

Freedom of Information (Scotland) Act 2002 Briefings Series

SECTION 26 PROHIBITIONS ON DISCLOSURE

1. Scope of Briefing

The Freedom of Information (Scotland) Act 2002 (“the Act”) introduces a right of access to information held by Scottish public authorities. This Act came 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. It aims to provide an overview of how the Commissioner views section 26 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 26 provides that information is exempt if its disclosure by a Scottish public authority, otherwise than under the Freedom of Information (Scotland) Act 2002:

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

The purpose of this briefing is to address cases where disclosure of information requested under the Act is prohibited under these headings. In these cases, the relevant statute, European Union Community obligation or court order will take precedence over the Act. Where this occurs the authority has no discretion whether to disclose the information or not; the prohibition must be respected.

3. Type of exemption

This is an absolute exemption. Therefore authorities will not be required to consider the public interest in such cases. The exemption lasts in perpetuity.

4. Paragraph (a) “is prohibited by or under an enactment”

Paragraph (a) provides that information will be exempt if it “is prohibited by or under an enactment”. The exemption contained in paragraph (a) applies to Acts of the Scottish Parliament and Acts of the UK Parliament¹ and to both primary and secondary legislation. Primary legislation means all Acts passed by the UK Parliament or Scottish Parliament. Secondary legislation² is any sort of legislation such as orders, rules or regulations (known as statutory instruments) made under an Act of the UK or Scottish Parliaments.

¹ Freedom of Information (Scotland) Act 2002 (henceforth referred to as FOI(S)A 2002), s 73

² Sometimes known as subordinate or delegated legislation

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Cases where paragraph (a) does not apply

Paragraph (a) does not extend to prohibitions under common law (judge-made law). In particular, this exemption cannot be used to withhold information because disclosure would constitute a breach of contract or even a criminal offence (unless provided by statute). However, it may be that in such cases, withholding the information would be justifiable under another exemption, such as breach of confidence (see briefing on *Section 36 Confidentiality* <http://www.itspublicknowledge.info/section36.htm>.)

Only Acts or statutory instruments that actually prohibit disclosure of information are covered by this paragraph. This contrasts with the position in other jurisdictions. For example, authorities in the United States and Canada can rely on statutory provisions which give the authority discretion whether to disclose information or not.³

In Scotland, legislation that gives authorities discretion to decide whether to withhold information will not be covered by the exemption in paragraph (a). When determining whether a piece of legislation grants such discretion or imposes a prohibition, it may be helpful to consider whether the provision is granting a power to withhold information or imposing a duty. Where legislation gives an authority the power to decide whether information should be withheld or not then paragraph (a) cannot be used to justify refusal of the information (although another exemption might apply). For example, the Local Government (Access to Information) Act 1985 (the 1985 Act) prohibits the disclosure of information in very limited circumstances, that is (1) where the information has been given to a council by a government department and that department has expressly forbidden the disclosure of the information and (2) where the disclosure is prohibited by statute or by the order of a court. If the information falls into either of these groups, it must not be disclosed in response to a request under the Act. However, there are other circumstances set out in the 1985 Act⁴ in which councils are *permitted* to withhold information from the public. The fact that councils are given discretion here means that the disclosure of the information is not *prohibited* by other legislation and that the exemption in paragraph (a) cannot be relied on. However, even if this exemption cannot be used, it is possible that councils will be able to rely on one of the other exemptions in the Act.

Similarly, Rule 9 of the Parole Board (Scotland) Rules 2001⁵ provides that information in connection with proceedings before the Board should not be disclosed to any person not involved in those proceedings or to the public unless the chairman of the Board directs otherwise. As the decision to withhold information is at the discretion of the Chairman, this provision will fall outwith the scope of paragraph (a).

Determining when paragraph (a) will apply

It may not always be easy to determine whether a piece of legislation actually prohibits disclosure. An Act may contain both a general and absolute prohibition on disclosure of information. In such cases, it will be a matter of legal interpretation whether the prohibition

³ Philip Coppel, *Information Rights*, Sweet & Maxwell 2004

⁴ See Sch 7A of the 1985 Act

⁵ SI 2001/315

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applies to the information requested. So, for example, where a piece of legislation prohibits the disclosure of certain information, the authority will have to assess whether the information requested by an applicant falls within the scope of this prohibition. In some cases, the prohibition on disclosure of information may be limited to a specified period.

The prohibition in a piece of legislation may be qualified and require the application of a judgment. So, for example, a statute might prohibit the disclosure of information where publication would harm or prejudice a particular interest such as national security or public safety. The legislation may nominate a specified person or body to make this decision. Alternatively, disclosure may be permitted but only on certain conditions. In these cases, the decision will be more difficult. FOI(S)A 2002 provides for unconditional disclosure; it does not allow public authorities to attach conditions governing what the applicant does with the information or allow this to be an issue when considering whether the information should be released. Whether paragraph (a) will apply in these instances will be considered by the Commissioner on a case by case basis.

Disclosure of information may be prohibited unless the person who provided the information or whom it concerns has given his or her consent to its release. For example, section 34 of the Legal Aid (Scotland) Act 1986 (LASA) makes it a criminal offence for anyone employed by or acting on behalf of the Scottish Legal Aid Board (SLAB) to disclose information provided to SLAB for the purposes of LASA without the consent of the person who provided the information. Where legislation prohibits the disclosure of information unless the consent of a specified person has been obtained, the Commissioner expects authorities to make attempts to obtain this consent, wherever practicable, so that the information can be released.

In other cases, legislation may prohibit disclosure of information but permit the information to be released for certain specified purposes. For example, LASA goes on to list the circumstances in which the type of information described above can be disclosed without consent by the person who supplied it and without a criminal offence being committed.⁶ These include disclosures for the purpose of:

- (a) the proper performance or facilitating the proper performance by the Secretary of State, the Board, any court or tribunal or by any other person or body of duties or functions under this Act;
- (b) investigating, prosecuting or determining any complaint of professional misconduct against a solicitor or an advocate;
- (c) investigating or prosecuting any offence or for the report of any proceedings in relation to such an offence and
- (d) any investigation by the Scottish Public Services Ombudsman.

Under FOI an authority is not permitted to ask why an applicant wants the information or how they intend to use it. Further, the decision for the authority under FOI is simply whether the information should be made available to the public, rather than to a specific applicant. However, where statute provides that information can be released only for specified purposes, the authority will need to know why the applicant wants the information and how

⁶ Legal Aid (Scotland) Act 1986, s 34(2)

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they intend to use it before releasing it. In such cases, although the information may not be disclosed under FOI (because the information cannot be released to the general public) this does not prevent an authority from releasing the information to a specific applicant where it is required for the purposes specified in that statute. Each request, however, will need to be considered on a case by case basis.

Authorities will often need to take legal advice where they consider that disclosure of the information requested might be prohibited by legislation.

An authority that uses paragraph (a) as justification for withholding information in response to an FOI request will be expected to state what enactment or statutory instrument applies and which specific provision (section, subsection or paragraph number) prevents disclosure.

Identifying legislation prohibiting disclosure

In contrast to the position in other jurisdictions, such as Australia and Canada where Acts prohibiting disclosure of information are listed in a Schedule to the Act, FOI(S)A 2002 does not provide authorities with a list of enactments which fall under paragraph (a). It is hoped that projects being undertaken by the Scottish Executive and the Department of Constitutional Affairs (discussed below) will assist authorities in identifying relevant legislation.

Will all current prohibitions still apply under the new FOI regime?

Because some statutory prohibitions may have become obsolete, the Act provides that existing statutory prohibitions can be amended or repealed on a case-by-case basis. The Act provides that the Scottish Ministers can by order repeal or amend a “relevant enactment” that is “capable of preventing” the disclosure of information under section 1 of the Act.⁷

However, the Ministers cannot repeal or amend an Act of Parliament or Act of the Scottish Parliament that received Royal Assent after the end of 2002 or any secondary legislation made on or after 28 May 2002. Any legislation or secondary legislation passed after these dates containing a prohibition on the disclosure of information will have been passed in the full knowledge that it will prevent a right of access under the Act.

It should be noted that a number of the existing prohibitions on disclosure are necessary to implement European Community legislation and for that reason cannot be amended or repealed.

The Scottish Executive is currently identifying Scottish legislation containing provisions which may prohibit the disclosure of information by Scottish public authorities. It has been liaising with the Department of Constitutional Affairs (DCA) which is conducting a similar exercise in connection with the removal of statutory prohibitions in Westminster legislation. To date no order has been made under the Act appealing or amending legislative

⁷ FOI(S)A 2002, s 64

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prohibitions.

However, the UK Government has already relaxed and repealed a number of prohibitions on disclosure in relation to requests under the Freedom of Information Act 2000.⁸ The effect of the Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004 (“2004 Order”) is to amend a number of pieces of legislation, including some UK-wide Acts, to allow information to be released in the event of a request being made for the information under the Freedom of Information Act 2000. For example, the 2004 Order applies to the Medicines Act 1968, the Health and Safety at Work etc Act 1974 and the Biological Standards Act 1997, all of which are UK wide. The 2004 Order will not allow the information to be released, however, if a request is made under the Scottish Act. This means that, at the time of writing, UK public authorities will have to release the information in some situations where Scottish public authorities are barred from doing so.

5. Paragraph (b) “incompatible with a community obligation”

Paragraph (b) provides that information can be withheld if its disclosure would be incompatible with a “community obligation”.

Meaning of “community obligation”

The term “Community obligation” refers to a European Union (EU) obligation rather than other obligations that the UK might have at a European or international level. So, for example, paragraph (c) does not extend to the Convention for the Protection of Human Rights and Fundamental Freedoms which is an initiative of the Council of Europe and not the European Union.

“Community obligation” means “any obligation created or arising by or under the Treaties, whether an enforceable Community obligation or not.”⁹ The phrase “an obligation under these Treaties” has been widely interpreted by the European Court of Justice (ECJ), which is the Court of the European Union. It includes the EC Treaty¹⁰ and its amending and supplementing Treaties, EC Regulations, Directives and Decisions.

Meaning of “member state”

Community obligations are usually binding on “Member States”. Local government, police forces and certain health providers are considered to be part of the Member State. While the Act applies to all of these public authorities, it also applies to many more bodies which are not considered to be part of the Member State.

It is possible, therefore, that a public authority will not be 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 use paragraph (b) to justify withholding information. Authorities will

⁸ Freedom of Information Act 2000; *hereafter* FOIA 2000

⁹ European Communities Act 1972 at Schedule 2

¹⁰ Treaty Establishing the European Community as amended by Subsequent Treaties, Rome, 25 March 1957

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need to seek legal advice to determine whether they form part of the Member State.

Community obligations enacted into UK law

Many community obligations have been enacted into national law. For example, both the Data Protection Act 1998 and the Consumer Protection Act 1987 are derived from European Union Directives. Where the disclosure is prohibited by a community obligation that has been enacted into UK law, paragraph (a) (discussed above) should normally be used as grounds for withholding information rather than paragraph (b). However, there may be cases, discussed below, where a Directive has not been properly implemented by a state. Where this occurs, paragraph (b) may be used.

Cases where paragraph (b) may apply: obligations having direct effect

It has been suggested that paragraph (b) will be used in cases where European legislation has not yet been enacted into national law but has “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 even if they have not been implemented in that particular Member State. This means that the legislation can be enforced in the national courts whether or not there is national legislation giving effect to the relevant provisions of Community law. Direct effect only applies between the individual and the public authorities of the state; it does not apply between individuals and private companies.

The question whether a particular provision has direct effect depends on the type of obligation; that is, whether it is a Treaty article, directive or regulation. EU Regulations are directly applicable to UK law without further legislation while 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. Generally, in order to have direct effect, the provision must be enforceable in a court and impose a sufficiently precise and unconditional obligation. It cannot depend on the discretion or judgment of another body such as the state or a Community institution.

Cases where paragraph (b) may apply: conflict with EU Access to Information regime

This exemption might also apply in cases where EU documentation would not have been made available under the EU’s own access to information regime. Disclosure by a UK authority in these circumstances might arguably be “incompatible with a Community obligation”. The regulation establishing the EU Access to Information regime states:

“Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.”¹¹

¹¹ Regulation EC No. 1049/2001 of the European Parliament and Council regarding public access to European Parliament, Council and Commission, Recital 15

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Article 5 of the same Regulation goes on to say that Member States should not disclose a document originating from an EU institution without first consulting the institution concerned in order to take a decision that “does not jeopardise the attainment of the objectives of this Regulation” unless it is clear that the document should or should not be disclosed.¹²

The EU Ombudsman, who has responsibility for overseeing the EU Access to Information regime, has expressed concern that this regulation seems to require the FOI regimes of member states not to be more liberal than the EU Regime.¹³

Cases where paragraph (c) may apply: information held by officials

This exemption may also apply where information is held by civil servants or members of a UK Administration acting as representatives on one of the EU institutions (Commission, European Parliament or Council). Various treaties place obligations on members of the institutions and officials not to disclose information that they acquire in the course of their duties. For example, Article 214 of the EC Treaty¹⁴ provides that:

“The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.”

A UK representative on one of the EU Institutions, as a Committee member for example, may hold the information on behalf the UK Administration. Disclosure of this information might be restrained by this community obligation if an FOI request is received.

When dealing with requests for information public authorities may wish to obtain their own legal advice on whether disclosure of information might be incompatible with a Community obligation. In all cases, the Commissioner will expect the authority to justify the use of paragraph (b) by citing the specific provision and explaining why it applies to the particular information requested.

6. Paragraph (c) “would constitute, or be punishable as, a contempt of court”

Under paragraph (c) information will not be supplied to an applicant if to do so would constitute, or be punishable as, a contempt of court.

There are two broad categories of contempt of court; “statutory contempts” and common law contempts. Paragraph (c) is principally concerned with the latter category.

¹² Ibid, Article 5

¹³ Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal*, Butterworths 2001 (3rd Edition)

¹⁴ Treaty Establishing the European Community as amended by Subsequent Treaties, Rome, 25 March 1957

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Statutory contempts are regulated by the Contempt of Court Act 1981 (“the 1981 Act”). The 1981 Act prohibits disclosure that would prejudice the administration of justice once proceedings are “active”.¹⁵ The statute lays down rules of strict liability (with certain exceptions) for the publication of information “which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.”¹⁶ Strict liability means that the act alone will constitute an offence; it is not necessary to show that the perpetrator “intended” the outcome. Disclosure prohibited by the 1981 Act will normally fall within paragraph (a).

Common law or judge-made law contempt covers a wide variety of acts not covered by the 1981 Act. These include conduct that offends the dignity of the court and refusal by a witness to answer a competent and relevant question.¹⁷ It also applies to failure to obey an order of any court, whether criminal or civil, and to the publication of information where court proceedings are not yet “active” but imminent.¹⁸ These last two categories are likely to be most relevant to FOI requests.

For example, a public authority may be subject to a court order requiring it not to disclose particular information. In those circumstances the disclosure of that information in violation of the order will be a contempt of court and exempt by virtue of paragraph (c). It is not necessary for the order to be directed at the public authority; if the court has granted an order against a party restraining it from disclosing information pending a court hearing, it may be a contempt of court for a third party, such as a public authority, to disclose the information if they have knowledge of the court order.¹⁹

Paragraph (c) could arguably cover information whose disclosure was specifically made the subject of an interdict, if the authority was aware of the interdict. It has, however, been argued that a breach of interdict is not properly a contempt of court but a distinct offence of impeding the course of justice.²⁰

Common law contempt of court would also cover publication of information which would create a real risk of prejudice or impediment to a fair trial or to the administration of justice where proceedings are imminent or pending but not yet “active”.²¹ For example, it is likely to be contempt of court for an authority which knows that proceedings are about to be instituted against someone to disclose information that is likely to prejudice those proceedings.

In contrast to the 1981 Act, the authority will normally have to act wilfully or deliberately flout

¹⁵ This is defined in the Contempt of Court Act 1981 and varies depending on whether the proceedings are criminal proceedings at first instance, other proceedings at first instance and appellate proceedings

¹⁶ Contempt of Court Act 1981, s 2(2)

¹⁷ Hume *Commentaries* 1,380; HM Advocate v Airs 1975 JC 64, Green v Smith 1987 SCCR 686 cited in Stair Memorial Encyclopaedia

¹⁸ Graham v Robert Younger 1955 JC 28, 1955 SLT 250 cited in Stair Memorial Encyclopaedia

¹⁹ *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, HL cited in J McDonald and C H Jones, *The Law of Freedom of Information*, OUP 2003, p 179

²⁰ D M Walker, *The Law of Civil Remedies in Scotland*, p 142 cited in Stair Memorial Encyclopaedia

²¹ This is defined in the Contempt of Court Act 1981 and varies depending on whether the proceedings are criminal proceedings at first instance, other proceedings at first instance and appellate proceedings

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judicial authority to be punished for contempt under common law.²² The publisher of the information must be shown to have intended to cause such prejudice or impediment. “Intention” here does not mean motive or desire and it can be inferred from the circumstances surrounding the disclosure. An authority that knowingly discloses information in the face of a court order, in response to a request under the Act, is likely to show sufficient intent.

Authorities should be aware that contempt of court is a concept covering not only courts proper but a range of tribunals or bodies “exercising the judicial power of the state”.²³ This definition includes district Courts, Sheriff Courts, the High Court of Justiciary and the Court of Session. Other bodies that have been judged to fall under the scope of Contempt legislation include the children’s hearing system, the Mental Health Review Tribunal and employment tribunals.²⁴

Authorities should seek legal advice if they believe that disclosure of information in response to an FOI request might constitute a contempt of court.

7. Experience in other jurisdictions

As described above, both Canada and Australia have similar provisions in their access to information regimes.

The Canadian Access to Information Act²⁵ provides that a government institution must refuse to disclose any record that contains information the disclosure of which is restricted by a provision set out in Schedule II to the Act. There are a number of key differences between the Canadian legislation and the Scottish Act. For example, Schedule II may contain legislation which provides for a discretionary right to withhold the information (see discussion at section 5 above). The provisions of the Act also apply to legislation enacted both before and after the Access to Information Act. Where a statute contains a provision prohibiting disclosure that is not listed in Schedule II to the Access to Information Act, then information can only be withheld if it falls under another exemption in the Act.

The Australian Freedom of Information Act 1982 (1982 Act) also contains an exemption (section 38) which preserves provisions prohibiting disclosure in other pieces of legislation. However, the provision must either be listed in Schedule 3 to the 1982 Act or section 38 must expressly apply to the document or information contained in the document. The Government policy is that section 38 should apply only where the legislation concerned specifically and directly identifies the nature of the information not to be disclosed.

²² Annotated Notes to the Freedom of Information (Scotland) Act 2002, Current Law Statutes published by W. Green

²³ Contempt of Court Act 1981, s 19

²⁴ Freedom of Information (Scotland) Act 2002 (asp 13) (Annotated) Current Law Statutes published by W Green, 13-46; hereafter FOI(S)A 2002 (Annotated)

²⁵ Access to Information Act, s 24(1)

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8. Updates

The guidance in this briefing may be amended following any decisions by the Scottish Information Commissioner on appeals involving the section 26 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.

February 2005

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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. Stair Memorial Encyclopaedia, Contempt of Court
7. Department of Constitutional Affairs Guidance, Section 44 - Prohibitions on Disclosure
8. UK Information Commissioner, Freedom of Information Act Awareness Guidance No. 27
9. Canada Freedom of Information Act 1982
10. Ireland Freedom of Information Act 1997 (as amended)
11. New Zealand Official Information Act 1982
12. The Australian Freedom of Information Act 1982

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Appendix

Section 26: Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;
- (b) is incompatible with a Community obligation; or
- (c) would constitute, or be punishable as, a contempt of court.