

Freedom of Information (Scotland) Act 2002 Briefings Series

SECTION 36 CONFIDENTIALITY

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 comes 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 and prepare the public and public authorities for its implementation. It aims to provide an overview of how the Commissioner views section 36 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 36 of the Act is divided into two parts and describes two separate situations in which information may be exempt from disclosure.

The first part of the exemption¹ applies to any information about which a claim to confidentiality of communications could be maintained in legal proceedings. This part of the exemption is subject to the public interest test.

The second part of the exemption² applies to information which was obtained by a Scottish public authority from another person which, if disclosed by the Scottish public authority which obtained the information, would constitute a breach of confidence actionable by the person who gave the information to the authority, or by any other person.

This briefing looks at the issues surrounding both parts of this exemption in turn.

[See appendix for full text of these exemptions.](#)

3. Duration

Neither part of the section 36 exemption applies to information contained in records more than 30 years old.³

4. Section 36(1) – confidentiality of communications

When might this exemption apply?

¹ Freedom of Information (Scotland) Act 2002 (FOI(S)A), s 36(1); *hereafter* “FOI(S)A 2002”

² FOI(S)A 2002, s 36(2)

³ FOI(S)A 2002, s 58(1)

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As mentioned above, section 36(1) applies to information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, but what does this mean? In most cases, a witness appearing in court must answer any questions put to them and a person who has information which relates to a court case must give that information to the court if the court asks for it. However, there are some situations in which the witness or the person who has the information can refuse to answer a question or release information to the court on the ground that to do so would infringe some interest the protection of which, in the eyes of the law, is more important than ascertaining the truth or the administration of justice. Such information is usually said to be “privileged.” Whether information is privileged will depend on a number of different factors, such as the nature of the information or the purpose for which information was exchanged and, importantly, the relationship of the parties involved. Basically, if the relationship is such that a person can refuse to give evidence in court or disclose information to the court, then this exemption will apply.

There are a number of relationships to which this exemption might apply. Although the equivalent of this exemption in the Freedom of Information Act 2000⁴ only covers “legal professional privilege” (at least for the rest of the UK), it is clear from discussions while the Freedom of Information Bill was being considered by the Scottish Parliament that “confidentiality of communications” is wider than “legal professional privilege”.⁵

Legal professional privilege

In Scotland, advice given by a solicitor to their client and information passed by a client to their solicitor is confidential. The exemption will therefore cover a lot of information shared between a public authority and their solicitors. Confidentiality will protect such correspondence regardless of whether the solicitor is an “in-house” solicitor employed by the authority or is in private practice. The advice need not be in relation to any specific court case.

However, in order for this exemption to apply, the information must have been communicated between the solicitor and his client in a professional context. Since the privilege is restricted to communications made to professionally qualified and instructed lawyers, it cannot attach to either legal advice from non-professional persons or to informal advice given from a lawyer to a friend rather than a client.

Although Scottish public authorities may rely on this exemption to withhold advice which they have received from their solicitors, the public authority, as the client, has the right to waive this right to confidentiality. Indeed, given that the exemption is subject to the public interest test, Scottish public authorities must now waive this right to confidentiality where it is in the public interest to do so (see below).

Other confidential relationships

As mentioned above, there are a number of relationships in respect of which a claim for

⁴ Freedom of Information Act 2000, s42(1); *hereafter* FOIA 2000

⁵ Scottish Parliament, Justice 1 Committee, 26 February 2002, Freedom of Information (Scotland) Bill, col. 3275

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confidentiality could be maintained in legal proceedings. However, it is difficult to think of many examples where these would be relevant to the Act.

The relationship between a journalist and their source is protected under the Contempt of Court Act 1981.⁶ This means that a journalist does not need to disclose the source of information contained in a publication for which he is responsible, unless the disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. This will cover journalists employed by Scottish public authorities, if any are in fact so employed. It will not cover journalists employed by BBC Scotland for two reasons. Firstly, BBC Scotland is covered by the (UK-wide) Freedom of Information Act 2000 rather than the Scottish Act and, secondly, BBC Scotland is only covered by the 2000 Act in respect of information held for purposes other than those of journalism, art or literature.⁷

Communications made in the course of a professional relationship such as that of doctor and patient are protected by law insofar as improper disclosure of information may give rise to an action for damages for breach of confidence. This protection does not extend to the recognition of any legal privilege to withhold information about a patient from a court⁸ in the same way that exists for the solicitor/client or journalists/source relationship. However, medical information held by a doctor may still be exempt under section 36(1). The same is likely to apply to other professional relationships such as that of social worker and client.

5. Consideration of the public interest test

Section 36(1) is subject to the public interest test as set out in section 2 of the Act. This means that even if information is exempt under section 36(1), the information must still be released if the public interest in disclosing the information is not outweighed by the public interest in withholding the information.

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 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.

Regardless of the existence of the Act, a claim to confidentiality of communications could, in the relationships mentioned above, be waived where it was in the public interest to do so.

⁶ Contempt of Court Act 1981, s10

⁷ FOIA 2000, Schedule 1 Part VI

⁸ The Laws of Scotland Online: Stair Memorial Encyclopaedia (Butterworths Direct), Evidence, 3. para.686; hereafter “Stair Memorial Encyclopaedia”

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For example, solicitors can be forced to give evidence against their clients in fraud and the Contempt of Court Act specifically states that journalists must release the names of their sources where it is in the public interest for this information to be released. An Act of Parliament can also override a claim to confidentiality of communications.

However, it is likely that the greatest effect of the exemption in section 36(1) on current practice is that legal advice given by solicitors instructed by Scottish public authorities will now have to be released if it is in the public interest for the advice to be disclosed.

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 keeps the public adequately informed of any danger to public health or safety, or to the environment;
- whether disclosure would contribute to ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
- 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 contribute to the effective oversight of expenditure of public funds and that the public obtain value for money
- 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 it is in the public interest to disclose information which is subject to a claim of confidentiality, 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 in another public authority.

6. Section 36(2) – actionable breach of confidence

The exemption contained in section 36(2) is wider than the exemption contained in section 36(1) and covers information obtained by a Scottish public authority from another person, the disclosure of which would constitute an actionable breach of confidence. Although there is a tendency to think about this exemption as relating only to confidentiality clause in contracts, the exemption is in fact wider than this, as will be seen below. And while older contracts may contain a number of confidentiality clauses, the mere fact that the clause exists does not mean that the information is exempt under the Act, as this briefing will show.

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In drafting this exemption, Parliament has “attempted to import the Scots law on confidentiality”⁹ into the Act. The law of Scotland on breach of confidence is not yet fully formulated and it is fair to say that the law of confidence is an area which is continually growing and changing. As a result, before using this particular exemption to withhold information or before releasing information which could be confidential, public authorities would be well advised to seek legal advice.

When might this exemption apply?

There is a two stage test which must be passed before this exemption can be relied on. Firstly, the information must have been obtained by a Scottish public authority from another person. “Person” is defined widely and means another individual, another Scottish public authority or any other body, such as a company or partnership.

Although the definition of “another person” includes another Scottish public authority, public authorities must remember that it does not include the sharing of information within an authority. This means, for example, that information passed from one department of the Scottish Executive to another or from one department of a local authority to another does not attract this exemption.

The second test is that the disclosure of the information by the public authority would constitute an actionable breach of confidence either by the person who gave the information to the public authority or by any other person.

Although there was no discussion about the meaning of the word “actionable” when the Bill was being considered in Parliament, during a discussion about the equivalent exemption in the Freedom of Information Act 2000, it was suggested that “actionable” means being able to go to court and win.¹⁰ The Commissioner takes the view that actionable means that the basic requirements for a successful action appear to be fulfilled.

There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:

- the information must have the necessary quality of confidence;
- the public authority must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality; and
- there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.

Does the information have the necessary quality of confidence?

The type of information which can be protected by the law of confidence is very wide and can range from highly personal information to information about trade and business and historical information about government. The information can be in any format, including unrecorded information, although this will not be relevant when considering any requests for information under the Act as the Act only gives people the right to access recorded

⁹ Scottish Parliament, Justice 1 Committee, 26 February 2002, Freedom of Information (Scotland) Bill, col. 3280

¹⁰ Hansard, HL (series 5) vol 618, col 416 (25 October 2000)

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information.

In order for information to have the necessary quality of confidence, it must not, in general, be common knowledge and a member of the public would have to apply skill and labour to produce the information him or herself.

Where, for example, a company says that certain information is confidential yet publicises that information on its website it is unlikely to be able to argue that the information has the necessary quality of confidentiality.

In what circumstances will a public authority come under the obligation to maintain confidentiality?

A public authority will most obviously come under an obligation to maintain confidentiality where the information was disclosed to the authority with an express statement that it should be kept confidential. This may be set out explicitly in a contract or the information may have been accompanied by a letter which clearly set out the circumstances under which the information was to be disclosed. In these circumstances the public authority which received the information will be aware that the person giving the information considered the information to be confidential and so there will generally be little difficulty in imposing an obligation of confidence on the recipient authority. For example, a family may donate letters to an archive on the understanding that the letters must not be made publicly available within a certain period of time.

However, it is also possible that an actionable claim of confidentiality can arise without any express statement that the information is in fact confidential. In these circumstances, public authorities should consider:

- The nature of the information. As mentioned above, just because information isn't generally known doesn't make it confidential. However, if information of a very personal nature is disclosed to a social worker by their client, then it is reasonable to expect that the information is being transferred in confidence. It is also important to remember that just because a document is marked "confidential" (or equivalent), it does not mean that the information is actually confidential.
- The relationship between the parties. If, as mentioned above, the relationship between the parties is one of doctor/patient or social worker/client, then this makes it more likely that the information was disclosed in confidence.
- The way in which the information was obtained. If illegal or improper means were used to obtain the information, then this suggests that the information is likely to be confidential. However, this is something public authorities are unlikely to have to consider.

Unauthorised disclosure to the detriment of the person who communicated the information

For a breach of confidence to occur, the disclosure of the information must not have been authorised by the person who communicated the information. Consent can be express (e.g. the company which asked for the information to be kept confidential has agreed to the information being disclosed) or by implication (e.g. the company which asked for the information to be kept confidential has already released the information to the media).

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Where a request is made for confidential information, it would be good practice for the public authority concerned to ask the person, company etc. who gave them the information for permission to release it, particularly where some time has passed since the information was obtained by the authority. Circumstances may have changed and the person or company may feel that there is no longer any need for the information to be kept confidential. Even if some of the information might legitimately be protected by the confidentiality clause, the aim should be to release as much of the information as possible.

Scottish public authorities considering using this exemption must always remember that in some cases there will not be anyone who will be able to raise an action for breach of confidentiality and that the information may no longer be confidential.

In order for a case to be actionable, there must also be some detriment to the person who gave the information. In many cases, this will mean a claim for damages by a contractor following the release of information.

Remember that for a breach of confidence to be actionable, all three requirements must be fulfilled. It is also important to note that, in addition, there are a number of defences to an action for breach of confidentiality. These must also be considered in deciding whether a release of information would constitute an actionable breach of confidence.

Defences

The principle defence is the public interest defence. Although this test was originally construed relatively narrowly for breaches of confidence, the courts now interpret the public interest widely. The public interest defence extends to “crimes, frauds and misdeeds, both those actually committed as well as those in contemplation.”¹¹ It has also been defined as extending to “a just cause or excuse for breaching confidence.”¹²

In considering the public interest defence, the Commissioner will expect public authorities to consider the tests which are set out in paragraph 4 above and, where the balance of the public interest in maintaining the confidence is the same as disclosing the information, to release the information.

Other defences which have been successfully used against claims of breach of confidence include the defence that the information was known to the recipient before the information was given in confidence, and the defence that the information has subsequently entered into the public domain. Remember too that where a disclosure is required by law or by order of the court, then the information can be released without a breach of confidence occurring.

7. Further consideration of the public interest test

It is important to note that the section 36(2) exemption is an absolute exemption under the

¹¹ Initial Services Ltd v Putterill [1968] 1 QB 396

¹² Fraser v Evans [1969] 1 QB 349

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Act. This means that, in the Act, the exemption is not subject to the public interest test. However, given that the exemption has to be considered in line with the common law of confidence, which as mentioned above has a public interest defence, then the exemption should be treated as a class exemption and public authorities should take the public interest into account in deciding whether to disclose the information.

8. New contracts entered into by Scottish public authorities: the Section 60 Code

Under section 60 of the Act, the Scottish Ministers are to issue a code of practice providing guidance to Scottish public authorities as to how they should discharge their functions under the Act. Section 60(2)(d) specifically says that the Code must include guidance on the inclusion of terms in contracts relating to the disclosure of information.

There were real concerns as the Bill was going through Parliament that public authorities could put confidentiality clauses into their contracts and, simply by doing this, be able to withhold information. However, the Justice Minister made it clear that “it will not be open to public authorities to decide that it would be inconvenient to disclose certain information and therefore simply to label it confidential”¹³ because section 36 sets out two conditions on the use of the exemption. In addition, public authorities must comply with the Section 60 Code. If a public authority fails to comply with any aspect of the Section 60 Code, then the Commissioner can issue a practice recommendation to the public authority, setting out which part of the Code the public authority is not complying with and what steps the public authority has to take to comply with the Code.¹⁴

The following is a summary of the guidance to public authorities in the Code¹⁵:

- Public authorities should consider carefully any request to hold information in confidence and should make it clear that they cannot guarantee that information will not be disclosed unless the requirements of section 36(2) (or some other exemption) are met.
- When entering into contracts, public authorities should refuse to include terms which restrict the disclosure of information held by the authority beyond the restriction permitted in the Act (i.e. if the information is a trade secret or release of the information would or would be likely to substantially prejudice the commercial interests of any person).
- Although pressure may be put on public authorities when entering into contracts to accept confidentiality clauses, public authorities should consider carefully whether the information is in fact confidential and also the public interest in disclosing any or all of the terms. Public authorities should therefore resist confidentiality clauses wherever possible.
- Any confidentiality clauses being drawn up must be drawn up as narrowly as possible. Any acceptance of such confidentiality clauses must be for a good reason, be capable of being justified to the Commissioner and include the proviso that information which is not, in fact, exempt under the terms of the Act or whose disclosure is required on public interest grounds, may have to be disclosed regardless of any agreement.

¹³ Scottish Parliament, Justice 1 Committee, 26 February 2002 col.3274

¹⁴ FOI(S)A 2002, s 44

¹⁵ Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 Part II; *hereafter* Section 60 Code of Practice

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- Information should only be accepted in confidence if it is necessary for the authority to obtain that information in order to carry out its functions and it would not otherwise be provided or could not otherwise be obtained. Authorities should not agree to hold information in confidence if it is clearly not confidential in nature.
- Apart from in exceptional cases, public authorities should not impose terms of secrecy on contractors.

The above is a summary of the guidance contained in the Section 60 Code. The Code should be read in full, particularly by any public authority which wishes to accept information in confidence.

9. Relationship with the EU Procurement Regulations

The Public Supply Contracts Regulations¹⁶, Public Services Contracts Regulations¹⁷ and the Public Works Contract Regulations¹⁸ made by the European Union impose an obligation on contracting authorities to respect the confidentiality of information provided by the supplier or service provider where that request is reasonable. The regulations also impose a legal obligation on contracting authorities to maintain the confidentiality of information pending evaluation of tender.

There are proposals to introduce a new consolidated public sector procurement Directive.¹⁹ The proposed Directive has a tighter confidentiality provision: it will prohibit contracting authorities from disclosing information which has been designated as confidential by contractors and, in particular, information such as technical or trade secrets and the confidential aspects of tenders. The new Directive is unlikely to be in place until 2006. However, this particular provision of the proposed Directive is stated to apply in accordance with national law. This means that any public authority contemplating non-disclosure in line with the proposed Directive will still need to apply the confidentiality exemption as contained in section 36 of the Act.²⁰

10. Overseas experience

“Confidentiality” is a common exemption in freedom of information legislation around the world. It is also one of the exemptions which cause a lot of difficulties for public authorities.

The United States freedom of information legislation does not apply to “trade secrets and commercial or financial information obtained from a person and privileged or commercial”²¹ and in Australia there is an exemption for documents the disclosure of which would constitute an actionable breach of confidence.²²

¹⁶ The Public Supply Contracts Regulations 1995

¹⁷ The Public Services Contracts Regulations 1993

¹⁸ The Public Works Contracts Regulations 1991

¹⁹ Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

²⁰ Section 60 Code of Practice para. 50

²¹ United States Code, Title 5, s 552(b)(4)

²² Freedom of Information Act 1982 s 45

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In Canada there are detailed provisions relating to confidential information. Canadian courts have consistently said that the test for what is “confidential” is objective and that although government institutions may undertake to keep information confidential, this does not mean that the information should not be disclosed under the Access to Information Act 1982.

The Canadian Information Commissioner has described the confidentiality exemption in the 1982 Canadian Act as “one of the most used, abused and litigated.” He also said that the 1982 Act is too cautious in extending protection to private businesses; especially in the days of government downsizing and privatisation when more and more matters affecting the public interest are dealt with in the private sector.²³ This is also likely to be an issue in Scotland.

In New Zealand, the confidentiality exemption is subject to the public interest test although their Official Information Act 1982 says that there would be good reason to withhold information if it is necessary to:

- protect information which would disclose a trade secret;
- protect information which is subject to the obligation of confidence if the disclosure of the information would prejudice the supply of information from the same source;
- enable a Minister to carry on negotiations without prejudicing or disadvantaging the negotiations or
- prevent the disclosure or use of official information for improper gain or improper advantage.

In Ireland, there are two exemptions for confidential information, one covering information the disclosure of which would constitute a breach of a legal duty of confidence. The other consists of information given in confidence and on the understanding that it would be treated as confidential. This second type of information should be disclosed unless the head of the public body concerned considers that its disclosure would be likely to prejudice the future giving of similar information and would not serve the public interest better than non-disclosure.

A practical problem identified by the Irish Information Commissioner in his report on the first three years of the Irish Freedom of Information Act 1997 was the difficulty of determining when information is given in confidence or is subject to a legal duty of confidence. The problems arise because in many cases there is no express assurance of confidentiality and the employees of the bodies having to consider disclosing the information may not be able to establish with any certainty the precise circumstances in which the information was given to the public body and the use to which the provider of the information intended it to be put.

This is also likely to be the case in the early years of the Scottish Act, particularly in relation to existing information held by public authorities. However, the Scottish Information Commissioner expects that if public authorities comply in full with the Section 60 Code, then

²³ Office of the Information Commissioner of Canada, Annual Report 2000/01, pages 74-6

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public authorities will, in the future, know what information has been given to them in confidence and the circumstances in which the information can be disclosed.

11. Updates

The guidance in this briefing may be amended following any decisions by the Scottish Information Commissioner on appeals involving the Confidentiality 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 on the Commissioner's website and monthly newsletter.

November 2004

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. Stair Memorial Encyclopaedia
5. Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002
6. J MacDonald and C H Jones, *The Law of Freedom of Information*, OUP 2003
7. Freedom of Information Act 2000

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/publications/index.php

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Appendix: Section 36

36. Confidentiality

(1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) Information is exempt information if -

(a) it was obtained by a Scottish public authority from another person (including another such authority); and

(b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.