

## Key Questions for Public Authorities – Freedom of Information Act 2000

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## **Section 1 – information not held**

In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

In order to assist with this determination please answer the following questions:

- What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?
- If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.
- If searches included electronic data, which search terms were used?
- If the information were held would it be held as manual or electronic records?
- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
- If recorded information was held but is no longer held, when did the [public authority] cease to retain this information?
- Does the [public authority] have a record of the document's destruction?
- What does the [name of PA] formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the [name of PA] describe the way in which it has handled comparable records of a similar age?
- If the information is electronic data which has been deleted, might copies have been made and held in other locations?
- Is there a business purpose for which the requested information should be held? If so what is this purpose?
- Are there any statutory requirements upon the [name of PA] to retain the requested information?

## **Sections 2(1)(b) and 2(2)(b) – public interest tests**

[If a 'qualified' exemption has been cited, the public authority will need to explain how it has considered the public interest tests set out at section 2(1)(b) or section 2(2)(b) of the Act.

In order to determine whether the public interest tests have been applied appropriately, the ICO will require answers to the following questions:]

What public interest arguments in favour of disclosing the information/confirming or denying whether the information is held were taken into account?

What public interest arguments in favour of maintaining the exemption/neither confirming nor denying whether the information is held were taken into account?

Please explain why you consider that on balance the public interest in maintaining the exemption [or neither confirming or denying] outweighs that in disclosing the withheld information. Please include details of any particular weighting exercise that has been carried out.

Please ensure that your submissions focus on the content of the information that has actually been withheld rather than simply being generic public interest arguments.

## **Section 3(2) – Held/Not held**

### Section 3(2)(a)

Please explain on what basis the [name of PA] has concluded that although it physically holds the information of the nature requested it does not hold this information for the purposes of the Act – i.e. on what basis have you concluded that although you physically hold the information it is not needed for any of the [name of PA's] own functions.

### Section 3(2)(b)

Please explain the nature of the relationship between the [name of PA] and the third party which physically holds the requested information with respect to the information itself in order to allow the ICO to determine whether this information is held on behalf of the [name of PA].

If applicable, please provide a copy of the contract between the [name of PA] and third party in relation to this information.

### **Section 11 – means of communication**

Section 11 allows an applicant to specify a means of communication by which he would prefer to be provided with the requested information. In this case the complainant has specified that he wishes communication to be made [describe the form in which the applicant has requested the information].

Please confirm that in responding to this request the [name of PA] has considered the preferred means of communication specified by the complainant.

If the [name of PA] has not complied with the preferred means of communication please provide a detailed explanation which sets out why it was concluded that to comply with such a preference would be unreasonable in all the circumstances of this request.

### **Section 12 – the cost of compliance exceeds the appropriate limit**

Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations).

Section 12(2) allows a public authority to refuse to confirm or deny whether it holds information of the nature requested if simply to do so would in itself exceed the appropriate limit.

The appropriate limit for central government departments is £600 and £450 for all other public authorities.

The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:

- determining whether the information is held;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information; and

- extracting the information from a document containing it.

With reference to the four activities set out above, please provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request. (Or confirming whether information falling within the scope of the request is held).

When providing these calculations please include a description of the nature the type of work that would need to be undertaken (e.g. searching X number of files – 1 hour).

In providing this estimate please be aware that a number of Information Tribunal decisions have made it clear that an estimate for the purposes of section 12 has to be 'reasonable' which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence.

Please clarify whether a sampling exercise has been undertaken in order to determine this estimate.

Please also confirm that the estimate has been based upon the quickest method of gathering the requested information, e.g. where possible databases would be used rather than searching manual files.

Section 16 places a duty on a public authority to provide advice and assistance to someone making an information request, including helping an applicant refine a request so that it can be answered within the appropriate costs limit. Therefore, please clarify the nature of any advice and assistance given to the applicant in this case and if no advice and assistance was provided please explain why not.

## **Section 14 – vexatious and repeated requests**

### Section 14(1)

In order to determine whether a public authority has correctly refused a request on the basis that it is vexatious, the ICO will look at the context and history of the request. In particular the ICO will consider the following five criteria:

- whether compliance with the request would create a significant burden in terms of expense **and** distraction;

- whether the request is designed to cause disruption or annoyance;
- whether the request has the effect of harassing the public authority or its staff;
- whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable; and
- whether the request has any serious purpose or value.

Therefore, in order to support [name of PA's] position that this request should be refused on basis of section 14(1) please provide evidence to demonstrate that this request meets any of the five criteria above. Although it is possible that a request can be deemed vexatious if it only meets one of the above criteria, it would strengthen [name of PA's] position if you can demonstrate that the request meets a number of the criteria.

In preparing your response you may find it useful to review our guidance on repeated requests, which can be viewed [here](#).

### Section 14(2)

Requests can be refused on the basis of section 14(2) if:

- it is made by the same person as a previous request;
- it is identical or substantially similar to the previous request; and
- no reasonable interval has elapsed since the previous request.

Therefore to support the application of section 14(2) in this case please provide a clear explanation setting out why you believe the request which has been refused meets the three criteria set out above. If possible, please provide a copy of the previous request which [name of PA] considers this current request to be identical or substantially similar to. Please also provide a copy of the [name of PA's] response when it received this earlier request.

In preparing your response you may find it useful to review the guidance note the ICO has published on repeated requests. This note can be found [here](#) [or copy enclosed].

### **Prejudice-based exemptions**

[LTT 13 sets out a three step test which must be followed for a prejudice based exemption to be engaged:

- the applicable interests within the exemption must be identified;
- the nature of the prejudice must be considered; and
- the likelihood of the prejudice occurring must be considered.

For the purposes of this key questions document wording in relation the first two tests is included, where appropriate, in each particular set of questions. However, standard wording for asking for submissions on the likelihood of prejudice, i.e. the third criteria, is set out below and can be used for all prejudice based exemptions.]

The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

Please confirm which threshold of likelihood [name of PA] is relying on in this case, i.e. the lower threshold that disclosure 'would be likely' to have a prejudicial effect or the higher threshold that disclosure 'would' have a prejudicial effect.

## **Section 21 – information accessible to applicant by other means**

Please clearly explain how the requested information would be accessed by the applicant and why this information is considered to be **reasonably** accessible to him/her specifically.

If the information is available via a publication scheme, please provide details of the relevant scheme. If the information is accessible through a publication scheme on payment of a fee, please detail the charge applied to access this information.

If the information in question is available online, please provide the relevant URLs. Please confirm when this information was uploaded onto the website, or confirm that the information was available via this route at the date of the request.

Has [name of PA] taken into account the particular circumstances of the applicant when deciding whether access to the information is reasonable?

Where the public authority has applied section 21(2)(b), please provide details of the enactment which public authority is relying upon.

## **Section 22 – information intended for future publication**

In order correctly rely on section 22 there must have been a settled intention to publish the requested information prior to the request being received. Therefore, please provide evidence which demonstrates that the information was going to be published at the time of the initial request. Was the publication date determined when the request was actually received? If so, please confirm on date publication will take place.

Furthermore, for this exemption to be relied on section 22(1)(c) requires that the application is 'reasonable in all the circumstances' of the request. Therefore, please explain why in this case the [name of PA] concluded that the application of the exemption was a reasonable one.

[\[Remember to ask questions about the PIT\]](#)

## **Section 23 – information supplied by, or relating to, bodies dealing with security matters**

Please confirm whether the [name of PA] is relying on section 23(1) on the basis that the requested information was directly or indirectly supplied to it by one the bodies in sub-section (3) **or** on the basis that requested information relates to one of the bodies in subsection (3).



If the position is that the information was directly or indirectly supplied to [name of PA] please clarify which of the bodies listed in section (3) it was supplied by. If it was indirectly supplied to the [name of PA] please explain the connection between the information and the relevant security body.

If the position is that the information relates to one of the bodies listed in subsection (3) please clarify which of the bodies the information relates to and why – i.e. what is the connection between the information and the named security body.

Is [name of PA] relying on section 23(1) to withhold all of the information falling within the scope of the request or just part of it?

If a certificate has been issued by a Minister of the Crown under section 23(2) please provide a copy of that the certificate.

## **Section 24 – national security**

Please provide a detailed explanation to support the [name of PA] position that withholding this information is required in order to safeguard national security.

In providing this explanation please be aware that the ICO interprets 'required' in the context of section 24 to mean reasonably necessary. In effect this means that there has to be a risk of harm to national security, but there is no need to prove that there is a specific, direct or imminent threat.

If a certificate has been issued by a Minister of the Crown under section 24(3) please provide a copy of the certificate.

[\[Remember to ask questions about the PIT\]](#)

## **Section 26 – defence**

Please provide a detailed explanation which demonstrates why disclosure of the withheld information would, or would be likely to prejudice:

- the defence of the British Islands or any colony (section 26(1)(a)); or
- the capability, effectiveness or security of any relevant forces (section 26(1)(b)).

Please ensure that you provide evidence which demonstrates a causal relationship between disclosure of the information that has actually been requested and any prejudice which may occur.

[\[Remember to ask questions about likelihood\]](#)

[\[Remember to ask questions about the PIT\]](#)

## **Section 27 – international relations**

### Section 27(1)

Please confirm which sub-section(s) of 27(1) the [name of PA] is relying on to withhold the information that has been requested and furthermore please provide a clear explanation which sets out why disclosure of the information would, or would be likely to result in the prejudice a particular sub-section is designed to protect.

Please ensure that you provide evidence which demonstrates a causal relationship between disclosure of the information that has actually been requested and any prejudice which may occur.

[\[Remember to ask questions about likelihood\]](#)

### Section 27(2)

In order to allow the ICO to consider the application of section 27(2) please confirm which State, international organisation or international court the [name of PA] received the information requested information from.

Furthermore, please explain on what basis the [name of PA] believes that the terms upon which this information was obtained would lead the third party to believe that this information would be treated confidentially. For example, is there a formal agreement between the [name of PA] and third party which indicates that confidentiality is required? If so, please provide a copy of any such agreement.

[\[Remember to ask questions about the PIT  
– bear in mind inherent the PIT in 27\(2\) – see LTT134\]](#)

## **Section 28 – relations within the United Kingdom**

Please provide a detailed explanation which sets out why disclosure of the withheld information would, or would be likely to prejudice

relations between any administration in the United Kingdom and any other such administration.

Please ensure that you provide evidence which demonstrates a causal relationship between disclosure of the information that has actually been requested and any prejudice which may occur.

[\[Remember to ask questions about likelihood\]](#)

[\[Remember to ask questions about the PIT\]](#)

## **Section 29 – the economy**

Please confirm which sub-section of 29(1) the [name of PA] is relying on to withhold the requested information and provide a detailed explanation which sets out why disclosure of the withheld information would, or would be likely to prejudice what each sub-section is designed to protect.

Please ensure that you provide evidence which demonstrates a causal relationship between disclosure of the information that has actually been requested and any prejudice which may occur.

[Remember to include questions about likelihood]

[\[Remember to ask questions about the PIT\]](#)

## **Section 30 – Investigations and proceedings conducted by public authorities**

### Section 30(1)

Please confirm which sub-section(s) of 30(1) the [name of PA] is relying on to withhold information.

With regard to sections 30(1)(a) and 30(1)(b) please confirm the nature of the investigation and explain why the withheld information relates to this specific investigation. Please also clarify whether this investigation was complete at the time of the request.

[For all sub-sections of 30(1)] Please explain why the withheld information is needed by the [name of PA] to fulfil the investigatory functions set out in 30(1)(a) to (c). If not clear, please explain on what basis the [name of PA] has the power to carry out such an investigation.

### Section 30(2)(a)

Please confirm which of the sub-sections in 30(2)(a) the [name of PA] is relying on to withhold the information. Please explain why the withheld information relates to the functions listed in 30(2)(a).

### Section 30(2)(b)

Please confirm why the [name of PA] has concluded that the withheld information relates to the obtaining of information from a confidential source.

[\[Remember to ask questions about the PIT\] – see LTT20 for the particular PI issues relevant to s30\]](#)

### **Section 31 – law enforcement**

Please confirm which sub-section(s) of 31(1) the [name of PA] is relying on to withhold the information that has been requested.

Please clearly explain why disclosure of the information would prejudice, or be likely to prejudice the function which a particular sub-section is designed to protect.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.

[And/or]

If relying on section 31(1)(g), please confirm which of the [name of PA] functions listed in 31(2)(a) to (i) would or would be likely to be prejudiced by release of the requested information. Please explain on what basis the [name of PA] has the authority to undertake this function (citing statute wherever possible).

Please ensure that you provide evidence which demonstrates a causal relationship between disclosure of the information that has actually been requested and any prejudice which may occur.

[\[Remember to ask questions about likelihood\]](#)

[\[Remember to ask questions about the PIT\]](#)

## **Section 32 – court records**

Please confirm which of the sub-sections in either section 32(1) or section 32(2) the [name of PA] is relying on to withhold the requested information.

The application of both sections requires the consideration of two concepts – information and documents: it is not only the reason for holding the information which is relevant to the engagement of section 32, but also the type of document the information is contained in.

In respect of the concept of documents, please explain why the requested information is contained in a document that would be covered by the requirements of section 32. (Guidance on the types of documents that the ICO considers will be covered by the exemption is contained [here](#)).

In respect of the concept of information, please explain why the requested information is held **only** by virtue of being contained in a document relevant to this exemption. In responding to this point please explain how the information was acquired by [name of PA] and how the information is used. (Guidance on these points is available [here](#).)

## **Section 33 – audit functions**

Section 33 can only apply to a public authority that has the functions set out in sections 33(1)(a) or 33(1)(b). Therefore please explain on what basis the [name of PA] has a function either in relation to the audit of accounts of other public authorities **or** a function in relation to the examination of the economy, efficiency and effectiveness with which such authorities use their resources in discharging their functions.

[No need to ask the preceding para if the PA clearly has an audit function, e.g. Audit Commission].

Which of the [name of PA] functions would, or would be likely to, be prejudiced by the disclosure of the information and in particular how would this prejudice affect the [name of PAs] exercise of the functions set out in 33(1)(a) or 33(1)(b).

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.

[\[Remember to ask questions about likelihood\]](#)

[\[Remember to ask questions about the PIT\]](#)

## **Section 34 – Parliamentary privilege**

Please provide a detailed explanation setting out how disclosure of the requested information would result in an infringement of the privileges of either House of Parliament.

If a certificate has been issued under section 34(3) by either the Speaker of the House of Commons or the Clerk of the Parliaments, please provide a copy.

## **Section 35 – formulation of government policy, etc**

### Section 35(1)(a)

Please clarify exactly which government policy or policies the [name of PA] considers this information to relate to.

The Information Tribunal has made it clear that in cases where section 35(1)(a) applies central to the consideration of the public interest test is the timing of any request. This is because once the formulation/development of a policy has been made completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight. (See for example: *DFES v Information Commissioner*, EA/2006/0006, paragraph 75). Furthermore, the Tribunal has made it clear that policy formulation and development is **not** one which is a 'seamless web', i.e. a policy cycle in which a policy is formulated following which any information on its implementation is fed into the further development of that policy or the formulation of a new policy.

It is therefore necessary for the ICO to be able to identify when the policy formulation/development stage to which the withheld information relates ended and the implementation of this policy began. Therefore, please explain when the [name of PA] considers the formulation/development of the policy or policies to which this information relates to have been completed, or indeed confirm why the [name of PA] considers the formulation/development of this particular policy (or policies) to have been ongoing at the time the complainant submitted his request.

If a decision in relation to the relevant policy has been taken, in line with the requirements of section 35(2) please confirm that any statistical information has not been withheld on the basis of section 35(1)(a).

#### Section 35(1)(b)

If not clear please, identify which Ministers the communications involve, or which Cabinet/committee discussions the information relates to; describe (in adequate detail) how the information relates to the communications in question.

If a decision in relation to the relevant policy has been taken, in line with the requirements of section 35(2) please confirm that any statistical information has not been withheld on the basis of section 35(1)(b).

#### Section 35(1)(c)

If not clear, identify the Law Officers asked to provide the advice and what advice was being sought or provided.

#### Section 35(1)(d)

Which private office(s) does the information relate to? How does it relate to its/their operation?

[\[Remember to ask questions about the PIT. When asking about the PIT in relation to the application of section 35\(1\)\(a\) clarify that sufficient regard has been given to the requirements of section 35\(4\).\]](#)

### **Section 36 – prejudice to effective conduct of public affairs**

Section 36 is a prejudiced based exemption which works in a slightly different way to the other prejudiced based exemptions contained within the Act. Section 36 can only be engaged if in the reasonable opinion of the qualified person disclosure would result in any of the effects set out in section 36(2) of the Act.

In order for the ICO to determine whether section 36 was correctly applied please provide a copy of the submissions given to the qualified person in order for them reach their opinion **and** a copy of the opinion which was subsequently provided.

The ICO recognises that in some cases discussions with the qualified person will be oral rather than in writing. If that is the case then please

provide a full record of the discussion (taken at the time of the discussion) and the decision reached.

If it is the case that there is not even a written record taken at the time of the discussion, then as a minimum the ICO will accept a signed statement from the qualified person recording their opinion. In order to assist public authorities in providing this statement a [form](#) is available on the ICO's website which shows the minimum information we would expect public authorities to provide to us about the qualified person's opinion.

Furthermore, if in providing such documents, the following is not clear, please provide a response to the following questions:

- When was this opinion sought and when was it given?
- What information did the qualified person have access to when giving this opinion?
- For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
- Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?
- Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?

Please clarify which limb(s) of section 36(2) the qualified person considered to be engaged; please note the limbs are not mutually exclusive, but the qualified person does need to specify which limb or limbs they consider to be engaged.

If [name of PA] is relying on section 36(2)(c) – i.e. 'otherwise prejudice effective conduct of public affairs' – please clarify what the nature of this prejudice is.

[\[Remember to ask questions about the PIT – for the section 36 exemption, see particular approach to the PIT set out in LTT 36\]](#)

## **Section 37 – communications with Her Majesty, etc. and honours**

### Section 37(1)(a)

Explain why [name of PA] believes that the information relates to communications with the Queen, with other members of the Royal Family or with the Royal Household.

### Section 37(1)(b)



Explain why [name of PA] believes that the information relates to the award of any honour or dignity by the Crown (subsection (1)(b)).

[\[Remember to ask questions about the PIT\]](#)

### **Section 38 – health and safety**

Please explain why disclosure of the information would endanger, or be likely to endanger the health or safety of an individual.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any endangerment to an individual which may occur.

[Remember to ask questions about likelihood]

[\[Remember to ask questions about the PIT\]](#)

### **Section 40 – personal information**

[Case officers should remember to only ask the questions for the sub-section(s) that are relevant to their case – in most cases this will be those under section 40(2) and the first principle questions].

#### Section 40(1)

Why has [name of PA] concluded that all of requested information constitutes the personal data of the applicant? ('Personal data' is defined by section 1(1) of the Data Protection Act 1998)

#### Section 40(2)

In order to assist the ICO's consideration of the application of section 40(2) please explain whose personal data the [name of PA] considers the requested information to be. Is the [name of PA's] position that all of the withheld information is personal data? Has the [name of PA] considered whether any of the withheld information also constitutes sensitive personal data? (Both 'personal data' and 'sensitive personal data' are defined by section 1(1) of the Data Protection Act 1998).

Please confirm which of the data protection principles you believe would be breached if the withheld information was disclosed.

[First data protection principle]

In assessing whether disclosure would be unfair and thus constitute a breach of the first data protection principle the ICO takes into account a number of factors such as:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 ECHR;
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
  - whether information of the nature requested is already in the public domain;
  - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

Therefore in explaining why you believe that disclosure would be unfair and/or unlawful please consider the criteria set out above.

Have the [name of PA] considered whether any of the conditions in schedule 2 would allow the information to be disclosed, for example the sixth condition?

In responding to the above questions, you may find it useful to review the ICO's guidance note on section 40 which goes into further detail about this exemption. This note can be found [here](#).

#### Section 40(3)(a)(ii)

Please provide a copy of the notice submitted by the data subject, confirm which steps were taken in response to this notice and supply documentary evidence of these steps.

[\[Remember to ask questions about the PIT\]](#)

#### Section 40(4)

Please confirm why the individual whose is the focus of the requested information would not be able to access this information under the subject access provisions contained in the Data Protection Act 1998.

[\[Remember to ask questions about the PIT\]](#)

### **Section 41 – information provided in confidence**

For section 41(1)(a) to be met the information must have been provided by a third party. Therefore please identify which third party provided [name of PA] with the withheld information.

For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. In the ICO's view a breach will be actionable if:

1. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)

2. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)

3. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party. (Please note that the approach taken by the courts in **some** cases is that detriment is not always a prerequisite to an actionable breach of confidence.)

Therefore, with reference to the three criteria above, please explain why disclosure of the withheld information to the public would constitute an actionable breach of confidence.

Although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. Therefore please explain why in this case the [name of PA] concluded that public interests in disclosing the requested information did not outweigh the interests in maintaining confidentiality.

## **Section 42 – legal professional privilege**

Please confirm whether [name of PA] is relying on the fact that the withheld information is subject to legal advice privilege **or** litigation privilege.

Legal advice privilege is generally considered where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:

- the communications must be made between a professional legal adviser and client;
- the communications must be made for the sole or dominant purpose of obtaining legal advice; and
- the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.

Therefore, with reference to the above criteria please explain why [name of PA] believes that the withheld information attracts advice privilege.

Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. This type of privilege can only be relied upon in circumstances where the following criteria are met:

- where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility;
- the dominant purpose of the communications must be to obtain advice to assist in the litigation; and
- the communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.

Therefore, with reference to the above criteria please explain why [name of PA] believes that the withheld information attracts litigation privilege.

Where a privileged communication has been placed into the public domain or disclosed without restrictions being placed on its further use, the ICO believes that privilege can no longer apply. This is because the advice can no longer be said to be confidential. In light of this please confirm that the [name of PA] is satisfied that privilege has not been lost by virtue of the advice losing its confidentiality.

[\[Remember to ask questions about the PIT\]](#)

## **Section 43 – commercial interests**

### Section 43(1)

Provide evidence to support the position that the withheld information constitutes a trade secret. For example, is it the case that the information is used to gain a competitive advantage but it is not generally known in that trade or business? Are steps taken to keep the information secret?

## Section 43(2)

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.

If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and please provide copies of correspondence the [name of PA] has had with third parties in relation to this request.

[Where the information concerns a tendering process] Provide a copy of the Invitation to Tender (where appropriate), details of when the tendering process was complete or details of what stage the tendering process had reached when the request for information was made. Please also provide details of when the tendering process is likely to be completed.

[\[Remember to ask questions about likelihood\]](#)

[\[Remember to ask questions about the PIT\]](#)

## **Section 44 – prohibitions on disclosure**

### Section 44(1)(a)

Please specify the enactment and the specific provision(s) of that enactment which prohibit disclosure of the withheld information. Explain in detail why the provision(s) in question would prohibit disclosure of the withheld information. Where relevant, please explain why [name of PA] has concluded that the gateways to disclosure or exceptions to the prohibition contained within the enactment are not engaged in respect of this request.

[More specific questions can be adapted from the s44 legal briefings on the knowledge base].

Section 44(1)(b)

Please specify the Community obligation and the specific provision(s) of that obligation which prohibit disclosure of the withheld information. Explain in detail why the provision(s) in question would prohibit disclosure of the withheld information.

Section 44(1)(c)

Please explain in detail why disclosure of the withheld information would constitute or be punishable as a contempt of court.