

## Freedom of Information Act Awareness Guidance No 13

### Relations within the UK

The right under the Freedom of Information Act 2000 (the Act) to request information held by public authorities (known as the **right to know**) comes into force from January 2005. The **Awareness Guidance** published by the Information Commissioner aims to assist public authorities and their staff in thinking about some of the issues resulting from the implementation of the Act. The guidance introduces key concepts and exemptions in the Act and summarises the types of approach that may be taken in practice.

#### A) What does the act say?

Section 28(1) sets out an exemption from the right to know if the disclosure of the information in question would, or would be likely to prejudice relations between two or more United Kingdom administrations.

The Act contains two types of exemption: class-based and prejudice-based. For a prejudice based exemption, such as s.28 to apply, it is necessary to consider whether a particular disclosure would be likely to damage the interest set out in the exemption.

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Section 28 is a qualified exemption. This means that it can only be relied upon where the public interest in maintaining the exemption outweighs the public interests in disclosing the information. Issues concerning the 'public interest test' are discussed below in Section C. (See also Awareness Guidance No 3.)

### **What is meant by 'administration'?**

Sub-section 28(2) of the Act defines 'Administration in the United Kingdom' as meaning (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, established by the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998 respectively.

It therefore follows that Local Authorities throughout the United Kingdom are excluded from this section as are the administrations of the Isle of Man and the Channel Islands.

### **Who can claim the exemption?**

Although the purpose of the exemption is to ensure that the Act does not cause harm to relations between the different UK administrations, it would be a mistake to think that only the administrations themselves may be able to rely upon the exemptions. The Scottish Administration is subject to separate Scottish legislation and requests to it must be made under that Act (although in point of fact it contains a similar exemption to that in the UK Act). Although the National Assemblies for Wales and the Northern Ireland Assembly are public authorities to which requests for information may be made, there is no equivalent public authority for England or the UK as a whole, central government departments being separate public authorities.

At the same time, it is clear that information whose disclosure might harm the relationships between, say the British government and a devolved administration could easily be held by another public authority. As is discussed under "Implementation Issues" in Section D (below), however, there may be different practical considerations for different types of public authorities.

## **B) Establishing "Prejudice"**

### **The meaning of "prejudice"**

The Act does not give any guidance as to the meaning of the word "prejudice". However, the term 'likely to prejudice' has been considered by the courts in the context of the Data Protection Act 1998 - for instance in *Lord v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin). In broad terms, the Commissioner takes the view that "prejudice" means "harm" or "damage" and that the term 'likely to prejudice' indicates a degree of probability where there is a very significant and weighty chance of prejudice to the subject matter of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not. Whether prejudice exists is a matter of fact to be decided on a case by case basis.

### Relations between the administrations

In deciding whether the disclosure of information might prejudice relations between administrations in the UK, it will be of assistance to look at the arrangements which exist between those administrations.

#### a) General arrangements

Devolution is now an established part of the constitution of the United Kingdom and the three Acts of Parliament mentioned earlier (the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998) define the respective functions of the UK government and the devolved administrations. It is recognised that it is legitimate for different administrations to take a different view of a wide range of different matters and that from time to time these differences may give rise to disagreements which are the subject of negotiations, particularly between the UK administration and the devolved administrations. It is not difficult to imagine that from time to time there will be information held by the different administrations whose disclosure might prejudice their own negotiating positions and, by implication, good relations with the others.

#### b) Memoranda of Understanding etc

Good relations, including in particular a good degree of mutual trust, between the different administrations are clearly desirable in principle. Supporting the statutory relationships set out in the legislation referred to above, are various memoranda of understanding and concordats. These are described below. Their significance in the context of FOI is that collectively they set out, among other matters, the terms under which one administration may supply another with information. It is clear that there will be some circumstances under which one administration would not have supplied information if it believed that that information might then be disclosed in response to an FOI request.

#### i) Memorandum of Understanding

Relationships between the UK government and the individual administrations are defined principally in a Memorandum of Understanding (Command Paper 5240). This MOU sets out the principles which underlie relations between them, even though the agreements contained in the MOU are not legally binding.

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### ii) Overarching concordats

To supplement the MOU, four separate overarching Concordats apply broadly uniform arrangements in respect of:

- matters with an EU dimension
- financial assistance to industry
- international relations touching on the responsibilities of the devolved administrations
- statistical work across the UK.

All four administrations have committed themselves to the principle of good communication with each other and especially where one administration's work may have some bearing upon the responsibilities of another administration. However each administration ensures that the information it supplies to another 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. (Note: the law of confidence is a complex legal area. Although there is an exemption at s. 41 of the Act for information whose disclosure might result in an actionable breach of confidence - see Awareness Guidance No 2- in practice it will almost certainly be easier to rely upon s.28 when the question is whether there is prejudice to relations between different UK administrations.)

### iii) Bilateral concordats

Underpinning the overarching Concordats a number of bilateral concordats have been developed to ensure common guidance and working practices across the administrations and the relevant UK government departments.

### **Examples of disclosures which might cause prejudice**

The administrations provide each other with as full and open as possible access to policy information, statistics and representations from third parties. Although much of this information would be disclosable under the Act were an application made to the originating administration, some might be protected by an exemption. S.28 provides the mechanism whereby the administration receiving the information may protect the legitimate interests of the originator.

It is not difficult to see how the following might give rise to prejudice:

- release of information concerning another administration's spending plans or unannounced policy proposals.
- a thumbnail sketch of the strength and weaknesses of the individual members of an executive.
- the release of a report which is critical of another administration before that administration had the opportunity to consider and make representations and preparations before publication.

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- comments within the UK government on a devolved administrations policy proposal or legislation.
- information whose release could prejudice confidential and diplomatic negotiations.
- sensitive information held by UK government departments on devolved matters which predate devolution but which concern the devolved administrations.
- information relating to reserved or excepted matters held by departments in the devolved administrations relating to reserved or excepted matters where disclosure might be to harm the interests of the UK government.

This list is not intended to be exhaustive.

The Act provides no indication of the degree of harm that may be expected to flow from disclosure. It is clear, however, that this must be more than trivial even though it may not be sufficient to cause such events as a breakdown in relations. A disclosure which resulted in an administration refusing to share information necessary for the proper discharge to its functions with a counterpart administration would be likely to engage the exemption. Mere political embarrassment, by contrast, is not a factor to be taken into account.

To a large extent an assessment of the degree of prejudice overlaps with the public interest test: serious or substantial prejudice will be more likely to be contrary to the public interest than a minor risk.

### C) The Public Interest Test

As mentioned, section 28 is a qualified exemption. That is, it is subject to the public interest test which is set out in section 2 of the Act. Even where a public authority is satisfied that the release of the information requested would prejudice the relations between administrations it can only refuse to provide the information if the public interest in withholding the information outweighs the public interest in disclosing it. Clearly the bias is in favour of disclosure and there will be occasions where information is released even though it would or be likely to prejudice relations between administrations.

The public interest test is dealt with more fully in "[Awareness Guidance No 3 – The Public Interest Test](#)". Generally speaking, the public interest is served where access to the information would:

- further the understanding of, and participation in the debate of issues of the day, in this case this might be participation in debate about a decision due to be taken by an administration or in debate about relations between administrations;
- promote accountability and transparency of the administrations for decisions taken by them;

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- promote accountability and transparency of public spending by the administrations;
- allow individuals to understand decisions made by the administrations affecting their lives;
- bring to light information affecting public health and safety.

In considering the public interest it may also be helpful to bear in mind that certain considerations will not be relevant. For instance, if information is complex or incomplete and therefore potentially misleading these factors should not, in themselves be used to justify non-disclosure. Information should be disclosed if the only likely harm would be embarrassment to an administration although if disclosure might discourage openness in the expression of opinions, then that might be a reason for withholding it. It may also be necessary to disregard previous requests: the fact that the public interest may not favour disclosure today does not mean that it would not do so given changed circumstances in the future.

Whether the information requested prejudices or would be likely to prejudice relations between two or more administrations, an administration considering relying upon the section 28 exemption must consider whether there is, in fact, an overriding public interest in providing the information. In practice this will involve weighing the prejudice caused by possible disclosure against the likely benefit to the applicant and the wider public.

### **D) Implementation Issues**

#### **Sensitivity markings**

When providing information to other public authorities, administrations may find it helpful to make clear what, if any, restrictions there should be on its usage, and treat information which it receives in accordance with the restrictions which are specified to its usage. (As with protective markings, any sensitivity markings will only be indicative. The principle purpose will be to alert the recipient to the need to consult with the originating administration.)

#### **Approach recommended to central government departments and devolved administrations**

The memoranda of understanding and other agreements described earlier (and also listed under "Further Reading" - below), are designed to facilitate cooperation between administrations and, in particular, to allow the communication of relevant information. The two principle grounds for relying upon the s.28 exemption will be that the disclosure of information may compromise negotiating positions or the formulation of policy towards other administrations or that it would breach the MOUs or other understandings. The Commissioner would generally expect that in the latter case, a reasonably detailed explanation, with reference to the relevant documents, is given to applicants and, in the event of complaint, to the Commissioner himself. Where information has been received from another administration, the

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Commissioner would generally expect the views of that administration to have been obtained.

### **Approach recommended to other public authorities**

It is unlikely that information which originates with a body other than a central government department or a devolved administration will be exempt under s.28. From time to time, however, it may be that another public authority is given information by one of those bodies and that disclosure would engage the exemption.

Where information carries a sensitivity marking or where it dates from a time before such markings were widely used, it is likely to be sensible to consult with the administrations whose interests may be damaged by disclosure (this will typically be the administration from which the information was received). Given that response to requests must be given within 20 working days, it may be sensible to establish a regular channel of communication if it is expected that the s.28 exemption will be widely used by the authority.

## **E) Further reading**

### **Other Relevant Documentation**

In considering invoking the exemption provided by section 28 the following should be consulted where necessary:

- Government of Wales Act 1998
- Northern Ireland Act 1998
- Scotland Act 1998
- Freedom of Information (Scotland) Act 2002 – section 28
  
- 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)
  
- Concordats between the United Kingdom Government and the Scottish Executive, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee on:
  - Co-ordination of European Union Policy Issues
  - Financial Assistance to Industry
  - International Relations
  - Statistics
  
- Bilateral Concordats between United Kingdom Government Departments and the Scottish Executive, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee.