

# Prejudice to the effective conduct of public affairs (section 36)

## Freedom of Information Act

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## Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities the main provisions of section 36 and the meaning of key terms used in that section, including 'qualified person' and 'reasonable opinion', and recommends what public authorities should record when applying this exemption.

## Overview

- Section 36 provides an exemption if disclosure would or would be likely to:
  - (a) prejudice collective responsibility or the equivalent in Wales and Northern Ireland;
  - (b) inhibit the free and frank provision of advice or exchange of views; or
  - (c) otherwise prejudice the effective conduct of public affairs.
- Other than for statistical information, s36 requires the authority's 'qualified person' to give their 'reasonable opinion' that disclosure would or would be likely to cause the types of prejudice or inhibition listed above.
- It is a qualified exemption, other than for information held by Parliament. This means that even if the exemption applies, the public authority must still disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- It should always be possible for a public authority to carry out an internal review, at least to reconsider the public interest test.

- Public authorities should keep a record of the qualified person's opinion and the submission made to obtain that opinion. In the event of a complaint, the ICO will expect to see a record of the qualified person's opinion.

## What FOIA says

5. Section 36(1)–(4) states:

**36.—(1)** This section applies to—

- (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

- (a) would, or would be likely to, prejudice —
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the Cabinet of the Welsh Assembly Government.
- (b) would, or would be likely to, inhibit—
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the

effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

6. Section 36(1)(a) means that where information held by government departments or the Welsh Assembly Government is exempt under section 35 of the Act (to do with the formulation of government policy), section 36 cannot apply to that information. This is the case even if section 35 is engaged in relation to any particular information but the public interest test under section 35 is in favour of disclosure. Before considering section 36, these bodies should therefore check that the information in question does not engage section 35.

## Qualified person

### Identifying the qualified person

7. Section 36 requires that, other than for statistical information, the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. Therefore, in order to use section 36, public authorities must establish who their qualified person is.
8. The qualified person is not chosen by the authority itself. Section 36(5) explains what is meant by the ‘qualified person’. Subsections (a) to (n) define who the qualified person is for a number of specific authorities. This list has been amended since the Act was first passed, as public authorities have changed, and so public authorities should consult the latest version. The version of the Freedom of Information Act at [www.legislation.gov.uk](http://www.legislation.gov.uk) is regularly updated.
9. Subsections (a) to (n) of section 36(5) only specify the qualified person for a limited number of public authorities. Most public authorities will fall under section 36(5)(o). For these authorities the qualified person is either a Minister of the Crown or a person authorised by a Minister of the Crown. A Minister may authorise the public authority itself or any officer or employee of the authority to be the qualified person.

10. Where the qualified person is the public authority itself rather than a specific post, this means the highest decision-making body within the authority.

**Example**

In [Guardian Newspapers Ltd and Brooke v Information Commissioner and British Broadcasting Corporation \(EA/2006/0011 and EA/2006/0013, 8 January 2007\)](#), the Information Tribunal said, in relation to the BBC, at paragraph 26:

*"Our provisional view is that, where there is an authorisation of the authority itself as the qualified person under s36(5)(o)(ii), the opinion must be the opinion of the authority's primary decision-making organ, being, in the case of the BBC, the Board of Governors."*

11. The Ministry of Justice previously produced a list of qualified persons by type of authority. However, this does not cover all public authorities and it is on an [archived web page](#) that is not updated\*. In some cases it specifies the qualified person for types of authorities (eg local authorities, schools and police authorities) rather than for individual named authorities.
12. If a public authority does not have an authorised qualified person, it should ask for an authorisation from a Minister of the Crown, via the appropriate government department. If public authorities are unsure how to obtain authorisation they should contact the Cabinet Office at: [foi-team@cabinetoffice.gov.uk](mailto:foi-team@cabinetoffice.gov.uk)

**Example**

In [Salmon v Information Commissioner and King's College Cambridge \(EA/2007/0135, 17 July 2008\)](#) the Information Tribunal found that section 36 was not engaged because no officer or employee of the college had been authorised as the qualified person at the time of the request.

13. The public authority cannot choose the qualified person themselves; nor can the qualified person delegate the authority to someone else if the qualified person is available to give an

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\*<http://webarchive.nationalarchives.gov.uk/20090608182148/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm>

opinion. However, situations may arise in which the qualified person cannot give the opinion because they are absent or not available. For example, they may be on leave or on sickness absence, or there may be no-one in that post at the relevant time. In those cases the question is whether someone else has been formally designated to act in that capacity. This could be done through a scheme of delegation which specifies that someone else can exercise that post holder's powers and functions whenever they are absent, or those powers and functions could be formally delegated to the alternative person as the need arises. Provided there is a formal delegation of some sort then the alternative person is truly 'standing in the shoes' of the absent post holder and so they can act as the qualified person. This is different from a situation where the post holder who is the qualified person is absent and someone else is simply covering part of their work, such as attending meetings or replying to correspondence but without having the powers and functions of the post formally delegated to them. In that situation the other person is not the qualified person.

14. While it is the qualified person who must give the required opinion, someone else in the authority, eg the authority's freedom of information officer, may carry out the preparatory work leading up to the decision, for example assembling the evidence and summarising the arguments.

### **Qualified person's opinion is needed to engage the exemption**

15. The qualified person is required to give a reasonable opinion about the likelihood of prejudice or inhibition under section 36(2). The qualified person's opinion is crucial in order to engage the exemption. If the opinion is not given by the appropriate person, then the exemption cannot apply.
16. As section 36 is a qualified exemption, the public authority may, if necessary, under section 10(3), extend the 20 day time limit in order to consider the balance of public interest, but they must still, under section 17(1), inform the requestor within 20 days that section 36 is engaged and why. Section 36 can only be engaged when the qualified person has given their opinion. This means that the public authority should obtain that opinion within 20 days before they can extend the time limit to consider the public interest test. However, section 36 can still be engaged if the qualified person gives their reasonable opinion by the completion of the internal review (see below under [Internal reviews](#)).

17. Therefore, public authorities wishing to apply section 36 should identify who their qualified person is and obtain their opinion in good time in order to carry out the public interest test.

## Reasonable opinion

### Reasonableness

18. To engage section 36, the qualified person must give an opinion that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
19. In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law.
20. The most relevant definition of 'reasonable' in the *Shorter Oxford English Dictionary* is: "*in accordance with reason; not irrational or absurd*". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.
21. This is not the same as saying that it is the **only** reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion.
22. The Information Tribunal in [Guardian Newspapers Ltd and Brooke v Information Commissioner and British Broadcasting Corporation \(EA/2006/0011 and EA/2006/0013, 8 January 2007\)](#) said at paragraph 60:

*"We do not favour substituting for the phrase 'reasonable opinion' some different explanatory phrase, such as 'an opinion within the range of reasonable opinions'. The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must*

*take a view on whether there either is or is not the requisite degree of likelihood of inhibition.”*

23. Where the ICO is considering a complaint regarding information withheld under section 36, it will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person’s knowledge of or involvement in the issue.
24. The ICO is primarily concerned with the reasonableness of the substantive opinion and is not explicitly required to assess the quality of the reasoning process that lay behind it. However, the content of the opinion or the submission made to support it will often be relevant to the ICO’s assessment of whether the opinion is reasonable. It is in the public authority’s interests to provide the ICO with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that we may find that the opinion is not reasonable. If the qualified person makes an assertion that appears on the face of it to be an unreasonable opinion, then we are likely to find the exemption is not engaged, but if they had supported it by argument and evidence that relevant factors have been taken into account, it may be evident that it is at least *a* reasonable opinion. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise.

### **Would, or would be likely**

25. It is important to remember that the qualified person’s opinion is about whether the prejudice or inhibition would or would be likely to occur. These are two different things. ‘Would prejudice’ means that it is more likely than not (ie a more than 50%



chance) that prejudice would occur. 'Would be likely' is a lower standard; it means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur (for further discussion on this point, see our separate guidance on [The prejudice test](#)).

26. There may be cases in which it is reasonable to think that there is a real chance of prejudice occurring (would be likely), but not reasonable to think that the risk is more than 50% (would).
27. The choice between would and would be likely is important because it affects the balance of factors in the public interest test.

### **Blanket rulings**

28. Section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion. We recognise that public authorities will tend to develop a general approach to, or policy on, releasing certain types of information, but this must not limit the qualified person's discretion. An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified person should consider the facts in each case, weigh the relevant factors and ignore irrelevant factors in order to reach their opinion.

### **Information held by Parliament**

29. In dealing with a complaint regarding section 36, the ICO will consider whether the qualified person's opinion was reasonable, in order to decide whether the exemption is engaged. However, in relation to information held by the House of Commons or House of Lords, under section 36(7) a certificate signed by the Speaker of the House of Commons or the Clerk of the Parliaments, certifying that in his reasonable opinion disclosure would or would be likely to have the effects in section 36(2), is conclusive evidence of that fact. The reasonableness of that opinion is not open to question.
30. Furthermore, under section 2(3)(e), where section 36 is engaged in respect of information held by the House of Commons or House of Lords, the exemption is absolute. This means that where there is a certificate as described above, the

information is exempt from disclosure and there is no public interest test.

**Example**

In ICO decision notice [FS50355903](#), the public authority, the House of Commons, issued a certificate pursuant to section 36(7) signed by the Speaker of the House of Commons and stating that in his reasonable opinion the requested information was exempt from disclosure on the grounds provided for by section 36(2)(b) of the Act. The ICO decided that, given the section 36(7) certificate is conclusive, section 36(2)(b) was engaged. As this exemption is absolute in relation to information held by the House of Commons, there was no public interest test to consider. The ICO therefore found that the public authority lawfully withheld the requested information.

**Statistical information**

31. Under section 36(4), a qualified person's opinion is not required if the information in question is statistical. If the public authority is withholding information on this basis they must still, in accordance with section 17(1), explain to the requestor (and to the ICO if there is a complaint to us) why s36(2) applies, but they can make this decision without seeking a qualified person's opinion.

**Example**

In ICO decision notice [FS50297517](#), Hertfordshire County Council withheld statistics on racial incidents in schools in North Hertfordshire with reference to section 36(2)(c). As the information was statistical, under section 36(4) they were not required to obtain the reasonable opinion of a qualified person. In this case the ICO found that the information was correctly withheld.

32. The term 'statistical information' has a wider meaning than 'statistics'. It includes the raw data that is used for statistical analysis, the mathematical model or methodology used to analyse the data and the product or outcome of that analysis. There is further discussion of statistical information in our separate guidance on section 35, which relates to the formulation of government policy.

## The nature of the prejudice

### Collective responsibility

33. Section 36(2)(a)(i) covers information whose disclosure would or would be likely to prejudice collective responsibility:

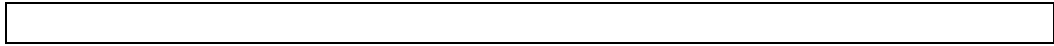
**36.—(2)** *Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—*

*(a) would, or would be likely to, prejudice—*

*(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown*

34. Section 36 cannot apply to information that is exempt under section 35. Section 36(1)(a) makes this clear. In many cases, the issue of collective responsibility will arise in the context of information that is held by government departments and relates to the formulation or development of government policy. Such information would therefore engage section 35 rather than section 36. However, section 36(2)(a)(i) could apply to any other information whose disclosure would or would be likely to prejudice collective responsibility, including information held by other public authorities.
35. Collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of our constitutional system of government. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but once a decision is made they are all bound to uphold and promote that agreed position to Parliament and the public. This principle is set out at paragraph 2.1 of the [Ministerial Code](#) (May 2010):

*“The principle of collective responsibility, save where it is explicitly set aside, requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and ministerial committees, including in correspondence, should be maintained.”*



36. The convention of collective responsibility incorporates elements of [safe space](#) and [chilling effect](#), discussed further below. However, there is an additional unique element: that ministers need to present a united front in defending and promoting agreed positions. If disclosure would undermine this united front by revealing details of diverging views, this would undermine ongoing government unity and effectiveness.
37. In essence, this means that the fact that a minister may have disagreed with a particular policy is not normally disclosed.
38. There have in fact been instances in which former ministers have revealed details of Cabinet discussions in their memoirs, and information that identifies the positions taken by ministers may sometimes enter the public domain by means other than via FOIA.
39. However, in terms of section 36(2)(a)(i), the issue for the qualified person to consider is whether disclosing the requested information under FOIA would or would be likely to prejudice collective responsibility. Each case will need to be considered according to its own circumstances. Furthermore, although collective responsibility is an important constitutional principle, the exemption is not absolute. Even if prejudice would or would be likely to occur, it is still necessary for the public authority to carry out the public interest test objectively in order to decide whether the information should be disclosed. Nonetheless, the importance of maintaining collective responsibility is likely to carry significant weight in the public interest test.

### **Northern Ireland and Wales Executive**

40. Section 36(2)(a)(ii) concerns prejudice to the work of the Executive Committee of the Northern Ireland Assembly, and section 36(2)(a)(iii) concerns prejudice to the work of the Cabinet of the Welsh Assembly Government:

**36.—(2)** Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—

(a) would, or would be likely to, prejudice—

(i) the work of the Executive Committee of the Northern Ireland Assembly, or

(ii) the work of the Cabinet of the Welsh Assembly Government.

41. The Ministerial Code for the Welsh Government (<http://wales.gov.uk>) states that the Cabinet operates on the basis of collective responsibility. The Ministerial Code for the Northern Ireland Executive ([www.northernireland.gov.uk](http://www.northernireland.gov.uk)) does not refer to a convention of collective responsibility. However, it should be noted that these subsections are in any case expressed more broadly than subsection 36(2)(a)(i); they refer to 'the work' of these bodies. The prejudice envisaged could therefore be more generally to the activities of these two bodies and their ability to function, rather than to the specific convention of collective responsibility.

### **Free and frank provision of advice or exchange of views**

42. Section 36(2)(b) states:

**36.—(2)** Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation

43. Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the

provision of advice or the exchange of views may impair the quality of decision making by the public authority.

44. Public authorities may claim either or both of these exemptions, but they should be clear about which of them the qualified person's opinion relates to. If it is not evident how the provision of advice or the exchange of views would be inhibited, it may be harder for the ICO to find that the opinion was a reasonable one.
45. Note that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.
46. The terminology used in these subsections is not explicitly defined in the Act, but the ICO's understanding of the key terms is as follows:
  - 'Inhibit' means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
  - Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.
  - The 'exchange of views' must be as part of a process of deliberation.
  - 'Deliberation' refers to the public authority's evaluation of competing arguments or considerations in order to make a decision.

## Chilling effect arguments

47. Arguments under s36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
48. Civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice. Where lobbyists have been involved in the discussions then they are even less likely to be inhibited in their contributions by the possibility of disclosure as they are trying to further their own agenda by influencing the public authority. Public authorities should consider therefore how likely it is that lobbyists will actually be deterred from contributing. Nonetheless, chilling effect arguments cannot be dismissed out of hand.
49. Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
50. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.

### **Example**

ICO decision notice [FS50209659](#) concerned a request to the BBC for notes of a meeting between the Director General and other senior BBC managers, and David Cameron, then Leader of the Opposition. The ICO accepted that the BBC engages in such discussions in order to understand how policy decisions will affect it and to enable it to make decisions about how it operates and how best to provide input to politicians about relevant issues. It was reasonable for the qualified person to

conclude that releasing the notes of this meeting would mean that future discussions would be less candid, and this in turn would harm the BBC's deliberations. Section 36(2)(b)(ii) was therefore engaged.

51. Where it is reasonable to think that inhibition under s36(2)(b)(i) or (ii) would or would be likely to occur, the public authority should still consider how much weight to attach to the alleged chilling effect when carrying out the public interest test.

### **Other prejudice to the effective conduct of public affairs**

52. Section 36(2)(c) states:

**36.—(2)** *Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

53. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.

#### **Example**

ICO decision notice [FS50350899](#) concerned a request for notes from the meetings of Conservative and Liberal Democrat negotiating teams prior to the formation of the coalition government. The Commissioner accepted that the qualified person's opinion that s36(2)(c) was engaged was reasonable:

*"At this critical point in the formation of a government political parties must have the greatest possible confidence in relying on the services and support of the civil service without any concern that information provided, consulted or relied on may be compromised by being revealed at a later date. The conduct of public affairs is likely to be prejudiced if political*



*parties feel unable to ask for civil service advice."*

54. Section 36(2)(c) is concerned with the effects of making the information public. However, it does not relate, for example, to the internal effect on the public authority of collating information that has been requested or of making decisions on redaction.
55. In [McIntyre v Information Commissioner and the Ministry of Defence \(EA/2007/0068, 4 February 2008\)](#), the Information Tribunal said at paragraph 25:

*"We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure".*

56. The Information Tribunal here took the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b). The Information Tribunal made this point in [Evans v Information Commissioner and the Ministry of Defence \(EA/2006/0064, 26 October 2007\)](#); they said, at paragraph 53, in relation to a claim of section 36(2)(c):

*"The principle arguments in favour of this exemption advanced by the MoD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves freely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting. However, if the*

*same arguments are to be advanced, then the prejudice feared is not 'otherwise'. Some prejudice other than that to the free and frank expression of advice (or views, as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged."*

## Safe space arguments

57. Public authorities may argue that they need a 'safe space' to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
58. Traditionally safe space arguments relate to internal discussions but public authorities do sometimes invite external organisations/individuals to participate in their decision making process (eg consultants, advisors, lobbyists, interest groups etc). Safe space arguments can still apply where external contributors have been involved, as long as those discussions have not been opened up for general external comment. However this argument will generally carry less weight than if the process only involved internal contributors.

### Example

In [The Department for Business, Enterprise and Regulatory Reform \(DBERR\) v the Information Commissioner and Friends of the Earth \(EA/2007/0072, 29 April 2008\)](#) the Tribunal recognised that there was value in government being able to test ideas with informed third parties and knowing what the reaction of a particular group of stakeholders might be in relation to a specific policy. The Tribunal stated;  
*"...we do accept that there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken."* (para 119 DBERR).

59. The safe space argument is more commonly applied to the development of government policy, and as such it relates to section 35. However, there may be a similar need for any public authority to have a safe space in which to develop ideas or make decisions. If the disclosure of information would or

would be likely to prejudice this, there may be an argument for engaging section 36(2)(c).

60. The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice. On the other hand, if it is argued that disclosing information would interfere with or distract from the process in any other way, or would prejudice or undermine the decision itself, rather than the frankness of the discussion specifically, then this argument only relates to section 36(2)(c).
61. This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly sidetracked. However, this can only last for a short time and the public authority would have to explain clearly why it was still required at the time of the request on the facts of each case. The timing of the request will therefore be an important factor.

### **Record keeping arguments**

62. It is sometimes argued that concerns about disclosure lead to public authorities keeping less detailed or even inadequate records of discussions and that this would impact on the quality of decision making and hence engage section 36(2)(c).
63. The ICO is sceptical of these arguments and the Information Tribunal has shared this scepticism. The Information Tribunal in [\*Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC \(EA/2006/0011 and EA/2006/0013, 8 January 2007\)\*](#) said at paragraph 107:

*"For purposes of effective administration a responsible public body ought to keep suitable minutes of important meetings, whether or not the minutes may be disclosed to the public at a future date".*

64. While there may have been a tendency in recent years towards keeping less detailed minutes, at least in central government, there is no clear evidence that this is directly attributable to the effects of FOIA. In any case, keeping less detailed minutes can

actually represent good record keeping practice, provided they are adequate for evidential and business purposes, ie what the Tribunal referred to above as 'suitable minutes'. If the department endorses or permits a loss of detail in its records, it will be difficult to argue that the loss of detail is harmful.

65. However, some record keeping arguments may actually be chilling effect arguments made in a slightly different way (ie that disclosure would result in less detailed advice, which would then inevitably result in less detailed records of that advice). These chilling effect arguments may be relevant to engaging section 36(2)(b), as discussed above.

## Neither confirm nor deny

66. Section 36(3) envisages circumstances in which it is not appropriate for the public authority to either confirm or deny whether they hold the requested information, which is normally the duty under s1(1)(a) of the Act. In such cases the qualified person must still give their reasonable opinion that to confirm or deny that the information is held would in itself have the effects listed in s36(2). Having obtained this opinion, the public authority must still carry out a public interest test to decide whether the public interest in not confirming or denying outweighs the public interest in complying with s1(1)(a). The refusal notice should indicate which subsection of s36 is engaged, without disclosing whether the information is held or not.

## Public interest test

67. Apart from cases where the information is held by the House of Commons or House of Lords, section 36 is a qualified exemption, which means that, even when the qualified person has given their opinion that the exemption is engaged, the public authority must still carry out a public interest test. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. If it does not, the information must be released.
68. The public interest test is separate from the qualified person's opinion. The qualified person is not required to carry out the public interest test themselves, although they may do so. It is possible for officers of the public authority, having received the

qualified person's opinion, to carry out the public interest test themselves. In that case they should be aware that the fact that the exemption is engaged by the qualified person's opinion does not automatically mean that the information should be withheld. There should be an objective consideration of the public interest factors on either side.

69. The qualified person's opinion will affect the weight of the argument for withholding the information. If the qualified person has decided that disclosure would prejudice or inhibit, this will carry a greater weight than if they said disclosure would be likely to prejudice or inhibit. Of course, the qualified person's opinion on this point must be reasonable, and the ICO will consider whether that opinion was reasonable in deciding whether the exemption is engaged.
70. The qualified person's opinion brings weight to the arguments for withholding; the significance of this weight will vary from case to case. Section 36 is not an absolute exemption (other than in relation to information held by Parliament) and arguments in favour of disclosure must be considered, taking account of the circumstances of the case.
71. In considering a complaint regarding section 36, if the ICO finds that the opinion was reasonable, we will consider the weight of that opinion in the public interest test. This means that we accept that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, but we will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming our own assessment of whether the public interest test dictates disclosure.
72. The Information Tribunal in [\*Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC \(EA/2006/0011 and EA/2006/0013, 8 January 2007\)\*](#) said at paragraph 92:

*"In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity,*

*extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur."*

### **Example**

In ICO decision notice [FS50264783](#) the complainant requested information from the then Department for Children Schools and Families regarding a 'Review of Academies'. The Department withheld the information with reference to exemptions including sections 36(2)(b)(i) and (ii). The ICO found that these exemptions were engaged but that the public interest in maintaining them did not outweigh the public interest in disclosure. Although it was reasonable to think that there would be inhibition, the ICO did not accept that it would be severe or widespread, taking account of the timing of the request.

## **Internal reviews**

73. The ICO expects public authorities to offer an internal review to applicants who are dissatisfied with a decision to withhold information which they have requested. An internal review of the decision presents an opportunity for the authority to reconsider how it dealt with the request.
74. In the case of section 36 we expect that the qualified person would take the opportunity to consider their reasonable opinion again, taking account of any comments from the complainant. Furthermore it should always be possible for the public authority to review the public interest arguments.
75. If section 36 has been applied and there have been flaws in the process leading to the opinion of the qualified person, the internal review provides an opportunity to correct them. For example:
  - If the qualified person's opinion was not given within 20 days, section 36 can still be engaged if the opinion is given before the completion of the internal review, even though there will have been a procedural breach of section 17(1).
  - If there was in fact no qualified person authorised at the time of the request but they are authorised before the

completion of the internal review, they can give their opinion then and engage the exemption.

- If the authority has not previously considered section 36, it can do this during the internal review, provided that they seek the qualified person's opinion and carry out the public interest test.

## Recording the opinion

76. In order for the qualified person to form a reasonable opinion, the public authority should provide them with all relevant material, eg the information itself or a description of it, together with arguments and any evidence on what the effects of disclosure would be. In the ICO's view it will be difficult for the qualified person to reach a reasonable opinion if they are not aware of the nature of the information and the relevant factors (and only the relevant factors) that need to be taken into account. It is also important that it is clear what information the opinion relates to.
77. In dealing with a complaint the ICO will expect to see evidence of the qualified person's opinion and how it was reached. The more evidence we have of how the qualified person's opinion was formed, the better we can assess whether it was reasonable. The purpose of obtaining evidence is not to assess the quality of the qualified person's reasoning process, but to help us to decide whether the substantive opinion could be considered reasonable in the terms described above.
78. The Information Tribunal has emphasised the importance of documenting the opinion and how it was reached. In [\*University of Central Lancashire v Information Commissioner & Colquhoun \(EA/2009/0034, 8 December 2009\)\*](#) the Tribunal said:

*"Section 36 provides for an exceptional exemption which the public authority creates by its own action, albeit subject to scrutiny of its reasonableness, the likelihood of prejudice and the question of the public interest. That factor of itself justifies a requirement that the authority provide substantial evidence as to the advice (other than legal advice) and the arguments presented to the qualified person upon which his opinion was founded. We emphasise that no set formula is required, just a simple clear record of the process."* (paragraph 58)

79. In [Chief Constable of Surrey Police v Information Commissioner \(EA/2009/0081, 8 July 2010\)](#), a later Tribunal said:

*"...ideally it is critical if not at least best practice for the public authority to maintain a documentary record clearly and unequivocally affecting the opinion of a qualified person referring specifically to the particular exemption considered and relied on and ideally showing how that opinion was reached. If the Commissioner is to second guess the qualified person then those reasons are self evidently very important..."*  
(paragraph 54)

80. On this basis, we would expect to see a record of who gave the opinion, their status as qualified person and the dates when the opinion was sought and given; furthermore, in order to consider whether the opinion was reasonable we would ideally expect to see a copy of the submission made to the qualified person detailing the information in question, the factors to be taken into account and the reasons why disclosure would or would be likely to have the specific prejudicial or inhibitory effect. Public authorities should also provide a record of the factors the qualified person took into account, the weight they attached to them, and the opinion they gave.
81. While good record keeping practice would suggest that the public authority should be able to provide the above information and documents, we recognise that in some cases such discussions may be oral rather than in writing. If that is the case then we would accept a full record of the discussion (taken at the time of the discussion) and the decision.
82. If there is not even a record taken at the time of the discussion, then **as a minimum** we would accept a signed statement from the qualified person recording their opinion. In order to assist public authorities in providing this statement, we have produced a form, which is available as a separate document: [Record of the qualified person's opinion](#). This shows the minimum information that we expect public authorities to provide to us about the qualified person's opinion. While there is no statutory requirement for public authorities to complete the form, to do so should assist them in giving us the information we require. In addition, public authorities may also wish to use it as part of the process of obtaining the qualified



person's opinion. For further information, please see the introduction and notes to the form.

## **Recording the public interest test**

83. Under section 17(3) public authorities must explain to the requester why the balance of the public interest test favours withholding the information. In addition to the record of the qualified person's opinion, they should therefore also have a record of the factors taken into account in the public interest test and the weight given to them. They can then refer to these in any internal review and provide them to the ICO if there is a complaint.
84. In relation to the public interest test the following should be recorded:
- Public interest factors in favour of maintaining the exemption and the weight attached to them.
  - Public interest factors in favour of disclosure, and the weight attached to them.
  - The outcome of the public interest test. The information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Other considerations**

### **Interaction with section 35**

85. If any part of section 35 is engaged, section 36 cannot apply. Government departments will therefore need to consider section 35 before applying section 36. See [our guidance](#) on section 35 for more information.

### **Historical records (the 20-year rule)**

86. Section 63 provides that section 36 cannot apply to historical records. In simple terms, this originally meant that the exemption expired after 30 years. It could not cover any information contained in a file more than 30 years old.
87. This 30-year time limit has now been amended to 20 years by the Constitutional Reform and Governance Act 2010. This reduction is being phased in gradually over 10 years. Details

are set out in [The Freedom of Information \(Definition of Historical Records\) \(Transitional and Saving Provisions Order 2012 \(SI 2012/3029\)\)](#). In effect, from the end of 2013 the time limit is 29 years. It will reduce by another year every year until it reaches 20 years at the end of 2022.

88. However, note that for sections 36(2)(a)(ii) and (c) relating to prejudice to public affairs in Northern Ireland, the time limit remains 30 years.

### **Environmental information**

89. If the information is environmental, this guidance is not relevant and public authorities will instead need to consider disclosure under the Environmental Information Regulations 2004 (EIR). The most relevant EIR exceptions are likely to be regulation 12(4)(d) (material in the course of completion, unfinished documents and incomplete data) and regulation 12(4)(e) (internal communications).
90. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or the EIR.

### **More information**

91. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
92. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
93. If you need any more information about this or any other aspect of freedom of information, please [contact us](#): see our website [www.ico.org.uk](http://www.ico.org.uk).