



## EXEMPTION NOTE

### Section 26 Information provided in confidence

This note is one of a series intended to provide practical guidance on the exemptions set out in the Isle of Man Freedom of Information Act 2015 (FOI).

Requests for information must be considered on a case by case basis and the Information Commissioner will review decisions on the facts of each case.

## THE EXEMPTION

Section 26 states:

### 26 Information provided in confidence

Information is absolutely exempt information if —

- (a) it was obtained by the public authority from another person (including another public authority); and
- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

## THE MAIN POINTS

1. PAs may refuse to give the applicant the information requested if the information is absolutely exempt information.
2. This is an absolute exemption which means the PA does not have to consider whether disclosure of the information would be in the public interest in terms of FOI.
3. However, the PA will need to carry out the in-built test to determine whether it would have a public interest defence for the breach of confidence to determine whether a breach of confidence caused by the disclosure of the information would, in fact, be 'actionable'.
4. Case law on the common law of confidence suggests that a breach of confidence won't succeed, and therefore won't be actionable, in circumstances where a PA can rely on a public interest defence.
5. However the Courts have recognised that there can be a strong public interest in disclosing information where, for example, enforcing an obligation of confidence would cover up wrong doing, allow the public to be misled, or unjustifiably inhibit public scrutiny of a matter of public concern.
6. Therefore to apply the exemption the PA must also consider whether a court would or would not uphold a disclosure of confidential information in the public interest.
7. To apply this exemption the Public Authority (PA) must establish that
  - a. the information sought by a request was obtained from, or provided by, another person, **and**
  - b. that a disclosure of the information would constitute an actionable breach of confidence by the person who supplied it to the PA, or any other person.

### Information obtained from another person.

8. A person means a legal person and therefore includes: an individual, a company, partnership or another public body, etc.
9. The PA cannot apply this exemption to internal information including information obtained from a division or section of the same PA.
10. The exemption does not apply to information the PA provides "in confidence" to another person.

## Actionable breach of confidence

11. "Actionable", means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win." (Hansard HL (Series 5), Vol.618, col.416)
12. To determine whether or not the disclosure of the information would constitute an actionable breach of confidence the PA must establish that the information:
  - has the "necessary quality of confidence,"
  - was obtained in circumstances which imposed an obligation to maintain confidence and
  - unauthorised disclosure will be detrimental to the person from whom it was obtained.
13. In deciding whether the information has the "necessary quality of confidence" the PA should consider:
  - if the information is common knowledge,
  - can be relatively easily ascertained from other information in the public domain and
  - the passage of time since the information was obtained.
14. Information which is common knowledge or can be readily ascertained from other information in the public domain will not have the necessary quality of confidence. The quality of confidence tends to reduce with the passage of time and therefore previously confidential information may no longer have the necessary quality of confidence.
15. Obligations to maintain confidentiality may be express or implied.
16. Usually an express obligation can be easily evidenced as it is recorded in writing. For example, where a clause in a contract does impose an obligation of confidentiality upon the PA, it will be required to demonstrate that any confidentiality clause or restriction was accepted or agreed in good faith and for proper justifiable purposes. The PA must be certain that the breach of such terms would be actionable.
17. An express obligation can also be made orally. It will be a matter for the PA to evidence how that obligation was imposed, for example by reference to a contemporaneous file note.
18. An actionable claim can arise without an express statement. The PA should consider:
  - the nature of the information  

Certain information is generally accepted to have been provided in confidence. For example where a person must provide health information to obtain a service or benefit would usually have an expectation of confidence.
  - and
  - the relationship between the parties.  

Professional confidential relationships, for example the doctor/patient relationship is likely to mean that information obtained from a patient was provided in confidence.
19. The disclosure of information cannot lead to a breach of confidence if the person from whom it was obtained consents to its disclosure.
20. The PA may consider seeking the person's view as to whether the information is still considered to

be confidential and/or consent for disclosure. However it remains a matter for the PA to determine whether or not the information has the necessary quality of confidence.

21. Consent can be express, for example in an agreement, or implied for example if the person has already put the information in the public domain. Note: where the information is personal data, as defined in the Data Protection Act, and the PA seeks to rely upon consent to disclose information in response to a request, it must ensure that the person's consent accords with the requirements of that Act.
22. A PA must be able to evidence that detriment will be caused to the person from whom the information was obtained. Detriment is not limited to financial detriment, for example emotional distress may be detrimental to the person.

## **OTHER CONSIDERATIONS**

1. There are circumstances where the PA may apply the exemption to information obtained from a member of staff provided the PA is satisfied that, in the circumstances, the member of staff is a separate person. For example if the PA has obtained information from a member of staff during a grievance or disciplinary procedure the member of staff may be considered to be a separate person.
2. The use of confidentiality clauses in contracts with third parties should be carefully considered and set reasonable levels of expectations about what may be disclosed.

## **FURTHER RESOURCES**

**APPENDIX 1: IOM Commissioner Decisions & IOM Case law**

**APPENDIX 2: Other Commissioner Decisions & Case law**

## APPENDIX 1 IOM Commissioner Decisions & Case law

### IOM Commissioner Decisions

None

### IOM Case law

None



## **APPENDIX 2**

### **Other Commissioner Decisions & Case law**

#### Note

Neither the Commissioner nor the Court are obliged to follow decisions or case law from other jurisdictions.

#### **UK Information Commissioner Decisions**



## Scottish Information Commissioner (SIC) Decisions

The SIC's decisions are available at: [www.itspublicknowledge.info/decisions](http://www.itspublicknowledge.info/decisions)

Decision Number	Parties	Summary
029/2008	Mrs G and Aberdeen City Council	Mrs G asked the Council for information from her late son's social work records. The SIC was satisfied that the son had provided the information to his social worker in confidence – and that the duty of confidence survived the death of her son.
013/2008	Millstream Associates Ltd and East Renfrewshire Council	The price quoted and subsequently paid for the establishment of a procurement portal was information which was provided to the Council by the supplier, and was not a figure which was subject to negotiation. However, the quote provided to the Council did not indicate what maintenance charge would be levied. The quote listed three pricing options for the annual licence, and the option chosen by the Council could not be determined from the information in the quote. The SIC therefore did not accept that the ongoing cost of the portal was information which was provided by a third party
166/2007	Mr A and University of Paisley	Employees giving evidence in a grievance procedure are not viewed as "the public authority" when deciding if information had been obtained from a third party, but as an individual in their own right.
088/2007	Association of Dumfries and Galloway Accommodation Providers and Visit Scotland	The SIC concluded that the information in the contracts had been negotiated between Visit Scotland and the contractor and therefore could not be said to have been provided to Visit Scotland by the contractor.
073/2007	Orkney Pre-School and Play Association and Orkney Islands Council	The SIC did not accept that disclosure of a report would cause detriment: the people referred to in the report were either acting in an official capacity or could not be identified from the report.
202/2006	Angus Macdonald and Greater Glasgow NHS Board	The SIC accepted that there had been an oral agreement that no information provided by a private sector hospital in connection with an audit would be shared elsewhere. The information therefore had the quality of confidence.
180/2006	Alfred Weir and Fife Council	Mr Weir asked the Council for information from tenders. The SIC was satisfied that the passage of time meant that the information was much less sensitive than it once had been and that it no longer had the quality of confidence.
049/2006	Western Ferries (Clyde) Ltd and Caledonian MacBrayne Ltd	The SIC was satisfied that the disposal value of a vessel could be accurately determined from information already in the public domain and so did not have the quality of confidence.

## Case law

### UK Tribunal decisions

