



EXEMPTION NOTE

Prejudice and Likelihood

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.

Exemptions that require consideration of prejudice

The following qualified exemptions require prejudice to be established in order to engage the exemption.

Section or subsection	Consideration required as to whether the disclosure would be:	Type of information (in broad terms)
28(5)(a) & (b)	Likely to prejudice	(a) the defence of the British Islands or any of them; or (b) the capability, effectiveness or security of any relevant forces.
29(1)	Likely to prejudice	The Island's relations with specified parties
29(2)	Likely to prejudice	The Island's interests abroad
30(1)	Likely to prejudice	(a) the economic interests of the Island; (b) the financial interests of the Island; or (c) the ability of the government to manage the national economy.
32 (1)	Likely to prejudice	(a) the prevention or detection of crime; (b) the apprehension or prosecution of offenders; (c) the administration of justice; (d) the assessment or collection of a tax or duty or of an imposition of a similar nature; (e) the operation of immigration controls; or (f) the maintenance of security and good order in institutions (within the meaning of the Custody Act 1995) where persons are lawfully detained.
32(2)	Likely to prejudice	the exercise by any public authority of its functions for any of the purposes mentioned in subsection [32](3) or any civil proceedings brought as a result of the exercise of such a function.
33(1)	Likely to prejudice	the exercise of any of the public authority's functions in relation to any of the matters referred to in subsection [33](2)
35 (a)	Likely to prejudice	the work of the Council of Ministers;
35(b)	Likely to inhibit	(i) the free and frank provision of advice; OR (ii) the free and frank exchange of views for the purposes of deliberation; OR
35(c)	Likely otherwise to prejudice	the effective conduct of public business.
36 (a)	Likely to endanger	the physical or mental health of an individual
36(b)	Likely to endanger	the safety of an individual
37(1)(i)	Likely to prejudice	(i) the public authority or a person who is, or will be, carrying out the research on behalf of the public authority; or
37(1)(ii)	Likely to prejudice	(ii) the subject matter of the research.

If prejudice is not established the exemption is not engaged.

If prejudice is established, the public authority (PA) must then go on to consider the balance of public interest.

THE MAIN POINTS

What is Prejudice?

Prejudice is not defined in FOI. In legal terms, the word 'prejudice' is commonly understood to mean harm.

To say that disclosure of the information would or would be likely to prejudice the interests specified in the exemption implies that it would (or would be likely to) harm those interests.

Many of the qualified exemptions can be applied if disclosing the information held by the PA would harm the interests covered by the exemption.

Although there are some variations in wording, and these different words do not have exactly the same meaning, the approach to adopt in deciding whether there is a likelihood of prejudice is the same for all of these exemptions.

Deciding whether disclosure would cause prejudice is called the prejudice test.

The prejudice test

It is not sufficient to anticipate some difficulty as a result of information entering the public domain. The PA has to satisfy itself that the prejudice or harm that is specified in the exemption either would or would be likely to occur and must establish that there is, at the very least, a real risk of prejudice, not just a theoretical risk or mere possibility.

There must be a recognition or understanding of what would happen if the information was disclosed and how this would cause prejudice to the interests identified in the exemption, based on evidence.

The prejudice test relates to circumstances at the time when the authority received the request or within the statutory time for compliance.

The test requires the PA to:

1. Identify the "applicable interests" within the relevant exemption
2. Identify the "nature and severity of the prejudice".
3. Identify the "causal link"
4. Establish the "level of likelihood of the occurrence of prejudice"

The severity and likelihood taken together indicate the impact of the prejudice and affect the weight attached to the arguments for the exemption.

1. Applicable interests

The PA must show that the prejudice it envisages does engage the exemption. Where an exemption is split into subsections, the PA must identify the relevant subsection.

Arguments about prejudice to any other interests will not engage the exemption.

2. Nature and severity of the prejudice

The PA must evidence that the prejudice claimed is “real, actual or of substance”.

For example, a simple assertion of commercial sensitivity will almost never be sufficient to prevent the release of commercially sensitive information without asking the supplier to set out how its commercial position would be damaged by the particular information being released.

The PA must be able to identify and explain why the disclosure of the information is capable of harming the interest in some way, i.e. have a damaging or detrimental effect on it.

If the consequences of disclosure would be trivial or insignificant there is no prejudice.

This does not mean that the prejudice has to be particularly severe or unavoidable. There may be cases where disclosure could cause harm to the interest specified in the exemption but the PA can mitigate the effect of the disclosure, perhaps by issuing other communications to put the disclosure in context. (The duty to advise and assist is relevant here)

In such a case, where the severity of the prejudice can be mitigated, the exemption may not be engaged or, if the applicant requests a review of the decision, the effect of the mitigating actions may be taken into account as a factor in the public interest test.

3. Identify the causal link

The PA must be able to establish and identify the “causal link” between the disclosure and the prejudice (negative consequence of the disclosure of the information) claimed.

The authority must be able to show how the disclosure of the specific information requested would or would be likely to lead to the prejudice and there must be a logical connection between the disclosure and the prejudice in order to engage the exemption.

4. Establish the level of likelihood of the occurrence of prejudice

Although there must be a causal link, the prejudice test relates to something that may happen in the future, if the information were disclosed. Therefore it is not usually possible to provide concrete proof that the prejudice would or would be likely to result.

Nevertheless, there must be more than a mere assertion or belief that disclosure would lead to prejudice.

The test required is that the prejudice (i.e. the real possibility of the negative consequence identified happening) “would” or “would be likely” to occur if the information was disclosed.

‘Would’ and ‘would be likely’ imply different levels of likelihood.

The PA must identify and explain which level of likelihood applies. Where a public authority has not specified the level of likelihood and in the absence of clear evidence to the contrary, the Commissioner will consider that ‘would be likely’ applies.

Likelihood of prejudice – some of the considerations by the Commissioner

- a. Has the PA identified the specific qualified exemption and shown how the exemption does apply?
- b. Has the PA clearly identified by specific evidence and/or explanation the nature of such prejudice, and the causal link between the disclosure of the information and the prejudice (ICO [Decision Notice FS50448565 \(9 October 2012\)](#))
- c. Has the PA identified the severity of the prejudice?
- d. What significant risk of prejudice occurring, rather than a remote possibility, has the PA identified and how has it explained that the prejudice is real, actual and of substance?
- e. Has the PA identified the likelihood of the prejudice occurring, i.e. "would" or "would be likely" to be caused, and stated this in its refusal notice?
 - a. If the authority fails to do so, the lower threshold will be applied, unless there is clear evidence that it should be the higher level ([Ian Edward McIntyre v the Information Commissioner and the Ministry of Defence \(EA/2007/0068\)](#), 4 February 2008)
 - b. "Clear evidence" would include the language used by the authority, such as references to the consequences of disclosure, rather than the possible consequences of disclosure.
- f. Has the PA provided any evidence of the impact of previous similar disclosures? This will be given significantly more weight than mere speculation (Department for Work and Pensions v Information Commissioner (EA/2012/0207, 0232 & 0233, 17 May 2013).)

FURTHER RESOURCES

UK Information Commissioner's guidance
Scottish Information Commissioner's briefing:

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

Issue Date	Decision Number	Public Authority
26 October 2016	2016/0003	Cabinet Office

IOM Case law

None



APPENDIX 2

Other Commissioner Decisions & Case law

Note

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

UK Information Commissioner Decisions

(ICO Decision Notice FS50448565 (9 October 2012))

Case law

UK Tribunal decisions

(Department for Work and Pensions v Information Commissioner (EA/2012/0207, 0232 & 0233, 17 May 2013).)

(Ian Edward McIntyre v the Information Commissioner and the Ministry of Defence (EA/2007/0068), 4 February 2008)