

## Freedom of Information Act Awareness Guidance No. 14

### International Relations

The right under the Freedom of Information Act to request official information held by public bodies (known as the **right to know**) comes into force in January 2005. The **Awareness Guidance** series is published by the Information Commissioner to assist public authorities and, in particular, staff who may not have access to specialist advice in thinking about some of the issues. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in preparing for implementation. Here we consider the exemption relating to International Relations

Particularly for central government departments (but also for other larger public authorities) more detailed advice on the scope and approach to be taken to the exemption relating to international relations will be available from the Department for Constitutional Affairs.

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

Section 27 contains two closely related provisions: an exemption for information whose disclosure would or would be likely to harm UK interests, dealt with in s.27(1), and an exemption for information obtained in confidence from another state or international organisation or court, dealt with in s.27(2) and (3).

#### Prejudice to UK Interests - Section 27(1)

S.27(1) focuses on the effects of the disclosure of information and provides for information to be exempt under section 27(1) if its disclosure would, or would be likely to prejudice:

- relations between the United Kingdom and any other state
- relations between the United Kingdom and any other international organisation or international court
- the interests of the United Kingdom abroad
- the promotion or protection by the United Kingdom of its interests abroad

As is discussed in further detail below, the important point to note is that prejudice must be to the interests of the UK itself rather than simply to the public authority which holds the information.

## **Information provided in confidence - Section 27(2) and (3)**

Information is exempt under sections 27(2) and (3) if it is confidential information obtained from a state other than the United Kingdom, or from an international organisation or international court. Sections 27(2) and (3) relate not primarily to the subject of the information, nor the harm resulting from its disclosure, but to the circumstances under which it was obtained and the conditions placed on it by its supplier. Although there is no explicit test of prejudice attached to this provision, it is difficult to envisage cases where information was in fact confidential but its disclosure would not result in any harm.

Information will remain confidential for as long as the terms on which it was obtained require it to be held in confidence. It is also confidential for as long as the state, organisation or court expect it to be so held. Section 27(3) refers to the expectation placed on the information by an international organisation, non-UK state or international court, that it will be held in confidence by the UK public authority. Section 27(3), therefore, includes implied confidence. There is no requirement that an actionable breach of confidence must occur (as is the case in the exemption at section 41 relating to information provided in confidence) for this part of the exemption to apply. (For more on s.41, see [Awareness Guidance No 2.](#))

Public authorities relying on the confidentiality provisions in section 27(2) and (3) should take appropriate legal advice on general questions of law, such as the law of confidence and the interpretation of international agreements, as the Information Commissioner's Office is unable to give general legal advice.

## **Definition of the terms used in the exemption**

Section 27(5) defines the terms used elsewhere in the exemption as follows:

**International courts:** international judicial bodies established by a resolution of which the UK is a member or by an international agreement to which the UK is a party, for example, the European Court of Human Rights, the European Court of Justice, and the International Court of Justice.

**International organisations and organs of international organisations:** any international organisation whose members include any two or more States, for example the European Union, the European Parliament or the United Nations. It also includes international organisations established for a specific purpose such as the World Trade Organisation. In addition it includes international bodies established to carry out specific functions in an international context, for example, Interpol, in the area of international policing.

**States and organs of States:** the government of any state and any organ of its government and will include for example, states with a government structure; the overseas territories of the UK and of other countries; and Crown Dependencies

such as the Channel Islands. Under section 27(5), 'state' also includes 'any territory', outside the UK which would include territories which are not recognised as states in international law but which may be the subject of international law or international agreements. An example is Antarctica. In addition, the exemption includes the 'organs' of any government, for example, a state's legislature and executive.

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

Many public authorities carry out functions which relate directly to, or have the potential to affect, the international relations of the UK. Central government departments, especially the Foreign and Commonwealth Office and the Department for International Development will receive requests for information, the disclosure of which may be exempt under section 27(1) if it would prejudice the international relations or interests of the UK.

Other government departments, for example, the Department of Trade and Industry, the Ministry of Defence and the Home Office will also receive requests for information that may be exempt from disclosure under section 27. In addition, police authorities, NHS trusts, prison services, universities, and local authorities (among others) are likely to receive requests for information which could be exempt under section 27 if its disclosure would prejudice the international relations or interests of the UK. Section 27 covers information, the disclosure of which would harm the international relations between the UK and any other state or international organisation, or the interests of the UK abroad, not the interests of the public authority itself.

Information likely to prejudice the interests of the UK abroad will include information held by a public authority, which if disclosed, would harm UK interests in relation to an international arrangement, or in its dealings with another state or non-UK organisation. The interests of the UK abroad and the international relations of the UK would cover a wide range of issues relating to, for example:

- Communications between public authorities in the UK and other states, international organisations or organs of other states
- The exchange of political views between states
- UK policy and strategic positioning in relation to other states or to international organisations
- Diplomatic matters between states
- International trade partnerships
- Consular matters in relation to UK citizens abroad or visitors to the UK
- Procedures of overseas offices
- State visits by overseas officials and Ministers
- International funding matters
- Cases before international courts or cases pending
- Controversial visitors to the UK
- International events, for example, the Olympic Games

- Universities' international relations and strategic alliances for research and attracting funding
- Local authorities in relation to town twinning
- District or county councils or regional development agencies in relation to their applications for EU funding

The exemption does not necessarily focus on the scale or importance of the issue or on the subject or type of the information, but on whether UK interests abroad, or the international relations of the UK would be prejudiced through the disclosure of the information relating to the issue. Section 27 would only apply if the disclosure of information held by a public authority would prejudice the international relations or interests of the UK not of a part of the UK, or a sector or group in the UK, or the interests of the public authority itself.

For example, the disclosure of a health authority's policy on negotiations with another state relating to the employment of overseas staff would not necessarily prejudice the international relations or interests of the UK. However, if a multinational protocol for the employment of medical staff from other states was being established, the disclosure of the information held by the health authority, if contradictory, might affect the UK's wider policy in this area and prejudice its negotiating position in the establishment of the protocol. The issue of timing will affect the sensitivity of information requested, and the level of harm will be determined by the currency of the information in relation to wider international issues that may be prejudiced by the disclosure.

Different types of relationships, levels of openness and negotiating positions will exist between the UK and other states or international organisations. The interests of the UK abroad will vary from state to state, as will the relationships that have been, or will be established. The relationships will also vary over time. Changing events affecting international relations and the timing of the disclosure of information will also influence the application of the exemption to requests for disclosure under section 27.

For example, the relations between the UK and the 10 countries that joined the EU in 2004 are likely to have been transformed by the EU obligations now governing interaction between the countries. Information held by UK public authorities about risk to UK interests from the countries before they joined the EU might now be obsolete. However, the potential for prejudice to the international relations between the countries through the disclosure of such information may have increased as a result of their change in status, even though the conditions under which it was generated no longer apply. New obligations may govern the interaction between the countries which could be undermined by the disclosure. The information may be exempt under section 27 if its disclosure would prejudice the newly established international relations between the UK and the new EU member states.

Differences in culture, religion, legislation and infrastructure will determine the type and level of prejudice that may occur to the international relations between the UK and another state or states, international organisation or international court.

For example, public authorities such as universities, museums and government departments may hold information relating to the movement and location of cultural artefacts and antiquities internationally. The negotiation of codes of conduct relating to the movement and location of cultural artefacts and antiquities may be particularly sensitive and dependent on a high level of trust between states with very different cultures. The disclosure of information could prejudice the international relations of the UK if the cultural sensitivities of the states or governments involved were not taken into account in dealing with requests for information. In some cases, the most sensitive cultural context might determine the level of prejudice to international relations when considering issues of disclosure. Information, the disclosure of which would not be particularly sensitive in the UK, might need to be exempt so as not to cause prejudice to the relations between the UK and another state with different cultural sensitivities.

### **C) How section 27 works**

The **right to know** places two related duties on public authorities:

- the duty to confirm or deny that the information requested is held and, if it is,
- the duty to communicate the information to the applicant.

Both duties must be considered separately, although clearly if it is decided that there is no duty to confirm or deny the holding of information there will be no duty to provide the information to the applicant.

In either case, public authorities must demonstrate either that there would or would likely be prejudice to the interests of the UK and/or that the information requested is confidential and had been obtained from another state, international organisation or international court. In addition they must consider whether the public interest in withholding the information outweighs the public interest in its disclosure.

### **The duty to confirm or deny**

Further advice on the duty to confirm or deny is provided in [Awareness Guidance No 21](#). Although the number of occasions when a public authority will be justified in neither confirming nor deny that it holds information requested may not be very large, the Act acknowledges that such occasions may arise.

For example, the disclosure of information held by a public authority relating to the UK's opinions of the level of participation and performance of the other nations in an international arrangement may harm international relations. Such may be the risk to the international relations or interests of the UK abroad of disclosing that the information exists that even confirming or denying that such information is held may prejudice the international relations or interests of the UK.

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.

### **The prejudice test**

Section 27(1) is subject to the prejudice test which means that a public authority cannot withhold information unless its disclosure would, or would be likely to, prejudice the international relations or interests of the United Kingdom or its interests abroad. The Information Commissioner's interpretation of 'likely to prejudice' is that there should be evidence of a significant risk of prejudice to the subject of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests. Whether prejudice exists is to be decided on a case by case basis. The prejudice test is a dynamic concept and different levels of prejudice will occur at different times according to the varying circumstances affecting the international relations or interests of the UK abroad.

In assessing the likelihood of the prejudice that a disclosure of information might cause it is necessary to identify the particular harm that may arise.

For example, the Foreign Office may hold an unfavourable assessment of the economic prospects of a close ally. It may reasonably judge that disclosure of the assessment may exacerbate those economic difficulties, leading to a deterioration of the relationship between the UK and the other state.

The FCO may hold a similar assessment about a state with which it holds less friendly relations. Although disclosure might not prejudice the relationship between the states, if disclosure were to lead to adverse consequences for UK businesses with interests in the other state or to threats to UK citizens, then it may still be proper to rely upon the exemption.

Further guidance on the prejudice test is given in [Awareness Guidance No 20](#).

### **Determining whether information is confidential**

Confidential information, as defined in s.27(2) and (3) is not subject to a test of prejudice. The task for public authorities in this context is therefore primarily to assess whether the information requested is, as a matter of fact confidential.

If information requested of a public authority is already in the public domain, partially or fully, it is unlikely to be confidential although exceptions are possible. For instance, if the reliability of that information is uncertain but disclosure under the Act would confirm its authenticity then it may be reasonable to refuse a request. However, if it has been put in the public domain by the state or international organisation which supplied it or might be

obtained on request, for instance, under the FOI legislation of the other state, then it could not be considered confidential.

As discussed earlier, in some cases there will be a formal confidentiality agreement. In others, the context in which information was obtained will imply a duty of confidence.

If in doubt public authorities should consult the source of the information and, if necessary, take their own legal advice.

### **The public interest test**

Section 27 is a qualified exemption. This means that even if the information requested is exempt the public authority must decide whether the public interest in maintaining the exemption outweighs the public interest in its disclosure, in other words that the harm that would be likely to be caused to the international relations of the UK by disclosure would be greater than the public interest in disclosure.

Although the Act does not list the factors that would favour disclosure, the Information Commissioner has suggested that among the factors that would weigh in favour of disclosure are:

- Furthering the understanding and participation in the public debate of issues of the day.
- Promoting accountability and transparency by public authorities for decisions taken by them.
- Promoting accountability and transparency in the spending of public money
- Allowing individuals, companies and other bodies to understand decisions made by public authorities affecting their lives.
- Bringing to light information affecting public health and safety.

Applying the public interest test means weighing the harm that is identified in a particular exemption against the wider public interest that may be served by disclosure. The test must be applied on a case by case basis.

For instance, a central government department may hold information concerning negotiations over a cultural or a diplomatic issue with a European partner. Disclosure of this information might prejudice the outcome of those negotiations and might result in damage to the relations between the UK and the foreign government. The exemption would thus apply.

However, the public has a clear interest in knowing whether international arrangements, for instance membership of the European Union, bring the advantage to the UK that are claimed. The department must therefore consider whether in the particular case, there **may** be a stronger public interest in disclosing the information, despite the harm that may be caused, since disclosure would inform public debate and promote understanding of international affairs.

## **Interaction with other exemptions**

Public authorities wishing to rely on the exemption at section 27 should consider whether there is an interaction between section 27 and other exemptions in the Act. Public authorities should identify the most appropriate exemption or exemptions which apply to the information requested, in each case. Public authorities should provide the fullest response to the applicant that details which exemption or exemptions apply to the information requested. It will not be appropriate for a public authority to exhaust all of the exemptions in turn with the aim of withholding information.

Other exemptions which may be relevant and on which guidance is issued or planned include; s.23 relating to information supplied by or dealing with security matters; s.24 relating to national security; s.29 relating to the economy; s.31 relating to law enforcement; s.35 relating to the formulation of government policy etc.; s.37 relating to communications with Her Majesty etc.; s.39 relating to environmental information; s.43 relating to commercial interests

## **D) Summary and Issues for Implementation**

Information may be exempt under section 27 if its disclosure would prejudice the international relations or interests of the UK. In addition, information is exempt if it is confidential information obtained from a state other than the UK or from an international organisation or international court. Information may also be exempt under section 27 if there is an expectation placed on the information by an international organisation, non-UK state or international court, that it will be held in confidence by the UK public authority.

- In relying on the exemption at section 27 public authorities should consider whether to confirm or deny that the information is held. They must demonstrate the level of prejudice that would result from the disclosure of the information requested. Public authorities must also demonstrate that the public interest in withholding the information outweighs the public interest in its disclosure.
- The exemption at section 27 does not necessarily focus on the scale or importance of the issue but its effects on the international interests of the UK and whether the international relations or interests of the UK would be prejudiced through the disclosure of the information relating to the issue.
- Section 27 would only apply if the disclosure of information held by a public authority would prejudice the international relations or interests of the UK not of a part of the UK, or a sector or group in the UK.
- Section 27 allows for the exemption of information held by public authorities, the disclosure of which would prejudice the international relations or interests of the UK, *not* the interests of the public authority itself.
- Different types of relationships, levels of openness and negotiating positions will exist between the UK and other states or international organisations which will affect the level of prejudice resulting from the disclosure.



- The interests of the UK abroad will vary from state to state, as will the relationships that have been, or will be established. The relationships will also vary over time. These factors will affect the level of prejudice resulting from the disclosure.
- Changing events affecting international relations will also influence the application of the exemption to requests for the disclosure of information under section 27.
- Differences in culture, religion, legislature and infrastructure will determine the type and level of prejudice that may occur to the international relations between the UK and another state or states, international organisation or international court.
- Public authorities relying on section 27 should take appropriate legal advice on general questions of law, such as the law of confidence and the interpretation of international agreements, as the Information Commissioner's Office is unable to give general legal advice.
- The Information Commissioner recommends that those authorities that are likely to wish neither to confirm nor deny that they hold the information requested, should prepare a standard response explaining their policy to applicants.
- Public authorities wishing to rely on the exemption at section 27 should consider whether there is an interaction between section 27 and other exemptions in the Act. Public authorities should identify the most appropriate exemption or exemptions which apply to the information requested, in each case.
- Public authorities should provide the fullest response to the applicant that details which exemption or exemptions apply to the information requested. It will not be appropriate for a public authority to exhaust all of the exemptions in turn with the aim of withholding information.