



Information Commissioner

## Freedom of Information Act Awareness Guidance No. 27

### Prohibitions on Disclosure

The right under the Freedom of Information Act (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.

This guidance considers section 44 of the Act, which relates to the exemption from the duty to provide information if its disclosure, otherwise than under the Act, is prohibited under the conditions specified in the exemption.

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

Section 44 covers information which is prohibited from disclosure under other legislation. Under s44, information is exempt if its disclosure by the public authority holding it:

- is prohibited by or under any enactment
- is incompatible with any Community obligation, or
- would constitute or be punishable as a contempt of court

#### How section 44 works

Section 44 is an absolute exemption, which means that if information is covered by any of the subsections in s44 then it is exempt from disclosure. There is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it. Information covered by s44 is either exempt or it is not. Absolute exemptions contain an inbuilt prejudice test. This test means that the harm to the public interest that would result from the disclosure of information falling within an absolute exemption has already been established.

#### The duty to confirm or deny

Under s1 of the Act a public authority is obliged to inform the applicant whether it holds the information requested (known as “the duty to confirm or deny”) and if so, to communicate it to the applicant. Section 44 (2) provides an exemption from the duty to confirm or deny whether information is held. The exemption has the effect of

acknowledging that it may, on rare occasions, be necessary neither to confirm nor deny that information is held if this is a requirement under other legislation, or under certain conditions or processes as specified in s44.

Although the number of occasions when a public authority will be justified in neither confirming nor denying that it holds information requested may not be very large, the Act acknowledges that such occasions may arise.

The Information Commissioner recommends that public authorities that are likely to wish neither to confirm nor deny that they hold the information requested, should prepare a policy explaining their general approach to the duty to confirm or deny. Further advice on the duty to confirm or deny is provided in Awareness Guidance No 21.

## **B) What information is covered and who may rely on the exemption**

### **a) Where the disclosure of information is prohibited under any enactment - Section 44(1)(a)**

Section 44 (1) (a) provides for the exemption of information where its disclosure is prohibited by other legislation. Provisions in existing legislation prohibiting the disclosure of information are known as statutory prohibitions or statutory bars and confer an obligation on a public authority not to disclose specific information.

There are estimated to be around 400 hundred provisions in statute which prevent or limit the disclosure of information. The Department of Constitutional Affairs (DCA) is carrying out a review of existing prohibitions under s75 of the Act. Section 75 provides an order making power to amend, repeal or retain any enactment which appears to be capable of preventing the disclosure of information (including unrecorded information) under s1 of the Act. When dealing with requests for information public authorities should obtain their own legal advice on whether any information that they hold is subject to a statutory prohibition. Public authorities should check whether the relevant prohibitions have been amended or repealed. Updates and reports of the review of the statutory prohibitions on disclosure of information can be found by visiting [www.dca.gov.uk](http://www.dca.gov.uk).

## **Environmental Information**

Section 44 (1) (a) applies to all information except that which is covered by the Environmental Information Regulations (EIR) at s39 of the Act. Regulation 5 (6) of the EIR provides that any enactment or rule of law that would otherwise prevent the disclosure of information under the EIR does not apply. This means that if the information being requested is environmental information as defined by the EIR, the absolute exemption under s44 is not available. The information may be exempt from disclosure under the exceptions at regulation 12 of the EIR, all of which are subject to the public interest test. It is, therefore, crucial to distinguish between environmental

information and any other type of information that is the subject of a request for disclosure.

In practice, however, when dealing with requests for environmental information subject to a prohibition on its disclosure under other legislation, public authorities should be aware that the existence of a statutory reason not to disclose will form a very strong public interest argument for withholding the information. Therefore, even though regulation 5(6) of the EIR disapplies statutory prohibitions on environmental information, the disclosure of which will, in most cases, be subject to the public interest test under the EIR, the existence of a statutory prohibition will be a significant factor in balancing the public interest in disclosing or withholding the information.

#### **b) Where the disclosure of information is incompatible with European Community obligations - Section 44 (1) (b)**

Section 44(1) (b) provides for the exemption of information where its disclosure is incompatible with any European Community obligation. Where these obligations are incorporated in UK law such as by an Act of Parliament or Regulations, they will be covered by s44(1) (a). If the information falls within a Community obligation that says it should be exempt, but that obligation either does not need to be, or has not properly been transposed into UK law, then s44(1) (b) may apply. The term “Community obligation” includes:

- **EU Regulation** – This is of general application and is binding in its entirety and directly applicable in all Member States (see below for “Member State”). Regulations usually do not require any further enactment in UK law in order to be given legal effect
- **EU Treaty** – Articles of EU treaties and the Protocols to those treaties may have direct effect where those provisions are designed to give individuals rights (see below for “direct effect”)
- **Directive** – This is binding as to the result to be achieved upon each Member State to which it is addressed but leaves to the national authorities the choice of form and method of implementing it. This may have direct effect against the public authority even where it has not yet been enacted in UK law (see below for “direct effect”)
- **Decision** – This is binding in its entirety upon those to whom it is addressed
- **Recommendations and Opinions** – These have no binding force and would not be a “Community obligation”

#### **Member State**

Whilst the European Court of Justice (ECJ) has defined ‘Member State’ broadly to include such entities as local government, police forces and certain health providers, the Act only applies to public authorities as those set out in Schedule 1, those designated under Order under s5, or a publicly owned company as defined in s6.

Although there is a large degree of overlap between these two definitions, there will be 'public authorities' for the purposes of the Act which are not necessarily deemed to be part of the Member State and there will be entities that are deemed to be part of the Member State which are not public authorities for the purposes of the Act. It is, therefore, possible that a public authority is not bound by Community obligations because it does not form part of the Member State as defined by the ECJ. It would not, therefore, be able to claim the absolute exemption under s44 (1) (b).

### **Direct effect**

Certain provisions of EU law are directly effective in that they create individual rights which a national court must protect. Individuals may be able to rely on these rights against the Member State, or an emanation of the state, even if they have not been implemented in that Member State. Direct effect only applies between the individual and the public authorities of the state; it does not apply between individuals or private companies.

The question of whether a particular provision has direct effect depends on the type of obligation, that is, whether it is a Treaty article or a Directive. Generally, the provision must be enforceable in a court. It must impose a sufficiently precise and unconditional obligation. It cannot depend on the discretion or judgement of another body such as the state or a Community institution. Unlike EU Regulations which are directly applicable to UK law without further legislation, a Directive may have direct effect where the state has not correctly or completely implemented the Directive within the time limit set for its implementation.

When dealing with requests for information public authorities should obtain their own legal advice on whether any information that they hold is subject to the application of any relevant Community obligations.

### **c) Where the disclosure of information would constitute a contempt of court - Section 44(1)(c)**

Section 44 (1) (c) provides for the exemption of information if its disclosure would constitute or be punishable as a contempt of court. Contempt of court serves the primary function of protecting the integrity of court proceedings. The Contempt of Court Act 1981 and the common law set out when proceedings become active.

A public authority may be subject to a court order requiring it not to disclose particular information. Information subject to a court order prohibiting its disclosure would be covered by s44 (1) (c). Information gathered under compulsion, would, if disclosed, constitute contempt of court.

However, it is important to note that a person can be in contempt of court even when not subject to a court order or party to proceedings. If a public authority is subject to a court order requiring it not to disclose particular information or if a disclosure of

information by a public authority might prejudice the outcome of court proceedings, it should seek legal advice on whether the disclosure is likely to constitute a contempt of court.

### **C) Interaction with other exemptions**

Section 44 is an absolute exemption which means that if information is covered by any of the subsections in s44 then it is exempt from disclosure. There is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it. There may, however, be an interaction with other exemptions in the Act, in particular, with s39 on environmental information.

Other exemptions which may be relevant include and on which guidance is issued are: s27 which relates to international relations and s32 which relates to court records.

### **D) Summary and issues for implementation**

- Section 44 (1) (a) applies to all information except that which is covered by the Environmental Information Regulations (EIR) at s39 of the Act. The effect of s5 (6) of the EIR is that any enactment or rule of law that would otherwise prevent the disclosure of information under the EIR does not apply.
- Many public authorities may hold information which is subject to prohibitions on its disclosure under other legislation. When dealing with requests for information public authorities should obtain their own legal advice on whether any information that they hold is subject to a statutory prohibition.
- Public authorities should also check whether the relevant prohibitions have been amended or repealed by the review of statutory bars undertaken by the DCA.
- Many public authorities may hold information, the disclosure of which may be incompatible with European Community obligations. When dealing with requests for information public authorities should obtain their own legal advice on whether any information that they hold is subject to the application of any relevant Community obligations.
- If a public authority is subject to a court order requiring it not to disclose particular information, or if a disclosure of information by a public authority might affect or prejudice the outcome of court proceedings, the public authority should take its own legal advice on whether the disclosure would constitute a contempt of court.