

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

### SECTION 35 LAW ENFORCEMENT

#### 1. Scope of briefing:

The Freedom of Information (Scotland) Act 2002 introduced a right of access to information held by Scottish public authorities. The 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 35 of the Act.

The 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 35 creates a qualified exemption<sup>1</sup> that applies to information the release of which would, or would be likely to, prejudice substantially one or more of a range of different law enforcement functions and activities. This is a wide ranging exemption that covers information relating not just to detection, prosecution and detention of offenders, but also to matters including the operation of immigration controls, the assessment or collection of taxes and various regulatory functions.

Each of the functions and activities this exemption is designed to protect is listed in section 35(1). For some of these, the exemption will only apply if information relates to an authority carrying out the function for a purpose listed in section 35(2). Although this exemption contains a lot of detail setting out its scope, its structure is relatively simple.

Section 35(1) states that information will be exempt if its release would, or would be likely to prejudice substantially any of the law enforcement or general functions and activities listed in section 35(1)(a)-(h).

The first six activities and functions are<sup>2</sup>:

- The prevention or detection of crime
- The apprehension or prosecution of offenders
- The administration of justice
- The assessment or collection of any tax or duty (or imposition of a similar nature)
- The operation of the immigration controls
- The maintenance of security and good order in prisons or other institutions where persons are lawfully detained.

For these, the exemption applies in a direct manner. If the release of information would, or would be likely to, prejudice substantially one or more of these activities or functions, then it is exempt from release.

<sup>1</sup> See section 6 below for more on the meaning of this term.

<sup>2</sup> Freedom of Information (Scotland) Act 2002, s 35(1)(a)-(f); hereafter FOI(S)A 2002

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The final two activities<sup>3</sup> must be considered in conjunction with the purpose for which they are carried out in order to determine whether information relating to them should be exempt. These are:

- The exercise of any public authority of its functions for any of the specified purposes (below)
- Any civil proceedings brought by or on behalf of any public authority, where these proceedings arose from an investigation carried out for any of the specified purposes.

Here, the exemption will only apply if there is or is likely to be substantial prejudice to these more general activities where they are carried out for one or more of the purposes listed in section 35(2).

The purposes are<sup>4</sup>:

- To ascertain whether a person has failed to comply with the law
- To ascertain whether a person is responsible for improper conduct
- To ascertain whether circumstances which would justify regulatory action being taken to ensure compliance with any law exist or may arise
- To ascertain a person's fitness or competence to manage a corporate body, or to carry on a profession or other activity
- To ascertain the cause of an accident
- To protect a charity against misconduct or mismanagement in its administration
- To protect the property of a charity from loss or mismanagement
- To recover the property of a charity
- To secure the health, safety and welfare of persons at work
- To protect people (other than those at work) against risks to health or safety arising from the actions of persons at work.

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

### 3. Who can use this exemption?

Public authorities responsible for carrying out the range of law enforcement and regulatory functions and activities listed in section 35 are most likely to hold information that falls under its scope. However, the use of this exemption is not restricted to such bodies. Any public authority can rely on this exemption if the release of information it holds would, or would be likely to, substantially prejudice one or more of the activities listed. Circumstances may arise where one authority withholds information because of the likelihood of prejudice being caused to another organisation's regulatory or law enforcement activities, including a public authority covered by the Freedom of Information Act 2000.<sup>5</sup>

When considering the likely impact that releasing information would have on another organisation's activities, the public authority holding the requested information may wish to

<sup>3</sup> FOI(S)A 2002 s 35(1)(g)-(h).

<sup>4</sup> FOI(S)A 2002 s 35(2).

<sup>5</sup> FOI(S)A 2002 s 35(1)(g)

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take into consideration the views of that other body. However, the final decision on whether information should be released or withheld rests with the authority which holds the information and has received the request.

### 4. Key terms and concepts

Although section 35 refers to a range of law enforcement activities and functions, it does not define them. The following briefly considers in general terms the meaning of each of these. These are not intended as exhaustive definitions but are intended as broad guides to aid interpretation of the exemption.

It should be borne in mind that information will not be exempt under section 35 simply by virtue of relating to one or more of these activities or purposes. The likely effects of disclosure must also be taken into consideration in order to establish whether the exemption applies, as must the public interest test and the substantial prejudice test, both of which are considered separately in section 6 of this briefing.

#### **“Prevention or detection of crime”<sup>6</sup>**

This term is wide ranging, encompassing any action taken to anticipate and prevent crime, or to establish the identity and secure prosecution of the persons suspected of being responsible for crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection.

#### **“Apprehension or prosecution of offenders”<sup>7</sup>**

There is likely to be a considerable overlap between information relating to “the apprehension or prosecution of offenders” and that relating to “the prevention or detection of crime”. “Apprehension and prosecution of offenders” has a more narrow scope, however, relating to all aspects of the process of identifying, arresting or prosecuting those suspected of being responsible for unlawful activity. Again, this term could refer to the apprehension and prosecution of specific offenders, or to more general techniques (e.g. investigative processes used) and strategies designed for these purposes.

#### **“Administration of justice”<sup>8</sup>**

Courts and tribunals are the main bodies responsible for administering justice in Scotland, alongside other non-adversarial mechanisms such as the children’s hearings system. The “administration of justice” although not defined, could refer widely to matters related to the working of these bodies and mechanisms. Examples of such matters might include the judicial appointments system, and protection of basic principles such as the right to a fair trial<sup>9</sup>.

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<sup>6</sup> FOI(S)A 2002 s 35(1)(a)

<sup>7</sup> FOI(S)A 2002 s 35(1)(b)

<sup>8</sup> FOI(S)A 2002 s 35(1)(c)

<sup>9</sup> It should be noted that courts and tribunals themselves are not “public authorities” for the purposes of the Act and so it does not grant any right to access information held by them. Information relating to the administration of justice that might be requested under the Act might be held by a range of bodies that have responsibilities in relation to the justice system. These include (amongst others) the Scottish Executive Justice Department, the Scottish Courts Service or the Scottish Legal Aid Board. See Schedule 1 to the Act for the full list of Scottish Public Authorities covered by the Act.

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### **“Assessment or collection of any tax or duty (or of any imposition of a similar nature)”<sup>10</sup>**

Taxes and duties both share common characteristics as compulsory contributions to state funds, required in relation to income, goods or services. Their main purpose is to raise revenue to finance public expenditure. This definition will include taxes raised at local level (such as council tax) as well as those raised at national level such as vehicle excise duty (road tax) and income tax.

### **“The operation of the immigration controls”<sup>11</sup>**

The term “immigration controls” can be interpreted as incorporating both the physical controls at points of entry to the UK and the procedural mechanisms by which entry to and residency in the UK is controlled. These mechanisms might include, for example, visa requirements for non-UK nationals, policies for preventing and investigating illegal immigration, and policies in relation to the granting of asylum.

### **“Maintenance of security and good order in prisons or in other institutions where persons are lawfully detained”**

Alongside prisons, people might be lawfully detained in, for example, young offenders institutions, local authority secure accommodation, secure hospitals, or immigration detention and removal centres. This part of the section 35 exemption refers to the maintenance of both security and good order in such institutions. The term ‘security’ implies matters such as the safe and effective custody of those held, and the safety of any person in or around the institution. The term ‘good order’ suggests considerations in relation to the smooth running of these institutions. The use of the word “and” suggests that both conditions must exist before this particular exemption can be relied on.

### **“The exercise by any public authority... or Scottish public authority of its functions for any of the purposes mentioned in subsection (2)”<sup>12</sup>**

Here, the exemption relates to any function of any public authority, where it is carried out for a relevant purpose (i.e. one of the purposes listed in s 35(2)). When considering whether substantial prejudice will, or will be likely to follow from release of information under this part of the exemption, authorities should be reminded that the exemption applies when harm will be caused to the function of the authority, rather than the purpose for which the functions are executed.

A public authority’s functions are those things it has the power, or an obligation to do. These functions may be set out in law, or they may derive from the Crown (the Royal Prerogative). Any public authority wishing to rely on this exemption must be able to show that it does in fact have the power or obligation to carry out a particular function.

### **“Civil proceedings...”<sup>13</sup>**

“Civil proceedings” can refer to any non-criminal case heard before a court or tribunal. To

<sup>10</sup> FOI(S)A 2002 s 35(1)(d)

<sup>11</sup> FOI(S)A 2002 s 35(1)(e)

<sup>12</sup> FOI(S)A 2002 s 35(1)(f)

<sup>13</sup> FOI(S)A 2002 s 35(1)(g)

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fall under the scope of section 35(1)(g), however, any civil proceedings:

- Must have been brought by or on behalf of a public authority,
- Must have (directly or indirectly) arisen out of an investigation authorised in law or royal prerogative powers; and
- The investigation must have been carried out for one of the purposes listed in s 35(2).

Again, any prejudice identified following consideration of the harm test must be to the civil proceedings rather than the purpose for which they have been brought in order for this part of the exemption to be engaged.

### **The purposes<sup>14</sup>**

The final two sets of activities set out above differ from the first six in that the exemption is only engaged where they are carried out for one or more of a range of purposes listed in section 35(2). These cover a range of matters that are, again, not defined within the Act. These purposes are not considered in full below, but the interpretation of some key terms is considered briefly.

#### **“Conduct which is improper”**

The second purpose is that of establishing whether any person is responsible for improper conduct. Establishing this fact may involve considering a person's actions in relation to some expected standard. For example, the Code of Conduct for Councillors sets out the standards of conduct with which all Scottish councillors must comply<sup>15</sup>.

#### **“Regulatory activity”**

Regulation is the formal process of overseeing a particular sector or activity and ensuring compliance with legal and other requirements (e.g. performance standards). Regulatory activity will normally be carried out by a person or organisation given specific power to do so.

## **5. Duration**

The section 35 law enforcement exemption does not apply to information contained in records more than 100 years old.<sup>16</sup>

## **6. Type of exemption**

Section 35 is a qualified exemption which is subject to both the substantial prejudice and public interest tests. Exemptions like this one are sometimes known as “content exemptions”. Even where a public authority decides that disclosure of information would substantially prejudice any of the functions or activities specified in this exemption, the public interest test must also be considered. To do this, the public authority must consider whether, in all the circumstances of the case, the public interest in withholding the

<sup>14</sup> FOI(S)A 2002 s 35(2)

<sup>15</sup> This code can be viewed here: <http://www.scotland.gov.uk/library5/localgov/cocc-00.asp>. Complaints under this Code would be considered by the Standards Commission for Scotland.

<sup>16</sup> FOI(S)A 2002 s 58(1).

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information is outweighed by the public interest in disclosing the information. Information should only be withheld if the public interest in doing so outweighs that in release. 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>17</sup>

### Consideration of the substantial prejudice test

Information cannot be withheld under section 35 unless an authority can demonstrate that any of the various functions and activities listed would, or would be likely to, be prejudiced substantially as a result of release.

Examples of the type of question that may be relevant to this exemption when considering whether substantial prejudice would or would be likely to follow from release include:

- Would release of the information revealing law enforcement techniques enable offenders to avoid detection?
- Would release reduce the prospects of a fair trial taking place?
- Would release affect the ability of the judiciary to function effectively, and independently?
- Would release provide information that would undermine efforts to reduce tax evasion and avoidance?
- Would release undermine the government's immigration control policies and procedures?
- Would release heighten the risk of prisoner escapes?

There is no definition of "substantial prejudice" in the Act, but the Commissioner's view is that in order to claim this exemption the damage caused by disclosing information would have to be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time. Authorities should consider disclosing the information asked for unless it would cause them real, actual and significant harm<sup>18</sup>. They must be able to evidence this harm to the Commissioner.

### Consideration of the public interest test

Section 35 is subject to the public interest test which is set out in section 2 of the Act. 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.

<sup>17</sup> FOI(S)A 2002 s 66.

<sup>18</sup> See also Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002, para 72.

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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
- 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.

### 7. 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>19</sup>

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<sup>19</sup> FOI(S)A 2002, s 18

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### 8. Overlap with other exemptions

Section 35 is a wide ranging exemption that consequently has the potential to overlap with a number of other exemptions listed in the Act. The greatest overlap is likely in relation to the exemption in section 34, **investigations by Scottish public authorities and proceedings arising out of such exemptions.**

Under the (UK-wide) Freedom of Information Act 2000, the equivalent law enforcement and investigations exemptions<sup>20</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 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.

### 9. Overseas experience

Exemptions to protect law enforcement procedures and techniques are common in freedom of information laws around the world. For example, under the Commonwealth of Australia's Freedom of Information Act<sup>21</sup>, information is exempt from release where it would "disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures".<sup>22</sup>

In the 1994 case *Re Murphy and Australian Electoral Commission*<sup>23</sup>, the Administrative Appeals Tribunal judged that the Australian Electoral Commissioner was justified in withholding under this exemption information about the range of acceptable reasons for failure to vote in compulsory elections. It was accepted that revealing this information would be likely to prejudice the Commission's law enforcement procedures by allowing people to circumvent them by submitting one of the acceptable explanations.

In the 1999 Irish case *Mr John Burns, The Sunday Times newspaper and the Office of the Revenue Commissioners*, the Information Commissioner considered whether releasing information about the names of bodies considered to be charities for the tax purposes (and so receiving tax exemptions) could reasonably be expected to prejudice or impair the enforcement of or compliance with tax law<sup>24</sup>. In this case, the Information Commissioner annulled the decision of the Office of the Revenue Commissioner, rejecting its argument

<sup>20</sup> Freedom of Information Act 2000, s 30 and s 31 respectively.

<sup>21</sup> For similar provisions elsewhere, see for example: USA - Freedom of Information Act 1966, 5 USC §552 (b)(7)(E); New Zealand - Official Information Act 1982 s 6(c) and s 27(1)(a); Canada – Access to Information Act R.S. 1985 16(1)(c); Ireland – Freedom of Information Act 1997 s 23.

<sup>22</sup> Freedom of Information Act 1982 (Commonwealth of Australia) s 37(2)(b)

<sup>23</sup> See the summary of this decision here:

[http://www.ag.gov.au/agd/FOI/Decisions\\_Summaries/1994/FOI\\_Decision\\_D333\\_Murphy.htm](http://www.ag.gov.au/agd/FOI/Decisions_Summaries/1994/FOI_Decision_D333_Murphy.htm).

<sup>24</sup> See the full decision here: [http://www.oic.gov.ie/2242\\_3c2.htm](http://www.oic.gov.ie/2242_3c2.htm).

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that release and consequent weakening of the guarantee of confidentiality offered by the Revenue in relation to tax details would “*prejudice the making of tax returns or influence taxpayers to restrict information either in their returns to Revenue or in other areas*”.

### 10. Updates

The guidance in this briefing may be amended following any decisions by the Scottish Information Commissioner on appeals involving the law enforcement exemption, 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.

### 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 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: Section 37

#### 35 Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;
- (c) the administration of justice;

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- (d) the assessment or collection of any tax or duty (or of any imposition of a similar nature);
- (e) the operation of the immigration controls;
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
- (h) any civil proceedings-
  - (i) brought; and
  - (ii) arising out of an investigation conducted, for any such purpose, by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.

### (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-
  - (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.