

Freedom of Information (Scotland) Act 2002 Briefings Series

SECTION 32 - International Relations

1. Scope of Briefing

The Freedom of Information (Scotland) Act 2002 introduces a right of access to information held by Scottish public authorities. The Act came into force on 1 January 2005. The Scottish Information Commissioner has produced this briefing as part of a series of briefings designed to aid understanding of the Act. It aims to provide an overview of how the Commissioner views section 32 of the Act.

The briefing will be developed over time as the Commissioner receives applications under the Act and the courts make decisions. It is not a comprehensive statement of the exemption and does not constitute legal advice. The briefing is referenced throughout and, where appropriate, it will recommend additional sources for further reading.

2. What does the Act say?

The exemption under section 32 can be split into two parts.

The first part exempts information if its disclosure would substantially prejudice one of the following:

- relations between the UK and any other State;
- relations between the UK and any international organisation or international court;
- the interests of the United Kingdom abroad; or
- the promotion or protection by the UK of its interests abroad¹.

The second part exempts information if it is confidential information which has been obtained from a State other than the UK, from an international organisation or from an international court².

Section 32 continues by setting out, for the purposes of the second part of the exemption, the circumstances under which information should be considered to be confidential. Information should be considered as “confidential” if either:

- the terms under which the information was obtained require it to be held in confidence; or
- the circumstances under which it was obtained mean that the State or international body supplying it can “reasonably expect” it to be held in confidence³.

The section concludes by providing a definition of key terms contained in the exemption, specifically “international court”, “international organisation” and “State”⁴.

These definitions are discussed in detail below.

For the full text of the exemption see the Appendix to this document.

¹ Freedom of Information (Scotland) Act 2002, s32(1)(a); *hereafter* FOI(S)A 2002

² FOI(S)A 2002, s32(1)(b)

³ FOI(S)A 2002, s32(2)

⁴ FOI(S)A 2002, s32(3)

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3. Definition of key terms

International Court

Section 32 defines “international court” as any international court which:

- (a) is not an international organisation; and
- (b) is established –
 - (i) by a resolution of an international organisation of which the United Kingdom is a member; or
 - (ii) by an international agreement to which the United Kingdom is a party⁵;

This means that for a court to be defined as an “international court” under the terms of the Act, the United Kingdom must either be a member of the international organisation responsible for establishing the Court, or must be a party to the international agreement which established it. This definition is slightly more restrictive than that for “international organisations” (see below).

It is worth noting that a number of generally recognised international courts also fulfil the criteria of “international organisations” (e.g. The European Court of Human Rights, the International Court of Justice, the International Criminal Court). In general, however, the application of either exemption under section 32 will be the same regardless of whether the body falls within the definition of “international organisation” or “international court”.

International Organisation

An international organisation is defined as:

- (a) an international organisation whose members include any two or more States; or
- (b) an organ of such an international organisation.⁶

There is no fixed meaning of “international organisation” in international law. However, it is generally recognised that the core attributes of an international organisation are:

- that it is created by a treaty between two or more States;
- that it possesses a constitution;
- that it is a legal entity in international law; and
- that it generally, but not always, has an exclusive membership of States or governments.⁷

Organisations covered by this definition would include the Council of Europe, the European Court of Human Rights, the European Union and its organs, the International Atomic Energy Agency, NATO, the United Nations and the World Trade Organisation. This list

⁵ FOI(S)A 2002, s32(3)

⁶ FOI(S)A 2002, s32(3)

⁷ C.F. Amerasinghe, *Principles of Institutional Law of International Organizations* (Cambridge University Press, Cambridge, 1996); G. Schwarzenberger, *International Law as applied by International Courts and Tribunals* (Stevens & Sons, London, 1976); both referenced in Phillip Coppel, *Information Rights*, (Sweet and Maxwell, London, 2004)

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however is by no means exhaustive.

State

“State” is defined as:

- (a) the government of any State; and
 - (b) any organ of such a government,
- and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.⁸

The definition of state therefore includes the government of all States outwith the United Kingdom, along with all “organs” of that government. An “organ” can be defined as “a person, body of people or thing by which some purpose is carried out or some function is performed”⁹. An organ of government would therefore include a state’s legislature and executive bodies, as well as other governmental bodies carrying out functions on behalf of the State.

References in section 32 to “a State other than the United Kingdom” also include references to any territory outwith the United Kingdom. This definition of “State” will therefore include all territories outwith the United Kingdom which are not recognised as States in international law, but “belong to, or are under the dominion of, a ruler or State.”¹⁰ This definition will encompass all British territories, such as Bermuda, the Falkland Islands, Gibraltar and the British Antarctic Territory, as well as those territories belonging to any other State.

United Kingdom

“United Kingdom” is defined in the Interpretation Act 1978 and refers to the UK in its entirety, comprising Great Britain (England, Scotland and Wales) and Northern Ireland¹¹.

4. Section 32(1)(a) – Where disclosure would substantially prejudice international relations or the interests of the United Kingdom

Section 32(1)(a) – Type of Exemption

The first exemption under section 32 is a qualified exemption which is subject to both the substantial prejudice and public interest tests. This type of exemption is sometimes known as a “content exemption”. Even where a public authority decides that disclosure of information would substantially prejudice the interest specified in this exemption, the public interest test must also be applied.

The public authority must consider whether, in all the circumstances of the case, the public interest in withholding the information is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of

⁸ FOI(S)A 2002, s32(3)

⁹ Oxford English Dictionary, 2005

¹⁰ Oxford English Dictionary, 2005

¹¹ Interpretation Act 1978, s.5 & Sch.1

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disclosure. However, the Act is not intended to restrict access to information in any way and public authorities may choose to disclose information voluntarily, notwithstanding this exemption.¹²

Further guidance on the application of the public interest test is contained later in this briefing.

Section 32(1)(a) – Consideration of the substantial prejudice test

Section 32(1)(a) requires an authority to demonstrate that substantial prejudice to the UK's international relations or interests abroad will result from the release of information before it is able to withhold that information.

There is no definition of “substantial prejudice” in the Act, but the Commissioner's view is that in order to claim this exemption the damage caused by disclosing information would have to be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time.

When considering the exemption under section 32(1)(a), therefore, authorities should disclose the information requested unless it can be clearly demonstrated that disclosure would cause real, actual and significant harm to the United Kingdom's international relations or interests. Authorities should be aware that they may be required to evidence this harm to the Commissioner.¹³

Section 32(1)(a) – Implementation Issues

In considering the application of the exemption under section 32(1)(a) authorities should be aware that it is the international relations and interests of the United Kingdom **as a whole** which should be at risk of substantial prejudice from the release of information, not those of a component region, part, or sector of the UK, nor indeed those of the public authority itself. Authorities should therefore only consider the application of this exemption if it can be clearly demonstrated that substantial prejudice to the international relations or interests of the entire UK would result from the release of information.

The exemption also requires the public authority to concentrate on the potential impact that release may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information. There may be circumstances where potentially controversial information concerning one state may have little or no impact on international relations, while seemingly innocuous information relating to a second may have a substantial impact. This may depend on the political relations and diplomatic sensitivities that exist at the time, or may depend on cultural, religious or legislative differences. Authorities should therefore consider the content of the information only in terms of the impact that it may have on particular relations or interests were it to be released.

¹² FOI(S)A s66

¹³ See also Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002, paragraph 72.

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The attitude of a particular State or organisation towards freedom of information may also require deliberation. It may be the case for example that relations with States or bodies which are less open will be at greater risk of prejudice if sensitive information is released. However this will not necessarily be true in all circumstances and authorities should consider each information request in context.

Even if a negative reaction is anticipated from the release of information, an assessment will have to be made as to whether this reaction is likely to substantially prejudice international relations. There may be circumstances where the release of information may cause diplomatic annoyance or irritation, but would not result in serious, long-term harm to the relations between countries.

Information unavailable in the UK has in the past been disclosed under the US Freedom of Information Act without substantial prejudice to relations between the two countries. For example, in the 1980's a House of Commons Select Committee investigating the collapse of the International Tin Council was unable to access information relevant to the investigation from the UK government, which claimed the information was confidential. As a result, much of the information considered by the committee came from relevant disclosures made under the US Act.¹⁴ The release of this information under the US Act however did not serve to substantially prejudice relations between the two countries.

The timing of the release may also be an issue. While release may be prejudicial at one point in time, the risk of prejudice to the interest or relationship may well diminish as time passes. If subsequent requests for the information are received, the authority should consider these requests within the current context.

Authorities may also wish to examine whether the information is already in the public domain. If the information has been made available elsewhere, and in particular by the State or body who provided the information, the likelihood of prejudice to the relations with that State may be substantially reduced, or even negated.

Section 32(1)(a)(iii) and (iv) allows authorities to withhold information which would seriously prejudice the "interests of the United Kingdom abroad" or the promotion and protection of those interests. The UK's interests might potentially include interests with a financial, economic or trade basis, as well as interests relating to defence, territorial matters, or the prevention of terrorism. The interests of the UK abroad will however vary over time, from State to State, and according to the circumstances of each particular case.

Before applying any of the exemptions under section 32(1)(a), public authorities should be aware that they may be required to demonstrate to the Commissioner that disclosure would indeed substantially prejudice the relations or interests in question.

5. Section 32(1)(b) – Where information is “confidential”

¹⁴ Campaign for Freedom of Information Press Release, Monday July 22, 1991; House of Commons Trade and Industry Select Committee, 1985-86 Session, Report 2, Tin Crisis, HC305

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Section 32(1)(b) – Type of Exemption

Unlike section 32(1)(a), which is subject to both the substantial prejudice test and the public interest test, section 32(1)(b) is a qualified exemption and is therefore subject to the public interest test only. This type of exemption is sometimes known as a “class exemption”.

Where public authorities find that this exemption applies to the information requested, they must go on to consider whether, in all the circumstances of the case, the public interest in withholding the information is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

However, the Act is not intended to restrict access to information in any way and public authorities may choose to disclose information voluntarily, notwithstanding this exemption.¹⁵

Further guidance on the application of the public interest test is contained later in this briefing.

Section 32(1)(b) – Implementation Issues

Section 32(1)(b) exempts information if it is confidential information which has been obtained from a State other than the UK, an international organisation or an international court.

Unlike the general exemption relating to Confidentiality under section 36(2), the exemption under 32(1)(b) does not require the breach of confidence to be “actionable” before information can be exempted. (See the Commissioner’s briefing on s.36 for further information on this exemption. This can also be viewed on our website at www.itspublicknowledge.info.)

The exemption under section 32(1)(b) focuses solely on the terms and circumstances under which the information was obtained. If the terms under which it was obtained require it to be held in confidence, or if there is a reasonable expectation on the part of the State or body supplying the information that it should be held in confidence, then it may be considered as ‘confidential information’ under section 32(1)(b)¹⁶.

In order to apply this exemption therefore the authority should be prepared to clearly demonstrate this requirement for confidentiality to the Commissioner in the event of an appeal. This demonstration of confidentiality may take the form of evidencing a formal agreement between parties, or a statement by the supplier indicating that confidentiality is required. Alternatively, the document may be clearly marked as confidential by the State or international body supplying it.

Where an authority wishes to make the case that there is a reasonable expectation on the part of the State or body supplying the information, this might potentially be evidenced by

¹⁵ FOI(S)A s66

¹⁶ FOI(S)A s32(2)

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demonstrating that equivalent information provided under similar circumstances was done so under terms requiring confidentiality, or by clearly demonstrating that confidentiality of communications is presumed in the relationship in question.

If the information requested is already in the public domain then it is unlikely to be confidential, although there will be exceptions. If however it has been put into the public domain by the State or international body which supplied it, or can be reasonably obtained from that body, then it should not generally be considered confidential.

To confirm the status of a particular piece of documentation the authority may wish to consult with the State or international body supplying the information. In addition, the authority may wish to seek legal advice.

Finally, it is important to remember that the definition of 'confidential information' contained in section 32(1)(b) applies only to information obtained from a foreign State, international organisation or international court. Before the exemption can be applied therefore, the authority should confirm the status of the body supplying the information.

6. Consideration of the public interest test

Both exemptions under Section 32 are subject to the public interest test as set out in Section 2 of the Act. This means that even if information can be exempted under either section 32(1) or section 32(2), the information must still be released if the public interest in disclosing the information is not outweighed by the public interest in withholding the information.

The Act does not define the public interest but it has been described as "something which is of serious concern and benefit to the public". It has also been held that public interest does not mean what is of interest to the public but what is in the interest of the public. What constitutes the public interest may change over time and according to the circumstances of each case. Because of this, authorities will need to make any judgements on a case by case basis in the light of emerging guidance or best practice.

When applying this exemption, public authorities must consider whether, in all the circumstances of the case, the public interest in withholding the information is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

This list is not exhaustive but contains some of the factors which public authorities should take into account when applying the public interest test:

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation;
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;

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- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- whether disclosure would contribute to the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether disclosure would contribute to the effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual's right to privacy.

In deciding whether disclosure is in the public interest, authorities should not take into account:

- possible embarrassment of government or other public authority officials;
- the seniority of persons involved in the subject matter;
- the risk of the applicant misinterpreting the information;
- possible loss of confidence in government or in another public authority

7. Duration of Exemption

This exemption does not fall away over time, but remains in perpetuity.

Information may subsequently be released however if, over the course of time, the balance of the public interest in relation to the issue has shifted in favour of release or, in the case of section 32(1)(a), the likelihood of substantial prejudice has diminished.

8. Ministerial Certificate

A ministerial certificate under section 52 of the Act can overrule the Commissioner's decision that this exemption does not apply. This certificate will only apply to information of "exceptional sensitivity", and must be laid before Parliament by the First Minister following consultation with the Executive.

9. Overseas experience.

Most countries with freedom of information legislation in place have an equivalent exemption to section 32 in the Scottish Act.

For example, the Australian Freedom of Information Act exempts information if there is a

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'reasonable expectation' that release would cause damage to international relations.¹⁷ In common with the Scottish legislation the Act then goes on to exempt material which has been 'communicated in confidence' by a foreign government or international organisation. There is, however, no requirement under the Australian legislation to consider the public interest in relation to the issue before deciding to withhold information.

The New Zealand Act carries a similar exemption which, again, is not subject to the public interest test. This states that information can be withheld if release would be likely to prejudice international relations or prejudice the entrusting of confidential information to New Zealand by foreign governments or international organisations.¹⁸

The exemption under the Canadian Act requires information to be withheld if it has been obtained in confidence from a foreign government or international organisation¹⁹ or if its disclosure would be injurious to international affairs.²⁰ While the latter exemption is subject to the public interest test, the former is absolute.

10. Updates

The guidance in this briefing may be amended following any decision by the Scottish Information Commissioner on appeals involving the International Relations exemption, should his decisions provide further guidance on the interpretation of this section of the Freedom of Information (Scotland) Act 2002. Updates to this briefing and the others in this series will be publicised on the Commissioner's website and monthly newsletter.

8 March 2005

Sources

1. Freedom of Information (Scotland) Act 2002
2. Freedom of Information (Scotland) Act 2002 (Annotated), Current Law Statutes, published by W. Green
3. Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002
4. J MacDonald and CH Jones, *The Law of Freedom of Information*, OUP, 2003
5. P Coppel, *Information Rights*, Sweet & Maxwell, 2004
6. Freedom of Information Act Awareness Guidance No.14: International Relations, UK Information Commissioner, October 2004
7. Freedom of Information (Scotland) Act 2002, Section 32 exemption, Scottish Executive FOI Unit, December 2004
8. Oxford English Dictionary (Online Version)
9. Campaign for Freedom of Information Press Release, Monday July 22, 1991
10. House of Commons Trade and Industry Select Committee, 1985-86 Session, Report 2, Tin

¹⁷ Freedom of Information Act 1982, s.33

¹⁸ Official Information Act 1982, s.6

¹⁹ Access to Information Act 1982, s.13

²⁰ Access to Information Act 1982, s.15

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Crisis, HC305

11. Interpretation Act, 1978
12. Canadian Access to Information Act, 1982
13. Australian Freedom of Information Act, 1982
14. New Zealand Freedom of Information Act 1982

APPENDIX

Section 32 International relations

(1) Information is exempt information if –

- (a) its disclosure under this act would, or would be likely to, prejudice substantially-
 - (i) relations between the United Kingdom and any other State;
 - (ii) relations between the United Kingdom and any international organisation or international court;
 - (iii) the interests of the United Kingdom abroad; or
 - (iv) the promotion or protection by the United Kingdom of its interests abroad;or
- (b) it is confidential information obtained from-
 - (i) a State other than the United Kingdom; or
 - (ii) an international organisation or international court.

(2) For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while-

- (a) the terms on which that information was obtained require it to be held in confidence; or
- (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(3) In subsection (1)-

"international court" means an international court which-

- (a) is not an international organisation; and
- (b) is established-
 - (i) by a resolution of an international organisation of which the United Kingdom is a member; or
 - (ii) by an international agreement to which the United Kingdom is a party;

"international organisation" means-

- (a) an international organisation whose members include any two or more States; or
- (b) an organ of such an international organisation;

"State" includes-

- (a) the government of any State; and
- (b) any organ of such a government,

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and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.