



EXEMPTION NOTE

Section 35 Conduct of public business

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 35 states:

35 Conduct of public business

Information is qualified exempt information if its disclosure would, or would be likely —

- (a) to prejudice the work of the Council of Ministers;
- (b) 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
- (c) otherwise to prejudice the effective conduct of public business.

THE MAIN POINTS

1. This is a qualified exemption.
2. The exemption also requires determination of a prejudice test (section 35(a) and (c)) or a test of inhibition (section 35(b)).
3. If the PA determines that it can be applied to some, or all, of the information sought in a request, the PA must still go on to consider the public interest in the information and determine whether “the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

The Information Commissioner has published guidance on the public interest and further advice is contained in Section 3 of the Code of Practice.

4. The exemption consists of three distinct exemptions. A Public Authority may withhold all or some of the information sought by a request when that information would, or would be likely to:
 - prejudice
 - the work of the Council of Ministers, or
 - prejudice
 - the effective conduct of public business, or
 - inhibit:
 - the free and frank provision of advice, or
 - the free and frank exchange of views for the purposes of deliberation.
5. The exemption requires the PA to establish that disclosure of the information would, or would be likely to, cause prejudice or create an inhibition.
6. To apply the particular exemption identified, the PA must establish a significant probability that prejudice or inhibition would, or would be likely to, occur as a result of the disclosure of the information sought. The prejudice or inhibition must be real and demonstrable, a remote or hypothetical possibility of prejudice is not sufficient.

Work of the Council of Ministers – 35(a)

7. The functions of Council of Ministers are set out in the [Government Code](#). To apply the exemption the PA must first establish that the information sought by a request does concern the work of Council of Ministers.

Free and frank provision of advice or exchange of views – 35(b)(i) & (ii)

8. While the exemption can be applied to information contained in advice or an exchange of views, it can also apply to other types of information if disclosure would have an inhibiting effect on the future provision of advice or exchange of views.
9. Inhibit is not defined. In the context of the exemption it means to restrain or suppress the freedom with which advice is given or views expressed. The PA must demonstrate that disclosure would result in a real and significant inhibition. Factors to consider include:
 - a. The identity or status of the author and/or the recipient of the advice or views.
Where advice or views are provided as part of day to day professional functions, the probability of an inhibition occurring is less.
 - b. The sensitivity of the advice or views.
The subject matter and content of the advice or views and how they were expressed may be relevant.
 - c. The circumstances in which the advice or views are given.
The context may be relevant, for example advice given during ongoing policy formation may be sensitive.

The effective conduct of public business – 35(c)

10. Potentially this distinct exemption, due to its general nature, could apply in a wide range of situations. However, by the inclusion of "otherwise", it only be applied if no other part of the exemption applies.
11. To apply the exemption the PA needs to identify:
 - a. what aspect of its public business would be, or would be likely to be, affected; and
 - b. the adverse or prejudicial consequences that disclosure of the information in question would have on the **effective conduct** of the identified public business.
12. Factors which may be relevant when considering whether the exemption applies include:
 - a. The sensitivity of the information
While the information may relate to a sensitive or controversial matter the information itself may not be sensitive. In contrast, information which in itself is not controversial could still be prejudicial to the conduct of public business.
 - b. The passage of time
Disclosure of information about an ongoing matter may be prejudicial, however, once the matter is concluded, the probability of prejudice will tend to diminish. The PA must demonstrate that disclosure would cause ongoing or future prejudice to the business.

OTHER CONSIDERATIONS

1. A PA cannot simply claim that disclosing any advice or view automatically causes an inhibition to the way advice or views are given in the future.
2. FOI establishes a legal right to be given information. This exemption is intended to balance that right where there is a real and justified need to protect information. However it does not create a blanket exemption for all internal communications for fear that public servants will react negatively to the potential for release of information in response to FOI requests.
3. The Code of Practice on Access to Government Information has existed since 1996 and, as such, every public servant should have a general expectation that information containing advice or views may be disclosed in response to a request.
4. If the Commissioner reviews the PA's handling of the FOI request, he expects the PA, where it has relied on section 35(c), to provide details of what harm, or prejudice to which area of public business has been identified and how that harm or prejudice would be caused (or be likely to be caused) by the disclosure of the information.

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

Issue Date	Decision Number	Public Authority
21 November 2016	2016/0004	Cabinet Office

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

Decision Number	Parties	Summary
185/2016	ABW Consultants Ltd And West Lothian Council	FOI request made for details of complaints made against a named councillor and for details of any subsequent investigations into the complaints. The SIC decided that council employees were following an investigative process which required a high degree of confidentiality to ensure that the allegations which had been made could be investigated fairly and objectively and must consider the future prejudice to this type of investigation that may be caused by disclosure.
241/2014	Iain Maciver and Comhairle nan Eilean Siar	This involved a request for a significant case review following a murder. On considering the disclosure of the recommendations from the review, it was noted that the Comhairle hadn't evidenced that disclosure would negatively impact on its ability to implement them. Without such evidence, the SIC could not accept that "bad press" or an increase in enquiries about the case would significantly impede or prevent it from enacting the recommendations.
193/2014	Mr H and Risk Management Authority (RMA)	Mr H asked the RMA about tools involved in the risk management of offenders. The SIC was satisfied that disclosing this information would undermine the effectiveness of the tools; high risk offenders would be able to use this information to their advantage. This would undermine the role of the RMA in promoting effective practice and setting effective standards.
089/2007	James Cannell and Historic Scotland	Mr Cannell asked for the advice given to Ministers about a listed building appeal. The SIC decided that, as the advice forms an essential part of the established appeal process, the disclosure of the advice would not inhibit the provision of this type of advice in future.
053/2007	Mark Latham, Shetland Times and the Scottish Ministers	The harm caused by disclosing information may weaken over time or through changes in circumstances, such as a new Ministerial appointment.
088/2006	Mr and Mrs G Bonelle and West Lothian Council	The Council withheld an exchange of views, but there was no indication that the exchange was in any way sensitive. There was no disagreement or controversy, and the information was similar in character to other information already released to the requesters. The mere fact that the exchange took place would not, in this case, have a substantially inhibiting effect.
076/2006	Paul Hutcheon and the Scottish Ministers	Information which relates to a matter of substance, but which is itself routine or mundane (e.g. expressing a view on a deadline or meeting arrangements) is unlikely to cause the harm required for the exemption to apply.

065/2005	Camillo Fracassini of The Sunday Times and the Common Services Agency for the Health Service	Information on the mortality rates of surgeons, was refused on the grounds that release would make clinicians unwilling to take part in the clinical audit process. The SIC found that collection of the data was routine, and did not rely on the goodwill of the surgeons. Similar information had previously been released into the public domain, and there was no evidence that misleading conclusions had been drawn from the information. The SIC concluded that the exemption did not apply.
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Case law

UK Tribunal decisions

