

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

### Section 34 Investigations by Scottish public authorities and proceedings arising out of such investigations

#### 1. Scope of Briefing

The Freedom of Information (Scotland) Act 2002 introduces a right of access to information held by Scottish public authorities. The Act came into force on 1 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 34 of the Act.

The briefing will be developed over time as the Commissioner receives 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 34 introduces four separate (but interrelated) exemptions that apply to information held in relation to investigations that are carried out by Scottish public authorities, or legal proceedings that arise as a result of these investigations.

[See Appendix 1 for the full text of the exemption.](#)

- i. The exemption in section 34(1) relates to information that is or has been held for the purposes of criminal investigations and proceedings.

Information is exempt from release if the authority has held it at any time for the purposes of:

- an investigation that it has a duty to carry out in order to establish whether
  - a person should be prosecuted for an offence, or
  - a person prosecuted for an offence is guilty of it.
- an investigation conducted by the authority that may lead to a report to the procurator fiscal to allow the fiscal to determine whether criminal proceedings should be raised.
- criminal proceedings that were instigated as a result of a report made by the authority to the procurator fiscal.

- ii. The exemption in section 34(2) applies to information that is held for the purposes of an investigation into the cause or circumstances of the death of a person.

Information is exempt from release if:

- It is held by a public authority for the purposes of a fatal accident inquiry that has not yet concluded

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- It has been held at any time for the purpose of an investigation carried out either;
    - by virtue of the authority's duty to ascertain the cause of death of a person, or
    - for the purpose of making a report to the procurator fiscal about the cause of death of a person.
  - iii. The exemption in section 34(3) applies to information that relates to obtaining information from confidential sources. Such information will be exempt only if it was obtained or recorded for purposes of an investigation that the authority has the power to carry out for one of the purposes listed in section 35(2) of the Act<sup>1</sup>.
- See Appendix 2 for a list of these purposes.
- iv. The final exemption, contained in section 34(4), applies to information that has been obtained for the purposes of civil proceedings brought by or on behalf of the authority holding it, where these proceedings have arisen out of the type of investigations mentioned in the first and third exemptions in section 34.

### 3. Scope of the exemptions

It should be noted that the exemptions in section 34 apply to information that is held or collected for the purposes of specific investigations or specific proceedings arising out of these investigations. This exemption will therefore not apply to more general information about investigations or proceedings (such as procedures for how they should be carried out, policies for determining what should be investigated, or statistics relating to the outcome of investigations)<sup>2</sup>.

### 4. Duration

The exemptions in section 34 (1), (3) and (4) will apply in perpetuity to information falling under their scope.

Information held for the purpose of a fatal accident inquiry<sup>3</sup> will be exempt only until that inquiry is concluded.

Section 34(2)(b) (exempt information that is held for the purposes of an investigation into the cause of death or for making a report to the procurator fiscal into the cause of death) will fall away after a period of 100 years.

### 5. Background on the role of the Procurator Fiscal

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<sup>1</sup> This exemption in s 34(3) does not apply to information relating to obtaining information from confidential sources where it has been obtained or recorded for the purposes of criminal investigations and prosecutions. Such information would be exempt by virtue of s 34(1) rather than s 34(3).

<sup>2</sup> The law enforcement exemption in section 35 of the Act will apply to more general information about law enforcement and regulatory activities where its release would substantially prejudice these activities. For more information on this exemption see the separate briefing at [www.itspublicknowledge.info/section35.htm](http://www.itspublicknowledge.info/section35.htm).

<sup>3</sup> Freedom of Information (Scotland) Act 2002, s 34(2)(a); hereafter "FOI(S)A 2002".

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The first two exemptions contained in section 34 refer to information that is held for the purposes of making a report to the Procurator Fiscal. It is therefore important to understand the role of the Procurator Fiscal within the Scottish legal system in order to fully understand the scope of the exemptions.

The Crown Office and Procurator Fiscal Service is a department of the Scottish Executive headed by the Lord Advocate. Procurators Fiscal have two main functions; as public prosecutors and as investigators of sudden deaths. Reports may be made to the Procurator Fiscal on either of these matters.

### The Role of the Procurator Fiscal in criminal cases<sup>4</sup>

The Procurator Fiscal is responsible for investigating and prosecuting crime in his or her district<sup>5</sup>. In most cases, initial investigations are carried out by the police, who will carry out work to identify the person responsible for a crime and gather evidence demonstrating guilt. Other authorities may also be responsible for this investigation. For example, local authorities are responsible for investigating offences relating to trading standards and environmental health matters. Once initial investigations have been undertaken, the investigating authority will make a report to the Procurator Fiscal, outlining the charges against the accused and the evidence gathered. The Procurator Fiscal must then conduct or direct further investigations in order to decide whether a prosecution should be taken forward.

### The role of the Procurator Fiscal in relation to sudden or suspicious deaths

The second function of the Procurator Fiscal is to investigate all sudden and suspicious deaths in his or her district. In a small number of cases, a fatal accident inquiry will be held<sup>6</sup>.

A fatal accident inquiry is a public inquiry into the circumstances of death, heard before a Sheriff. It is instigated by an application from the Procurator Fiscal to the Sheriff for the area most closely associated with the death. Provisions for Fatal Accident Inquiries are set out in the Fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976. A fatal accident inquiry must be held whenever a person dies as a result of an accident in the course of their work; or following the death of a person in legal custody<sup>7</sup>. The Lord Advocate can also decide that a fatal accident inquiry should be held in other cases where he judges that it is in the public interest to do so.

Few sudden deaths actually lead to fatal accident inquiries. In 2001-02, for example, 13,625 sudden deaths were reported to the Procurator Fiscal Service but only 62 inquiries

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<sup>4</sup> See e.g. A. A. Patterson, T. St. J. N. Bates and M. R. Poustie, 1999, (4<sup>th</sup> Ed) *The Legal System of Scotland: Cases and Materials*, Edinburgh W. Green: pp. 104-107.

<sup>5</sup> The Procurator Fiscal Service is divided into 11 geographical areas, with an Area Procurator Fiscal in each. Within these 11 areas, there are 48 Procurator Fiscal offices in total, one for each Sheriff Court district. For more information on the service, see: <http://www.crownoffice.gov.uk/>.

<sup>6</sup> See e.g. The Laws of Scotland Online: Stair Memorial Encyclopaedia (Butterworths Direct), Fatal Accident Inquiries, s 458ff

<sup>7</sup> This requirement can only be waived if the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in the course of criminal proceedings in respect of the death.

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were held<sup>8</sup>. Reports of deaths will generally be made by GPs or hospital doctors, the police or in some cases registrars of deaths. In other cases, the Procurator Fiscal may require that autopsies or further investigations are carried out to establish the cause of death<sup>9</sup>. He or she can also instigate a criminal investigation if the death is suspicious. Autopsies are carried out by pathologists, normally employed by universities or Health Boards, but other public authorities, such as the police, will also carry out investigations into deaths at the instruction of the Procurator Fiscal.

### 6. Purpose of the exemptions

In written evidence<sup>10</sup> to the Justice 1 Committee of the Scottish Parliament as it considered the Freedom of Information (Scotland) Bill, the Lord Advocate, Colin Boyd QC, stated that the existence in perpetuity of an exemption such as that in section 34(1) was “essential for an effective criminal justice system” for the following reasons:

- The risk to public confidence in the criminal justice system and willingness to co-operate with it if information provided by witnesses or victims was later disclosed;
- The possibility that disclosures would risk the informant system;
- The need for consistency with the Freedom of Information Act 2000 to ensure cross-border co-operation in the investigation and prosecution and crime;
- Disclosure of any aspect of a criminal investigation may prejudice or bar future criminal procedure.

In his oral evidence to the committee, the Lord Advocate also argued that it was important that this exemption continued to apply even after a report to a procurator had been made and a decision had been taken not to proceed with a prosecution. “It is important that the reporting authority knows that the reports that it submits to the procurator fiscal will not be transmitted on.”<sup>11</sup>

These arguments were reiterated by the Justice Minister, Jim Wallace QC, at the Committee meeting that addressed this exemption at stage 2 of the parliamentary process<sup>12</sup>.

On the exemption in section 34(2), the Lord Advocate noted that the purpose and role of a fatal accident inquiry would be “seriously undermined” if information generated and obtained by it was released before its conclusion. Further, he noted that this exemption

<sup>8</sup> See the annual report of the Crown Office and Procurator Fiscal Service 2001-02: [http://www.crownoffice.gov.uk/departamental/01-2002%20Annual%20Report/annual\\_review/18.htm](http://www.crownoffice.gov.uk/departamental/01-2002%20Annual%20Report/annual_review/18.htm)

<sup>9</sup> In the evidence of the Procurator Fiscal Service to the Shipman Inquiry, it was noted that in the Edinburgh District, approximately 2000 deaths are reported to the Procurator Fiscal each year. Of these, around 1000 will lead to autopsies being carried out. The report of this Inquiry describes the Scottish system of deaths investigation and registration in some detail. See: [http://www.the-shipman-inquiry.org.uk/tr\\_page.asp?id=243](http://www.the-shipman-inquiry.org.uk/tr_page.asp?id=243).

<sup>10</sup> See [http://www.scottish.parliament.uk/S1/official\\_report/cttee/just1-02/jlr02-01-04.htm](http://www.scottish.parliament.uk/S1/official_report/cttee/just1-02/jlr02-01-04.htm)

<sup>11</sup> Scottish Parliament, Justice 1 Committee, 5 December 2001, Freedom of Information (Scotland) Bill, col. 2974.

<sup>12</sup> Scottish Parliament, Justice 1 Committee, 5 March 2002, Freedom of Information (Scotland) Bill, col. 3627ff.

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was necessary to avoid any possible prejudice to any criminal prosecution that followed its conclusions.

### 7. Type of exemption

All of the exemptions contained in section 34 are qualified exemptions and are therefore subject to the public interest test. These types of exemptions are sometimes known as “class exemptions”. Where public authorities find that this exemption applies to the information requested, they must go on to consider whether, in all the circumstances of the case, the public interest in withholding the information is outweighed by the public interest in disclosing 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>13</sup>

### 8. Consideration of 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 not outweighed by that in maintaining the exemption. If the two are evenly balanced, the presumption should always be in favour of disclosure.

This list is not exhaustive but contains some of the factors which public authorities should take into account when applying the public interest test:

- 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 the administration of justice and enforcement of the law including the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether disclosure would affect the economic interests of the whole or part of the United Kingdom;
- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money;
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment;
- whether disclosure would impact adversely on safeguarding national security or international relations; and

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<sup>13</sup> FOI(S)A 2002, s 66.

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- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- whether disclosure would ensure fairness in relation to applications or complaints, reveal malpractice or enable the correction of misleading claims;
- whether disclosure would contribute to a debate on a matter of public interest;
- whether disclosure would prejudice the protection of an individual's right to privacy.

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

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

Any authority wishing to rely on this exemption should maintain a record of its decision-making process which can be produced should the applicant request a review or complain to the Scottish Information Commissioner.

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 held by the authority. 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>14</sup>

## 10. Implementation Issues

### Section 34(1)

This exemption is made up of three related parts which together exempt information that is held for the purposes of an investigation that leads or may lead to criminal proceedings, and information held for the purposes of legal proceedings that arise from these investigations.

Section 34(1)(a) exempts information held for the purposes of an investigation that an authority has a duty to carry out in order to establish whether someone should be prosecuted for an offence, or if they are guilty of it. Bodies with such a duty will include those traditionally associated with law enforcement and the prosecution of crime, such as the police or the Procurator Fiscal. It will also incorporate a range of other bodies that have a duty to investigate other areas where criminal offences may be committed. For example, as noted earlier, local authorities have a duty to investigate matters in relation to environmental health and trading standards. Any authority withholding information by virtue of section 34(1)(a) should be able to demonstrate to the Commissioner that they do indeed

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<sup>14</sup> FOI(S)A 2002, s 18



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have a legal duty to conduct the investigation. Such a duty will normally be set out in statute or will derive from the Crown.

The second part of this exemption in section 34(1)(b) applies more broadly to information held for the purposes of an investigation that may lead to the authority deciding to make a report to the Procurator Fiscal.

Information at any time held for the purposes of such an investigation will remain exempt in perpetuity, even where the authority ultimately decides not to submit a report to the Procurator Fiscal, or where the Fiscal decided that no prosecution should take place. This was debated in the Justice 1 Committee when the Bill passed through Parliament. Michael Matheson, MSP, expressed concerns that in this form, the exemption would capture information on a range of issues in the public interest, such as research into medical errors, industrial disease or food poisoning. He argued that a “harm test” on this provision would ensure that personal privacy would still be protected<sup>15</sup>. The Justice Minister responded that it was important for this exemption to apply in perpetuity, even where no report was made to the Procurator Fiscal, in order to protect those under investigation and witnesses from “trial by media”.

### Section 34(3)

This exemption has to be read in conjunction with section 35(2), which lists a range of regulatory purposes for which investigations might be carried out. These purposes are listed in [Appendix 2](#) of this briefing.

In order for information to be exempt under section 34(3), all of the following conditions must be met:

- it was obtained or recorded for the purposes of an investigation (other than those that would fall under the scope of 34(1));
- the authority’s power to conduct the investigation is set out in law or derives from the Crown (the Royal Prerogative);
- the investigation relates to one or more of the purposes listed in section 35(2) of the Act and
- the information relates to the obtaining of information from confidential sources.

Information obtained from confidential sources will not be exempt under section 34(3). This may be exempt under one of the other exemptions in section 34, or the exemption in section 36 of the Act (“Confidentiality”). Rather, section 34(3) will exempt information, for example, about how such information is gathered, how informants are recruited and how information obtained from confidential sources is transmitted.

## 11. Overlap with other exemptions

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<sup>15</sup> Scottish Parliament, Justice 1 Committee, 5 March 2002, Freedom of Information (Scotland) Bill, col. 3267ff.

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Given its application to information relating to criminal investigations, the scope of section 34 will overlap significantly with that of section 35 of the Act, **law enforcement**, which applies to information the release of which would prejudice substantially any of a range of law enforcement activities and functions.

Under the Freedom of Information Act 2000, the equivalent law enforcement and investigations exemptions<sup>16</sup> are mutually exclusive. If the investigations exemption applies, the law enforcement one cannot. The effect of this mutual exclusivity is to make the investigations exemption alone apply to information held for the purposes of specific investigations, while the law enforcement exemption applies to more general information such as policies and strategies. This mutual exclusivity is not a feature of the Freedom of Information (Scotland) Act, and so some information relevant to particular investigations may be exempt under both sections 34 and 35 of the Act.

## 12. Overseas experience

Exemptions relating to law enforcement processes and investigations are commonplace in freedom of information laws around the world. However, because it automatically applies to any information held for the purposes of an investigation, the Scottish provision has wider scope than a number of comparative exemptions. In Ireland, for example, a harm test applies to the equivalent provision<sup>17</sup>. This states that a request for information can be refused where access could reasonably be expected to prejudice or impair the prevention, detection, or investigation of offences..

In the 1999 case of Messrs. AAU and the Department of Agriculture and Food, the Irish Information Commissioner found that information relating to an ongoing investigation into alleged interference with cattle tags was correctly withheld under this provision. Prosecution was being contemplated in the case but had not yet begun in the case. The Commissioner judged that releasing requested information would be prejudicial to both the investigation and any future prosecution. However, the Commissioner did order the release of one of the eight disputed documents as the contents were already known to the applicants, and so release could not prejudice the investigation or future prosecution<sup>18</sup>. However, if this information had been requested at a later date, once the investigation and any prosecution was completed, this same exemption would not necessarily apply.

Similarly, the Commonwealth of Australia Freedom of Information Act (1982) exempts information in relation to investigations only when a test of harm is met<sup>19</sup>. Under this Act, a document is exempt from disclosure where its release could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law,

## 13. Updates

The guidance in this briefing may be amended following any decisions by the Scottish

<sup>16</sup> Freedom of Information Act 2000, s 30 and 31 respectively.

<sup>17</sup> Freedom of Information Act 1997, s 23(1)(a).

<sup>18</sup> For the full text of the decision, see: [http://www.oic.gov.ie/21ae\\_3c2.htm](http://www.oic.gov.ie/21ae_3c2.htm).

<sup>19</sup> Freedom of Information Act 1982, s 37.



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Information Commissioner on appeals involving section 34, should his decisions provide further guidance on the interpretation of this section of the Freedom of Information (Scotland) Act 2002. Updates to this briefing and the others in this series will be publicised through the Commissioner's website and monthly newsletter.

**March 2005**

### 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 Freedom of Information Act 2000
- 5 Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002
- 6 Freedom of Information Act Awareness Guidance No 17 – Law Enforcement , UK Information Commissioner, 2004
- 7 P Coppel, *Information Rights*, Sweet and Maxwell 2004.
- 8 J MacDonald and C H Jones, *The Law of Freedom of Information*, OUP 2003
- 9 A A Paterson, T St. J N. Bates and M R Poustie, *The Legal System of Scotland: Cases and Materials*, Edinburgh W. Green, 1999 (4<sup>th</sup> Ed).
- 10 The Laws of Scotland Online: Stair Memorial Encyclopaedia, Butterworth

### Further Reading

- 1 Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000 by Meredith Cook, August 2003, published by the UK Constitution Unit and available at - [www.ucl.ac.uk/constitution-unit/foidp/publications.php#097](http://www.ucl.ac.uk/constitution-unit/foidp/publications.php#097)

## Appendix 1: Section 34

### **34 Investigations by Scottish public authorities and proceedings arising out of such investigations**

(1) Information is exempt information if it has at any time been held by a Scottish public authority for the purposes of-

- (a) an investigation which the authority has a duty to conduct to ascertain whether a person-
  - (i) should be prosecuted for an offence; or

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- (ii) prosecuted for an offence is guilty of it;
  - (b) an investigation, conducted by the authority, which in the circumstances may lead to a decision by the authority to make a report to the procurator fiscal to enable it to be determined whether criminal proceedings should be instituted; or
  - (c) criminal proceedings instituted in consequence of a report made by the authority to the procurator fiscal.
- (2) Information is exempt information if-
  - (a) held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14) but not for the time being concluded; or
  - (b) held at any time by a Scottish public authority for the purposes of any other investigation being carried out-
    - (i) by virtue of a duty to ascertain; or
    - (ii) for the purpose of making a report to the procurator fiscal as respects,
      - the cause of death of a person.
- (3) Information held by a Scottish public authority is exempt information if-
  - (a) it was obtained or recorded by the authority for the purposes of investigations (other than such investigations as are mentioned in subsection (1)) which are, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment, conducted by the authority for any purpose specified in section 35(2); and
  - (b) it relates to the obtaining of information from confidential sources.
- (4) Information is exempt information if obtained or recorded by a Scottish public authority for the purposes of civil proceedings, brought by or on behalf of the authority, which arise out of such investigations as are mentioned in subsection (1) or (3).

## Appendix 2: The purposes listed in section 35(2)

- 35** (2) The purposes are-
- (a) to ascertain whether a person has failed to comply with the law;
  - (b) to ascertain whether a person is responsible for conduct which is improper;
  - (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
  - (d) to ascertain a person's fitness or competence in relation to-

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- (i) the management of bodies corporate; or
- (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;
- (e) to ascertain the cause of an accident;
- (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
- (g) to protect the property of a charity from loss or mismanagement;
- (h) to recover the property of a charity;
- (i) to secure the health, safety and welfare of persons at work; and
- (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.