

## Freedom of Information (Scotland) Act 2002 Briefings Series

### SECTION 28 RELATIONS WITHIN THE UNITED KINGDOM

#### 1. Scope of Briefing

The Freedom of Information (Scotland) Act 2002 introduces a right of access to information held by Scottish public authorities. This Act comes into force in January 2005. The Scottish Information Commissioner has produced this briefing as part of a series of briefings designed to aid understanding of the Act and prepare the public and public authorities for its implementation. It aims to provide an overview of how the Commissioner views section 28 of the Act.

This briefing will be developed over time as the Commissioner determines 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?

Section 28 of the Act provides that information may be withheld if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.<sup>1</sup>

Section 28 is a qualified exemption which is subject to both the substantial prejudice and public interest tests. These types of exemptions are sometimes known as “content exemptions”. 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 disclosing the information is outweighed by the public interest in withholding 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.<sup>2</sup>

[See appendix for full text of this exemption.](#)

#### 3. Meaning of “administration in the United Kingdom”

Section 28 defines “administration in the United Kingdom” as the Government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly and the National Assembly for Wales.<sup>3</sup>

The term “Scottish Administration” is defined in the Scotland Act 1998<sup>4</sup> and refers to the Members of the Scottish Executive, junior Scottish Ministers and non-ministerial office

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<sup>1</sup> Freedom of Information (Scotland) Act 2002 = FOI(S)A 2002, s 28(1)

<sup>2</sup> FOI(S)A 2002, s 66

<sup>3</sup> FOI(S)A 2002, s 28(2)

<sup>4</sup> Scotland Act 1998, s 126(6) and (7)

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holders of the Scottish Administration. The term “Scottish Administration” also includes members of staff of the office holders listed above.

### 4. Duration of this exemption

The exemption does not apply to information contained in records more than 30 years old.

### 5. Who can use this exemption?

Although section 28 is concerned with harm to relations between UK administrations, this exemption could be used by authorities not directly affected by disclosure. There may be cases where Scottish public authorities other than the Scottish Administration have been supplied with information from another UK administration, the disclosure of which could harm relations between administrations. It is not necessary for the information to have been supplied by another UK administration or Scottish public authority for it to be covered by this exemption; an internally produced document could fall within its scope.

Different considerations may apply, however, depending on whether the information has been produced internally or supplied to the Scottish public authority by another UK administration. As a result, this briefing will consider separately the application of this exemption to:

- information supplied by another UK administration
- internally produced information

### 6. Information supplied by another UK administration

Scottish public authorities may hold information that has been supplied by a UK administration such as the UK Government, the Executive Committee of Northern Ireland or the Welsh Assembly in the expectation that it would not be supplied to other bodies or to the wider general public. It might be argued that disclosure of this information against the wishes of that particular administration could harm relations between UK administrations. For example, Scottish public authorities might hold:

- details of ongoing negotiations
- policy plans received from another administration which have not yet been announced
- details of a sensitive UK negotiating position in the EU which, although reserved, impacts on devolved matters

Information falling within these categories will not automatically be protected from disclosure, however. In each case, the authority will need to show that release of the information would “substantially prejudice” relations between UK administrations and, further, that disclosure is not in the public interest. These two concepts, substantial prejudice and the public interest, are discussed at paragraphs 8 and 9 below.

When considering the scope of this exemption, public authorities should check whether the information has been supplied by the UK Government and is held “in confidence”. In

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addition, different considerations may apply depending on whether the recipient authority is the Scottish Administration or any other Scottish public authority.

These points are considered below.

### **a) Cases where the information requested has been supplied by the UK Government and is held in confidence**

Public authorities will not need to consider section 28 where information has been supplied by the UK Government and is held “in confidence”. This is because section 3 of the Act<sup>5</sup> provides that information is not “held” by a Scottish public authority for the purposes of the Act if it is held “in confidence” having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom.<sup>6</sup> If a request for such information is received by a Scottish public authority, the applicant should be directed to the appropriate UK Government department where the request should be dealt with according to the provisions of the UK Freedom of Information 2000 Act (“FOIA 2000”).

The basis for section 3 is the Scotland Act 1998 which states that the Scottish Parliament has competence to legislate on Freedom of Information in relation to information held by the Scottish Parliament, any part of the Scottish administration, the Parliamentary corporation and any Scottish public authority with mixed functions or no reserved functions with the exception of information supplied by a Minister of the Crown or government department and held in confidence.<sup>7</sup>

Where a Scottish public authority receives a request for information that the authority believes was supplied by a UK Government department it will need to confirm that the information was in fact supplied by a UK Government department and determine whether the information is held “in confidence.”

Cases where it is not obvious that information has been supplied by a UK government department should be extremely rare as it will normally be clearly marked. The only occasion where this is likely to occur is in relation to information received by the Scottish Office pre-devolution; the Scottish Executive and the National Archives of Scotland now hold former Scottish Office information. In such cases, these bodies should contact the Scotland Office.<sup>8</sup>

As mentioned above, having confirmed that the information has been supplied by a UK

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<sup>5</sup> FOI(S)A 2002, s 3(2)(a)(ii)

<sup>6</sup> FOI(S)A 2002, s 3(2)(a)(ii)

<sup>7</sup> Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999, (S.I. 1999/1749)

Interestingly, the Scotland Act 1998 as originally enacted did not reserve freedom of information to Westminster leaving it open for the Scottish Parliament to pass legislation that could have covered UK-wide bodies and central government. To avoid bodies being subject to two different regimes the Scotland Act 1998 was subsequently amended. Freedom of Information (Scotland) Act 2002 (asp 13) (Annotated), Current Law Statutes published by W Green; hereafter FOI(S)A 2002 (Annotated), p 13-12

<sup>8</sup> The passing of the Scotland 1998 Act saw the abolition of the old Scottish Office and the creation of the new Scottish Executive and Scottish Parliament. In Whitehall, the Scotland Office came into being to assist the Secretary of State for Scotland in his functions and duties.

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Government Department, the Scottish public authority will then need to determine whether the information is held “in confidence”. It is envisaged that information supplied by UK Government Departments and intended to be held in confidence will normally be clearly marked as such. Protective markings will usually be an indicator of an expectation of confidentiality. The HMG (Her Majesty’s Government) Protective Marking System provides for four levels of protective marking; “restricted”, “confidential”, “secret” and “top secret”. Each level indicates the standard of protection which must be given to the item.<sup>9</sup>

As a matter of good practice, Scottish public authorities will, nevertheless, wish to determine the status of any “in confidence” or other protective marking before directing the applicant to the relevant UK Government department. Most Scottish public authorities will hold material that has been supplied over a period of time. There may be cases where the information requested is now in the public domain or, through the passage of time, has lost its sensitivity. A confidentiality or protective marking on a file or collection of documents may be applicable to only part of the information. It is difficult to see how the public interest would be served, given the delays in response that would occur, if applicants for such information were automatically directed to the UK Department.

Scottish public authorities will need to determine the validity and extent of an “in confidence” or protective marking on a case by case basis in consultation with the relevant UK Government department.

During the parliamentary debates, the Scottish Executive confirmed that if there was no clear indication from the UK Department that a document is confidential the presumption would be that the document fell within the scope of the Scottish Act.<sup>10</sup> There may be cases, however, where information without an “in confidence” or other protective marking appears to an authority to be sensitive. In such cases, the Scottish public authority will wish to confer with the relevant UK Government Department to determine the status of the information.

In cases where information has been supplied by a UK Government Department and is held “in confidence” the authority should issue a notice<sup>11</sup>

- a) stating that it does not hold the information requested
- b) advising the applicant that this information is covered by the UK Freedom of Information Act 2000 and
- c) referring the applicant to the relevant UK Government Department.

As discussed above, the section 3 provision that information is not “held” applies only to information supplied by the UK Government and held “in confidence”. Communications from other UK administrations and communications from the UK Government not held “in confidence” may still be protected under section 28 if disclosure would “substantially prejudice” relations between UK administrations.

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<sup>9</sup> For further information see the publication scheme for the Crown Prosecution Service which has a helpful description of the Protective Marking System

<sup>10</sup> Justice 1 Committee: Committee Official Report – 16 May 2001. Col 2460

<sup>11</sup> FOI(S)A 2002, s 17

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### **b) Cases where the recipient authority is the Scottish Administration (falling outwith section 3)**

Special considerations may apply where the information requested is held by the Scottish Administration but was supplied to it by another UK administration. During the parliamentary debates on the Bill, the Justice Minister emphasised the need “to ensure that the necessary exchange of information with Westminster and with the devolved administrations in Northern Ireland and Wales can operate effectively”.<sup>12</sup>

Following devolution a series of agreements, known as concordats, were drawn up among the four administrations (quadrilateral concordats) or between two administrations (bilateral) to facilitate co-operation between the UK Government and the devolved administrations on both reserved and devolved matters. The provisions of an overarching concordat, the Memorandum of Understanding (MoU), are implicit in all other concordats or supplementary agreements. The MoU sets out the broad principles that govern inter-administration policy cooperation and consultation; in particular, the need for timely exchange of information and consultation and, where appropriate, for confidentiality.

Paragraph 11 of the MoU states that: “Each administration will wish to ensure that the information it supplies to others is subject to appropriate safeguards in order to avoid prejudicing its interests. The [four] administrations accept that in certain circumstances a duty of confidence may arise and will between themselves respect legal requirements of confidentiality. Each administration can only expect to receive information if it treats such information with appropriate discretion.”<sup>13</sup>

The MoU goes on to provide that the administration supplying the information should state what, if any, restrictions apply to its usage. Administrations are instructed to treat information they receive in accordance with any restrictions specified by the supplier.

The concordats do not create legal obligations, however, and decisions on disclosure of information held by an administration will need to be taken in accordance with the provisions of the Act.

While protective markings indicating the sensitivity of information may be used as an indicator of the need to consult the supplier of the material, they do not remove the need to assess the information in the light of the Act. Where appropriate, the Scottish Administration will, no doubt, consult with the relevant administration(s) and seek their views. While the Commissioner recognises the need to preserve the flow of information among UK administrations, this needs to be balanced against the requirements of freedom of information.

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<sup>12</sup> Statement by Jim Wallace to the Scottish Parliament, Official Report, 23 June 1999, Col 656

<sup>13</sup> Memorandum of Understanding between the UK Government and the Cabinet of the National Assembly of Wales, the Northern Ireland Executive Committee and the Scottish Ministers (Cmd 5240)

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### c) Cases where information is supplied to any other Scottish public authority (falling outwith section 3)

The MoU only applies to information shared among the UK administrations and therefore does not apply where information is passed to Scottish public authorities other than the Scottish Administration. Any information with protective markings will need to be assessed on a case by case basis as and when requests are received. In particular, Scottish public authorities should note paragraph 52 of the Section 60 Code of Practice<sup>14</sup> which reminds authorities that they should not agree to hold information in confidence if it is clearly not confidential in nature. A protective marking will not in itself determine that disclosure would substantially prejudice relations between UK administrations and information may be released in response to a Freedom of Information request even if it does contain formally classified information.

Again, where appropriate, the authority will wish to consult with the relevant administration. The Section 60 Code provides guidance to authorities where they are considering disclosing information that has been provided by or directly concerns a UK Department.

Authorities should consult with the relevant UK Department before disclosing information in such cases, except where the views of that department can have no effect on the decision of the authority or, in the circumstances, consultation would be disproportionate.<sup>15</sup>

Where information is withheld, the Scottish public authority will itself need to be satisfied that non-disclosure is justified under the terms of section 28. When consulting with another UK administration, it might be helpful to stress that the harm test contained in the Scottish Act is “substantial prejudice” as opposed to the UK Act’s “prejudice.”

## 7. Internally produced information

Internally produced information might also fall within this exemption if its disclosure would substantially prejudice relations between UK administrations. Examples of the kind of information that might be held by Scottish public authorities are:

- a thumbnail sketch of the strength and weakness of the individual members of an administration
- a report critical of another administration before that administration has had the opportunity to consider and make representations and preparations before publication
- information whose release could substantially prejudice confidential and diplomatic negotiations
- comments on another administration’s policy proposal or legislation

Theoretically, any Scottish public authority could use the exemption in this way. It is unlikely, however, that information that originates from a body other than the Scottish

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<sup>14</sup> Scottish Ministers’ Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (“Section 60 Code of Practice”)

<sup>15</sup> Section 60 Code of Practice, para 53

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Administration will be exempt under section 28. It is recognised that a document produced by the Scottish Administration and passed onto another Scottish public authority could be covered by this exemption.

### 8. Consideration of the substantial prejudice test

Authorities seeking to rely on this exemption will need to show that disclosure will substantially prejudice relations between UK administrations. 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. Authorities should consider disclosing the information asked for unless it would cause them real, actual and significant harm<sup>16</sup>. They must be able to evidence this harm to the Commissioner.

Authorities should avoid classifying types of documents as potentially falling within this exemption. As with all exemptions, the use of section 28 will need to be justified on a case by case basis.

For example, an authority seeking to use this exemption to protect negotiations would have to be satisfied that disclosure of the information requested actually would or would be likely to substantially prejudice relations between administrations. Once negotiations are complete it will be more difficult for an authority to argue for the continued use of this exemption.

Likewise, an administration holding comments on another administration’s policy proposals<sup>17</sup> could not rely on this exemption if the comments were essentially already known by the administration or the disclosure was unlikely to affect significantly relations between the two administrations. This exemption cannot be used to withhold information the disclosure of which would merely exacerbate existing strained relations.

While it might be legitimate to withhold a thumbnail sketch of the strengths and weaknesses of the individual members of an administration,<sup>18</sup> section 28 should not be relied upon to prevent release of unflattering or careless remarks about members of another administration.

Information may lose its sensitivity over time. Scottish public authorities should not rely on a previous refusal to justify withholding information in response to a later request.

There may be cases where the administration which provided the information would have disclosed it (even if a case can be made for non-disclosure).

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<sup>16</sup> Section 60 Code of Practice, para 72

<sup>17</sup> This example was given by the UK government during the Committee Stage of the Bill in the House of Lords. Lord Falconer of Thoroton, Minister of State at the Cabinet Office, *Hansard*, HL (series 5) vol 617, col 1280 (19 October 2000)

<sup>18</sup> Lord Falconer, *ibid*.

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As mentioned above, although the FOIA 2000 contains an almost identical exemption a lower harm test is used; the authority is required to show only that disclosure would “prejudice” relations.<sup>19</sup> Therefore, it is foreseeable that information that is withheld under FOIA 2000 may be disclosed under the equivalent Scottish provision.

### 9. Consideration of the public interest

Even where an authority is satisfied that disclosure would substantially prejudice relations between UK administrations, it must go on to consider the public interest test. 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 disclosing the information is outweighed by the public interest in withholding 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 factors which public authorities should take into account when applying the public interest test in connection with section 28:

- 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 would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure would impact adversely on safeguarding national security or international relations;
- whether disclosure would contribute to a debate on a matter of public interest;
- information which helps public understanding of the devolution settlement

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

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

### 10. Decision to withhold: content of decision notice

Any authority wishing to rely on this exemption should maintain a record of its decision-making process in order to evidence this to the applicant or Commissioner should a

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<sup>19</sup> Freedom of Information Act 2000 = FOIA 2000, s 28



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complaint or request for review be made.

Where an authority takes the view that this exemption applies to a request for information, it can (by virtue of section 18 of the Act) give a refusal notice to the applicant without having to reveal whether the information exists or is so held by the Administration. This provision is based on the presumption that for the authority to confirm whether the information exists or is held would be contrary to the public interest.<sup>20</sup>

### 11. International developments

Both Canada and Australia have equivalent provisions in their respective Freedom of Information regimes. In these countries there is a similar exemption in the federal statute concerning relations between states/provinces and the central government.

The relevant sections in the Canadian *Access to Information Act* are Section 13(1)(c) and Section 14. Information is contained in the Annual Reports of the Information Commissioner of Canada at <http://www.infocom.gc.ca/menu-e.asp>. Information on the application of these exemptions is also available on the website of the Treasury Board of Canada: [http://www.tbs-sct.gc.ca/pubs\\_pol/gospubs/TBM\\_121/CHAP2\\_8-2\\_e.asp#information](http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_121/CHAP2_8-2_e.asp#information)

The relevant section in the Australian *Freedom of Information Act 1982* is Section 33A. A memorandum focusing on specific exemptions, including section 33A has been developed and can be found on the website of the Attorney-General's Department: <http://law.gov.au/www/securitylawHome.nsf/AllDocs/RWP278465730F4C2CEDCA256D3B00170F39?OpenDocument#c4>

### 12. Updates

The guidance in this briefing may be amended following any decisions by the Scottish Information Commissioner on appeals involving the section 28 exemption, should his decisions provide further guidance on the interpretation of this section of the Freedom of Information (Scotland) Act. Updates to this briefing and the others in this series will be publicised on the Commissioner's website and in the monthly newsletter.

**December 2004**

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<sup>20</sup> FOI(S)A 2002, s 18

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### 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 Parliament, Justice 1 Committee Official Reports
4. Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002
5. J MacDonald and C H Jones, *The Law of Freedom of Information*, OUP 2003
6. Freedom of Information Act Awareness Guidance No. 13: Relations within the UK, UK Information Commissioner
7. Memorandum of Understanding between the UK Government and the Cabinet of the National Assembly for Wales, the Northern Ireland Executive Committee and the Scottish Ministers (Cmd 5240)
8. Canada Freedom of Information Act 1982
9. The Australian Freedom of Information Act 1982

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### ***Appendix: Section 28***

#### **28. Relations within the United Kingdom**

**a.** Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.

**b.** In subsection (1), "administration in the United Kingdom" means-

(a) the Government of the United Kingdom;

(b) the Scottish Administration;

(c) the Executive Committee of the Northern Ireland Assembly; or

(d) the National Assembly for Wales.