likely to be relevant (ie under consideration) in the circumstances. Given the breadth of offences within the police's remit the Commissioner accepts that where it is unclear if an offence has actually occurred it will be difficult to be very specific. However we would still expect police forces to provide an indication, based on the nature of the incident, of the types of offences under consideration.

If, at the time of the request, a public authority has yet to conclusively rule out any offence having occurred– so that effectively the matter remains unresolved- section 30(1)(a) will apply.

However, if by the time of the request, a decision has been made that there was no offence, section 30(1)(a) will apply to information created up to the point that decision was reached. However it will not apply to information created after that decision.

Other public authorities

Other public authorities have duties to investigate offences. Where they have a limited remit in terms of the offences they regulate, the Commissioner would expect them to be more specific about the nature of the offence or offences under investigation.

Not all breaches of legislation will constitute offences for the purposes of section 30(1)(a). In contrast to police forces, the Commissioner is unlikely to regularly accept arguments from other public authorities that information about **any** investigation into compliance with statutory obligations is exempt under section 30(1)(a) because there is a possibility that an offence within the authority's remit may have been committed. To engage section 30(1)(a) public authorities need to provide evidence to demonstrate why, in the circumstances of the case, an offence may have occurred. In other words they need to explain why an investigation is likely to focus on determining whether to charge someone with an offence as opposed to simply determining compliance with statutory obligations.

For example, where **offences** are only investigated by one department within an authority, it may be reasonable for it to argue that any information about investigations in that department is exempt under section 30(1)(a). However, the Commissioner is unlikely to accept that investigations by other departments into general compliance with other statutory obligations (not offences) will within section 30(1)(a).

Details to be included in a decision notice

Depending on the stage of any investigation, it may be harmful to reveal the offences under consideration in a decision notice. Case officers therefore need to take care and consult with the public authority about the level of detail that can be put in the published decision. As far as possible we should try to avoid using confidential annexes but there may be instances where this is necessary to explain our findings.

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes			
Related Documents	ICO guidance: Investigations and proceedings (section 30)		

Contact: Jo Pedder

Date: 31/05/2013	**Reference number: CWAN 011**

- Information Commissioner's Office intranet

FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI	s19, s21	Investigating section 19 and 21(3) complaints

Summary:

Complaints that section 21(3) has been incorrectly cited as a basis for refusing to provide information inevitably raise section 19 compliance issues that require investigation. The Commissioner's position is that where a public authority publishes information in accordance with its publication scheme it will be exempt by virtue of section 21(3) by default. Therefore case officers should investigate section 19 first and reach a decision about whether the public authority has complied with the model scheme and relevant definition document as this will inform the decision about section 21(3).

Further Information:

In circumstances where a complainant is claiming that requested information is not reasonably accessible by virtue of section 21 (3), issues of compliance with section 19 inevitably arise. The initial focus of the investigation should be on compliance with section 19.

For example, a request may be made for information which is subject to payment of a fee and which the public authority claims is reasonably accessible to the applicant because it is made available in accordance with its publication scheme and so is exempt under section 21(3). The requester then says that the information is not reasonably accessible to him due to the high level of the fee.

The Commissioner's position, as set out in the section 21 guidance, is that information published in accordance with the publication scheme (and any payment due determined in accordance with the scheme) is reasonably accessible to an applicant under section 21(3). If a public authority is found to have breached section 19 it also therefore follows that it is unlikely to be able to claim that the requested information is exempt under section 21(3). This is why section 19 should be considered first.

As we expect all public authorities to have adopted the Commissioner's model scheme, the investigation should first seek to establish whether the public authority has in fact done this. If it has not, this would be a breach of section 19(1)(a). Similarly, if, for example, the public authority has adopted the model scheme but is not complying with the requirements for fees as set out in the scheme, this is likely to be breach of section 19(1)(b) as the public authority would not be publishing information in accordance with the scheme.

The same procedure should be adopted for any other complaints that are received about the accessibility of information in a publication scheme. For example, a complainant may argue that information is not reasonably accessible because it is only available by inspection. Although the information may objectively be less accessible (by definition information available only via inspection is likely to be less accessible than if the information were copied and sent to the applicant), caseworkers should consider whether this means of publication is permitted in the model publication scheme. Note that the wording of the model publication scheme does recognise that in certain circumstances it is reasonable for information to be made available by inspection only.

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes	LTT026		
Related Documents	Model publication scheme ICO guidance: Information reasonably accessible to the applicant (section 21)		
Contact: DC			
Date: 31/05/2013		**Reference number: CWAN 012**	

FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI EIR	s50 reg 18	Drafting DN steps

Summary:

Avoid any steps ordering a PA to disclose or refuse (or just to disclose) "the requested information". Instead, DNs should order a PA to:

- disclose (or refuse) **identified** information, or
- issue a fresh response under FOIA or the EIR

Further Information:

We need to draft DN steps very carefully to enable clarity over whether the PA has complied with the DN, and allow us to issue a second DN in appropriate cases. In particular, we need to avoid the problem in the *Charman* case – in other words, we need to ensure that a PA has technically complied with the DN once it provides a response which, on its face, is permitted under the legislation. If so, we can deal with any complaints about new elements of that response as a new s50 case. See the policy summary of *Charman* for background information.

In particular, the *Charman* problem arises if we order a PA to take steps in relation to *"the requested information"* (or information otherwise defined by reference to the wording of the request), but we do not yet know whether the PA has correctly identified all information falling within the scope of the request. This means that we cannot be sure whether the step has been taken for all the requested information. Any later dispute about the scope of request, or held/not held, would have to be a DN compliance investigation rather than a new s50 case. This interferes with our internal casework procedures and undermines the parties' rights of appeal to the Tribunal.

Instead, steps need to identify the relevant information without referring back to the request itself. DNs should either clearly describe or list the information (eg in an annex), identify it by reference to the PA's actions (eg the information refused under s42, the information the PA identified as falling within the scope of the request), or otherwise order a response without referring to "the requested information".

The table below suggests appropriate wording for steps in common types of DNs. This provides a starting point, but case officers should always consider how best to tailor this wording to the individual circumstances of each case.

Type of DN	Steps
Non-response	• **issue a response under FOIA or the EIR** (pick one regime if obvious which applies)
Inadequate response	• **issue a fresh response under FOIA or the EIR** (pick one regime if obvious which applies)
Wrong regime	• **issue a response under FOIA / the EIR**
Held /not held - inadequate search	We should not generally use a DN in these circumstances. If a PA needs to conduct further searches for information, and a formal step is necessary to progress the case, we should use an IN instead. See also LTT193.
Rejecting procedural exemptions	• **issue a fresh response under FOIA / the EIR without relying on s12 / s14 / regulation 12(4)(b) / regulation 12(4)(c)** (delete as appropriate) • **issue a fresh response under the EIR without relying on regulation 12(4)(b), unless engaged on the basis that the costs of compliance would be manifestly unreasonable** (if rejecting EIR manifestly unreasonable arguments which are focussed purely on value / purpose of request, but we consider it would be unfair on the PA to prevent them from considering more objective costs arguments)
s12 upheld – provide advice and assistance	• **provide advice and assistance to enable the complainant to submit a refined request within the cost limit** This step can only be included if we have established that the request can actually be refined. And in many cases this can be done as part of the investigation rather than in a DN. Only consider a DN if absolutely necessary to progress the case.
Rejecting NCND	• **confirm or deny whether information falling within the scope of the request is held, and disclose or refuse any information identified**
Fully investigated – ordering disclosure	• **disclose specified information** (eg listed in annex), or • **disclose the information withheld under sXX**, or • **disclose the requested information** (only if satisfied that the PA has identified all relevant information) Note that in fully investigated cases we should generally ensure that the scope of the request is clearly understood and the PA has identified all relevant information. In other words that we are satisfied that on a balance of probabilities nothing further is held. In these cases it may be appropriate to simply order disclosure of the requested information.

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes	LTT187, LTT189, LTT190, LTT192, LTT193		
Related Documents	Tribunal summary: *Charman v IC & ODA (EA/2011/0210, 27 April 2012)*		
Contact: LS			
Date: 14/06/2013		**Reference number: CWAN 013**	

- Information Commissioner's Office intranet

FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI	S40(1)	Applicant's personal data

Summary:

- If a request is only for the applicant's personal data it should be considered under the DPA, not FOIA.

- If it is a hybrid request or it's not clear whether all the information is the applicant's personal data, then:
  - We can issue a s12/s14 notice without establishing which information is the applicant's personal data. Whether we uphold the procedural exemption or not, the public authority must still deal with the applicant's personal data appropriately under the DPA and FOIA.
  - In a held/ not held case, if we find that further information is held we should tell the public authority to deal with the applicant's personal data appropriately under the DPA and FOIA.

Further Information:

This Advice Note is relevant to cases involving the applicant's own personal data and procedural exemptions (s1, s12, s14).

- **Request is only for applicant's personal data**

Where a request is only for an applicant's own personal data we should consider the complaint under the DPA and not under FOIA. If the complainant insists upon a DN, and we are satisfied that all the requested information is the applicant's personal data, then we should issue a s40(5) DN, rather than a s1, s12 or s14 DN.

- **Hybrid request or not clear**

Where the request is a hybrid request (ie it involves the applicant's personal data and other data), or where it isn't clear whether all the information covered by the request will be the applicant's personal data, then the position is as follows:

  - **Section 12/section 14**

A s12 or 14 DN may be issued without first establishing which information is the applicant's own personal data and which information isn't.

If such a notice **upholds the application of s12 or s14** then the Other Matters section should advise the public authority that regardless of the Commissioner's findings under FOIA it will still have an obligation to consider whether the applicant's own personal data should be provided under the subject access provisions of the DPA.

If such a notice finds that **s12 or s14 is not engaged** then the steps should be to issue a fresh response without relying on s12/s14. We should however put the public authority on notice that we will expect it to apply s40(5) in relation to any information that constitutes the personal data of the applicant (or would constitute it if it were held) and to deal with this information under the subject access provisions of the DPA.

  - **Held/ not held**

In relation to held not held cases, the issue should only arise where we find that more information is held but don't go on to consider whether it should be released or not. In these cases we should again issue a DN that orders a fresh response and puts the public authority on notice that we will expect it to NCND whether any of the information is the applicant's personal data under s40(5) and deal with this information under the subject access provisions of the DPA.
For an explanation of the approach to DNs in scenarios where we find that further information is held, see LTT193.

Source of Casework Advice Note	Policy Delivery	**Details**	Based on decision taken at signatories meeting 21/06/2011; see Briefing for signatories - Policy trends in decision notices (April-May) 20110628
Related Casework Advice Notes	CWAN013 LTT193		
Related Documents	ICO guidance: Personal information Neither confirm nor deny in relation to personal data		
Contact: CW			
Date: 05/07/2013		**Reference number:** CWAN 014	

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FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI EIR	S40 R13	Sensitive personal data and fairness

Summary:

If the requested information is sensitive personal data of a third party then in most cases it will be unfair to disclose it. We have some standard wording that can be used in DNs in such cases.

If we find that disclosure of sensitive personal data would be fair, we then have to establish that Schedule 3 condition 1 or 5 is satisfied.

Further Information:

Our guidance on s40/r13 says that the first step in considering fairness is to establish whether the requested information is sensitive personal data, as defined in section 2(a)-(h) of the DPA. If so, then in the majority of cases the data subject will have a reasonable expectation that the information would not be disclosed and furthermore the consequences of disclosure could be distressing to them. For example, it is almost self- evident that to disclose someone's medical records will be unfair as in our society there is a clear expectation that medical information will remain confidential, both to preserve the relationship between doctor and patient and also because the disclosure will be damaging or distressing to the data subject. In the majority of cases we are therefore likely to find that disclosure would be unfair.

In such cases, where we find that disclosure of sensitive personal data would be unfair, the following standard wording can be used in the DN:-

> *"The Commissioner notes that the information in this case falls under s2**(complete)** of the Data Protection Act 1998 as it relates to the data subject's……..**(complete).** As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely (*) to have a detrimental or distressing effect (*) on the data subject, the Commissioner considers that it would be unfair to disclose the requested information."*

(*) – It might be possible to be more specific or use stronger language in certain circumstances.

However, section 2 of the DPA lists a wide range of types of sensitive personal data. A data subject may have no objection to the disclosure of some sensitive personal data; the guidance document gives the example of the political opinions of a Member of Parliament. If the data subject has consented to the disclosure or deliberately made the information public themselves, then it is likely that we would find that disclosure would be fair.

If we do find that the disclosure of sensitive personal data would be fair, then following the approach set out in the guidance document, we then have to establish that a Schedule 3 condition is satisfied. If we found that disclosure would be fair because the data subject consented to it, then condition 1 may be satisfied; if we found that it was fair because the data subject deliberately put the information in the public domain themselves, then condition 5 may be satisfied.

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes			
Related Documents	ICO guidance: Personal information		
Contact: CW			
Date: 08/07/2013		**Reference number:** CWAN 015	

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FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI EIR	S40 R13	Considering whether disclosure of personal data would be lawful

Summary:

- It is only necessary to consider lawfulness if disclosure would be fair and meet a Schedule 2/3 condition.
- Disclosure is not lawful if it would breach statute or common law, a duty of confidence or an enforceable contractual agreement.
- Case officers should assume that disclosure would be lawful unless there is some evidence in the case to suggest it may not be
- The Commissioner does not agree with the Tribunal's finding in relation to compromise agreements in Gibson EA/2010/0095

Further Information:

Consider fairness and Schedule conditions first
In s40 cases, if it is decided that disclosing personal data would be fair and meet a Schedule 2 condition (and a Schedule 3 condition if relevant), case officers should then decide whether the disclosure would be lawful. If they have already found that disclosure would not be fair or would not meet a Schedule 2/3 condition, then the personal data is exempt and they do not need to consider lawfulness.

The meaning of 'lawful'
Our guidance document on personal information explains what is meant by 'lawful':

" *"Lawful" refers to statute law and common law, whether criminal or civil. This includes industry-specific legislation or regulations. Furthermore, a disclosure that would breach an implied or explicit duty of confidence or an enforceable contractual agreement would also be unlawful."* (para 114)

The guidance also explains that a disclosure that would breach the right to privacy in Article 8 of the Human Rights Act would also be unlawful, but if that is the case it is likely that the disclosure would already have been found to be unfair.

Assessing whether disclosure would be lawful
Case officers should assume that disclosure would be lawful unless there is some evidence in the case to suggest it may not be. This evidence would be that:

- issues of breach of confidence or a contractual term or of other law have arisen in our consideration of fairness/ schedules, or
- the PA has suggested it would be a breach of confidence or of a contractual term or unlawful in another way. They may have suggested this specifically in the context of s40 or, if not, they may have claimed s41 or s44; if either of these exemptions are claimed there may be issues of lawfulness in relation to s40. If the case is EIR then claims of r12(5) (d), (e) or (f) may raise breach of confidence issues relevant to lawfulness under r13.

Case officers are not required to proactively investigate areas of law that we do not regulate in order to look for a potential breach. However, there may be cases in which the PA has not claimed s40 but as regulator we consider it may be engaged. In such a case if disclosure would be fair and satisfy Schedule conditions then we should seek the PA's view on lawfulness.

Case officers will need to consider carefully any arguments about lawfulness put forward by the PA, and obtain legal advice if necessary.

Compromise agreements
Case officers should be aware of one particular case which complainants may cite when arguing that breaching a duty of confidence or contractual agreement is not sufficient to render a disclosure unlawful. In *Gibson v IC and Craven District Council* EA/2010/0095 the First Tier Tribunal found that, despite of the existence of a confidentiality clause, it would be lawful to disclose some parts of a compromise agreement. The Commissioner disagrees with the Tribunal's findings in this case because he remains satisfied that, because of the nature of the information in question, it was truly confidential and therefore to disclose the information would both breach an explicit duty of confidence and an enforceable contractual agreement. Even if the Commissioner agreed with the Tribunal on the facts of the case, he would not accept that the *Gibson* decision could be read as establishing a general rule that disclosure in breach of a duty of confidence or an enforceable contractual agreement would be lawful.

In other words, despite *Gibson*, the Commissioner's view remains that a disclosure in breach of a duty of confidence or an enforceable contractual agreement would be unlawful.

It should be noted that in *Gibson*, as in other such cases, the compromise agreement would have been jointly created between the public authority and the employee. Therefore s41 would not have been applicable because the Commissioner would not have accepted that the information was provided to the public authority by a third party. In such cases case officers should be prepared to consider arguments presented in respect to confidentiality when analysing both fairness and lawfulness under s40.

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes			
Related Documents	ICO guidance: Personal information		
Contact: CW			
Date: 10/07/2013		**Reference number:** CWAN 016	

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FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
Both	S40, R13	Consent

Summary:

Where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be fair and can also be used to satisfy Schedule 2, condition 1.

However, in all other circumstances, the Commissioner will take the data subject's comments into account insofar as they represent an expression of the views of the data subject at the time of the request had they given any thought to the issue at that time and these views will help to inform the analysis of fairness.

Further Information:

This Advice Note explains how to address the issue of consent in cases involving section 40 or regulation 13. It explains how to deal with scenarios where the data subject has consented to disclosure (within or outside the time for compliance) or has not consented or has not been asked to consent.

This is relevant to the assessment of both fairness and Schedule conditions under Principle 1 DPA.

Dealing with consent scenarios:

(1) When asked by the public authority, the data subject HAS consented to disclosure

Where a data subject has consented to a disclosure of their personal data, an informal resolution is more likely. However, if it is necessary to consider this point in a decision notice then the Commissioner will adopt the following approach:

(i) Where a data subject has consented to disclosure of their personal data, it is useful to consider the following to ensure that any informed consent is obtained:

- Was the data subject fully aware that they were consenting to a disclosure to the world at large?
- Was the consent explicit (particularly where sensitive personal data is involved)?
- Was the data subject vulnerable in some way e.g. age?

This approach was supported by the Tribunal in the case of the Creekside Forum v IC & the Department for Culture, Media and Sport EA/2008/0065, 28 May 2009 when it said that it would *"…have been appropriate to have had evidence clarifying the circumstances on which consent was sought…"* (para 58).

(ii) Where the informed **consent is in place at the time of request or within the time for statutory compliance** then the case-officer may want to include the following standard paragraph:

"The Commissioner notes that the data subject has consented to the disclosure of their personal data within the time for statutory compliance with this request. The Commissioner is satisfied that the consent was freely given and informed and in particular that the data subject was aware that a disclosure under the FOIA is effectively to the world at large. As such, the Commissioner considers that it would be fair to disclose the personal data in this instance.

The Commissioner also considers that this consent can satisfy Schedule 2 condition 1."

(iii) Where the data subject provides his/her **response outside the time for statutory compliance**, then that response can be taken into account in considering fairness, insofar as it represents an expression of the views of the data subject which they already held at the time of the request had they given any thought to the issue at that time. In other words, the data subject already held these views at the time of the request but they only came to light when they were asked for their consent.

However, if the consent was given outside the time for statutory compliance, it is not valid consent for the purposes of Schedule 2, condition 1 or Schedule 3 condition 1.

(iv) Where a complainant indicates that the data subject has consented to the disclosure of their personal data, the Commissioner would need to confirm that this consent was genuine. This may require the public authority checking with the data subject or confirming the authenticity of the email or letter containing the consent. Once this has been confirmed, then points (i) to (iii) above should be considered.

(2) The data subject HAS NOT consented to disclosure (or the data subject has not been asked to give consent) (*)

Where the data subject has expressed a refusal to consent to the disclosure of their personal data either within the time for statutory compliance or at some later date, then the Commissioner will adopt the following approach when considering fairness:

(i) The expression of a refusal to consent is not absolutely determinative in the decision as to whether the data subject's personal data will be disclosed.

(ii) Instead, the data subject's comments will be taken into account insofar as they represent an expression of the views which they held at the time of the request had they given any thought to the issue at that time. In other words the data subject already had these views at the time of the request but these views only came to light when they were asked for their consent. As such, the data subject's views can be taken into account in any analysis of fairness.

However, as part of the fairness analysis includes a consideration of the data subject's reasonable expectations, a data subject may argue that their expectations have been shaped or reinforced by the process of seeking, and their refusing to provide, consent.

The Commissioner's view is that where a data subject refuses consent this will be based on how they already feel about the information even though they may not have actively considered their views on a potential disclosure and thus the act of seeking

consent simply prompts the data subject to consciously form a view on the issue of disclosure and to articulate that view to the public authority. Therefore although the refusal of consent can be seen as a reflection of the expectations of the data subject, it should not be seen as something that affects or informs those expectations.

It also remains important to still consider whether it is reasonable for the data subject to object to the disclosure. In some cases, it may also be possible for the data subject to provide details of the reasons why their individual circumstances may affect fairness, or shed light onto the circumstances which may lead the public authority to conclude that the data subject had a reasonable expectation that the information would remain confidential.

Therefore, the Commissioner will not give any further weight or consider that the data subject's expectations have been reinforced where the public authority has returned to the data subject claiming to be seeking their 'consent' but will take into account the additional detail provided by the data subject as to the circumstances and issues that existed at the time of the request.

If it is necessary to consider Schedule conditions (because disclosure would be fair) then the fact that the data subject has not given their consent means that Schedule 2 Condition 1 or Schedule 3 Condition 1 are not satisfied. However, other conditions may be relevant, ie Schedule 2 condition 6 or Schedule 3 condition 5.

(*) – This should not be confused with cases involving s.10 DPA notices.

Whether to seek consent

There is no obligation on a public authority to seek the data subject's consent to disclosure.

It is up to the case-officer to decide whether it would be useful to suggest to the public authority that the views of the data subject be sought as in borderline cases or those involving a small number of data subjects, it may be worth pursuing this point. However, in other cases where a large number of data subjects are involved or where it may over-complicate the investigation and any decision notice, it may be impractical or a disproportionate use of public funds to pursue this point.

In the EIR case of De Mello v IC and the Environment Agency EA/2008/0054 11 December 2008, the Tribunal commented:

"50. The Tribunal has, however, some sympathy with the Appellant's point that -- in this kind of situation -- a check by the EA with the original complainant, to see whether there was any objection to releasing the letter, might have resolved the situation and saved a significant cost to the public (even in the limited circumstances of a paper hearing of the appeal). It may be that the EA and other such public bodies wish to review their initial procedures in situations such as this -- not because it is a matter of law but simply because it is a matter of common sense -- but that is a matter for them. There may well be cost implications that make such procedures difficult to introduce but, if the writer of a letter of complaint is happy for it and the personal data within it to be disclosed in the end, anything that saves public bodies and Appellant's such as Mr de Mello from having to spend time and effort debating the disclosure of such information should be encouraged".

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes			
Related Documents	ICO guidance: Personal information		
Contact: CW			
Date: 10/07/2013		**Reference number:** CWAN 017	

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FOI POLICY INTERNAL KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
Both	S40(4) R13(3)	Information exempt from the subject access right

Summary:

It is only necessary to consider the exemption in section 40(4) FOIA/ regulation 13(3) EIR (for information exempt from the subject access right) if it has been raised by the public authority.

If the public authority does apply s40(4)/r13(3), case officers should point out that it may be simpler to consider other exemptions first.

If the public authority continues to rely on s40(4)/r13(3) then case officers should establish which DPA exemption is being relied on and whether it is engaged and, if so, the balance of the public interest under FOIA/EIR.

If it is found that s40(4)/r13(3) does not apply, it may be necessary for case officers to proactively consider whether disclosure would contravene DPA principles under s40(3)/r13(2).

Further Information:

When is it necessary to consider s 40(4)/ r13(3) in FOI case work?

Section 40(4)/ regulation 13(3) should only be considered in cases where it has been claimed by a public authority. There is no expectation that case officers should pro-actively consider this exemption/ exception (and by implication pro-actively consider whether any of the numerous DPA exemptions would apply if the data subject were to request the information) if it has not been claimed.

Where section 40(4)/ regulation 13(3) has been claimed by a public authority it is appropriate to refer the authority to our guidance on Information exempt from the subject access right. This points out (at paragraph 35) that it may be simpler to consider first the exemptions in section 40(3)/ regulation 13(2), for disclosure that would contravene DP Principles. It may also be appropriate to consider other FOIA/EIR exemptions/ exceptions, since some of the exemptions from the subject access right in DPA relate to interests that are also protected by these exemptions/ exceptions.

This may lead to the public authority withdrawing its reliance on section 40(4)/ regulation 13(3). If it continues to claim it however, then this exemption will need to be considered (unless of course another exemption has already been upheld).

If it is appropriate to consider s40(4)/ r13(3), then how detailed does the analysis of the DPA exemption need to be?

If a PA cannot be persuaded to withdraw its reliance upon section 40(4)/ regulation 13(3) in favour of applying another exemption/ exception, then case officers will need to consider it.

Our Subject Access Code of Practice (chapter 9) gives guidance on the main exemptions from the subject access right.

It will be necessary to establish not just that an exemption under the DPA exists, but also that the exemption would actually apply to the information in question.

In essence the depth of analysis required will be similar to that applied to FOI exemptions and will entail :

- if the DPA exemption is class-based – establishing information falls within the class;
- if the DPA exemption is prejudice-based - establishing that the prejudice would be likely to occur;

and then:

- carrying out the public interest test as set out in section 2/ regulation 13(3).

Proactive application of section 40(3)/ regulation 13(2)

If it is appropriate to consider a public authority's s40(4) claim, but it is found that s40(4) does not apply, then, in light of the Commissioner role as regulator of the DPA, it may still be necessary to pro-actively consider whether disclosure would contravene DPA principles under section 40(3)/ regulation 13(2).

In this situation the argument may be made that releasing personal into the public domain under FOIA, when a data subject cannot gain access to the same information under the DPA, is unfair processing and thus contravenes the first data protection principle.

The Commissioner accepts that this will often be the case, but considers that it is also possible for the processing to be fair in the particular circumstances of the case. In the Lord Ashcroft case FS50197952 he found the processing to be fair, and to meet schedule 2 condition 6 of the DPA even though the information in question was not available to the data subject under the DPA.

Source of Casework Advice Note	Policy Delivery	**Details**	
Related Casework Advice Notes			
Related Documents	ICO guidance: Information exempt from the subject access right - Subject access code of practice		
Contact: CW			
Date: 10/07/2013		**Reference number:** CWAN 018	

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